CHAPTER

1

INCOME TAX APPELLATE TRIBUNAL – AN OVERVIEW

Q.1 What is the objective of constituting the Income Tax Appellate Tribunal?

Ans. The Frank's Committee on Administrative Tribunals and Enquiries has stated that the advantages which Tribunals have over Courts lay in cheapness, accessibility, freedom from technicality, expedition and expert knowledge of the Members over the particular subjects. To achieve the said objective, the Income Tax Appellate Tribunal was set up on 25th January, 1941, as an independent quasi-judicial body to hear second appeals from the decisions of the Appellate Assistant Commissioner (now Commissioner of Income Tax (Appeals). The motto of the Income Tax Appellate Tribunal is "Sulabh Nyay Satvar Nyay". Criteria for its working is "(i) Cheapness; (ii) Accessibility; (iii) Freedom from technicalities; (iv) Expedition; and (v) an expert knowledge of the subject". Sections 252 to 255 of the Income-tax Act, 1961, sections 24 and 26 of Wealth Tax Act deal with provisions relating to appeals to the Appellate Tribunal. The Income Tax Appellate Tribunal ("The Tribunal") has formulated its own Rules and procedure – The Income Tax (Appellate Tribunal) Rules, 1963 ("the rules") in exercise of the powers conferred under section 255(5) of the Income-tax Act. It is functioning under the Union Ministry of Law and Justice and not under the Union Ministry of Finance.

Q.2 When was the Tribunal founded?

Ans. The Tribunal was founded on 25th January, 1941.The Tribunal was constituted on the recommendations of the Enquiry Committee Report, 1936. A Bill to amend the Income-tax Act, 1922 was introduced in the Central Legislative Assembly to set up the Income Tax Appellate Tribunal. This was referred to the Select Committee. In pursuance of the recommendations of the said Committee section 5A was introduced in the Income-tax Act, 1922.

Q.3 What is the total number of Benches of the Tribunal and the places at which they are located?

Ans. In pursuance of sub-rule (1) of Rule 4 of the Rules, the present sanctioned strength is 53 benches at 25 places vide Order F. No. 63-Ad(AT)/97. The said order contains names of the place and number of Bench(es) along with Districts/States/Union Territories wherefrom appeals and applications shall be heard and determined by such Bench(es). 10 new Benches are likely to be added to the present strength. The headquarters of the Tribunal and its President is located at Mumbai. The President of the Tribunal is the head of the institution. He exercises administrative controls over all Benches of the Tribunal. The headquarters of the Sr. Vice President is at Delhi. There are seven zones, each zone has one Vice President, However, Mumbai has two Vice Presidents. Zones with Benches are: Mumbai Zone (13); Delhi Zone (11); Calcutta Zone (8); Chennai Zone (5); Ahmedabad Zone (5); Hyderabad Zone (6) and

Chandigarh Zone (5). Tribunal Benches all over India are considered as one Institution.

Q.4 What is the language used in the Tribunal?

Ans. The language used in the Tribunal is English. However, parties may file documents in Hindi if they so desire, and the Bench may permit the use of Hindi in its proceedings or may pass orders in Hindi in the Benches located in the States notified in Notification No. F.71.Ad(AT)74 dated 5-5-1975.

Q.5 What are the Court hours of the Tribunal?

Ans. The Court timing is from 10.30 a.m. to 1.30 p.m. and 2.30 p.m. to 4.30 p.m., with certain exception in the North Eastern States. However, a large number of the Benches function only uptil 1.30 p.m. It is desirable that the bench exhausts the cause list for the day and if necessary re-assemble after the lunch break. Part heard matters are usually posted for hearing at 2.30 p.m. or next day. The cause-list is prepared in advance and is displayed at a conspicuous place outside the Court room.

Q.6 Whether proceedings before the Tribunal are open to the public?

Ans. Except cases in respect of which the Central Government has issued notification under sub-section (2) of section 138 of the Income-tax Act 1961, the proceedings before the Tribunal are open to the public. However the Tribunal may in its discretion restrict proceedings before it in a particular concerned case to the assessee and its representatives.

Q.7 What are the qualifications required for appointment as Member of the Income Tax Appellate Tribunal

Ans. The Tribunal has two types of Members – Judicial and Accountant

A Judicial Member shall be a person who has for at least ten years held a Judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade II of that Service or any equivalent or higher post for at least three years or an advocate in practice for at least ten years.

An Accountant Member shall be a person who has for at least ten years been in the practice of accountancy as a Chartered Accountant under the Chartered Accountants Act, 1949 (38 of 1949), or as a registered accountant under any law formerly in force or partly as a registered accountant and partly as a Chartered Accountant, or who has been a member of the Indian Income-tax Service, Group A, and has held the post of Additional Commissioner of Income-tax or any equivalent or higher post for at least three years.

In our opinion, individuals holding the rank of Commissioner and above, alone should qualify considering the sanctity and status of the prestigious institution. The amendment operative from 1-8-1998 needs re-consideration.

Q.8 How is a Member of the Tribunal selected?

Ans. As and when a vacancy arises the Ministry of Law and Justice makes an announcement in the leading newspapers and invites applications from eligible candidates. The Federation always publishes the details of vacancies for the post of the Members of the ITAT in its journal. The applications are scrutinized and thereafter, interviews are held at different places. The Selection Committee comprises of a Sr. Judge of the Supreme Court as Chairman, Union Law Secretary, President of ITAT and Member, Law Commission. There is complete transparency in the process of interview and has proved to be a satisfactory method for selection of Members.

Q.9 What is the pay scale and facilities provided to a Member?

Ans. The pay of the President / Senior Vice President is fixed at Rs. 26,000/-. The pay scale of Vice President is 24,050/- – 26,000/-; Member Rs. 22,400/- – Rs. 26,000/-. Residential accommodation, car, telephone and other facilities and perquisites are also provided. The pay is very much similar to a Judge of the High Court. With the efforts of the Federation and its member Associations further facilities have been provided to Members of the Tribunal *[All India Federation of Tax Practitioners jointly with Rajasthan Tax Consultants vs. Union of India (1998) 97 Taxmann 48 (Raj.); All India Federation of Tax Practitioners vs. Union of India [Income Tax Review Page 4, Vol. XXIII April, 1997] Union of India vs. All Gujarat Federation of Tax Practitioners & Others and Rajasthan Tax Consultants & Ors.* SLP (Civil) Nos. 6904-05 1998 of (2004) 6 AIFTP Journal (April) 34. Compliance report was called and submitted in April, 2004.

Q.10 Who has the power to transfer Members from one place to another?

Ans. Ever since the establishment of ITAT, the President of the ITAT has the power to transfer a Member from one place to another. In the year 1996, then Law Secretary issued a notification stating that, the Ministry of Law has the power to transfer Members. The said notification was challenged by the ITAT Bar Association, Mumbai and other associations. The Hon'ble Bombay High Court, stayed the operation of notification (*Income Tax Appellate Tribunal Bar Association vs. Union of India, 2350 of 1996,* Income Tax Review April 1997 page 1 to 3 Vol. XXIII No. 1). The matter was transferred to Hon'ble Supreme Court. The Hon'ble Supreme Court vide their order dated 5th January, 2004, upheld the order of Bombay High Court and prescribed certain guidelines (AIFTP Journal Vol. 6 No. 1 January, 2004 issue. As per guidelines, the President in consultation with Sr. Vice President and Vice Presidents, has the exclusive authority to transfer the Members from one place to another. [*Ajay Gandhi vs. B. Singh (2004) 265 ITR 451 (SC)].*

Q.11 What type of residential accommodation the Members of ITAT are entitled to?

Ans. The Members of ITAT are entitled to type VII accommodation. However, in city like Mumbai, there is great difficulty in getting the accommodation. When the Members were not getting the residential accommodation, the Federation filed a PIL before the Bombay High Court. After the said order of High Court the Members are being allowed accommodation quite expeditiously. (*All India Federation of Tax Practitioners vs. Union of India, 2464 of 1996,* Income Tax Review Page 4 Vol. XXIII April 1997).

However, even now, Members who have been appointed from the profession are not getting accommodation immediately as they do not have previous Government service experience. There is discrimination in allotting the residential accommodation to Members of ITAT. The matter was taken to the Bombay High Court and the Court directed to make representation to Government. The representation is pending before the Government for its consideration. In *Rajasthan Tax Consultants vs. Union of India (1998) 97 Taxmann 48 (Raj.),* the Court held that, Members of Tribunal are Judicial officers for all purposes as they discharge Judicial functions and their independence should be maintained by providing suitable official residential accommodation. The Hon'ble Supreme Court has laid down detailed guidelines for providing residential accommodation and other facilities to the Members of Income Tax Appellate Tribunal *(UOI vs. All Gujarat Federation & Others (supra).*

Q.12 Who can represent before the Tribunal and by what process?

Ans. Any legal practitioner, Chartered Accountant, tax practitioner or any person related to the assessee or person regularly employed by the assessee can represent on filing of the authority. An advocate should file Vakalatnama affixing Court fee and welfare stamps as per the State Law. In Maharashtra, it is Rs. 10/-, if he is member of Welfare scheme, additional welfare stamp of Rs. 2/-. Other persons have to furnish a Power-of-Attorney on non-judicial stamp of the value specified under the State Stamp Law. In Maharashtra, as per Article 48(a) it is Rs. 100/- for special Power of Attorney and Rs. 500/- in any other case. Court fee and stamp duty is as per State Law, and varies from State to State. In case of deficiency of stamp, the Assistant Registrar should bring it to the notice of the Bench. He himself cannot refuse to accept as stated in the letter of the President D.O. No. P/7/2003 dated 8-12-2003 published in (2003) 185 CTR (N & V) 48.

Stamp duty on documents authorizing appearance on behalf of assessee.

After the issue of Board's Circular No. 50 (XL-43) D of 1956, dated the 28th December, 1956, the question has been raised whether accountants and income tax practitioners should file vakalatnamas or powers of attorney and, if the latter, what the scales of court fees or stamp duties leviable thereon.

The Board have been advised that a document purporting to authorize a person who is not a pleader or mukhtar duly appointed under section 7 of the Legal Practitioners Act, 1879, is not a vakalatnama or a mukhtarnama and requires to be stamped as a power of attorney under the Stamp Act. Therefore, the power of attorney in favour of a registered accountant or an income-tax practitioner or any other person who is not a duly appointed mukhtar under section 7 of the Legal Practitioners Act is a power of attorney (and not a vakalatnama or mukhtarnama) and requires to be stamped not under the Court Fees Act, but under the provisions of the Stamp Act as in force in the particular area; i.e., subject to the local amendments.

C.B.R. Circular No. 9 (XL-48) of 1958 dated May 13, (1958) 34 ITR 19 St.

Q.13 Can authority be given to a firm to represent its client in a matter before the ITAT?

Ans. It is possible to give authority in the name of a firm. However, the partner who represents before the ITAT must sign as partner. Necessary information about the constitution of the partnership firm should be filed with the Bar Council/Bench/Institute.

Q.14 Whether a Sr. Advocate needs to file Vakalatnama?

Ans. An Advocate is designated as a Senior Advocate by the Supreme Court or a High Court by virtue of his ability, standing at the Bar or special knowledge or experience in law, deserving of such distinction. The Bar Council of India Rules, 1976, neither permit nor allow a Senior Advocate to file a Vakalatnama, to appear without junior Advocate in any Court or Tribunal. A senior Advocate should get precedence to address over other Advocates.

In *E. S. Reddi vs. The Chief Secretary, Government of A. P. (1987) SC 1550*, the Hon'ble Supreme Court discussed in detail the status of Sr. Advocate.

Q.15 Is there any dress regulation prescribed for the Members and for the Authorised Representative?

Ans. 15.1 Summer dress for the Members of the Tribunal shall be white shirt, white pant with black coat, a black tie or a buttoned-up black coat. In winter, stripped or black trousers may be worn in place of white trousers.

15.2 Rule 17A of the Rules prescribes the dress for the authorised representative of the parties (other than a relative or regular employee of the assessee). In the case of a male, a suit with a tie or buttoned up coat over a pant or national dress; i.e., a long buttoned up coat or dhoti or churidar pyjama is prescribed. The colour of the coat shall preferably be black. In the case of female representatives black coat over white or any other sober coloured saree. However, if the authorised representatives belongs to a profession such as law or Chartered Accountancy and they have been prescribed a dress for appearing in the professional capacity before any Court, Tribunal or other such authority, they may at their option appear in that dress in lieu of the dress mentioned above.

Sometimes, we observe that Advocates/Chartered Accountants appear before the Tribunal without wearing the prescribed dress and the Members adjourn the matters till the authorised representative appears in the prescribed dress. We suggest that any representative who appears before the Tribunal, should wear the proper dress to avoid unnecessary adjournment. Other persons appearing before the Tribunal shall also be properly dressed.

Q.16 How should Members of the Tribunal be addressed?

Ans. As per tradition, the Members are addressed as “Your Honour”. Some representatives address Members as “Your Lordships” which is improper and need to be avoided.

Q.17 If the counsel has two cases on the same date in different Bench, which Bench has to be give preference?

Ans. According to established practice, the higher Court has to be given the first preference. e.g., if matters are before the Bench of President and also before other Bench, the Counsel has to give preference to Bench of President.

Q.18 How should communication be addressed to the Registrar of the Income Tax Appellate Tribunal?

Ans. All communications addressed to the Tribunal by the parties with regard to appeals or applications or cross objections, should bear the number and the Bench thereof, or if the number is not known, the date of filing thereof, should invariably be given. The Registrar vide letter dated 13-4-2000 has issued a Circular stating that the office of the ITAT should accept all the letters/correspondences addressed to the ITAT. It is learnt that some authorities are not honouring this instruction. The text of the Circular is reproduced hereunder:

Date : 13-4-2000

“Notice for General Public

Some complaints have been received by the undersigned from counsels for the assessees that some of the Officers of the Income-tax Appellate Tribunal are refusing to accept any appeals, applications etc. on flimsy grounds.

This is for the general information that no appeal and application can be refused by any of the Government servants, when submitted by the assessee. Defects, if any, are only to be pointed out in writing and placed before the concerned Bench for their orders.

If any members of the public face any such difficulty whereby any of the Officers have refused to accept appeals, applications etc. on flimsy grounds, immediate attention may kindly be drawn to Registrar in writing for further action at this end.

N. N. Nayak

Registrar

Income Tax Appellate Tribunal"

Q.19 Can the Registrar refuse to accept adjournment petition filed well before proposed date of hearing?

Ans. No. In *Shamalsha Girdhari vs. Asstt. Commissioner (2000) 72 ITD 469 (Bom.)*, the Tribunal held that, the Registrar cannot refuse to accept adjournment petition filed well before the proposed date of hearing.

Q.20 What is the meaning of Constitution of a Bench, SMC, Division Bench, Third Member and Special Bench?

Ans. 20.1 Constitution of a Bench:

Section 252 provides for the constitution of Income Tax Appellate Tribunal consisting of Judicial Members and Accountant Members to discharge the function conferred on the Appellate Tribunal. It also provides for appointment by the Central Government of one or more Members of the Tribunal to be Vice President(s) and of one of the Vice President(s) to be the Senior Vice President. It also provides that the Central Government may appoint Sr. Vice President or one of the Vice Presidents of the Appellate Tribunal to be the President. As per, section 255(1) the powers and functions of the Appellate Tribunal shall be exercised and discharged by Benches of the Tribunal, which shall be constituted by the President from amongst the Members of the Tribunal.

20.2 Single Member Bench (SMC):

The President or any other authorized Member may, sitting singly, dispose of any case which has been allotted to such Bench, but the jurisdiction of Single Member Bench is limited to cases where the total income of the assessee, as computed by the Assessing Officer does not exceed Rs. 5 Lakhs. Any appeal under the Wealth Tax Act cannot be heard by a Single Member Bench, as held in *CWT vs. S. Baliah (1978) 114 ITR 858 (AP)*, because there is no corresponding section in that Act. A Single Member Bench should follow the view of a Division Bench.

20.3 Division Bench:

Section 255(2) provides that ordinarily a Bench shall consist of two Members, one Judicial and the other Accountant Member. A Division Bench should follow the view of the Special Bench and a Co-ordinate Bench. In case of disagreement with the view of a Division Bench, it should request the President for constitution of the Special Bench. In case of wealth tax appeal a Division Bench can be constituted by two Judicial Members or two Accountant Members also.

20.4 Third Member Bench:

Section 255(4) provides that if the Members of the Bench have a difference of opinion, the case is to be referred by the President of the Tribunal for hearing such points by one or more Members of the Tribunal and such point thereupon is to be decided in accordance with the majority view from amongst the Third Member and the Members who originally heard the case.

The scope of an order under s.255(4) is very limited. The Third Member has only to agree with the Judicial Member or with the Accountant Member. The Third Member cannot give a different opinion, which would result in three opinions as against two opinions. (*ITO vs. Gurubachhan Singh J. Juneja (1995) 55 ITD 75 (95) (Ahd) (TM)*.

The Third Member cannot himself formulate a new point on which he could rest his decision. He is competent only to decide the points referred to him by the differing members – *Jan Mohammed vs. CIT (1953) 23 ITR 15 (All).* The Third Member cannot act as if he was an Appellate Authority over the two Members of the Tribunal and direct them to rehear and dispose of the matter afresh – *ITO vs. Vice President, ITAT, Madras (1985) 155 ITR 310 (Mad).* The jurisdiction of Third Member is not confined to the language of question(s) framed in reference but it extends to the entire sum and substance of opinion on specified point(s). The Third Member has power to consider the entire material, reasoning and conclusions recorded by the Members as well as contentions advanced on behalf of the parties and record his findings in such a manner that difference of opinion amongst members can be decided by a majority view – *Khopade Kisanrao Manikrao vs. ACIT* (2000) *74 ITD 25 (Pune) (TM).* Once specific differences between the Members are referred to Third Member and referral order does not express any difference at all, in identifying difference between Members, Third Member can neither alter questions referred to him nor can modify question and/or reframe questions and then decide reframed question instead of original questions — *Niraj Petrochemicals Ltd. vs. ITO (2000) 73 ITD 1 (Hyd.) (TM).* Also refer to the speech of Shri M. A. Bakshi, Vice President at Members Conference (2003) 87 ITD Special Issue (35-39).

20.5 Special Bench:

Section 255(3) provides for Constitution of a Special Bench consisting of three or more Members. The President, for disposal of a particular case or cases, may constitute such Special Bench. At least one of the Members of such Special Bench must necessarily be a Judicial member and one an Accountant Member. Such Bench may dispose of cases allotted by the President to it for disposal. The *Supreme Court in ITAT vs. DCIT (Assts) (1996) 218 ITR 275* has held that 'The High Court in the exercise of its powers under Article 226 of the Constitution cannot sit in appeal or judgement against the administrative decision of the President of the Appellate Tribunal who might have felt that the case was of all-India importance and was required to be decided by a larger Bench of the Tribunal of three Members. Such an administrative order is not open to scrutiny under Article 226 of the Constitution of India except in extraordinary cases wherein the order is shown to be a mala fide one'. In *C. Ramaiah Reddy vs. ACIT (2003) 87 ITD 439 (Bang.) (SB)*, it has been held that the President has the power to constitute a Special Bench for disposal of an appeal for any year, he can constitute it suo motu.

Q.21 Is the Tribunal a Court?

Ans. Technically speaking a Tribunal is not a Court. The Tribunal consists of a Judicial Member and an Accountant Member. An Accountant Member need not be well conversant with the technicalities of law, need not be a law graduate or an advocate or a law officer. An Accountant Member may be a tax authority well versed in accounting principles or a Chartered Accountant. The Income Tax Appellate Tribunal is not bound by any technical rules of the law of evidence. The National Tax Tribunal Ordinance, 2003 by article 16(1) has provided: "The National Tax Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided, by the principles of natural justice". Section 255(5) empowers the Appellate Tribunal to regulate its own procedure, subject to the provisions of the Act. It has formulated its own procedure by the Income Tax (Appellate Tribunal) Rules, 1963 and is not governed by the Civil Procedure Code. It is a final fact finding body but subject to the appellate jurisdiction under s. 260A of the I.T. Act and writ jurisdiction of the Hon'ble High Court. The Supreme Court has not recognized the Income-tax Appellate Tribunal as a "Civil Court" or as a "Court". The Supreme Court in *Ajay Gandhi vs. B. Singh (2004) 265 ITR 451 at 456* observd: "The Income-tax Appellate Tribunal exercises judicial functions and has the trappings of a Court".

Section 255(6) invests the Tribunal, for the purpose of discharging its functions, with all the powers which are vested in the income-tax authorities under section 131 regarding discovery, production of evidence, summoning witnesses and enforcing their attendance and compelling production of their books of account or other documents, and issuing commissions, etc. It further provides that the proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 226, and for the purpose of section 196 of the Indian Penal Code and the Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXXV of the Criminal Procedure Code. It is deemed as a Civil Court only for the specific purpose and not for all purposes or under the Civil Procedure Code. It is well settled that a deeming provision should be construed strictly.

The Rajasthan High Court in *Rajasthan Tax Consultants vs. Union of India (1998) 97 Taxman 48* did not consider the Members of the Income-tax Appellate Tribunal as Members of Judicial services i.e., District Judges etc. It observed: "It is true that the matter before the Supreme Court related to the members of judicial services; i.e., District Judges, etc. and technically the members of the Tribunal may not fall in that category but we are of the opinion that there is no reason that the directions given by the Apex Court should not be made applicable to the members of the Tribunals as for the purposes they are judicial officers and discharge judicial functions." (Page 56). The Hon'ble Court also observed at page 53 that Judicial Member of the Tribunal is equivalent in rank to Additional Secretary to the Government of India.

It is a familiar feature of modern legislation to set up bodies and Tribunals, and entrust them with work of a judicial, quasi judicial or administrative character, but they are not courts; in the accepted sense of that term, though they may possess, as observed by Lord Sankey L. C. in Sheel Co. of Australia's case (1931) Act 275, some of the trappings of a Court. *Hon'ble Venkatarama Ayyar J., in Virindar Kumar Satyawadi (1955) 2 SCR 1013*, has referred to several decisions of the Courts in England and Australia as to what are the essential characteristics of a Court as distinguished from Tribunals exercising quasi-judicial functions. Lord Sankey L. C. enumerate some propositions on this subject: (1) A Tribunal is not necessarily a Court in this strict sense because it gives a final decision. (2) Nor because it hears witnesses on oath. (3) Nor because two or more contending parties appear before it between whom it has to decide. (4) Nor because it gives decisions which affect the rights of subjects. (5) Nor because there is an appeal to a Court. (6) Nor because it is a body to which a matter is referred by another body. *[See Rex vs. Electricity Commissioners (1924) 1 K. B. 171)"*

Q.22 What is the pendency of appeals before the Income Tax Appellate Tribunal?

Ans. As on 31-8-2004 the number of appeals pending before the Tribunal was 1,45,000, out of which 20,000 appeals could be decided by Single Member Bench. The pendency in Mumbai (35,000), Delhi (20,000), Ahmedabad (17,000), Chennai (13,000). President Shri Vimal Gandhi, with the help of Sr. Vice President and Vice Presidents is making sincere efforts to reduce the pendency to less than a lakh. The ITAT Bar Association, Mumbai, has volunteered to help the ITAT to group matters and dispose of covered matters. We are hopeful that, within two years, the pendency will reduce to less than one lakh. It is likely that a single member case may be disposed off in less than one year.

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CHAPTER

2

APPEAL BEFORE THE INCOME TAX APPELLATE TRIBUNAL

Q.23 Who can file an appeal to the Tribunal?

Ans. Any assessee who is aggrieved by an order passed by Commissioner (Appeals) or an order passed by a Commissioner under section 12AA; or 263; or 271; or 272A; or 154 amending an order passed under s.263; or an order passed by the Chief Commissioner or a Director General or a Director u/s. 272A; may prefer an appeal to the Appellate Tribunal. Similarly, the Commissioner may prefer an appeal to the Appellate Tribunal against the order of Commissioner of Income Tax (Appeals). It has been held by High Courts that even a third party has a right of appeal if, as a result of an order passed in an appeal by the first appellate authority before whom he is not a party, he is saddled with a liability for any tax or other sum. (1957) *32 ITR 762 (Bom) Kikabhai Abdulali vs. ITAT; (1998) 234 ITR 617 (Ker) Benoy Kurian vs. Agrl. ITO; (1983) 144 ITR 557 (Cal) CIT vs. N. Ch. R. Row & Co.*

The Board has issued Instruction No. F-279/126/98 – 17 dated 27-3-2000 stating that the Commissioner should not file an appeal to the Tribunal if the tax effect is less than Rs. 1,00,000/-, appeal to High Court if the tax effect is less than Rs. 2,00,000 and appeal to Supreme Court if tax effect is less than Rs. 5,00,000/-. In *CIT vs. Camco Colour Co. (2002) 254 ITR 565 (Bom),* the Hon'ble Court dismissed the appeal of the Department, only on the ground that tax effect was less than the prescribed limit. There is divergence of opinion in various High Courts. The Board vide Instruction No. 6 of 2003 dated 17-7-2003 (F. No. 279 / Misc. 18/2003) once again clarified that for ascertaining the tax effect, interest and penalty also should be taken into consideration. According to the Board, the tax effect means the revenue effect, which denotes, the amount of tax, interest, penalty, fine or any other sum involved. In some cases the Tribunal has dismissed the appeal of the Department only on the ground that the tax effect is less than the prescribed limit. See *ITO vs. Smt. Tara Devipushpal (2003) 127 Taxman 155 (Jabalpur) (Mag.), ITO vs. Roopchand Jain (2003) 79 TTJ 406 (Nag.)*

Q.24 What is the time limit for filing an appeal?

Ans. An appeal has to be filed within 60 days of receipt of an order by the assessee. In the case of the Department the appeal can be filed within 60 days of the receipt of the order by the respective Commissioner. The memo of appeal shall be presented by the appellant in person or by agent or sent by registered post as to reach before the due date. The receiving authority has to endorse the date on which it is received and sign.

Q.25 Whether the Tribunal has the power to condone the delay in filing an appeal?

Ans. As per section 253 (5), the Appellate Tribunal may admit an appeal filed beyond the period of limitation if it is satisfied that there was sufficient cause for not presenting the appeal within time. It is desirable to file application for condonation, giving in detail reasons for delay supported by acceptable evidence / affidavit; along with the appeal. Negligence, inaction or mala fides would not constitute sufficient cause.

Instances where the delay was caused due to wrong legal advice or because the assessee was critically ill at the relevant time or that he was bona fide pursuing a remedy which did not lie, were held to be sufficient cause for condonation of delay. The *Supreme Court in Collector of Land Acquisition vs. MST Katiji & Others (1987) 167 ITR 471*, has held that the Court should have a pragmatic and liberal approach. The Hon'ble Supreme Court in *N. Balakrishnan vs. M. Krishnamurthy (1998) 7 SCC 123* condoned delay of 883 days and has observed that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not provide discretion only in the cases of delay within a certain limit. The only criterion is the acceptability of explanation irrespective of the length of delay. The primary function of the court, being the adjudication of the disputes between the parties and to advance substantial justice, it is not enough to turn down the plea of the litigant and to shut the door against him for some lapse on his part which has caused the delay. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor. The Supreme Court in *Vedabai vs. Shantaram Baburao Patil & Another (2002) 125 S.T.C. 375* observed that the Court has to exercise its discretion, keeping in mind that the principle of advancing justice is of prime importance and the expression "sufficient cause" should receive a liberal construction. The approach of Courts should be pragmatic so as to impart substantial justice.

Q.26 Mistake of an Advocate or Consultant, whether a reasonable cause for delay in filing of an appeal?

Ans. If the mistake of a professional is bonafide, it shall constitute a "reasonable cause". The Hon'ble Supreme Court in *Rafiq C. Munshilal AIR 1981 SC 1400, (1401)* observed that "we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted". Where an applicant engages a counsel, he would be justified in presuming that the counsel would attend to the case. The applicant cannot be made to suffer for the negligence of the counsel. An appeal cannot be dismissed because the counsel failed to appear when the case was posted for hearing. Also see *(1988) 172 ITR 331 (MP) Mahavirprasad Jain vs. CIT, (1979) 118 ITR 507 (SC) Concord of India Insurance Co. Ltd. vs. Smt. Nirmala Devi & Others, (1990) 181 ITR 183 (All) Kripa Shanker vs. CIT.* In *Municipal Corporation vs. Ramcharan AIR (2003) S.C. 2164*, the Court held that failure of the counsel on account of confusion is a sufficient cause.

Q.27 What documents should accompany the appeal memo?

Ans. Every memo of appeal shall be filed in the prescribed form (Form No. 36) in triplicate along with –

(i) Two copies of the order against which appeal is preferred (at least one of which shall be a certified copy);

(ii) Two copies of the order of the Income Tax Officer;

(iii) Two copies of the grounds of appeal before the first appellate authority;

(iv) two copies of the statement of facts, if any, filed before the said appellate authority;

(v) If appeal is against a penalty order (a) two copies of the assessment order;

(vi) If the assessment order is under s. 143(3) read with section 144A – two copies of the directions under s. 144A;

(vii) In case of reassessment under s. 147 – two copies of the original assessment order;

(viii) Receipted Challan of Tribunal Fee;

The Tribunal may accept the memo of appeal without the above but it is not advisable to file the appeal without the abovementioned annexures except when the appeal is getting barred by time. The appellant shall be intimated and requested to remove the defects by the Registry within the specified period. If no defect memo is issued – it shall be deemed to have been condoned as held in *ACIT vs. Rayang Timber Products (P) Ltd. (2002) 82 ITD 73 (Gau) (TM);*

(ix) Vakalatnama/Power of Attorney in favour of the Authorised Representative at the option of the assessee;

(x) In Revenues appeal – a certified copy of the order of the Commissioner directing the filing of the appeal.

The meaning of the "Certified Copy" has been liberalised by the Explanation to Rule 9 of the Rules vide letter No. 5068 AT/46 dated 17-12-1946. Copy of the order appealed against bearing the signature of the issuing or authorized officer and the seal of the office which issued the copy has been equated with the "Certified Copy". A photo copy of such order duly authenticated by the appellant or his authorized representative as a true copy, will suffice.

Q.28 What are the fees payable for filing an appeal?

Ans. The Tribunal fee during 1-6-1992 to 30-9-1998 was as under:–

(a) Where total income assessed by A.O. was one lakh rupees or less – Rs. 250/-; and

(b) Where total income exceeded rupee one lakh – Rs. 1,500/-.

However, from 1-10-1998 the fee structure has been substantially enhanced and is as follows:-

(a)	Where total income computed by the A.O. is up to Rs. 1 lakh.	Rs. 500/-
(b)	Where total income computed is between Rs. 1,00,000/- and Rs. 2,00,000/-	Rs. 1,500/-
(c)	On total income exceeding Rs. 2,00,000/- at 1% of the assessed income, subject to a maximum of	Rs. 10,000/-.
(d)	Where subject matter of appeal relates to any other matter	Rs. 500/-
(e)	Stay Application under Rule 35A	Rs. 500/-
(f)	Rectification application under s. 254(2)	Rs. 50/-
(g)	On appeal by the Revenue and Cross Objections by the assessee	Rs. NIL

The Hyderabad Bench of ITAT in *Andhra Pradesh State Electricity Board vs. ITO (1994) 49 ITD 552* has held that (i) income computed by the A.O. alone has to be seen and not income after appeal effect; (ii) total income should be arrived at after set off of unabsorbed losses, unabsorbed depreciation etc.; (iii) Loss is negative income and would be considered as income; and (iv) Agricultural income is to be excluded for computation of total income. Also see *Tapan Kumar Saha vs. ITO (2004) 83 TTJ 350 (Calcutta Bench).*

The Mumbai Tribunal in *M/s. Narendra Valji Shah vs. ACIT* – ITA No. 3545/Mum./99, A.Y. 1995-96, Bench 'C', order dated 24-5-2000 held that the levy of penalty under s. 271B is not in any way related to the total income but is related to the total turnover and hence, the appeal fees would be Rs. 500/- only. The Mumbai Bench in *Amruta Enterprises vs. DCIT (2003) 84 ITD 172* has held that the quantum of penalty under s. 271(1)(c) could not be linked with assessed income, hence, the fee payable shall be Rs. 500/- and not based on total income computed by the A.O. Thus, Tribunal fee payable in respect of appeal against penalty levied under different sections shall be Rs. 500/- only. In *Seahorse Ship Agencies Pvt. Ltd. vs. Dy. CIT*, ITA No. 101/Mum/2001, Bench 'H' dated 15-3-2002, the Tribunal held that, in respect of appeal filed relating to penalty levied under section 158BFA(2), the Tribunal fees will be only Rs. 500/-. In *Vinod Khatri vs. ACIT, Delhi Special Bench (2004) 82 TTJ 911* held that the filing fee for appeal before Tribunal against penalty under s. 271(1)(c) is governed by clause (d) of section 253(6) and not by clauses (a), (b) and (c) thereof. Thus fee shall be Rs. 500/- only. This is also clarified by the CBDT Circular No. 779 dated 14-9-1999 (1999) 240 ITR St. 3 while adding clause (4).

If a single application for stay of recovery is made to ITAT for a number of assessment years, then the filing fees payable under s. 253(7) would be Rs. 500/- only and not Rs. 500/- per assessment year – *Chiranjilal S. Goenka vs. WTO (2000) 66 TTJ 728 (Mum).*

In *Mrs. Nimu R. Thadani vs. Jt. CIT, ITA No. 5437/Mum/97, A.Y. 1996-97*, order dated 11-2-2000, the Tribunal has held that in cases of appeals filed in respect of interest levied under s. 234A, 234B, 234C or any other interest, clause (d) of section 253(6) would be applicable and the appeal fee would be Rs. 500/- because interest is in no way related to the assessed income, but linked with the tax payable.

In *Chromatic India Ltd. vs. ITO, ITA Nos. 3486/M/2001 and 3487/M/2001*, Bench 'D' dated 12-12-2002, the Mumbai Tribunal has held that appeal fee against the order under section 263 is Rs. 500/- only.

Q.29 If assessee has paid more appeal fees, how can he claim a refund?

Ans. The assessee should make an application before the Tribunal for claiming the refund and at the hearing of appeal, the Members will pass an appropriate order and the assessee can get the refund. The request for refund can be made orally also at the time of hearing. Refund voucher shall be issued by the Assessing Officer. On his failure, the assessee may approach the higher authorities or file a writ.

Q.30 Whether challan for payment of Tribunal fee has to be obtained from the Assessing Officer?

Ans. The appellant need not obtain challan from the Assessing Officer. The appeal fees can be paid in any challan stating "The Tribunal fees" and giving the reference of the assessment year. In case of urgency and on the last day of limitation, the fee can be deposited in cash with the Tribunal.

Q.31 Where can an appeal be presented?

Ans. As per *Order No. 1 of 1973 dated 10th July, 1973, [(F. No. F-161-AD(AT)/70)) (1973) 90 ITR (St.) 25]* the Registrar of the Income-tax Appellate Tribunal has authorised the Assistant Registrars of the Appellate Tribunal situated at different places to be the authorised officers to receive appeals or applications. In his absence from office, the appeal may be presented to the Superintendent / Asst. Superintendent / Seniormost Head Clerk at the Tribunal's office during office hours. In the event the period of limitation for presentation of the appeal is expiring, the appellant may present it to the respective Assistant Registrar at his residence or any other place, wherever he may be or to a Member of the Tribunal at his residence or wherever he or she may be.

Q.32 Whether the appeal can be sent by registered post?

Ans. Yes. It is advisable if the appeal is being sent through post, that it should be sent through Registered A.D. addressed to the Registrar or other authorised officer of the Tribunal. However, the point to be noted is that it must reach the authorised officer within the period of limitation because it shall be deemed to have been presented on the day on which it is received in the office of the Tribunal. Any delay in transmission by post may not be excluded in computing the period of limitation, as the postal authorities are not considered as agents of the addressee but they are agents of the sender. *[F. N. Roy vs. Collector of Customs AIR 1957 (SC) 648].* However, if postal authority has taken abnormal time for delivery, an application for condonation would have to be filed. It may be considered as sufficient cause.

Q.33 Whether appeal against an order passed by an authority in Pune or Delhi can be filed at Mumbai?

Ans. The appeal relating to a Pune or Delhi case can be filed at Mumbai, if it is getting time barred and in such cases the Mumbai Tribunal after receiving the appeal forwards the appeal papers to the concerned Bench. Tribunal, though functioning at different places is one institution.

Q.34 What is meant by cross objection?

Ans. If the assessee or the Assessing Officer prefers an appeal to the Tribunal, and the appeal is not rejected under Rule 12 of the ITAT Rules, 1963, a notice is given by the Tribunal to the respondent informing him of the fact of such filing, also enclosing the memorandum and grounds of appeal. The respondent can file, under s.253(4), a memorandum of cross objections in Form No. 36A, within 30 days from the date of receipt of such notice, against any part of the order of the first appellate authority deciding any issue against him. The respondent is not required to pay any filing fees and the Tribunal shall dispose of such memorandum of cross objections as if it were an appeal. Such cross objections is registered and numbered as an appeal and all the rules, so far as may be, shall apply to such appeal. It has to be heard along with the appeal and disposed of by a common order. There is no difference between an appeal and a cross objection *[CIT vs. Purbanchal Paribhan Gosthi (1998) 234 ITR 663 (Guwahati)].* The Pune Bench of ITAT in *Asst. Commissioner vs. Kripa Chemicals (P) Ltd., (2002) 82 ITD 449* held that even where the appeal is withdrawn or is dismissed for default, cross-objections may nevertheless be heard and determined. It relied on the *Superintendent Engineer vs. B. Subba Reddy AIR 1999 SCW 1479.* Rule 27 of the ITAT Rules, 1963, empowers the respondent to the order appealed against to support the same on any of the grounds decided against him, though he may not have appealed or filed a cross objection. *CIT vs. BPL Systems & Projects Ltd. (1997) 227 ITR 779 (Kerala).* However, filing of cross-objection is advisable and such valuable right should be exercised vigilantly. Cross objector is an appellant and not an intervener.

Q.35 Can cross objection be filed belatedly?

Ans. If the respondent is able to satisfy the Bench that the delay in filing of the cross objection was due to good, sufficient or reasonable cause, the Tribunal can condone the delay and admit the cross objection. The cross-objector should file application for condonation of delay.

Q.36 What is meant by cross appeal?

Ans. When the assessee and the Revenue prefer appeals against the same order, such appeals are considered as cross appeals. In substance there is no difference between cross objection and cross appeal. *CIT vs. Purbancha Paribahan Gosthi (1998) 234 ITR 663 (Guwahati)*

Q.37 Who should be the respondent in appeal or cross objection?

Ans. The respondent in the appeal filed by the assessee should always be the Assessing Officer concerned, who has jurisdiction over the case on the material date. In the appeal filed by the Income Tax Officer / Assessing Officer, the assessee is made the respondent.

Q.38 Who is authorised to sign the appeal or cross objection?

Ans. As prescribed in s. 253(b) read with Rule 47 an appeal or application must be signed by:–

In case of appeal/cross objection preferred by	To be signed by
Individual	Himself
HUF	Karta and in his absence from India, by any other adult member of the family
Firm	Managing Partner, in the alternative, Partner
Local authority	Principal Officer
Association of Persons	Member of the Association or the Principal Officer.
Company	Managing Director or the Director or Liquidator
Non Resident company	Power of Attorney holder
Government managed company	Principal Officer thereof

If an individual assessee is absent from India, the appeal memo may be signed by the authorized person, if mentally incapacitated, by the guardian or any person competent to act on his behalf; and if for any other reason, it is not possible for the individual to sign, by any person duly authorized by him in this behalf. A valid power of attorney from the individual should be attached to the appeal. In the case of a company, the appeal has to be signed by the Managing Director of the company. An Advocate cannot sign the memo of appeal on behalf of an appellant. There is a column for additional signature of the Authorised representative. An Advocate / Authorised Representative should sign in that capacity. Vakalatnama / Power of Attorney should be submitted with the memo of appeal.

Q.39 Can an Executive Director sign the appeal memo before the Tribunal?

In the case of company, it is the Managing Director who is authorized to file an appeal memo before the Tribunal. In cases where the Managing Director is not available, the Executive Director can sign the appeal memo. Appeal memo signed by the Executive Director is a curable defect if a reasonable cause is shown before the Tribunal. In *National Insurance Co. Ltd. vs. CIT (1995) 213 ITR 862 (Cal.),* the Court held that, the return signed by a Director and not by the Managing Director was invalid in the absence of any explanation. An appeal cannot be dismissed without giving an opportunity to cure the said defect, *Malani Trading Co. vs. CIT (2001) 252 ITR 670 (Bom.) Defective memo of appeal can be cured (2004) 186 CTR 162 (P & H), (2003) 264 ITR 313, CIT vs. V. K. Sood Engineers Contractors (P) Ltd.*

Q.40 Whether signing of appeal by a person other than specified is curable?

Ans. There are divergent views on the issue as to whether a defect in signature would render the appeal a nullity. The Hon'ble Calcutta High Court in *Sheonath Singh vs. CIT (1958) 33 ITR 591* has held that the absence of or defect in the signature of the appellant is not fatal so as to render the appeal a nullity and it is an irregularity which can be rectified and will be treated as having been rectified retrospectively. Whereas the Hon'ble Allahabad High Court in Special Manager, Court of Wards, *Naraindas Narsinghdas vs. CIT (1950) 18 ITR 204* has taken a contrary view and held that where the signature on the appeal was that of an agent, the appeal filed was invalid. In the following cases, it has been held that an appeal signed by an Advocate / C.A. / any other person is curable. M*rs. Luiza Saldanha vs. CIT (1983) 16 TTJ 243 (Bom), Pyrkes Win Stores vs. ITO (1984) 9 ITD 93 (Bom), Harileles vs. ITO (1986) 29 Taxman 22 (Bom) (Trib), Rajendrakumar Maneklal Sheth (HUF) vs. CIT (1995) 213 ITR 715 (Guj).* It is advisable to file fresh memo of appeal along with an application for condonation of delay.

Q.41 Whether undisputed tax should be paid before filing an appeal?

Ans. Section 249(4) provides that no appeal shall be entertained under Chapter XX unless at the time of filing the appeal the assessee has paid the taxes due on the returned income or where no return is filed, an amount equal to the amount of advance tax which was payable by him. Filing of appeal before Tribunal also falls under this chapter, hence provisions of section 249(4) are applicable. The Chennai Bench in *V. Baskaran vs. ACIT (1998) 62 TTJ 698* held that right of appeal is a creature of statute and the appellant must comply with the conditions or requirements for admission and for consideration of an appeal.

The Appellate Authority is vested with the power to exempt an assessee from the above condition of payment of tax. If the assessee makes an application and is able to show good and sufficient reasons, as to why he should be exempted from the operation of section 249(4), he can be allowed to file after recording the reasons in writing. An order refusing to exercise such discretion is an appealable order — *CIT vs. Smt. Nanhibai Jaiswal 171 ITR 646 (M.P.)* In *Shri Parasram G. Purohit vs. ACIT, ITA No. 2689/Bom/93, Assessment Year 1989-90*, the Hon'ble Bombay Tribunal, held that once the tax required to be paid u/s. 249(4) has been paid before the final date of hearing, it is incumbent upon the appellate authority to consider the appeal as having been filed on the date of payment. (Decision of *Supreme Court in CIT vs. Filmistan 42 ITR 163* referred to). In *Bharatkumar Sekhsaria vs. Dy. CIT (2002) 82 ITD 512 (Bom.),* the Tribunal held that when amount of the tax due is not paid before filing the appeal, the assessee's appeal is not maintainable. It may be noted that the Bombay High Court admitted the appeal filed against the order of the Tribunal. However, in a latter decision in the case of *Umesh Popatlal Shah vs. DCIT & Others IT (SS)* A. No. 42 to 44/M/2000, the Bombay Tribunal distinguished the decision of

Sekhsaria and held that the appeal should be treated as belated till the fees was paid and consequently condonation of delay to be considered.

In *CIT vs. Smt. G. A. Smanthakamani (2002) 125 Taxman 424 (Mad.)*, the Court held that, section 249(4) cannot be read down so as to restrict it to appeal against assessment only, it will be applicable in case of appeal against penalty also. In *ITO vs. Tata Iron & Steel Co. Ltd. (2001) 71 ITD 323 (Cal.)*, the Tribunal held that, appeal is not maintainable where tax is not deducted at source from payment made to non-resident and is not paid to Government, prior to filing of appeal.

In *Pawan Kumar Ladha vs. Asstt. CIT (2003) 84 ITD 178 (Indore) & Malva Texturising (P) Ltd. vs. Asstt. CIT (2002) 77 TTJ (Indore) 995*, the Tribunal has taken the view that provisions of section 249(4)(a) falling under Chapter XXA are not applicable to the appeals filed before the Tribunal.

In *Anil Sanghi vs. Asstt. CIT (2003) 85 ITD 73 (Delhi) SB*, the Tribunal has held that for the period 1-7-1995 to 31-12-1996 during which provisions for first appeal in respect of block assessment was filed provisions of section 249(4) were not applicable.

Q.42 Assessee has paid the tax, but not interest u/s. 234A, 234B, 234C, whether appeal is maintainable?

Ans. In *Subbaiah Nadar & Sons vs. Asst. CIT (2003) 84 ITD 55 (Chennai)*, the Tribunal has held that section 249(4), refers only to tax and not interest, hence, the appeal cannot be dismissed for non payment of interest.

Q.43 If an order is setaside with a specific direction and no appeal is filed against the direction. Can the direction be challenged in Second Appeal?

Ans. Once the direction is given, the same has to be followed by the assessing officer. If no appeal is preferred against the said direction, such direction is binding on the Assessing Officer and he should follow the direction of the superior authority. The officer cannot go beyond the specific direction of the appellate authority. The direction can be challenged before the Tribunal by taking additional ground. On satisfaction, additional ground can be permitted by the Tribunal. *Cawnpore Chemical Works P. Ltd. vs. CIT (1992) 197 ITR 296 (All.), CIT vs. S. V. Divakar (1993) 201 ITR 914 (Orissa)*

Q.44 Whether it is mandatory to give notice to valuation officer, when assessment order is based on report of the valuation officer?

Ans. Yes. It is mandatory for the appellate authority to give notice of hearing to valuation officer. If notice is not given, the Tribunal will set aside the matter to follow the statutory requirement. The Tribunal is also required to give notice to the valuation officer

Q.45 Whether a concession of law is binding?

Ans. A concession of law made by an assessee or his authorized representative is not binding. There cannot be any estoppel against statute. *Rani Anand Kunvar vs. CIT (1940) 8 ITR 126 (Oudh), Gouri Sahai Ghisa Ram vs. CIT (1979) 120 ITR 338 (All), CIT vs. Archana R. Dhanwatay (1982) 136 ITR 355 (Bom.), Narsepalli Oil Mills vs. State of Mysore (1973) 32 STC 599 (Mad.) Central Council for Research in Ayurveda & Siddha vs. Dr. K. Shankara Kumari (2001) 5 SCC 60, CIT vs. Mahalaxmi Sugar Mills Co. Ltd. (1986) 160 ITR 920 (SC) at (928).* Inclusion in return of sales, not assessable to tax assessment of such sales. Appeal not barred – doctrine of estoppel not applicable, (2004) 136 STC 292 (Kar) Bhandari Metals & Alloys (P) Ltd. vs. State of Kerala.

In *ITO vs. Estate of Late K. S. Engineer (2001) 70 TTJ 161 (Bom),* the Tribunal held that, a receipt cannot be taxed merely because assessee has offered the same for assessment or that he has not challenged similar assessment in earlier years. In Ark Investment Ltd. vs. ITO (1985) 13 ITD 65 (Mad), the Tribunal has held that, even if the assessee shows the income taxable, he can file an appeal and such appeal must be disposed on merit.

Q.46 Can an appeal be filed against an order under s. 264 or 273A of the Income-tax Act?

Ans. No appeal lies to the Tribunal. The only remedy is by way of a writ before the High Court under Article 226 of the Constitution of India.

Q.47 Whether an appeal can be filed against a dead person?

Ans. No. No appeal can be filed against a dead person. The Court held that the appeal filed by the Department against a dead person is liable to be dismissed. In *CIT vs. Smt. Santosh Rani (1996) 219 ITR 301(MP).* Appeal can be filed after bringing the legal heirs on records.

Q.48 Whether disputes of levy of tax, interest or penalty, in respect of public sector undertaking can be decided by the Tribunal?

Ans. Disputes between Tax Department and public sector undertaking must be referred to Cabinet Committee. Only after, getting the approval, the Tribunal can proceed with the matter. *Oil & Natural Gas Commission vs. CCE (1992) 104 CTR 31 (SC); [ITO vs. Indian Airlines Ltd. (1998) 99 Taxman 332 (Mad.) (Mag.)].* Recently, in cases where the approval has not been obtained for a considerable time and the matter has been adjourned several times, the Tribunal has been dismissing the appeal with liberty to apply for restoration when the approval is received. The purpose is to see that frivolous litigation between Government Departments and Public Sector Undertakings should not be dragged in the Courts; *CCE vs. Jeesop & Co. Ltd. (1999) 9 SCC 181; Canara Bank vs. National Thermal Power Corporation (2001) 1 SCC 43 (2001) 104 Comp Cas 97.* Decision taken by the Committee shall be binding on all the departments – *Mahanagar Telephone Nigam Ltd. vs. CBDT (2004) 267 ITR 647 (SC).*

Q.49 Whether appeal can be decided ex parte on the ground of non-filing of Power of Attorney or Vakalatnama?

Ans. In *Prayas Agag Udyog (P.) Ltd. vs. ITAT (2001) 118 Taxman 68 (All.),* the Court held that, the Tribunal cannot dispose of an appeal ex parte on the ground that, the Chartered Accountant who moved an application for adjournment had no Power of Attorney or Vakalatnama, authorizing him to represent the petitioner. The Tribunal should have brought the defect to the notice of the petitioner and got the defect removed.

Q.50 Whether appeal can be dismissed by the Tribunal in Limine for not attaching the grounds of appeal?

Ans. In *CIT vs. V. K. Sood Engineers & Contractors (P) Ltd. (2003) 264 ITR 313 (P & H),* the Court held that the Tribunal was not right in dismissing the appeal in limine, since it is a rectifiable defect.

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CHAPTER

3

APPEAL FORM AND CONTENTS

Q.51 How to draft the grounds of appeal or cross objection?

Ans. As per Rule 8 of the Rules, the grounds of appeal should be concise and under different heads. Grounds of appeal should not be argumentative or narrative. Such grounds should be numbered consecutively. Grounds should be drafted very carefully, the point in dispute be highlighted. It is desirable to challenge findings of facts which are contrary to the material on record or are objected to. On receipt of defect memo, grounds originally filed can be substituted. If ground is not comprehensive, the Respondent/Tribunal may object at the final hearing and may not allow to raise additional ground. If ground is exhaustive and framed in general words – all aspects can be argued. See *CIT vs. Scindia Steam Navigation Co. Ltd. (1961) 42 ITR 589 (SC); CIT vs. Birad Kanwarji (HH) (1979) 119 ITR 96 (Raj.).*

The statement of facts should be filed before the Commissioner of Income-tax (A). It is very vital for assessees to present the statement of facts in such a manner so as to bring out clearly the issues in the assessment/penalty proceedings which are under challenge. There is no requirement of filing statement of facts before the Appellate Tribunal. But copy of statement of facts filed before the CIT(A) should be annexed.

Q.52 Whether additional ground can be filed at the time of hearing of appeal?

Ans. Rule 11 of the Rules, provide that the appellant, shall not except by leave of Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal. However, the Tribunal is competent to allow the appellant to raise, at the hearing of the appeal, an additional ground even without a formal amendment of the memorandum of appeal *(CIT vs. Nelliappan (1967) 66 ITR 722 (SC). New India Life Ass. Co. Ltd. vs. CIT (1957) 31 ITR 844, 846 (Bom.)*

The appellant should make an application in writing containing the additional ground, its necessity and reasons as to why it could not be taken earlier. It should be established that it goes to the root of the issue and is necessary for dispensation of justice. A copy of such application should be provided to the respondent and respondent is heard, before its disposal. Permission to raise the additional ground is discretionary. Reasons for admission have to be recorded by the Tribunal and the discretion should be exercised judiciously so as to further the cause of justice and not arbitrarily.

In *Ahmedabad Electricity Co. Ltd. vs. CIT (1993) 199 ITR 351 (Bom) (FB),* the Court held that, Rules 11 and 29 of the Appellate Tribunal Rules indicate that the scope of enquiry before the Tribunal can be wider than the points which are raised before the Tribunal. The Tribunal, therefore, would ordinarily have the power to allow additional points to be raised before it so long as they arise from the subject matter of the proceedings. The proceedings before the Tribunal are not necessarily confined only to the subject matter raised in the memorandum of appeal. The word "thereon" in section 254 does not in any manner restrict the jurisdiction of the Appellate Tribunal. The word "thereon" merely refers to the appeal. To read the word "thereon" as restricting the jurisdiction of the Appellate Tribunal is not warranted. It does not refer to the scope of jurisdiction at all. The words which prescribe the extent of jurisdiction of the Tribunal under section 254 are the words "may pass such orders.... as it thinks fit". These are the words which describe the jurisdiction of the Appellate Tribunal. The word "thereon" merely refers to the fact that the Tribunal while deciding the appeal has to exercise its jurisdiction. Looked at from a slightly different point of view, if the word "thereon" can be said to refer to the subject matter of the appeal, then the subject matter of the appeal is the entire tax proceeding of the assessee which is before the Tribunal for consideration; and this will cover the proceedings before the ITO, before the AAC as well as before the Tribunal — including the grounds raised before the Tribunal, any additional grounds which may be allowed to be raised before the Tribunal as also cross-objections, if any, before the Tribunal. Undoubtedly, the Tribunal has a discretion to decide whether any additional points can be allowed to be raised at the stage of appeal before it, and it may not permit such a new point to be raised for good reasons. But the extent of jurisdiction of the Tribunal is not confined only to points which were considered by the AAC and which may be challenged in appeal before the Tribunal. The Tribunal can permit other grounds also to be raised before it, provided, of course, that they arise out of the proceedings. Accordingly, it can be said that, the Tribunal has jurisdiction to permit additional grounds to be raised before it even though they may not arise from the order of AAC, as long as these grounds are in respect of the subject matter of the entire tax proceedings.

So far as legal issues are concerned, additional grounds can be raised at any time. Few case laws on the subject of power to allow a new ground of appeal to be raised are: N*ational Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC), Jute Corporation of India vs. CIT (1991) 187 ITR 688 (SC), Godavari Sugar Mills Ltd. vs. CIT (1993) 199 ITR 351 (Bom) (FB), Ramgopal Ganpatrai & Sons vs. CIT (1953) 24 ITR 362 (372) (Bom), Anam Venkata Krishna Reddy vs. CIT (1988) 172 ITR 425 (A.P.), Deep Chand Kothari vs. CIT (1988) 171 ITR 381 (Raj), J. S. Parkar vs. V. B. Palekar (1974) 94 ITR 616 (Bom), CIT vs. Stepwell Industries Ltd. (1997) 228 ITR 171 & 463 (SC), ACIT vs. Soni Photo Films (P) Ltd. (1998) 67 ITD 81 (SB), CIT vs. Delhi Sanitary Stores (1981) 127 ITR 822 (Raj.)*

Q.53 Whether additional ground can be raised orally?

Ans. Leave to urge additional grounds may be sought either in writing or by oral prayer. Rule 11 of the Appellate Tribunal Rules speaks only of leave and the leave may be sought either in writing or by an oral prayer — *Amines Plasticizers Ltd. vs. CIT, (1997) 223 ITR 173 (Guwahati)*. Grounds of Appeal can be amended by taking leave of the Tribunal orally — *Assam Carbon Products Ltd. vs. CIT (1997) 224 ITR 57 (Guwahati)*. There is no particular form for raising an additional ground. *Baby Samuel vs. ACIT (2003) 262 ITR 385 (Bom.)*. The additional ground can be raised at any time. *Shilpa Associate vs. ITO (2003) 263 ITR 317 (Raj.)*. New plea can be raised orally though no cross objection or appeal has been filed, *Assam Company (India) Ltd. vs. CIT (2002) 256 ITR 423 (Guwahati), Baby Samuel vs. ACIT (2003) 262 ITR 385 (Bom.)*

Q.54 Whether issues regarding jurisdiction or limitation not raised before the CIT (A) can be raised for first time before the Income Tax Appellate Tribunal?

Ans. Yes. Legal ground going to the root of the issue and if facts are on record, can be raised at any time. In *CIT vs. Mohd. Iqbal and Others (1996) 221 ITR 481 (MP) Krishna Gopal Bhadra vs. ITO (1980) 124 ITR 580 (Cal.), CIT vs. Commonwealth Trust (India) Ltd. (1996) 221 ITR 474 (Ker.) CF Town Municipal Council Atharia vs. Labour Court AIR 1969 SC, 1335 (1338)* courts have held that the question of limitation can be raised at any point of time because it goes to the root of the matter. Similar is the position about the jurisdiction. The Supreme Court in *UOI vs. British India Corp. Ltd. (2004) 268 ITR 481* observed, the question of limitation is a mandate to the forum and irrespective of the fact whether it was raised or not, the forum must consider and apply it, if there is no dispute or facts.

Q.55 Whether assessee can raise a ground regarding jurisdiction in respect of the assessement in the penalty appeal at any time?

Ans. The assessee is entitled to raise the ground relating to jurisdiction stating that the assessment based on the return is bad in law, hence penalty is liable to be quashed — *Union of India vs. Rai Singh D. L. Singh Bist (1973) 88 ITR 200 (SC), CIT vs. Dumraon Cold Storage and Refrigeration Service (1974) 97 ITR 137 (Patna), Shri Bhormal Aidanmali Jain vs. IAC of I.T. [No.9204 and 9205 — assessment year 1977-78, Bench "E", dated November 23,* 1989 (SMC)], *Sanabhai R. Dalwali vs. ITO (1990) 34 ITD 183 (Ahd.).*

Q.56 Can assessee support the order of Commissioner of Income Tax (Appeals) on any ground decided against it, even though no appeal is filed?

Ans. In *Dy. CIT vs. Smithkline Beecham Consumer Brands Ltd. (2003) 126 Taxmann 104 (Cal.),* the Tribunal held that, in view of Rule 28 of Income Tax (Appellate Tribunal) Rules, assessee can support order of Commissioner (Appeals) on any ground decided against it even though no appeal is filed.

Q.57 Can appellant agitate the issue not pressed before the CIT(A)?

Ans. Yes. An appellant despite having not pressed an issue before the authorities below, can still raise and agitate the same before the Tribunal. There cannot be any estoppel against statute. No concession on law is permissible. *Vijay Kumar Jain vs. CIT (1975) 99 ITR 349 (P&H); J. K. Oil Mills Co. Ltd. vs. CIT (1976) 105 ITR 53 (Allahabad); Hindusthan Zinc Ltd. vs. DCT (2002) 77 TTJ 315 (Jodhpur Bench).*

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CHAPTER

4

ADDITIONAL EVIDENCE

Q.58 Whether evidence which was not filed before the lower authorities can be filed before the Tribunal?

Ans. Rule 29 places a total bar on the parties to the appeal from producing additional evidence, either oral or documentary, before the Tribunal. But Tribunal has been vested with inherent discretion to allow the production of the additional evidence in the following circumstances:–

(i) If the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause;

(ii) If the Income-tax authorities have decided the case without giving sufficient opportunity to the assessee to advance evidence either on points specified by them, or not specified by them.

On the existence of either of the circumstances mentioned above, the Tribunal for reasons to be recorded may allow such documents to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced. The Tribunal has the discretion to permit to adduce additional evidence.

