— Dr. Justice Vineet Kothari *

Current Issues Concerning Expert Evidence in International Tax Cases in India

Preamble

Tax litigation in the Indian judicial system occupies an important and large portion of judicial time. It is divided between adjudicating and appellate authorities as fact finding bodies created under the Income Tax Act, 1961 and the Constitutional Courts are in place for deciding substantial questions of law in twenty four High Courts and the Supreme Court in India. These have laid down a number of judicial precedents for resolving various tax disputes in the country.

However, despite this there has been a recent phenomenon of International Tax Disputes, on which Income