ITO vs. B. N. Bhattacharya (1978) 112 ITR 423, 427 (Cal.), CIT vs. Motilal Hirabhai Spinning & Wvg. Co. Ltd. (1978) 113 ITR 173, 179, 180 (Guj). CIT vs. Smt. Kamal C. Mehboobhani (1995) 214 ITR 15 (Bom), Dy. CIT vs. Vira Construction Co. (1997) 61 ITD 33 (Mum) (TM)

If evidence produced by assessee is genuine, reliable and proves assessee's case, then assessee should not be denied opportunity of it being produced for the first time before the appellate authority—

Jagbir Singh vs. ITO (1987) 23 ITD 15 (Del.), Electra (Jaipur) (P) Ltd. vs. IAC (1988) 26 ITD 236 (Del.), Smt. Prabhavati S. Shah vs. CIT (1998) 231 ITR 1 (Bom), Abhay Kumar Shroff vs. ITO (1997) 63 ITD 144 (Patna) (TM), Jagannath Prasad Kanhaiya Lal Vs. CIT (1988) 171 ITR 596 (Alla.), CIT vs. Gani Bhai Wanab Bhai (1998) 232 ITR 900 (M.P), Deep Chand Kothari vs. CIT (1988) 171 ITR 381 (Raj.), Controller of Estate Duty vs. Narasamma (1980) 125 ITR 196 (A.P.)

Q.59 What is the meaning of additional evidence and procedure to adduce additional evidence?

Ans. Any evidence which has not been produced before the Assessing Officer or Commissioner of Income Tax (Appeals) shall be considered as additional evidence. There is a distinction between additional evidence and supporting evidence. If certain material / evidence has been placed before the lower authorities and further supporting evidence is placed before the Tribunal – it should not be considered as additional evidence. However, narrow difference exists between the two. The appellant should make an application seeking permission to rely upon additional evidence. The application should give reasons, justify the necessity, prove its genuineness, its non-availability earlier or that there was no negligence, mala fides and latches or inaction on the part of the appellant for not producing it before the lower authorities. The additional evidence should be annexed with the application and by way of an additional paper book. If possible, it should be supported by an affidavit of the appellant. Its copy has to be provided to the respondent and the respondent should be given an opportunity of being heard. On being satisfied, the Tribunal should record its reasons, admit and consider at the time of final hearing. If the Tribunal fails to consider such evidence or the application, it amounts to a mistake rectifiable under s. 254 (2) and the matter must be restored to the Tribunal to dispose of the application as held by the Supreme Court in *Jyotsna Suri & Others vs. ITAT (2003) 179 CTR 265 (SC).*

Q.60 Whether assessment orders or Government records can be considered as additional evidence?

Ans. Assessment orders cannot be considered as additional evidence. However, the assessee may seek leave of the Tribunal to produce and rely upon the assessment order if it has not been produced before the lower authorities, and is being produced for the first time and permission may be given to produce the same. As per section 74 of the Evidence Act the Government records are considered as public documents. Hence the same can be produced for the first time before the Tribunal with the permission of the Bench.

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CHAPTER

5

DUTIES OF THE TRIBUNAL

Q.61 What are the duties of the Tribunal?

Ans. Strictly speaking the Appellate Tribunal is not a Court but has all the trappings of the Court of law. The Appellate Tribunal performs judicial act in judicious manner. The Tribunal is the final fact finding authority. Its finding on facts is final and no appeal lies to the Hon'ble High Court. The powers of the Appellate Tribunal are very wide but there is no power of enhancement. All questions, whether of law or of fact which relate to the assessment of an assessee may be raised before the Tribunal. In disposing of the appeal, the Tribunal has the power to give appropriate directions and to pass such orders as it thinks fit, after giving an opportunity of being heard to both parties to an appeal. The powers include the power to annul an assessment order or set it aside. The powers have been expressed in the widest possible terms similar to the powers of the Civil Appellate Court u/s. 96 and order 41 of the Code of Civil procedure. Duty is to avoid multiplicity of proceedings and to make a detailed well discussed order after incorporating facts emerging from records, considering the arguments raised by both the parties and the judicial precedents cited at the time of hearing.

The Tribunal being a final fact finding authority has to consider and decide all issues that are brought before it. It cannot decide only one issue arising out of many issues and decline to go into the other issues raised before it on the ground that further issues will not arise in view of the finding on the issue decided by it. If the Tribunal declines to consider and decide the other issues it will only protract and delay the proceedings for the assessee has to get the decision of the Tribunal on the initial point set aside by approaching the High Court and thereafter, again go back to the Tribunal for a decision on other issues left undecided by it earlier. This will amount to multiplicity of proceedings. It is desirable that the Tribunal should avoid disposing of matters on preliminary issues alone, without deciding all the issues raised before it and it should, as far as possible express its view on all points raised before it, so that the higher Courts have the benefit of its decision on other points also, if necessary.

Some relevant case laws on the subject are:

The Tribunal must consider all the material and not only a part of it.

Udhavdas Kewalram vs. CIT (1967) 66 ITR 462 (SC)

It is not only the duty of the Tribunal to examine the material facts but also to come to a legal conclusion that the facts do not justify the allowance or disallowance of an expenditure.

CIT vs. Turner Morrison & Co. (P) Ltd. (1974) 93 ITR 385 (Cal).

The Tribunal should not rest its conclusion merely on legal views without recording findings on matters of facts.

Simhadri Narasingh Prusty & Ors. vs. CIT (1971) 79 ITR 219 (Orissa)

The Tribunal being the final authority on facts, it is necessary and it is the requisite of the law that in disposing the appeal, it clearly sets out the facts, the contentions of the assessee as well as the revenue and deals with each of such contentions with reference to the facts, circumstances and relative evidence and records its findings with reasons therefor on each contention.

E. A. Venkataramier & Sons vs. CIT (1967) 65 ITR 316 (Mad)

The Tribunal is under a duty to decide all questions of fact and law raised in the appeal before it. For the purpose it must consider whether on the materials relied upon by the assessee his plea is made out. The Tribunal cannot make arbitrary decisions; it cannot base its judgements on conjectures, surmises or speculation. Between the claims of the public revenue and of the tax-payers, Tribunal must maintain a judicial balance.

Esthuri Aswathiah vs. CIT (1967) 66 ITR 478 (SC)

The Tribunal must decide cases in a judicial spirit and record reasons in support of its decision.

CIT vs. Walchand & Co. (1967) 65 ITR 381 (SC)

The orders of the Tribunal must be self contained and set out in full the facts and the reasons for arriving at a decision. Reference to earlier orders are unhelpful because at the time of hearing, these orders are not placed before the Court and it will not therefore be possible to appreciate the Tribunal's views in these matters.

CIT vs. Guntur District Co-operative Marketing Society Ltd. (1985) 154 ITR 799 (AP)

On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises or on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings even though on questions of fact will be liable to be set aside by the Court.

Omar Salay Mohamed Sait vs. CIT (1959) 37 ITR 151 (SC)

An order of a judicial authority like that of the Appellate Tribunal is a solemn one and the Tribunal should devote great care in expressing it.

M.R.M. Periannan Chettiar vs. CIT (1960) 39 ITR 159 (Mad)

The order of the Tribunal should embody a complete picture of what happens at the hearing. If a point is argued it should be dealt with and disposed of in express terms however weak the argument or baseless the contention. The Tribunal being the final fact finding authority it is desirable that its views on facts should be stated comprehensively to cover all points in controversy. Omissions in the order can give rise to questions of law.

Senairam Dongarmal vs. CIT (1956) 29 ITR 122 (Assam)

The Tribunal in deciding a case should not be unduly influenced by trivial procedural technicalities. The memo of appeal should be liberally seen and entertained. No specific formula is necessary for seeking relief at the hands of a Court or Tribunal, if the necessary grounds have been taken in the appeal memo. *CIT vs. Calcutta Discount Co. Ltd. (1973) 91 ITR 8 (SC).*

In Manibyrabha vs. CIT (2004) 265 ITR 560 (Ker), the Court held that it is the duty of the Tribunal to pass a reasoned order, in this case the Hon'ble Tribunal has not discussed the cases cited before it. The Hon'ble High Court set aside the order of the Tribunal.

It is the duty of the Tribunal being the highest appellate Tribunal exercising the appellate jurisdiction under the I.T. Act to examine the issue, both of law and fact in right perspective and in detail. It must appear from the order passed by the Tribunal that sincere efforts were made to decide the issue that fell for examination, keeping in view the law laid down by Apex Court in its right earnest. Mere reference of a citation in the order for recording a finding is not enough. It is never regarded as a case observing judicial discipline. Any finding whether on facts or in law if recorded cursorily and without assigning reasons can never be regarded as judicial finding. It is incapable of being sustained in higher courts in heirarchy. *Shreejee Chitra Mandir vs. CIT (2004) 269 ITR 55 (M.P.).*

During the last few years, it has been noticed that some Members of the Tribunal interrupt, do not give patient hearing and want counsels to curtail their submissions/arguments though appropriate on the issues involved in the wisdom of the arguing counsel. Some orders are brief, do not set out the arguments made on both sides, their analysis and discussion on the citations. Such attitude on the part of some of the Hon'ble Members spoil the image and reduce past glory of the Tribunal. A representation was made by the Federation and corrective measures are being taken by the President. The speeches of Shri A. Kalyanasundharam, Senior Vice President on "Conventions in the Tribunal" and of Shri J. P. Bengra, Vice President on "A Time to Introspect" at the Members meeting (87 ITD Special Issue page 13-19 and 29-34 respectively) lay down the guidelines and are inspiring and call upon Members to perform their duty in a judicious manner with smile and dispense justice.

Q.62 Whether right of an assessee is restricted to the plea raised by him?

Ans The right of an assessee is not restricted to the plea raised by him. It is the duty of the authority to allow relief on any other ground, if permissible. *Ciba of India Ltd. vs. CIT (1993) 202 ITR 1 (Bom), CIT vs. Mahalaxmi Textiles Ltd. (1967) 66ITR 710 (SC).*

Q.63 When the assessee and the Department are in appeal, against the same order whether both the appeals must be heard together?

Ans. Yes. In *CST vs. Vijai Int. Udyog (1985) 152 ITR 111 (SC),* the Supreme Court held that both appeals must be heard together. The Gauhati High Court in *CIT vs. Highway Construction Co. 217 ITR 234 (1996)* has however held that when the appeals involve different points this can be heard separately. According to us, it is always, desirable to make an application to hear both the appeals together, mainly because, if assessee and Department is in appeal, for example on the issue of addition to GP, if appeal of department is dismissed; in assessees appeal, the Department may contend that as the Tribunal has already given the finding, in respect of GP addition, in respect of same point, there cannot be any further relief. It may also be desirable to have only one order from the Tribunal, otherwise, the assessee or Department may have to file two separate appeals before the High Court for the same assessment year.

Q.64 Whether appeal can be filed against an order setting aside/restoring the matter to the assessing officer?

Ans. In *Berulal Tiwari vs. CIT (1988) 173 ITR 280 (AP), CIT vs. Sati K. Sippy (1992) 195 ITR 276 (Bom),* the Courts have held that there cannot be appeal against a set aside order. In our view, if the setting aside is illegal and all the material was available before the CIT (A) an appeal should be preferred and should be entertained by the

Tribunal. Refer *United Commercial Bank vs. CIT (1982) 137 ITR 434 (Cal.), Oriental Paper & Industries vs. State of Orissa 83 STC 202 (Orissa), Raja Vikramaditya Singh (Decd) vs. CIT (1988) 169 ITR 55 (M.P.), Smt. Neena Syal vs. ACIT (1999) 70 ITD 62 (Chd.), Commissioner of Wealth Tax vs. Vanavarayar (M.K.S.) (1980) 122 ITR 184 (Mad.)*

Q.65 Whether an order of the lower authority shall be void or voidable where the principles of natural justice have not been followed?

Ans. An order of the lower authorities where the principles of natural justice have not been followed is not void. The Tribunal may have to follow the principles of natural justice or may have to restore the matter back to the lower authority to comply with the principles of natural justice. In view of the Supreme Court decision in *Superintendent (Tech.) Central Excise vs. Pratap Rai (1977) 114 ITR 231*, an order passed in violation of principles of natural justice does not become bad ab initio, it suffers from intervening irregularly or illegality which can be cured. It does not affect the jurisdiction but only makes further proceedings bad. In *Colonisers vs. CIT (1992) 41 ITD 57 (Hyd.) (SB)*, the Tribunal has held that order passed in violation of natural justice is void ab initio.

The issue of violation of principles of natural justice can be raised for the first time before the Tribunal. *Appropriate Authority & Anr. vs. Vijay Kumar Sharma (2001) 249 ITR 554 (SC), Tin Box Company vs. CIT (2001) 249 ITR 216 (SC), Union of India vs. Vipan Kumar Jain (2003) 260 ITR 1 (SC), J. T. (India) Exports vs. UOI (2003) 262 ITR 269 (Del.) (FB).*

Q.66 What is the doctrine of per incuriam?

Ans. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute *[Municipal Corporation of Delhi vs. Gurnam Kaur, (1989) 1 SCC 101, 110 (SC)]*. In other words, when a decision is rendered without noticing a binding precedent or is inconsistent with a statutory provision, it is per incuriam and, therefore, loses its efficacy as a precedent. Except the parties to the lis, it binds none [Per *M. N. Rao, J., in Y. V. Anjaneyulu vs. ITO, (1990) 182 ITR 242, 307 (AP)]*. The doctrine of per incuriam should be limited to decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned [*Morelle vs. Wakeling, (1995) 2 QB 379] Wolkem (P) Ltd. vs. CIT (2003) 259 ITR 430 (Raj)*. The doctrine will not be extended to cases which were merely not fully argued or which appear to take a wrong view of the authorities or to misinterpret a statute [*Mamleshwar Prasad vs. Kanahaiya Lal, AIR 1975 SC 907, 910*].

Q.67 Can an issue neither agitated before AO or CIT(A) be agitated before the ITAT?

Ans. The Tribunal should not indulge in technicality of law and the procedure. It is meant to do justice. It should entertain an issue not agitated before AO or CIT(A), if it is a question of law or if the facts are already on records. In case the facts need ascertainment – the Tribunal should not hesitate in remanding to the lower authorities to decide in accordance with law and after opportunity to the other side. In *Indo Java & Co. vs. IAC (1989) 30 ITD 161 (Delhi) (SB*) the special bench has held that point which can be agitated in appeal before tribunal by an appellant may also include points impinge on computation of income as shown by the assessee himself by mistake or otherwise and even not agitated before ITO or ACC.

Q.68 Whether proceeding before ITAT is continuation of assessment proceedings?

Ans. Second appeal lies before the Tribunal. An appeal is always a continuation of assessment proceedings. Hence, proceedings before the Tribunal is continuation of assessment proceedings. Whatever could be submitted or agitated before the Assessing Officer can be submitted or agitated or claimed before the Tribunal. In *CIT vs. Indian Express (Madurai) Pvt. Ltd. (1983) 140 ITR 705 (Mad.)* it was held that the appeal proceedings is also continuation of assessment proceedings to determine the correct assessment, hence, claim which was not made before the CIT(A) can be made before ITAT.

Q.69 Can papers collected after hearing was over be considered as evidence?

Ans. Once hearing is complete, normally no additional papers should be received/collected by the Tribunal. If certain material evidence/document/paper/submission/citation remain to be submitted at the time of hearing, by inadvertent mistake or mistake of the counsel, it shall be appropriate in order to dispense justice, to accept, to provide its copy to the other side and rehear the issue. Without providing opportunity to the other party, it cannot be considered in the order of the Tribunal and cannot be forwarded to the High Court. In *Jhalani Tools (I) (P) Ltd. vs. CIT, (1989) 31 ITD 81 (Delhi) (SB)* has held that papers which were collected after hearing was over by one of the members *suo motu* do not constitute evidence hence not forwarded to the High Court.

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CHAPTER

6

POWERS OF THE TRIBUNAL

Q.70 What is the extent and scope of the powers of the Tribunal?

Ans. The powers of the Tribunal have been expressed in the widest possible terms under section 254, “may after giving both the parties to the appeal an opportunity of being heard, and pass such orders thereon as it thinks fit”. Its powers, thus, are almost similar to the powers of an appellate court under the Code of Civil Procedure. A wide power, however, is not such that it can be exercised in any manner. The Tribunal can interfere with the orders of the lower authorities, but can do so only on judicial considerations and on the basis of reasons that suggest clearly that the lower authorities had committed an error of law or such fact that had vitiated its considerations and gone perverse for such reasons. Its primary task is not to go into the return of the assessee and decide what amount of tax should be levied upon his income, but to see whether the taxing authorities, including the first appellate authority have committed any error of law or of fact and on account of such error, the assessee has suffered. A greater protection is extended by the law to the Revenue in the sense that, in cases where tax is found to have been short levied, discretion is given to the competent authority (Commissioner) to reopen the whole matter, if it is in public interest to do so. The Tribunal has got to protect, on the one hand, the interest of the assessee in the sense that he is not subjected to any amount of tax, in excess of what he is bound to pay, and on the other hand, it has a duty to protect the interests of the Revenue and to see that no one dodged the Revenue and escaped without paying the tax *[CIT vs. Rayala Corporation (P) Ltd. (1995) 215 ITR 883, 894, 894-95 (Mad.)]*

Some important case laws on the subject of powers of Tribunal are as follows:

The power and jurisdiction of the Tribunal are of wide amplitude and depending upon the exigencies in a given case, it has the power to make such appropriate orders thereon as justice of the case demands. The powers of the Tribunal are expressed in widest possible terms similar to the power of the Appellate Court under section 96 of the Code of Civil Procedure. The words “as it thinks fit” are of wide amplitude to give directions to authorities below, to afford an opportunity to the assessee and revenue to adduce evidence afresh and consider the same and to submit a report.

Thakur V. Hari Prasad vs. CIT (1987) 167 ITR 603 (AP)

The plain implication of the section is that the Tribunal’s powers are limited to passing such order as it may think fit on the appeal. The expression “thereon” clearly and undoubtedly points to the conclusion that the powers of the Appellate Tribunal are limited to the subject matter of the appeal.

Pathikonda Balasubba Setty vs. CIT (1967) 65 ITR 252 (Mys)

Tribunal’s power is limited to the subject matter of the appeal before it. The powers of the Tribunal in dealing with appeals are expressed in section 254(1) in the widest possible terms. The word ‘thereon’ restricts the jurisdiction of the Tribunal to subject matter of the appeal *[Hukumchand Mills Ltd. vs. CIT (1967) 63 ITR 232 (236, 237) (SC)]*. The power is restricted to the year under appeal, incidental observation relating to other years, if any, made, is not strictly speaking, a finding. The Tribunal has no jurisdiction to give direction with regard to the proceedings of the earlier year or to include deleted amount in an other year's assessment. *ITO vs. Murlidhar Bhagwan Das (1964) 52 ITR 335 (SC).*

As the Tribunal has wide powers in respect of subject matter of an appeal before it, it can decide any question which is material to the subject matter before it even though it was not specifically raised.

CIT vs. Amaredranath Mukherjee & Bros. (1973) TLR 119 (Cal)

The subject matter of an appeal before the Tribunal can only be the decision express or implied of the first appellate authority and the jurisdiction of the Tribunal is restricted to the subject matter of the appeal.

CIT vs. Steel Cast Corporation (1977) 107 ITR 683 (Guj)

Merely because a ground has not been raised before the first appellate authority though it could be raised in support of the relief sought in the appeal, it cannot be said that it cannot be raised before the Tribunal. Such a ground can be raised provided it falls within the contents of the subject matter of the appeal before the first appellate authority.

CIT vs. Cellulose Products of India Ltd. (1985) 151 ITR 499 (Guj) (F.B.)

The word "thereon" confines power of the Tribunal to pass orders on the subject matter of the appeal before it and the Tribunal cannot go beyond the scope of the appeal and pass an order or give a direction which does not fall within the subject matter of the appeal.

F.Y. Khambhaty vs. CIT (1966) 61 ITR 30 (Guj)

Consent does not give jurisdiction to any authority and if there is inherent want of jurisdiction in an authority, failure of the party concerned to challenge the jurisdiction does not confer jurisdiction on the authority. A pure question of law going to the root of the jurisdiction can be raised for the first time before the Tribunal.

CWT vs. N. A. Narielwalla (1980) 126 ITR 344 (Bom)

A question of limitation raises a plea for want of jurisdiction and is a question of law. If a question of limitation can be decided on the basis of facts on record, Tribunal should permit such questions to be raised for first time before it.

Krishna Gopal Bhadra vs. ITO (1980) 124 ITR 580 (Cal)

In the event of assessee challenging the validity of search under s.132 on the ground of non-existence of any of the circumstances/conditions enumerated in clauses (a) or (b) or (c) of sub-section (1) of section 132 or challenging the very factum of search on the ground that there was no search warrant, the Assessing Officer as well as the Tribunal, not only have powers but are duty bound, in exercise of their quasi-judicial jurisdiction, to adjudicate upon the matter and consequently can call for the records of concerned authorities leading to the issue of authorization of search and can satisfy itself with regard to the authorization having been issued in accordance with the law.

Dr. A. K. Bansal vs. ACIT (2000) 73 ITD 49 (All) (T.M.)

Q.71 Whether the Tribunal has power to remand?

Ans. Yes. The Tribunal has power to remand to the Assessing Officer or to the CIT(A). Some of the case laws are:

Where the first appellate authority has rejected a new claim of the assessee on the ground that no such claim was made in the return or in the course of assessment proceedings nor was there any material on record to support such a claim, the Tribunal is not justified in entertaining such a claim and directing the Assessing Officer to examine the claim of the assessee on merits.

CIT vs. G. S. Rice Mills (1982)136 ITR 761 (All)

If the Tribunal feels in a particular case before it, substantial justice requires that the claim of the assessee though raised before first appellate authority for the first time should have been investigated by that authority, the Tribunal is competent to direct it to rehear the parties and give a finding on the contention.

CIT vs. Sayaji Mills (1974) 94 ITR 26 (Guj)

Under Rule 28, the power of remand is only incidental to its power to hear and dispose of the appeal. But the power of remand cannot exceed the jurisdiction under section 254(1). Hence, Tribunal cannot exercise the power of remand for purpose of enhancing the tax.

V. Ramaswamy Iyengar vs. CIT (1960) 40 ITR 377 (Mad)

The power of remand should be used sparingly and only in cases where the Tribunal after an examination of the material already placed on record by way of evidence takes the view that it is not possible for it to make a just order on the appeal without assistance of further evidence or without the assistance of a clearer finding by the authority from whose order appeal has been presented.

Pathikonda Balasubbu Setty vs. CIT (1967) 65 ITR 252 (Mys)

The power of remand is to be exercised judicially and not in an arbitrary or capricious manner. The exact nature of the remand order to be passed in a given case is a matter within the absolute discretion of the Tribunal but the power being judicial must be exercised judiciously according to rule and not humours, must be legal and regular, disciplined as opposed to capricious.

Jeypore Timber and Veneer Mills (P) Ltd. vs. CIT (1982) 137 ITR 415 (Gauhati)

The power to set aside an assessment and to direct the Assessing Officer to make a fresh assessment is clearly comprehended in the words "pass such orders as it thinks fit". The Tribunal can therefore while setting aside the assessee's appeal direct the Assessing Officer to make a fresh assessment after giving due notice to the assessee.

Saurashtra Salt Mfg. Co. vs. CIT (1967) 66 ITR 404 (Guj)

Q.72 Whether the Tribunal has the power of enhancement?

Ans. No. Under section 254(1), the Tribunal is not competent to give a finding which is adverse to the assessee and make the latter's position worse than before, thus resulting in an enhancement of assessment, *[Puranmal Radhan Kishan & Co. vs. CIT (1957) 31 ITR 294 (Bom)]. New India Life Assurance Co. Ltd. vs. CIT (1957) 31 ITR 844 (Bom.)* It is not open to the Tribunal to give a finding adverse to the assessee which does not arise from any question raised in the appeal nor is it open to it to raise any ground which would work adversely to the appellant and pass an order which makes his position worse than it was under the order appealed against *[J.K.*

Bankers vs. CIT (1974) 94 ITR 107 (All)]; so much so that where a set aside of the entire order of assessment and a remand order has the effect or the probability of resulting in an enhancement of the assessment under appeal, the Tribunal is not empowered to do indirectly what it cannot directly do *[V. Ramaswamy Iyengar vs. CIT (1960) 40 ITR 377 (Mad); Pathikonda Balasubba Setty vs. CIT (1967) 65 ITR 252 (Mys.)]. Puranmal Radhakishan & Co. vs. CIT (1957) 31 ITR 294 (Bom), New India Life Assurance Ltd. vs. CIT (1957) 31 ITR 844 (Bom), J. K. Bankers vs. CIT – (1974) 94 ITR 107 (All), State of Kerala vs. Vijaya Stores (1979) 116 ITR 15, 18-19 (SC) & Pahulal Ved Prakash vs. CIT (1990) 186 ITR 589, 594 (All) and Jeypore Timber and Veneer Mills P. Ltd. vs. CIT (1982) 137 ITR 415 (Guwahati).* But where the Tribunal finds that disallowance of a particular expenditure by the authorities below is not proper, the Tribunal is competent to sustain the disallowance, wholly or partially, under a different section under which it may be properly disallowed – *Steel Containers Ltd. vs. CIT (1978) 112 ITR 995 (Cal).*

Q.73 Whether the Tribunal has the power to call for documents?

Ans. Under section 255(6), read with section 131, the Tribunal has the power to call for the documents relevant for deciding the appeal. In *Union of India vs. Sheo Shankar Sitaram (1974) 95 ITR 523* (All) at the request of the assessee, the Tribunal directed the Department to produce certain records, which pertained to the assessment and penalty proceedings and the Department's claim of privilege under section 124 of the Evidence Act, was negatived by the court.

Q.74 Whether the Tribunal has power to pronounce upon validity of Act?

Ans. No. In *CIT vs. Straw Products Ltd. (1966) 60 ITR 156 (163-4)* the Supreme Court held that the Tribunal and the tax authorities being preservers of this Act, cannot pronounce upon the constitutional validity or vires of any provision of this Act. Therefore, such a question cannot arise out of the order of Tribunal and cannot be made subject matter of reference to the High Court. Such a question of validity can be raised only in writ petition. Refer *Venkatraman & Co. Ltd. vs. State of Madras (1966) 60 ITR 112 (SC), Dhrangadhra Chemical Works Ltd. vs. CIT (1975) 101 ITR 491 (Bom), L. Chandrakumar vs. Union of India (1997) 228 ITR 725 (SC).*

Q.75 Whether the Tribunal has power to award cost?

Ans. Yes. With effect from 1-6-1999, sub-section 2B is inserted in Section 254, which gives the Tribunal discretion to award cost in suitable cases if the facts so warrant. In *ACIT vs. Shanti Star Builders ITA No. 9601/B/91 dated 30-6-1999, Bench 'B', Mumbai*, the Tribunal awarded cost of Rs. 2,000/- for the inconvenience caused to the assessee. In that case, the departmental counsel had sought for an adjournment though on earlier occasion it was agreed that on the next date, the case would be argued. The assessee's counsel had come from Calcutta on both the occasions. However, the Tribunal is very slow in awarding the cost. In *Ms. Jay Brothers Investment & Trading vs. Dy. CIT*, ITA No. 6542/M/97 dated 6-11-2000, the Tribunal awarded the cost, while dismissing Department appeal holding that issue involved in the appeal is self evident and appeal is frivolous. In one case, though notice for hearing was given of only seven days and adjournment was moved in advance, on the ground of counsel was away to Ranchi as per pre-programme, the Tribunal adjourned on cost of Rs. 300/-. The Federation has made a representation to lay down guidelines to have uniformity in approach. The speeches of Shri R. P. Garg, Vice President and Shri M. K. Chaturvedi, Vice President, at All India Members Conference 2003 (87 ITD Special issue pages 20-29 and 40-42) can be referred for guidance.

Q.76 Can Tribunal dismiss an appeal ex parte?

Ans. Rules 24 and 25 of Appellate Tribunal Rules, 1963, lay down the procedure for hearing of appeal ex parte by the Tribunal. Proviso to rule 24 provides that when an appeal has been disposed of ex parte and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called out for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal. If a notice is sent to the assessee by Registered Post, the postal authorities may send back the notice stating "refused to accept" or the postal authorities may deliver the notice to a person who is not authorised to receive. If on receiving the acknowledgment from postal authorities an ex parte order is passed, and if an assessee files an affidavit and brings to the notice to the Tribunal that he has not received or he has not been served the notice, the Tribunal should restore the matter. In *Meghji Kanji Patel vs. Kundanmal Chamanlal AIR 1968 Bom 387*, the Hon'ble Bombay High Court held that where an affidavit is filed the same has to be accepted. This view of Bombay High Court, is affirmed by the Supreme Court in *Puwada Venkateswara Rao vs. Chindamana Venkata Ramana AIR 1976 SC 869, 871.*

In *CIT vs. Multiplan India (P) Ltd. (1991) 38 ITD 320*, (Del.) the reference was filed by the department. On the date of hearing neither the representative of the department was present nor an adjournment application was moved. The Tribunal passed the order after 5 days, dismissing the appeal of department, treating the appeal as unadmitted. Against the order, the department filed reference Application to refer the matter to High Court. The Tribunal rejected the Reference Application on the ground that the Department should have made application for restoration of appeal under rule 24 of the Income Tax Appellate Tribunal Rules and observed that revenue chose to add to the litigation for no justifiable reason, hence no question of law arose. However, it may be noted that the Tribunal has not considered the ratio laid down by Supreme Court in *CIT vs. Chenniappa Mudaliar (1969) 74 ITR 41 (SC),* wherein the Court held that the Tribunal must decide the case on merit and cannot dismiss it on non-appearance of appellant. Hence, in our view the order of the Tribunal in Multiplan India requires reconsideration.

It has been observed that in a number of cases, matters have been dismissed by the Tribunal applying the ratio of Multiplan India and thereafter, when the assessee makes an application for restoration under rule 24 of the Income-tax Appellate Tribunal Rules, the same is restored. This results in multiplicity of litigation. Matters come up for hearing before the Tribunal after about 6 years of filing. It may be possible that the appellant might have changed its address, consultant etc. In such a case, before passing the ex parte order, if a notice is sent through assessing officer lot of unintended paper work, time and expenses can be saved. When an assessee pays the Tribunal fees, it cannot be said that he has no interest in pursuing the matter. It is therefore urged that before applying the ratio of Multiplan India (P) Ltd, a notice may be sent to the assessee through assessing officer.

Applications made for restoration of appeals which are dismissed in limine under rule 24 on account of non-appearance, deserve to be liberally construed. The approach of the Tribunal should be little liberal with a view to advance justice. Rule 24 of the Income-tax (Appellate Tribunal)Rules, 1963, is similar to Order 9, rule 13 of the Code of Civil Procedure, 1908. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court or the Tribunal to exercise powers ex debito justitiae. The "sufficient cause" referred to in rule 24 may be construed as good cause. If the cause is good it would also be sufficient. If a party is unaware of the date of hearing and the unawareness is not due to any fault of his, then unawareness would be sufficient cause which would prevent a party from appearing in the Court. *Rainbow Agri Industries Ltd. vs. ITAT (2004) 266 ITR 39 (Bombay); CIT vs. Ansal Housing & Constructions Ltd. (2004) – 190 CTR 172 (Delhi).*

Where an ex parte order is passed against the assessee, great responsibility is cast on the Members of Tribunal. The Members have to act not only as judges but also as representative for the party who is not represented. The duty of the Tribunal is to decide correct interpretation of law, hence, it may not be desirable to decide any issue which involved an important question of law in an ex-parte order. However, if it is inevitable, then the Tribunal may request any member of Bar to assist the Bench as amicus curiae. In such a situation assistance of the Bar Association may be sought. If such a system is developed, it may go a long way in building the confidence of the institution in the mind of the public. Even an ex parte order, should not lead to punishment to an assessee who may not be in a position to engage a competent representative.

Q.77 Whether an ex parte order can be recalled? If yes – its procedure.

Ans. Yes. This is a power incidental to and ancillary to the jurisdiction given for the Tribunal. *Murlidhar Sudra vs. ITAT (1973) 92 ITR 189 (Cal)*

In following cases it has been held that the ex parte order can be recalled: *CIT vs. ITAT and Another (1992) 196 ITR 640 (Ori.) at (645), CIT vs. ITAT & Another (1992) 196 ITR 683 (Ori), Joseph Michael & Bros. vs. ITAT (1993) 199 ITR 466 (Ker.), Kripa Shankar vs. CIT/WT (1990) 181 ITR 183 (All), Ravi Construction & Co. vs. CIT (1988) 173 ITR 674 (Guj.), CWT vs. Illa Dalmia (Smt.) (1987) 168 ITR 306 (Del.), Mahaverprasad Jain vs. CIT (1987) 172 ITR 331 (M. P.).*

The assessee can make an application to recall the ex parte order passed by the Tribunal. The Tribunal has power under Rule 24 of the Rules to restore the appeal decided ex parte. The application for restoration should be in detail, explaining cause of absence, supported by material and affidavit, if possible. Rule 24 should be construed liberally *(Rainbow Agri Industries Ltd. vs. ITAT (2004) 266 ITR 38 (Bombay).* As per Rule 25 of the Tribunal Rules, the respondent can also make an application to restore the ex parte order passed against him. However, the proviso to Rule 25 is not clear. Hence, amendment of the provision is desirable to avoid litigation.

Q.78 What is meant by "discretionary power"?

Ans. The word 'discretion' standing single and unsupported by circumstances signifies exercise of judgement, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, here the Legislature concedes discretion it also imposes a heavy responsibility.

On many aspects and matters the members of the Tribunal have discretion. Discretion should be exercised judiciously as a judicial authority well versed in law. In Halsbury's Laws of England, 4th Edn., Vol. I, it has been observed : "A statutory discretion is not, however, necessarily or, indeed, usually absolute; it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether to act and how to act. Moreover, there may be a discretion whether to exercise a power, but no discretion as to the mode of its exercise; or a duty to act when certain conditions are present, but a discretion how to act. Discretion may thus be coupled with duties".

Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgement directed by circumspection; deliberate judgement; soundness of judgment; a science or understanding to discern between falsity and truth between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (Per Lord Halsbury, L. C., In *Sharp vs. Wakefield, (1981) Appeal Cases 173)*. Also *(See S. G. Jaisinghani vs. Union of India and Other (AIR 1967 SC 1427)*. Discretion has to be exercised fairly and without fear. When one hold flowers in both hands, it gives equal fragrance without discriminating either of the hands – whether it is right or left – nothing more or nothing less fragrance to each of the two. It is rightly said **"Men with discretion will not deflect from the path of rectitude".**

Q.79 Whether the Tribunal can give finding/direction for another year?

Ans. Generally, the Tribunal does not have the jurisdiction to give any direction with regard to the proceedings relating to another year or to include deleted amount in any other year's assessment. Where an appeal relates to a particular assessment year, the finding and direction must necessarily be limited to that particular year –*ITO vs. Murlidhar Bhagwan Das (1964) 52 ITR 335 (SC)*. The Tribunal cannot order reopening of assessment for another year – *CIT vs. Manick Sons (1969) 74 ITR 1, 5(SC)*. In case any deduction is disallowed after holding it is allowable in another year, a finding / direction should be given in the interest of justice. *(Perfect Equipments vs. Dy. CIT (2003) 85 ITD 50 (Ahd.)*

Q.80 Can Tribunal setaside matter to cure the deficiency in the assessment order?

Ans. Fresh opportunity need not be granted to the erring tax authority to make good the deficiency. In *Asst. CIT vs. Anima Investment Ltd. (2000) 73 ITD 125 (Del.) (TM)*, the Delhi Tribunal held that the Tribunal cannot set aside the matter to make good a deficiency in the assessment order. However, the Tribunal is liberal and may restore the matter to the A.O. for fresh enquiry.

Q.81 Can Tribunal pass protective order?

Ans. In *Smt. Hemlata Agarwal vs. CIT (1967) 64 ITR 428 (All.)*, the Court held that, though it might be open to an ITO to make protective assessment; it is not open to the Tribunal which is final Court of fact, to make a protective order.

Q.82 Can the Tribunal give more relief than that asked for by the appellant?

Ans. The Act has left the parties going up as appellants before the Tribunal to choose and set the scope of their appeals by raising questions arising out of the relevant proceedings. They can limit their attack on the determination of the first appellate authority and seek an intervention of the Tribunal only to the extent they consider necessary for getting the relief they intend to claim from the Tribunal. They are not, however, permitted to widen the scope of the proceedings determined by the Assessing Officer or the first appellate authority. Within the outer limit of those proceedings, they are free to ask for the necessary relief thus limiting the subject matter and ultimately the scope of the appeal. It is plain that once these limits are set, the Tribunal can deal only with that part of the order of the lower authority which has been made the subject matter of the appeal before the Tribunal. It would not be permissible for the Tribunal to adjudicate or give a finding on a question which was not agitated or in regard to which no relief was claimed before the lower authorities or which was not in dispute and which does not form the subject matter of the appeal. It is thus clear that the Tribunal has no jurisdiction to base its decision on a question which was not the subject of dispute at any stage of the proceedings and is not the subject matter of the appeal. It has no power to enlarge the scope of the proceedings or that of the appeal before it by permitting the parties or any one of them to ask for a relief which was never the subject matter in those proceedings or of the appeal. In short, the Tribunal is not competent to travel beyond the scope of the appeal in order to decide questions raised by the assessee subsequently. *[CIT vs. Krishna Mining Co., (1977) 107 ITR 702, 707-08, 708 (A.P.)]*

Q.83 Can Tribunal consider subsequent events?

Ans. Yes. The principle that subsequent events can be taken into consideration by a Court when granting relief to parties is applicable to assessments. Therefore, the Tribunal hearing an appeal has jurisdiction to admit additional evidence regarding a subsequent event *[Anglo American Direct Tea Trading Co. vs. CAGIT, (1968) 69 ITR 667 (SC)].*

Q.84 What is expected of the Tribunal

Ans. The Tribunal is the final fact finding authority and if it goes wrong the party is virtually left with no remedy. A reference to the High Court presupposes a pure point of law or a point of law of substantial importance but if on an appreciation of evidence much is to be decided then there arises a dead lock. In all judicial proceedings it is a well settled principle of law that the quality of the order that is passed must demonstrate a total application of mind by the authority who has passed the order. Where a sufficiently high authority such as the Tribunal is concerned a high sense of responsibility must pervade the order at all times. There has to be proper consideration of the facts and an appreciation in the manner prescribed by law which is not to be careless and more importantly, the application of all the well defined principles that govern the case *[ACIT vs. Gautam Investments (P) Ltd. (2001) 250 ITR 324 (Kar).]*

Tribunal to consider case carefully and to give a well reasoned order. Order must indicate that mind has been applied to factual aspects of the case. Recording of reasoning or findings is basic in a judicial order. The Tribunal as the ultimate fact finding authority, has a very high degree of responsibility cast on it because correction of errors thereafter in many cases is not possible. When there is a legal duty enjoined on a forum that duty is liable to be discharged and cannot be bypassed. Since an issue of fact is also intertwined with a legal aspect it is incumbent on the Tribunal to consider the case on the merits and pass a well reasoned order. Even in cases where the appellate authority reaches a finding that interference is not necessary, the order need not be long but the quality of the order must indicate that the authority has applied its mind to all aspects of the case factually and legally and that there is justification for its decision irrespective of whether it concurs or differs. *[J. Bheemananda Gupta vs. Asstt. CIT (2001) 250 ITR 537 (Kar.), Lalchand Bhagat Ambika Ram vs. CIT (1959) 37 ITR 288 (S.C.)].*

The Tribunal being the final fact finding authority is expected to apply its mind to the contentions and issues and give a separate finding on each issue. The fact that the order of the Tribunal from independently examining the issues and then discussing the same. *[Vinjane Centre vs. Dy. CIT (2002) 258 ITR 191 (Madras)].*

The Tribunal while passing orders cannot gloss over important matters in a one sentence statement that these judgments are distinguishable. Even assuming that the judgments are either not applicable or distinguishable, it is a well defined procedure that applies to all judicial forums that it is essential to record what the judgments in question are, or a brief summary of the contentions raised and to record the findings thereon. It is not permissible to merely brush aside important legal issues or to disregard them as it will become impossible for the next higher authority to be able to decipher as to what is the ground on which the Tribunal rejected a particular contention *[Munibyrappa vs. CIT (2004) 265 ITR 560(Kar.)].*

When the Tribunal was to dislodge the order passed by the appellate authority it was obligatory on the part of the Tribunal to demonstrate as to how the findings recorded by the appellate authority were not consistent with the facts and the provisions of law. It was obligatory on the part of every appellate authority to point out by good and acceptable reasoning as to how the facts and circumstances of one case happened to be different from other cases. It was improper to close the doors to a litigant by a casual treatment of some statements moving towards a conclusion that the precedents on which such litigant relied were different from his case. *[R.D. Joshi & Co. vs. CIT (2001) 251 ITR 332 (M.P.)].*

The Appellate Tribunal is a judicial body exercising judicial powers under the statute. It is not empowered to employ its jurisdiction arbitrarily. Whatever it does must be done in consonance with sound judicial principles and in accordance with well accepted doctrines applicable to judicial bodies. The power conferred on the Tribunal by section 254 to pass "such orders thereon as it thinks fit" in respect of an appeal before it must be exercised within the limits which can be discovered by reference to the jurisdiction of the authority whose order has given rise to the appeal *[CIT vs. Ram Murti (1973) 87 ITR 577 (Allahabad)].* If a provision is in the statute book when the question come up for decision before the Tribunal, even though the assessee may not specifically refer to such provision, the Tribunal ought to have considered and referred to such provision. It is the duty of the Tribunal to consider the law as it existed then even though the assessee failed to bring it to its notice. *[Kerala Chemicals & Protein Ltd. vs. CIT (1999) 235 ITR 467 (Kerala); CIT vs. Mahalakshmi Sugar Mills Co. Ltd. (1986) 160 ITR 920 (S.C.)].*

Q.85 Whether informal question can be put to the assessee or his counsel at the time of hearing?

Ans. The Tribunal being a quasi-judicial authority is expected to restrain itself to the assessment order, appellate order and other papers or documents placed in the paper book and arguments of both the parties. The Tribunal is not expected to put informal questions to the party or their counsel. Such answers cannot be relied upon for coming to any conclusion adverse to the assessee in view of the procedure prescribed by Rules 29, 30 and 31. Such answers could not form part of the record and no adverse inference could be drawn against the assessee based on such informal answers. *[Roshan Di Hatti vs. CIT (1977) 107 ITR 938 (S.C.)].*

Q.86 When there is an appeal and a cross appeal – can the two appeals be heard separately?

Ans. No. It is desirable that the Tribunal hear both appeals together. On account of the mistake of the Tribunal is not clubbing the two appeals, the statutory right of appeal of one party could not be negatived. It is a well settled proposition of law that no party should suffer on account of the mistake of the Court or the Tribunal *[CST vs. Vijai Int. Udyog (1985) 152 ITR 111 (S.C.)].*

CHAPTER

7

MISCELLANEOUS APPLICATION – RECTIFICATION OF MISTAKE

Q.87 Whether the Tribunal has power to rectify its order?

Ans. The Tribunal's power to rectify its order is derived from the provisions contained in section 254(2) of the Act. The said section provides that the Tribunal shall rectify any mistake apparent from the record by amending any order passed by it under sub-section (1) within four years from the date of the order if the mistake is brought to its notice by the assessee or the Assessing Officer. The proviso to section 254(2) makes it clear that any amendment which has the effect of enhancing an assessment or reducing a refund or increasing the liability of an assessee cannot be made unless the Tribunal has heard the assessee on its intention to do so.

Rule 34A of the Appellate Tribunal Rules 1963 which was inserted w.e.f. 25th July, 1991 provides for the procedure for dealing with an application under section 254(2). It provides that an application shall clearly and concisely set out the mistake apparent from the record of which rectification is sought. The application must be in triplicate and the procedure for filing of appeals is to apply *mutatis mutandis* to such applications. The Bench which originally heard the matter must ordinarily hear the application, unless the President, Senior Vice President, Vice President or the Senior Member present at the station otherwise directs. The application must be disposed of after hearing both the parties. The proviso to sub-rule (3) of Rule 34A provides that it would not be necessary to post a Miscellaneous Application for hearing if it prima facie appears to be a petition for review. Sub-rule (4) provides that an order disposing of an application under sub-rule (3) shall be in writing with reasons in support of its decision.

Prior to the insertion of Rule 34A in the Rules, there was controversy as to whether the principles of natural justice were required to be followed before an order is made disposing of application under section 254(2). The Delhi High Court in *Smart Pvt. Ltd. vs. ITAT (1990) 182 ITR 384* took the view that although there was no specific provision for dealing with an application under section 254(2), the rules of natural justice would require that both parties be heard before disposal of the application.

A possible area of controversy is where the proviso to sub-rule (3) of Rule 34A is invoked and Miscellaneous Application is not posted for hearing on the ground that it appeared prima facie to be a petition for review. *[Refer ITO vs. Hemesh Family Trust (1995) 51 TTJ 601 (Ahd)]* or that the rejection of the Miscellaneous Application does not result either in increase or a reduction of refund when no hearing is required *[Refer Drill Rock Engg. (P) Ltd. vs. ITO (1990) 36 ITD 135 (Hyd) & Pearl Agencies vs. IAC (1989) 30 ITD 342 (Del)].* Rejecting the application under rule 34A(3) without hearing shall be in violation of principles of natural justice and such rule is void. The Tribunal should hear the assessee before dismissing the petition. An application cannot however be dismissed solely on the ground that the assessee failed to appear on the date of hearing – *Brijlal vs. ACIT (1996) 59 ITD 1 (Del) (TM).*

There is no doubt that the power of review is not an inherent power but must be conferred by law either specifically or by necessary implication. *(Patel Thackersy vs. Profyumansinghji Arjunsinghji AIR 1970 SC 1273)* Courts have consistently held that review proceedings imply those proceedings where a party as of right can apply for consideration of the matter already decided upon after a fresh hearing on the merits of the controversy between the parties and that such a remedy is available only if provided by the statute. As early as in *Trikamlal Maneklal In Re : (1958) 33 ITR 725 (Bom)* the Bombay High Court held that the Tribunal having once delivered a judgment which has by operation of law become final is not entitled to review its decision in a subsequent proceeding.

The general rule, however, is subject to exceptions, and one of the exceptions is that a Judicial Tribunal can always recall and quash its own order when it is shown that it was obtained by fraud or by palpable mistake or was made in utter ignorance of the statutory provision. *(Mangat Ram Kuthiala vs. CIT (1960) 38 ITR 1 (Pun).* However, an inherent power to rectify a wrong committed by itself cannot be construed to be a power of review. *(Shew Paper Exchange vs. ITO (1974) 93 ITR 186 (Cal.).* Thus a Court or Tribunal can be said to have an inherent power and jurisdiction to rectify a wrong or correct an error committed by itself. *(S.B. Singar Singh & Sons vs. ITAT (1965) 58 ITR 626 (All.)*

It is a moot point as to when the Tribunal can be said to be exercising its inherent power or its statutory power to correct a mistake apparent from the record under section 254(2) and when the exercise of the power tantamounts to a review of its earlier order. There is marked difference between review and the rectification. Distinction is not properly appreciated.

Q.88 Under what circumstances, can the order of Tribunal be said not to contain a mistake apparent on record?

Ans. Failure to consider argument advanced is not an error apparent on the record. *CIT vs. Ramesh Electric and Trading Co. (1993) 203 ITR 497 (Bom), Khushalchand B. Daga vs. ITO (1972) 85 ITR 48 (Bom)* Oversight of fact is not a mistake apparent. *CIT vs. Gokulchand Agarwal (1993) 202 ITR 14 (Cal)* Erroneous order in the light of subsequent decision of jurisdictional High Court is not rectifiable. *Kishanchand J. Bhavnani (HUF) vs. WTO (1989) 29 ITD 383. (Bom.).* Recalling of an order under section 254(2) not possible *CIT vs. ITAT (1992) 196 ITR 683 (Orissa).* The Orissa High Court held that the power under section 254(2) is merely to "amend an order passed" under section 254(1). "Amendment" of order does not obliterate the order originally passed and its substitution by another order. Order rejecting Miscellaneous Application cannot be rectified. In *CIT vs. ITAT (1992) 196 ITR 838 (Orissa).*

Q.89 Under what circumstances Courts have held that the order of Tribunal is liable to be rectified?

Ans. Order contrary to pronouncement. Refer *CIT vs. G. Sagar Suri and Sons (1990) 185 ITR 484. (Del). CIT vs. Sunil Kumar (1995) 212 ITR 238 (Raj.)* Order made under misconception or misapprehension. Refer *Maharaja Martant Singh Ju Deo vs. CIT (1988) 171 ITR 586 (MP).* Failure to consider preliminary objection. Refer *Laxmi Electronic Corporation Ltd. vs. CIT (1991) 188 ITR 398 (All), CIT vs. Keshav Fruit Mart (1993) 199 ITR 771 (All).*

Failure to consider alternative argument *CIT vs. ITAT (1988) 172 ITR 158 (MP),* Failure to consider material on record *CIT vs. Mithalal Ashok Kumar (1986) 158 ITR 755 (MP),*Order based on erroneous assumptions *CIT vs. Shakuntala Rajeshwar*

(1986) 160 ITR 840 (Del), Order based on a decision subsequently reversed, *Kil Kotagiri Tea and Coffee Estates Company Ltd. vs. ITAT (1988) 174 ITR 579* (Ker)

Non-consideration of relevant provisions of law/rule/Supreme Court decision. *CIT vs. Quilon Marine Produce Co. (1986) 157 ITR 448) (Ker); Modu Timblo vs. 1st WTO (1995) 53 ITD 53 (Pune)(TM); IAC vs. Gilard Electronics (1986) 18 ITD 176 (Jp.); ACIT vs. Somany Pilkington Ltd. (1994) 49 ITD 207 (Delhi).* Similarly, *CIT vs. Ballabh Prasad Agarwalla (1997) 90 Taxman 283 (Cal). CIT vs. Subodhchandra S. Patel (2004) 265 ITR 445 (Gujarat).* Decisions not cited referred to in order *Lakhmini Mewal Das vs. ITO (1972) 84 ITR 649 Cal).* Decisions cited not referred to in order *Finquick Finance (P) Ltd. vs. ACIT (2003) 87 ITD 323 (Delhi) (TM), Mohan Meakin Ltd. vs. ITO (2004) 84 TTJ (TM) 1.*

Order can be amended in the light of retrospective amendment. *M. K. Venkatachalam vs. Bombay Dyeing and Mfg. Co. Ltd. (1958) 34 ITR 143 (SC).* On amendment with retrospective effect would require a rectification consequent to the retrospective amendment. *CIT vs. Eva Raha (1980) 121 ITR 293 (Gau); CIT vs. Kelvin Jute Co. Ltd. (1980) 126 ITR 679 (Cal).* Even if a reference has been made *ITO vs. Homi Mehta & Sons (P) Ltd. (1985) 14 ITD 64 (Bom).*

Order can be amended in the light of a subsequent Supreme Court decision. It is well settled that where no further investigation of facts is called on the facts found, the principle of law declared by the Supreme Court can be straightaway applied with the consequence of rendering order mistaken. It would be case of a mistake apparent from the record *[Walchand Nagar Industries Ltd. vs. V. S. Gaitonde (1962) 44 ITR 260 (Mah); CBDT Circular No. 68 dated 17-11-1971 – Chaturvedi & Pithisaria – Circular Book Vol. II page 1847; ITO vs. Shashi Raj Kapoor (1987) 21 ITD 406 (Bom) Bank of Rajasthan vs. IAC (2004) 88 ITD 577 (Jodh) HPFC vs. CIT (1998) 233 ITR 450 (H.P.); His Highness Sir Rama Varma vs. ITO (1982) 2 ITD 491 (Coch) Bank of Rajasthan Ltd. vs. IAC (2004) 88 ITD 577 (JP)* but not where limitation had expired *Soorajmull Nagarmull vs. CIT (1984) 20 TTJ 145 (Cal).* Supreme Court order passed after Rectification Order passed. Rectification is without jurisdiction. *CIT vs. Schlumberger Sea Co. Inc. (2003) 264 ITR 331 (Calcutta).*

Tribunal finding that there was an error in its order and recalling it is finding of fact, no question of law arises from its order.

CIT vs. Umeshchand K. Patel (1997) 225 ITR 1050 (M.P.)

Tribunals can rectify errors in its order.

Seth Madan Lal Modi vs. CIT (2003) 261 ITR 49 (Delhi)

If there is mistake committed by Courts or Tribunal it needs to be rectified as no one should suffer or come to grief on account of mistake committed by Courts.

Rahulkumar Bajaj vs. ITO (1999) 69 ITD 1 (SB) (Nag.)

Where decisions cited before the Tribunal are not considered at all then it may be a case of a mistake apparent from record but when the decisions relied upon have been considered but not to the advantage of a party, is not a mistake apparent from record.

Finquick Finance (P) Ltd. Vs. CIT (2003) 87 ITD 323 (TM) (Del)

A look at the record must show that there has been an error, reference to documents outside the record and the law is inpermissible.

CIT vs. Keshri Metal Pvt. Ltd. 237 ITR 165 (SC)

Only an apparent error of fact or law can be rectified. If the mistake of law has to be established by constructing the words of a section to find its proper meaning, then such an error cannot normally be a rectifiable error.

Poothundu Plantations Pvt. Ltd. vs. Agricultural Income Tax Office and Other (1996) 221 ITR 557 (SC)

The Hon'ble Supreme Court in *L. Hirday Narain vs. ITO (1970) 78 ITR 26* at 27 observed: "If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling, the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right – public or private – of a citizen.

The power to rectify the order of assessment conferred on the Income-tax Officer by section 35 is to ensure that injustice to the assessee or to the revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that to do justice, it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding. That power is not discretionary and the Income-tax Officer cannot, if the conditions for its exercise were shown to exist, decline to exercise it."

The Apex Court in "*Distributors (Baroda) Pvt. Ltd. vs. Union of India (1985) 155 ITR 120 at 124* observed : "To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce V. Delameter (A. M. Y. at page 18) "a judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors".

The Allahabad High Court in *Laxmi Electronic Corporation Ltd. vs. CIT (1991) 188 ITR 398* observed: "It is well-settled proposition that an act of Court (which means and includes a Tribunal of the nature of the Income tax Appellate Tribunal) should not prejudice a party. In such a case, it would not be just to drive the party to a reference under section 256 of the Act. It must be left to the Tribunal to reopen an appeal if it finds that it has omitted to deal with an important ground urged by the party".

The Rajasthan High Court in *CIT vs. Ramesh Chand Modi (2001) 249 ITR 323* observed: "Where the Tribunal fails to decide some of the questions raised before it inadvertently or by oversight, the only appropriate method of correcting such mistake is to recall the order and make fresh order after affording an opportunity of hearing to such party. In all such cases, ordinarily the Court Tribunal acts ex debito justitiae to prevent abuse of process even in the absence of any power."

"Once a mistake on the face of the record is established, what order should follow to correct that mistake shall always depend on the facts and circumstances required to rectify the mistake. If the mistake is one which requires determination of some undecided issue because it has not been decided though raised, the procedure that would follow the discovery of such mistakes is to recall the order and decide the case afresh or to decide that issue after affording an opportunity to the parties concerned and pass a fresh order in the light of finding on such issue. The order under section

254(2) of the Income-tax Act, 1961, is not confined to arithmetical or clerical mistakes, nor only to correct substantive mistakes but also procedural mistakes."

"Where a Tribunal fails to notice the question raised before it inadvertently under any misapprehension, in correcting such error by recalling the order made without deciding such question which goes to the root of the matter for deciding the same appropriately falls in such category of procedural mistakes which such Tribunal must correct ex debito justitiae, even in the absense of any power."

The Rajasthan High Court in *Champalal Chopra vs. State of Rajasthan (2002) 257 ITR 74* observed: "A reading of sub-section (2) of Section 254 of the Income-tax Act, 1961, makes it clear that its scope and ambit is limited. It restricts the power of the Appellate Tribunal to rectify mistakes apparent from the record. In the normal course, the power of rectification cannot be extended to recalling the entire order, because obviously it would mean passing a fresh order. This is not the legislative intent. However, in a given case where the factual mistake is so apparent that it becomes necessary to correct the same, the Tribunal would be justified in not only correcting the said mistake by way of rectification but if the judgment has proceeded on the basis of that fact, it would be justified in recalling such order".

The Rajasthan High Court again in *CIT vs. S. S. Gupta (2002) 257 ITR 440* observed: "Once the conclusion is reached that there exists a mistake apparent on the face of the record, the Tribunal has the necessary power to rectify its order and for eliminating such mistake". As the order speaks for itself and about the facts stated in the order as stated above there is no dispute about the correctness of such facts, the answer is self-evident that a mistake was apparent on the face of the record inasmuch as a finding of fact against the assessee has been reached on the basis of material which was conveyed to the Tribunal after the hearing was over, and thus the Tribunal inadvertently took into consideration such information which was never disclosed to the assessee without affording any opportunity to him to explain the information transmitted to the Tribunal without notice to the assessee which apparently vitiated the order founded on such information. Taking into account such material for basing its findings which was never made part of the record, amounts to a mistake apparent from record, which is fatal to sustain the order. This mistake is obvious from record."

Q.90 What is the present scenario?

Ans. Recently the Federation has noticed that some of the Hon'ble Members take the statutory duty heavily cast under section 254 (2) of the Income-tax Act, very lightly and in a casual, mechanical and perfunctory manner. Rectification Applications are disposed of in a haste, in an arbitrary and whimsical manner and after ignoring apparent, patent and blatant mistakes of law and facts and not rectifying and amending the order against principles laid down by the Hon'ble Supreme Court and the jurisdictional High Court. It causes unnecessary expense and avoidable inconvenience to the parties, resulting in long drawn litigation. Representation was made and the President has forwarded the same to the Senior Vice President & Vice Presidents for giving a serious thought and take suitable measures vide D. O. No. P/7/2003 dated December 15, 2003.

Q.91 What is the meaning of "record"?

Ans. Record means record of the Tribunal; i.e., the papers and documents and orders which have been placed in the 'Paper Book' and with the memo of appeal, before the Tribunal by the parties. Any paper or document before the lower authorities but not included in the Paper Book shall not be part of the record. It is advisable to file the Paper Book containing the submissions and material placed before the lower authorities. However, papers emerging from the assessment order and appellate order to be considered. *Amrit Bottlers (P) Ltd. vs. ITO (1994) 49 ITD 1 (TM). CIT vs. Ballabh Pd. Agarwalla (1998) 233 ITR 354 (Calcutta).*

Q.92 When appeal is filed before the High Court u/s. 260A and appeal is dismissed in limine, whether Tribunal can rectify the mistake apparent from the record?

Ans. In *Seth Chemical Works (P) Ltd. vs. Dy. CIT (2001) 114 Taxmann 117 (Cal.) (Mag.)*, the Tribunal held that, where from Tribunal's order an appeal is filed under section 260A to High Court and High Court dismissed the appeal in limine, there is no merger of Tribunal order with High Courts order and Tribunal can rectify mistake from record in its order. The Tribunal relied on the ratio of Supreme Court judgment in *Kunhayammed vs. State of Kerala (2000) 245 ITR 360 (SC)*

Q.93 Whether rectification application u/s. 254(2) can be signed and filed by authorized representative of the Department?

In, *ITO vs. Vadilal Nanchand (Ahd.)*, (1999) 63 TTJ (Ahd) 189 it has been held that, application filed u/s. 254(2), by Senior authorized representative of the Department is not maintainable.

See *Dy. CIT vs. Maruti Textiles (P) Ltd. (2000) 66 TTJ 575 (Ahd.), Dy. CIT vs. Saraf Trading Corporation (2001) 73 TTJ 741 (Coch.)*

Q.94 Whether Rectification Application u/s. 254(2) can be signed by the authorized representative of the assessee?

Ans. If the Vakalatnama/Power of Attorney confers the power to make any application or petition, the authorized representative can make the application. However, it is advisable to submit the application signed by the assessee to avoid unnecessary objection.

Q.95 What is the fee?

Ans. Fee for the Miscellaneous Application is Rs. 50/-. The receipted challan should be submitted with the application. The application should be filed as early as possible but not later than four years from the date of order of the Tribunal.

Q.96 Whether the Tribunal can review its order u/s. 254(2) of the Act?

Ans. The power of review is not inherent in a Court or Tribunal. It is a creature of the statute. A court or Tribunal cannot review its own decision unless it is permitted to do so by statute. The courts having general jurisdiction like Civil Courts have inherent power. But the courts or Tribunals of limited jurisdiction created under special statutes have no inherent power. The Tribunal has no power to review its order in the garb of section 254(2) of the Act. As regards rectification of mistakes, there is a provision u/s. 254(2) of the Act which is similar to section 154 of the Act. *(Gopinath Deb vs. Budhia Swain, AIR 1983 Orissa 31, 33)*. Section 152 of the Civil Procedure Code permits to correct only clerical errors or arithmetical mistakes or errors arising from any accidental slip or omission. *(CIT vs. Globe Transport Corpn. (1992) 195 ITR 311 at 318-319 (Rajasthan), CIT vs. Roop Narain Sardar Mal (2004) 186 CTR 713 (Rajasthan), CIT vs. Devilal Soni (2003) 30 Tax World 238 at 241 (Rajasthan), Jainarain Jeevraj vs. CIT (1980) 121 ITR 358 at 363 (Rajasthan), Prajatantra Prachar Samiti vs. CIT (2004) 186 CTR 96 at 101 (Orissa). CIT vs. Jagabandhu Roul (1984) 145 ITR 153 at 157 (Orissa), CIT & Another vs. ITAT & Another (1992) 196 ITR 640 at 645-46 (Orissa), Shaw Wallace & Co. Ltd. vs. ITAT & Others (1999) 240 ITR 579 at 583 (Calcutta), CIT vs. K. L. Bhatia (1990) 182-ITR 361 at 367 (Delhi), CIT vs. Suman Tea & Plywood Industries Pvt. Ltd. (1997) 226 ITR 34 at 44 (Calcutta), ITO vs. ITAT & Another (1998) 229 ITR 651 at 656 (Pat.),* *CIT & Another vs. ITAT & Another (1994) 206 ITR 126 at 136-137 (AP), Asstt. CIT vs. C. N. Ananthram (2004) 266 ITR 470 (Kar.), Karan & Co. vs. ITAT (2002) 253 ITR 131 (D)*

Q.97 What should be the contents of an order of the Tribunal on application under s. 254 (2) of the Act?

Ans. Before an order is made by the Tribunal amending the earlier order, it must be satisfied that the earlier order suffers from mistake apparent from the record. The Tribunal must refer to the materials on record which were not considered or misread which led to the passing of a patently wrong order under s. 254(1) of the Act. The Tribunal should pass only one order amending the earlier order if it is satisfied that the earlier order suffers from mistake apparent from the record. *(ACIT vs. C.N. Anantharam (2004) 266 ITR 470 (Kar.), Karan & Co. vs. ITAT (2001) 169 CTR (Del) 361 : (2002) 253 ITR 131 (Del), CIT & Anr. vs. ITAT & Anr. (1992) 102 CTR (Orissa) 281: (1992) 196 ITR 640 (Orissa) and CIT vs. U.P. Shoe Industries (1999) 152 CTR (All) 205; (1999) 235 ITR 663 (Allahabad). Prajatantra Prachar Samiti vs. CIT (2003) 264 ITR 160 (Orissa).*

Q.98 What is the time limit for making the application and passing the order?

Ans. Time provided for making application under the Act is 4 years from the date of the order u/s. 254(1), which is sought to be rectified. However, the order can be passed beyond the said period of 4 years. Once the assessee has moved the application within four years from the date of order, the Tribunal cannot reject that application on the ground that four years have lapsed, which includes the period of pendency of the application before the Tribunal. If the assessee has moved the application within four years from the date of the order, the Tribunal is bound to decide the application on the merits and not on the ground of limitation. Section 254(2) of the Income-tax Act, 1961, lays down that the Appellate Tribunal may at any time within four years from the date of the order rectify the mistake apparent from the record but that does not mean that if the application is moved within the period allowed; i.e., four years, and remains pending before the Tribunal, after the expiry of four years the Tribunal can reject the application on the ground of limitation *(Harshvardhan Chemicals & Minerals vs. UOI (2002) 256 ITR 767 (Rajasthan).*

Q.99 Can the Tribunal condone delay in filing the application?

Ans. No discretion has been conferred statutorily to condone delay and admit an application u/s. 254(2) of the Act beyond 4 years. However, the ITAT, Nagpur Bench in *Bhilai Engineering Corporation Ltd. vs. Dy. CIT (2002) 81 ITD 282* observed "After Tribunal may, there is comma. Thereafter the words are at any time within four years. This setting of the section suggests that the words "at its own" are implied, therefore, the time limit of four years is in the context of *suo motu* rectification. Where rectification is to be done in accordance with the prayer made by either of the parties such time limit is not much relevant. The requirement of justice is the paramount factor. It is to be seen that how best justice could be done. If the error is palpable, Tribunal in the interest of justice can proceed with the matter and set the things right. In the said case, delay was due to mistake of the counsel and the issue involved was covered by the decision of the Apex Court, which is a binding precedent. The Tribunal took into consideration the legal pragmatism. It was reminded of the dictum : Fiat justitia ruat et coelum (Justice should be done even if the heaven falls). The procedure should be the hand maid and not the mistress of legal justice. Cause of justice should not be subservient to the rules of procedure".

In *Khusalchand B. Daga vs. ITO (1972) 85 ITR 48 (Bom)*, the Court held that, the Tribunal should not allow a party to suffer for its own mistake, order has to be rectified.

Q.100 Can Tribunal be made as a respondent in an appeal or writ before the High Court?

Ans. When an order particularly an order on Rectification Application u/s. 254(2) is in challenge before the High Court by way of appeal or a writ, it is desirable to make the Tribunal as one of the respondents. On making respondent, the Tribunal comes to know as to cause of grievance; can plead and explain its view point and shall preserve and make available the record. There are innumerable cases where the Income Tax Appellate Tribunal has been made a party. Please refer *State of Rajasthan vs. ITAT & Others (2003) 259 ITR 686 (Raj). Jyotsna Suri vs. ITAT & Others (2003) 179-CTR-265 (SC); I.T.O. vs. ITAT (1987) 168-ITR-809 (Raj.); C.I.T. vs. ITAT (1992) 196 ITR 838 (Orissa); Kil Kotagiri Tea & Coffee vs. ITAT (1988) 174-ITR-579 (Ker); C.I.T. vs. ITAT (1994) 206 ITR 126 (A.P), D.I.T. (Exemption) vs. ITAT (1998) 232-ITR-688 (Del); Lalit Suri Jyotsana Suri vs. ITAT (1998) 232-ITR-395 (Del); C.I.T. vs. ITAT (1992) 196-ITR-640 (Orissa); C.I.T. vs. ITAT (1994) 210-ITR-397 (Orissa); I.T.O. vs. ITAT (1998) 229-ITR-651 (Patna); Prasad Productions vs. ITAT (1997) 226-ITR-778 (Mad); Real Food Products (P) Ltd. vs. ITAT (1998) 229-ITR-351 (AP); Smart Pvt. Ltd. vs. ITAT (1990) 182-ITR-384 (Delhi FB); Punjab National Bank vs. ITAT (1991) 54-Taxman-227 (Delhi); Prem Sahily Trust vs. ITAT (1993) 201-ITR-190 (Delhi); Shaw Wallace & Co. Ltd. vs. ITAT (1999) 240-ITR-579 (Cal.); Rainbow Agri Industries Ltd. vs. ITAT (2004) 266 ITR 38 (Bombay).* The view of the *Hon'ble Supreme Court in Savitri Devi vs. District Judge (1999) 2-SCC-577* is completely distinguishable and inapplicable on the Tribunal. In the said case the Hon'ble Court strongly deprecated the practice of impleading the judicial officers, who disposed of the matter in a civil proceeding when the writ petition was filed in the High Court.

Q.101 What is the remedy against an order u/s. 254(2)?

Ans. If the order is without jurisdiction, a writ can be filed. Appeal lies against such order u/s. 260A before the High Court. *Shaw Wallace & Co. Ltd. vs. ITAT (1999) 240 ITR 579 (Cal.); ITO vs. ITAT (1998) 229 ITR 651 (Patna), CIT vs. ITAT (1994) 206 ITR 126 (AP).*

Q.102 Whether Tribunal can *suo motu* rectify the order based on the judgment of Supreme Court, Jurisdictional High Court or failure to consider the relevant provisions of the Act.

Ans. Section 254(2) of the Act provides the power on the Tribunal to *suo motu* rectify on finding the mistake apparent on the record. Rather it is the duty of the Tribunal to do so. The Tribunal can suo motto rectify the order based on the judgment of S.C. as law laid down by the S.C. is the law of the land and the Tribunal is bound to follow under Article 141 of the Constitution. Same is the position for the judgment of the jurisdictional High Court. If the Tribunal has failed to consider the relevant provision of the Act — it should rectify the mistake by applying relevant provision because the Tribunal has to act in accordance with the provisions of the Income-tax Act. However notice to both the parties should be given and they should be heard.

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CHAPTER

8

STAY APPLICATION

Q.103 Whether the Tribunal has power to stay the recovery of demand?

Ans. Yes, the Tribunal and every appellate authority has inherent power to stay the recovery. The assessee can file a Stay Petition before the Tribunal to stay the recovery proceedings when the appeal is pending before the Tribunal. An appellate authority has the inherent power to stay recovery of demand, which is in dispute before it. The Supreme Court in *ITO vs. M. K. Kunhi (1969) 71 ITR 815 (SC) : TC 8R. 460* held that the power to grant stay is incidental or ancillary to its appellate jurisdiction and it could well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of adding all such acts, or employing such means as are and essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.

Rule 35A prescribes the procedure for filing and disposal of stay petition. In the light of the said rule, it is desirable that every application should be neatly typed on one side of the sheet of paper, should be in English and should state concisely the required information. The application should be accompanied by the required documents and correspondence and should be supported by an affidavit from the applicant or his duly authorized agent. An application which does not conform with the above requirements is liable to be summarily rejected. Earlier no Tribunal fee was required to be deposited while making a stay application. A fee has been prescribed at Rs. 500/- with effect from 1st October, 1998. One single stay petition for tax outstanding for more than one year is possible.

The Central Board of Direct Taxes has issued instructions which state that the recovery proceedings may be stayed where the income determined on assessment is substantially greater than the returned income — CBDT Instruction No. 96 *[F. No. 1-6-69—ITCC], dated 21st August, 1969 [165 ITR 650 (Ker) in the case of N. Rajan Nair vs. ITO (1987)]*. Recovery proceedings may be stayed where the income determined on assessment is substantially greater than the returned income — *Mrs. R. Mani Goyal vs. CIT (1996) 217 ITR 641 (All.)*. Where the income determined on assessment is more than twice the income returned, collection of tax should be stayed during appeal — *Maharana Shri Bhagwat Singhji of Mewar vs. ITAT (1997) 223 ITR 192 (Raj.)*. Tribunal cannot refuse stay on the ground that CIT has already granted conditional stay — *Ashok Kumar Aggarwal vs. ITAT (1997)226 ITR 490 (Del.)*. The Central Board of Direct Taxes has issued a Circular in which it has laid down the guidelines for the Assessing Officer to exercise his discretion under section 220(6) of the Income-tax Act, 1961, to treat the assessee as not being in default in respect of the amounts disputed in First Appeal pending before Dy. CIT (A)/CIT(A), where the dispute is about interpretation of law or where the issue is decided in favour of the assessee in an earlier order *[Circular No. 530 dated 6-3-1989 176 ITR (St.) 240* and *Circular No. 589 dated 16-1-1991, 187 ITR (St.) 79.]*

The Tribunal has implied powers of staying recovery proceedings during the pendency of appeal — *Shiv Shakti Rubber & Chemical Works vs. ITAT (1995) 213 ITR 299 (All). KEC International Ltd. vs. B. R. Balakrishnan (2001) 251 ITR 158 (Bom.)*. The Tribunal can stay recovery proceedings when the reference is pending before the High Court. Thus, where an assessee has not succeeded in appeal before the Hon'ble Tribunal and reference is pending before the High Court and if the assessee can establish that he is not in a position to make the payment of disputed tax, the Tribunal can stay the recovery proceedings until the disposal of reference by the High Court — *CIT vs. Bansi Dhar & Sons (1986) 157 ITR 665 (SC).* Now, in case of an appeal under s. 260A of the Act before the High Court, the High Court alone can grant stay, not the Tribunal. In *Endeavour Investments Ltd. vs. Dy. CIT (1999) 70 ITD 17 (Chennai) (TM)*, it has been held that in matters where stay of tax has been granted, it is a judicial practice to treat those appeals as priority appeals because otherwise the granting of stay has no meaning. Further, even if the assessee does not comply with the conditions of the stay, the appeal would continue to have the status of priority appeal.

Q.104 Whether separate stay petitions should be filed seeking stay of recovery of demand for different assessment years?

Ans. In *Wipro Ltd. vs. ITO (2003) 86 ITD 407 (Bang.)*, the Tribunal held that, separate stay petitions should be filed seeking stay of recovery of different assessment years. However, in *Chirangjilal S. Gaonkar vs. WTO (2000) 66 TTJ (Mum.) 728*, it has been held that a single application can be filed.

Q.105 Under what circumstances can the Tribunal stay recovery?

Ans. (i) If there is a prima facie case in favour of the assessee; (ii) the assessee's financial position does not permit payment of the demand; (iii) the balance of convenience is in favour of the assessee and (iv) demand is well secured with no loss to the revenue. Principles laid down in Order 39, Rules 1 & 2 of the Code of Civil Procedure will apply. *Maharana Shri Bhagwat Singhji of Mewar vs. ITAT (1997) 223 ITR 192 (Raj.). JCT Ltd. vs. ITAT (2002) 258 ITR 291(Delhi). The Hon'ble Bombay High Court in KEC International Ltd. vs. B. R. Balakrishna & Others (2001) 251 ITR 158 (Bom.)*, have laid down various parameters for the stay of recovery.

Q.106 Whether the Tribunal has the power to stay the assessment proceedings?

Ans. Yes, if the appeal before the Tribunal against order of the Commissioner under s. 263 is pending and the Assessing Officer is proposing to pass an order in pursuance of the order under section 263, the Tribunal can stay the assessment proceedings on consideration of the facts. There are instructions of the President to take up such appeals on priority basis and dispose them off expeditiously to avoid multiplicity of proceedings. *ITO vs. Khalid Khan (1977) 110 ITR 79 (AP), Puranmal vs. ITO (1975) 98 ITR 39 (Pat.), Ritz Ltd. vs. Vyas (1990) 185 ITR 311 (Bom).*

Q.107 When the stay application is pending for hearing, can the Tax Department recover the tax in dispute?

Ans. In the case of *RPG Enterprises Ltd. vs. Dy. CIT (2001) 251 ITR (AT) 20 (30)* (Bom) the Tribunal observed: "We are living in a democratic set up and the tax-payers deserve to be respected for their contribution in the National Development. Public servants are expected to discharge their functions dutifully but not unreasonably. The officers are supposed to work diligently but not harassingly. It is absolutely necessary for the Department of Revenue to gain public trust and confidence by acting judiciously and avoiding undue harassment. We appreciate the scheme of rewarding honest and diligent officers of the Department but also feel that there is a necessity of identifying overzealous officers harassing the tax-payers by misusing their powers." The Tribunal held that the Assessing Officer is precluded from taking coercive action for the recovery of the disputed demand until the expiry of the period of limitation allowed for filing of appeal against the decision of the first appellate authority and also during the pendency of stay application before any revenue authority or the Tribunal. The Tribunal also held that, the Commissioner is required to give an opportunity and pass speaking order. *IAC vs. Moderm Electronics (1989) 31 ITD 299 (Hyd.), Choudhary Construction Company vs. Commissioner Commercial Taxes Department and Others (2002) 127 STC 47 (R), CIT vs. Usha Prestressed & Allied Industries (1996) 131 CTR 551 (Guj.).*

Q.108 Whether the Tribunal can direct the Department to give back the money recovered when stay application is pending for disposal?

Ans. In *Western Agencies (Mad.) vs. Jt. CIT (2003) 86 ITD 462 (Mad.),* the Tribunal has held that, the Tribunal can exercise powers of a Civil Court and pass an order by way mandatory direction to the Department to return amounts recovered forcibly during pendency of stay petition and Income Tax appeal.

Q.109 Whether a stay application can be filed before the Tribunal when appeal is pending before CIT(A)?

Ans. For filing a stay petition before the Tribunal, a valid appeal should be pending before the Tribunal. Therefore when the appeal is pending before the CIT (A), the Tribunal cannot entertain the stay application. However, stay application can be filed before the CIT (A) who has inherent power to grant stay of demand in suitable cases. *Gajanana Agencies vs. ITO (1994) 210 ITR 865 (Ker.), Prem Prakash Tripathi vs. CIT (1994) 208 ITR 461 (All), Paulsons Litho Works vs. ITO (1994) 208 ITR 676 (Ker.), Lalit Khanna vs. Controller of Estate Duty (1994) 207 ITR 955 (All.), Tin Manufacturing Co. of India vs. CIT (1995) 212 ITR 451 (All.).*

Q.110 Whether the Tribunal has power to pass interim order to stay the recovery without hearing the other side on a holiday?

Ans. In exceptional cases, the Tribunal can stay the recovery even without hearing the other side. However, normally the Tribunal fixes the stay application and makes an order after hearing both the sides. In *Bulk India Transport Co. vs. CIT (2004) 266 ITR 144 (All),* Court held that, the Tribunal has power to grant interim relief.

Q.111 If an appeal has not been disposed of in 6 months, what is the remedy?

Ans. If an appeal has not been heard or the order has not been passed, the assessee may move an application for extension of stay. Normally the Tribunal passes such order extending the stay, if the delay is not on the part of the applicant. *Centre for Women's Development Studies vs. Dy. Director of Income Tax (2002) 257 ITR (AT) 60 (Delhi)*

Q.112 Whether section 254 (2A) is retrospective?

Ans. No. These provisions are prospective in nature and operative on the stay order granted by the Tribunal on and from 1-6-2001. Orders made earlier remain unaffected and remain operative after 6 months and till disposal of the appeal. *A.P. State Civil Supplies Corpn. Ltd. vs. Dy. CIT (2002) 83 ITD 398 (Hyd.).*

Q.113 Whether tax recovery can be made protective?

Ans. In, *Jagannath Bawri vs. CIT (1998) 234 ITR 464 (471) (Gau.),* the Court held that, when assessment is made on protective basis, the recovery cannot be made on protective basis.

Q.114 When rectification application is pending, whether Department can recover the tax in dispute?

Ans. In *Sultan Leather Finishers Pvt. Ltd. vs. ACIT (1991) 191 ITR 179 (All),* it has been held that no recovery proceedings are possible during pendency of rectification application under s. 154.

Q.115 What is the recent trend in matters of stay of recovery?

Ans. During the last few years, it has been observed that some of the Benches of the Appellate Tribunal are slow, rigid and too technical in granting stay of demand. Sometimes, it is insisted that the administrative remedy, (including refusal from the Commissioner of Income Tax) be exhausted. Stay petitions are not fixed immediately. It is desirable that the stay petition is fixed within a week from date of its filing, is heard within a fortnight from the date of presentation and order is dictated in open Court immediately after hearing. It needs to be expeditiously disposed of. When stay is granted, appeal also deserves to be expeditiously disposed of.

Two provisos have been inserted in section 254 (2A) of the Act by the Finance Act, 2001 with effect from 1st June, 2001. The object is to avoid allowing demand of tax remaining irrecoverable for a long period owing to appeals not being heard by the Appellate Tribunal after stay is granted. Section 254 (2A) of the Act provides that an appeal be decided within a period of 4 years from the end of the financial year in which such appeal is filed. These provisions provide that when the Appellate Tribunal passes an order granting stay of recovery of tax pending in appeal before it, the Tribunal should hear such appeal within a period of 180 days from the date of the order granting stay, failing which the stay granted would stand vacated on the expiry of that period. Such automatic vacation of stay is unjustified. Many a times adjournments are sought by the Department and/or because required records or papers documents are not produced on time, so as to enable the Appellate Tribunal to decide the appeal within specified period. Sometimes where only one Bench is functioning, one of the Members may not be posted or may be on leave for a longer period and the Division Bench may not function for part of the period or longer period. Appeals against special assessment for the block period and search assessments generally involve substantial tax demands and highly disputable issues, and may take a longer time for judicious disposal. The two provisos inserted deserve to be deleted.

Q.116 What is the duty of the Tribunal on a stay petition?

Ans. It is appropriate and essential the the Tribunal should post hearing immediately, hear both the sides and dictate the order in open Court – reasons to follow. The stay operates immediately on pronouncement. Copy of order should be issued on the same day. The order should be speaking and judicious after considering all the aspects of the matter. The remedy against such order is by way of writ under Article 226/227 of the Constitution before the Hon'ble High Court. Discretion should be exercised according to the rules of reason and justice and law, not arbitrary, vague or fanciful. *Todarmal Safarishmal Lashkar vs. CIT (1979) 118 ITR 759 (M.P.), Thangaraj (SM) vs. State of Tamil Nadu (1989) 175 ITR 428 (Mad.), Security & Detective Bureau Ltd. vs. ACIT (1993) 44 ITD 452 (Mad), Lalit Khanna vs. Controller of Estate Duty (1994) 207 ITR 955 (All.)*

Q.117 Many times the Tribunal passes orders stating that if the assessee applies for adjournment, the stay will be vacated. Whether such an order be passed?

Ans. It is advisable not to make such observations in the order granting stay of disputed demand. Such an order may not be legal. There may be events when the appellant may have to seek any adjournment for reasons beyond its control. The Bench has the discretion to decide whether to grant further stay or not when the appeal is fixed for hearing and an adjournment is sought.

Q.118 Whether Tribunal has power to grant extension of stay of recovery beyond six months?

Ans. Tribunal has power to grant a further stay on expiry of six months of earlier stay if the facts and circumstances so demand. *Centre for Women's Development Studies vs. Dy. Director of Income Tax (2002) 257 ITR (AT) 60 (Delhi).*

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CHAPTER

9

PRECEDENT

Q.119 What are the general principles of precedent?

Ans. In *CIT vs. B. R. Constructions (1993) 202 ITR 222 (AP) (FB),* the AP High Court has discussed in detail the general principles regarding the binding nature of precedent which reads: "The effect of a binding precedent in India is that the decisions of the Supreme Court are binding on all the Courts. Article 141 of the Constitution embodies the rule of precedents. All the subordinate Courts are bound by the judgements of the High Courts. A single Judge of a High Court is bound by the judgement of another single Judge and a fortiori judgements of Benches consisting of more Judges than one. So also, a Division Bench of a High Court is bound by the judgement of another Division Bench or a Full Bench. A single Judge or Benches of High Courts cannot differ from the earlier judgements of co-ordinate jurisdiction merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice is of paramount importance. But if the earlier judgement is erroneous or adherence to the rule of precedents results in manifest injustice, differing from an earlier judgement will be permissible. When a Division Bench differs from the judgement of another Division Bench, it has to refer the case to a Full Bench. A Single Judge cannot differ from a decision of a Division Bench except when that decision or a judgement relied upon in that decision is overruled by a Full Bench or the Supreme Court, or when the law laid down by a Full Bench or the Supreme Court is inconsistent with the decision. It may be noticed that a precedent will not be binding – (i) if it is reversed or overruled by a higher Court; (ii) when it is affirmed or reversed on a different ground; (iii) when it is inconsistent with the earlier decisions of the same rank (iv) when it is sub silentio; and (v) when it is rendered per incuriam.

A judgement can be said to be per incuriam if it is rendered in ignorance of the provisions of a statute or a rule having statutory force or a binding authority. But if the provision of the Act was noticed and considered before the conclusion was arrived at, merely on the ground that it has erroneously reached the conclusion, the judgement cannot be ignored as being per incuriam. The rule of per incuriam is of limited application."

In *Union of India vs. Raghubir Singh (1989) 178 ITR 548 (551-57) (SC),* the Apex Court held that, the doctrine of binding precedent has merit of promoting certainty and consistency in judicial decisions and enables an organic development of law, besides providing assurance to an individual as to the consequence of transactions, forming part of his daily affairs.

In *Union of India vs. Dhanwanti Devi (1998) 6 SCC 44, 51-52,* the Hon'ble Supreme Court held that, a decision is an authority for what it decides. The essence of a decision is its ratio. The principle on which a question has been decided is alone binding precedent.

Q.120 When there are two judgements of the jurisdictional High Court, which are contrary to each other and the latter judgement is delivered without referring to the earlier judgement, which judgement should the Tribunal follow?

Ans. It is clear that when there are conflicting judgements of the jurisdictional High Court, normally the latter judgement would prevail provided it has referred to the earlier decision and distinguished the same. However, if the earlier judgement is not referred to at all, and there are two conflicting judgements, it is open to the Tribunal to follow that judgement, the reasoning of which appeals to the Tribunal. Since both the jurisdictional High Court judgement are binding the Tribunal has to prefer one or the other judgment and in such a case it can prefer either of the two judgments. *Amarsingh Yadav vs. Santi Devi AIR (1987) Patna 191* and *CIT vs. Madhukant M. Mehta (1981) 132 ITR 159 (Guj).*

Q.121 The Tribunal has decided the assessee's appeal in its favour. The Reference Application of the Department is also rejected. The Assessing Officer refuses to follow the order of the Tribunal and makes addition. Can contempt proceedings be initiated for not following the order of the Tribunal. If yes, what is the procedure?

Ans. Though the principle of res judicata and doctrine of estoppel are not applicable to tax proceedings, yet the dispute must achieve finality. When no reference is pending before the jurisdictional High Court or/and the Supreme Court, it tantamounts to acceptance by the department, of the view pronounced by the Tribunal. Unless and until, there is change in factual matrix or law or there are strong reasons to differ, the Assessing Officer must follow the view expressed by the superior authority. The Assessing Officer administratively does not function under the Tribunal but the Tribunal being the final fact finding body, a quasi-judicial authority, the Assessing Officer must faithfully obey its orders. In *Agrawal Warehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP)*, the Court held that the orders passed by the Tribunal are binding on all tax authorities functioning under the jurisdiction of Tribunal.

The Madras High Court in *Shree Rajendra Mills Ltd. vs. Joint Commercial Taxes Officer (1971) 28 STC 483* observed: " In the hierarchy of the authorities set up under the Sales Tax Act, the Tribunal is superior to the Appellate Assistant Commissioner, who is bound by the orders of the Tribunal which will be as effective as the orders of the High Court as far as their binding character on him is concerned. Merely because a tax case has been filed by the department, it does not act as a kind of stay of operation of the order of the Tribunal. So long as the order of the Tribunal is not set aside, the Appellate Assistant Commissioner is bound to give effect to and his failure to do so on the ground that the department has filed an appeal will be really a contempt of the Tribunal`s order. Though it is open to him to take his own view on the facts, as far as the law propounded by the Tribunal is concerned, it is binding and should be applied to the facts before him." The Allahabad High Court in *K. N. Agrawal vs. CIT (1991) 189-ITR-769 (All)* observed that the orders of the Tribunal are binding upon the Assessing Officer and since he acts in a quasi-judicial capacity, the discipline of such functioning demands that he should follow the decision of the Tribunal.

The Apex Court in *Union of India vs. Kamlakshi Finance Corporation Ltd., AIR 1992 SC at 712* a case under the excise law observed : " It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant

Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the Appellate authority is not "acceptable" to the department – in itself an objectionable phrase and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws." The Hon`ble Supreme Court further stated that utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the order of the higher appellate authorities, which are binding on them.

Technically speaking the Tribunal is not a court but has all the trappings of a court. It is the final fact finding authority and commands a highly dignified place in the hierarchy of justice. However, the Contempts of Court Act, 1971 would be inapplicable and contempt proceedings, in my opinion, cannot be initiated for not following the order of the Tribunal. The aggrieved person should take up the matter administratively before the Commissioner or the Chief Commissioner or Central Board of Direct Taxes. Additionally, the appellant should request the Tribunal to award exemplary cost. *In CTO vs. Kamal and Co. (1987) 67 STC 402* Chief Justice of Rajasthan High Court, as he then was stated that the power of the Board of Revenue to award costs, is a matter within its discretion, and does not depend upon the existence of an express provision, which merely reiterates a power which is inherent in the constitution of the authority itself. Also refer *Agrawal (K. N.) vs. CIT (1991) 189 ITR 769 (All.), Prasad & Co. vs. Dy. Commissioner of Income Tax (1992) 43 ITD 93 (Har.), Bank of Baroda vs. H. C. Shrivatsava (2002) 256 ITR 385 (Bom.), Asst. Collector of Central Execise vs. Dunlop India Ltd. (1985) 154 ITR 172 (SC)*

Q.122 When there are two judgements of the Supreme Court, which are contrary to each other, which judgement should the Tribunal follow? Is obiter dicta of the Supreme Court binding on the Tribunal?

Ans. Article 141 of the Constitution prescribes that judgements of the Supreme Court are binding on all Courts and based on the rule of precedent the latest judgement is to be followed as that is the last word spoken by the Apex Court. The Supreme Court sits in Division Bench of two or three Judges. In Jawed Ahmad's case the Supreme Court observed that it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of Division Bench of two judges, although it may be otherwise where a Full Bench or a Constitution Bench does so. Obiter dicta of the Supreme Court is binding on the Tribunal. The Full Bench of the Andhra Pradesh High Court in *Ushodaya Enterprises Ltd. vs. Commissioner of Commercial Taxes (1993) 111 STC 711* observed " In a case of conflict arising from the decisions of co-equal Benches of the Supreme Court, the High Court is free to disregard the decision which is based on an obvious mistake of fact or the one which purports to follow the ratio of an earlier decision though such ratio is found to be non-existent. The High Court can legitimately decline to follow such decision and follow the earlier decision which is backed by reasoning – whether it is accepted to the High Court or not, and which is free from an such apparent flaw. The later decision need not be automatically followed despite the fact that it rests on a conclusion based on an erroneous impression that an earlier decision took a particular view which in fact it has not taken." In our view the same principle may be followed by the Tribunal.

Q.123 What is the precedent value of orders passed by different types of Benches of Tribunal?

Ans. A decision of a Division Bench and Third Member Bench is binding on the Single Member Bench. A decision of a Special Bench is binding on all the Benches of the Tribunal. A decision of the Special Bench can be distinguished or disregarded if there is any contrary view of the jurisdictional High Court or of the Supreme Court. A co-ordinate Bench should follow the view of another co-ordinate Bench or else refer the matter to a larger Bench through the President. *S. I. Roopal and Others vs. Government through Chief Secretary, Delhi & Others AIR 2000 SC 594, Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722 (SC), Pradip Chandra Parija vs. Pramod Chandra Patniak (2002) 254 ITR 99 (SC), Agrawal Warehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP), CIT vs. L. G. Ramamurthi & Others (1977) 110 ITR 453 (Mad.), Export House vs. ITO (1985) 23 TTJ 285 (Amritsar), Chandulal Venichand vs. ITO (1991) 38 ITD 138 (Ahd.)*

Q.124 What is the binding nature of the decision of High Courts?

Ans. As per the doctrine of precedent, all lower courts, Tribunals and authorities exercising judicial or quasi-judicial functions are bound by the decisions of the High Court within whose territorial jurisdiction these courts, Tribunals and authorities function. In *CIT vs. Kantilal Nathuchand (1964) 53 ITR 420 (Guj.)*, the Court doubted, but followed for the sake of uniformity among the High Courts the judgement of another High Court in the matter of interpretation of the Income-tax Act. Also refer *CIT vs. Chimanlal J. Dalal & Co. (1965) 57 ITR 285 (Bom)*. Tribunals functioning within the jurisdiction of a particular High Court are bound to follow the decision of the jurisdiction High Court — *State of AP vs. Commercial Tax Officer (1988) 169 ITR 564 (AP); Air Conditioning Specialists Pvt. Ltd. vs. Union of India (1996) 221 ITR 739 (Guj)*. The Assessing Officer is bound to follow the decision of Supreme Court as also the decision of High Court of the State within whose jurisdiction he is functioning — *K. Subramanian, ITO vs. Siemens India Ltd. (1985) 156 ITR 11 (Bom)*. The order of the Tribunal not applying the decision of jurisdictional High Court was held to be erroneous — *Shri Mahabir Industries vs. CIT (1996) 220 ITR 459 (Guwahati)*. Not following the decision of the High Court within whose jurisdiction the ITO acts, would tantamount to committing contempt of that court — *(1983) 143 ITR 120 (Bom.) Siemens India Ltd. vs. K. Subramaniam (ITO)*.

The decision of a High Court does not have binding force outside the State. *Dr. T. P. Kapadia vs. CIT (1973) 87 ITR 511 (Mys.). CIT vs. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom.), Geoffrey Manners & Co. Ltd. vs. CIT (1996) 221 ITR 695 (Bom.), CIT vs. Vardhman Spinning (1997) 226 ITR 296 (P&H), N. R. Paper and Board Ltd. & Others vs. DCIT (1998) 234 ITR 733 (Guj.)*. No reference can be made on a question of law which is settled by a decision of the jurisdictional High Court. *CIT vs. HIM Containers Ltd. (1995) 216 ITR 674 (Guwahati) Kiersentec vs. CIT 11 Taxman 70 (Bom.) (1982)*

The decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside the territorial jurisdiction. The fact that there is only one decision of any one High Court on a particular point or that of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or any other subordinate courts or Tribunals outside their jurisdiction. That status is reserved only for the decisions of the Supreme Court, which are binding on all courts in the country by virtue of Article 141 of the Constitution. *Consolidated Pneumatic Tool Co. (India) Ltd. vs. CIT (1994) 209*

ITR 277, 282 (Bom), Universal Ferro & Allied Chemicals Ltd. vs. P.G.K. Warrier (1983) 143 ITR 959 (Bom.).

In *CIT vs. G. Dalabhai & Co. (1997) 226 ITR 922 (Guj)*, it was observed "Before parting with the case, we notice with anguish the language used by the Income Tax Officer in his assessment order saying that 'With due respect to the decision of the Gujarat High Court, I do not follow the same'. The Income Tax Officer in not following the decision of the Gujarat High Court within whose supervisory territory he was functioning, is far from satisfactory, that is the least we can say. The minimum decorum of the system of hierarchy that Tribunals in the administration of justice and their Judicial subordination to the High Court of the territory in which they function requires that they restrain in the use of proper expression while following or not following the decision of the High Court".

Q.125 When an order becomes an order of the Tribunal?

Ans. Rules 34(1) and 35 of the ITAT Rules. 1963 makes it clear that unless the order of Bench is signed by all Members constituting it and is dated, it is not an order of the Tribunal. *ITAT vs. V. K. Agrawal (1999) 235 ITR 175, 188 (SC).*

Q.126 What is the principle of Stare decisis?

Ans. There should be consistency in law. If any view has been taken by the Supreme Court or the lower authorities and remains unchallenged and the law is not amended / modified, such view should prevail. *Commercial Tax Officer Circle '8' Jaipur vs. Hemraj Udhog and Others (1987) 64 STC 324 (R).* There should be consistency in law. *Radhasoami Satsang vs. CIT (1992) 193 ITR 321 (SC), CIT vs. A. R. J. Security Printers (2003) 264 ITR 276 (Delhi), CIT vs. Balkrishna Malhotra (1971) 81 ITR 759 (SC).*

The Supreme Court in Sakhi vs. Union of India AIR 2004 SC 3566 at 3577 observed : "Stare decisis is a well known doctrine in legal jurisprudence. The doctrine of stare decisis, meaning to stand by decided cases, rests upon the principle that law by which men are governed should be fixed, definite and known, and that, when the law is declared by Court of competent jurisdiction authorized to construe it, such declaration is absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. It requires that rules of law when clearly announced and established by a Court of last resort should not be disregarded and set aside but should be adhered to and followed. What it precludes is that where a principle of law has become established by a series of decisions, it is binding on the Courts and should be followed in similar cases. It is a whole-some doctrine which gives certainty to law and guides the people to mould their affairs in future".

Q.127 What is the binding precedent of order of Supreme Court?

Ans. Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus the law as interpreted by the Supreme Court is binding on all Courts and Tribunals in India *CGT vs. Aluminium Corporation of India Ltd. (1972) 85 ITR 167 (172) (SC)*. The decision of the Supreme Court in taxation matters amounts to a declaration of law as contemplated by Article 141 of the Constitution of India. *Karamchand Premchand Pvt. Ltd. vs. CIT (1975) 101 ITR 46 (52) (Guj.).* The High Court cannot ignore a decision of Supreme Court on the ground that the relevant provision was not brought to the notice of the Supreme Court, *Badlachandas Mathurdas Lukhani Municipal Committee AIR 1970 SC 1002. Tata Iron & Steel Co. Ltd. vs. D.V. Bapat ITO (1975) 101 ITR 292(327) (Bom)*. The Tribunal is bound to follow the principle of law laid down by the Supreme Court. It is not open to the Tribunal to say that the Supreme Court decision was not relevant simply because, it was not under the statute under which the Tribunal is working. *Bhavnagar University vs. Palitana Sugar Mill Pvt.*

Ltd. AIR 2003 SC 511. Ratio is Binding AIR 2002 SC 1598, AIR 2002 SC 834. *CIT vs. Vallabhdas Vithaldas & Others (2002) 253 ITR 543 (Guj.)*

The view expressed by the Supreme Court is an authority on the subject provided facts and situation is identical. The Supreme Court in *State of West Bengal vs. Kesoram Industries Ltd. (2004) 266 I.T.R. 721* corrected inadvertent error in *India cement Ltd. vs. State of Tamil Nadu (1990) 1 SCC 12* on the aspect of 'Royalty is not tax after 14 years.'

Q.128 Whether rejection of SLP can be considered as an order of Supreme Court? What is the binding effect?

Ans. A mere dismissal of SLP does not mean that the judgement of the High Court stands affirmed by the Supreme Court. The effect of a dismissal is that no appeal was permitted and not that an appeal against the said judgement was dismissed by the Supreme Court affirming the view of the High Court. *J. K. Charitable Trust vs. WTO (1996) 222 ITR 523 (All.)*

Rejection of SLP does not mean that the judgement of High Court has been approved by the Supreme Court on merit.

CIT vs. Quality (1997) 224 ITR 77 (Pat.)

Q.129 Whether appeal dismissed by the Supreme Court is binding on the Tribunal though the order may not be speaking?

Ans. Where a decision of the Supreme Court is virtually a non speaking order which does not set out the facts or the reason for the conclusion or direction given, it cannot be treated as a binding precedent. *Government of India vs. Workmen of State Trading Corporation (1997) 11 SCC 641. State of Manipur vs. Thinjujam Brojen Muti AIR 1996 SC 2124. Ajith Kumar Rath vs. State of Orissa AIR 2000 SC 85.*

Q.130 When there are two judgements of the jurisdictional High Court which are contrary to each other which will be binding on Income Tax Appellate Tribunal?

Ans. The later judgement shall be of binding on the Tribunal.

Q.131 When there is no contrary judgement, whether Tribunal has to follow decision of non-jurisdictional High Court?

Ans. Yes. Income-tax is a Central Act and therefore the Tribunal should follow the decision. In, *CIT vs. Highway Construction Co. (P) Ltd. (1996) 217 ITR 234 (240) (Gauh.),* the Court held that, when there is a decision of different High Court and there is no contrary decision, it will be just and proper for the Tribunal to follow the said decisions.

Q.132 Can revenue take conflicting stands?

Ans. No. The revenue cannot take conflicting stands. It has got the assistance of technical persons and should be consistent. It cannot discriminate between the assessees. *Seshasayee Paper and Boards Ltd. vs. CIT (2003) 260 ITR 419 (Mad.), Union of India vs. Kaumudini Narayan Dalal (2001) 249 ITR 219 (SC), Berger Paints (2004) 266 ITR 99 (SC), Union of India vs. Satish Panalal Shah (2001) 249 ITR 221 (SC).*

Q.133 Is CIT(A) bound to follow the decision of the Tribunal?

Ans. Yes. CIT(A) being subordinate to the Tribunal is bound to follow the view of the Tribunal. *Agrawal Warehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP)*

Q.134 Whether a judgement of the Supreme Court is retrospective or prospective?

Ans. Law is settled by the Supreme Court. Law laid down by Supreme Court is the law in existence since its enactment. It is retrospective in operation. Such law is from inception unless and until spelt as prospective by the Supreme Court. All Courts, Tribunals, authorities and citizens are bound to follow the diction laid by the Supreme Court or else shall be liable to contempt. *Calcutta and Another vs. Collector of Customs AIR 1962 SC 1893 at 1905, M. A. Murthy vs. State of Karnataka and Others (2003) 264 ITR 1 (SC), Kil Kotagiri Tea and Coffee Estate Co. Ltd. vs. ITAT (1988) 174 ITR 579 (Ker.)*

Q.135 Whether one Bench of the Tribunal is bound to follow the order of another Bench?

Ans. For the sake of uniformity, one Bench of the Tribunal is bound to follow the view expressed by another Bench of the Tribunal unless the earlier view is per-incurium — *CIT vs. L. G. Ramamurthi (1977) 110 ITR 453 (Mad), CIT vs. S. Devaraj (1969) 73 ITR 1 (Mad). Modu Timblo (Individual) vs. CIT (1994) 206 ITR 647(Bom.) – Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722 (SC), Pradip Chandra Parija vs. Pramod Chandra Patnaik (2002) 254 ITR 99 (SC), Agrawal Warehousing & Leasing Ltd. vs. CIT (2002) 257 ITR 235 (M.P.),* The Bench should not come to a conclusion totally contradictory to the conclusion reached by the earlier Bench of the Tribunal. Where a Bench wants to differ from an earlier Bench decision, the matter should be referred to a larger Bench on a request made to the President — *CIT vs. Goodlass Nerolac Paints Ltd.. (1991) 188 ITR 1 (5) (Bom). Sayaji Iron and Engineering Co. vs. CIT (2002) 253 ITR 749 (Guj.), Sis Ram Sharma & Co. vs. ITO (1988) 25 ITD 410 (Delhi)(TM), Subarna Plantation & Trading Co. Ltd. vs. ITO (1989) 28 ITD 177 (Cal.), Longwalia Poultry Farm vs. Dy. CIT (1998) 67 ITD 45 (Chan.) (TM), Birumal Gaurishankar Jain vs. Income Tax Settlement Commission (1992) 195 ITR 792 (ITSC) (SB), Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722, 726, 727 (SC), Sub. Inspector Rooplal & Another vs. Lt. Governor, New Delhi & Others (2000) 1 SCC 644 (654) (SC), Dy. CIT vs. Reliance Industries Ltd. (2004) 88 ITD 273 (Mum) (SB).*

Q.136 Whether the decision of Tribunal is binding on lower authorities?

Ans. Judicial discipline demands that authorities subordinate to the Tribunal accept as binding the decisions of the Tribunal. In *Khalid Automobiles vs. Union of India (1995) 4 SCC (Suppl.) 653,* the Court held that an order of the Tribunal was binding on the assessing officer and the first appellate authority and that failure to follow the same may constitute contempt of Tribunal's order. See *Rajendra Mills Ltd. vs. Jt. CIT (1971) 28 STC 483 (Mad.), Serethil Raja Metal vs. CTO (1990) 79 STC 38 (Mad.)* and *Union of India vs. Kamlakshi Finance Corporation Ltd. AIR 1992 SCC 711 (712) (SC).*

In *Voest Alpine Ind. GmbH vs. ITO (2000) 246 ITR 745, (749) (Cal.),* the Court condemned the action of assessing officer in making an assessment contrary to the decision of the Tribunal which had become final. Also see *Bank of Baroda vs. H. C. Shrivatsava & Another (2002) 256 ITR 385 (390) (Bom.), Asstt. CCE vs. Dunlop India Ltd. (1985) 154 ITR 172 (SC), Govindram Seksaria Charity Trust vs. ITO (1987) 168 ITR 387 (MP), Agarwal Warehousing & Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP), C. D. Thandani vs. ITO vs. Universal Ferro & Allied Chemicals Ltd. (1988) 172 ITR 30 (Bom.)*

CHAPTER

10

REPRESENTATION BEFORE INCOME TAX APPELLATE TRIBUNAL

Q.137 How should an adjournment application be addressed to the Tribunal?

Ans. An application for adjournment of a hearing should be made well in advance. It should be presented personally. If it cannot be presented personally, a stamped envelope with the address of the assessee or his representative should, as far as possible, accompany the application. If a reply is required telegraphically, the necessary postage stamps should accompany the application. If a telegram is sent asking for adjournment, arrangement should be made for a reply-paid telegram. The Tribunal is not bound to reply to the applications for adjournment. Unless the assessee hears that his application for adjournment has been granted, he or his authorized representative should remain present at the hearing of the appeal or application or cross objection, as the case may be. Whenever the assessee's representative files the application for adjournment, he should file the same along with vakalatnama in his favour. If the assessee does not get any intimation, he or his representative must remain present on the day of hearing. The Registry should not refuse to accept letters or requests for adjournment when they are filed much ahead of the date of hearing of the matter – *Shamalsha Girdhari Co. vs. Asstt. CIT (2000) 72 ITD 469 (Mum).*

No procedure has been provided in the Act or rules for filing of adjournment application. It is advisable to file an adjournment application containing therein the reason for seeking adjournment and such reason should constitute a good, sufficient cause and should be supported by relevant material. It is advisable to move the application in advance. Earlier the Tribunal used to consider such application and grant adjournment in advance. However, now such application is considered by the Bench where the appeal is listed on the date of hearing. Normally, the Bench considers the adjournment application in the beginning, while some Benches take up adjournment applications at the number listed in the cause list, so that the counsel or assessee's representative has to remain present till the matter is called out. The minutes of the meeting held between the ITAT Bar Association and Vice President, Shri J. P. Bengra, Mumbai, record that, if adjournment application is filed 15 days in advance, the Vice President will pass necessary order on such an application. (AIFTP Journal April, 2004 page Nos. 31 to 33 (32)]. Therefore, we suggest to file the application for adjournment well in advance and one copy may be forwarded to departmental representative.

Q.138 When an assessee expires after filing the appeal what is the procedure for bringing legal heirs on record?

Ans. During the pendency of an appeal/application if the assessee, whether he be appellant or respondent dies, or is adjudicated insolvent or in the case of the company, it goes into liquidation, the appeal/application shall not abate, on account of Rule 26 of the Rules. In such cases, the legal representative/heir or liquidator/receiver as the case may be, has to apply to Tribunal for continuing the appeal/application and for bringing him on record. One of the legal heirs has to make an application to the Registrar, in duplicate, along with two copies of sworn affidavit and death certificate. It is advisable to file an application along with copies of affidavit as soon as they come to know about the death, liquidation etc. so that, unnecessary adjournment, at the time of hearing may be avoided. The appeal is taken up for hearing after the concerned AO has verified the same.

Q.139 What is the procedure for fixing an appeal for out of turn hearing?

Ans. Substantial number of appeals are pending before the Tribunal, wherein the issue(s) involved are either covered by orders of the Tribunal, or by the decisions of the jurisdictional High Court, or the Supreme Court. Instructions have been issued that covered matters should be taken up for hearing and final disposal out of turn. An application for out of turn hearing should be accompanied by the following:

(i) A copy of the grounds of appeals in respect of the appeal(s) pending before the Tribunal.

(ii) Copy(ies) of the order(s) of the Tribunal covering all the issues raised in the aforesaid grounds, if such order(s) are not reported in the ITD.

(iii) Citation of the case wherein all the issues raised in the aforesaid grounds are covered.

(iv) Citation of the case wherein all the issues raised in the aforesaid grounds are covered by the decision of the jurisdictional High Court or the Supreme Court.

After scrutiny of the application and ascertaining the fact that all the issues raised in the grounds of appeal are covered by the decision of the Tribunal / High Courts / Supreme Court, as the case may be, the office would place the matter before the Tribunal for out of turn hearing.

In other matters also, on being satisfied that early hearing is in the interest of justice, the Tribunal may order for early and out of turn hearing.

Q.140 What is the procedure for filing paper book?

Ans. The provisions regarding filing of paper book are contained in Rule 18 of the Rules. If the appellant or the respondent, as the case may be, proposes to refer or rely upon any document or statements or other papers on the file of or referred to in the assessment or appellate orders, he may submit a paper book in duplicate containing such papers duly indexed and paged at least a day before the date of hearing of the appeal along with proof of service of a copy of the same to the Departmental Representative at least a week before the date of hearing:

Provided, however, the Bench may in an appropriate case condone the delay and admit the paper book on the date of hearing also.

The Tribunal may *suo motu* direct the preparation of a paper book in triplicate by and at the cost of the appellant or the respondent containing copies of such statements, papers and documents as it may consider necessary for the proper disposal of the appeal.

The papers referred to in sub-rule (1) above must always be legibly written or typewritten in double space or printed. If xerox copy of a document is filed, then the same should be legible. Each paper should be certified as a true copy by the party filing the same, or his authorised representative and indexed in such a manner as to give the brief description or the relevance of the document, with page numbers and the Authority before whom it was filed.

Additional evidence, if any, shall not form part of the same paper book, if any party desiring to file additional evidence, should file the same by way of a separate paper book containing such particulars as are referred to in sub-rule (3) accompanied by an application stating the reasons for filing such additional evidence.

The parties shall not be entitled to submit any supplementary paper book, except with the leave of the Bench.

Paper/paper books not conforming to the above rules are liable to be ignored.

The Hon'ble Tribunal in exceptional cases accepts the paper book even on the day of hearing provided the other side does not object to the same. Otherwise to the hearing is usually adjourned and cost may be levied. Documents or papers contained in the paper book must be specifically brought to the notice of the Tribunal and referred to at the time of hearing. Documents that are referred to and relied upon by the parties during the course of arguments shall alone be treated as part of the record of the Tribunal and considered in the order. One should very carefully screen, scrutinize and prepare paper book. Necessary document / paper should not be left out and unnecessary papers should not be filed and paper book made bulky/lengthy. Paper Book should be filed in triplicate and acknowledgement should be obtained.

As regards case laws which are not reported in the ITR or ITD, it may be desirable to file copies of the same in a separate paper book which may help in speedy disposal of matters.

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CHAPTER

11

GENERAL

Q.141 Whether an adjournment application signed by the appellant / authorized representative but presented by his assistant or clerk or peon should be entertained?

Ans. Construing the provisions strictly, literally and technically the Tribunal may be right in not accepting such application. However, it is not in the interest of equity and justice. As an old established practice and precedent, the Tribunal has been considering adjournment applications of the assessee/authorized representative submitted by article clerks or peons. Such latitude and concession is desired of the Tribunal. The Tribunal is meant to impart justice and not to punish a tax-payer for the lapses of the authorized representative or ignorance of the assessee or on account of technicality of law. It is, however, befitting and in the interest of maintaining the decorum of the Tribunal that the authorized representative or the assessee himself or a Senior official remains present when adjournments are sought.

Q.142 Can the Tribunal refuse to take cognizance of statements on question of fact made at the Bar, by representatives, in the course of arguments?

Ans. Rule 10 of the Appellate Tribunal Rules, 1963 requires that where a fact which is not borne out by, or is contrary to, the record is relied upon it shall be stated clearly and concisely and supported by a duly sworn affidavit. In the light of this Rule, the Tribunal shall be competent to refuse to take cognizance of statements on questions of fact at the Bar, by authorized representatives, which are not in consonance with the facts emerging from the records. However, the Tribunal has been taking cognizance of statements made at the Bar, on account of the dignified position of an advocate or a chartered accountant. Misrepresentation, false representation or wrong representation would amount to misconduct and the contemnor can be appropriately dealt with by the Bar Council of India or the Institute of Chartered Accountants or the Tribunal as the case may be. However, it is advisable for the representative not to make any statement at the Bar on questions of fact. It should always be supported by an affidavit of the assessee and submitted sufficiently in advance. *Bata India Ltd. vs. DCIT (1996) 217 ITR 871 (Cal.)*

Q.143 When an affidavit can be filed before the Tribunal?

Ans. When a fact cannot be borne out by or is contrary to record, it should be stated clearly and concisely and should be supported by a duly sworn affidavit. *(See CIT vs. T.I. & M Sales Ltd. (1987) 166 ITR 93 at 101 (SC).* An application for time for filing an affidavit at the time of hearing of the appeal shall not ordinarily be granted. The Registrar, the Deputy Registrars and the Assistant Registrars are empowered to administer oath to any witness or to a deponent of an affidavit in so far as the Tribunal is concerned. No fee is charged for this purpose. Affidavit can be notorised by the Notary Public. It is a risky document. There should not be any false statement. Otherwise the deponent can be prosecuted for perjury.

Q.144 Can the Tribunal issue summons to an assessee and record the statement under oath or can Tribunal cross examine the C.A. who has filed an affidavit relied upon by an assessee?

Ans. The Tribunal has all the powers of a Court. It can issue such summons. The Tribunal, for the purpose of discharging its functions, have all the powers which are vested in the income-tax authorities u/s. 131 of the Act and any proceeding before the Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code. The Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898. The Tribunal is competent to initiate contempt proceedings also. *ITAT vs. V. K. Agarwal (1999) 235 ITR 175 (SC)*

Q.145 Can the Tribunal insist on production of the books of account? For how many years is the assessee supposed to maintain the books of account?

Ans. The Tribunal can insist on production of books of account and other documents which are found relevant for disposal of the matter. The Central Board of Direct Taxes has power to prescribe the books of account and other documents to be kept and maintained. Rule 6F prescribes books of account and documents that are to be kept and maintained by the assessee. The books of account and documents shall be kept and maintained for a period of 6 years from the relevant assessment year. Though the above limits are prescribed as per the Act and Rules, we are of the view that all years in respect of which appeals are pending irrespective of whether the assessee is the appellant or respondent should be preserved that the assessee.

Q.146 What is the procedure for publication of Tribunal orders?

Ans. The President of the Appellate Tribunal has constituted an Advisory Board at Delhi Benches of the Appellate Tribunal to select cases for publication in the Income-tax Tribunal Decision (ITD). The Members constituting the Bench, or in the event of their absence by retirement or otherwise, the Vice-President or the President may mark an order as 'Fit for Publication'. Such orders are immediately sent in the proforma as at Appendix XXI(d) to the ITD Publication Advisory Board for its consideration for publication in the 'Income-tax Tribunal Decisions under intimation to the Head Office. A list of all such cases is to be placed on the notice board every month to enable authorized representatives of the other tax journals/periodicals to apply for copy of the said order(s) on payment of requisite fee.

Q.147 What is the procedure for obtaining certified copy of document on the file of the Tribunal :

Ans. Copies of the documents on the appellate record of the Tribunal are supplied on an application bearing a Court Fee Stamp of ten paise vide last clause of Article 1(a), Schedule II of the Court Fee Act, 1870. This application should invariably indicate clearly whether the document is required for the Applicant's personal use or for submitting before any Court. On receipt of such application, it should be first diarised like any other miscellaneous receipt and the receipt number and initial of the diarist is put up in form as at Appendix LIII. The diarist then passes on such application to the clerk concerned to whom this application is marked by the Head Clerk/Assistant Superintendent, on receipt from the Assistant Registrar concerned. Only an assessee or his authorized representative is authorized to apply for certified copy of the documents on record of the Tribunal. However in case of orders which are certified by the Bench to be 'Fit for publication, anyone can apply for a certified copy of such order. It is not felt desirable to exhaustively clarify as to in respect of what papers, certified copies can be issued and in what cases it cannot be issued.

Such applications for issue of certified copy of the documents should be placed before the Bench and its order should be obtained.

The dealing clerk enters the application in the Register maintained for the purpose as at Appendix LIII(a) and informs the applicant the charges payable in case the copy is to be supplied to him. In case he is the applicant not legally entitled to get the copy under rules and/or provision of the Act, he is asked to produce or file a letter of authority or no objection certificate from the assessee Appellant/Applicant or Respondent. Having been fully satisfied the Applicant is informed of the charges as estimated plus incidental postal and other charges, if necessary in a letter as at Appendix LVII. The charges for one copy, according to Rule 49 of the Rules is Rs. 10/- for a full page or part thereof irrespective of whether the copy is typed or Xeroxed. Charges for urgent copy is twice the normal charges; i.e., Rs. 20/- per page. Copying fee has to be deposited in advance in cash.

Q.148 What is the procedure and fees for inspection of records?

Ans. An application for inspection of the records of the Tribunal can be made by the parties. Fees for inspection of records are as under:–

(i)	For the first hour or part thereof	Rs. 20/-
(ii)	For every additional hour or part thereof	Rs. 10/-

No fee shall be charged for inspecting records of a pending appeal or application by a party thereto. The inspection fee has to be deposited in cash and in advance.

Q.149 Whether oral hearing and written arguments both possible?

Ans. It is advisable to submit written submissions in brief, for the convenience of all concerned. Even on filing of written submissions – on request – oral hearing is a right of the appellant. Oral hearing is a must on grounds of public policy and in public interest – *CWT vs. Sri Jagdish Prasad Choudhary (1995) 211 ITR 472 (Pat) (FB) & M.S. Jewellery vs. Assistant Commissioner (1995) 97 STC 455 (458) (Ker) following Govinda Prabhu & Brothers (1985) 59 STC 33 (Ker). J. T. (India) Exports vs. Union of India (2003) 262 ITR 269 (Del.) (FB), Caullapalli Nageswara Rao and Others vs. Andhra Pradesh State Road Transport Corporation & Other. AIR 1959 SC 308*. The Tribunal cannot refuse to accept written submissions – *ITAT vs. Dy. CIT (Assts) (1996) 82 Excise Law Times 4, 9 (SC).*

Q.150 What is the procedure for transfer of appeal?

Ans. Application for transfer is to be made to the Hon'ble President with copy to the concerned Bench. The appellant may for valid reasons apply for transfer of his appeal or application from the Bench having ordinary jurisdiction to any other Bench in India. In such a case, if the appeal is pending, report is called from the Assistant Registrar concerned with the comments of the Bench to which the matter has been allotted and a copy of the transfer application is sent to C.I.T concerned for his objection, if any. On receipt of his reply the application for transfer is put up with the replies received from Assistant Registrar and the C.I.T. to the President for passing order under Rule 4 or 40 of the Rules, and the same is communicated to the parties and the authorities concerned. Special order is passed by the President. When an appeal is transferred, the cross objection arising out of that appeal is simultaneously to be transferred along wit the appeal.

Q.151 What is meant by Full Court farewell?

Ans. When a Member retires, the Bar requests the President / Vice President to hold a full court farewell in honour of the retiring Member. This is a mark of the respect given by the Bar to the Member. The Bar gives farewell to only such Member whose integrity is not in doubt. This is not a farewell party. It has great traditional value. This tradition has been adopted from the High Court / Supreme Court. The Managing Committee of the ITAT Bar Association at Mumbai decided unanimously after careful consideration and deliberation, not to give farewell to the retiring Accountant Member. It caused irritation to the Presidents. See speech delivered on 1-8-2003 87 ITD Part 6 dated 5-11-2003. Hon'ble Shri S. E. Dastur wrote an exhaustive article "Is a Court Reference a Formality" explaining the objective and purpose. 6 AIFTP Journal 2004 February Part. It is high time that the members of the noble profession realise the sanctity and the purpose.

A Full Court Reference is held on the demise of members or an eminent professional.

Q.152 What is meant by Service Rules?

Ans. Members of the Tribunal are Government servants. All Government servants are covered by strict service rules, such as they cannot accept gifts, they cannot take free travel, service etc.

Q.153 Whether Members have any code of conduct to be followed?

Ans. There is no code of conduct prescribed by the Tribunal. Members are governed by service rules. The ITAT Bar Association's Co-ordination Committee of the Federation has formulated and forwarded a draft code of conduct to the President of the Tribunal for its adoption to preserve the values of the Tribunal. (See Annexure). It shall add glory to the institution. We hope the Tribunal since adopt it forthwith and the members shall adhere to the code.

Q.154 Whether the assessing officer can himself appear and argue the matter before the Tribunal?

Ans. Assessing Officer cannot appear himself and argue the matter before the Tribunal. It is only the DR's whose name appears in the Official Gazette who can appear and represent the matter before the ITAT. *Tata Chemical vs. Dy. Commissioner of Income Tax (1998) 67 ITD 56 (Bom.)*

Q.155 Whether the Federation has adopted Standards of Professional Conduct and Etiquette for members of the Federation?

Ans. Yes. The Standards of Professional Conduct and Etiquette for its members was adopted at the EGM Meeting held at Hyderabad on 22-4-2001 and is part of its constitution. The objective is to preserve the dignity and honour of the tax profession. (See Annexure). The Federation is very much concerned with the conditions prevalent and is very much vigilant in implementing. We feel ethics as the uppermost.

Q.156 If the matter is referred to Third Member, when is the copy of the order supplied?

Ans. As per the present practice followed by the Tribunal, the order is supplied only when the matter is fixed for hearing by the Third Member. Earlier it used to be sent immediately after reference to the President. The earlier system is better and the Tribunal should revert back to the old system.

Q.157 Within how many days is the order required to be passed by the Tribunal?

Ans. There is no time limit fixed by the Act / Rules. However the orders are normally required to be passed by the end of next month of the date of hearing. In *Anil Rai vs. State of Bihar (2001) 7 SCC 318*, the Hon'ble Supreme Court held that, the orders must be passed within two months of the hearing. The same principle will apply to

Members of the Tribunal also. It may be appreciated that most of the Members are passing the order with in two months of hearing.

Q.158 Whether Members of the ITAT can approach the High Court for their grievances relating to service conditions?

Ans. In *L. Chandra Kumar vs. Union of India (1997) 228 ITR 725 (SC.)* and *Abdul Razaek vs. Union of India (1999) 102 Taxman 219 (233 & 235),* the Courts have held that Members of the Tribunal must approach CAT and not the High Court for their grievances relating to service conditions.

Q.159 Whether there is any organization to take care of the interests of the professionals and the tax-payers?

Ans. Yes. There exist ITAT Bar Association at all major cities. The Federation has constituted ITAT Bar Association's Co-ordination Committee with representatives of Bar from every station where a Bench is located. The committee is to keep a balance between the Bar and the Bench and to work in such a manner whereby the dignity of the two is preserved. Representations are made from time to time and the Committee meets every six months to ascertain, to consider the grievances and to makes efforts to alleviate the grievances. Representations are being made regularly. It is heartening to note that representations are disposed of expeditiously and properly.

Q.160 What is the procedure for service of notices?

Ans. Notices of the Tribunal are served through post on the appellant or his Authorized Representative or by registered post at the address on the memo of appeal. Sometimes first notice is sent by certificate of posting but before making an ex parte order, notice is served by registered post. If the appellant or the assessee respondent is not available, efforts are made to get the notice served through the Income Tax Department. A notice for date of hearing is prepared before five weeks and is served before three weeks before the date of hearing to enable the assessee to submit the Paper Book as well as prepare for final hearing. In case of short notice as well as on first date of hearing adjournment in routine is granted. However, there exists a solitary instance of levy of cost of Rs. 300/- on the first adjournment, when a notice was short in time and adjournment application was filed in advance.

Q.161 Whether the above stated requirement of adequate time strictly followwed?

Ans. It is being noticed that in order to liquidate pendency and to have expeditious disposal, the mandate as to service before three weeks is not being followed. Recently it has been noticed that notice for date of hearing is served on the same day or a day earlier and appeal is dismissed in limine under Rule 19(2) with the observations: "The laws assist those who are vigilant and not those who sleep over their rights; which principles is embodied in the well known dictum "VIGILANTIBUS NON DORMENTIBUS, JURA SUBVENIUNT'. It is also stated that the assessee is not serious to pursue his case, when there are no latches, negligence or default on the part of the assessee. Reliance is placed on CIT vs. Multiplan India Ltd. (1991) 38 ITD 320 (Delhi) which is misplaced. (ITA No. 531/JP/2001 dated 22-4-2004). The assessee is compelled to make application for restoration and pay Tribunal fee of Rs. 50/-

Q.162 What is the concept of 'Rule of Law'?

Ans. Levy and collection of tax should be in accordance with law and in confirmity with the article 265 of the Constitution of India. Rule of Law is fundamental to maintain social order. Obedience and respect for law should be commended and commanded through the force of law and not by the law of force; because law of force leads to destruction of Rule of Law, and Force and Law protects it. Preference of citizens for Law and Order within the State reflects the Rule of Law. The Rule of law postulates that the Government must be run in accordance with law and the machinery of the Government should function through the law. When we say government according to law, it means that a citizen can challenge governmental action before the Court. We must constantly remember and remind that if we destroy the Rule of Law, it will destroy us; and if we protect the ule of Law, it protects us. Therefore, it is the duty of all concerned and the Judges to protect the Rule of Law.

The profession of law and accountancy are great professions. Its continued existence is necessary for the administration of justice flow of finance as well as for the proper functioning of the democratic republic. Good Lawyers/Chartered Accountants have been a boon not only to their clients but also for the whole country. The members of the two profession should first set an example of right thinking, and right speech, coupled with right action. Hard work, honesty and humility should constitute the core of the character of the professionals. Compassion and concern for the people will enhance the prestige of the profession and makes it honourable or noble.

Judiciary being a conscientious wing of the State is conscious of the necessity for the Judges to be sensitized to the need for self restraint. Greater the Power, greater the restraint. Judges should always bear in mind the famous line of Shakespeare. “It is excellent to have a giant’sstrength, but it is tyrannous to use it like a giant.” It equally applies on the honourable members of the Tribunal. In the words of Hon’ble Mr. Justice Shivraj V. Patil of the Supreme Court: **“FEAR NONE EXCEPT ONE, WHO IS ABOVE EVERYONE”.** Rule of law should prevail and not they whims or arbitrariness of any authority. Majesty of law should be upheld.

Q.163 What is the procedure for service of order?

Ans. An order is normally dispatched for service within 4-5 days of the signatures of the Member(s). It is served in the same manner as stated about the notice. Lately it is found that the orders are not served immediately and sometimes are delayed with bad intentions. Suggestion has been made by the Federation on 8-12-2003 to serve within three days of the order and by Registered Post. The President has forwarded the representation for necessary action on 15-12-2003 by D.O. No. P/7/2003 (2004) 186 CTR 50 (Q&N).

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CHAPTER

12

REPETITIVE APPEALS

Q.164 How can an assessee avoid filing of repetitive appeals?

Ans. Section 158A of the Income-tax Act, 1961, inserted by the Taxation Laws (Amendment) Act, 1984, w.e.f. 1st October, 1984 makes special provision for avoiding repetitive appeals. This section provides that where an assessee claims that any question of law arising in his case for an assessment year which is pending before the Income-tax Officer or any appellate authority is identical with a question of law arising in his case for another assessment year which is pending before the High Court on a reference under section 256 or before the Supreme Court on a reference under section 257 or in appeal under section 261, he may furnish to the concerned authority a declaration in the form as at Appendix XXIV(a) which shall be verified in the manner indicated therein. The declaration and the verification shall be signed by the person competent to sign the appeal. Such declaration shall be furnished to the Appellate Tribunal in triplicate.

On receipt of the declaration mentioned above, the Appellate Tribunal shall call for a report from the Income-tax Officer on the correctness of the claims made in the declaration and where the Income-tax Officer makes a request to the Appellate Tribunal to give him an opportunity of being heard in the matter, the Appellate Tribunal will allow him such opportunity.

As soon as application is received, the concerned appeal record together with the application should be put up to the Bench for orders in the form as at Appendix XXIV(b). On receipt of orders of the Bench, the letter in the proforma as at Appendix XXIV(c) should be issued to the Income-tax Officer and copy to the Departmental Representative and case posted for hearing on date fixed by the Bench for hearing.

Q.165 What is the remedy against an order of the Tribunal?

Ans. Now the remedy is to file an appeal u/s. 260A of the Act before the jurisdictional High Court on a substantial question of law, within 120 days from the date of receipt of the order of the Tribunal. Against an order under s. 254(2) – writ also lies, if the order is without jurisdiction.

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CHAPTER

13

SPECIAL BENCH ORDERS

Sr. No.	Names	Citations	Issues	Sections	
A					
1.	A & Others vs. WTO (Bom.)	(1978) T & P Vol. 11 Jan. 67	Charitable Trust	13(1)(h), 23A of W. T. Act	
2	A Bombay vs. ITO (Bom.)	(1974) T & P Vol. 6 Oct. 18 Municipal Taxes	House Property –	23	
3.	A. K. Jain & Bros. (HUF) vs. ITO (Delhi)	(1992) 40 ITD 100 / (1992) 42 TTJ 353	Advance Tax – Interest – Refunds	214, 221, 232 243 r.w. 237, 244 & 240	
4.	A. P. Paper Mills Ltd. vs. ITO (Hyd.)	(1988) 27 ITD 44 Possession	Depreciation – Permissive 32 (1)		
5.	ABC Delhi vs. ITO (Delhi)	(1976) T & P Vol. 8 July 1	Appeal – Levy of Interst	139, 246	
6.	Allied Chemical Corpn. vs. IAC (Bom.) 3 ITD 418	(1983) 2 SOT 62 / (1983) Dividend, Non-Resident	Appellate Tribunal -– Powers,	5(2)(b) w.r. Rule 115	
7.	Amar Dye Chem. Ltd. vs. ITO (Bom.)	(1983) 3 SOT 384 Capital Employed / Borrowed Capital / Business Expenditure	Tribunal – Powers – Vires / 19A(3)	255, 28, 37, 80J r.w.	
8.	American Express International Banking Corpn. vs. IAC (Bom.)	(1983) 6 ITD 373 / (1984) 18 TTJ 218	Method of Accounting	145	
9.	Ananthakrishna (B.) vs. ITO (Coch.)		(1984) 10 ITD 748 earned leave	Income – Surrender of	4
10.	Anil Sanghi vs. Asstt. CIT (Delhi)	(2003) 85 ITD 73 / (2003) 79 ITD 517 (2003) 263 ITR (AT) 30	Appellate Tribunal – Appeals – Block Assessment	253 r.w. 249 (4)	
11.	Apara Textile Traders Ltd. vs.	(1982) 2 ITD 600 / (1983) STO (Ahd.)	Sur Tax – Surcharge Deposit 2 SOT 603	2(5) r.w.2(i) – Deduction	
12.	Arasan Aluminium Industries (P) Ltd. vs. ITO (Mad.)	(1982) 1 ITD 10 / (1982) 1 SOT 45	Income – Capital Revenue Receipt – Pre Commencement	4	
13.	Arathi Shenoy vs. Jt. CIT (Bang.)	(2000) 75 ITD 100 / (2000) 69 TTJ 779 (2000) 246 ITR (AT) 1	Association of Persons / Capital Gain	4 / 45	
14.	Arvind Mills Ltd. vs. ITO (Ahd.)	(1982) 1 ITD 872 / 2 SOT 207 – Bonus / Business Expenditure	Interst paid to Government	28(i), 37(1), 220 (2)	
15.	Assam Tea Co. vs. ITO (Asr.)	(2004) 82 TTJ 729	Reassessment	147(a)	
16.	Associated Agricultural Development Foundation vs. ITO (Delhi)	(1989) 31 ITD 29	Income – Assessable	2(24)	
17.	Asstt. CGT vs. Jagan Nath Sayal (Delhi)	(2000) 72 ITD 1	Wealth Tax – Asset – Shares	2(e)	
18.	Appollo Tyres Ltd. vs. Asst. CIT (Delhi)	(2004) 89 ITD 235	Actual cost – Foreign Exchange earned on cancellation of contract has to be reduced from cost of plant and machinery	43A	

19.	Asstt. CIT vs. Ajax Investment Ltd. (Ahd.) vs. Acro Prelish Inv. Ltd.	(2003) 78 TTJ 847 (2003) 263 ITR (AT) 42	Company – Subsidiary	2(18)(b)
20.	Asstt. CIT vs. Gayatri Traders (Hyd.) 56 TTJ 303	(1996) 58 ITD 121 / (1996) Accounts Audited	Penalty – Failure to Get	271B r.w. 44AB
21.	Asstt. CIT vs. K. S. Shetty & Co. (Chennai)	(2003) 81 TTJ 158 / (2003) 87 ITD 259 / (2003) 263 ITR (AT) 71	Business / Loss – Chitfund	28(1) & 37(1)
22.	Asstt. CIT vs. Rajinikanth (A.) (Mad.) 75 TTJ 511	(2002) 81 ITD 84 / (2002) Exemption – Insurance Policy	Wealth Tax – Asset /	2(e) / 5(1)(vi) r.w. 2(e)
23.	Asstt. CIT vs. Soni Photo Films (P.) Ltd. (Delhi)	(1998) 67 ITD 81 / (1999) 64 TTJ 682 (2000) 245 ITR (AT) 11	Appellate Tribunal – Additional Grounds / Investment Allowance	254 / 32A
24.	Asstt. CIT vs. Srinivasulu (M.) (Hyd.) 59 TTJ 393	(1997) 62 ITD 159 / (1997)	Assessment –Prima facie adjustment	143(1)(a)
25.	Asstt. CWT vs. Davender Kumar Jain (Delhi)	(2000) 67 TTJ 1	Wealth Tax – Asset – Shares	2(e)
26.	Asstt. CIT A. Rajnikant	(2002) 81 ITD 84 / (2002) 75 TTJ 511 (2003) 261 ITR (AT) 98	Wealth Tax – Asset / Exemption – annuity	2(e) / 5(1)(vi) r.w. 2(e)

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27.	B. S. Malhotra (HUF) vs. Dy. CIT (Pune)	(1996) 55 TTJ 493 Return	Reassessment – Material particulars – Wealth Tax	147(a)
28.	Babu Lal Grand Sons Family Trust Vs. ITO (Delhi)	(1989) 31 ITD 52	Revision	263
29.	Bakulesh T. Shah vs. Dy. CIT (Mum.) 78 TTJ 358	(2002) 81 ITD 89 / (2002)	DTAA – Constitution of India/ Income Accrual	91 r.w. art. 371F(k) & (n) / 5
30.	Baldevraj Sitaram Malhotra (HUF) vs. ITO (Pune)	(1996) 58 ITD 35 / (1996) 55 TTJ 493	Reassessment	147(a)
31.	Bangalore Trading Corpn. vs. ITO (Mad.)	(1983) 3 SOT 26	Appeal – Revised Return	139(2), 215
32.	Bela Singh Pabla vs. ITO (Delhi)	(1982) 1 ITD 370 / (1983) 2 SOT 410	Assessment – Direction – IAC	144B, 143(3), 147
33.	Bhilal Engg. Corpn. Ltd. vs. Dy. CIT (Nag.)	(1997) 63 ITD 223 / (2002) 75 TTJ 505	Depreciation	32
34.	Bijoynagar Tea Co. Ltd. vs. ITO (Cal.)	(1983) 3 SOT 116 Allowance	Agricultural Development	35C
35.	Biju Patnaik vs. WTO (Delhi)	(1982) 12 TTJ 25 / (1982) 1 SOT 623 / (1983) 3 ITD 693	Wealth Tax Rule 1BB – Valuation – Residential House	7(1) / (4)
36.	Birad Kanwar of Udaipur vs.	(1983) 3 SOT 230 ITO (Jp.)	Income	4, 10(2), 10(19)
37.	Blackie & Sons (India) Ltd. vs. ITO (Bom.)	(1983) 3 SOT 72	Perquisists – Medical Expenses	17, 40 A(5)
38.	Brahadeeswaram (R.) vs. ACED (Mad.)	(1983) 3 SOT 101	Additional Grounds – Appellate Tribunal – Power	63, 34(1)(c)

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39.	Cadell Weaving Mills Co. (P.) Ltd. vs. Asstt. CIT (Mum.)	(2002) 80 ITD 79 / (2003) 78 TTJ 369	Book Profits – Zero Tax Companies	115J, 10(3)
40	Cadell Wvg. Mills Co. (P.) Ltd. vs. Asstt. CIT (Bom.)	(1995) 55 ITD 137 / (1995) 53 TTJ 538 (1996) 217 ITR 51 (11)	Casual & Non-recurring receipts / Capital Gain	10(3) r.w. 45 / 45 r.w.2(47)

41.	Century Iron & Steel Ltd. vs. ITO (Delhi)	(1989) 31 ITD 117 / (1990) 37 TTJ 43	Deductions – New Industrial undertakings	80HH r.w. 80AB
42.	Chadha (R. D.) vs. CIT (Delhi)	(1982) 2 ITD 592 / (1983) 2 SOT 77	Exemption – Terminal Benefit	10 (10A) (i)
43.	Chandiok (J.C.) vs. Dy. CIT (Delhi)	(1999) 69 ITD 75 / (1999) (1999) 238 ITR (ITAT) 89 64 TTJ 1	Casual & Non-recurring receipts – Capital Gain	10(3) r.w. 2 & 5
44.	Chemosyn (P) Ltd. vs. ITO (Bom.)	(1992) 42 ITD 1 / (1992) 42 TTJ 403	Business Expenditure Advertisement – Publicity Samples.	37 (3A) / 37 (3B)
45.	Chenni Chattiar (C) vs. WTO (Mad.)	(1982) 1 ITD 232 / (1984) 14 TTJ 540/1 507 637	Wealth Tax – HUF – Reassessment	20 r.w. 17
46	Chhabria Trust vs. Asstt. CIT	(2003) 80 TTJ 861 / (2003) 87 ITO 181 (2003) 264 ITR (AT) 12	Block of assets – Depreciation Capital Gain	2(11) r.w. 50
47.	CIT vs. Highway Construction Co. (P) Ltd (Cal.)	(1986) 15 ITD 66	Reference – Question of Law	256
48.	CIT vs. Mahalakshmi Glass Works (P) Ltd. (Bom.)	(1983) 3 SOT 8	Reference Application	256(1), 2(16) 121
49.	Colaba Central Co-op. Consumers Wholesale and Retail Stores Ltd	(1981) 12 TTJ 379 / (1983) 3 SOT 46 vs. ITO (Bom.)	Co-operative Society – Deduction	28, 37 (1)
50.	Colonisers vs. Asstt. CIT (Hyd.)	(1992) 41 ITD 57 / (1992) 45 TTJ 114	Appellate Tribunal – Powers – Violation of Natural Justice void ab initio	254 r.w. 68
51.	Craig Harvey (H. F.) vs. ITO (Mad.)		(1988) 25 ITD 1	Capital Gains 55(2)(i) r.w. 49(2)
52.	CWT vs. Ramesh Mafatlal	1973 T & P Vol. 5 - 6		
53.	CWT vs. Razia Begum (Smt.) (Delhi)	(1985) 11 ITD 677 Rule 1BB	Reference – Question of Law	27 (1)

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54.	Daks Copy Services (P.) Ltd. vs. ITO (Bom.)	(1989) 30 ITD 223 / (1989) 34 TTJ 604	Investment – Allowance is Allowable on Zerox and Photo Copying Machine	32A, 255
55.	Dayakar (P.) vs. ITO (Hyd.)	(1995) 53 ITD 25	Salaries – Exemption – conveyance – Development Officer allowance	10(14)
56.	Deb. Sahitya Kuthir (P) Ltd. vs. ITO (Cal.)	(1983) 3 SOT 450	Industrial Company – Manufacturing	80J(4), 2(7)(d)
57.	Deo (R.K.) vs. ITO (Hyd.)	(1984) 9 ITD 274 / (1985) 21 TTJ 343	Income from House Property	27(ii)
58.	Des Raj Nagpal vs. ITO (Delhi)	(1985) 13 ITD 800	Capital Gain – Long term – Short term	54, 2(42A)
59.	Detective Devices (P.) Ltd. vs. ITO (Hyd.)	(1987) 22 ITD 9 / (1988) 30 TTJ 327 Transfer / Business Income – Deposit – Company / Depreciation	Appellate Tribunal – Powers – Additional Grounds /	254 / 2(47) / 28(i) / 32
60.	Devendra Kumar Jain vs. Asstt. CWT (Delhi)	(2000) 67 TTJ 1	Wealth Tax – Asset – Shares	2(e)
61.	Dhanwatay (Smt. S. V.) vs. WTO (Nag.)	(1989) 28 ITD 135 / (1989) 33 TTJ 136, (1983) 2 SOT 31	Valuation officer – Reference/ Individual	16A r.w. 3A, 3

62.	Duncans Agro Industries Ltd. vs. IAC (Delhi)	(1990) 33 ITD 61 / (1990) 37 TTJ 480 Proceedings	Acquisition of Immovable Properties – Initiation of	269C
63.	Dwarkadas & Co. (P) Ltd. vs. ITO (Bom.)	(1982) 1 ITD 303 / (1982) 13 TTJ 107 / 1 SOT 495	Revision – Commissioner, Appeal	263, 246, 214
64.	Dy. CIT vs. Catholic Syrian Bank Ltd. (Coch)	(2004) 82 TTJ 181 / (2004) 88 ITD 185	Bad debts	36(1)(vii) & 36(1)(viia)
65.	Dy. CIT vs. Kicha Sugar Co. Ltd. (Delhi)	(1996) 57 ITD 11 / (1996) 55 TTJ 4	Bonus – Customary – Business Expenditure	37 (1), 36 (1)(ii),
66.	Dy. CIT vs. Nagarjuna Investment Trust Ltd. (Hyd.)	(1998) 65 ITD 17 / (1998) 62 TTJ 33	Income – Accrual – Method of Accounts	5 r.w. 145
67.	Dy. CIT vs. Reliance Industries Ltd. (Mum.)	(2004) 82 TTJ 765 (2004) 88 ITD 273	Income – Capital Revenue Receipt – Precedent – Tribunal	4
68.	Dy. CIT vs. Shashi Kapur (Delhi)	(1991) 39 ITD 47 / (1991) 41 TTJ 549	Wealth Tax – Valuation of assets – Interest of partner in firm	7
69.	Dy. CIT vs. CWC Wires (P) Ltd. (Hyd.)	(2004) 89 ITD 1 (2004) 83 TTJ 1	Business disallowance exim duty paid in advance cannot be allowed as deduction	43B
70.	Dy. CIT vs. Shree Lalit Fabrics (P.) Ltd. (Chd.)	(1992) 41 ITD 119	Investment Allowance – Manufacture / Tribunal – Special Bench	32A / 255 (3)
71.	Dy. CIT vs. Vinod S. Kapur (Delhi)	(1991) 39 ITD 47 / (1991) 41 TTJ 549	Wealth Tax - Valuation of assets - Interest of partner in firm	7

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72.	East Coast Marine Products (P) Ltd. vs. ITO (Hyd.)	(1983) 4 ITD 72	Revision - Direction of IAC / Commission	263
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233.	Mid East Portfolio Management Ltd. vs. Dy. CIT (Mum.)	(2003) 81 TTJ 37 / (2003) 87 ITD 537	Depreciation – Sales & Lease back	32(1) & 43(1)
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235.	Modipon Ltd. vs. ITO (Delhi)	(1983) 3 SOT 328	Development – Rebate – New Industrial Undertaking	33, 80J(i)
236.	Mohammed Omer Family Trust vs. ITO (Hyd.)	(1992) 40 ITD 1 / (1991) 41 TTJ 459	Trust – AOP Business Expenditure	4 r.w. 161(1A), 161(1A), 37(1)
237.	Mohan Rao (K.S.). vs. ITO (Hyd.)	(1982) 1 SOT 34 / (1983) 4 ITD 1	HUF or Individual – Inheritance by son	4
238.	Mohanlal Hargovinddas vs. IAC (Bom.)	(1989) 31 ITD 97 / (1989) 35 TTJ 340	Business Expenditure – Good will	37(1)
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240.	Mridu Hari Dalmia vs. ITO	(1984) 7 ITD 761	Salaries – Perquisites fair rental value	17(5)
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250.	Octavius Steel & Co. Ltd. vs. Asstt. CIT (Kol)	(2002) 83 ITD 87 / (2003) 78 TTJ 170 (2003) 260 ITR (AT) 109	Capital Gains – Conversation investment in stock-in-trade	45(5) 2(47)(vi)
251.	Oil & National Gas Corpn. Ltd. vs. Dy. CIT (Delhi.)	(2002) 83 ITD 151 / (2002) 77 TTJ 387 (2003) 261 ITR (AT) 1	Business Loss – Expenditure – Foreign exchange loss	28(i) r.w. 37(1) & 43 A
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273. Rajendra Ratilal vs. WTO (Bom.)	(1986) 15 ITD 61 / (1986) 24 TTJ 392	Wealth Tax – Exemptions	5(1)(xxxii)
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282. Ratanchand Chordia M. vs. ITO (Mad.)	(1982) 1 SOT 78	Income from House Property – Annual value	23(1)
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291. Sahney Steel & Press Works Ltd. vs. ITO (Hyd.)	(1981) 11 TTJ 351 / (1982) 1 SOT 316 / (1983) 4 ITD 6	Remission or cessation of liability – Subsidicy	41(1) r.w. 28(iv)

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316. Sri Koda Katla Rice Mill vs. ITO (Hyd)	(1979) 8 TTJ 566	Deduction – confiscation of goods	28
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341.	West Coast Paper Mills Ltd. vs. Jt. CIT (Mum.)	(2003) 81 TTJ 37	Depreciation	32(1) & 43(1)
342.	Wood Craft Products Ltd. vs. ITO (Cal.)	(1982) 1 ITD 1 / (1982) 1 SOT 407	Deductions – Religious nature	80 G
343.	WTO vs. Anik Pal Chowdhury (Cal.)	(1988) 25 ITD 287 / (1988) 31 TTJ 230	Wealth Tax – Rule 1D – Valuation of Assets	7(1) r.w. 1D of W.T. Act
344.	WTO vs. Chettiappa Chettliar (S. V.) (Mad.)	(1986) 18 ITD 252 / (1986) 26 TTJ 167 Memorandum	Wealth Tax – Valuation of shares, Restriction on	7 r.w. 1D
345.	WTO vs. Gopichand (Jp.)	(1986) 16 ITD 142 / (1986) 24 TTJ 541	Wealth Tax – Exemptions – Residential House	5(1)(iv)
346.	WTO vs. Gulabchand Jhabakh (L.) (Mad.)	(1982) 1 SOT 613 / (1982) 14 TTJ 465	Wealth Tax Exemption	5(1)(iva)
347.	WTO vs. Kirloskar (S.R.) (Pune)	(1984) 8 ITD 288 / (1984) 20 TTJ 361	HUF	4 r.w. 8
348.	WTO vs. Krishna Murthy (R.) (Hyd.)	(1992) 40 ITD 89 / (1992) 42 TTJ 627 (1992) 1981 ITR 131 (AT)	Wealth Tax – Hindu Undivided Family – Partition	20 r.w. 171
349.	WTO vs. Mistry (K. M.) (Bom.)	(1995) 52 ITD 39 / (1995) 51 TTJ 678	Wealth Tax – Net Wealth – Assets belonging to assessee	2(m)
350.	WTO vs. Narendra Kumar Gupta (Delhi)	(1983) 4 ITD 694	Wealth Tax – Asset / Valuation	2(e), 7(2) r.w. rules 2C & 9B
351.	WTO vs. Niranjan Narottam (Individual) (Ahd.)	(1985) 14 ITD 27 / (1985) 23 TTJ 564	Wealth Tax – Valuation – Self – Occupied Residential house	7(4)
352.	WTO vs. Seth Sudhir Kumar Modi (Delhi)	(1986) 24 TTJ 289	Wealth Tax – Valuation	7(1)
353.	WTO vs. Seth Sudhir Kumar Modi (Delhi)	(1985) 14 ITD 194 / (1986) 24 TTJ (Delhi) 289	Wealth Tax – Rule 1D – Valuation of Asset – Shares – Firm – partner	7, Rule 10
354.	WTO vs. Shaileshchandra D. Shah & Ors. (Ahd.)	(1995) 83 Taxman 352/(1995) 52 TTJ 354	House – Partners – House Property – Exemption	5(1)(iv)
355.	WTO vs. Shashikant K. Doshi (Pune)	(1985) 22 TTJ 13	Wealth Tax – Exemption	5(1)(iv)
356.	WTO vs. Sheth (C. J.) (Bom.)	(1983) 4 ITD 706	Wealth Tax – Valuation of Assets – Unquoted Equity shares / Advance Tax Liability	7
357.	WTO vs. Shri Girishchandra Dahyabhai Family Trust (Ahd.)	(1995) 52 TTJ 354	House – Partners – House Property – Exemption	5(1)(iv)
358.	WTO vs. Shyam Mohan Rawat (Jp.)	(1986) 15 ITD 96 / (1986) 25 TTJ 61	Wealth tax – Valuation of assets – Stock	253 r.w. 27, 143, 47(ii)
359.	WTO vs. Sona S. Sapatwalla (Mrs.) (Bom.)	(1983) 3 SOT 105	Wealth Tax Assets – Exemption	2(m)(ii)

Note : Decisions covered upto 89 ITD, 268 ITR (A7), 84 TTJ and 3 SOT.

CHAPTER

14

PENDING SPECIAL BENCHES CASES

INCOME TAX APPELLATE TRIBUNAL
STATEMENT SHOWING THE LIST OF SPECIAL BENCH CASES PENDING AS ON 31-8-2004

MUMBAI BENCHES

1) Whether on the facts and in the circumstances of the case the decision in the case of Parsi Zoroastrian Anjun Trust, how V.C.I.T. (163 ITR 832) was applicable in the assessees case.

Bai Sonabai Hirji Agiary Trust.

ITA No. 6269 /B/85

2) "Whether the interest payable to the assessee under section 244A of the Income-tax Act, on the tax refundable in the proceedings under section 143(1)(a) of the Act, accrued to the assessee in the year of its receipt or in the year in which the proceedings under section 143(1)(a) attained finality?"

M/s. Avada Trading Co. Pvt. Ltd.

ITA No. 805/Mum/01 – A. Y. 1997-98

3) "Whether in determining the profits and gains of business or profession for purpose of section 32AB, 'any amount' withdrawn from reserves or provisions and credited to the profits and loss account is to be reduced from the profit computed in accordance with requirements of Part- II & III of Schedule-VI to the Companies Act (1) 1956 and whether ascertained liabilities referred to in Clause-V of section 32AB is relevant only for addition in the profits and not for reduction."

M/s. Indian Plywood Mfg. Co. Ltd.

ITA 2186/Mum/91 – A. Y. 1987-88

4) 1. "Whether in the facts and circumstances of the case, the bottles costing less than Rs. 5,000/- constitute part of 'block of asset' as contemplated under section 2(11) of the I. T. Act, 1961 and thereby attracting the provisions of section 50 of the Act?"

2. "Whether in the facts and circumstances of the case, if the answer to question No. 1 is in the negative, the old proceeds realized by the assessee from the sale of old bottles are revenue receipts in nature?"

M/s. Jaihind Bottling Co. Pvt. Ltd.

ITA Nos. 6609 & 7553/M/94, 6610 & 7554/M/94, 8790 & 8701/M/95 A. Y. 1990-91, 1991-92 & 1992-93

5) "Whether on the facts and circumstances of the case and in law, the "Settlement" dated 3rd March, 1987 continues to govern the computation of the income even after 31-3-1987 and would apply to the assessment years subsequent to the asst. year 1987-88?'

M/s. Warner Brothers (FE) Inc.

ITA Nos. 94 & 4703/M/99 2362/M/00 7237/M/02 C.O. No. 169/M/00

A.Y. 1995-96 to 1998-99

6) 1. Whether provisions of S. 40A(2) of IT Act, 1961 are applicable to payments made by a Co-operative Society to its members towards purchase price of cane supplied or as Khodki charges?

2. If the answer to Q. No. 1 is in the affirmative, whether on the facts and in the circumstances of the case, any portion of the price actually paid by the assessee for sugarcane supplied as fixed by Commissioner or sugar (who is also the Registrar of Co. op. Sugar Factories representing the State) is liable to be disallowed u/s. 40A(2) as excessive or unreasonable having regard to the legitimate business needs?

3. Whether on the facts and in the circumstances of the case, any portion of sugarcane price and khodki charges fixed as above and actually paid by the assessee is liable to be disallowed as non-business expenditure?

4. Whether on the facts and in the circumstances of the case, any portion of cane price/ khodki charges actually paid is liable to be disallowed as "bonus" as defined u/s. 2(4) of Maharashtra Co-op. Societies Act, 1960?

5. Whether on the facts and in the circumstances of the additional amount paid by the society for procurement of sugarcane is liable to be disallowed under section 40A(2) of I.T. Act, 1961 as excessive or unreasonable expenditure.

Manjara Shetkari SSK Ltd. ITA Nos. 647 & 657/PN/96

Samartha SSK Ltd. ITA Nos. 103 &69/PN/97

Tuljabhavani SSK Ltd. ITA Nos. 104 & 225/PN/97

7) "On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in holding that provision of section 73 read with explanation thereto are not applicable in the assessee company and thereby further erred in directing to allow the set off losses incurred in the business of purchase and sale if shares against the other income. The said view is well supported by the decided case by Hon'ble Calcutta High Court in the case of *Eastern Aviation & Industries Ltd – vs. C. I. T. reported at 208 ITR 1023."*

Concord Commercials Pvt. Ltd.

ITA No. 5220/M/94 – A.Y. 1989-90

8) 1. "Whether in view of the decision of the Hon'ble Supreme Court in the case of IPCA Laboratories Ltd. (2004) 266 ITR 541 the ratio laid down by the Hon'ble Delhi Special Bench in the case of *M/s. Lalson Enterprises vs. DCIT (2004) 89 ITD 25 (SB)*, respect of Question (ii) before the Special Bench which read as under, is no more good law:

"Whether the proviso to deduction 80HHC (3) can be applied in a case where the export profit computed as per clause (a), (b) or (c) of Sub-section (3) or aggregate thereof is a negative profit (loss) has to be adjusted / set off against the amount of deduction allowable under the proviso to section 80HHC (3) or the loss computed under all or any of the clause (a), (b) or (c) of section 80HHC (3) has computed under proviso to section 80HHC (3) of the Income-tax Act?

2. "Whether in any view of the matter, if the figure as computed under clause (a), (b) or (c) of sub-section (3) is a negative figure, would an assessee be entitled to a deduction under section 80HHC if after setting off the said negative figure against the amount computed under the proviso to sub-section (3), there remains a positive figure?"

*B. Sora*bji vs. IAC

DELHI BENCHES

9) Whether the Income–tax Appellate Tribunal has powers to adjudicate upon the issue relating to validity of the search conducted u/s. 132 while disposing the appeal against the block assessment.

Promain Ltd. IT (SS) A 325/D/97

10) 1. Whether the proviso to sec. 143(2) of the I. T. Act, 1961 which mandates the issuance of notice within 12 months from the end of the return is filed, also applies to the returns filed pursuant to notice u/s. 148 of I. T. Act?

2. If the answer to the aforesaid question is in the affirmative then what is the effect of non-service of notice under the proviso to sec. 143(2) within the time prescribed, to the returns filed under pursuant to sec. 148 of the I. T. Act?

Shri Raj Kumar Chawla, Delhi ITA No. 4020/Del/2000

Shri Rajiv Chawla, Delhi ITA No. 4078/Del/2000

Shri Ajay Kumar Chawla, Delhi ITA No. 4022/Del/2000

A.Y. 1995-96

11) "Whether on the facts and in the circumstances, the revenues earned by the appellant from supply of equipment and software to Indian Telecom operators were taxable in India?"

M/s. Motorola Inc., N. Delhi

ITA No. 2455/Del/2000 A. Y. 1997-98

M/s. Erricsson Radio Systems AB, Delhi

ITA No. 815, 1798/01 & C.O. 60/01

M/s. Nokia Networks OY.

ITA No. 1963,19643

Finland – ITA No. 2510/01

12) "On the facts and in law, whether assessee Royal Jordanian is a "person" which in the meaning of the Act and its income earned and accrued in India from the commercial activity had absolute immunity from tax under the Income-tax Act, 1961 particularly when the subject of the European Convention on State Immunity Act, 1978 in England."

M/s. Royal Jordanian Airlines, New Delhi

ITA No. 5252/Del/1998

KOLKATA BENCHES

13) "Whether even after insertion of Clause 4(B) in section 80HHC, deduction under section 80HHC is to be made before the application of Rule 8. In other words, whether the deduction u/s. 80HHC, under the amended law, is to be computed with regard to entire composite profits or only 40% thereon?"

Meleod Russel (I) Ltd.

ITA No. 2341/Cal/96

14) "Whether the provision made for doubtful debts advances & Investments; i.e., for unascertained liabilities, falls within the purview of adjustments u/s. 115- JA of the Income-tax Act, 1961 and whether the A. O. was justified to made computing the book profits?"

M/s. Usha Martin Inds. Ltd.

ITA No. 1304/Cal/2000 – A. Y. 1997-98

15) "Whether on the facts and in the circumstances of the case, the expenditure incurred by the assessee towards development fee and fees for operating on the floor paid to Calcutta Stock Exchange Association, towards admission fee and technology cost paid to OTC Exchange of India and towards Non-adjustable deposit for membership subscription and deposit for Very Small Aperture Terminal (VSAT) paid to National Stock Exchange of India could be treated as revenue or capital expenditure?"

M/s. Peerless Securities Ltd.

ITA No. 251/Cal/2000 – A. Y. 1996-97

16) "Whether on the facts and in the circumstances of the case the assessee engaged in the real estate business and following project completion method, is justified in claiming project expenditure on accrual basis in the year of incurring, when income is reflected only in the year of completion of the project."

M/s. Peerless Developers Ltd.

ITA No. 168/Cal/01 – A. Y. 1996-97

17) "Whether, the provision of interest by a permanent establishment of a foreign enterprises payable to head office and/or other branches outside India is allowable deduction and if so, whether provisions of sec. 40(a)(i) of the I.T. Act, 1961 is attracted in respect of such payments / provisions?"

ABN Amro Bank N. V.

ITA No. 694-695/Cal/02 – A. Y. 1997-98 & 1998-99

18) "When the loss in share dealing suffered by the assessee is more than the income of the assessee from other sources in the assessment year 1997-98, whether the assessee can be said to be having principal business of granting loans and advances and not hit by Explanation to section 73 of the I. T. Act merely because in the preceding assessment years the assessee was not dealing in shares but was having interest income from leasing."

M/s. Venkateshwar Investment and Finance Ltd.

ITA No. 296/Kol/2002

CHENNAI BENCH

19) Contribution to Approved Gratuity Fund if more than actual valuation is the excess over the actuarial valuation not allowable as expenditure?

M/s. Rajalakshmi Mills Coimbatore Ltd.

ITA No. 1074/Mds/87

HYDERABAD BENCH

20) "Whether on the facts and in the circumstances of the case, he levy of surcharge on the charged under s. 113 in respect of the undisclosed income of the block period from 1-4-1989 to 18-11-1997 which is prior to insertion of proviso to s. 113 is valid in law?"

M/s. Merit Enterprises. vs. D. C. I. T., C. C. –I Hyderabad.

IT (SS) A No. 31/Hyd/01 (Blocked period 1-4-1989 to 18-11-1999)

BANGALORE BENCH

21) "Whether the impugned order passed by the Tribunal without affording any opportunity to hear the department can be held to be legal and valid?"

Mrs. Arathi Shenoy & Others

MP No. 113/Bang/01 77, 112-114/Bang/01 (ITA 946, 952 to 957/B/98, 959/B/98)

AMRITSAR BENCH

22) 1. "Whether on the facts and the circumstances of the case, the re-assessment proceedings initiated by the A. O. and confirmed by the CIT(A) are valid?

2. If answer to question No. 1 above is affirmative, as to whether the cash credits introduced by the assessee(s) are genuine?

Sh. Durga Parshad Goyal, Moga

ITA No. 663-664/ASR/95, 380/ASR 95

Bindra Machinery Store

380/ASR/95

United Bricks Inds.

377/ASR/95

Surinder Pal Bansal

378/ASR/95, MA 44/95

Daluram Shivcharan Dass

389/ASR/95, MA 40/95

CHANDIGARH BENCH

23) Having regard to the provisions of sections 271D and 271E and section 275 of the Income-tax Act, whether period of limitation for purposes of section 275 of the Act is to be reckoned from the date when assessment proceedings are completed or from the date when penalty proceedings are initiated by the JCIT?

M/s. Dewan Chand Amritlal Hissar

ITA No. 1244/Chd/98

M/s. Bhagwandas Lalit Mohan, Sirsa

ITA No. 1245/Chd/98

CUTTACK BENCH

24) "Whether on the facts and circumstances of the case and as per provisions of sec. 55(2)(b)(i) the assessee on 1-4-1981 or the valuation arrived at by the department by applying the cost inflation index method 1-4-1987 was the correct method for arriving at fair market value of assets as on 1-4-1981".

Shri Hiralal Lokchandani

ITA No. 555/CTK/2002 – A. Y. 1998-99

AHMEDABAD BENCHES

25) 1. Whether on the facts and in the circumstances of the case the Appellate Tribunal has substantially erred in Law in deleting the addition made u/s. 32AB(6) of the Act.

2. Whether on the facts and in the circumstances of the case the Appellate Tribunal has substantially erred in law in directing to allow separate u/s. 80 HH and 80-I of the Act?

Nirma Industries Ltd., Ahmedabad

ITA No. 5131/Ahd/95 &4996/Ahd/96

26) "Whether penalty can be levied u/s. 271(1)(c) in cases where the assessed income is loss having regard to the amendment made by the Taxation Laws (Amendment) Act, 1975 and by the Finance Act, 2002?"

Akshal Pump & Engg. P. Ltd., Ahmedabad

ITA No. 1027/AHD/2003 for A.Y. 1995-96

M/s. Prayas Woollens P. Ltd., Baroda

ITA No. 312/AHD/2003 for A. Y. 1998-99

Kushal Electronics P. Ltd., Baroda

ITA No. 3294/AHD/2003 for A. Y. 1994-95

Alchems P. Ltd., Ahmedabad

ITA No. 1435/AHD/2003 for A. Y. 1996-97

Nature Cure P. Ltd., Ahmedabad

ITA No. 2137/AHD/2003 for A. Y. 1997-98

Apsara Processors P. Ltd., Ahmedabad

ITA No. 284/AHD/2004 for A. Y. 1986-87

Khedkar Brothers Trading Co., Anand

ITA No. 251/AHD/2002 for A. Y. 1986-87

Ravi Pharmaceuticals P. Ltd., Baroda

ITA No. 3832/AHD/2003 for A. Y. 1995-96

27) *Kodidas Vandas & Others*

ITA Nos. 2401/Ahd/2003 & others – question to be decided.

CHAPTER

15

ITAT – SUGGESTIONS MADE BY REGISTRAR FOR GUIDANCE OF ASSESSEES AND THEIR REPRESENTATIVES

Q.1 What is the objective of constituting the Income Tax Appellate Tribunal?

Ans. The Frank's Committee on Administrative Tribunals and Enquiries has stated that the advantages which Tribunals have over Courts lay in cheapness, accessibility, freedom from technicality, expedition and expert knowledge of the Members over the particular subjects. To achieve the said objective, the Income Tax Appellate Tribunal was set up on 25th January, 1941, as an independent quasi-judicial body to hear second appeals from the decisions of the Appellate Assistant Commissioner (now Commissioner of Income Tax (Appeals). The motto of the Income Tax Appellate Tribunal is "Sulabh Nyay Satvar Nyay". Criteria for its working is "(i) Cheapness; (ii) Accessibility; (iii) Freedom from technicalities; (iv) Expedition; and (v) an expert knowledge of the subject". Sections 252 to 255 of the Income-tax Act, 1961, sections 24 and 26 of Wealth Tax Act deal with provisions relating to appeals to the Appellate Tribunal. The Income Tax Appellate Tribunal ("The Tribunal") has formulated its own Rules and procedure – The Income Tax (Appellate Tribunal) Rules, 1963 ("the rules") in exercise of the powers conferred under section 255(5) of the Income-tax Act. It is functioning under the Union Ministry of Law and Justice and not under the Union Ministry of Finance.

Q.2 When was the Tribunal founded?

Ans. The Tribunal was founded on 25th January, 1941.The Tribunal was constituted on the recommendations of the Enquiry Committee Report, 1936. A Bill to amend the Income-tax Act, 1922 was introduced in the Central Legislative Assembly to set up the Income Tax Appellate Tribunal. This was referred to the Select Committee. In pursuance of the recommendations of the said Committee section 5A was introduced in the Income-tax Act, 1922.

Q.3 What is the total number of Benches of the Tribunal and the places at which they are located?

Ans. In pursuance of sub-rule (1) of Rule 4 of the Rules, the present sanctioned strength is 53 benches at 25 places vide Order F. No. 63-Ad(AT)/97. The said order contains names of the place and number of Bench(es) along with Districts/States/Union Territories wherefrom appeals and applications shall be heard and determined by such Bench(es). 10 new Benches are likely to be added to the present strength. The headquarters of the Tribunal and its President is located at Mumbai. The President of the Tribunal is the head of the institution. He exercises administrative controls over all Benches of the Tribunal. The headquarters of the Sr. Vice President is at Delhi. There are seven zones, each zone has one Vice President, However, Mumbai has two Vice Presidents. Zones with Benches are: Mumbai Zone (13); Delhi Zone (11); Calcutta Zone (8); Chennai Zone (5); Ahmedabad Zone (5); Hyderabad Zone (6) and Chandigarh Zone (5). Tribunal Benches all over India are considered as one Institution.

Q.4 What is the language used in the Tribunal?

Ans. The language used in the Tribunal is English. However, parties may file documents in Hindi if they so desire, and the Bench may permit the use of Hindi in its proceedings or may pass orders in Hindi in the Benches located in the States notified in Notification No. F.71.Ad(AT)74 dated 5-5-1975.

Q.5 What are the Court hours of the Tribunal?

Ans. The Court timing is from 10.30 a.m. to 1.30 p.m. and 2.30 p.m. to 4.30 p.m., with certain exception in the North Eastern States. However, a large number of the Benches function only uptil 1.30 p.m. It is desirable that the bench exhausts the cause list for the day and if necessary re-assemble after the lunch break. Part heard matters are usually posted for hearing at 2.30 p.m. or next day. The cause-list is prepared in advance and is displayed at a conspicuous place outside the Court room.

Q.6 Whether proceedings before the Tribunal are open to the public?

Ans. Except cases in respect of which the Central Government has issued notification under sub-section (2) of section 138 of the Income-tax Act 1961, the proceedings before the Tribunal are open to the public. However the Tribunal may in its discretion restrict proceedings before it in a particular concerned case to the assessee and its representatives.

Q.7 What are the qualifications required for appointment as Member of the Income Tax Appellate Tribunal

Ans. The Tribunal has two types of Members – Judicial and Accountant

A Judicial Member shall be a person who has for at least ten years held a Judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade II of that Service or any equivalent or higher post for at least three years or an advocate in practice for at least ten years.

An Accountant Member shall be a person who has for at least ten years been in the practice of accountancy as a Chartered Accountant under the Chartered Accountants Act, 1949 (38 of 1949), or as a registered accountant under any law formerly in force or partly as a registered accountant and partly as a Chartered Accountant, or who has been a member of the Indian Income-tax Service, Group A, and has held the post of Additional Commissioner of Income-tax or any equivalent or higher post for at least three years.

In our opinion, individuals holding the rank of Commissioner and above, alone should qualify considering the sanctity and status of the prestigious institution. The amendment operative from 1-8-1998 needs re-consideration.

Q.8 How is a Member of the Tribunal selected?

Ans. As and when a vacancy arises the Ministry of Law and Justice makes an announcement in the leading newspapers and invites applications from eligible candidates. The Federation always publishes the details of vacancies for the post of the Members of the ITAT in its journal. The applications are scrutinized and thereafter, interviews are held at different places. The Selection Committee comprises of a Sr. Judge of the Supreme Court as Chairman, Union Law Secretary, President of ITAT and Member, Law Commission. There is complete transparency in the process of interview and has proved to be a satisfactory method for selection of Members.

Q.9 What is the pay scale and facilities provided to a Member?

Ans. The pay of the President / Senior Vice President is fixed at Rs. 26,000/-. The pay scale of Vice President is 24,050/- – 26,000/-; Member Rs. 22,400/- – Rs. 26,000/-. Residential accommodation, car, telephone and other facilities and perquisites are also provided. The pay is very much similar to a Judge of the High Court. With the efforts of the Federation and its member Associations further facilities have been provided to Members of the Tribunal *[All India Federation of Tax Practitioners jointly with Rajasthan Tax Consultants vs. Union of India (1998) 97 Taxmann 48 (Raj.); All India Federation of Tax Practitioners vs. Union of India [Income Tax Review Page 4, Vol. XXIII April, 1997] Union of India vs. All Gujarat Federation of Tax Practitioners & Others and Rajasthan Tax Consultants & Ors.* SLP (Civil) Nos. 6904-05 1998 of (2004) 6 AIFTP Journal (April) 34. Compliance report was called and submitted in April, 2004.

Q.10 Who has the power to transfer Members from one place to another?

Ans. Ever since the establishment of ITAT, the President of the ITAT has the power to transfer a Member from one place to another. In the year 1996, then Law Secretary issued a notification stating that, the Ministry of Law has the power to transfer Members. The said notification was challenged by the ITAT Bar Association, Mumbai and other associations. The Hon'ble Bombay High Court, stayed the operation of notification (*Income Tax Appellate Tribunal Bar Association vs. Union of India, 2350 of 1996*, Income Tax Review April 1997 page 1 to 3 Vol. XXIII No. 1). The matter was transferred to Hon'ble Supreme Court. The Hon'ble Supreme Court vide their order dated 5th January, 2004, upheld the order of Bombay High Court and prescribed certain guidelines (AIFTP Journal Vol. 6 No. 1 January, 2004 issue. As per guidelines, the President in consultation with Sr. Vice President and Vice Presidents, has the exclusive authority to transfer the Members from one place to another. [*Ajay Gandhi vs. B. Singh (2004) 265 ITR 451 (SC)].*

Q.11 What type of residential accommodation the Members of ITAT are entitled to?

Ans. The Members of ITAT are entitled to type VII accommodation. However, in city like Mumbai, there is great difficulty in getting the accommodation. When the Members were not getting the residential accommodation, the Federation filed a PIL before the Bombay High Court. After the said order of High Court the Members are being allowed accommodation quite expeditiously. (*All India Federation of Tax Practitioners vs. Union of India, 2464 of 1996,* Income Tax Review Page 4 Vol. XXIII April 1997).

However, even now, Members who have been appointed from the profession are not getting accommodation immediately as they do not have previous Government service experience. There is discrimination in allotting the residential accommodation to Members of ITAT. The matter was taken to the Bombay High Court and the Court directed to make representation to Government. The representation is pending before the Government for its consideration. In *Rajasthan Tax Consultants vs. Union of India (1998) 97 Taxmann 48 (Raj.),* the Court held that, Members of Tribunal are Judicial officers for all purposes as they discharge Judicial functions and their independence should be maintained by providing suitable official residential accommodation. The Hon'ble Supreme Court has laid down detailed guidelines for providing residential accommodation and other facilities to the Members of Income Tax Appellate Tribunal *(UOI vs. All Gujarat Federation & Others (supra).*

Q.12 Who can represent before the Tribunal and by what process?

Ans. Any legal practitioner, Chartered Accountant, tax practitioner or any person related to the assessee or person regularly employed by the assessee can represent on filing of the authority. An advocate should file Vakalatnama affixing Court fee and welfare stamps as per the State Law. In Maharashtra, it is Rs. 10/-, if he is member of Welfare scheme, additional welfare stamp of Rs. 2/-. Other persons have to furnish a Power-of-Attorney on non-judicial stamp of the value specified under the State Stamp Law. In Maharashtra, as per Article 48(a) it is Rs. 100/- for special Power of Attorney and Rs. 500/- in any other case. Court fee and stamp duty is as per State Law, and varies from State to State. In case of deficiency of stamp, the Assistant Registrar should bring it to the notice of the Bench. He himself cannot refuse to accept as stated in the letter of the President D.O. No. P/7/2003 dated 8-12-2003 published in (2003) 185 CTR (N & V) 48.

Stamp duty on documents authorizing appearance on behalf of assessee.

After the issue of Board's Circular No. 50 (XL-43) D of 1956, dated the 28th December, 1956, the question has been raised whether accountants and income tax practitioners should file vakalatnamas or powers of attorney and, if the latter, what the scales of court fees or stamp duties leviable thereon.

The Board have been advised that a document purporting to authorize a person who is not a pleader or mukhtar duly appointed under section 7 of the Legal Practitioners Act, 1879, is not a vakalatnama or a mukhtarnama and requires to be stamped as a power of attorney under the Stamp Act. Therefore, the power of attorney in favour of a registered accountant or an income-tax practitioner or any other person who is not a duly appointed mukhtar under section 7 of the Legal Practitioners Act is a power of attorney (and not a vakalatnama or mukhtarnama) and requires to be stamped not under the Court Fees Act, but under the provisions of the Stamp Act as in force in the particular area; i.e., subject to the local amendments.

C.B.R. Circular No. 9 (XL-48) of 1958 dated May 13, (1958) 34 ITR 19 St.

Q.13 Can authority be given to a firm to represent its client in a matter before the ITAT?

Ans. It is possible to give authority in the name of a firm. However, the partner who represents before the ITAT must sign as partner. Necessary information about the constitution of the partnership firm should be filed with the Bar Council/Bench/Institute.

Q.14 Whether a Sr. Advocate needs to file Vakalatnama?

Ans. An Advocate is designated as a Senior Advocate by the Supreme Court or a High Court by virtue of his ability, standing at the Bar or special knowledge or experience in law, deserving of such distinction. The Bar Council of India Rules, 1976, neither permit nor allow a Senior Advocate to file a Vakalatnama, to appear without junior Advocate in any Court or Tribunal. A senior Advocate should get precedence to address over other Advocates.

In *E. S. Reddi vs. The Chief Secretary, Government of A. P. (1987) SC 1550*, the Hon'ble Supreme Court discussed in detail the status of Sr. Advocate.

Q.15 Is there any dress regulation prescribed for the Members and for the Authorised Representative?

Ans. 15.1 Summer dress for the Members of the Tribunal shall be white shirt, white pant with black coat, a black tie or a buttoned-up black coat. In winter, stripped or black trousers may be worn in place of white trousers.

15.2 Rule 17A of the Rules prescribes the dress for the authorised representative of the parties (other than a relative or regular employee of the assessee). In the case of a male, a suit with a tie or buttoned up coat over a pant or national dress; i.e., a long buttoned up coat or dhoti or churidar pyjama is prescribed. The colour of the coat shall preferably be black. In the case of female representatives black coat over white or any other sober coloured saree. However, if the authorised representatives belongs to a profession such as law or Chartered Accountancy and they have been prescribed a dress for appearing in the professional capacity before any Court, Tribunal or other such authority, they may at their option appear in that dress in lieu of the dress mentioned above.

Sometimes, we observe that Advocates/Chartered Accountants appear before the Tribunal without wearing the prescribed dress and the Members adjourn the matters till the authorised representative appears in the prescribed dress. We suggest that any representative who appears before the Tribunal, should wear the proper dress to avoid unnecessary adjournment. Other persons appearing before the Tribunal shall also be properly dressed.

Q.16 How should Members of the Tribunal be addressed?

Ans. As per tradition, the Members are addressed as "Your Honour". Some representatives address Members as "Your Lordships" which is improper and need to be avoided.

Q.17 If the counsel has two cases on the same date in different Bench, which Bench has to be give preference?

Ans. According to established practice, the higher Court has to be given the first preference. e.g., if matters are before the Bench of President and also before other Bench, the Counsel has to give preference to Bench of President.

Q.18 How should communication be addressed to the Registrar of the Income Tax Appellate Tribunal?

Ans. All communications addressed to the Tribunal by the parties with regard to appeals or applications or cross objections, should bear the number and the Bench thereof, or if the number is not known, the date of filing thereof, should invariably be given. The Registrar vide letter dated 13-4-2000 has issued a Circular stating that the office of the ITAT should accept all the letters/correspondences addressed to the ITAT. It is learnt that some authorities are not honouring this instruction. The text of the Circular is reproduced hereunder:

Date : 13-4-2000

"Notice for General Public

Some complaints have been received by the undersigned from counsels for the assessees that some of the Officers of the Income-tax Appellate Tribunal are refusing to accept any appeals, applications etc. on flimsy grounds.

This is for the general information that no appeal and application can be refused by any of the Government servants, when submitted by the assessee. Defects, if any, are only to be pointed out in writing and placed before the concerned Bench for their orders.

If any members of the public face any such difficulty whereby any of the Officers have refused to accept appeals, applications etc. on flimsy grounds, immediate attention may kindly be drawn to Registrar in writing for further action at this end.

N. N. Nayak

Registrar

Income Tax Appellate Tribunal"

Q.19 Can the Registrar refuse to accept adjournment petition filed well before proposed date of hearing?

Ans. No. In *Shamalsha Girdhari vs. Asstt. Commissioner (2000) 72 ITD 469 (Bom.)*, the Tribunal held that, the Registrar cannot refuse to accept adjournment petition filed well before the proposed date of hearing.

Q.20 What is the meaning of Constitution of a Bench, SMC, Division Bench, Third Member and Special Bench?

Ans. 20.1 Constitution of a Bench:

Section 252 provides for the constitution of Income Tax Appellate Tribunal consisting of Judicial Members and Accountant Members to discharge the function conferred on the Appellate Tribunal. It also provides for appointment by the Central Government of one or more Members of the Tribunal to be Vice President(s) and of one of the Vice President(s) to be the Senior Vice President. It also provides that the Central Government may appoint Sr. Vice President or one of the Vice Presidents of the Appellate Tribunal to be the President. As per, section 255(1) the powers and functions of the Appellate Tribunal shall be exercised and discharged by Benches of the Tribunal, which shall be constituted by the President from amongst the Members of the Tribunal.

20.2 Single Member Bench (SMC):

The President or any other authorized Member may, sitting singly, dispose of any case which has been allotted to such Bench, but the jurisdiction of Single Member Bench is limited to cases where the total income of the assessee, as computed by the Assessing Officer does not exceed Rs. 5 Lakhs. Any appeal under the Wealth Tax Act cannot be heard by a Single Member Bench, as held in *CWT vs. S. Baliah (1978) 114 ITR 858 (AP)*, because there is no corresponding section in that Act. A Single Member Bench should follow the view of a Division Bench.

20.3 Division Bench:

Section 255(2) provides that ordinarily a Bench shall consist of two Members, one Judicial and the other Accountant Member. A Division Bench should follow the view of the Special Bench and a Co-ordinate Bench. In case of disagreement with the view of a Division Bench, it should request the President for constitution of the Special Bench. In case of wealth tax appeal a

Division Bench can be constituted by two Judicial Members or two Accountant Members also.

20.4 Third Member Bench:

Section 255(4) provides that if the Members of the Bench have a difference of opinion, the case is to be referred by the President of the Tribunal for hearing such points by one or more Members of the Tribunal and such point thereupon is to be decided in accordance with the majority view from amongst the Third Member and the Members who originally heard the case. The scope of an order under s.255(4) is very limited. The Third Member has only to agree with the Judicial Member or with the Accountant Member. The Third Member cannot give a different opinion, which would result in three opinions as against two opinions. (*ITO vs. Gurubachhan Singh J. Juneja (1995) 55 ITD 75 (95) (Ahd) (TM)*.

The Third Member cannot himself formulate a new point on which he could rest his decision. He is competent only to decide the points referred to him by the differing members – *Jan Mohammed vs. CIT (1953) 23 ITR 15 (All)*. The Third Member cannot act as if he was an Appellate Authority over the two Members of the Tribunal and direct them to rehear and dispose of the matter afresh – *ITO vs. Vice President, ITAT, Madras (1985) 155 ITR 310 (Mad)*. The jurisdiction of Third Member is not confined to the language of question(s) framed in reference but it extends to the entire sum and substance of opinion on specified point(s). The Third Member has power to consider the entire material, reasoning and conclusions recorded by the Members as well as contentions advanced on behalf of the parties and record his findings in such a manner that difference of opinion amongst members can be decided by a majority view – *Khopade Kisanrao Manikrao vs. ACIT* (2000) *74 ITD 25 (Pune) (TM)*. Once specific differences between the Members are referred to Third Member and referral order does not express any difference at all, in identifying difference between Members, Third Member can neither alter questions referred to him nor can modify question and/or reframe questions and then decide reframed question instead of original questions — *Niraj Petrochemicals Ltd. vs. ITO (2000) 73 ITD 1 (Hyd.) (TM)*. Also refer to the speech of Shri M. A. Bakshi, Vice President at Members Conference (2003) 87 ITD Special Issue (35-39).

20.5 Special Bench:

Section 255(3) provides for Constitution of a Special Bench consisting of three or more Members. The President, for disposal of a particular case or cases, may constitute such Special Bench. At least one of the Members of such Special Bench must necessarily be a Judicial member and one an Accountant Member. Such Bench may dispose of cases allotted by the President to it for disposal. The *Supreme Court in ITAT vs. DCIT (Assts) (1996) 218 ITR 275* has held that 'The High Court in the exercise of its powers under Article 226 of the Constitution cannot sit in appeal or judgement against the administrative decision of the President of the Appellate Tribunal who might have felt that the case was of all-India importance and was required to be decided by a larger Bench of the Tribunal of three Members. Such an administrative order is not open to scrutiny under Article 226 of the Constitution of India except in extraordinary cases wherein the order is shown to be a mala fide one'. In *C. Ramaiah Reddy vs. ACIT (2003) 87 ITD 439 (Bang.) (SB)*, it has been held that the President has the power to constitute a Special Bench for disposal of an appeal for any year, he can constitute it suo motu.

Q.21 Is the Tribunal a Court?

Ans. Technically speaking a Tribunal is not a Court. The Tribunal consists of a Judicial Member and an Accountant Member. An Accountant Member need not be well conversant with the technicalities of law, need not be a law graduate or an advocate or a law officer. An Accountant Member may be a tax authority well versed in accounting principles or a Chartered Accountant. The Income Tax Appellate Tribunal is not bound by any technical rules of the law of evidence. The National Tax Tribunal Ordinance, 2003 by article 16(1) has provided: "The National Tax Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided, by the principles of natural justice". Section 255(5) empowers the Appellate Tribunal to regulate its own procedure, subject to the provisions of the Act. It has formulated its own procedure by the Income Tax (Appellate Tribunal) Rules, 1963 and is not governed by the Civil Procedure Code. It is a final fact finding body but subject to the appellate jurisdiction under s. 260A of the I.T. Act and writ jurisdiction of the Hon'ble High Court. The Supreme Court has not recognized the Income-tax Appellate Tribunal as a "Civil Court" or as a "Court". The Supreme Court in *Ajay Gandhi vs. B. Singh (2004) 265 ITR 451 at 456* observd: "The Income-tax Appellate Tribunal exercises judicial functions and has the trappings of a Court".

Section 255(6) invests the Tribunal, for the purpose of discharging its functions, with all the powers which are vested in the income-tax authorities under section 131 regarding discovery, production of evidence, summoning witnesses and enforcing their attendance and compelling production of their books of account or other documents, and issuing commissions, etc. It further provides that the proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 226, and for the purpose of section 196 of the Indian Penal Code and the Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXXV of the Criminal Procedure Code. It is deemed as a Civil Court only for the specific purpose and not for all purposes or under the Civil Procedure Code. It is well settled that a deeming provision should be construed strictly.

The Rajasthan High Court in *Rajasthan Tax Consultants vs. Union of India (1998) 97 Taxman 48* did not consider the Members of the Income-tax Appellate Tribunal as Members of Judicial services i.e., District Judges etc. It observed: "It is true that the matter before the Supreme Court related to the members of judicial services; i.e., District Judges, etc. and technically the members of the Tribunal may not fall in that category but we are of the opinion that there is no reason that the directions given by the Apex Court should not be made applicable to the members of the Tribunals as for the purposes they are judicial officers and discharge judicial functions." (Page 56). The Hon'ble Court also observed at page 53 that Judicial Member of the Tribunal is equivalent in rank to Additional Secretary to the Government of India.

It is a familiar feature of modern legislation to set up bodies and Tribunals, and entrust them with work of a judicial, quasi judicial or administrative character, but they are not courts; in the accepted sense of that term, though they may possess, as observed by Lord Sankey L. C. in Sheel Co. of Australia's case (1931) Act 275, some of the trappings of a Court. *Hon'ble Venkatarama Ayyar J., in Virindar Kumar Satyawadi (1955) 2 SCR 1013,* has referred to several decisions of the Courts in England and Australia as to what are the essential characteristics of a Court as distinguished from Tribunals exercising quasi-judicial functions. Lord Sankey L. C.

enumerate some propositions on this subject: (1) A Tribunal is not necessarily a Court in this strict sense because it gives a final decision. (2) Nor because it hears witnesses on oath. (3) Nor because two or more contending parties appear before it between whom it has to decide. (4) Nor because it gives decisions which affect the rights of subjects. (5) Nor because there is an appeal to a Court. (6) Nor because it is a body to which a matter is referred by another body. *[See Rex vs. Electricity Commissioners (1924) 1 K. B. 171)"*

Q.22 What is the pendency of appeals before the Income Tax Appellate Tribunal?

Ans. As on 31-8-2004 the number of appeals pending before the Tribunal was 1,45,000, out of which 20,000 appeals could be decided by Single Member Bench. The pendency in Mumbai (35,000), Delhi (20,000), Ahmedabad (17,000), Chennai (13,000). President Shri Vimal Gandhi, with the help of Sr. Vice President and Vice Presidents is making sincere efforts to reduce the pendency to less than a lakh. The ITAT Bar Association, Mumbai, has volunteered to help the ITAT to group matters and dispose of covered matters. We are hopeful that, within two years, the pendency will reduce to less than one lakh. It is likely that a single member case may be disposed off in less than one year.

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Q.23 Who can file an appeal to the Tribunal?

Ans. Any assessee who is aggrieved by an order passed by Commissioner (Appeals) or an order passed by a Commissioner under section 12AA; or 263; or 271; or 272A; or 154 amending an order passed under s.263; or an order passed by the Chief Commissioner or a Director General or a Director u/s. 272A; may prefer an appeal to the Appellate Tribunal. Similarly, the Commissioner may prefer an appeal to the Appellate Tribunal against the order of Commissioner of Income Tax (Appeals). It has been held by High Courts that even a third party has a right of appeal if, as a result of an order passed in an appeal by the first appellate authority before whom he is not a party, he is saddled with a liability for any tax or other sum. (1957) *32 ITR 762 (Bom) Kikabhai Abdulali vs. ITAT; (1998) 234 ITR 617 (Ker) Benoy Kurian vs. Agrl. ITO; (1983) 144 ITR 557 (Cal) CIT vs. N. Ch. R. Row & Co.*

The Board has issued Instruction No. F-279/126/98 – 17 dated 27-3-2000 stating that the Commissioner should not file an appeal to the Tribunal if the tax effect is less than Rs. 1,00,000/-, appeal to High Court if the tax effect is less than Rs. 2,00,000 and appeal to Supreme Court if tax effect is less than Rs. 5,00,000/-. In *CIT vs. Camco Colour Co. (2002) 254 ITR 565 (Bom),* the Hon'ble Court dismissed the appeal of the Department, only on the ground that tax effect was less than the prescribed limit. There is divergence of opinion in various High Courts. The Board vide Instruction No. 6 of 2003 dated 17-7-2003 (F. No. 279 / Misc. 18/2003) once again clarified that for ascertaining the tax effect, interest and penalty also should be taken into consideration. According to the Board, the tax effect means the revenue effect, which denotes, the amount of tax, interest, penalty, fine or any other sum involved. In some cases the Tribunal has dismissed the appeal of the Department only on the ground that the tax effect is less than the prescribed limit. See *ITO vs. Smt. Tara Devipushpal (2003) 127 Taxman 155 (Jabalpur) (Mag.), ITO vs. Roopchand Jain (2003) 79 TTJ 406 (Nag.)*

Q.24 What is the time limit for filing an appeal?

Ans. An appeal has to be filed within 60 days of receipt of an order by the assessee. In the case of the Department the appeal can be filed within 60 days of the receipt of the order by the respective Commissioner. The memo of appeal shall be presented by the appellant in person or by agent or sent by registered post as to reach before the due date. The receiving authority has to endorse the date on which it is received and sign.

Q.25 Whether the Tribunal has the power to condone the delay in filing an appeal?

Ans. As per section 253 (5), the Appellate Tribunal may admit an appeal filed beyond the period of limitation if it is satisfied that there was sufficient cause for not presenting the appeal within time. It is desirable to file application for condonation, giving in detail reasons for delay supported by acceptable evidence / affidavit; along with the appeal. Negligence, inaction or mala fides would not constitute sufficient cause.

Instances where the delay was caused due to wrong legal advice or because the assessee was critically ill at the relevant time or that he was bona fide pursuing a remedy which did not lie, were held to be sufficient cause for condonation of delay. The *Supreme Court in Collector of Land Acquisition vs. MST Katiji & Others (1987) 167 ITR 471,* has held that the Court should have a pragmatic and liberal approach. The Hon'ble Supreme Court in *N. Balakrishnan vs. M. Krishnamurthy (1998) 7 SCC 123* condoned delay of 883 days and has observed that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not provide discretion only in the cases of delay within a certain limit. The only criterion is the acceptability of explanation irrespective of the length of delay. The primary function of the court, being the adjudication of the disputes between the parties and to advance substantial justice, it is not enough to turn down the plea of the litigant and to shut the door against him for some lapse on his part which has caused the delay. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor. The Supreme Court in *Vedabai vs. Shantaram Baburao Patil & Another (2002) 125 S.T.C. 375* observed that the Court has to exercise its discretion, keeping in mind that the principle of advancing justice is of prime importance and the expression "sufficient cause" should receive a liberal construction. The approach of Courts should be pragmatic so as to impart substantial justice.

Q.26 Mistake of an Advocate or Consultant, whether a reasonable cause for delay in filing of an appeal?

Ans. If the mistake of a professional is bonafide, it shall constitute a "reasonable cause". The Hon'ble Supreme Court in *Rafiq C. Munshilal AIR 1981 SC 1400, (1401)* observed that "we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted". Where an applicant engages a counsel, he would be justified in presuming that the counsel would attend to the case. The applicant cannot be made to suffer for the negligence of the counsel. An appeal cannot be dismissed because the counsel failed to appear when the case was posted for hearing. Also see *(1988) 172 ITR 331 (MP) Mahavirprasad Jain vs. CIT, (1979) 118 ITR 507 (SC) Concord of India Insurance Co. Ltd. vs. Smt. Nirmala Devi & Others, (1990) 181 ITR 183 (All) Kripa Shanker vs. CIT.* In *Municipal Corporation vs. Ramcharan AIR (2003) S.C. 2164,* the Court held that failure of the counsel on account of confusion is a sufficient cause.

Q.27 What documents should accompany the appeal memo?

Ans. Every memo of appeal shall be filed in the prescribed form (Form No. 36) in triplicate along with –

(i) Two copies of the order against which appeal is preferred (at least one of which shall be a certified copy);

(ii) Two copies of the order of the Income Tax Officer;

(iii) Two copies of the grounds of appeal before the first appellate authority;

(iv) two copies of the statement of facts, if any, filed before the said appellate authority;

(v) If appeal is against a penalty order (a) two copies of the assessment order;

(vi) If the assessment order is under s. 143(3) read with section 144A – two copies of the directions under s. 144A;

(vii) In case of reassessment under s. 147 – two copies of the original assessment order;

(viii) Receipted Challan of Tribunal Fee;

The Tribunal may accept the memo of appeal without the above but it is not advisable to file the appeal without the abovementioned annexures except when the appeal is getting barred by time. The appellant shall be intimated and requested to remove the defects by the Registry within the specified period. If no defect memo is issued – it shall be deemed to have been condoned as held in *ACIT vs. Rayang Timber Products (P) Ltd. (2002) 82 ITD 73 (Gau) (TM);*

(ix) Vakalatnama/Power of Attorney in favour of the Authorised Representative at the option of the assessee;

(x) In Revenues appeal – a certified copy of the order of the Commissioner directing the filing of the appeal.

The meaning of the “Certified Copy” has been liberalised by the Explanation to Rule 9 of the Rules vide letter No. 5068 AT/46 dated 17-12-1946. Copy of the order appealed against bearing the signature of the issuing or authorized officer and the seal of the office which issued the copy has been equated with the “Certified Copy”. A photo copy of such order duly authenticated by the appellant or his authorized representative as a true copy, will suffice.

Q.28 What are the fees payable for filing an appeal?

Ans. The Tribunal fee during 1-6-1992 to 30-9-1998 was as under:–

(a) Where total income assessed by A.O. was one lakh rupees or less – Rs. 250/-; and

(b) Where total income exceeded rupee one lakh – Rs. 1,500/-.

However, from 1-10-1998 the fee structure has been substantially enhanced and is as follows:-

(a)	Where total income computed by the A.O. is up to Rs. 1 lakh.	Rs. 500/-
(b)	Where total income computed is between Rs. 1,00,000/- and Rs. 2,00,000/-	Rs. 1,500/-
(c)	On total income exceeding Rs. 2,00,000/- at 1% of the assessed income, subject to a maximum of	Rs. 10,000/-.
(d)	Where subject matter of appeal relates to any other matter	Rs. 500/-

(e)	Stay Application under Rule 35A	Rs. 500/-
(f)	Rectification application under s. 254(2)	Rs. 50/-
(g)	On appeal by the Revenue and Cross Objections by the assessee	Rs. NIL

The Hyderabad Bench of ITAT in *Andhra Pradesh State Electricity Board vs. ITO (1994) 49 ITD 552* has held that (i) income computed by the A.O. alone has to be seen and not income after appeal effect; (ii) total income should be arrived at after set off of unabsorbed losses, unabsorbed depreciation etc.; (iii) Loss is negative income and would be considered as income; and (iv) Agricultural income is to be excluded for computation of total income. Also see *Tapan Kumar Saha vs. ITO (2004) 83 TTJ 350 (Calcutta Bench).*

The Mumbai Tribunal in *M/s. Narendra Valji Shah vs. ACIT* – ITA No. 3545/Mum./99, A.Y. 1995-96, Bench 'C', order dated 24-5-2000 held that the levy of penalty under s. 271B is not in any way related to the total income but is related to the total turnover and hence, the appeal fees would be Rs. 500/- only. The Mumbai Bench in *Amruta Enterprises vs. DCIT (2003) 84 ITD 172* has held that the quantum of penalty under s. 271(1)(c) could not be linked with assessed income, hence, the fee payable shall be Rs. 500/- and not based on total income computed by the A.O. Thus, Tribunal fee payable in respect of appeal against penalty levied under different sections shall be Rs. 500/- only. In *Seahorse Ship Agencies Pvt. Ltd. vs. Dy. CIT*, ITA No. 101/Mum/2001, Bench 'H' dated 15-3-2002, the Tribunal held that, in respect of appeal filed relating to penalty levied under section 158BFA(2), the Tribunal fees will be only Rs. 500/-. In *Vinod Khatri vs. ACIT, Delhi Special Bench (2004) 82 TTJ 911* held that the filing fee for appeal before Tribunal against penalty under s. 271(1)(c) is governed by clause (d) of section 253(6) and not by clauses (a), (b) and (c) thereof. Thus fee shall be Rs. 500/- only. This is also clarified by the CBDT Circular No. 779 dated 14-9-1999 (1999) 240 ITR St. 3 while adding clause (4).

If a single application for stay of recovery is made to ITAT for a number of assessment years, then the filing fees payable under s. 253(7) would be Rs. 500/- only and not Rs. 500/- per assessment year – *Chiranjilal S. Goenka vs. WTO (2000) 66 TTJ 728 (Mum).*

In *Mrs. Nimu R. Thadani vs. Jt. CIT, ITA No. 5437/Mum/97, A.Y. 1996-97,* order dated 11-2-2000, the Tribunal has held that in cases of appeals filed in respect of interest levied under s. 234A, 234B, 234C or any other interest, clause (d) of section 253(6) would be applicable and the appeal fee would be Rs. 500/- because interest is in no way related to the assessed income, but linked with the tax payable.

In *Chromatic India Ltd. vs. ITO, ITA Nos. 3486/M/2001 and 3487/M/2001*, Bench 'D' dated 12-12-2002, the Mumbai Tribunal has held that appeal fee against the order under section 263 is Rs. 500/- only.

Q.29 If assessee has paid more appeal fees, how can he claim a refund?

Ans. The assessee should make an application before the Tribunal for claiming the refund and at the hearing of appeal, the Members will pass an appropriate order and the assessee can get the refund. The request for refund can be made orally also at the time of hearing. Refund voucher shall be issued by the Assessing Officer. On his failure, the assessee may approach the higher authorities or file a writ.

Q.30 Whether challan for payment of Tribunal fee has to be obtained from the Assessing Officer?

Ans. The appellant need not obtain challan from the Assessing Officer. The appeal fees can be paid in any challan stating "The Tribunal fees" and giving the reference of the assessment year. In case of urgency and on the last day of limitation, the fee can be deposited in cash with the Tribunal.

Q.31 Where can an appeal be presented?

Ans. As per *Order No. 1 of 1973 dated 10th July, 1973, [(F. No. F-161-AD(AT)/70)) (1973) 90 ITR (St.) 25]* the Registrar of the Income-tax Appellate Tribunal has authorised the Assistant Registrars of the Appellate Tribunal situated at different places to be the authorised officers to receive appeals or applications. In his absence from office, the appeal may be presented to the Superintendent / Asst. Superintendent / Seniormost Head Clerk at the Tribunal's office during office hours. In the event the period of limitation for presentation of the appeal is expiring, the appellant may present it to the respective Assistant Registrar at his residence or any other place, wherever he may be or to a Member of the Tribunal at his residence or wherever he or she may be.

Q.32 Whether the appeal can be sent by registered post?

Ans. Yes. It is advisable if the appeal is being sent through post, that it should be sent through Registered A.D. addressed to the Registrar or other authorised officer of the Tribunal. However, the point to be noted is that it must reach the authorised officer within the period of limitation because it shall be deemed to have been presented on the day on which it is received in the office of the Tribunal. Any delay in transmission by post may not be excluded in computing the period of limitation, as the postal authorities are not considered as agents of the addressee but they are agents of the sender. *[F. N. Roy vs. Collector of Customs AIR 1957 (SC) 648].* However, if postal authority has taken abnormal time for delivery, an application for condonation would have to be filed. It may be considered as sufficient cause.

Q.33 Whether appeal against an order passed by an authority in Pune or Delhi can be filed at Mumbai?

Ans. The appeal relating to a Pune or Delhi case can be filed at Mumbai, if it is getting time barred and in such cases the Mumbai Tribunal after receiving the appeal forwards the appeal papers to the concerned Bench. Tribunal, though functioning at different places is one institution.

Q.34 What is meant by cross objection?

Ans. If the assessee or the Assessing Officer prefers an appeal to the Tribunal, and the appeal is not rejected under Rule 12 of the ITAT Rules, 1963, a notice is given by the Tribunal to the respondent informing him of the fact of such filing, also enclosing the memorandum and grounds of appeal. The respondent can file, under s.253(4), a memorandum of cross objections in Form No. 36A, within 30 days from the date of receipt of such notice, against any part of the order of the first appellate authority deciding any issue against him. The respondent is not required to pay any filing fees and the Tribunal shall dispose of such memorandum of cross objections as if it were an appeal. Such cross objections is registered and numbered as an appeal and all the rules, so far as may be, shall apply to such appeal. It has to be heard along with the appeal and disposed of by a common order. There is no difference between an appeal and a cross objection *[CIT vs. Purbanchal Paribhan Gosthi (1998) 234 ITR 663 (Guwahati)].* The Pune Bench of ITAT in *Asst. Commissioner vs. Kripa Chemicals (P) Ltd., (2002) 82 ITD 449* held that even where the appeal is withdrawn or is dismissed for default, cross-objections may nevertheless be heard and determined. It relied on the *Superintendent Engineer vs. B. Subba Reddy AIR 1999 SCW 1479.* Rule 27 of the ITAT Rules, 1963, empowers the respondent to the order appealed against to support the same on any of the grounds decided against him, though he may not have appealed or filed a cross objection. *CIT vs. BPL Systems & Projects Ltd. (1997) 227 ITR 779 (Kerala).* However, filing of cross-objection is advisable and such valuable right should be exercised vigilantly. Cross objector is an appellant and not an intervener.

Q.35 Can cross objection be filed belatedly?

Ans. If the respondent is able to satisfy the Bench that the delay in filing of the cross objection was due to good, sufficient or reasonable cause, the Tribunal can condone the delay and admit the cross objection. The cross-objector should file application for condonation of delay.

Q.36 What is meant by cross appeal?

Ans. When the assessee and the Revenue prefer appeals against the same order, such appeals are considered as cross appeals. In substance there is no difference between cross objection and cross appeal. *CIT vs. Purbancha Paribahan Gosthi (1998) 234 ITR 663 (Guwahati)*

Q.37 Who should be the respondent in appeal or cross objection?

Ans. The respondent in the appeal filed by the assessee should always be the Assessing Officer concerned, who has jurisdiction over the case on the material date. In the appeal filed by the Income Tax Officer / Assessing Officer, the assessee is made the respondent.

Q.38 Who is authorised to sign the appeal or cross objection?

Ans. As prescribed in s. 253(b) read with Rule 47 an appeal or application must be signed by:–

In case of appeal/cross objection preferred by	To be signed by
Individual	Himself
HUF	Karta and in his absence from India, by any other adult member of the family
Firm	Managing Partner, in the alternative, Partner
Local authority	Principal Officer
Association of Persons	Member of the Association or the Principal Officer.
Company	Managing Director or the Director or Liquidator
Non Resident company	Power of Attorney holder
Government managed company	Principal Officer thereof

If an individual assessee is absent from India, the appeal memo may be signed by the authorized person, if mentally incapacitated, by the guardian or any person competent to act on his behalf; and if for any other reason, it is not possible for the individual to sign, by any person duly authorized by him in this behalf. A valid power of attorney from the individual should be attached to the appeal. In the case of a company, the appeal has to be signed by the Managing Director of the company. An

Advocate cannot sign the memo of appeal on behalf of an appellant. There is a column for additional signature of the Authorised representative. An Advocate / Authorised Representative should sign in that capacity. Vakalatnama / Power of Attorney should be submitted with the memo of appeal.

Q.39 Can an Executive Director sign the appeal memo before the Tribunal?

In the case of company, it is the Managing Director who is authorized to file an appeal memo before the Tribunal. In cases where the Managing Director is not available, the Executive Director can sign the appeal memo. Appeal memo signed by the Executive Director is a curable defect if a reasonable cause is shown before the Tribunal. In *National Insurance Co. Ltd. vs. CIT (1995) 213 ITR 862 (Cal.),* the Court held that, the return signed by a Director and not by the Managing Director was invalid in the absence of any explanation. An appeal cannot be dismissed without giving an opportunity to cure the said defect, *Malani Trading Co. vs. CIT (2001) 252 ITR 670 (Bom.) Defective memo of appeal can be cured (2004) 186 CTR 162 (P & H), (2003) 264 ITR 313, CIT vs. V. K. Sood Engineers Contractors (P) Ltd.*

Q.40 Whether signing of appeal by a person other than specified is curable?

Ans. There are divergent views on the issue as to whether a defect in signature would render the appeal a nullity. The Hon'ble Calcutta High Court in *Sheonath Singh vs. CIT (1958) 33 ITR 591* has held that the absence of or defect in the signature of the appellant is not fatal so as to render the appeal a nullity and it is an irregularity which can be rectified and will be treated as having been rectified retrospectively. Whereas the Hon'ble Allahabad High Court in Special Manager, Court of Wards, *Naraindas Narsinghdas vs. CIT (1950) 18 ITR 204* has taken a contrary view and held that where the signature on the appeal was that of an agent, the appeal filed was invalid. In the following cases, it has been held that an appeal signed by an Advocate / C.A. / any other person is curable. M*rs. Luiza Saldanha vs. CIT (1983) 16 TTJ 243 (Bom), Pyrkes Win Stores vs. ITO (1984) 9 ITD 93 (Bom), Harileles vs. ITO (1986) 29 Taxman 22 (Bom) (Trib), Rajendrakumar Maneklal Sheth (HUF) vs. CIT (1995) 213 ITR 715 (Guj).* It is advisable to file fresh memo of appeal along with an application for condonation of delay.

Q.41 Whether undisputed tax should be paid before filing an appeal?

Ans. Section 249(4) provides that no appeal shall be entertained under Chapter XX unless at the time of filing the appeal the assessee has paid the taxes due on the returned income or where no return is filed, an amount equal to the amount of advance tax which was payable by him. Filing of appeal before Tribunal also falls under this chapter, hence provisions of section 249(4) are applicable. The Chennai Bench in *V. Baskaran vs. ACIT (1998) 62 TTJ 698* held that right of appeal is a creature of statute and the appellant must comply with the conditions or requirements for admission and for consideration of an appeal.

The Appellate Authority is vested with the power to exempt an assessee from the above condition of payment of tax. If the assessee makes an application and is able to show good and sufficient reasons, as to why he should be exempted from the operation of section 249(4), he can be allowed to file after recording the reasons in writing. An order refusing to exercise such discretion is an appealable order — *CIT vs. Smt. Nanhibai Jaiswal 171 ITR 646 (M.P.)* In *Shri Parasram G. Purohit vs. ACIT, ITA No. 2689/Bom/93, Assessment Year 1989-90,* the Hon'ble Bombay Tribunal, held that once the tax required to be paid u/s. 249(4) has been paid before the final date of hearing, it is incumbent upon the appellate authority to consider the appeal as having been filed on the date of payment. (Decision of *Supreme Court in CIT vs. Filmistan 42 ITR 163* referred to). In *Bharatkumar Sekhsaria vs. Dy. CIT (2002) 82*

ITD 512 (Bom.), the Tribunal held that when amount of the tax due is not paid before filing the appeal, the assessee's appeal is not maintainable. It may be noted that the Bombay High Court admitted the appeal filed against the order of the Tribunal. However, in a latter decision in the case of *Umesh Popatlal Shah vs. DCIT & Others IT (SS)* A. No. 42 to 44/M/2000, the Bombay Tribunal distinguished the decision of Sekhsaria and held that the appeal should be treated as belated till the fees was paid and consequently condonation of delay to be considered.

In *CIT vs. Smt. G. A. Smanthakamani (2002) 125 Taxman 424 (Mad.),* the Court held that, section 249(4) cannot be read down so as to restrict it to appeal against assessment only, it will be applicable in case of appeal against penalty also. In *ITO vs. Tata Iron & Steel Co. Ltd. (2001) 71 ITD 323 (Cal.),* the Tribunal held that, appeal is not maintainable where tax is not deducted at source from payment made to non-resident and is not paid to Government, prior to filing of appeal.

In *Pawan Kumar Ladha vs. Asstt. CIT (2003) 84 ITD 178 (Indore) & Malva Texturising (P) Ltd. vs. Asstt. CIT (2002) 77 TTJ (Indore) 995,* the Tribunal has taken the view that provisions of section 249(4)(a) falling under Chapter XXA are not applicable to the appeals filed before the Tribunal.

In *Anil Sanghi vs. Asstt. CIT (2003) 85 ITD 73 (Delhi) SB,* the Tribunal has held that for the period 1-7-1995 to 31-12-1996 during which provisions for first appeal in respect of block assessment was filed provisions of section 249(4) were not applicable.

Q.42 Assessee has paid the tax, but not interest u/s. 234A, 234B, 234C, whether appeal is maintainable?

Ans. In *Subbaiah Nadar & Sons vs. Asst. CIT (2003) 84 ITD 55 (Chennai),* the Tribunal has held that section 249(4), refers only to tax and not interest, hence, the appeal cannot be dismissed for non payment of interest.

Q.43 If an order is setaside with a specific direction and no appeal is filed against the direction. Can the direction be challenged in Second Appeal?

Ans. Once the direction is given, the same has to be followed by the assessing officer. If no appeal is preferred against the said direction, such direction is binding on the Assessing Officer and he should follow the direction of the superior authority. The officer cannot go beyond the specific direction of the appellate authority. The direction can be challenged before the Tribunal by taking additional ground. On satisfaction, additional ground can be permitted by the Tribunal. *Cawnpore Chemical Works P. Ltd. vs. CIT (1992) 197 ITR 296 (All.), CIT vs. S. V. Divakar (1993) 201 ITR 914 (Orissa)*

Q.44 Whether it is mandatory to give notice to valuation officer, when assessment order is based on report of the valuation officer?

Ans. Yes. It is mandatory for the appellate authority to give notice of hearing to valuation officer. If notice is not given, the Tribunal will set aside the matter to follow the statutory requirement. The Tribunal is also required to give notice to the valuation officer

Q.45 Whether a concession of law is binding?

Ans. A concession of law made by an assessee or his authorized representative is not binding. There cannot be any estoppel against statute. *Rani Anand Kunvar vs. CIT (1940) 8 ITR 126 (Oudh), Gouri Sahai Ghisa Ram vs. CIT (1979) 120 ITR 338 (All), CIT vs. Archana R. Dhanwatay (1982) 136 ITR 355 (Bom.), Narsepalli Oil Mills vs. State of Mysore (1973) 32 STC 599 (Mad.) Central Council for Research in Ayurveda & Siddha vs. Dr. K. Shankara Kumari (2001) 5 SCC 60, CIT vs. Mahalaxmi Sugar Mills Co. Ltd. (1986) 160 ITR 920 (SC) at (928).* Inclusion in return of sales, not assessable to tax assessment of such sales. Appeal not barred – doctrine of estoppel not applicable, (2004) 136 STC 292 (Kar) Bhandari Metals & Alloys (P) Ltd. vs. State of Kerala.

In *ITO vs. Estate of Late K. S. Engineer (2001) 70 TTJ 161 (Bom),* the Tribunal held that, a receipt cannot be taxed merely because assessee has offered the same for assessment or that he has not challenged similar assessment in earlier years. In Ark Investment Ltd. vs. ITO (1985) 13 ITD 65 (Mad), the Tribunal has held that, even if the assessee shows the income taxable, he can file an appeal and such appeal must be disposed on merit.

Q.46 Can an appeal be filed against an order under s. 264 or 273A of the Income-tax Act?

Ans. No appeal lies to the Tribunal. The only remedy is by way of a writ before the High Court under Article 226 of the Constitution of India.

Q.47 Whether an appeal can be filed against a dead person?

Ans. No. No appeal can be filed against a dead person. The Court held that the appeal filed by the Department against a dead person is liable to be dismissed. In *CIT vs. Smt. Santosh Rani (1996) 219 ITR 301(MP).* Appeal can be filed after bringing the legal heirs on records.

Q.48 Whether disputes of levy of tax, interest or penalty, in respect of public sector undertaking can be decided by the Tribunal?

Ans. Disputes between Tax Department and public sector undertaking must be referred to Cabinet Committee. Only after, getting the approval, the Tribunal can proceed with the matter. *Oil & Natural Gas Commission vs. CCE (1992) 104 CTR 31 (SC); [ITO vs. Indian Airlines Ltd. (1998) 99 Taxman 332 (Mad.) (Mag.)].* Recently, in cases where the approval has not been obtained for a considerable time and the matter has been adjourned several times, the Tribunal has been dismissing the appeal with liberty to apply for restoration when the approval is received. The purpose is to see that frivolous litigation between Government Departments and Public Sector Undertakings should not be dragged in the Courts; *CCE vs. Jeesop & Co. Ltd. (1999) 9 SCC 181; Canara Bank vs. National Thermal Power Corporation (2001) 1 SCC 43 (2001) 104 Comp Cas 97.* Decision taken by the Committee shall be binding on all the departments – *Mahanagar Telephone Nigam Ltd. vs. CBDT (2004) 267 ITR 647 (SC).*

Q.49 Whether appeal can be decided ex parte on the ground of non-filing of Power of Attorney or Vakalatnama?

Ans. In *Prayas Agag Udyog (P.) Ltd. vs. ITAT (2001) 118 Taxman 68 (All.),* the Court held that, the Tribunal cannot dispose of an appeal ex parte on the ground that, the Chartered Accountant who moved an application for adjournment had no Power of Attorney or Vakalatnama, authorizing him to represent the petitioner. The Tribunal should have brought the defect to the notice of the petitioner and got the defect removed.

Q.50 Whether appeal can be dismissed by the Tribunal in Limine for not attaching the grounds of appeal?

Ans. In *CIT vs. V. K. Sood Engineers & Contractors (P) Ltd. (2003) 264 ITR 313 (P & H),* the Court held that the Tribunal was not right in dismissing the appeal in limine, since it is a rectifiable defect.

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Q.51 How to draft the grounds of appeal or cross objection?

Ans. As per Rule 8 of the Rules, the grounds of appeal should be concise and under different heads. Grounds of appeal should not be argumentative or narrative. Such grounds should be numbered consecutively. Grounds should be drafted very carefully, the point in dispute be highlighted. It is desirable to challenge findings of facts which are contrary to the material on record or are objected to. On receipt of defect memo, grounds originally filed can be substituted. If ground is not comprehensive, the Respondent/Tribunal may object at the final hearing and may not allow to raise additional ground. If ground is exhaustive and framed in general words – all aspects can be argued. See *CIT vs. Scindia Steam Navigation Co. Ltd. (1961) 42 ITR 589 (SC); CIT vs. Birad Kanwarji (HH) (1979) 119 ITR 96 (Raj.).*

The statement of facts should be filed before the Commissioner of Income-tax (A). It is very vital for assessees to present the statement of facts in such a manner so as to bring out clearly the issues in the assessment/penalty proceedings which are under challenge. There is no requirement of filing statement of facts before the Appellate Tribunal. But copy of statement of facts filed before the CIT(A) should be annexed.

Q.52 Whether additional ground can be filed at the time of hearing of appeal?

Ans. Rule 11 of the Rules, provide that the appellant, shall not except by leave of Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal. However, the Tribunal is competent to allow the appellant to raise, at the hearing of the appeal, an additional ground even without a formal amendment of the memorandum of appeal *(CIT vs. Nelliappan (1967) 66 ITR 722 (SC). New India Life Ass. Co. Ltd. vs. CIT (1957) 31 ITR 844, 846 (Bom.)*

The appellant should make an application in writing containing the additional ground, its necessity and reasons as to why it could not be taken earlier. It should be established that it goes to the root of the issue and is necessary for dispensation of justice. A copy of such application should be provided to the respondent and respondent is heard, before its disposal. Permission to raise the additional ground is discretionary. Reasons for admission have to be recorded by the Tribunal and the discretion should be exercised judiciously so as to further the cause of justice and not arbitrarily.

In *Ahmedabad Electricity Co. Ltd. vs. CIT (1993) 199 ITR 351 (Bom) (FB),* the Court held that, Rules 11 and 29 of the Appellate Tribunal Rules indicate that the scope of enquiry before the Tribunal can be wider than the points which are raised before the Tribunal. The Tribunal, therefore, would ordinarily have the power to allow additional points to be raised before it so long as they arise from the subject matter of the proceedings. The proceedings before the Tribunal are not necessarily confined only to the subject matter raised in the memorandum of appeal. The word "thereon" in section 254 does not in any manner restrict the jurisdiction of the Appellate Tribunal. The word "thereon" merely refers to the appeal. To read the word "thereon" as restricting the jurisdiction of the Appellate Tribunal is not warranted. It does not refer to the scope of jurisdiction at all. The words which prescribe the extent of jurisdiction of the Tribunal under section 254 are the words "may pass such orders.... as it thinks fit". These are the words which describe the jurisdiction of the Appellate Tribunal. The word "thereon" merely refers to the fact that the Tribunal while deciding the appeal has to exercise its jurisdiction. Looked at from a slightly different point of view, if the word "thereon" can be said to refer to the subject matter of the appeal, then the subject matter of the appeal is the entire tax proceeding of the assessee which is before the Tribunal for consideration; and this will cover the proceedings before the ITO, before the AAC as well as before the Tribunal —

including the grounds raised before the Tribunal, any additional grounds which may be allowed to be raised before the Tribunal as also cross-objections, if any, before the Tribunal. Undoubtedly, the Tribunal has a discretion to decide whether any additional points can be allowed to be raised at the stage of appeal before it, and it may not permit such a new point to be raised for good reasons. But the extent of jurisdiction of the Tribunal is not confined only to points which were considered by the AAC and which may be challenged in appeal before the Tribunal. The Tribunal can permit other grounds also to be raised before it, provided, of course, that they arise out of the proceedings. Accordingly, it can be said that, the Tribunal has jurisdiction to permit additional grounds to be raised before it even though they may not arise from the order of AAC, as long as these grounds are in respect of the subject matter of the entire tax proceedings.

So far as legal issues are concerned, additional grounds can be raised at any time. Few case laws on the subject of power to allow a new ground of appeal to be raised are: N*ational Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC), Jute Corporation of India vs. CIT (1991) 187 ITR 688 (SC), Godavari Sugar Mills Ltd. vs. CIT (1993) 199 ITR 351 (Bom) (FB), Ramgopal Ganpatrai & Sons vs. CIT (1953) 24 ITR 362 (372) (Bom), Anam Venkata Krishna Reddy vs. CIT (1988) 172 ITR 425 (A.P.), Deep Chand Kothari vs. CIT (1988) 171 ITR 381 (Raj), J. S. Parkar vs. V. B. Palekar (1974) 94 ITR 616 (Bom), CIT vs. Stepwell Industries Ltd. (1997) 228 ITR 171 & 463 (SC), ACIT vs. Soni Photo Films (P) Ltd. (1998) 67 ITD 81 (SB), CIT vs. Delhi Sanitary Stores (1981) 127 ITR 822 (Raj.)*

Q.53 Whether additional ground can be raised orally?

Ans. Leave to urge additional grounds may be sought either in writing or by oral prayer. Rule 11 of the Appellate Tribunal Rules speaks only of leave and the leave may be sought either in writing or by an oral prayer — *Amines Plasticizers Ltd. vs. CIT, (1997) 223 ITR 173 (Guwahati).* Grounds of Appeal can be amended by taking leave of the Tribunal orally — *Assam Carbon Products Ltd. vs. CIT (1997) 224 ITR 57 (Guwahati).* There is no particular form for raising an additional ground. *Baby Samuel vs. ACIT (2003) 262 ITR 385 (Bom.).* The additional ground can be raised at any time. *Shilpa Associate vs. ITO (2003) 263 ITR 317 (Raj.).* New plea can be raised orally though no cross objection or appeal has been filed, *Assam Company (India) Ltd. vs. CIT (2002) 256 ITR 423 (Guwahati), Baby Samuel vs. ACIT (2003) 262 ITR 385 (Bom.)*

Q.54 Whether issues regarding jurisdiction or limitation not raised before the CIT (A) can be raised for first time before the Income Tax Appellate Tribunal?

Ans. Yes. Legal ground going to the root of the issue and if facts are on record, can be raised at any time. In *CIT vs. Mohd. Iqbal and Others (1996) 221 ITR 481 (MP) Krishna Gopal Bhadra vs. ITO (1980) 124 ITR 580 (Cal.), CIT vs. Commonwealth Trust (India) Ltd. (1996) 221 ITR 474 (Ker.) CF Town Municipal Council Atharia vs. Labour Court AIR 1969 SC, 1335 (1338)* courts have held that the question of limitation can be raised at any point of time because it goes to the root of the matter. Similar is the position about the jurisdiction. The Supreme Court in *UOI vs. British India Corp. Ltd. (2004) 268 ITR 481* observed, the question of limitation is a mandate to the forum and irrespective of the fact whether it was raised or not, the forum must consider and apply it, if there is no dispute or facts.

Q.55 Whether assessee can raise a ground regarding jurisdiction in respect of the assessement in the penalty appeal at any time?

Ans. The assessee is entitled to raise the ground relating to jurisdiction stating that the assessment based on the return is bad in law, hence penalty is liable to be quashed — *Union of India vs. Rai Singh D. L. Singh Bist (1973) 88 ITR 200 (SC), CIT vs. Dumraon Cold Storage and Refrigeration Service (1974) 97 ITR 137 (Patna), Shri Bhormal Aidanmali Jain vs. IAC of I.T. [No.9204 and 9205 — assessment year 1977-78, Bench "E", dated November 23,* 1989 (SMC)], *Sanabhai R. Dalwali vs. ITO (1990) 34 ITD 183 (Ahd.).*

Q.56 Can assessee support the order of Commissioner of Income Tax (Appeals) on any ground decided against it, even though no appeal is filed?

Ans. In *Dy. CIT vs. Smithkline Beecham Consumer Brands Ltd. (2003) 126 Taxmann 104 (Cal.),* the Tribunal held that, in view of Rule 28 of Income Tax (Appellate Tribunal) Rules, assessee can support order of Commissioner (Appeals) on any ground decided against it even though no appeal is filed.

Q.57 Can appellant agitate the issue not pressed before the CIT(A)?

Ans. Yes. An appellant despite having not pressed an issue before the authorities below, can still raise and agitate the same before the Tribunal. There cannot be any estoppel against statute. No concession on law is permissible. *Vijay Kumar Jain vs. CIT (1975) 99 ITR 349 (P&H); J. K. Oil Mills Co. Ltd. vs. CIT (1976) 105 ITR 53 (Allahabad); Hindusthan Zinc Ltd. vs. DCT (2002) 77 TTJ 315 (Jodhpur Bench).*

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Q.58 Whether evidence which was not filed before the lower authorities can be filed before the Tribunal?

Ans. Rule 29 places a total bar on the parties to the appeal from producing additional evidence, either oral or documentary, before the Tribunal. But Tribunal has been vested with inherent discretion to allow the production of the additional evidence in the following circumstances:–

(i) If the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause;

(ii) If the Income-tax authorities have decided the case without giving sufficient opportunity to the assessee to advance evidence either on points specified by them, or not specified by them.

On the existence of either of the circumstances mentioned above, the Tribunal for reasons to be recorded may allow such documents to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced. The Tribunal has the discretion to permit to adduce additional evidence.

ITO vs. B. N. Bhattacharya (1978) 112 ITR 423, 427 (Cal.), CIT vs. Motilal Hirabhai Spinning & Wvg. Co. Ltd. (1978) 113 ITR 173, 179, 180 (Guj). CIT vs. Smt. Kamal C. Mehboobhani (1995) 214 ITR 15 (Bom), Dy. CIT vs. Vira Construction Co. (1997) 61 ITD 33 (Mum) (TM)

If evidence produced by assessee is genuine, reliable and proves assessee's case, then assessee should not be denied opportunity of it being produced for the first time before the appellate authority—

Jagbir Singh vs. ITO (1987) 23 ITD 15 (Del.), Electra (Jaipur) (P) Ltd. vs. IAC (1988) 26 ITD 236 (Del.), Smt. Prabhavati S. Shah vs. CIT (1998) 231 ITR 1 (Bom), Abhay Kumar Shroff vs. ITO (1997) 63 ITD 144 (Patna) (TM), Jagannath Prasad Kanhaiya Lal Vs. CIT (1988) 171 ITR 596 (Alla.), CIT vs. Gani Bhai Wanab Bhai (1998) 232 ITR 900 (M.P), Deep Chand Kothari vs. CIT (1988) 171 ITR 381 (Raj.), Controller of Estate Duty vs. Narasamma (1980) 125 ITR 196 (A.P.)

Q.59 What is the meaning of additional evidence and procedure to adduce additional evidence?

Ans. Any evidence which has not been produced before the Assessing Officer or Commissioner of Income Tax (Appeals) shall be considered as additional evidence. There is a distinction between additional evidence and supporting evidence. If certain material / evidence has been placed before the lower authorities and further supporting evidence is placed before the Tribunal – it should not be considered as additional evidence. However, narrow difference exists between the two. The appellant should make an application seeking permission to rely upon additional evidence. The application should give reasons, justify the necessity, prove its genuineness, its non-availability earlier or that there was no negligence, mala fides and latches or inaction on the part of the appellant for not producing it before the lower authorities. The additional evidence should be annexed with the application and by way of an additional paper book. If possible, it should be supported by an affidavit of the appellant. Its copy has to be provided to the respondent and the respondent should be given an opportunity of being heard. On being satisfied, the Tribunal should record its reasons, admit and consider at the time of final hearing. If the Tribunal fails to consider such evidence or the application, it amounts to a mistake rectifiable under s. 254 (2) and the matter must be restored to the Tribunal to dispose of the application as held by the Supreme Court in *Jyotsna Suri & Others vs. ITAT (2003) 179 CTR 265 (SC).*

Q.60 Whether assessment orders or Government records can be considered as additional evidence?

Ans. Assessment orders cannot be considered as additional evidence. However, the assessee may seek leave of the Tribunal to produce and rely upon the assessment order if it has not been produced before the lower authorities, and is being produced for the first time and permission may be given to produce the same. As per section 74 of the Evidence Act the Government records are considered as public documents. Hence the same can be produced for the first time before the Tribunal with the permission of the Bench.

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Q.61 What are the duties of the Tribunal?

Ans. Strictly speaking the Appellate Tribunal is not a Court but has all the trappings of the Court of law. The Appellate Tribunal performs judicial act in judicious manner. The Tribunal is the final fact finding authority. Its finding on facts is final and no appeal lies to the Hon'ble High Court. The powers of the Appellate Tribunal are very wide but there is no power of enhancement. All questions, whether of law or of fact which relate to the assessment of an assessee may be raised before the Tribunal. In disposing of the appeal, the Tribunal has the power to give appropriate directions and to pass such orders as it thinks fit, after giving an opportunity of being heard to both parties to an appeal. The powers include the power to annul an assessment order or set it aside. The powers have been expressed in the widest possible terms similar to the powers of the Civil Appellate Court u/s. 96 and order 41 of the Code of Civil procedure. Duty is to avoid multiplicity of proceedings and to make a detailed well discussed order after incorporating facts emerging from records, considering the arguments raised by both the parties and the judicial precedents cited at the time of hearing.

The Tribunal being a final fact finding authority has to consider and decide all issues that are brought before it. It cannot decide only one issue arising out of many issues and decline to go into the other issues raised before it on the ground that further issues will not arise in view of the finding on the issue decided by it. If the Tribunal declines to consider and decide the other issues it will only protract and delay the proceedings for the assessee has to get the decision of the Tribunal on the initial point set aside by approaching the High Court and thereafter, again go back to the Tribunal for a decision on other issues left undecided by it earlier. This will amount to multiplicity of proceedings. It is desirable that the Tribunal should avoid disposing of matters on preliminary issues alone, without deciding all the issues raised before it and it should, as far as possible express its view on all points raised before it, so that the higher Courts have the benefit of its decision on other points also, if necessary.

Some relevant case laws on the subject are:

The Tribunal must consider all the material and not only a part of it.

Udhavdas Kewalram vs. CIT (1967) 66 ITR 462 (SC)

It is not only the duty of the Tribunal to examine the material facts but also to come to a legal conclusion that the facts do not justify the allowance or disallowance of an expenditure.

CIT vs. Turner Morrison & Co. (P) Ltd. (1974) 93 ITR 385 (Cal).

The Tribunal should not rest its conclusion merely on legal views without recording findings on matters of facts.

Simhadri Narasingh Prusty & Ors. vs. CIT (1971) 79 ITR 219 (Orissa)

The Tribunal being the final authority on facts, it is necessary and it is the requisite of the law that in disposing the appeal, it clearly sets out the facts, the contentions of the assessee as well as the revenue and deals with each of such contentions with reference to the facts, circumstances and relative evidence and records its findings with reasons therefor on each contention.

E. A. Venkataramier & Sons vs. CIT (1967) 65 ITR 316 (Mad)

The Tribunal is under a duty to decide all questions of fact and law raised in the appeal before it. For the purpose it must consider whether on the materials relied upon by the assessee his plea is made out. The Tribunal cannot make arbitrary decisions; it cannot base its judgements on conjectures, surmises or speculation. Between the claims of the public revenue and of the tax-payers, Tribunal must maintain a judicial balance.

Esthuri Aswathiah vs. CIT (1967) 66 ITR 478 (SC)

The Tribunal must decide cases in a judicial spirit and record reasons in support of its decision.

CIT vs. Walchand & Co. (1967) 65 ITR 381 (SC)

The orders of the Tribunal must be self contained and set out in full the facts and the reasons for arriving at a decision. Reference to earlier orders are unhelpful because at the time of hearing, these orders are not placed before the Court and it will not therefore be possible to appreciate the Tribunal's views in these matters.

CIT vs. Guntur District Co-operative Marketing Society Ltd. (1985) 154 ITR 799 (AP)

On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises or on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings even though on questions of fact will be liable to be set aside by the Court.

Omar Salay Mohamed Sait vs. CIT (1959) 37 ITR 151 (SC)

An order of a judicial authority like that of the Appellate Tribunal is a solemn one and the Tribunal should devote great care in expressing it.

M.R.M. Periannan Chettiar vs. CIT (1960) 39 ITR 159 (Mad)

The order of the Tribunal should embody a complete picture of what happens at the hearing. If a point is argued it should be dealt with and disposed of in express terms however weak the argument or baseless the contention. The Tribunal being the final fact finding authority it is desirable that its views on facts should be stated comprehensively to cover all points in controversy. Omissions in the order can give rise to questions of law.

Senairam Dongarmal vs. CIT (1956) 29 ITR 122 (Assam)

The Tribunal in deciding a case should not be unduly influenced by trivial procedural technicalities. The memo of appeal should be liberally seen and entertained. No specific formula is necessary for seeking relief at the hands of a Court or Tribunal, if the necessary grounds have been taken in the appeal memo. *CIT vs. Calcutta Discount Co. Ltd. (1973) 91 ITR 8 (SC).*

In Manibyrabha vs. CIT (2004) 265 ITR 560 (Ker), the Court held that it is the duty of the Tribunal to pass a reasoned order, in this case the Hon'ble Tribunal has not discussed the cases cited before it. The Hon'ble High Court set aside the order of the Tribunal.

It is the duty of the Tribunal being the highest appellate Tribunal exercising the appellate jurisdiction under the I.T. Act to examine the issue, both of law and fact in right perspective and in detail. It must appear from the order passed by the Tribunal that sincere efforts were made to decide the issue that fell for examination, keeping in view the law laid down by Apex Court in its right earnest. Mere reference of a citation in the order for recording a finding is not enough. It is never regarded as a case observing judicial discipline. Any finding whether on facts or in law if recorded cursorily and without assigning reasons can never be regarded as judicial finding. It is incapable of being sustained in higher courts in heirarchy. *Shreejee Chitra Mandir vs. CIT (2004) 269 ITR 55 (M.P.).*

During the last few years, it has been noticed that some Members of the Tribunal interrupt, do not give patient hearing and want counsels to curtail their submissions/arguments though appropriate on the issues involved in the wisdom of the arguing counsel. Some orders are brief, do not set out the arguments made on both sides, their analysis and discussion on the citations. Such attitude on the part of some of the Hon'ble Members spoil the image and reduce past glory of the Tribunal. A representation was made by the Federation and corrective measures are being taken by the President. The speeches of Shri A. Kalyanasundharam, Senior Vice President on "Conventions in the Tribunal" and of Shri J. P. Bengra, Vice President on “A Time to Introspect” at the Members meeting (87 ITD Special Issue page 13-19 and 29-34 respectively) lay down the guidelines and are inspiring and call upon Members to perform their duty in a judicious manner with smile and dispense justice.

Q.62 Whether right of an assessee is restricted to the plea raised by him?

Ans The right of an assessee is not restricted to the plea raised by him. It is the duty of the authority to allow relief on any other ground, if permissible. *Ciba of India Ltd. vs. CIT (1993) 202 ITR 1 (Bom), CIT vs. Mahalaxmi Textiles Ltd. (1967) 66ITR 710 (SC).*

Q.63 When the assessee and the Department are in appeal, against the same order whether both the appeals must be heard together?

Ans. Yes. In *CST vs. Vijai Int. Udyog (1985) 152 ITR 111 (SC)*, the Supreme Court held that both appeals must be heard together. The Gauhati High Court in *CIT vs. Highway Construction Co. 217 ITR 234 (1996)* has however held that when the appeals involve different points this can be heard separately. According to us, it is always, desirable to make an application to hear both the appeals together, mainly because, if assessee and Department is in appeal, for example on the issue of addition to GP, if appeal of department is dismissed; in assessees appeal, the Department may contend that as the Tribunal has already given the finding, in respect of GP addition, in respect of same point, there cannot be any further relief. It may also be desirable to have only one order from the Tribunal, otherwise, the assessee or Department may have to file two separate appeals before the High Court for the same assessment year.

Q.64 Whether appeal can be filed against an order setting aside/restoring the matter to the assessing officer?

Ans. In *Berulal Tiwari vs. CIT (1988) 173 ITR 280 (AP), CIT vs. Sati K. Sippy (1992) 195 ITR 276 (Bom)*, the Courts have held that there cannot be appeal against a set aside order. In our view, if the setting aside is illegal and all the material was available before the CIT (A) an appeal should be preferred and should be entertained by the Tribunal. Refer *United Commercial Bank vs. CIT (1982) 137 ITR 434 (Cal.), Oriental Paper & Industries vs. State of Orissa 83 STC 202 (Orissa), Raja Vikramaditya Singh (Decd) vs. CIT (1988) 169 ITR 55 (M.P.), Smt. Neena Syal vs. ACIT (1999) 70 ITD 62 (Chd.), Commissioner of Wealth Tax vs. Vanavarayar (M.K.S.) (1980) 122 ITR 184 (Mad.)*

Q.65 Whether an order of the lower authority shall be void or voidable where the principles of natural justice have not been followed?

Ans. An order of the lower authorities where the principles of natural justice have not been followed is not void. The Tribunal may have to follow the principles of natural justice or may have to restore the matter back to the lower authority to comply with the principles of natural justice. In view of the Supreme Court decision in *Superintendent (Tech.) Central Excise vs. Pratap Rai (1977) 114 ITR 231*, an order passed in violation of principles of natural justice does not become bad ab initio, it suffers from intervening irregularly or illegality which can be cured. It does not affect the jurisdiction but only makes further proceedings bad. In *Colonisers vs. CIT (1992) 41 ITD 57 (Hyd.) (SB)*, the Tribunal has held that order passed in violation of natural justice is void ab initio.

The issue of violation of principles of natural justice can be raised for the first time before the Tribunal. *Appropriate Authority & Anr. vs. Vijay Kumar Sharma (2001) 249 ITR 554 (SC), Tin Box Company vs. CIT (2001) 249 ITR 216 (SC), Union of India vs. Vipan Kumar Jain (2003) 260 ITR 1 (SC), J. T. (India) Exports vs. UOI (2003) 262 ITR 269 (Del.) (FB).*

Q.66 What is the doctrine of per incuriam?

Ans. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute *[Municipal Corporation of Delhi vs. Gurnam Kaur, (1989) 1 SCC 101, 110 (SC)]*. In other words, when a decision is rendered without noticing a binding precedent or is inconsistent with a statutory provision, it is per incuriam and, therefore, loses its efficacy as a precedent. Except the parties to the lis, it binds none [Per *M. N. Rao, J., in Y. V. Anjaneyulu vs. ITO, (1990) 182 ITR 242, 307 (AP)]*. The doctrine of per incuriam should be limited to decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned [*Morelle vs. Wakeling, (1995) 2 QB 379] Wolkem (P) Ltd. vs. CIT (2003) 259 ITR 430 (Raj)*. The doctrine will not be extended to cases which were merely not fully argued or which appear to take a wrong view of the authorities or to misinterpret a statute [*Mamleshwar Prasad vs. Kanahaiya Lal, AIR 1975 SC 907, 910*].

Q.67 Can an issue neither agitated before AO or CIT(A) be agitated before the ITAT?

Ans. The Tribunal should not indulge in technicality of law and the procedure. It is meant to do justice. It should entertain an issue not agitated before AO or CIT(A), if it is a question of law or if the facts are already on records. In case the facts need ascertainment – the Tribunal should not hesitate in remanding to the lower authorities to decide in accordance with law and after opportunity to the other side. In *Indo Java & Co. vs. IAC (1989) 30 ITD 161 (Delhi) (SB*) the special bench has held that point which can be agitated in appeal before tribunal by an appellant may also include points impinge on computation of income as shown by the assessee himself by mistake or otherwise and even not agitated before ITO or ACC.

Q.68 Whether proceeding before ITAT is continuation of assessment proceedings?

Ans. Second appeal lies before the Tribunal. An appeal is always a continuation of assessment proceedings. Hence, proceedings before the Tribunal is continuation of assessment proceedings. Whatever could be submitted or agitated before the Assessing Officer can be submitted or agitated or claimed before the Tribunal. In *CIT vs. Indian Express (Madurai) Pvt. Ltd. (1983) 140 ITR 705 (Mad.)* it was held that the appeal proceedings is also continuation of assessment proceedings to determine the correct assessment, hence, claim which was not made before the CIT(A) can be made before ITAT.

Q.69 Can papers collected after hearing was over be considered as evidence?

Ans. Once hearing is complete, normally no additional papers should be received/collected by the Tribunal. If certain material evidence/document/paper/submission/citation remain to be submitted at the time of hearing, by inadvertent mistake or mistake of the counsel, it shall be appropriate in order to dispense justice, to accept, to provide its copy to the other side and rehear the issue. Without providing opportunity to the other party, it cannot be considered in the order of the Tribunal and cannot be forwarded to the High Court. In *Jhalani Tools (I) (P) Ltd. vs. CIT, (1989) 31 ITD 81 (Delhi) (SB)* has held that papers which were collected after hearing was over by one of the members *suo motu* do not constitute evidence hence not forwarded to the High Court.

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Q.70 What is the extent and scope of the powers of the Tribunal?

Ans. The powers of the Tribunal have been expressed in the widest possible terms under section 254, "may after giving both the parties to the appeal an opportunity of being heard, and pass such orders thereon as it thinks fit". Its powers, thus, are almost similar to the powers of an appellate court under the Code of Civil Procedure. A wide power, however, is not such that it can be exercised in any manner. The Tribunal can interfere with the orders of the lower authorities, but can do so only on judicial considerations and on the basis of reasons that suggest clearly that the lower authorities had committed an error of law or such fact that had vitiated its considerations and gone perverse for such reasons. Its primary task is not to go into the return of the assessee and decide what amount of tax should be levied upon his income, but to see whether the taxing authorities, including the first appellate authority have committed any error of law or of fact and on account of such error, the assessee has suffered. A greater protection is extended by the law to the Revenue in the sense that, in cases where tax is found to have been short levied, discretion is given to the competent authority (Commissioner) to reopen the whole matter, if it is in public interest to do so. The Tribunal has got to protect, on the one hand, the interest of the assessee in the sense that he is not subjected to any amount of tax, in excess of what he is bound to pay, and on the other hand, it has a duty to protect the interests of the Revenue and to see that no one dodged the Revenue and escaped without paying the tax *[CIT vs. Rayala Corporation (P) Ltd. (1995) 215 ITR 883, 894, 894-95 (Mad.)]*

Some important case laws on the subject of powers of Tribunal are as follows:

The power and jurisdiction of the Tribunal are of wide amplitude and depending upon the exigencies in a given case, it has the power to make such appropriate orders thereon as justice of the case demands. The powers of the Tribunal are expressed in widest possible terms similar to the power of the Appellate Court under section 96 of the Code of Civil Procedure. The words "as it thinks fit" are of wide amplitude to give directions to authorities below, to afford an opportunity to the assessee and revenue to adduce evidence afresh and consider the same and to submit a report.

Thakur V. Hari Prasad vs. CIT (1987) 167 ITR 603 (AP)

The plain implication of the section is that the Tribunal's powers are limited to passing such order as it may think fit on the appeal. The expression "thereon" clearly and undoubtedly points to the conclusion that the powers of the Appellate Tribunal are limited to the subject matter of the appeal.

Pathikonda Balasubba Setty vs. CIT (1967) 65 ITR 252 (Mys)

Tribunal's power is limited to the subject matter of the appeal before it. The powers of the Tribunal in dealing with appeals are expressed in section 254(1) in the widest possible terms. The word 'thereon' restricts the jurisdiction of the Tribunal to subject matter of the appeal *[Hukumchand Mills Ltd. vs. CIT (1967) 63 ITR 232 (236, 237) (SC)]*. The power is restricted to the year under appeal, incidental observation relating to other years, if any, made, is not strictly speaking, a finding. The Tribunal has no jurisdiction to give direction with regard to the proceedings of the earlier year or to include deleted amount in an other year's assessment. *ITO vs. Murlidhar Bhagwan Das (1964) 52 ITR 335 (SC).*

As the Tribunal has wide powers in respect of subject matter of an appeal before it, it can decide any question which is material to the subject matter before it even though it was not specifically raised.

CIT vs. Amaredranath Mukherjee & Bros. (1973) TLR 119 (Cal)

The subject matter of an appeal before the Tribunal can only be the decision express or implied of the first appellate authority and the jurisdiction of the Tribunal is restricted to the subject matter of the appeal.

CIT vs. Steel Cast Corporation (1977) 107 ITR 683 (Guj)

Merely because a ground has not been raised before the first appellate authority though it could be raised in support of the relief sought in the appeal, it cannot be said that it cannot be raised before the Tribunal. Such a ground can be raised provided it falls within the contents of the subject matter of the appeal before the first appellate authority.

CIT vs. Cellulose Products of India Ltd. (1985) 151 ITR 499 (Guj) (F.B.)

The word “thereon” confines power of the Tribunal to pass orders on the subject matter of the appeal before it and the Tribunal cannot go beyond the scope of the appeal and pass an order or give a direction which does not fall within the subject matter of the appeal.

F.Y. Khambhaty vs. CIT (1966) 61 ITR 30 (Guj)

Consent does not give jurisdiction to any authority and if there is inherent want of jurisdiction in an authority, failure of the party concerned to challenge the jurisdiction does not confer jurisdiction on the authority. A pure question of law going to the root of the jurisdiction can be raised for the first time before the Tribunal.

CWT vs. N. A. Narielwalla (1980) 126 ITR 344 (Bom)

A question of limitation raises a plea for want of jurisdiction and is a question of law. If a question of limitation can be decided on the basis of facts on record, Tribunal should permit such questions to be raised for first time before it.

Krishna Gopal Bhadra vs. ITO (1980) 124 ITR 580 (Cal)

In the event of assessee challenging the validity of search under s.132 on the ground of non-existence of any of the circumstances/conditions enumerated in clauses (a) or (b) or (c) of sub-section (1) of section 132 or challenging the very factum of search on the ground that there was no search warrant, the Assessing Officer as well as the Tribunal, not only have powers but are duty bound, in exercise of their quasi-judicial jurisdiction, to adjudicate upon the matter and consequently can call for the records of concerned authorities leading to the issue of authorization of search and can satisfy itself with regard to the authorization having been issued in accordance with the law.

Dr. A. K. Bansal vs. ACIT (2000) 73 ITD 49 (All) (T.M.)

Q.71 Whether the Tribunal has power to remand?

Ans. Yes. The Tribunal has power to remand to the Assessing Officer or to the CIT(A). Some of the case laws are:

Where the first appellate authority has rejected a new claim of the assessee on the ground that no such claim was made in the return or in the course of assessment proceedings nor was there any material on record to support such a claim, the Tribunal is not justified in entertaining such a claim and directing the Assessing Officer to examine the claim of the assessee on merits.

CIT vs. G. S. Rice Mills (1982)136 ITR 761 (All)

If the Tribunal feels in a particular case before it, substantial justice requires that the claim of the assessee though raised before first appellate authority for the first time should have been investigated by that authority, the Tribunal is competent to direct it to rehear the parties and give a finding on the contention.

CIT vs. Sayaji Mills (1974) 94 ITR 26 (Guj)

Under Rule 28, the power of remand is only incidental to its power to hear and dispose of the appeal. But the power of remand cannot exceed the jurisdiction under section 254(1). Hence, Tribunal cannot exercise the power of remand for purpose of enhancing the tax.

V. Ramaswamy Iyengar vs. CIT (1960) 40 ITR 377 (Mad)

The power of remand should be used sparingly and only in cases where the Tribunal after an examination of the material already placed on record by way of evidence takes the view that it is not possible for it to make a just order on the appeal without assistance of further evidence or without the assistance of a clearer finding by the authority from whose order appeal has been presented.

Pathikonda Balasubbu Setty vs. CIT (1967) 65 ITR 252 (Mys)

The power of remand is to be exercised judicially and not in an arbitrary or capricious manner. The exact nature of the remand order to be passed in a given case is a matter within the absolute discretion of the Tribunal but the power being judicial must be exercised judiciously according to rule and not humours, must be legal and regular, disciplined as opposed to capricious.

Jeypore Timber and Veneer Mills (P) Ltd. vs. CIT (1982) 137 ITR 415 (Gauhati)

The power to set aside an assessment and to direct the Assessing Officer to make a fresh assessment is clearly comprehended in the words "pass such orders as it thinks fit". The Tribunal can therefore while setting aside the assessee's appeal direct the Assessing Officer to make a fresh assessment after giving due notice to the assessee.

Saurashtra Salt Mfg. Co. vs. CIT (1967) 66 ITR 404 (Guj)

Q.72 Whether the Tribunal has the power of enhancement?

Ans. No. Under section 254(1), the Tribunal is not competent to give a finding which is adverse to the assessee and make the latter's position worse than before, thus resulting in an enhancement of assessment, *[Puranmal Radhan Kishan & Co. vs. CIT (1957) 31 ITR 294 (Bom)]. New India Life Assurance Co. Ltd. vs. CIT (1957) 31 ITR 844 (Bom.)* It is not open to the Tribunal to give a finding adverse to the assessee which does not arise from any question raised in the appeal nor is it open to it to raise any ground which would work adversely to the appellant and pass an order which makes his position worse than it was under the order appealed against *[J.K. Bankers vs. CIT (1974) 94 ITR 107 (All)]*; so much so that where a set aside of the entire order of assessment and a remand order has the effect or the probability of resulting in an enhancement of the assessment under appeal, the Tribunal is not empowered to do indirectly what it cannot directly do *[V. Ramaswamy Iyengar vs. CIT (1960) 40 ITR 377 (Mad); Pathikonda Balasubba Setty vs. CIT (1967) 65 ITR 252 (Mys.)]. Puranmal Radhakishan & Co. vs. CIT (1957) 31 ITR 294 (Bom), New India Life Assurance Ltd. vs. CIT (1957) 31 ITR 844 (Bom), J. K. Bankers vs. CIT – (1974) 94 ITR 107 (All), State of Kerala vs. Vijaya Stores (1979) 116 ITR 15, 18-19 (SC) & Pahulal Ved Prakash vs. CIT (1990) 186 ITR 589, 594 (All) and Jeypore Timber and Veneer Mills P. Ltd. vs. CIT (1982) 137 ITR 415 (Guwahati).* But where the Tribunal finds that disallowance of a particular expenditure by the authorities below is not proper, the Tribunal is competent to sustain the disallowance, wholly or partially, under a different section under which it may be properly disallowed – *Steel Containers Ltd. vs. CIT (1978) 112 ITR 995 (Cal).*

Q.73 Whether the Tribunal has the power to call for documents?

Ans. Under section 255(6), read with section 131, the Tribunal has the power to call for the documents relevant for deciding the appeal. In *Union of India vs. Sheo Shankar Sitaram (1974) 95 ITR 523* (All) at the request of the assessee, the Tribunal directed the Department to produce certain records, which pertained to the assessment and penalty proceedings and the Department's claim of privilege under section 124 of the Evidence Act, was negatived by the court.

Q.74 Whether the Tribunal has power to pronounce upon validity of Act?

Ans. No. In *CIT vs. Straw Products Ltd. (1966) 60 ITR 156 (163-4)* the Supreme Court held that the Tribunal and the tax authorities being preservers of this Act, cannot pronounce upon the constitutional validity or vires of any provision of this Act. Therefore, such a question cannot arise out of the order of Tribunal and cannot be made subject matter of reference to the High Court. Such a question of validity can be raised only in writ petition. Refer *Venkatraman & Co. Ltd. vs. State of Madras (1966) 60 ITR 112 (SC), Dhrangadhra Chemical Works Ltd. vs. CIT (1975) 101 ITR 491 (Bom), L. Chandrakumar vs. Union of India (1997) 228 ITR 725 (SC).*

Q.75 Whether the Tribunal has power to award cost?

Ans. Yes. With effect from 1-6-1999, sub-section 2B is inserted in Section 254, which gives the Tribunal discretion to award cost in suitable cases if the facts so warrant. In *ACIT vs. Shanti Star Builders ITA No. 9601/B/91 dated 30-6-1999, Bench 'B', Mumbai*, the Tribunal awarded cost of Rs. 2,000/- for the inconvenience caused to the assessee. In that case, the departmental counsel had sought for an adjournment though on earlier occasion it was agreed that on the next date, the case would be argued. The assessee's counsel had come from Calcutta on both the occasions. However, the Tribunal is very slow in awarding the cost. In *Ms. Jay Brothers Investment & Trading vs. Dy. CIT*, ITA No. 6542/M/97 dated 6-11-2000, the Tribunal awarded the cost, while dismissing Department appeal holding that issue involved in the appeal is self evident and appeal is frivolous. In one case, though notice for hearing was given of only seven days and adjournment was moved in advance, on the ground of counsel was away to Ranchi as per pre-programme, the Tribunal adjourned on cost of Rs. 300/-. The Federation has made a representation to lay down guidelines to have uniformity in approach. The speeches of Shri R. P. Garg, Vice President and Shri M. K. Chaturvedi, Vice President, at All India Members Conference 2003 (87 ITD Special issue pages 20-29 and 40-42) can be referred for guidance.

Q.76 Can Tribunal dismiss an appeal ex parte?

Ans. Rules 24 and 25 of Appellate Tribunal Rules, 1963, lay down the procedure for hearing of appeal ex parte by the Tribunal. Proviso to rule 24 provides that when an appeal has been disposed of ex parte and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called out for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal. If a notice is sent to the assessee by Registered Post, the postal authorities may send back the notice stating "refused to accept" or the postal authorities may deliver the notice to a person who is not authorised to receive. If on receiving the acknowledgment from postal authorities an ex parte order is passed, and if an assessee files an affidavit and brings to the notice to the Tribunal that he has not received or he has not been served the notice, the Tribunal should restore the matter. In *Meghji Kanji Patel vs. Kundanmal Chamanlal AIR 1968 Bom 387*, the Hon'ble Bombay High Court held that where an affidavit is filed the same has to be accepted. This view of Bombay High Court, is affirmed by the Supreme Court in *Puwada Venkateswara Rao vs. Chindamana Venkata Ramana AIR 1976 SC 869, 871.*

In *CIT vs. Multiplan India (P) Ltd. (1991) 38 ITD 320*, (Del.) the reference was filed by the department. On the date of hearing neither the representative of the department was present nor an adjournment application was moved. The Tribunal passed the order after 5 days, dismissing the appeal of department, treating the appeal as unadmitted. Against the order, the department filed reference Application to refer the matter to High Court. The Tribunal rejected the Reference Application on the ground that the Department should have made application for restoration of appeal under rule 24 of the Income Tax Appellate Tribunal Rules and observed that revenue chose to add to the litigation for no justifiable reason, hence no question of law arose. However, it may be noted that the Tribunal has not considered the ratio laid down by Supreme Court in *CIT vs. Chenniappa Mudaliar (1969) 74 ITR 41 (SC),* wherein the Court held that the Tribunal must decide the case on merit and cannot dismiss it on non-appearance of appellant. Hence, in our view the order of the Tribunal in Multiplan India requires reconsideration.

It has been observed that in a number of cases, matters have been dismissed by the Tribunal applying the ratio of Multiplan India and thereafter, when the assessee makes an application for restoration under rule 24 of the Income-tax Appellate Tribunal Rules, the same is restored. This results in multiplicity of litigation. Matters come up for hearing before the Tribunal after about 6 years of filing. It may be possible that the appellant might have changed its address, consultant etc. In such a case, before passing the ex parte order, if a notice is sent through assessing officer lot of unintended paper work, time and expenses can be saved. When an assessee pays the Tribunal fees, it cannot be said that he has no interest in pursuing the matter. It is therefore urged that before applying the ratio of Multiplan India (P) Ltd, a notice may be sent to the assessee through assessing officer.

Applications made for restoration of appeals which are dismissed in limine under rule 24 on account of non-appearance, deserve to be liberally construed. The approach of the Tribunal should be little liberal with a view to advance justice. Rule 24 of the Income-tax (Appellate Tribunal)Rules, 1963, is similar to Order 9, rule 13 of the Code of Civil Procedure, 1908. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court or the Tribunal to exercise powers ex debito justitiae. The "sufficient cause" referred to in rule 24 may be construed as good cause. If the cause is good it would also be sufficient. If a party is unaware of the date of hearing and the unawareness is not due to any fault of his, then unawareness would be sufficient cause which would prevent a party from appearing in the Court. *Rainbow Agri Industries Ltd. vs. ITAT (2004) 266 ITR 39 (Bombay); CIT vs. Ansal Housing & Constructions Ltd. (2004) – 190 CTR 172 (Delhi).*

Where an ex parte order is passed against the assessee, great responsibility is cast on the Members of Tribunal. The Members have to act not only as judges but also as representative for the party who is not represented. The duty of the Tribunal is to decide correct interpretation of law, hence, it may not be desirable to decide any issue which involved an important question of law in an ex-parte order. However, if it is inevitable, then the Tribunal may request any member of Bar to assist the Bench as amicus curiae. In such a situation assistance of the Bar Association may be sought. If such a system is developed, it may go a long way in building the confidence of the institution in the mind of the public. Even an ex parte order, should not lead to punishment to an assessee who may not be in a position to engage a competent representative.

Q.77 Whether an ex parte order can be recalled? If yes – its procedure.

Ans. Yes. This is a power incidental to and ancillary to the jurisdiction given for the Tribunal. *Murlidhar Sudra vs. ITAT (1973) 92 ITR 189 (Cal)*

In following cases it has been held that the ex parte order can be recalled: *CIT vs. ITAT and Another (1992) 196 ITR 640 (Ori.) at (645), CIT vs. ITAT & Another (1992) 196 ITR 683 (Ori), Joseph Michael & Bros. vs. ITAT (1993) 199 ITR 466 (Ker.), Kripa Shankar vs. CIT/WT (1990) 181 ITR 183 (All), Ravi Construction & Co. vs. CIT (1988) 173 ITR 674 (Guj.), CWT vs. Illa Dalmia (Smt.) (1987) 168 ITR 306 (Del.), Mahaverprasad Jain vs. CIT (1987) 172 ITR 331 (M. P.).*

The assessee can make an application to recall the ex parte order passed by the Tribunal. The Tribunal has power under Rule 24 of the Rules to restore the appeal decided ex parte. The application for restoration should be in detail, explaining cause of absence, supported by material and affidavit, if possible. Rule 24 should be construed liberally *(Rainbow Agri Industries Ltd. vs. ITAT (2004) 266 ITR 38 (Bombay)*. As per Rule 25 of the Tribunal Rules, the respondent can also make an application to restore the ex parte order passed against him. However, the proviso to Rule 25 is not clear. Hence, amendment of the provision is desirable to avoid litigation.

Q.78 What is meant by "discretionary power"?

Ans. The word 'discretion' standing single and unsupported by circumstances signifies exercise of judgement, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, here the Legislature concedes discretion it also imposes a heavy responsibility.

On many aspects and matters the members of the Tribunal have discretion. Discretion should be exercised judiciously as a judicial authority well versed in law. In Halsbury's Laws of England, 4th Edn., Vol. I, it has been observed : "A statutory discretion is not, however, necessarily or, indeed, usually absolute; it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether to act and how to act. Moreover, there may be a discretion whether to exercise a power, but no discretion as to the mode of its exercise; or a duty to act when certain conditions are present, but a discretion how to act. Discretion may thus be coupled with duties".

Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgement directed by circumspection; deliberate judgement; soundness of judgment; a science or understanding to discern between falsity and truth between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (Per Lord Halsbury, L. C., In *Sharp vs. Wakefield, (1981) Appeal Cases 173)*. Also *(See S.*

G. Jaisinghani vs. Union of India and Other (AIR 1967 SC 1427). Discretion has to be exercised fairly and without fear. When one hold flowers in both hands, it gives equal fragrance without discriminating either of the hands – whether it is right or left – nothing more or nothing less fragrance to each of the two. It is rightly said **"Men with discretion will not deflect from the path of rectitude".**

Q.79 Whether the Tribunal can give finding/direction for another year?

Ans. Generally, the Tribunal does not have the jurisdiction to give any direction with regard to the proceedings relating to another year or to include deleted amount in any other year's assessment. Where an appeal relates to a particular assessment year, the finding and direction must necessarily be limited to that particular year –*ITO vs. Murlidhar Bhagwan Das (1964) 52 ITR 335 (SC)*. The Tribunal cannot order reopening of assessment for another year – *CIT vs. Manick Sons (1969) 74 ITR 1, 5(SC)*. In case any deduction is disallowed after holding it is allowable in another year, a finding / direction should be given in the interest of justice. *(Perfect Equipments vs. Dy. CIT (2003) 85 ITD 50 (Ahd.)*

Q.80 Can Tribunal setaside matter to cure the deficiency in the assessment order?

Ans. Fresh opportunity need not be granted to the erring tax authority to make good the deficiency. In *Asst. CIT vs. Anima Investment Ltd. (2000) 73 ITD 125 (Del.) (TM),* the Delhi Tribunal held that the Tribunal cannot set aside the matter to make good a deficiency in the assessment order. However, the Tribunal is liberal and may restore the matter to the A.O. for fresh enquiry.

Q.81 Can Tribunal pass protective order?

Ans. In *Smt. Hemlata Agarwal vs. CIT (1967) 64 ITR 428 (All.),* the Court held that, though it might be open to an ITO to make protective assessment; it is not open to the Tribunal which is final Court of fact, to make a protective order.

Q.82 Can the Tribunal give more relief than that asked for by the appellant?

Ans. The Act has left the parties going up as appellants before the Tribunal to choose and set the scope of their appeals by raising questions arising out of the relevant proceedings. They can limit their attack on the determination of the first appellate authority and seek an intervention of the Tribunal only to the extent they consider necessary for getting the relief they intend to claim from the Tribunal. They are not, however, permitted to widen the scope of the proceedings determined by the Assessing Officer or the first appellate authority. Within the outer limit of those proceedings, they are free to ask for the necessary relief thus limiting the subject matter and ultimately the scope of the appeal. It is plain that once these limits are set, the Tribunal can deal only with that part of the order of the lower authority which has been made the subject matter of the appeal before the Tribunal. It would not be permissible for the Tribunal to adjudicate or give a finding on a question which was not agitated or in regard to which no relief was claimed before the lower authorities or which was not in dispute and which does not form the subject matter of the appeal. It is thus clear that the Tribunal has no jurisdiction to base its decision on a question which was not the subject of dispute at any stage of the proceedings and is not the subject matter of the appeal. It has no power to enlarge the scope of the proceedings or that of the appeal before it by permitting the parties or any one of them to ask for a relief which was never the subject matter in those proceedings or of the appeal. In short, the Tribunal is not competent to travel beyond the scope of the appeal in order to decide questions raised by the assessee subsequently. *[CIT vs. Krishna Mining Co., (1977) 107 ITR 702, 707-08, 708 (A.P.)]*

Q.83 Can Tribunal consider subsequent events?

Ans. Yes. The principle that subsequent events can be taken into consideration by a Court when granting relief to parties is applicable to assessments. Therefore, the Tribunal hearing an appeal has jurisdiction to admit additional evidence regarding a subsequent event *[Anglo American Direct Tea Trading Co. vs. CAGIT, (1968) 69 ITR 667 (SC)].*

Q.84 What is expected of the Tribunal

Ans. The Tribunal is the final fact finding authority and if it goes wrong the party is virtually left with no remedy. A reference to the High Court presupposes a pure point of law or a point of law of substantial importance but if on an appreciation of evidence much is to be decided then there arises a dead lock. In all judicial proceedings it is a well settled principle of law that the quality of the order that is passed must demonstrate a total application of mind by the authority who has passed the order. Where a sufficiently high authority such as the Tribunal is concerned a high sense of responsibility must pervade the order at all times. There has to be proper consideration of the facts and an appreciation in the manner prescribed by law which is not to be careless and more importantly, the application of all the well defined principles that govern the case *[ACIT vs. Gautam Investments (P) Ltd. (2001) 250 ITR 324 (Kar).]*

Tribunal to consider case carefully and to give a well reasoned order. Order must indicate that mind has been applied to factual aspects of the case. Recording of reasoning or findings is basic in a judicial order. The Tribunal as the ultimate fact finding authority, has a very high degree of responsibility cast on it because correction of errors thereafter in many cases is not possible. When there is a legal duty enjoined on a forum that duty is liable to be discharged and cannot be bypassed. Since an issue of fact is also intertwined with a legal aspect it is incumbent on the Tribunal to consider the case on the merits and pass a well reasoned order. Even in cases where the appellate authority reaches a finding that interference is not necessary, the order need not be long but the quality of the order must indicate that the authority has applied its mind to all aspects of the case factually and legally and that there is justification for its decision irrespective of whether it concurs or differs. *[J. Bheemananda Gupta vs. Asstt. CIT (2001) 250 ITR 537 (Kar.), Lalchand Bhagat Ambika Ram vs. CIT (1959) 37 ITR 288 (S.C.)].*

The Tribunal being the final fact finding authority is expected to apply its mind to the contentions and issues and give a separate finding on each issue. The fact that the order of the Tribunal from independently examining the issues and then discussing the same. *[Vinjane Centre vs. Dy. CIT (2002) 258 ITR 191 (Madras)].*

The Tribunal while passing orders cannot gloss over important matters in a one sentence statement that these judgments are distinguishable. Even assuming that the judgments are either not applicable or distinguishable, it is a well defined procedure that applies to all judicial forums that it is essential to record what the judgments in question are, or a brief summary of the contentions raised and to record the findings thereon. It is not permissible to merely brush aside important legal issues or to disregard them as it will become impossible for the next higher authority to be able to decipher as to what is the ground on which the Tribunal rejected a particular contention *[Munibyrappa vs. CIT (2004) 265 ITR 560(Kar.)].*

When the Tribunal was to dislodge the order passed by the appellate authority it was obligatory on the part of the Tribunal to demonstrate as to how the findings recorded by the appellate authority were not consistent with the facts and the provisions of law. It was obligatory on the part of every appellate authority to point out by good and acceptable reasoning as to how the facts and circumstances of one case happened to be different from other cases. It was improper to close the doors to a litigant by a casual treatment of some statements moving towards a conclusion that the precedents on which such litigant relied were different from his case. *[R.D. Joshi & Co. vs. CIT (2001) 251 ITR 332 (M.P.)].*

The Appellate Tribunal is a judicial body exercising judicial powers under the statute. It is not empowered to employ its jurisdiction arbitrarily. Whatever it does must be done in consonance with sound judicial principles and in accordance with well accepted doctrines applicable to judicial bodies. The power conferred on the Tribunal by section 254 to pass "such orders thereon as it thinks fit" in respect of an appeal before it must be exercised within the limits which can be discovered by reference to the jurisdiction of the authority whose order has given rise to the appeal *[CIT vs. Ram Murti (1973) 87 ITR 577 (Allahabad)].* If a provision is in the statute book when the question come up for decision before the Tribunal, even though the assessee may not specifically refer to such provision, the Tribunal ought to have considered and referred to such provision. It is the duty of the Tribunal to consider the law as it existed then even though the assessee failed to bring it to its notice. *[Kerala Chemicals & Protein Ltd. vs. CIT (1999) 235 ITR 467 (Kerala); CIT vs. Mahalakshmi Sugar Mills Co. Ltd. (1986) 160 ITR 920 (S.C.)].*

Q.85 Whether informal question can be put to the assessee or his counsel at the time of hearing?

Ans. The Tribunal being a quasi-judicial authority is expected to restrain itself to the assessment order, appellate order and other papers or documents placed in the paper book and arguments of both the parties. The Tribunal is not expected to put informal questions to the party or their counsel. Such answers cannot be relied upon for coming to any conclusion adverse to the assessee in view of the procedure prescribed by Rules 29, 30 and 31. Such answers could not form part of the record and no adverse inference could be drawn against the assessee based on such informal answers. *[Roshan Di Hatti vs. CIT (1977) 107 ITR 938 (S.C.)].*

Q.86 When there is an appeal and a cross appeal – can the two appeals be heard separately?

Ans. No. It is desirable that the Tribunal hear both appeals together. On account of the mistake of the Tribunal is not clubbing the two appeals, the statutory right of appeal of one party could not be negatived. It is a well settled proposition of law that no party should suffer on account of the mistake of the Court or the Tribunal *[CST vs. Vijai Int. Udyog (1985) 152 ITR 111 (S.C.)].*

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Q.87 Whether the Tribunal has power to rectify its order?

Ans. The Tribunal's power to rectify its order is derived from the provisions contained in section 254(2) of the Act. The said section provides that the Tribunal shall rectify any mistake apparent from the record by amending any order passed by it under sub-section (1) within four years from the date of the order if the mistake is brought to its notice by the assessee or the Assessing Officer. The proviso to section 254(2) makes it clear that any amendment which has the effect of enhancing an assessment or reducing a refund or increasing the liability of an assessee cannot be made unless the Tribunal has heard the assessee on its intention to do so.

Rule 34A of the Appellate Tribunal Rules 1963 which was inserted w.e.f. 25th July, 1991 provides for the procedure for dealing with an application under section 254(2).

It provides that an application shall clearly and concisely set out the mistake apparent from the record of which rectification is sought. The application must be in triplicate and the procedure for filing of appeals is to apply *mutatis mutandis* to such applications. The Bench which originally heard the matter must ordinarily hear the application, unless the President, Senior Vice President, Vice President or the Senior Member present at the station otherwise directs. The application must be disposed of after hearing both the parties. The proviso to sub-rule (3) of Rule 34A provides that it would not be necessary to post a Miscellaneous Application for hearing if it prima facie appears to be a petition for review. Sub-rule (4) provides that an order disposing of an application under sub-rule (3) shall be in writing with reasons in support of its decision.

Prior to the insertion of Rule 34A in the Rules, there was controversy as to whether the principles of natural justice were required to be followed before an order is made disposing of application under section 254(2). The Delhi High Court in *Smart Pvt. Ltd. vs. ITAT (1990) 182 ITR 384* took the view that although there was no specific provision for dealing with an application under section 254(2), the rules of natural justice would require that both parties be heard before disposal of the application.

A possible area of controversy is where the proviso to sub-rule (3) of Rule 34A is invoked and Miscellaneous Application is not posted for hearing on the ground that it appeared prima facie to be a petition for review. *[Refer ITO vs. Hemesh Family Trust (1995) 51 TTJ 601 (Ahd)]* or that the rejection of the Miscellaneous Application does not result either in increase or a reduction of refund when no hearing is required *[Refer Drill Rock Engg. (P) Ltd. vs. ITO (1990) 36 ITD 135 (Hyd) & Pearl Agencies vs. IAC (1989) 30 ITD 342 (Del)]*. Rejecting the application under rule 34A(3) without hearing shall be in violation of principles of natural justice and such rule is void. The Tribunal should hear the assessee before dismissing the petition. An application cannot however be dismissed solely on the ground that the assessee failed to appear on the date of hearing – *Brijlal vs. ACIT (1996) 59 ITD 1 (Del) (TM).*

There is no doubt that the power of review is not an inherent power but must be conferred by law either specifically or by necessary implication. *(Patel Thackersy vs. Profyumansinghji Arjunsinghji AIR 1970 SC 1273)* Courts have consistently held that review proceedings imply those proceedings where a party as of right can apply for consideration of the matter already decided upon after a fresh hearing on the merits of the controversy between the parties and that such a remedy is available only if provided by the statute. As early as in *Trikamlal Maneklal In Re : (1958) 33 ITR 725 (Bom)* the Bombay High Court held that the Tribunal having once delivered a judgment which has by operation of law become final is not entitled to review its decision in a subsequent proceeding.

The general rule, however, is subject to exceptions, and one of the exceptions is that a Judicial Tribunal can always recall and quash its own order when it is shown that it was obtained by fraud or by palpable mistake or was made in utter ignorance of the statutory provision. *(Mangat Ram Kuthiala vs. CIT (1960) 38 ITR 1 (Pun).* However, an inherent power to rectify a wrong committed by itself cannot be construed to be a power of review. *(Shew Paper Exchange vs. ITO (1974) 93 ITR 186 (Cal.).* Thus a Court or Tribunal can be said to have an inherent power and jurisdiction to rectify a wrong or correct an error committed by itself. *(S.B. Singar Singh & Sons vs. ITAT (1965) 58 ITR 626 (All.)*

It is a moot point as to when the Tribunal can be said to be exercising its inherent power or its statutory power to correct a mistake apparent from the record under section 254(2) and when the exercise of the power tantamounts to a review of its earlier order. There is marked difference between review and the rectification. Distinction is not properly appreciated.

Q.88 Under what circumstances, can the order of Tribunal be said not to contain a mistake apparent on record?

Ans. Failure to consider argument advanced is not an error apparent on the record. *CIT vs. Ramesh Electric and Trading Co. (1993) 203 ITR 497 (Bom), Khushalchand B. Daga vs. ITO (1972) 85 ITR 48 (Bom)* Oversight of fact is not a mistake apparent. *CIT vs. Gokulchand Agarwal (1993) 202 ITR 14 (Cal)* Erroneous order in the light of subsequent decision of jurisdictional High Court is not rectifiable. *Kishanchand J. Bhavnani (HUF) vs. WTO (1989) 29 ITD 383. (Bom.).* Recalling of an order under section 254(2) not possible *CIT vs. ITAT (1992) 196 ITR 683 (Orissa).* The Orissa High Court held that the power under section 254(2) is merely to "amend an order passed" under section 254(1). "Amendment" of order does not obliterate the order originally passed and its substitution by another order. Order rejecting Miscellaneous Application cannot be rectified. In *CIT vs. ITAT (1992) 196 ITR 838 (Orissa).*

Q.89 Under what circumstances Courts have held that the order of Tribunal is liable to be rectified?

Ans. Order contrary to pronouncement. Refer *CIT vs. G. Sagar Suri and Sons (1990) 185 ITR 484. (Del). CIT vs. Sunil Kumar (1995) 212 ITR 238 (Raj.)* Order made under misconception or misapprehension. Refer *Maharaja Martant Singh Ju Deo vs. CIT (1988) 171 ITR 586 (MP).* Failure to consider preliminary objection. Refer *Laxmi Electronic Corporation Ltd. vs. CIT (1991) 188 ITR 398 (All), CIT vs. Keshav Fruit Mart (1993) 199 ITR 771 (All).*

Failure to consider alternative argument *CIT vs. ITAT (1988) 172 ITR 158 (MP),* Failure to consider material on record *CIT vs. Mithalal Ashok Kumar (1986) 158 ITR 755 (MP),*Order based on erroneous assumptions *CIT vs. Shakuntala Rajeshwar (1986) 160 ITR 840 (Del),* Order based on a decision subsequently reversed, *Kil Kotagiri Tea and Coffee Estates Company Ltd. vs. ITAT (1988) 174 ITR 579* (Ker)

Non-consideration of relevant provisions of law/rule/Supreme Court decision. *CIT vs. Quilon Marine Produce Co. (1986) 157 ITR 448) (Ker); Modu Timblo vs. 1st WTO (1995) 53 ITD 53 (Pune)(TM); IAC vs. Gilard Electronics (1986) 18 ITD 176 (Jp.); ACIT vs. Somany Pilkington Ltd. (1994) 49 ITD 207 (Delhi).* Similarly, *CIT vs. Ballabh Prasad Agarwalla (1997) 90 Taxman 283 (Cal). CIT vs. Subodhchandra S. Patel (2004) 265 ITR 445 (Gujarat).* Decisions not cited referred to in order *Lakhmini Mewal Das vs. ITO (1972) 84 ITR 649 Cal).* Decisions cited not referred to in order *Finquick Finance (P) Ltd. vs. ACIT (2003) 87 ITD 323 (Delhi) (TM), Mohan Meakin Ltd. vs. ITO (2004) 84 TTJ (TM) 1.*

Order can be amended in the light of retrospective amendment. *M. K. Venkatachalam vs. Bombay Dyeing and Mfg. Co. Ltd. (1958) 34 ITR 143 (SC).* On amendment with retrospective effect would require a rectification consequent to the retrospective amendment. *CIT vs. Eva Raha (1980) 121 ITR 293 (Gau); CIT vs. Kelvin Jute Co. Ltd. (1980) 126 ITR 679 (Cal).* Even if a reference has been made *ITO vs. Homi Mehta & Sons (P) Ltd. (1985) 14 ITD 64 (Bom).*

Order can be amended in the light of a subsequent Supreme Court decision. It is well settled that where no further investigation of facts is called on the facts found, the principle of law declared by the Supreme Court can be straightaway applied with the consequence of rendering order mistaken. It would be case of a mistake apparent from the record *[Walchand Nagar Industries Ltd. vs. V. S. Gaitonde (1962) 44 ITR*

260 (Mah); CBDT Circular No. 68 dated 17-11-1971 – Chaturvedi & Pithisaria – Circular Book Vol. II page 1847; ITO vs. Shashi Raj Kapoor (1987) 21 ITD 406 (Bom) Bank of Rajasthan vs. IAC (2004) 88 ITD 577 (Jodh) HPFC vs. CIT (1998) 233 ITR 450 (H.P.); His Highness Sir Rama Varma vs. ITO (1982) 2 ITD 491 (Coch) Bank of Rajasthan Ltd. vs. IAC (2004) 88 ITD 577 (JP) but not where limitation had expired *Soorajmull Nagarmull vs. CIT (1984) 20 TTJ 145 (Cal).* Supreme Court order passed after Rectification Order passed. Rectification is without jurisdiction. *CIT vs. Schlumberger Sea Co. Inc. (2003) 264 ITR 331 (Calcutta).*

Tribunal finding that there was an error in its order and recalling it is finding of fact, no question of law arises from its order.

CIT vs. Umeshchand K. Patel (1997) 225 ITR 1050 (M.P.)

Tribunals can rectify errors in its order.

Seth Madan Lal Modi vs. CIT (2003) 261 ITR 49 (Delhi)

If there is mistake committed by Courts or Tribunal it needs to be rectified as no one should suffer or come to grief on account of mistake committed by Courts.

Rahulkumar Bajaj vs. ITO (1999) 69 ITD 1 (SB) (Nag.)

Where decisions cited before the Tribunal are not considered at all then it may be a case of a mistake apparent from record but when the decisions relied upon have been considered but not to the advantage of a party, is not a mistake apparent from record.

Finquick Finance (P) Ltd. Vs. CIT (2003) 87 ITD 323 (TM) (Del)

A look at the record must show that there has been an error, reference to documents outside the record and the law is inpermissible.

CIT vs. Keshri Metal Pvt. Ltd. 237 ITR 165 (SC)

Only an apparent error of fact or law can be rectified. If the mistake of law has to be established by constructing the words of a section to find its proper meaning, then such an error cannot normally be a rectifiable error.

Poothundu Plantations Pvt. Ltd. vs. Agricultural Income Tax Office and Other (1996) 221 ITR 557 (SC)

The Hon’ble Supreme Court in *L. Hirday Narain vs. ITO (1970) 78 ITR 26* at 27 observed: “If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling, the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right – public or private – of a citizen.

The power to rectify the order of assessment conferred on the Income-tax Officer by section 35 is to ensure that injustice to the assessee or to the revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that to do justice, it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding. That power is not discretionary and the Income-tax Officer cannot, if the conditions for its exercise were shown to exist, decline to exercise it.”

The Apex Court in "*Distributors (Baroda) Pvt. Ltd. vs. Union of India (1985) 155 ITR 120 at 124* observed : "To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce V. Delameter (A. M. Y. at page 18) "a judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors".

The Allahabad High Court in *Laxmi Electronic Corporation Ltd. vs. CIT (1991) 188 ITR 398* observed: "It is well-settled proposition that an act of Court (which means and includes a Tribunal of the nature of the Income tax Appellate Tribunal) should not prejudice a party. In such a case, it would not be just to drive the party to a reference under section 256 of the Act. It must be left to the Tribunal to reopen an appeal if it finds that it has omitted to deal with an important ground urged by the party".

The Rajasthan High Court in *CIT vs. Ramesh Chand Modi (2001) 249 ITR 323* observed: "Where the Tribunal fails to decide some of the questions raised before it inadvertently or by oversight, the only appropriate method of correcting such mistake is to recall the order and make fresh order after affording an opportunity of hearing to such party. In all such cases, ordinarily the Court Tribunal acts ex debito justitiae to prevent abuse of process even in the absence of any power."

"Once a mistake on the face of the record is established, what order should follow to correct that mistake shall always depend on the facts and circumstances required to rectify the mistake. If the mistake is one which requires determination of some undecided issue because it has not been decided though raised, the procedure that would follow the discovery of such mistakes is to recall the order and decide the case afresh or to decide that issue after affording an opportunity to the parties concerned and pass a fresh order in the light of finding on such issue. The order under section 254(2) of the Income-tax Act, 1961, is not confined to arithmetical or clerical mistakes, nor only to correct substantive mistakes but also procedural mistakes."

"Where a Tribunal fails to notice the question raised before it inadvertently under any misapprehension, in correcting such error by recalling the order made without deciding such question which goes to the root of the matter for deciding the same appropriately falls in such category of procedural mistakes which such Tribunal must correct ex debito justitiae, even in the absense of any power."

The Rajasthan High Court in *Champalal Chopra vs. State of Rajasthan (2002) 257 ITR 74* observed: "A reading of sub-section (2) of Section 254 of the Income-tax Act, 1961, makes it clear that its scope and ambit is limited. It restricts the power of the Appellate Tribunal to rectify mistakes apparent from the record. In the normal course, the power of rectification cannot be extended to recalling the entire order, because obviously it would mean passing a fresh order. This is not the legislative intent. However, in a given case where the factual mistake is so apparent that it becomes necessary to correct the same, the Tribunal would be justified in not only correcting the said mistake by way of rectification but if the judgment has proceeded on the basis of that fact, it would be justified in recalling such order".

The Rajasthan High Court again in *CIT vs. S. S. Gupta (2002) 257 ITR 440* observed: "Once the conclusion is reached that there exists a mistake apparent on the face of the record, the Tribunal has the necessary power to rectify its order and for eliminating such mistake". As the order speaks for itself and about the facts stated in the order as stated above there is no dispute about the correctness of such facts, the answer is self-evident that a mistake was apparent on the face of the record inasmuch as a finding of fact against the assessee has been reached on the basis of material which was conveyed to the Tribunal after the hearing was over, and thus the Tribunal inadvertently took into consideration such information which was never disclosed to the assessee without affording any opportunity to him to explain the information transmitted to the Tribunal without notice to the assessee which apparently vitiated the order founded on such information. Taking into account such material for basing its findings which was never made part of the record, amounts to a mistake apparent from record, which is fatal to sustain the order. This mistake is obvious from record."

Q.90 What is the present scenario?

Ans. Recently the Federation has noticed that some of the Hon'ble Members take the statutory duty heavily cast under section 254 (2) of the Income-tax Act, very lightly and in a casual, mechanical and perfunctory manner. Rectification Applications are disposed of in a haste, in an arbitrary and whimsical manner and after ignoring apparent, patent and blatant mistakes of law and facts and not rectifying and amending the order against principles laid down by the Hon'ble Supreme Court and the jurisdictional High Court. It causes unnecessary expense and avoidable inconvenience to the parties, resulting in long drawn litigation. Representation was made and the President has forwarded the same to the Senior Vice President & Vice Presidents for giving a serious thought and take suitable measures vide D. O. No. P/7/2003 dated December 15, 2003.

Q.91 What is the meaning of "record"?

Ans. Record means record of the Tribunal; i.e., the papers and documents and orders which have been placed in the 'Paper Book' and with the memo of appeal, before the Tribunal by the parties. Any paper or document before the lower authorities but not included in the Paper Book shall not be part of the record. It is advisable to file the Paper Book containing the submissions and material placed before the lower authorities. However, papers emerging from the assessment order and appellate order to be considered. *Amrit Bottlers (P) Ltd. vs. ITO (1994) 49 ITD 1 (TM). CIT vs. Ballabh Pd. Agarwalla (1998) 233 ITR 354 (Calcutta).*

Q.92 When appeal is filed before the High Court u/s. 260A and appeal is dismissed in limine, whether Tribunal can rectify the mistake apparent from the record?

Ans. In *Seth Chemical Works (P) Ltd. vs. Dy. CIT (2001) 114 Taxmann 117 (Cal.) (Mag.),* the Tribunal held that, where from Tribunal's order an appeal is filed under section 260A to High Court and High Court dismissed the appeal in limine, there is no merger of Tribunal order with High Courts order and Tribunal can rectify mistake from record in its order. The Tribunal relied on the ratio of Supreme Court judgment in *Kunhayammed vs. State of Kerala (2000) 245 ITR 360 (SC)*

Q.93 Whether rectification application u/s. 254(2) can be signed and filed by authorized representative of the Department?

In, *ITO vs. Vadilal Nanchand (Ahd.),* (1999) 63 TTJ (Ahd) 189 it has been held that, application filed u/s. 254(2), by Senior authorized representative of the Department is not maintainable.

See *Dy. CIT vs. Maruti Textiles (P) Ltd. (2000) 66 TTJ 575 (Ahd.), Dy. CIT vs. Saraf Trading Corporation (2001) 73 TTJ 741 (Coch.)*

Q.94 Whether Rectification Application u/s. 254(2) can be signed by the authorized representative of the assessee?

Ans. If the Vakalatnama/Power of Attorney confers the power to make any application or petition, the authorized representative can make the application. However, it is advisable to submit the application signed by the assessee to avoid unnecessary objection.

Q.95 What is the fee?

Ans. Fee for the Miscellaneous Application is Rs. 50/-. The receipted challan should be submitted with the application. The application should be filed as early as possible but not later than four years from the date of order of the Tribunal.

Q.96 Whether the Tribunal can review its order u/s. 254(2) of the Act?

Ans. The power of review is not inherent in a Court or Tribunal. It is a creature of the statute. A court or Tribunal cannot review its own decision unless it is permitted to do so by statute. The courts having general jurisdiction like Civil Courts have inherent power. But the courts or Tribunals of limited jurisdiction created under special statutes have no inherent power. The Tribunal has no power to review its order in the garb of section 254(2) of the Act. As regards rectification of mistakes, there is a provision u/s. 254(2) of the Act which is similar to section 154 of the Act. *(Gopinath Deb vs. Budhia Swain, AIR 1983 Orissa 31, 33).* Section 152 of the Civil Procedure Code permits to correct only clerical errors or arithmetical mistakes or errors arising from any accidental slip or omission. *(CIT vs. Globe Transport Corpn. (1992) 195 ITR 311 at 318-319 (Rajasthan), CIT vs. Roop Narain Sardar Mal (2004) 186 CTR 713 (Rajasthan), CIT vs. Devilal Soni (2003) 30 Tax World 238 at 241 (Rajasthan), Jainarain Jeevraj vs. CIT (1980) 121 ITR 358 at 363 (Rajasthan), Prajatantra Prachar Samiti vs. CIT (2004) 186 CTR 96 at 101 (Orissa). CIT vs. Jagabandhu Roul (1984) 145 ITR 153 at 157 (Orissa), CIT & Another vs. ITAT & Another (1992) 196 ITR 640 at 645-46 (Orissa), Shaw Wallace & Co. Ltd. vs. ITAT & Others (1999) 240 ITR 579 at 583 (Calcutta), CIT vs. K. L. Bhatia (1990) 182-ITR 361 at 367 (Delhi), CIT vs. Suman Tea & Plywood Industries Pvt. Ltd. (1997) 226 ITR 34 at 44 (Calcutta), ITO vs. ITAT & Another (1998) 229 ITR 651 at 656 (Pat.), CIT & Another vs. ITAT & Another (1994) 206 ITR 126 at 136-137 (AP), Asstt. CIT vs. C. N. Ananthram (2004) 266 ITR 470 (Kar.), Karan & Co. vs. ITAT (2002) 253 ITR 131 (D)*

Q.97 What should be the contents of an order of the Tribunal on application under s. 254 (2) of the Act?

Ans. Before an order is made by the Tribunal amending the earlier order, it must be satisfied that the earlier order suffers from mistake apparent from the record. The Tribunal must refer to the materials on record which were not considered or misread which led to the passing of a patently wrong order under s. 254(1) of the Act. The Tribunal should pass only one order amending the earlier order if it is satisfied that the earlier order suffers from mistake apparent from the record. *(ACIT vs. C.N. Anantharam (2004) 266 ITR 470 (Kar.), Karan & Co. vs. ITAT (2001) 169 CTR (Del) 361 : (2002) 253 ITR 131 (Del), CIT & Anr. vs. ITAT & Anr. (1992) 102 CTR (Orissa) 281: (1992) 196 ITR 640 (Orissa) and CIT vs. U.P. Shoe Industries (1999) 152 CTR (All) 205; (1999) 235 ITR 663 (Allahabad). Prajatantra Prachar Samiti vs. CIT (2003) 264 ITR 160 (Orissa).*

Q.98 What is the time limit for making the application and passing the order?

Ans. Time provided for making application under the Act is 4 years from the date of the order u/s. 254(1), which is sought to be rectified. However, the order can be passed beyond the said period of 4 years. Once the assessee has moved the application within four years from the date of order, the Tribunal cannot reject that application on the ground that four years have lapsed, which includes the period of pendency of the application before the Tribunal. If the assessee has moved the application within four years from the date of the order, the Tribunal is bound to decide the application on the merits and not on the ground of limitation. Section 254(2) of the Income-tax Act, 1961, lays down that the Appellate Tribunal may at any time within four years from the date of the order rectify the mistake apparent from the record but that does not mean that if the application is moved within the period allowed; i.e., four years, and remains pending before the Tribunal, after the expiry of four years the Tribunal can reject the application on the ground of limitation *(Harshvardhan Chemicals & Minerals vs. UOI (2002) 256 ITR 767 (Rajasthan).*

Q.99 Can the Tribunal condone delay in filing the application?

Ans. No discretion has been conferred statutorily to condone delay and admit an application u/s. 254(2) of the Act beyond 4 years. However, the ITAT, Nagpur Bench in *Bhilai Engineering Corporation Ltd. vs. Dy. CIT (2002) 81 ITD 282* observed "After Tribunal may, there is comma. Thereafter the words are at any time within four years. This setting of the section suggests that the words "at its own" are implied, therefore, the time limit of four years is in the context of *suo motu* rectification. Where rectification is to be done in accordance with the prayer made by either of the parties such time limit is not much relevant. The requirement of justice is the paramount factor. It is to be seen that how best justice could be done. If the error is palpable, Tribunal in the interest of justice can proceed with the matter and set the things right. In the said case, delay was due to mistake of the counsel and the issue involved was covered by the decision of the Apex Court, which is a binding precedent. The Tribunal took into consideration the legal pragmatism. It was reminded of the dictum : Fiat justitia ruat et coelum (Justice should be done even if the heaven falls). The procedure should be the hand maid and not the mistress of legal justice. Cause of justice should not be subservient to the rules of procedure".

In *Khusalchand B. Daga vs. ITO (1972) 85 ITR 48 (Bom)*, the Court held that, the Tribunal should not allow a party to suffer for its own mistake, order has to be rectified.

Q.100 Can Tribunal be made as a respondent in an appeal or writ before the High Court?

Ans. When an order particularly an order on Rectification Application u/s. 254(2) is in challenge before the High Court by way of appeal or a writ, it is desirable to make the Tribunal as one of the respondents. On making respondent, the Tribunal comes to know as to cause of grievance; can plead and explain its view point and shall preserve and make available the record. There are innumerable cases where the Income Tax Appellate Tribunal has been made a party. Please refer *State of Rajasthan vs. ITAT & Others (2003) 259 ITR 686 (Raj). Jyotsna Suri vs. ITAT & Others (2003) 179-CTR-265 (SC); I.T.O. vs. ITAT (1987) 168-ITR-809 (Raj.); C.I.T. vs. ITAT (1992) 196 ITR 838 (Orissa); Kil Kotagiri Tea & Coffee vs. ITAT (1988) 174-ITR-579 (Ker); C.I.T. vs. ITAT (1994) 206 ITR 126 (A.P), D.I.T. (Exemption) vs. ITAT (1998) 232-ITR-688 (Del); Lalit Suri Jyotsana Suri vs. ITAT (1998) 232-ITR-395 (Del); C.I.T. vs. ITAT (1992) 196-ITR-640 (Orissa); C.I.T. vs. ITAT (1994) 210-ITR-397 (Orissa); I.T.O. vs. ITAT (1998) 229-ITR-651 (Patna); Prasad Productions vs. ITAT (1997) 226-ITR-778 (Mad); Real Food Products (P) Ltd. vs. ITAT (1998) 229-ITR-351 (AP); Smart Pvt. Ltd. vs. ITAT (1990) 182-ITR-384 (Delhi FB); Punjab National Bank vs. ITAT (1991) 54-Taxman-227 (Delhi); Prem Sahily Trust vs. ITAT (1993) 201-ITR-190 (Delhi); Shaw Wallace & Co. Ltd. vs. ITAT (1999) 240-ITR-579 (Cal.); Rainbow Agri Industries Ltd. vs. ITAT (2004) 266 ITR 38 (Bombay).* The view of the *Hon'ble Supreme Court in Savitri Devi vs. District Judge (1999) 2-SCC-577* is completely distinguishable and inapplicable on the Tribunal. In the said case the Hon'ble Court strongly deprecated the practice of impleading the judicial officers, who disposed of the matter in a civil proceeding when the writ petition was filed in the High Court.

Q.101 What is the remedy against an order u/s. 254(2)?

Ans. If the order is without jurisdiction, a writ can be filed. Appeal lies against such order u/s. 260A before the High Court. *Shaw Wallace & Co. Ltd. vs. ITAT (1999) 240 ITR 579 (Cal.); ITO vs. ITAT (1998) 229 ITR 651 (Patna), CIT vs. ITAT (1994) 206 ITR 126 (AP).*

Q.102 Whether Tribunal can *suo motu* rectify the order based on the judgment of Supreme Court, Jurisdictional High Court or failure to consider the relevant provisions of the Act.

Ans. Section 254(2) of the Act provides the power on the Tribunal to *suo motu* rectify on finding the mistake apparent on the record. Rather it is the duty of the Tribunal to do so. The Tribunal can suo motto rectify the order based on the judgment of S.C. as law laid down by the S.C. is the law of the land and the Tribunal is bound to follow under Article 141 of the Constitution. Same is the position for the judgment of the jurisdictional High Court. If the Tribunal has failed to consider the relevant provision of the Act — it should rectify the mistake by applying relevant provision because the Tribunal has to act in accordance with the provisions of the Income-tax Act. However notice to both the parties should be given and they should be heard.

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Q.103 Whether the Tribunal has power to stay the recovery of demand?

Ans. Yes, the Tribunal and every appellate authority has inherent power to stay the recovery. The assessee can file a Stay Petition before the Tribunal to stay the recovery proceedings when the appeal is pending before the Tribunal. An appellate authority has the inherent power to stay recovery of demand, which is in dispute before it. The Supreme Court in *ITO vs. M. K. Kunhi (1969) 71 ITR 815 (SC) : TC 8R. 460* held that the power to grant stay is incidental or ancillary to its appellate jurisdiction and it could well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of adding all such acts, or employing such means as are and essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.

Rule 35A prescribes the procedure for filing and disposal of stay petition. In the light of the said rule, it is desirable that every application should be neatly typed on one side of the sheet of paper, should be in English and should state concisely the required information. The application should be accompanied by the required documents and correspondence and should be supported by an affidavit from the applicant or his duly authorized agent. An application which does not conform with the above requirements is liable to be summarily rejected. Earlier no Tribunal fee was required to be deposited while making a stay application. A fee has been prescribed at Rs. 500/- with effect from 1st October, 1998. One single stay petition for tax outstanding for more than one year is possible.

The Central Board of Direct Taxes has issued instructions which state that the recovery proceedings may be stayed where the income determined on assessment is substantially greater than the returned income — CBDT Instruction No. 96 *[F. No. 1-6-69—ITCC], dated 21st August, 1969 [165 ITR 650 (Ker) in the case of N. Rajan Nair vs. ITO (1987)].* Recovery proceedings may be stayed where the income determined on assessment is substantially greater than the returned income — *Mrs. R. Mani Goyal vs. CIT (1996) 217 ITR 641 (All.).* Where the income determined on assessment is more than twice the income returned, collection of tax should be stayed during appeal — *Maharana Shri Bhagwat Singhji of Mewar vs. ITAT (1997) 223 ITR 192 (Raj.).* Tribunal cannot refuse stay on the ground that CIT has already granted conditional stay — *Ashok Kumar Aggarwal vs. ITAT (1997)226 ITR 490 (Del.).* The Central Board of Direct Taxes has issued a Circular in which it has laid down the guidelines for the Assessing Officer to exercise his discretion under section 220(6) of the Income-tax Act, 1961, to treat the assessee as not being in default in respect of the amounts disputed in First Appeal pending before Dy. CIT (A)/CIT(A), where the dispute is about interpretation of law or where the issue is decided in favour of the assessee in an earlier order *[Circular No. 530 dated 6-3-1989 176 ITR (St.) 240* and *Circular No. 589 dated 16-1-1991, 187 ITR (St.) 79.]*

The Tribunal has implied powers of staying recovery proceedings during the pendency of appeal — *Shiv Shakti Rubber & Chemical Works vs. ITAT (1995) 213 ITR 299 (All). KEC International Ltd. vs. B. R. Balakrishnan (2001) 251 ITR 158 (Bom.).* The Tribunal can stay recovery proceedings when the reference is pending before the High Court. Thus, where an assessee has not succeeded in appeal before the Hon'ble Tribunal and reference is pending before the High Court and if the assessee can establish that he is not in a position to make the payment of disputed tax, the Tribunal can stay the recovery proceedings until the disposal of reference by the High Court — *CIT vs. Bansi Dhar & Sons (1986) 157 ITR 665 (SC).* Now, in case of an appeal under s. 260A of the Act before the High Court, the High Court alone can grant stay, not the Tribunal. In *Endeavour Investments Ltd. vs. Dy. CIT (1999) 70 ITD 17 (Chennai) (TM),* it has been held that in matters where stay of tax has been granted, it is a judicial practice to treat those appeals as priority appeals because otherwise the granting of stay has no meaning. Further, even if the assessee does not comply with the conditions of the stay, the appeal would continue to have the status of priority appeal.

Q.104 Whether separate stay petitions should be filed seeking stay of recovery of demand for different assessment years?

Ans. In *Wipro Ltd. vs. ITO (2003) 86 ITD 407 (Bang.),* the Tribunal held that, separate stay petitions should be filed seeking stay of recovery of different assessment years. However, in *Chirangjilal S. Gaonkar vs. WTO (2000) 66 TTJ (Mum.) 728,* it has been held that a single application can be filed.

Q.105 Under what circumstances can the Tribunal stay recovery?

Ans. (i) If there is a prima facie case in favour of the assessee; (ii) the assessee's financial position does not permit payment of the demand; (iii) the balance of convenience is in favour of the assessee and (iv) demand is well secured with no loss to the revenue. Principles laid down in Order 39, Rules 1 & 2 of the Code of Civil Procedure will apply. *Maharana Shri Bhagwat Singhji of Mewar vs. ITAT (1997) 223 ITR 192 (Raj.). JCT Ltd. vs. ITAT (2002) 258 ITR 291(Delhi). The Hon'ble Bombay High Court in KEC International Ltd. vs. B. R. Balakrishna & Others (2001) 251 ITR 158 (Bom.),* have laid down various parameters for the stay of recovery.

Q.106 Whether the Tribunal has the power to stay the assessment proceedings?

Ans. Yes, if the appeal before the Tribunal against order of the Commissioner under s. 263 is pending and the Assessing Officer is proposing to pass an order in pursuance of the order under section 263, the Tribunal can stay the assessment proceedings on consideration of the facts. There are instructions of the President to take up such appeals on priority basis and dispose them off expeditiously to avoid multiplicity of proceedings. *ITO vs. Khalid Khan (1977) 110 ITR 79 (AP), Puranmal vs. ITO (1975) 98 ITR 39 (Pat.), Ritz Ltd. vs. Vyas (1990) 185 ITR 311 (Bom).*

Q.107 When the stay application is pending for hearing, can the Tax Department recover the tax in dispute?

Ans. In the case of *RPG Enterprises Ltd. vs. Dy. CIT (2001) 251 ITR (AT) 20 (30)* (Bom) the Tribunal observed: "We are living in a democratic set up and the tax-payers deserve to be respected for their contribution in the National Development. Public servants are expected to discharge their functions dutifully but not unreasonably. The officers are supposed to work diligently but not harassingly. It is absolutely necessary for the Department of Revenue to gain public trust and confidence by acting judiciously and avoiding undue harassment. We appreciate the scheme of rewarding honest and diligent officers of the Department but also feel that there is a necessity of identifying overzealous officers harassing the tax-payers by misusing their powers." The Tribunal held that the Assessing Officer is precluded from taking coercive action for the recovery of the disputed demand until the expiry of the period of limitation allowed for filing of appeal against the decision of the first appellate authority and also during the pendency of stay application before any revenue authority or the Tribunal. The Tribunal also held that, the Commissioner is required to give an opportunity and pass speaking order. *IAC vs. Moderm Electronics (1989) 31 ITD 299 (Hyd.), Choudhary Construction Company vs. Commissioner Commercial Taxes Department and Others (2002) 127 STC 47 (R), CIT vs. Usha Prestressed & Allied Industries (1996) 131 CTR 551 (Guj.).*

Q.108 Whether the Tribunal can direct the Department to give back the money recovered when stay application is pending for disposal?

Ans. In *Western Agencies (Mad.) vs. Jt. CIT (2003) 86 ITD 462 (Mad.),* the Tribunal has held that, the Tribunal can exercise powers of a Civil Court and pass an order by way mandatory direction to the Department to return amounts recovered forcibly during pendency of stay petition and Income Tax appeal.

Q.109 Whether a stay application can be filed before the Tribunal when appeal is pending before CIT(A)?

Ans. For filing a stay petition before the Tribunal, a valid appeal should be pending before the Tribunal. Therefore when the appeal is pending before the CIT (A), the Tribunal cannot entertain the stay application. However, stay application can be filed before the CIT (A) who has inherent power to grant stay of demand in suitable cases. *Gajanana Agencies vs. ITO (1994) 210 ITR 865 (Ker.), Prem Prakash Tripathi vs. CIT (1994) 208 ITR 461 (All), Paulsons Litho Works vs. ITO (1994) 208 ITR 676 (Ker.), Lalit Khanna vs. Controller of Estate Duty (1994) 207 ITR 955 (All.), Tin Manufacturing Co. of India vs. CIT (1995) 212 ITR 451 (All.).*

Q.110 Whether the Tribunal has power to pass interim order to stay the recovery without hearing the other side on a holiday?

Ans. In exceptional cases, the Tribunal can stay the recovery even without hearing the other side. However, normally the Tribunal fixes the stay application and makes an order after hearing both the sides. In *Bulk India Transport Co. vs. CIT (2004) 266 ITR 144 (All),* Court held that, the Tribunal has power to grant interim relief.

Q.111 If an appeal has not been disposed of in 6 months, what is the remedy?

Ans. If an appeal has not been heard or the order has not been passed, the assessee may move an application for extension of stay. Normally the Tribunal passes such order extending the stay, if the delay is not on the part of the applicant. *Centre for*

Women's Development Studies vs. Dy. Director of Income Tax (2002) 257 ITR (AT) 60 (Delhi)

Q.112 Whether section 254 (2A) is retrospective?

Ans. No. These provisions are prospective in nature and operative on the stay order granted by the Tribunal on and from 1-6-2001. Orders made earlier remain unaffected and remain operative after 6 months and till disposal of the appeal. *A.P. State Civil Supplies Corpn. Ltd. vs. Dy. CIT (2002) 83 ITD 398 (Hyd.).*

Q.113 Whether tax recovery can be made protective?

Ans. In, *Jagannath Bawri vs. CIT (1998) 234 ITR 464 (471) (Gau.),* the Court held that, when assessment is made on protective basis, the recovery cannot be made on protective basis.

Q.114 When rectification application is pending, whether Department can recover the tax in dispute?

Ans. In *Sultan Leather Finishers Pvt. Ltd. vs. ACIT (1991) 191 ITR 179 (All),* it has been held that no recovery proceedings are possible during pendency of rectification application under s. 154.

Q.115 What is the recent trend in matters of stay of recovery?

Ans. During the last few years, it has been observed that some of the Benches of the Appellate Tribunal are slow, rigid and too technical in granting stay of demand. Sometimes, it is insisted that the administrative remedy, (including refusal from the Commissioner of Income Tax) be exhausted. Stay petitions are not fixed immediately. It is desirable that the stay petition is fixed within a week from date of its filing, is heard within a fortnight from the date of presentation and order is dictated in open Court immediately after hearing. It needs to be expeditiously disposed of. When stay is granted, appeal also deserves to be expeditiously disposed of.

Two provisos have been inserted in section 254 (2A) of the Act by the Finance Act, 2001 with effect from 1st June, 2001. The object is to avoid allowing demand of tax remaining irrecoverable for a long period owing to appeals not being heard by the Appellate Tribunal after stay is granted. Section 254 (2A) of the Act provides that an appeal be decided within a period of 4 years from the end of the financial year in which such appeal is filed. These provisions provide that when the Appellate Tribunal passes an order granting stay of recovery of tax pending in appeal before it, the Tribunal should hear such appeal within a period of 180 days from the date of the order granting stay, failing which the stay granted would stand vacated on the expiry of that period. Such automatic vacation of stay is unjustified. Many a times adjournments are sought by the Department and/or because required records or papers documents are not produced on time, so as to enable the Appellate Tribunal to decide the appeal within specified period. Sometimes where only one Bench is functioning, one of the Members may not be posted or may be on leave for a longer period and the Division Bench may not function for part of the period or longer period. Appeals against special assessment for the block period and search assessments generally involve substantial tax demands and highly disputable issues, and may take a longer time for judicious disposal. The two provisos inserted deserve to be deleted.

Q.116 What is the duty of the Tribunal on a stay petition?

Ans. It is appropriate and essential the the Tribunal should post hearing immediately, hear both the sides and dictate the order in open Court – reasons to follow. The stay operates immediately on pronouncement. Copy of order should be issued on the same day. The order should be speaking and judicious after considering all the aspects of the matter. The remedy against such order is by way of writ under Article 226/227 of the Constitution before the Hon'ble High Court. Discretion should be exercised according to the rules of reason and justice and law, not arbitrary, vague or fanciful. *Todarmal Safarishmal Lashkar vs. CIT (1979) 118 ITR 759 (M.P.), Thangaraj (SM) vs. State of Tamil Nadu (1989) 175 ITR 428 (Mad.), Security & Detective Bureau Ltd. vs. ACIT (1993) 44 ITD 452 (Mad), Lalit Khanna vs. Controller of Estate Duty (1994) 207 ITR 955 (All.)*

Q.117 Many times the Tribunal passes orders stating that if the assessee applies for adjournment, the stay will be vacated. Whether such an order be passed?

Ans. It is advisable not to make such observations in the order granting stay of disputed demand. Such an order may not be legal. There may be events when the appellant may have to seek any adjournment for reasons beyond its control. The Bench has the discretion to decide whether to grant further stay or not when the appeal is fixed for hearing and an adjournment is sought.

Q.118 Whether Tribunal has power to grant extension of stay of recovery beyond six months?

Ans. Tribunal has power to grant a further stay on expiry of six months of earlier stay if the facts and circumstances so demand. *Centre for Women's Development Studies vs. Dy. Director of Income Tax (2002) 257 ITR (AT) 60 (Delhi).*

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Q.119 What are the general principles of precedent?

Ans. In *CIT vs. B. R. Constructions (1993) 202 ITR 222 (AP) (FB)*, the AP High Court has discussed in detail the general principles regarding the binding nature of precedent which reads: "The effect of a binding precedent in India is that the decisions of the Supreme Court are binding on all the Courts. Article 141 of the Constitution embodies the rule of precedents. All the subordinate Courts are bound by the judgements of the High Courts. A single Judge of a High Court is bound by the judgement of another single Judge and a fortiori judgements of Benches consisting of more Judges than one. So also, a Division Bench of a High Court is bound by the judgement of another Division Bench or a Full Bench. A single Judge or Benches of High Courts cannot differ from the earlier judgements of co-ordinate jurisdiction merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice is of paramount importance. But if the earlier judgement is erroneous or adherence to the rule of precedents results in manifest injustice, differing from an earlier judgement will be permissible. When a Division Bench differs from the judgement of another Division Bench, it has to refer the case to a Full Bench. A Single Judge cannot differ from a decision of a Division Bench except when that decision or a judgement relied upon in that decision is overruled by a Full Bench or the Supreme Court, or when the law laid down by a Full Bench or the Supreme Court is inconsistent with the decision. It may be noticed that a precedent will not be binding – (i) if it is reversed or overruled by a higher Court; (ii) when it is affirmed or reversed on a different ground; (iii) when it is inconsistent with the earlier decisions of the same rank (iv) when it is sub silentio; and (v) when it is rendered per incuriam.

A judgement can be said to be per incuriam if it is rendered in ignorance of the provisions of a statute or a rule having statutory force or a binding authority. But if the provision of the Act was noticed and considered before the conclusion was arrived at, merely on the ground that it has erroneously reached the conclusion, the judgement cannot be ignored as being per incuriam. The rule of per incuriam is of limited application."

In *Union of India vs. Raghubir Singh (1989) 178 ITR 548 (551-57) (SC),* the Apex Court held that, the doctrine of binding precedent has merit of promoting certainty and consistency in judicial decisions and enables an organic development of law, besides providing assurance to an individual as to the consequence of transactions, forming part of his daily affairs.

In *Union of India vs. Dhanwanti Devi (1998) 6 SCC 44, 51-52,* the Hon'ble Supreme Court held that, a decision is an authority for what it decides. The essence of a decision is its ratio. The principle on which a question has been decided is alone binding precedent.

Q.120 When there are two judgements of the jurisdictional High Court, which are contrary to each other and the latter judgement is delivered without referring to the earlier judgement, which judgement should the Tribunal follow?

Ans. It is clear that when there are conflicting judgements of the jurisdictional High Court, normally the latter judgement would prevail provided it has referred to the earlier decision and distinguished the same. However, if the earlier judgement is not referred to at all, and there are two conflicting judgements, it is open to the Tribunal to follow that judgement, the reasoning of which appeals to the Tribunal. Since both the jurisdictional High Court judgement are binding the Tribunal has to prefer one or the other judgment and in such a case it can prefer either of the two judgments. *Amarsingh Yadav vs. Santi Devi AIR (1987) Patna 191* and *CIT vs. Madhukant M. Mehta (1981) 132 ITR 159 (Guj).*

Q.121 The Tribunal has decided the assessee's appeal in its favour. The Reference Application of the Department is also rejected. The Assessing Officer refuses to follow the order of the Tribunal and makes addition. Can contempt proceedings be initiated for not following the order of the Tribunal. If yes, what is the procedure?

Ans. Though the principle of res judicata and doctrine of estoppel are not applicable to tax proceedings, yet the dispute must achieve finality. When no reference is pending before the jurisdictional High Court or/and the Supreme Court, it tantamounts to acceptance by the department, of the view pronounced by the Tribunal. Unless and until, there is change in factual matrix or law or there are strong reasons to differ, the Assessing Officer must follow the view expressed by the superior authority. The Assessing Officer administratively does not function under the Tribunal but the Tribunal being the final fact finding body, a quasi-judicial authority, the Assessing Officer must faithfully obey its orders. In *Agrawal Warehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP),* the Court held that the orders passed by the Tribunal are binding on all tax authorities functioning under the jurisdiction of Tribunal.

The Madras High Court in *Shree Rajendra Mills Ltd. vs. Joint Commercial Taxes Officer (1971) 28 STC 483* observed: " In the hierarchy of the authorities set up under the Sales Tax Act, the Tribunal is superior to the Appellate Assistant Commissioner, who is bound by the orders of the Tribunal which will be as effective as the orders of the High Court as far as their binding character on him is concerned. Merely because a tax case has been filed by the department, it does not act as a kind of stay of operation of the order of the Tribunal. So long as the order of the Tribunal is not set aside, the Appellate Assistant Commissioner is bound to give effect to and his failure to do so on the ground that the department has filed an appeal will be really a contempt of the Tribunal`s order. Though it is open to him to take his own view on the facts, as far as the law propounded by the Tribunal is concerned, it is binding and should be applied to the facts before him." The Allahabad High Court in *K. N. Agrawal vs. CIT (1991) 189-ITR-769 (All)* observed that the orders of the Tribunal are binding upon the Assessing Officer and since he acts in a quasi-judicial capacity, the discipline of such functioning demands that he should follow the decision of the Tribunal.

The Apex Court in *Union of India vs. Kamlakshi Finance Corporation Ltd., AIR 1992 SC at 712* a case under the excise law observed : " It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the Appellate authority is not "acceptable" to the department – in itself an objectionable phrase and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws." The Hon`ble Supreme Court further stated that utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the order of the higher appellate authorities, which are binding on them.

Technically speaking the Tribunal is not a court but has all the trappings of a court. It is the final fact finding authority and commands a highly dignified place in the hierarchy of justice. However, the Contempts of Court Act, 1971 would be inapplicable and contempt proceedings, in my opinion, cannot be initiated for not following the order of the Tribunal. The aggrieved person should take up the matter administratively before the Commissioner or the Chief Commissioner or Central Board of Direct Taxes. Additionally, the appellant should request the Tribunal to award exemplary cost. *In CTO vs. Kamal and Co. (1987) 67 STC 402* Chief Justice of Rajasthan High Court, as he then was stated that the power of the Board of Revenue to award costs, is a matter within its discretion, and does not depend upon the existence of an express provision, which merely reiterates a power which is inherent in the constitution of the authority itself. Also refer *Agrawal (K. N.) vs. CIT (1991) 189 ITR 769 (All.), Prasad & Co. vs. Dy. Commissioner of Income Tax (1992) 43 ITD 93 (Har.), Bank of Baroda vs. H. C. Shrivatsava (2002) 256 ITR 385 (Bom.), Asst. Collector of Central Execise vs. Dunlop India Ltd. (1985) 154 ITR 172 (SC)*

Q.122 When there are two judgements of the Supreme Court, which are contrary to each other, which judgement should the Tribunal follow? Is obiter dicta of the Supreme Court binding on the Tribunal?

Ans. Article 141 of the Constitution prescribes that judgements of the Supreme Court are binding on all Courts and based on the rule of precedent the latest judgement is to be followed as that is the last word spoken by the Apex Court. The Supreme Court sits in Division Bench of two or three Judges. In Jawed Ahmad's case the Supreme Court observed that it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of Division Bench of two judges, although it may be otherwise where a Full Bench or a Constitution Bench does so. Obiter dicta of the Supreme Court is binding on the Tribunal. The Full Bench of the Andhra Pradesh High Court in *Ushodaya Enterprises Ltd. vs. Commissioner of Commercial Taxes (1993) 111 STC 711* observed " In a case of conflict arising from the decisions of co-equal Benches of the Supreme Court, the High Court is free to disregard the decision which is based on an obvious mistake of fact or the one which purports to follow the ratio of an earlier decision though such ratio is found to be non-existent. The High Court can legitimately decline to follow such decision and follow the earlier decision which is backed by reasoning – whether it is accepted to the High Court or not, and which is free from an such apparent flaw. The later decision need not be automatically followed despite the fact that it rests on a conclusion based on an erroneous impression that an earlier decision took a particular view which in fact it has not taken." In our view the same principle may be followed by the Tribunal.

Q.123 What is the precedent value of orders passed by different types of Benches of Tribunal?

Ans. A decision of a Division Bench and Third Member Bench is binding on the Single Member Bench. A decision of a Special Bench is binding on all the Benches of the Tribunal. A decision of the Special Bench can be distinguished or disregarded if there is any contrary view of the jurisdictional High Court or of the Supreme Court. A co-ordinate Bench should follow the view of another co-ordinate Bench or else refer the matter to a larger Bench through the President. *S. I. Roopal and Others vs. Government through Chief Secretary, Delhi & Others AIR 2000 SC 594, Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722 (SC), Pradip Chandra Parija vs. Pramod Chandra Patniak (2002) 254 ITR 99 (SC), Agrawal Warehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP), CIT vs. L. G. Ramamurthi & Others (1977) 110 ITR 453 (Mad.), Export House vs. ITO (1985) 23 TTJ 285 (Amritsar), Chandulal Venichand vs. ITO (1991) 38 ITD 138 (Ahd.)*

Q.124 What is the binding nature of the decision of High Courts?

Ans. As per the doctrine of precedent, all lower courts, Tribunals and authorities exercising judicial or quasi-judicial functions are bound by the decisions of the High Court within whose territorial jurisdiction these courts, Tribunals and authorities function. In *CIT vs. Kantilal Nathuchand (1964) 53 ITR 420 (Guj.)*, the Court doubted, but followed for the sake of uniformity among the High Courts the judgement of another High Court in the matter of interpretation of the Income-tax Act. Also refer *CIT vs. Chimanlal J. Dalal & Co. (1965) 57 ITR 285 (Bom)*. Tribunals functioning within the jurisdiction of a particular High Court are bound to follow the decision of the jurisdiction High Court — *State of AP vs. Commercial Tax Officer (1988) 169 ITR 564 (AP); Air Conditioning Specialists Pvt. Ltd. vs. Union of India (1996) 221 ITR 739 (Guj)*. The Assessing Officer is bound to follow the decision of Supreme Court as also the decision of High Court of the State within whose jurisdiction he is functioning — *K. Subramanian, ITO vs. Siemens India Ltd. (1985) 156 ITR 11 (Bom)*. The order of the Tribunal not applying the decision of jurisdictional High Court was held to be erroneous — *Shri Mahabir Industries vs. CIT (1996) 220 ITR 459 (Guwahati)*. Not following the decision of the High Court within whose jurisdiction the ITO acts, would tantamount to committing contempt of that court — *(1983) 143 ITR 120 (Bom.) Siemens India Ltd. vs. K. Subramaniam (ITO).*

The decision of a High Court does not have binding force outside the State. *Dr. T. P. Kapadia vs. CIT (1973) 87 ITR 511 (Mys.). CIT vs. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom.), Geoffrey Manners & Co. Ltd. vs. CIT (1996) 221 ITR 695 (Bom.), CIT vs. Vardhman Spinning (1997) 226 ITR 296 (P&H), N. R. Paper and Board Ltd. & Others vs. DCIT (1998) 234 ITR 733 (Guj.).* No reference can be made on a question of law which is settled by a decision of the jurisdictional High Court. *CIT vs. HIM Containers Ltd. (1995) 216 ITR 674 (Guwahati) Kiersentec vs. CIT 11 Taxman 70 (Bom.) (1982)*

The decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside the territorial jurisdiction. The fact that there is only one decision of any one High Court on a particular point or that of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or any other subordinate courts or Tribunals outside their jurisdiction. That status is reserved only for the decisions of the Supreme Court, which are binding on all courts in the country by virtue of Article 141 of the Constitution. *Consolidated Pneumatic Tool Co. (India) Ltd. vs. CIT (1994) 209 ITR 277, 282 (Bom), Universal Ferro & Allied Chemicals Ltd. vs. P.G.K. Warrier (1983) 143 ITR 959 (Bom.).*

In *CIT vs. G. Dalabhai & Co. (1997) 226 ITR 922 (Guj),* it was observed "Before parting with the case, we notice with anguish the language used by the Income Tax Officer in his assessment order saying that 'With due respect to the decision of the Gujarat High Court, I do not follow the same'. The Income Tax Officer in not following the decision of the Gujarat High Court within whose supervisory territory he was functioning, is far from satisfactory, that is the least we can say. The minimum decorum of the system of hierarchy that Tribunals in the administration of justice and their Judicial subordination to the High Court of the territory in which they function requires that they restrain in the use of proper expression while following or not following the decision of the High Court".

Q.125 When an order becomes an order of the Tribunal?

Ans. Rules 34(1) and 35 of the ITAT Rules. 1963 makes it clear that unless the order of Bench is signed by all Members constituting it and is dated, it is not an order of the Tribunal. *ITAT vs. V. K. Agrawal (1999) 235 ITR 175, 188 (SC).*

Q.126 What is the principle of Stare decisis?

Ans. There should be consistency in law. If any view has been taken by the Supreme Court or the lower authorities and remains unchallenged and the law is not amended / modified, such view should prevail. *Commercial Tax Officer Circle '8' Jaipur vs. Hemraj Udhog and Others (1987) 64 STC 324 (R).* There should be consistency in law. *Radhasoami Satsang vs. CIT (1992) 193 ITR 321 (SC), CIT vs. A. R. J. Security Printers (2003) 264 ITR 276 (Delhi), CIT vs. Balkrishna Malhotra (1971) 81 ITR 759 (SC).*

The Supreme Court in Sakhi vs. Union of India AIR 2004 SC 3566 at 3577 observed : "Stare decisis is a well known doctrine in legal jurisprudence. The doctrine of stare decisis, meaning to stand by decided cases, rests upon the principle that law by which men are governed should be fixed, definite and known, and that, when the law is declared by Court of competent jurisdiction authorized to construe it, such declaration is absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. It requires that rules of law when clearly announced and established by a Court of last resort should not be disregarded and set aside but should be adhered to and followed. What it precludes is that where a principle of law has become established by a series of decisions, it is binding on the Courts and should be followed in similar cases. It is a whole-some doctrine which gives certainty to law and guides the people to mould their affairs in future".

Q.127 What is the binding precedent of order of Supreme Court?

Ans. Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus the law as interpreted by the Supreme Court is binding on all Courts and Tribunals in India *CGT vs. Aluminium Corporation of India Ltd. (1972) 85 ITR 167 (172) (SC)*. The decision of the Supreme Court in taxation matters amounts to a declaration of law as contemplated by Article 141 of the Constitution of India. *Karamchand Premchand Pvt. Ltd. vs. CIT (1975) 101 ITR 46 (52) (Guj.)*. The High Court cannot ignore a decision of Supreme Court on the ground that the relevant provision was not brought to the notice of the Supreme Court, *Badlachandas Mathurdas Lukhani Municipal Committee AIR 1970 SC 1002. Tata Iron & Steel Co. Ltd. vs. D.V. Bapat ITO (1975) 101 ITR 292(327) (Bom)*. The Tribunal is bound to follow the principle of law laid down by the Supreme Court. It is not open to the Tribunal to say that the Supreme Court decision was not relevant simply because, it was not under the statute under which the Tribunal is working. *Bhavnagar University vs. Palitana Sugar Mill Pvt. Ltd. AIR 2003 SC 511.* Ratio is Binding AIR 2002 SC 1598, AIR 2002 SC 834. *CIT vs. Vallabhdas Vithaldas & Others (2002) 253 ITR 543 (Guj.)*

The view expressed by the Supreme Court is an authority on the subject provided facts and situation is identical. The Supreme Court in *State of West Bengal vs. Kesoram Industries Ltd. (2004) 266 I.T.R. 721* corrected inadvertent error in *India cement Ltd. vs. State of Tamil Nadu (1990) 1 SCC 12* on the aspect of 'Royalty is not tax after 14 years.'

Q.128 Whether rejection of SLP can be considered as an order of Supreme Court? What is the binding effect?

Ans. A mere dismissal of SLP does not mean that the judgement of the High Court stands affirmed by the Supreme Court. The effect of a dismissal is that no appeal was permitted and not that an appeal against the said judgement was dismissed by the Supreme Court affirming the view of the High Court. *J. K. Charitable Trust vs. WTO (1996) 222 ITR 523 (All.)*

Rejection of SLP does not mean that the judgement of High Court has been approved by the Supreme Court on merit.

CIT vs. Quality (1997) 224 ITR 77 (Pat.)

Q.129 Whether appeal dismissed by the Supreme Court is binding on the Tribunal though the order may not be speaking?

Ans. Where a decision of the Supreme Court is virtually a non speaking order which does not set out the facts or the reason for the conclusion or direction given, it cannot be treated as a binding precedent. *Government of India vs. Workmen of State Trading Corporation (1997) 11 SCC 641. State of Manipur vs. Thinjujam Brojen Muti AIR 1996 SC 2124. Ajith Kumar Rath vs. State of Orissa AIR 2000 SC 85.*

Q.130 When there are two judgements of the jurisdictional High Court which are contrary to each other which will be binding on Income Tax Appellate Tribunal?

Ans. The later judgement shall be of binding on the Tribunal.

Q.131 When there is no contrary judgement, whether Tribunal has to follow decision of non-jurisdictional High Court?

Ans. Yes. Income-tax is a Central Act and therefore the Tribunal should follow the decision. In, *CIT vs. Highway Construction Co. (P) Ltd. (1996) 217 ITR 234 (240) (Gauh.)*, the Court held that, when there is a decision of different High Court and there is no contrary decision, it will be just and proper for the Tribunal to follow the said decisions.

Q.132 Can revenue take conflicting stands?

Ans. No. The revenue cannot take conflicting stands. It has got the assistance of technical persons and should be consistent. It cannot discriminate between the assessees. *Seshasayee Paper and Boards Ltd. vs. CIT (2003) 260 ITR 419 (Mad.), Union of India vs. Kaumudini Narayan Dalal (2001) 249 ITR 219 (SC), Berger Paints (2004) 266 ITR 99 (SC), Union of India vs. Satish Panalal Shah (2001) 249 ITR 221 (SC).*

Q.133 Is CIT(A) bound to follow the decision of the Tribunal?

Ans. Yes. CIT(A) being subordinate to the Tribunal is bound to follow the view of the Tribunal. *Agrawal Warehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP)*

Q.134 Whether a judgement of the Supreme Court is retrospective or prospective?

Ans. Law is settled by the Supreme Court. Law laid down by Supreme Court is the law in existence since its enactment. It is retrospective in operation. Such law is from inception unless and until spelt as prospective by the Supreme Court. All Courts, Tribunals, authorities and citizens are bound to follow the diction laid by the Supreme Court or else shall be liable to contempt. *Calcutta and Another vs. Collector of Customs AIR 1962 SC 1893 at 1905, M. A. Murthy vs. State of Karnataka and Others (2003) 264 ITR 1 (SC), Kil Kotagiri Tea and Coffee Estate Co. Ltd. vs. ITAT (1988) 174 ITR 579 (Ker.)*

Q.135 Whether one Bench of the Tribunal is bound to follow the order of another Bench?

Ans. For the sake of uniformity, one Bench of the Tribunal is bound to follow the view expressed by another Bench of the Tribunal unless the earlier view is per-incurium — *CIT vs. L. G. Ramamurthi (1977) 110 ITR 453 (Mad), CIT vs. S. Devaraj (1969) 73 ITR 1 (Mad). Modu Timblo (Individual) vs. CIT (1994) 206 ITR 647(Bom.) – Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722 (SC), Pradip Chandra Parija vs. Pramod Chandra Patnaik (2002) 254 ITR 99 (SC), Agrawal Warehousing & Leasing Ltd. vs. CIT (2002) 257 ITR 235 (M.P.),* The Bench should not come to a conclusion totally contradictory to the conclusion reached by the earlier Bench of the Tribunal. Where a Bench wants to differ from an earlier Bench decision, the matter should be referred to a larger Bench on a request made to the President — *CIT vs. Goodlass Nerolac Paints Ltd.. (1991) 188 ITR 1 (5) (Bom). Sayaji Iron and Engineering Co. vs. CIT (2002) 253 ITR 749 (Guj.), Sis Ram Sharma & Co. vs. ITO (1988) 25 ITD 410 (Delhi)(TM), Subarna Plantation & Trading Co. Ltd. vs. ITO (1989) 28 ITD 177 (Cal.), Longwalia Poultry Farm vs. Dy. CIT (1998) 67 ITD 45 (Chan.) (TM), Birumal Gaurishankar Jain vs. Income Tax Settlement Commission (1992) 195 ITR 792 (ITSC) (SB), Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722, 726, 727 (SC), Sub. Inspector Rooplal & Another vs. Lt. Governor, New Delhi & Others (2000) 1 SCC 644 (654) (SC), Dy. CIT vs. Reliance Industries Ltd. (2004) 88 ITD 273 (Mum) (SB).*

Q.136 Whether the decision of Tribunal is binding on lower authorities?

Ans. Judicial discipline demands that authorities subordinate to the Tribunal accept as binding the decisions of the Tribunal. In *Khalid Automobiles vs. Union of India (1995) 4 SCC (Suppl.) 653,* the Court held that an order of the Tribunal was binding on the assessing officer and the first appellate authority and that failure to follow the same may constitute contempt of Tribunal's order. See *Rajendra Mills Ltd. vs. Jt. CIT (1971) 28 STC 483 (Mad.), Serethil Raja Metal vs. CTO (1990) 79 STC 38 (Mad.)* and *Union of India vs. Kamlakshi Finance Corporation Ltd. AIR 1992 SCC 711 (712) (SC).*

In *Voest Alpine Ind. GmbH vs. ITO (2000) 246 ITR 745, (749) (Cal.),* the Court condemned the action of assessing officer in making an assessment contrary to the decision of the Tribunal which had become final. Also see *Bank of Baroda vs. H. C. Shrivatsava & Another (2002) 256 ITR 385 (390) (Bom.), Asstt. CCE vs. Dunlop India Ltd. (1985) 154 ITR 172 (SC), Govindram Seksaria Charity Trust vs. ITO (1987) 168 ITR 387 (MP), Agarwal Warehousing & Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP), C. D. Thandani vs. ITO vs. Universal Ferro & Allied Chemicals Ltd. (1988) 172 ITR 30 (Bom.)*

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Q.137 How should an adjournment application be addressed to the Tribunal?

Ans. An application for adjournment of a hearing should be made well in advance. It should be presented personally. If it cannot be presented personally, a stamped envelope with the address of the assessee or his representative should, as far as possible, accompany the application. If a reply is required telegraphically, the necessary postage stamps should accompany the application. If a telegram is sent asking for adjournment, arrangement should be made for a reply-paid telegram. The Tribunal is not bound to reply to the applications for adjournment. Unless the assessee hears that his application for adjournment has been granted, he or his authorized representative should remain present at the hearing of the appeal or application or cross objection, as the case may be. Whenever the assessee's representative files the application for adjournment, he should file the same along with vakalatnama in his favour. If the assessee does not get any intimation, he or his representative must remain present on the day of hearing. The Registry should not refuse to accept letters or requests for adjournment when they are filed much ahead of the date of hearing of the matter – *Shamalsha Girdhari Co. vs. Asstt. CIT (2000) 72 ITD 469 (Mum).*

No procedure has been provided in the Act or rules for filing of adjournment application. It is advisable to file an adjournment application containing therein the reason for seeking adjournment and such reason should constitute a good, sufficient cause and should be supported by relevant material. It is advisable to move the application in advance. Earlier the Tribunal used to consider such application and grant adjournment in advance. However, now such application is considered by the Bench where the appeal is listed on the date of hearing. Normally, the Bench considers the adjournment application in the beginning, while some Benches take up adjournment applications at the number listed in the cause list, so that the counsel or assessee's representative has to remain present till the matter is called out. The minutes of the meeting held between the ITAT Bar Association and Vice President, Shri J. P. Bengra, Mumbai, record that, if adjournment application is filed 15 days in advance, the Vice President will pass necessary order on such an application. (AIFTP Journal April, 2004 page Nos. 31 to 33 (32)]. Therefore, we suggest to file the application for adjournment well in advance and one copy may be forwarded to departmental representative.

Q.138 When an assessee expires after filing the appeal what is the procedure for bringing legal heirs on record?

Ans. During the pendency of an appeal/application if the assessee, whether he be appellant or respondent dies, or is adjudicated insolvent or in the case of the company, it goes into liquidation, the appeal/application shall not abate, on account of Rule 26 of the Rules. In such cases, the legal representative/heir or liquidator/receiver as the case may be, has to apply to Tribunal for continuing the appeal/application and for bringing him on record. One of the legal heirs has to make an application to the Registrar, in duplicate, along with two copies of sworn affidavit and death certificate. It is advisable to file an application along with copies of affidavit as soon as they come to know about the death, liquidation etc. so that, unnecessary adjournment, at the time of hearing may be avoided. The appeal is taken up for hearing after the concerned AO has verified the same.

Q.139 What is the procedure for fixing an appeal for out of turn hearing?

Ans. Substantial number of appeals are pending before the Tribunal, wherein the issue(s) involved are either covered by orders of the Tribunal, or by the decisions of the jurisdictional High Court, or the Supreme Court. Instructions have been issued that covered matters should be taken up for hearing and final disposal out of turn. An application for out of turn hearing should be accompanied by the following:

(i) A copy of the grounds of appeals in respect of the appeal(s) pending before the Tribunal.

(ii) Copy(ies) of the order(s) of the Tribunal covering all the issues raised in the aforesaid grounds, if such order(s) are not reported in the ITD.

(iii) Citation of the case wherein all the issues raised in the aforesaid grounds are covered.

(iv) Citation of the case wherein all the issues raised in the aforesaid grounds are covered by the decision of the jurisdictional High Court or the Supreme Court.

After scrutiny of the application and ascertaining the fact that all the issues raised in the grounds of appeal are covered by the decision of the Tribunal / High Courts / Supreme Court, as the case may be, the office would place the matter before the Tribunal for out of turn hearing.

In other matters also, on being satisfied that early hearing is in the interest of justice, the Tribunal may order for early and out of turn hearing.

Q.140 What is the procedure for filing paper book?

Ans. The provisions regarding filing of paper book are contained in Rule 18 of the Rules. If the appellant or the respondent, as the case may be, proposes to refer or rely upon any document or statements or other papers on the file of or referred to in the assessment or appellate orders, he may submit a paper book in duplicate containing such papers duly indexed and paged at least a day before the date of hearing of the appeal along with proof of service of a copy of the same to the Departmental Representative at least a week before the date of hearing:

Provided, however, the Bench may in an appropriate case condone the delay and admit the paper book on the date of hearing also.

The Tribunal may *suo motu* direct the preparation of a paper book in triplicate by and at the cost of the appellant or the respondent containing copies of such statements, papers and documents as it may consider necessary for the proper disposal of the appeal.

The papers referred to in sub-rule (1) above must always be legibly written or typewritten in double space or printed. If xerox copy of a document is filed, then the same should be legible. Each paper should be certified as a true copy by the party filing the same, or his authorised representative and indexed in such a manner as to give the brief description or the relevance of the document, with page numbers and the Authority before whom it was filed.

Additional evidence, if any, shall not form part of the same paper book, if any party desiring to file additional evidence, should file the same by way of a separate paper book containing such particulars as are referred to in sub-rule (3) accompanied by an application stating the reasons for filing such additional evidence.

The parties shall not be entitled to submit any supplementary paper book, except with the leave of the Bench.

Paper/paper books not conforming to the above rules are liable to be ignored.

The Hon'ble Tribunal in exceptional cases accepts the paper book even on the day of hearing provided the other side does not object to the same. Otherwise to the hearing is usually adjourned and cost may be levied. Documents or papers contained in the paper book must be specifically brought to the notice of the Tribunal and referred to at the time of hearing. Documents that are referred to and relied upon by the parties during the course of arguments shall alone be treated as part of the record of the Tribunal and considered in the order. One should very carefully screen, scrutinize and prepare paper book. Necessary document / paper should not be left out and unnecessary papers should not be filed and paper book made bulky/lengthy. Paper Book should be filed in triplicate and acknowledgement should be obtained.

As regards case laws which are not reported in the ITR or ITD, it may be desirable to file copies of the same in a separate paper book which may help in speedy disposal of matters.

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Q.141 Whether an adjournment application signed by the appellant / authorized representative but presented by his assistant or clerk or peon should be entertained?

Ans. Construing the provisions strictly, literally and technically the Tribunal may be right in not accepting such application. However, it is not in the interest of equity and justice. As an old established practice and precedent, the Tribunal has been considering adjournment applications of the assessee/authorized representative submitted by article clerks or peons. Such latitude and concession is desired of the Tribunal. The Tribunal is meant to impart justice and not to punish a tax-payer for the lapses of the authorized representative or ignorance of the assessee or on account of technicality of law. It is, however, befitting and in the interest of maintaining the decorum of the Tribunal that the authorized representative or the assessee himself or a Senior official remains present when adjournments are sought.

Q.142 Can the Tribunal refuse to take cognizance of statements on question of fact made at the Bar, by representatives, in the course of arguments?

Ans. Rule 10 of the Appellate Tribunal Rules, 1963 requires that where a fact which is not borne out by, or is contrary to, the record is relied upon it shall be stated clearly and concisely and supported by a duly sworn affidavit. In the light of this Rule, the Tribunal shall be competent to refuse to take cognizance of statements on questions of fact at the Bar, by authorized representatives, which are not in consonance with the facts emerging from the records. However, the Tribunal has been taking cognizance of statements made at the Bar, on account of the dignified position of an advocate or a chartered accountant. Misrepresentation, false representation or wrong representation would amount to misconduct and the contemnor can be appropriately dealt with by the Bar Council of India or the Institute of Chartered Accountants or the Tribunal as the case may be. However, it is advisable for the representative not to make any statement at the Bar on questions of fact. It should always be supported by an affidavit of the assessee and submitted sufficiently in advance. *Bata India Ltd. vs. DCIT (1996) 217 ITR 871 (Cal.)*

Q.143 When an affidavit can be filed before the Tribunal?

Ans. When a fact cannot be borne out by or is contrary to record, it should be stated clearly and concisely and should be supported by a duly sworn affidavit. *(See CIT vs. T.I. & M Sales Ltd. (1987) 166 ITR 93 at 101 (SC).* An application for time for filing an affidavit at the time of hearing of the appeal shall not ordinarily be granted. The Registrar, the Deputy Registrars and the Assistant Registrars are empowered to administer oath to any witness or to a deponent of an affidavit in so far as the Tribunal is concerned. No fee is charged for this purpose. Affidavit can be notorised by the Notary Public. It is a risky document. There should not be any false statement. Otherwise the deponent can be prosecuted for perjury.

Q.144 Can the Tribunal issue summons to an assessee and record the statement under oath or can Tribunal cross examine the C.A. who has filed an affidavit relied upon by an assessee?

Ans. The Tribunal has all the powers of a Court. It can issue such summons. The Tribunal, for the purpose of discharging its functions, have all the powers which are vested in the income-tax authorities u/s. 131 of the Act and any proceeding before the Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code. The Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898. The Tribunal is competent to initiate contempt proceedings also. *ITAT vs. V. K. Agarwal (1999) 235 ITR 175 (SC)*

Q.145 Can the Tribunal insist on production of the books of account? For how many years is the assessee supposed to maintain the books of account?

Ans. The Tribunal can insist on production of books of account and other documents which are found relevant for disposal of the matter. The Central Board of Direct Taxes has power to prescribe the books of account and other documents to be kept and maintained. Rule 6F prescribes books of account and documents that are to be kept and maintained by the assessee. The books of account and documents shall be kept and maintained for a period of 6 years from the relevant assessment year. Though the above limits are prescribed as per the Act and Rules, we are of the view that all years in respect of which appeals are pending irrespective of whether the assessee is the appellant or respondent should be preserved that the assessee.

Q.146 What is the procedure for publication of Tribunal orders?

Ans. The President of the Appellate Tribunal has constituted an Advisory Board at Delhi Benches of the Appellate Tribunal to select cases for publication in the Income-tax Tribunal Decision (ITD). The Members constituting the Bench, or in the event of their absence by retirement or otherwise, the Vice-President or the President may mark an order as ‘Fit for Publication‘. Such orders are immediately sent in the proforma as at Appendix XXI(d) to the ITD Publication Advisory Board for its consideration for publication in the ‘Income-tax Tribunal Decisions under intimation to the Head Office. A list of all such cases is to be placed on the notice board every month to enable authorized representatives of the other tax journals/periodicals to apply for copy of the said order(s) on payment of requisite fee.

Q.147 What is the procedure for obtaining certified copy of document on the file of the Tribunal :

Ans. Copies of the documents on the appellate record of the Tribunal are supplied on an application bearing a Court Fee Stamp of ten paise vide last clause of Article 1(a), Schedule II of the Court Fee Act, 1870. This application should invariably indicate clearly whether the document is required for the Applicant's personal use or for submitting before any Court. On receipt of such application, it should be first diarised like any other miscellaneous receipt and the receipt number and initial of the diarist is put up in form as at Appendix LIII. The diarist then passes on such application to the clerk concerned to whom this application is marked by the Head Clerk/Assistant Superintendent, on receipt from the Assistant Registrar concerned. Only an assessee or his authorized representative is authorized to apply for certified copy of the documents on record of the Tribunal. However in case of orders which are certified by the Bench to be 'Fit for publication, anyone can apply for a certified copy of such order. It is not felt desirable to exhaustively clarify as to in respect of what papers, certified copies can be issued and in what cases it cannot be issued. Such applications for issue of certified copy of the documents should be placed before the Bench and its order should be obtained.

The dealing clerk enters the application in the Register maintained for the purpose as at Appendix LIII(a) and informs the applicant the charges payable in case the copy is to be supplied to him. In case he is the applicant not legally entitled to get the copy under rules and/or provision of the Act, he is asked to produce or file a letter of authority or no objection certificate from the assessee Appellant/Applicant or Respondent. Having been fully satisfied the Applicant is informed of the charges as estimated plus incidental postal and other charges, if necessary in a letter as at Appendix LVII. The charges for one copy, according to Rule 49 of the Rules is Rs. 10/- for a full page or part thereof irrespective of whether the copy is typed or Xeroxed. Charges for urgent copy is twice the normal charges; i.e., Rs. 20/- per page. Copying fee has to be deposited in advance in cash.

Q.148 What is the procedure and fees for inspection of records?

Ans. An application for inspection of the records of the Tribunal can be made by the parties. Fees for inspection of records are as under:–

(i)	For the first hour or part thereof	Rs. 20/-
(ii)	For every additional hour or part thereof	Rs. 10/-

No fee shall be charged for inspecting records of a pending appeal or application by a party thereto. The inspection fee has to be deposited in cash and in advance.

Q.149 Whether oral hearing and written arguments both possible?

Ans. It is advisable to submit written submissions in brief, for the convenience of all concerned. Even on filing of written submissions – on request – oral hearing is a right of the appellant. Oral hearing is a must on grounds of public policy and in public interest – *CWT vs. Sri Jagdish Prasad Choudhary (1995) 211 ITR 472 (Pat) (FB) & M.S. Jewellery vs. Assistant Commissioner (1995) 97 STC 455 (458) (Ker) following Govinda Prabhu & Brothers (1985) 59 STC 33 (Ker). J. T. (India) Exports vs. Union of India (2003) 262 ITR 269 (Del.) (FB), Caullapalli Nageswara Rao and Others vs. Andhra Pradesh State Road Transport Corporation & Other. AIR 1959 SC 308*. The Tribunal cannot refuse to accept written submissions – *ITAT vs. Dy. CIT (Assts) (1996) 82 Excise Law Times 4, 9 (SC).*

Q.150 What is the procedure for transfer of appeal?

Ans. Application for transfer is to be made to the Hon'ble President with copy to the concerned Bench. The appellant may for valid reasons apply for transfer of his appeal or application from the Bench having ordinary jurisdiction to any other Bench in India. In such a case, if the appeal is pending, report is called from the Assistant Registrar concerned with the comments of the Bench to which the matter has been allotted and a copy of the transfer application is sent to C.I.T concerned for his objection, if any. On receipt of his reply the application for transfer is put up with the replies received from Assistant Registrar and the C.I.T. to the President for passing order under Rule 4 or 40 of the Rules, and the same is communicated to the parties and the authorities concerned. Special order is passed by the President. When an appeal is transferred, the cross objection arising out of that appeal is simultaneously to be transferred along wit the appeal.

Q.151 What is meant by Full Court farewell?

Ans. When a Member retires, the Bar requests the President / Vice President to hold a full court farewell in honour of the retiring Member. This is a mark of the respect given by the Bar to the Member. The Bar gives farewell to only such Member whose integrity is not in doubt. This is not a farewell party. It has great traditional value. This tradition has been adopted from the High Court / Supreme Court. The Managing Committee of the ITAT Bar Association at Mumbai decided unanimously after careful consideration and deliberation, not to give farewell to the retiring Accountant Member. It caused irritation to the Presidents. See speech delivered on 1-8-2003 87 ITD Part 6 dated 5-11-2003. Hon'ble Shri S. E. Dastur wrote an exhaustive article "Is a Court Reference a Formality" explaining the objective and purpose. 6 AIFTP Journal 2004 February Part. It is high time that the members of the noble profession realise the sanctity and the purpose.

A Full Court Reference is held on the demise of members or an eminent professional.

Q.152 What is meant by Service Rules?

Ans. Members of the Tribunal are Government servants. All Government servants are covered by strict service rules, such as they cannot accept gifts, they cannot take free travel, service etc.

Q.153 Whether Members have any code of conduct to be followed?

Ans. There is no code of conduct prescribed by the Tribunal. Members are governed by service rules. The ITAT Bar Association's Co-ordination Committee of the Federation has formulated and forwarded a draft code of conduct to the President of the Tribunal for its adoption to preserve the values of the Tribunal. (See Annexure). It shall add glory to the institution. We hope the Tribunal since adopt it forthwith and the members shall adhere to the code.

Q.154 Whether the assessing officer can himself appear and argue the matter before the Tribunal?

Ans. Assessing Officer cannot appear himself and argue the matter before the Tribunal. It is only the DR's whose name appears in the Official Gazette who can appear and represent the matter before the ITAT. *Tata Chemical vs. Dy. Commissioner of Income Tax (1998) 67 ITD 56 (Bom.)*

Q.155 Whether the Federation has adopted Standards of Professional Conduct and Etiquette for members of the Federation?

Ans. Yes. The Standards of Professional Conduct and Etiquette for its members was adopted at the EGM Meeting held at Hyderabad on 22-4-2001 and is part of its constitution. The objective is to preserve the dignity and honour of the tax profession. (See Annexure). The Federation is very much concerned with the conditions prevalent and is very much vigilant in implementing. We feel ethics as the uppermost.

Q.156 If the matter is referred to Third Member, when is the copy of the order supplied?

Ans. As per the present practice followed by the Tribunal, the order is supplied only when the matter is fixed for hearing by the Third Member. Earlier it used to be sent immediately after reference to the President. The earlier system is better and the Tribunal should revert back to the old system.

Q.157 Within how many days is the order required to be passed by the Tribunal?

Ans. There is no time limit fixed by the Act / Rules. However the orders are normally required to be passed by the end of next month of the date of hearing. In *Anil Rai vs. State of Bihar (2001) 7 SCC 318*, the Hon'ble Supreme Court held that, the orders must be passed within two months of the hearing. The same principle will apply to Members of the Tribunal also. It may be appreciated that most of the Members are passing the order with in two months of hearing.

Q.158 Whether Members of the ITAT can approach the High Court for their grievances relating to service conditions?

Ans. In *L. Chandra Kumar vs. Union of India (1997) 228 ITR 725 (SC.)* and *Abdul Razaek vs. Union of India (1999) 102 Taxman 219 (233 & 235),* the Courts have held that Members of the Tribunal must approach CAT and not the High Court for their grievances relating to service conditions.

Q.159 Whether there is any organization to take care of the interests of the professionals and the tax-payers?

Ans. Yes. There exist ITAT Bar Association at all major cities. The Federation has constituted ITAT Bar Association's Co-ordination Committee with representatives of Bar from every station where a Bench is located. The committee is to keep a balance between the Bar and the Bench and to work in such a manner whereby the dignity of the two is preserved. Representations are made from time to time and the Committee meets every six months to ascertain, to consider the grievances and to makes efforts to alleviate the grievances. Representations are being made regularly. It is heartening to note that representations are disposed of expeditiously and properly.

Q.160 What is the procedure for service of notices?

Ans. Notices of the Tribunal are served through post on the appellant or his Authorized Representative or by registered post at the address on the memo of appeal. Sometimes first notice is sent by certificate of posting but before making an ex parte order, notice is served by registered post. If the appellant or the assessee respondent is not available, efforts are made to get the notice served through the Income Tax Department. A notice for date of hearing is prepared before five weeks and is served before three weeks before the date of hearing to enable the assessee to submit the Paper Book as well as prepare for final hearing. In case of short notice as well as on first date of hearing adjournment in routine is granted. However, there exists a solitary instance of levy of cost of Rs. 300/- on the first adjournment, when a notice was short in time and adjournment application was filed in advance.

Q.161 Whether the above stated requirement of adequate time strictly followwed?

Ans. It is being noticed that in order to liquidate pendency and to have expeditious disposal, the mandate as to service before three weeks is not being followed. Recently it has been noticed that notice for date of hearing is served on the same day or a day earlier and appeal is dismissed in limine under Rule 19(2) with the observations: "The laws assist those who are vigilant and not those who sleep over their rights;

which principles is embodied in the well known dictum “VIGILANTIBUS NON DORMENTIBUS, JURA SUBVENIUNT’. It is also stated that the assessee is not serious to pursue his case, when there are no latches, negligence or default on the part of the assessee. Reliance is placed on CIT vs. Multiplan India Ltd. (1991) 38 ITD 320 (Delhi) which is misplaced. (ITA No. 531/JP/2001 dated 22-4-2004). The assessee is compelled to make application for restoration and pay Tribunal fee of Rs. 50/-

Q.162 What is the concept of ‘Rule of Law’?

Ans. Levy and collection of tax should be in accordance with law and in confirmity with the article 265 of the Constitution of India. Rule of Law is fundamental to maintain social order. Obedience and respect for law should be commended and commanded through the force of law and not by the law of force; because law of force leads to destruction of Rule of Law, and Force and Law protects it. Preference of citizens for Law and Order within the State reflects the Rule of Law. The Rule of law postulates that the Government must be run in accordance with law and the machinery of the Government should function through the law. When we say government according to law, it means that a citizen can challenge governmental action before the Court. We must constantly remember and remind that if we destroy the Rule of Law, it will destroy us; and if we protect the ule of Law, it protects us. Therefore, it is the duty of all concerned and the Judges to protect the Rule of Law.

The profession of law and accountancy are great professions. Its continued existence is necessary for the administration of justice flow of finance as well as for the proper functioning of the democratic republic. Good Lawyers/Chartered Accountants have been a boon not only to their clients but also for the whole country. The members of the two profession should first set an example of right thinking, and right speech, coupled with right action. Hard work, honesty and humility should constitute the core of the character of the professionals. Compassion and concern for the people will enhance the prestige of the profession and makes it honourable or noble.

Judiciary being a conscientious wing of the State is conscious of the necessity for the Judges to be sensitized to the need for self restraint. Greater the Power, greater the restraint. Judges should always bear in mind the famous line of Shakespeare. “It is excellent to have a giant’sstrength, but it is tyrannous to use it like a giant.” It equally applies on the honourable members of the Tribunal. In the words of Hon’ble Mr. Justice Shivraj V. Patil of the Supreme Court: **“FEAR NONE EXCEPT ONE, WHO IS ABOVE EVERYONE”.** Rule of law should prevail and not they whims or arbitrariness of any authority. Majesty of law should be upheld.

Q.163 What is the procedure for service of order?

Ans. An order is normally dispatched for service within 4-5 days of the signatures of the Member(s). It is served in the same manner as stated about the notice. Lately it is found that the orders are not served immediately and sometimes are delayed with bad intentions. Suggestion has been made by the Federation on 8-12-2003 to serve within three days of the order and by Registered Post. The President has forwarded the representation for necessary action on 15-12-2003 by D.O. No. P/7/2003 (2004) 186 CTR 50 (Q&N).

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Q.164 How can an assessee avoid filing of repetitive appeals?

Ans. Section 158A of the Income-tax Act, 1961, inserted by the Taxation Laws (Amendment) Act, 1984, w.e.f. 1st October, 1984 makes special provision for avoiding repetitive appeals. This section provides that where an assessee claims that any question of law arising in his case for an assessment year which is pending before the Income-tax Officer or any appellate authority is identical with a question of law arising in his case for another assessment year which is pending before the High Court on a reference under section 256 or before the Supreme Court on a reference under section 257 or in appeal under section 261, he may furnish to the concerned authority a declaration in the form as at Appendix XXIV(a) which shall be verified in the manner indicated therein. The declaration and the verification shall be signed by the person competent to sign the appeal. Such declaration shall be furnished to the Appellate Tribunal in triplicate.

On receipt of the declaration mentioned above, the Appellate Tribunal shall call for a report from the Income-tax Officer on the correctness of the claims made in the declaration and where the Income-tax Officer makes a request to the Appellate Tribunal to give him an opportunity of being heard in the matter, the Appellate Tribunal will allow him such opportunity.

As soon as application is received, the concerned appeal record together with the application should be put up to the Bench for orders in the form as at Appendix XXIV(b). On receipt of orders of the Bench, the letter in the proforma as at Appendix XXIV(c) should be issued to the Income-tax Officer and copy to the Departmental Representative and case posted for hearing on date fixed by the Bench for hearing.

Q.165 What is the remedy against an order of the Tribunal?

Ans. Now the remedy is to file an appeal u/s. 260A of the Act before the jurisdictional High Court on a substantial question of law, within 120 days from the date of receipt of the order of the Tribunal. Against an order under s. 254(2) – writ also lies, if the order is without jurisdiction.

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[(1951) 20 ITR ST. 49]

A. The following suggestions are made for the guidance of the assessees and their representatives:–

1. In all communications addressed to the Tribunal by the parties with regard to appeals or applications the number thereof, or, if the number is not known, the date of filing thereof, should invariably be given. Failure to furnish this information will cause needless delay in answering correspondence.

2. An application for adjournment of the hearing should be made at the earliest possible time. If it could be presented personally, it should be done so. If it cannot be presented personally, a stamped envelope with the address of the assessee or his representative should, as far as possible, accompany the application. If a reply is required telegraphically, the necessary postage stamps should accompany the application. If a telegram is sent asking for adjournment, arrangement should be made for a reply paid telegram. The suggestion made in this paragraph is intended not so much as a measure of economy as a measure for greater efficiency. The Tribunal is not bound to reply the applications for adjournment. Replies will, however, be given as far as possible. Unless the assessee hears that his application for adjournment has been granted, he should remain present at the hearing of the appeal or application as the case may be.

3. Whenever an appeal or application is filed which is connected with an appeal or application relating to the same party filed earlier, reference thereto should invariably be given with the latter appeal or application so that the various connected appeals or applications could be linked up together. This will be for the convenience of the parties themselves.

If any practitioner wishes that appeals and applications relating to different assessees in which he is engaged, should be taken up on the same or consecutive days, he should intimate to the Tribunal the particulars of these appeals and applications including the date of filing thereof, well in advance.

4. An application for an early hearing of an appeal should invariably state why the assessee wants that his appeal should be given preference over the appeals made by other assessees. The application should also state whether or not the tax has been paid and, if so, to what extent.

5. An application for sending for the case of another assessee should also be made at the earliest possible opportunity. Cases will not ordinarily be sent for, for the purpose of making an assessment on the same basis as in other cases.

6. Attention is invited to Rule 11 of the Appellate Tribunal Rules. That Rule provides that where a fact which cannot be borne out by or is contrary to record is alleged, it should be stated clearly and concisely and should be supported by a duly sworn affidavit. Complaints are at times made before the Tribunal that certain statements attributed to the assessees or their representatives were in fact not made. Unless Rule 11 is complied with, it is not ordinarily possible to go outside the record. An application for time for filing an affidavit as required by Rule 11 at the time of hearing of the appeal will not ordinarily be granted. The object of this suggestion is to save time in hearing and deciding appeals.

7. If an appeal is barred by time, or if there are reasons for believing that it may be barred by time, an application for condoning the delay should be made well in advance before the hearing of the appeal. Such an application should, if necessary, be supported by an documentary evidence, as for example, a medical certificate or an affidavit.

8. Three copies (typed if possible) of the statements made by the assessee or the witnesses or of documents replied upon or of extract accounts, where necessary, should be produced at the time of hearing of the appeal. As far as possible all such documents and papers should be in English or translated in English. This suggestion has been accepted by many solicitors and auditors appearing before the Tribunal. This suggestion is intended to facilitate the hearing of the appeal. Extracts of accounts should, if possible, be certified by the assessee's representative or by any other reliable person and be in English.

9. Books of account should be kept handy at the time of hearing of the appeal. If books of account of the year preceding or succeeding year of account are relevant, they should also be kept handy.

10. Assessees should, as far as possible, be present at the hearing of the appeal. This suggestion is made entirely in the interest of the assessees.

B. The following suggestions may also be considered:–

(1) It has been noticed that requests are made to block the appeals to await decisions of the High Court or the Supreme Court on similar points involved

in the appeals. In order to avoid multiplicity in proceedings, the Appellate Tribunal accedes to such request. It is, however, found that in many of such cases, the particulars of the case involving identical points are not on record so as to ascertain whether that case been disposed of by the High Court/ the Supreme Court or not. This results in prolonged correspondence between the Tribunal and the parties causing long and avoidable delay in the disposal of those blocked appeals/ application/ cross objection. It is, therefore, suggested that an application for keeping the appeals/ applications/ cross objections blocked should invariably furnish the particulars of the case pending with the High Court/ the Supreme Court involving identical points for which the appeals or applications or cross objections are sought to be blocked. The assessee and the Departmental Representatives should inform the Tribunal about the disposal of the case by the High Court or the Supreme Court immediately after its disposal so as to enable the Tribunal to dispose of such blocked cases soon thereafter. In this connection, it may be made clear that the Tribunal is not bound to keep such appeals/ applications/ cross objections blocked for an indefinite period.

(2) Whenever any appeal against the penalty order is filed, the appellant should invariably inform the Tribunal in the forwarding letter whether any quantum appeal pertaining to the same assessment year is pending before the appellate authority. The Tribunal should be informed immediately of the decision in said quantum appeal. If the said quantum appeal has already been disposed of by the first appellate authority at time of filing of the penalty appeal before the Tribunal, the Tribunal may be intimated the date of filing of the quantum appeal to enable it to link both the appeals and post them for hearing on one date. In case no such quantum appeal is proposed to be filed before the Tribunal, the fact may be intimated to the Tribunal, so that the penalty appeal may be posted for hearing.

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CHAPTER

16

CHECKLIST FOR FILLING OF APPEAL BEFORE THE TRIBUNAL

1. The order received from the first appellate authority shall be verified properly to ensure that all the grounds of appeal including any additional grounds of appeal are have been disposed of.

2. Note the date on which the order of the appellate authority was communicated so as to file the appeal without time; i. e., within 60 days of the receipt/service of the order.

3. The Tribunal is empowered to condone the delay in filing an appeal and admit the appeal filed beyond the prescribed time limit, if good and sufficient reasons exist. Hence, if there is delay in filing of appeal, file the application for condonation of delay with supporting evidence like Affidavit, Certificate, etc. along with the appeal itself.

4. If it is the last day of filing the appeal, the same can be filed at the Tribunal's office in Mumbai even in respect of appeals required to be filed at Delhi, Ahmedabad or any other place. The Registry at Bombay will forward the same to places of jurisdiction.

5. Fees for filing appeal before the Tribunal can be paid in any challan applicable to respective assessee by mentioning in the challan that the payment is and for Tribunal fees. If it is last day, Tribunal fees can be paid by cash at the office of the Tribunal.

6. The appeal shall be filed in triplicate by attaching the following documents:–

   a) Form No. 36 duly filled in and signed by the person as specified in section 140 of the I. T. Act, 1961.

   b) Grounds of Appeal.

   c) Copy of the order appealed against and one copy should be certified by the assessee or Authorised Representative of the assessee.

   d) Copy of the order of the assessing officer, certified by assessee or authorized representative.

   e) Copy of the grounds of appeal and statement of facts filed before the first appellate authority.

   f) Counterfoil of the challan for the payment of fees and one copy shall be original.

   g) If the appeal is against the Penalty Order, under section 271(1)(c) copy of the Assessment Order shall also be filed.

7. As per Rules 6 and 7 of the Appellate Tribunal Rules, 1963 the Memorandum of Appeal shall be submitted to the Registrar. However, in case of emergency, the same can be handed over to the Registrar at his residence or to the members, when even they are available.

8. In case if any person has signed the memo of appeal as authorized representative, the necessary authority is to be filled and properly stamped as required under the rules.

9. In case any affidavit is filled, it is to be seen whether it is on a proper form and duly stamped.

10. If the grounds appeals are separately filed, they should be signed by the Appellant. They should be concise and serially numbered

11. In penalty appeal (s) preferred under Income-tax Act, the following information is to be called for in the memorandum at App. VII (a) (i) within the prescribed period:

    Whether any quantum appeal/appeals is/are pending before the Appellate Assistant Commissioner concerned pertaining to the assessment year to which the penalty appeal relates:

    Whether the aforesaid quantum appeal filed before the Appellate Assistant Commissioner has been disposed of. If so, the date of filing of the quantum appeal/appeals before the Tribunal may be intimated

12. An appeal received by post shall be deemed to be received on the date on which it is received at the Tribunal office.

13. As per Rule 18 of the Appellate Tribunal Rules, the appellant shall file paper book in triplicate at least 7 days before the date of hearing of the appeal. The paper book shall contain documents or statements of witnesses and other papers referred to or submitted before the Assessing Officer or CIT (A), on which the appellant would like to rely. Each paper should be certified as a true copy by the party filing the same; i.e., by the assessee or his authorized representative.

14. If the assessee in respect of whom appeal is to be preferred is dead, then legal heirs should be brought on record. The death certificate along with an affidavit should be filed with the Registry.

15. When appeals are filed against the order of CIT (A) the respondent in Form No. 35 has to be respective Assessing Officer. If the order is by Commissioner under section 263, then the respondent is the Commissioner.

III. Filing of Memorandum of Cross Objection

    1. The respondent may file a memorandum of cross objection against the order of the first appeal on receiving the notice of appeal filed by the other party.

    2. The memorandum of cross objection must be filed in prescribed Form No. 36 A within 30 days of the receipt of the notice of the appeal filed by the other party.

    3. No Tribunal fee is payable in respect of appeal filed for Cross Objection.

    4. Where the assessee goes in appeal before CIT(A) on say 5 to 6 grounds and he decides in favour of the assessee only on one particular ground, and has not given any finding on other ground agitated by the assessee, it would be advisable to take all the issues in the Cross Objection.

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CHAPTER

17

CHART FOR APPEALS BEFORE ITAT

	Particulars	Tribunal
I.	**Income Tax**	
		Sec. 252 to 255.
1.	Orders Appealable.	Mentioned u/s. 253
2.	Time limit of filing the appeal	Within 60 days from the date of Service of CIT (A)'s order.
3.	Prescribed Form No.	Form No. 36 (As per Rule 47(1))
4.	Who can file Appeal	Aggrieved Assessee or Commissioner.
5.	Fees Payable.	Rs. 500/- where the income assessed is Rs. 1lakh or less. Rs. 1,500/- where the income Rs. 1 lakh but less than Rs. 2 lakh and 1% of assessed income, subject to maximum of Rs. 10,000/- where the income assessed income is more than 2 lakhs.
6.	Documents to be filed.	Form No. 36, (As per Rule 47(1) of I. T. Rules) Grounds of Appeal, copy of order against which appeal is preferred, & Documents filed before the CIT (A) as referred in the column.
7.	Documents to be submitted in:	Triplicate.
8.	Place of filing.	Registrar of the Appellate Tribunal.
9.	Appeal to the High Court	Section 260-A
II.	**Cross Objection**	
1.	Prescribed Form No.	Form No. 36 A. (As per Rule 47(1) of I.T. Rules)
2.	Time limit for filing the Cross Objection.	Within 30 days of the receipt of the notice of appeal filed by other party
3.	Fees payable	No fees payable.
III.	**Stay Application**	
1.	Fees payable	Rs. 500/-
2.	Documents to be filed	Stay Petition, Rejection order for stay by CIT & Assessing Officer Affidavit, orders of lower authorities & documents furnished to them.
IV.	**Miscellaneous Application**	
1.	Fees payable	Rs. 50/- (w.e.f. 1-10-98)
2.	Documents to be filed	Miscellaneous Application. Order of the Tribunal or any documents to be relied upon.
V.	**Wealth Tax**	
1.	Fees payable	Form No. F. [As per rule 6 (1)].
2.	Fees payable.	Rs. 250/-
	Gift Tax	
1.	Prescribed Form No.	Form No. H (As per rule 6)
2.	Fees payable.	Rs. 200/-

CHAPTER

18

MINUTES OF MEETING WITH VICE PRESIDENT AS APPROVED BY PRESIDENT, ITAT, HON'BLE SHRI VIMAL GANDHI ON 19-3-2003

MINUTES OF MEETING OF THE HON'BLE VICE PRESIDENT SHRI J. P. BENGRA HELD ON 26TH FEBRUARY, 2003 WITH MEMBERS OF THE ITAT BAR ASSOCIATION

Points **Decision/Action arrived at**

1. Appeal Memos & Grounds of Appeal
1.1 In a number of cases, appeal memos of the Appeal section will ensure that appeal memos are
department are not received in advance, sent within a fortnight
only Notices are received

2. No. of Appeal and Bench
2.1 When an appeal is filed along with Appeal number and Bench will be informed on
acknowledgement appeal number and demand after 2 days of filing appeal
Bench may be informed

3. Notice of hearing
3.1 Where notice for hearing are not received Normally 21 days, notice is given to the parties.
giving sufficient time for preparation, In urgent matters short notice is given at the
adjournments are required to be sought for request of the assessee. This practice is being
followed and to continue

4. Priority matters
4.1 On application by the appellant, the
following appeals may be taken up on
priority basis
(a) Appeals against order u/s. 263 by the Appeals are taken on priority basis in respect of
CIT (Admn) and ex parte order of appeals against order u/s. 263. Henceforth, on
CIT(A) application, appeals against ex parte order of the
CIT(A) will also be taken on priority basis

	(b) Appeals against block assessments	On application by the aggrieved party, these appeals will be fixed on priority basis
	(c) Appeals relating to covered matters	— do —
	(d) High demand matter (more than 1 crore)	High demand matters in general cannot be given priority. However, in an appropriate case on an application, the matter will be considered
	(e) Matters relating to KVSS	Matters covered by KVSS will be posted for hearing on priority basis
	(f) Appeals pertaining to senior citizen should be fixed out of turn	If the assessee proves that assessee is of more than 70 years' old, such matter will also qualify for out of turn fixation
4.2	Miscellaneous Applications be heard at the earliest on priority basis	This is being followed. However, if anything contrary is noticed, the concerned party may approach the registry.
5.	Appellate orders	
5.1	There is considerable delay in passing orders and further delay in receipt of the orders	There are instructions that appeals should be disposed of in the ensuing month to which the hearing has been concluded. There are also instructions to the effect that the order should be despatched within 15 days
5.2	In case of very heavy matters the remaining board may be discharged and suitable date may be given to save time of other representatives	All the benches are aware of this procedure and may follow the same
6.	Applications:	
6.1	All applications made to the Tribunal should be placed before the Hon'ble Vice President	Adjournment applications received in advance will be placed before the Vice President. The registry will record the date and time of receipt of such applications. Applications sought to be filed before the commencement of the Bench will be accepted and placed before the Bench for consideration
7.	Paper Books	
1.	If the other side has no objection, paper book may be accepted, even at the time of hearing	Paper books are accepted even at the time of hearing. In case of objection from revenue side, such matters are being adjourned

2.	The paper took filed even a day before may be accepted by the registry	This is being followed and requires no deliberation
3.	In case of departmental appeals, assessees should be exempted from filing paper book	The Bench never insists the assessee to file paper book in departmental appeals and this will continue
4.	Wherever paper book is filed in advance, the same is misplaced invariably and not found in the case records	Standing instructions are already issued to the registry to make good of such a situation. As soon as the paper book is filed in advance, the registry will place the same in the case records
8.	Stay	
1.	Stay order may be passed and issued on the day of hearing itself	This is more or less being followed. However, it has been agreed that stay matters will be disposed of within 3, working days or the next working day as early as possible
2.	In case of emergency, applications may be put up before a sitting bench immediately	This is formally agreed upon and steps will be taken to implement the same
9.	Roll call of matters – priority a) Adjournments b) Covered matters c) Stay application matters d) Stay granted matters e) Other matters, where counsels/CAs are present f) ex parte matters	This practice is followed in all these areas except item (f). In respect of non-appearance cases pertaining to item (f), such matter may be heard before the Court rises.
10.	Adjournment 1. When a counsel is appearing before another bench or representing matters before High Court, the matters may be kept back or adjournment may be granted	Generally this practice is being adopted by the Tribunal. However, cannot be deliberated upon, as the issue pertains to a judicial proceeding.
	2. When an application for adjournment was filed at least fifteen days in advance, the decision may be informed to the assessee at the earliest	Registry is directed to put up all such applications seeking adjournments before the Vice President in advance so that necessary orders may be passed in such cases.

11.	Appeals where loss is more than five lakhs and issue involved is more than 5 lakhs	May be heard by Division Bench.
12.	Ex parte dismissal Miscellaneous Applications are being dismissed without hearing	Miscellaneous Application shall be fixed for hearing
13.	The registry does not consolidate appeals despite advance request in writing	The registry generally puts up the matter for consolidation on receipt of the application. However, the registry is directed to be prompt on such matter
14.	Power of Attorney – Stamp It is suggested that the Registry may write to the stamp authorities for clarification on stamp duty applicable to Chartered Accountants and Tax Consultants	Stamp Duty is being charged as per Stamp Duty Act. Does not have the jurisdiction to act upon such matters
15.	Matter referred to Third Members In case of difference of opinion between two members, parties are not informed by the office, that matter has been referred to third member	As soon as the order of the President nominating Third Member is received, the Asstt. Registrar will inform the parties and copies of the differing orders will be supplied to the parties. Further, as soon as the Third Member passes the order, copy of the same will also be sent to the parties
16.	Information about matters in all zones referred to and the date fixed for hearing by the Special Bench may be forwarded to our Association	Notice of Special Bench matters, as per the practice followed, shall be displayed on the Notice Board
17.	Publication of Tribunal judgments	
	1. One copy of judgments of the Tribunal may be given to Bar Association for circulation amongst the members	On payment of fees, copies of the judgments can be obtained by the Bar Association from the registry.
	2. List of judgments of all the zones which are fit for may be given to the Bar Association	List of judgments of all the zones marked for publication shall be provided to Bar on payment of fees, if the Committee thinks it proper
18.	During summer and Diwali vacations as declared by the High Court, adjournments may be liberally granted on necessary application being made in this regard	This practice is being followed
19.	Adequate furnishing by providing new airconditioners, chairs and side racks, etc.	Subject to the availability of funds, every step will be taken to provide infrastructures

20. Facility of library/waiting room near the In case of shortage of space in Court Rooms 9 & 10
Court Room Nos. 9 & 10 use of the room the Bar members can use library side of the
adjacent to Court Room 10 may be allowed Conference Room till the hearing concludes, until
to as library further orders.

21. Computerisation
The services of computer may be made This area is already under consideration of the
available for preparation of the Boards Tribunal and the outcome of the negotiations is
Board expected.

22. Quarterly meeting
At least once in three months meeing may be held Half yearly meetings may be held
with the President and Vice Presidents for
discussing administrative matters

CHAPTER

19

PRINCIPLES OF GOOD REPRESENTATION

Do's

1. Be Punctual and learn time management.
2. Adhere to the Dress Regulation.
3. File Letter of Authority in advance.
4. Sincerity to work & Good preparation.
5. Respect to the Chair. Be Courteous. Keep smile. Be Cheerful & Humble.
6. Use Simple Language.
7. Brevity & Precision.
8. Observe Decorum in the Court.
9. Listen all queries that may be raised by the Bench carefully without interruption and answer the same directly.
10. Get familiar with the important facts of both sides and plan the necessary theory.
11. The counsel should marshal the facts arrange them properly.
12. In opening an argument, put forth the best points which cannot be disputed and carry the Judge with you by reason.
13. Treat the opposite party with courtesy and do not decry him.
14. Evidence, and not eloquence, prevails.
15. He should be reasonable and should not trouble the court with technicalities.
16. A counsel must have common sense in a good measure.
17. To know the law is not enough to make a great lawyer. But you must know and apply it to the facts of your case to bring out results.
18. During the arguments, be cool, calm and temperate. Remember that advocacy is not a business but a profession, not a trade but a duty of honour.
19. Know when to step.
20. Build the Reputation.
21. Respect the seniors and be affectionate to the juniors.
22. Arguments in law courts are different from oratory in public meetings.

Don'ts

1. Don't Mislead Facts.
2. Don't Under Estimate other side.
3. Never be Over Confident.
4. Avoid Repetition.
5. Don't lose your temper whatever be the provocation.
6. Don't get annoyed if interrupted by the Bench.
7. Do not ridicule or belittle the Departmental Representative or the Department generally.
8. Do not argue loudly.
9. Do not cite law first. First analysis facts and then law.
10. Do not argue with the judge.

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"SEVEN LAMPS OF ADVOCACY" Justice S. B. Majumdar – AIFTP Journal Oct-Dec' 1999 Page No. 4

"ART OF REPRESENTATION" Shri Y. P. Trivedi, Sr. Advocate, Mumbai – AIFTP Journal June' 2002 Page No. 5

"ART OF REPRESENTATION" Shri S. N. Inamdar, Advocate, Mumbai – Income Tax Review, May' 2003 Page No. 72

"PROFESSIONALS ETHICS FOR TAX PROFESSIONALS" Shri S. E. Dastur, Sr. Advocate, Mumbai – 12th National Convention, AIFTP, page 25.

"BUILD THE NATION" Shri N. M. Ranka, Sr. Advocate, Jaipur – AIFTP Journal October, 2003 Page No. 36

"ROLE OF PROFESSIONALS IN TAX PRACTICE" Shri P. N. Shah, Chartered Accountant, Mumbai – 12th National Convention, AIFTP, page 31

"CODE OF PROFESSIONAL CONDUCT FOR THE LEGAL PROFESSION IN THE 21ST CENTURY" M. Jagannath Rao, Chairman, Law Commission of India. – 12th National Convention, AIFTP, page 19

"BHAGWAT GEETA AND PROFESSION" Shri V. H. Patil, Advocate, Mumbai – 12th National Convention, AIFTP, page 41

"ROLE OF THE JUDICIARY AND THE LEGAL PROFESSION" Shri N. A. Palkhivala – 12th National Convention, AIFTP, page 39

"TAX EVASION AND THE ROLE OF TAX ADVISOR" Income Tax Review, December, 2002 page 30

"ROLE AND RELEVANCE OF INCOME TAX APPELLATE TRIBUNAL IN DISPENSATION OF JUSTICE" Shri N. M. Ranka, Sr. Advocate, Jaipur – (2001) 169 CTR 112 (Article).

"IS A COURT REFERENCE A FORMALITY" Shri S. E. Dastur, Senior Advocate, Mumbai (2004) AIFTP Journal, Februaryissue.

ADVOCATE HIS MIND AND ART
Third Edition 2003 by P. Ramanath Aiyar.

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CHAPTER

20

SPECIMEN GROUNDS OF APPEAL, MISCELLANEOUS APPLICATION & STAY APPLICATION

A. SPECIMEN GROUNDS OF APPEAL

BEFORE THE HON'BLE INCOME TAX APPELLATE TRIBUNAL

In the case of ______________________________

Asst. Year : ____________________

Merit

A. Addition of Rs. 10,00,000/- as casual income in respect of surrender of tenancy rights.

1. The learned CIT(A), failed to appreciate that the amount received on surrender of tenancy rights was a capital receipt not chargeable to tax and hence, the same could not be assessed as casual or non-recurring income and therefore the addition of Rs.10,00,000/- is uncalled for and may be deleted.

2. Without prejudice to above, the learned CIT (A) failed to appreciate that, even assuming (not accepting) that the amount received represented income, the same was on surrender of a capital asset and hence, the same may be assessed as capital gains and not as casual or non-recurring income, and hence, the addition of Rs.10,00,000/- is unjustified and may be deleted.

B. G. P. addition of Rs. 75,000/-

3. The learned CIT(A), erred in confirming the ad hoc addition of G. P. of Rs. 75,000/-.

4. The learned CIT(A), failed to appreciate that, the appellant maintained stock Register and the Assessing Officer has not found any discrepancies in the books of account maintained by the appellant. Therefore just because G. P. is comparatively less during the year, that cannot be the basis to make ad hoc addition of Rs. 75,000/-.

C. 80HHC Claim of Rs. 5 lakh

5. The learned CIT(A), erred in not giving any finding as regards claim of deduction under section 80HHC, claimed as per grounds No. 11, before the CIT(A).

6. The learned CIT(A), failed to appreciate that all conditions of section 80HHC were satisfied. Therefore disallowance of claim of section 80HHC by the Assessing Officer is uncalled for.

D. Interest levied u/s.234A, 234B and 234C totaling to Rs.8,50,000/-.

7. The learned CIT(A) erred in confirming the levy of interest u/s.234A, 234B and 234C of the Act.

8. The learned CIT(A) failed to appreciate that the appellant is denying the liability to pay interest and the Assessing Officer directed the Inspector to charge interest which is unconstitutional and hence, liable to be deleted.

1 Prayer to amend Grounds of Appeal

9. The appellant craves leave to amend, alter or delete any of the above grounds of appeal.

Appellant.

B. SPECIMEN MISCELLANEOUS APPLICATION

In The Income Tax Appellate Tribunal

_______________ BENCH, ____________________

Before Shri _________________ and

MISCELLANEOUS APPLICATION ARISING OUT OF

I.T.A. No. ____________/_______/__________

Assessment year :________________________

A.B.C.Co. Pvt. Ltd., ... Appellant

vs.

Assessing Officer, ... Respondent

1. The above appeal was disposed of by the Tribunal by its order dated ________. The Appellant above named beg to present this application for rectification of certain mistakes which are apparent from record in the said Order.

2. Ground No. 4 in the said appeal related to the Appellant claim for extra shift allowance on electrification of tanks and equipment in Insecticides Plant No. 1. The details relating to electrification of tanks and equipment in the Insecticides Plant No. 1 have been furnished at page 51 to 54 of the compilation.

4. The Tribunal has disposed of this ground in paragraph 6 of its Order which reads as under :

"6. Ground No. 4 is for extra shift allowance on electrification of tanks and equipment in Insecticides Plant No. 1. The electrification or electrical job itself would not be a plant and machinery unless it has a connection with the plant and machinery. We, therefore confirm the orders of the departmental authorities on this point as nothing has been brought to our notice to establish that the said item is a part of plant and machinery. This ground is, therefore, rejected".

5. The Appellants submit that the said Order overlooks the fact that on page 54 of the compilation full details relating to electrification of tanks and equipment installed in Malathion Plant (Insecticides Plant No.1) had been furnished. The details clearly indicates the electrification of items was connected with plant and machinery. Therefore, following the basis laid down by the Tribunal itself in paragrpah 6 of the said order, the Tribunal ought to have held that the electrification of tanks and equipment in the Insecticides Plants No. 1 entitled to extra shift allowance. It is

respectfully submitted that the finding of the Tribunal that nothing had been brought to its notice to show that the said item was part of plant and machinery, has been made ignoring the details furnished at page 54 of the compilation. It is respectfully submitted that the omission on the part of the Tribunal consider these details constitute a mistake apparent from the record. The Appellant submit that the Tribunal may be pleased to suitably amend its said order to rectify the said mistake which is apparent from the record.

6. The counsel of the appellant relied on the decision of the Supreme Court and Jurisdictional High Court reported in _____ & _____ respectively. However, the Hon'ble Members have not referred both the aforesaid judgements in the order.

7. It is respectfully submitted that the Tribunal may be pleased to suitably amend its order to rectify the aforesaid mistake, which is apparent from the record.

The Appellant therefore prays that there is a mistake apparent from the record and the same may be rectified.

Dated this __________ day of ___________ 2000.

Appellant

C. SPECIMEN STAY APPLICATION

Appendix X(E)

Specimen Form of Application for Grant of Stay In the
Income Tax Appellate Tribunal

____________ **BENCH**

Stay Application No. _____ of __________ in the case of _________ for the assessment year(s) ________ under the ________ Act _________ for stay of recovery of tax/interest/penalty/fine/other items.

1. Name and address of the applicant :
2. Act under which the demand is raised Income-tax etc.) for which stay (i.e., application is moved :
3. Assessment year(s) involved :
4. Date of filing of appeal before the Tribunal and its number, if known :
5. Form the demand give break up :

   Tax :

   Interest :

   Penalty :

   Fine :

   Others :

   (a) Amount already paid :

   (b) Amount outstanding :

   (c) Amount which is not disputed out of (b) :

6. (a) Details of application for stay made to the revenue authorities :

1. ITO 2. IAC 3. CIT

(b) Result :

7. *Reasons for seeking stay :

8. (a) Whether the applicant is prepared to offer security :

(b) If yes, in what Form :

9. Prayer stating exact amount sought to be stayed

10. If stay is sought in relation to a matter pending in reference before the High Court give full particulars of R. A. No. and date etc. :

Date : Signature of the applicant.

*Separate sheet may be used if space is not sufficient

Note : 1. The application shall be made in triplicate and shall be neatly typed on one side of the paper with copies all the relevant document including demand notice, copies of correspondence with the Revenue authorities for stay of demand and copies of the letter refusing stay of demand.

2. The contents of the application shall be supported by an affidavit duly sworn in by the applicant or his authorised agent.

3. The application shall be presented by the applicant in person or by his authorised agent or sent by registered post to the Bench of the Tribunal where appeal was filed or which has got jurisdiction to hear the appeal.

BEFORE THE INCOME TAX APPELLATE TRIBUNAL, _______________

STAY APPLICATION NO. ...... OF 1992

M/s. ABC Co. Ltd. .... Petitioner

vs.

Assessing Officer .... Respondent.

The Humble Application of the Petitioner abovenamed most respectfully sheweth

1. The petitioner is a company engaged in the business of trading in variety of items for the last several years. The petitioner filed the Return of Income for the assessment year 2000 – 01 on showing the income of Rs. _______/-. The Petitioner had maintained regular books of account. The Petitioner made a payment of its sales tax liability for the last quarter ended on the due date of payment i.e. during the financial year ________. The said payment of Rs. 3 lakhs was disallowed under Section 43B of the Income-tax Act, 1961. The Petitioner further states that the Assessing Officer treated an expense of Rs. 1,80,000/- as capital expenditure as against the claim of the Petitioner of a revenue expenditure. The Petitioner further states that the Assessing Officer

demanded a tax of Rs. 7,50,000/- and levied an interest of Rs. 2,10,000/- under Section 215 of Income-tax Act, 1961. The Petitioner has already paid an amount of Rs. 5 lakhs, leaving the balance of Rs. 4,60,000/- unpaid. (Hereto marked Exhibit 'A' is the copy of the order passed by the Deputy Commissioner of Income-tax).

2. The Petitioner filed an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) upheld the order of the Assessing Officer (Hereto marked Exhibit 'B' is the copy of the order by the CIT (Appeals).

3. The Petitioner then filed an appeal before the Income-tax Appellate Tribunal, Bombay on ______ and the same is pending.

4. The Petitioner submits that the order of the Commissioner of Income-tax (Appeals) is not in conformity with the spirit of the law and the judgment of the various High Courts.

5. The Petitioner states that though the appeal is pending before the Tribunal, the Assessing Officer started recovery proceedings. The Petitioner had requested the Assessing Officer to keep the demand of tax and interest in abeyance, till the disposal of the appeal by the Hon'ble Tribunal. The request of the Petitioner was rejected by the Assessing Officer.

6. The Petitioner, thereafter, approached the Commissioner of Income-tax to keep the demand of tax in abeyance till the disposal of the appeal by the Tribunal and pointed out to the learned Commissioner that the Petitioner has very good chances of winning the appeal before the Tribunal in view of the judgments of various High Courts. The request of the Petitioner was rejected by the Commissioner. (Hereto marked Exhibit 'C' is the letter of the Commissioner).

7. The Petitioner submits that it had to close down its business since 1999 in view of certain circumstances and as such it was facing a serious financial stringency. In view of the closure of the business, the Petitioner finds it difficult to recover even its outstanding dues. The latest balance sheet of the Petitioner is enclosed. (Hereto marked Exhibit 'D').

8. The Petitioner, further, states that it is prepared to file an undertaking with the Department that it will not dispose of its fixed assets before the decision of the Tribunal.

9. The petitioner has good prima facie case in his favour. The petitioner has no liquid assets to pay the highly disputed demand. Balance of convenience is in his favour. There shall be no loss to the revenue. Demand is well secured. Assessed income is more than double of the returned income. It shall be in te interest of justice and equity to grant stay as prayed for.

10. The brief facts of the petitioner are as under :

a)	The Appeal filed on	:
b)	Appeal number allotted	: ITA No. ________ Bench 'A'.
c)	Returned Income	: Rs. ________/-
d)	Income assessed	: Rs. ________/-.
e)	Income assessed after giving effect of the order of the CIT(A)	: Rs. ________/-.

f)	Tax payable on the income assessed after giving effect to the order of the CIT(A)	: Rs. ________/-.
g)	Tax Paid	: Rs. ________/-.
h)	Balance tax payable as per assessed income after effect to the order of the CIT(A).	:
i)	Tax	: Rs. ________/-.
ii)	Interest	: Rs. ________/-
	Total of tax in dispute	: Rs. ________/-

10. The Petitioner, therefore, prays :

a) That the recovery proceedings initiated against the Petitioner may be stayed till the receipt of the order of the Hon'ble Tribunal ;

b) that the Deputy Commissioner of Income-tax, or the Commissioner of Income-tax or their subordinates or their successors may be restrained from taking any action as regards recovery of tax, interest and penalty levied or leviable for the relevant assessment year;

c) that the hearing of the Appeal may be expedited; and

d) that any other relief which the Hon'ble members may deem fit and proper in the nature and circumstances of the case.

I, the Director of ABC Co. Ltd.., state that whatever is stated hereinabove in the Stay Petition is true to the best of my knowledge and information.

For ABC Co. Ltd.
Director

Bombay.
Dated :

AFFIDAVIT

I, A, Director of ABC Co. Ltd. having its office at ________________________ have to state as under:

1. We have filed the return of income of the Company showing income of Rs. ________/-.
2. The Assessing Officer of Income-tax assessed the income of the Company at Rs. ________/-
3. In appeal, the contentions of the Petitioner did not find favour with the Commissioner of Income-tax (Appeals).
4. Being aggrieved by the order of the Commissioner of Income-tax (Appeals), we have filed an appeal to the Tribunal and the same is pending.
5. We feel sure that we have fair chance of succeeding in appeal before the Tribunal.
6. * We have no liquidity or bank balance to make the payment of tax in dispute.
7. The stay application has been prepared on our instructions.

I say that whatever is stated hereinabove and in the Stay Petition is true to the best of my knowledge and I believe the same to be true.

Solemnly affirmed at Bombay
on this ______________________ Director

Identified by me,

Advocate Deponent

Before me.

* Note: Facts may be changed appropriately.

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CHAPTER

21

SUGGESTIONS TO IMPROVE THE FUNCTIONING OF THE TRIBUNAL

A. ADMINISTRATION

1. Notices

    (a) Notice of hearing may be sent at least 30 days in advance.

    (b) In the High Court, there is a procedure of putting the list of matters on the warned list. The same procedure may be followed and matters, likely to come on board in the next month may be put up on the notice Board as warned list.

2. Orders

    (a) Notice may be put up for the matters which are pending for dictation. Normally, the orders should be passed within one month of the hearing but in no case more than 2 months.

    (b) On transfer of any Member hearing of part heard matters should be completed and heard matters should be disposed off.

3. Stay orders

    Stay orders may be passed in the open Court and handed over to the assessee at least the next day after the hearing.

4. Ex parte matters

    It is suggested that ex-parte orders may be passed after the regular hearings of matters which are represented has been completed.

5. Third Member

    It may be desirable that, the person who may be nominated as Third Member, as far as possible may be senior to Members, who have decided the matter.

6. Matters referred to the Special Bench

    (a) When a particular issue is pending before the Special Bench, all matters where the same issue is involved may be blocked till the Special Bench decided, instead of adjourning such matters for two months so that inconvenience to the assesses may be avoided and administrative paper work of the Tribunal reduced.

    (b) Matters disposed off by the Special Bench may be notified on the Notice Board and copies of the order may be sent to all ITAT Bar Associations.

    (c) It may be desirable that, the Members, who have not taken the view may be requested to sit on the Special Bench. It is already desirable that, the

Members who have taken the view either in favour or against may be avoided to decide the Special Bench matters.

7. Computerisation

Computerisation may be used for preparation of the Board and all records of Tribunal may be stored on Compact Disc which may help to overcome space constraint.

8. Covered Matters

Every month, matters filed before the Tribunal may be segregated as covered matters and other matters. Covered matters may be posted for hearing on an out-of –turn basis.

9. Grouping of matters

Where common issues are involved, matters may be grouped and disposed of, which may help assesses as well as the Department

10. Fixing of Appeals & Stay Petitions

The Board may be given 15 days in advance to the Bar and stay petitions may be kept for hearing on all the days instead of only on Friday as is the practice at present.

11. Fixing of Constitution

The Hon'ble Supreme Court in the matter relating to transfer of Members, accepted the suggestion of the Bar to have a Collegium of President, Sr. Vice President & Vice Presidents. It may be desirable that, where multiple Benches are functioning such as at Mumbai, Delhi, Calcutta, Ahmedabad. It may be desirable to have a Collegium of Vice President & Sr. Members to finalise the Constitution, which will bring more transperancy in the administration of Justice. It is also for consideration that, when there are 10 Judicial Members & 10 Accountant Members, a Member may be selected to the Bench by way of Lottery system, which will help immensely to build the image of the Tribunal.

12. Discharging the Board

In the High Court if a matter which is being heard is likely to take considerable time, practice is to discharge the rest of the Board. It is suggested that a similar practice be adopted in the Tribunal.

13. Copies of the Tribunal order

Copies of orders of the Tribunal which are being sent to the assesses are the last copies typed on both sides of thin sheets of paper and hence are not legible. It is also not possible to obtain legible Xerox copies. It is therefore suggested that legible copies typed on one side only may be sent to assesses.

14. Adjournment application

If an adjournment application is made well in advance and the Tribunal Member agrees with the reasonableness of the cause, the adjournment should be conveyed to the representative after informing the D. R., so that the time of the Court in granting adjournments on the day of hearing and also the time of the Counsel can be saved. In the good old days, this procedure was followed.

Adjournment applications should be taken up on the top of the Board and not as per the Cause-list. This saves the precious time of all concerned and enables the Bench to hear other matters peacefully. In some benches this practice is being followed.

15. Consolidation of appeals

The consolidation of appeals filed by the same assessee before different Benches takes a lot of time. A simple procedure can be adopted to avoid adjournments due to non-consolidation of the appeal in time.

16. Filing of paper book by the Department

The requirement to file paper book 7-10 days before the hearing should be applied to Departmental appeals also by requiring the D. R. to file the paper book in advance, a practice which is normally not followed.

17. Legal Assistance to Members

The Tribunal should have competent staff entrusted with the work of preparing brief for the Members in complicated cases. This brief can be prepared as soon as paper book is received from the parties and should state the facts in brief and the latest case law involving the legal issues. The Members hearing the case can study this brief before the hearing starts and this will enable them to apply their mind to the issues involved in a better manner. This brief will ensure that the Members do not miss out any issue while giving their judgement. It may take some time to implement this suggestion. Even Law students can be considered as trainees for helping Members of ITAT.

18. Submissions in writing

A practice of accepting brief submissions in writing from the parties can be started in complicated cases. These submissions can be filed with the Paper Book or at or before the hearing. In these submissions the facts can be stated, in brief, and case law relied upon can be pointed out in brief. This will assist the Members in quicker disposal of the case. However, oral hearing should be permitted even when written submissions have been filed.

19. Hearing of appeals within two years.

We have to find ways and means by which hearing of appeals is expedited so that cases can be decided within a period of two years from the date of filing.

20. Service of Orders

The orders should be dispatched for service within 3 days of being signed. Service should be affected by registered post at the address given in the memo of appeal.

21. Office

Office decorum should be maintained. The assessee or his Authorised Representatives should not be permitted to have access to the staff and other officers except the Registrar / Asst. Registrar etc. Though there are instructions to that effect; they are not administered strictly.

22. Code of Ethics for Members

Though Members are governed by the Service Rules of the Central Government, in order to improve the image and to add value to the life of the Hon'ble Members, the Code of Ethics suggested by the Federation be adopted and adhered to. The said rules are on the lines of Rules adopted by the Hon'ble Judges of the Supreme Court and the High Courts. A Member should not discuss any matter with the DR or AR in the chamber. If any clarification is needed it should be listed on the cause list – "To be mentioned" as in the High Court.

23. Relation between Bar and the Bench

Members of the Bar are Senior Officers / Officers of the Court and deserve respect and regard relations should be cordial. The Members should have a sense of humour in the Court Room. Be Cheerful. Value the time of others. Be Humble. Be Courteous and sweet tongued. Be fair to self and to humanity. Do the Divine act of dispensation of Justice with fairness, goodness, without malice, personal prejudices and personal interest. Image should be clean, character superb and movement cautious. Justice should not only be done but look to have been done should give patience hearing should try to follow and not to interrupt, such relevant clarification? Did the speaking will regard and balanced orders.

B. LEGAL ISSUES

1. Matter referred to Third Member - when a matter is referred to the Third Member, no information is sent to the assessee. The Income-tax Appellate Tribunal Rules may be amended so that as soon as a matter is referred to the Third Member intimation along with the orders may be sent to the assessee. Further, the matter referred to Third Member may be disposed of within six months of the reference to the Third Member.

2. Single Member Cases

   (a) Matters where the income assessed is Rs.5lacs and less are referred to a Single Member. Sometimes even cases where the loss assessed is more than Rs.5 lacs are referred to a Single Member Bench. The Law may be amended so that when the loss assessed is also more than Rs.5 lacs, the matter may be referred to a Division Bench.

   (b) Assessed income may be say above Rs.5 lacs however, penalty may be levied of only Rs.10,000/-. The matter cannot be decided by a Single Member. It is suggested that penalty involved of upto Rs.2 lacs may be decided by a Single Member, irrespective of the assessed income or loss. Similarly assessed income or loss. Correspondigly if assessed income is less than Rs.5 lacs, but penalty levied is more than 2 lacs, the matter may be referred to a Division Bench.

3. Appeal fees

   (c) Levy of appeal fees on the basis of assessed income is very harsh. Hence appeal fees is required to be reduced with maximum slab of Rs.2,500/-.

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CHAPTER

22

REFERENCE FOR ITAT

A. Suggestions made by Registar for guidance of Assessee and their representative (1951) 20 ITR St. 49

B. Conference of ITAT (1981) ITR St. 1

C. Synopsis of All India Conference of Members held in the year 1985 – speeches, statistics, etc. 12 ITD 22 to 43 St.

D. **Synopsis of Seminar of Members of Income Tax Appellate Tribunal**

At Vigyan Bhavan from 17 to 20 February 1992 Referencer Course for Members (32 ITD 4 – 31)

1. Welcome address by Shri Ch. G. Krishnamurthy, President, ITAT 32 ITD 4 St.
2. Inaugural address by Chief Justice of India. Shri Sabyasachi Mukharji 32 ITD 12 St.
3. Vote of thanks by Shri K.S. Vishwanathan Vice-President. 32 ITD 17 St.
4. Welcome address of the President to the Hon‘ble Law Minister 32 ITD 19 St.
5. Speech of Hon‘ble Mr. Dinesh Goswami, Minister of Law and Justice 32 ITD 22 St.
6. Valedictory Address of Hon‘ble Justice of S. Ranganathan 32 ITD 25 St.
7. Address by Dr. P.C. Rao Hon‘ble Law Secretary 32 ITD 30 St
8. Vote of thanks by Dr. George Cheriyan,the Sr. Vice-President 32 ITD 31 St
9. Rule of precedence, Shri N. A. Palkhivala 34 ITD 1 (St)
10. Principle of natural justice with reference to recent decisions of Supreme Court of India Shri K. K. Venugopal 34 ITD 25 (St)
11. Conventions in the Tribunal Dr. S. Narayanan 34 ITD 45 (St)
12. Judicial and Administrative Appellate forum in Western countries Shri O.P. Vaish 34 ITD 62 (St)
13. Admission of additional grounds Mr. K. Srinivasan 34 ITD 78 (St)
14. Interpretations of statutes Dr. Debi Paul 34 ITD 99 (St)
15. Principle of Natural Justice Shri Ashok H. Desai 34 ITD 118 (St)
16. Principle of Natural Justice Hon‘ble Justice S. Ranganath Mishra 34 ITD 132 (St)
17. Interpretation of fiscal Statutes Shri P.M. Bakshi 34 ITD 141 (St)
18. Principles of Natural Justice Mr. Soli Sorabjee 34 ITD 161 (St)

90.	Minutes of Meeting with Hon’ble Shri J. P. Bengra, Vice President, ITAT, Mumbai on 7-9-2000	AIFTP Journal July-Sept’ 2000	34 – 36
91.	Representation dated 11-8-2000 by the Chairman of AIFTP’s ITAT Bar Association’s Co-ordination Committee	AIFTP Journal July-Sept’ 2000	37 – 39
92.	Minutes of Meeting with President of ITAT	AIFTP Journal July-Sept’ 2001	40 – 44
93.	Minutes of Meeting with Hon’ble Shri M. A. Bakhsi, Vice President, Ahmedabad	AIFTP Journal Feb’ 2002	25 - 26
94.	Minutes of Meeting with Shri T. N. C. Rangarajan on 29/10/1993	Tribunal in next millennium	61 – 62
95.	Minutes of the meeting with Shri V. Dongzathang, Vice President, ITAT, Mumbai on 28/5/1995	Tribunal in next millennium	63 – 66
96.	Minutes of the Meeting with Shri Vimal Gandhi, Vice President, ITAT, Mumbai on 24/10/1997	Tribunal in next millennium	67 – 70
97.	Minutes if the Meeting with Shri S. L. Banerjee, Vice President, (Ahmedabad Zone) on 15/1/1998	Tribunal in next millennium	71 – 74
	Stamp Duty – Vakalatnama – letter dt. 17-10-1993 from General Stamp Office	I.T. Review Feb. & March, 1995 Vol. 20 Part 9	106
	L.M. Mohurkar & Another vs. Sales Tax Officer	I.T. Review Feb. & March, 1995 Vol. 20 Part 9	107 to 117
	Form of fact sheet	I.R. Review (March of Law) Jan. 1994 Vol. 19 No. 7	49-50

CHAPTER

23

TAX ARTICLES – ITAT

Bombay Chartered Accountants' Journal (BCAJ); Current Tax Report (CTR); Economic Times (E. T.)
Financial Express (F. E.); Income Tax Report (ITR); Income Tax Review (IT Review); Taxman
The Tax Reference (TR)

	Topic	***Author***	***Year***	***Magazine***	***Volume***	***Page***
1.	Tribunal peeps thrice through the gallery to determine length of stenter	Tulsi R. Rustogi	16-04-01	FE	——	6
2.	Annulment of Assessment Proceedings by Tribunal for violation of Rules of Natural justice – Propriety	P. Shreedharan	( )	TR	61	54
3.	Role and relevance of ITAT in dispensation of justice	N. M. Ranka	2001	CTR	169	112
4.	Mistake apparent from the record-Rectification by the appellate Tribunal u/s. 254 of the Income-tax Act, 1961	Jal E. Dastur	( )	BCAJ	33/5	505
5.	Fee for Filing appeal before ITAT – A case for rationalisation of the same	Sanjeev Jain	2001	Taxman	118	127
6.	Powers of Tribunal to rectify or amend its order	G. Lakshminarasimhan	2001	CTR	170	164
7.	Income Tax Appellate Tribunal – Past present and future	Arun Roy V. Saurabhjaywant	2001	Taxman	119	180
8.	Appeals before ITAT – Filing, preparation and presentation	Sandeep Kumar	2002	CTR	172	196
9.	Sec. 151 of the CPC and the ITAT	B. V. Venkataramaiah	2002	CTR	172	192
10.	Tribunal's power to recall its orders	R. Santhanam	2002	CTR	172	137
11.	Tribunal has extensive powers in dealing with appeals	Homi Ranina	2002	CTR	172	12
12.	Who is authorised to file application under s. 254(2)	Dr. Ramesh L. Butani	2002	CTR	175	173
13.	The power to call for	T. C. A. Ramanujam	2002	CTR	175	198
14.	Tribunal confuses review with rectification of error	Tulsi Rustogi	24-02-03	FE	——	12

15. Powers of the Tribunal and need for Harish Kumar Sud
2003 Taxman 127 33
widening scope of power of rectification
16. Stay of demand by Income-tax Appellate T. N. Pandey
2003 Taxman 127 104
Tribunal in cases where appeals have
been filed before it powers and obligation
17. Tribunal's failure to adjudicate pending Minu Agarwal
2003 CTR 180 6
case first – Whether makes out a case
for review
18. Dismissal of appeal for non-appearance Dev Kumar
Kothari 2003 CTR 129 84
of respondent – Drafting error in
amendment to rule 25 of appellate
Tribunal rules
19. Additional ground of appeal – whether can Minu
Agarwal 2003 CTR 182 37
be raised without any time limit
20. Income Tax Appellate Tribunal K. Gopal ( )
I. T. Review XXIX/2 31
21. Binding Nature of Tribunal orders Arati Vissanji
( ) I. T. Review XXIX/2 76
22. Power of tribunal to stay of demand Nishant Bhandari
TR 72 B- 266
– A judicial analysis
23. Additional ground of appeal – whether can Minu
Agarwal 2003 CTR 183 37
be raised without any time limit
24. ITAT – Recall, Restoration, Rectification, S. N. L.
Agarwala 2003 CTR 183 61
Review
25. Stay of demand by income-tax decision Piyush Kaushik
2003 Taxman 131 172
of Delhi Tribunal
26. Tribunals power to grant further stay Nisha Bhandari
( ) TR 74 B- 46
after expiry of 180 days – A recent decision
27. Appeal before Tribunal – Procedural Aspects K.
Ramalingam ( ) TR 74 B- 163
28. Controversies vis-à-vis institutional fee for T. Rama
( ) TR 75 B- 494
appeals before income tax appellate Tribunal Gopalachary &
– Analytical study U. L. N. Sudhakar
29. Appellate Tribunal SNL Agarwal 2004Taxman
135 44
30. Refund to tax-payer by Tribunal while R. Santhanam
2004 CTR 186 45
granting stay of demand
31. Special bench of the Tribunal: confusion R. L. Sangani
2004 CTR 186 141
about its constitution and jurisdiction

32. Powers of president of Tribunal for R. Santhanam
2004 CTR 187 141
transfer and postings

33. Tribunal is the final authority on fact Tulsi Rustogi
23-09-02 FE ——

34. Judicial precedents Kirit Sanghavi 2001 BCAJ
913

35. Fees for appeal to the tribunal should be T. N. Pandey
2004 CTR 189 79
based income as determine after First Appeal.

CHAPTER
24

1. SHRI N.A. PALKHIVALA, SENIOR ADVOCATE, BOMBAY

'...The ability and expertise of the Income-tax Appellate Tribunal have enabled it to pronounce numerous decisions which have really given a new direction to taxation laws and opened up new vistas of thought. The law relating to Income-tax and other direct taxes has grown and developed as a result of the vision and insight of the Tribunal. This is the highest tribute, which can be paid to any judicial body, and this is a tribute which the Tribunal richly deserves.

The Tribunal functions as a judicial body under the Ministry of law and is entirely beyond the control of the Income-tax Department. Happily, it is fully insulated from the pressures and influences of both bureaucrats and politicians. The Tribunal has shown great independence and courage in deciding cases according to law and in consonance with justice, regardless of the stakes involved. In short, it has fulfilled the purpose for which it was brought into existence and fully justified the high expectations with which it was concerned.

Administrative justice demands compromise. There is no pre-determined solution to the problem of tempering power with justice. The Tribunal has rightly earned the reputation of tempering judicial power with justice. It has evolved an economical, quick and informal procedure for doing justice as between the State and the citizen to great public satisfaction. In other words, it has acted as a Court of law in everything but name, while avoiding the regular process of civil law which is too cumbersome, technical and expensive".

2. SHRI Y.V.ANJANEYULU, SENIOR ADVOCATE, HYDERABAD (LATER BECAME JUDGE OF ANDHRA PRADESH HIGH COURT AND ALSO MEMBER OF LAW COMMISSION OF INDIA)

"....Tax laws of this country constitute a bizarre piece of legislation which, even to a trained mind, cause considerable difficulties in unraveling the intricacies. Expertise merely in this complicated branch of tax law is not adequate unless and overall proficiency in other branches of law is possessed. Hindu law, Transfer of Property Act, Partnership Act, Contract Act, Mohammadan law and a hot of other mercantile laws are closely and intimately connected with the administration of the tax laws in this country. Indeed, if one may say so, the Hindu law and Partnership law have considerably developed on account of the tax laws. It is gratifying to note that the Members of the Income-tax Appellate tribunal demonstrate a high degree of proficiency in all these allied branches of laws which contributes to a high measure of success and competency in considering matters of dispute by the Tribunal. It must be acknowledge that a high sense of objectivity prevails in the Tribunal and a feeling of confidence is created in the tax payers that their appeals are disposed of by the Tribunal without any fear or favour. It is this confidence that is generated in the tax-paying public that has largely contributed to the success and leadership of the Income-tax Appellate Tribunal among the Administrative Tribunals in this country. The Tribunal as a whole and the President, Vice-President and Members of the Tribunal in particular can look back to a creditable record of 40 years and legitimately be proud of having earned recognition of a high order to service to the country acknowledge by the State, which is the principal litigant, the taxpayers and the superior courts..."

3. SHRI N.K.P.SALVE, M.P.AND CHARTERED ACCOUNTANT, NEW DELHI.

(FORMER CABINET MINISTER IN UNION OF INDIA)

"If no tribute can be higher than this to a tax Tribunal, it is not a matter of good fortune, but the result of an un-wavering independence, fearlessness, impartiality coupled with erudition and scholarship of its expert members, preserved, and zealously nursed, in trying conditions over years. Above all, a high standard of integrity coupled with technical expertise are qualities which are a sine qua non for ideal judges.

In a tribute a famous Judge, one of the most eminent Jurists of our times has said:

"God give us men. A time like this demands strong minds, great hearts, true faith, ready hands.

Men whom the best of office does not kill

Men who possess opinion and a will

Men who have known, men who will not be

Men who can stand before a demagogue and damn his treachery without winking.

Tall men sun-crowned who live above the fog, in public duty and private thinking!"

Most members of the Tribunal, I may say without fear of contradiction, are an answer to this prayer".

1965 – ON SILVER JUBILEE

4. DR. SARVEPALLI RADHAKRISHNAN, FORMER PRESIDENT OF INDIA

"Born as the Tribunal was, out of the strong and natural desire of the people to be able to appeal to an independent body on important questions of fact, it provides a popular and informal forum for giving substantial justice, not bound by the rules of evidence, to persons aggrieved by decisions, of the Appellate Assistant Commissioners. The Tribunal, in the 25 years of its existence, has earned unstinted praise for the independence of its decisions; and in its fervent desire to do justice it has won the well merited confidence of the public."

5. SHRI NANI A. PALKHIVALA, THE EMINENT JURIST AND TAX PRACTITIONER

(ARTICLE)

"An informal atmosphere prevails in the Tribunal and cases are allowed to be argued, not only by lawyers but by accountants, Income-tax practitioners, relatives, officers of companies and other representatives. Secondly, the Tribunal, unlike a Civil Court, is not bound by the rules of evidence. It is permitted, in fact expected, to do substantial justice, bearing in mind (if one may adapt the historic dictum of justice Holmes) that there is a limit to the nicety of inquiry which is possible in a tax appeal. Relevant and even material facts, which the Tribunal really takes into account, would be exiled from the records in the Civil Court on the ground that they do not pass the tests of the Evidence Act. The Tribunal's work often involves investigation of facts embedded in accounts kept in a variety of languages and in documents which are not formally proved. In a sizeable number of cases the Tribunal is constrained to make merely rough guesses at truth. The decisions rendered by the Tribunal have, by and large been distinguished by sturdy independence and a desire to do justice.'

6. **SHRI M. P. CHITALE, FORMER PRESIDENT, THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA**

"As an appellate authority the Tribunal is unique for it provides not only the expertise in technical matters and tax laws and introduces informality in procedure, but it combines these qualities with the quality of judicial independence."

7. **SHRI SANAT P MEHTA ADVOCATE, BOMBAY**

"The Tribunal can well be proud of its performance in the past. The expeditious and relatively cheap justice it administers can stand out well in contrast to the delay and cost of justice in regular courts of law. Any scheme of tax administration must mean the continuation of the Tribunal, though with a more realistic approach to the various problems facing the Tribunal at present to enable it to make its past look dimmer by its future performance. If any change has to be made, none could be better than elevation of the position of the Tribunal."

8. **SHRI G. P. KAPADIA, FORMER PRESIDENT OF THE INSTITUTE OF CHARTERED ACCOUNTANT OF INDIA**

"Is may however, he stated that members recruited from the Department from the Department have exhibited considerable talent and have earned the respect and consideration of the taxpayer and the general public."

9. **SHRI C. R. PATTABHI RAMAN, MINISTER IN THE MINISTRY OF LAW**

'I make bold to say that the machinery has fulfilled its purpose. On the whole the public has expressed confidence in the dispensation of justice in the Appellate Tribunals in a comparatively cheap and expeditious manner and is satisfied with its working Several improvements have been made in recent years in the method of recruitment of the members of the Appellate Tribunal and with regard to the salaries payable and other conditions of service applicable to them so that better talent could be drawn from the legal and accountancy professions. The Tribunal can claim to have achieved considerable success in the task of holding balance even between the revenue authority and the tax payer. The consensus of opinion among tax payers, lawyers, accountants and the litigant public has been favourable to the Tribunal. It may be interest to know that the number of appeals and applications instituted in the Tribunal is in the region of 22000 per year. About 90 percent of the appeals disposed of by the Tribunal do not go on a reference to the High Court. The Tribunal's judgments on points of law are upheld in over two-thirds of the references by the Supreme Court, the Tribunals decisions were upheld in 72 cases. I am aware that the Tribunal` work often involves investigation of facts embedded in accounts kept in a variety of languages and in documents which may not have been formally proved."

10. **SHRI C. K. DAPHTARY, FORMER ATTORNEY GENERAL OF INDIA**

"... Though it is said that statistics support only the statistician yet sometimes they serve to underline a point and it will not be out of place to mention some figures. Various Benches have for five years from 1958 to 1963 disposed of over 66000 appeals and in only about 1175 of them, that is 4% have there been references to the High Courts. The Tribunal's orders have been reserved in only a small percentage and even where there have been further appeals to the Supreme Court, great majority of the decisions have been upheld. These are figures which speak for themselves. The reasons are apparent. The Benches have been manned by men of ability whether they are judicial of Accountant members. They can do approach the problems that come before them in a manner not constrained by technicalities. That is necessary, seeing that the material before them is mainly in books of account and commercial documents, which can be scrutinized only be an approach based on a practical knowledge of how trade and industry work and of what is fair, rather than a legalistic attitude of mind. The Accountants, Income-tax practitioners, businessmen and indeed any one who can elucidate facts of a matter can appeal. The expenses is comparatively little and the Tribunal is readily accessible because of its mobility."

11. SHRI G. S. PATHAK, FORMER UNION LAW MINISTER

"...The Standard which this Tribunal has set is a standard which should be followed by other Tribunals of this nature. This being one of the oldest Tribunals has properly set its standard, standard of integrity standard of judicial independence, standard of aloofness and standard of a detached mind which is the characteristic of every judicial mind. This Tribunal has deserved, and rightly deserved, the tributes paid to it."

1ST NOVEMBER 1976

12. SHRI H.R.GOKHALE, UNION LAW MINISTER

(Loksabha debates (18th Session) on the Constitution (42nd Amendment) Bill)

"I have got an example of the Income-tax Appellate Tribunal. We have judicial members, we have the accountant members. The Tribunal is functioning extremely well and even those people who have gone before the Income-tax Appellate Tribunal have told me and have spoken on the public platform that the Income-tax Appellate Tribunal as it is constituted today, is the best example to show how the tribunals if properly constituted, can create confidence. I can say that the income-tax Appellate Tribunal's decisions are rarely interfered with by the High Courts and the Supreme Court because the quality of their work has been found to be sufficiently good as to inspire confidence."

(MEMBERS CONFERENCE – 29-10-1977)

13. FORMER JUDGE, SUPREME COURT OF INDIA (SHRI P.N.BHAGWATI)

"...This Tribunal has been in existence for over 35 years and during this period it has acquired high prestige and reputation not only amongst the lawyers practicing before it but also amongst the assesses as well as the department. It has been able to inspire confidence in the public mind in regard to its caliber, integrity and independence. It has been doing justice boldly and fearlessly and many decisions given by it has involved large monetary stakes and yet it has not hesitated to decide in favour of the assesses. The greatest tribute was paid to it some years also when the assesses and the leading income-tax practitioners strongly opposed a suggestion put forward by a retired Chief justice of India that appeals on questions of law should be directly to the High Court from the decisions of the Appellate Assistant Commissioner without the intervention of the Income-tax Appellate Tribunal. The reason why the Income-tax Appellate Tribunal has been able to acquire such large credibility with the people is that the appointments of the Members of the Tribunal are made by a high powered selection authority presided over by a sitting Judge of the Supreme court nominated by the Chief Justice of India in view of this mode of selection, there is no scope for nepotism, corruption or political patronage and selections are made purely on the basis of merit and competence. There are quite a few tribunals in the States which have failed because the mode of appointment on those Tribunals is not insulated from political or other interference. If only an independent mode of appointment were adopted which would eliminate all forms of pulls and pressures and which would ensure selections purely on the basis of merit, we would be able to set up a really effective hierarchy of administrative tribunals. It is a matter of great satisfaction to find that the Government of India has now decided to set up

Administrative. Tribunals to deal with cases arising in various branches of law but these Administrative Tribunals will not succeed in inspiring confidence in the public mind unless a satisfactory mode of appointment is devised and, in my opinion the mode adopted in making appointments on the Income-tax Appellate Tribunal can and must be followed if we want to make our Administrative Tribunals successful.

14. FORMER JUDGE SUPREME COURT OF INDIA (SHRI R. S. PATHAK)

"...The Income-tax Appellate Tribunal is an outstanding example in this country of what an Appellate Tribunal should be. It has developed traditions over the years which have uniformly inspired public confidence, not only by the high quality of adjudication but also by the expeditious manner in disposing of its work."

15. FORMER CHIEF JUSTICE OF INDIA (SHRI M.H. BEG)

INAUGURAL ADDRESS

"I also recall how very impressed I was, from the very beginning of my appearances before it, by the dignity and decorum and orderliness and the unfailing courtesy of its Members at the proceedings of the Tribunal which were not inferior to those in a High Court.

I suppose that for a reason similar to the one I have mentioned above, you have a Judicial Member and an Accountant Member on each Bench Where each supplies the want of the other. The result is that, in my experience, the judgments of the Income-tax Appellate Tribunals are not only generally marked by sound legal reasoning but also exhibit considerable commonsense and realism. Indeed, I confess that have been so much impressed by some of the judgments of the Income-tax Appellate Tribunal that I wonder whether so much legal learning, which we sometimes see in the judgments of superior courts, is really needed for many decisions. Indeed, sometimes it can mislead and obstruct clear thinking."

1981

16. FORMER PRIME MINISTER (SMT INDIRA GANDHI)

" The Income Tax Appellate Tribunal with its branches spread all over the country has an important role. It has to preserve the interests of revenues to the State, to prevent harassment to the tax-payers and to render better service and quicker justice to the citizen and the State alike."

17. FORMER CHIEF JUSTICE OF INDIA (SHRI Y.V.CHANDRACHUD)

(DATED JULY 15,1981)

"..The Income-tax Appellate Tribunal is a model administrative tribunal whose illustrious example and commendable performance may well be emulated by similar other tribunals in different disciplines. There is uniform praise of the manner in which the Tribunal functions and I suppose it is one of the few quasi-legal institutions which is not plagued by the problem of arrears..."

18. FORMER PRIME MINISTER OF INDIA (SHRI RAJIV GANDHI)

DATED – MARCH 4, 1985

"...Income-tax is a major source of revenue. It is also a direct token of the citizen's contribution to the development of the country. Over the years, tax laws have grown in complexity and with it has grown the need for fair and dispassionate interpretation of the laws. The Income-tax Appellate Tribunal has made a useful contribution in this field."

CHAPTER

25

CODE OF ETHICS - FOR MEMBERS AND PROFESSIONALS ADOPTED BY THE FEDERATION

PREAMBLE

A member shall, at all times, comport himself in a manner befitting his status as a privileged member of his profession and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an member. He shall at all times in his dealings with the Court, tax officers, Departmental Representatives and clients act honourably and never in a manner which shows lack of honesty or probity. Without prejudice to the generality of the foregoing obligation, a member shall fearlessly uphold the interests of his client and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter contain canons of conduct and etiquette adopted as general guides, yet the specific mention thereof shall not be construed, as a denial of the existence of others equally imperative though not specifically mentioned.

Section I – Duty to the Court

1. A member shall always conduct himself honourably and while pleading a case before a Court act with dignity and self-respect. He shall not be servile and whenever there is proper ground for serious complaint against a judicial officer, it shall be his duty and right to submit his grievance to proper authorities.
2. A member shall maintain toward the Court a respectfully attitude, bearing in mind that the dignity of the judicial office is essential for the survival of a free community and the rendering of justice fearlessly.
3. A member shall not influence the decision of a Court by any illegal or improper means. Private communications with the Court relating to heard/pending matters are forbidden.
4. A member shall use his best efforts to restrain and prevent his client from resorting to unfair practice or from doing anything in relation to the Court opposing counsel or the Revenue which the member himself ought not to do. A member shall refuse to represent the client who indulges in such improper conduct.
5. A member shall appear in Court only in the prescribed dress and his appearance shall always be presentable. The member shall ensure compliance with this requirement with the authorised person representing him when seeking adjournment.
6. A member shall not enter appearance, act, plead or practice in any way before a Court if any member thereof or the presiding authority is related to him as spouse, brother or sister or as lineal ascendent or descendent of such member or of the three specified relatives.

Section II – Duty to the client

7. A member is bound to accept any brief in the Courts or Tribunals or before any other authority in or before which he professes to practice at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular case.

8. A member shall not ordinarily withdraw from engagements once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client. Upon his withdrawal from a case he shall, in the event fees have been accepted in advance, refund such part of the fees, if any, collected in advance, as has not been earned.

9. A member should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an member if he can withdraw from the case without jeopardising his client's interest.

10. It shall be the duty of a member fearlessly to uphold the interest of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other regardless of his personal opinion, bearing in mind that his loyalty is to the law which requires that no man should be made liable to pay tax levied on him without the authority of law.

11. A member shall not at any time be a party to fomenting of litigation.

12. A member shall not stipulate for a free contingent on the result of litigation or agree to share the proceeds thereof.

13. A member shall not do any thing whereby he abuses or takes advantage of the confidence reposed in him by his client.

14. A member who has at any time advised in connection with a matter or transaction or appeared in a matter shall not advise or appear for any other person who has an interest adverse to that of the person he has advised or acted for.

15. A member shall not directly or indirectly, commit a breach of the obligations imposed on him under Section 126 of the Indian Evidence Act.

16. A member should keep accounts of the client's money entrusted to him, and the accounts should show the amounts received from the clients or on his behalf, the expenses incurred for him and the debits made on accounts of fees with respective dates and all other necessary particulars and after the conclusion of the proceedings should promptly refund to the client the balance, if any, due to him.

Section III – Duty to opponent

17. A member shall be fair towards the Departmental Representatives.

18. A member shall not knowingly enter appearance in any case in which there is already a vakalatnama or memo of appearance filed by a member engaged for a party except with his consent.

19. A member whose consent is so sought shall not unreasonably withhold the same, where the client desires a change of the representative. He should also hand over to the client, the client's papers in his possession.

Section IV – General

20. A member shall not solicit work or advertise either directly of indirectly.

21. A member shall not offer private hospitality or favours of any kind to the Court except where they are his family members, close relatives and personal close friends of long standing. In such a case the member shall not appear before the Court. Inviting such persons to functions where a large number of guests are present is not prohibited. A gift may be made on the occasion of weddings or other similar functions to which a member is invited. The value of the gift should, however, be reasonable.

Note : For the purpose of these rules : 'Court' shall mean a Court, Tribunal or any other judicial authority. 'His' will include her.

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CHAPTER

26

CODE OF ETHICS - RECOMMENDED BY THE FEDERATION FOR MEMBERS OF ITAT

Based on the Code of Ethics applicable to the Judges of the Supreme Court and the High Courts, the following points be recommended to the President of the ITAT for adoption by Members of the ITAT.

(i) A member should not hold any office of a club, society or other association except in a professional organisation.

(ii) Close association of a member with individual members of the Bar, particularly those who practise in the Tribunal, must be eschewed.

(iii) A member should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or other close relative, if he or she is a member of the Bar, to appear before him or her or ever be associated in any manner with a case to be dealt by him.

(iv) A member should conduct himself/herself in a manner consistent with the dignity of his/her office.

(v) A member should not hear and decide a matter in which a member of his/her family, a close relative or a friend is concerned.

(vi) A member should not enter into public debate or express his/her views in public on political matter or on matters that have arisen are pending or are likely to arise for judicial determination.

(vii) A member will not accept hospitality of any kind including a private party or gifts on festive occasions except from his/her family, close relatives and friends.

(viii) A member should avoid attending private parties hosted by professionals who appear before him. He can attend functions organised by professional bodies.

(ix) A member should not engage directly or indirectly in trade or business, either by himself or in association with any other business. (Publication of a legal treatise or any activity in the nature of a hobby will not be construed as trade or business).

(x) A member should not ask for, accept contributions or otherwise actively associate himself/herself with the raising of any fund.

(xi) A member should not discuss matters relating to a case with a person concerned with or interested in a matter in the absence of the other side.

Suggested Judicial Procedure and Norms

(i) As far as possible a member should deliver his judgment in a case heard by him within 2 months of the last date of hearing.

(ii) If a member feels that he is inclined to take a different view from that indicated by him/the Bench in Court, he should refix the matter for hearing.

Note: 1. Central Civil Services (Conduct) Rules are applicable to Members of the Income Tax Appellate Tribunal.

2. It is based on Code of Ethics adopted for the Judges of the Supreme Court and High Courts.

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CHAPTER

27

CODE OF ETHICS - ADOPTED BY JUDGES OF SUPREME COURT AND HIGH COURTS

Chief Justices of all the High Courts have adopted a resolution that the judiciary will be bound by its own code of ethics to be known as the "restatement of values of judicial life". The 15-point Code stipulates that any act of a judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the judiciary's credibility has to be avoided. The following are the main points of the Code.

- A judge should not contest election to any office of a club, society or other association.
- He should not hold such elective office except in a society or association connected with the law.
- Close association of a judge with individual members of the bar, particularly those who practise in the same court, must be eschewed.
- A judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or any other close relative, if he or she is a member of the bar, to appear before him or even be associated in any manner with a case to be dealt by him.
- A member of a judges' family, if he or she is a member of the bar, should not be permitted to use the residence in which the judge actually resides, as an office.
- A judge should conduct himself with a degree of aloofness consistent with the dignity of his office.
- A judge should not hear and decide a matter in which a member of his family, a close relative or a friend is concerned.
- A judge should not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.
- A judge is expected to let his judgments speak for themselves. He will not give interviews to the media.
- A judge will not accept gifts or hospitality except from his family, close relatives and friends.
- A judge will not hear and decide a matter in which a company in which he holds shares is concerned, unless he has disclosed his interest and no objection to his hearing the matter is raised.
- A judge must not speculate in shares, stocks or the like.

- A judge should not engage directly or indirectly in trade or business, either by himself or in association with any other business (Publication of a legal treatise or any activity in the nature of a hobby will not be construed as trade or business).
- A judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund.
- Every judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of his office.
- The Code of Ethics was released by Chief Justice A.S. Anand at the Chief Justices' annual conference. It was also resolved that it would be mandatory for every judge to declare his assets, including those of his spouse and dependents.

[Courtesy : Lawyers Collective, printed for the benefit of professionals]

[Source – Lawyers Collective, February, 2000 page 24]

CHAPTER

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A TRIBUTE TO SHRI N. A. PALKHIVALA – A REFERENCER

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2. Nani is no more by Arvind Dalal – 2002 BCA Journal, December, 2002
3. N.A. Palkhivala – Bhavan Journal Special Issue – January, 2003
4. A full Court Reference on 17-12-2002 at Mumbai – AIFTP Journal, Janjuary, 2003 Page 5
5. Gist of speech of Hon'ble then Prime Minister Mr. Atal Bihari Vajpayee – AIFTP Journal, January, 2004 Page 4 (Releasing of stamp in memory of Shri N. A. Palkhivala)
6. Quest for Justice, First Nani A. Palkhivala Memorial Lecture by Fali S. Nariman, Sr. Advocate, – AIFTP Journal, February, 2004, Page 9
7. Portrait of Late Shri Nani A. Palkhivala was unveiled on 11-1-2004 by the Hon'ble Justice Shri V. M. Khare, Chief Justice of India at ITAT Bar Association's Library – AIFTP Journal, January, 2004 Page 2.

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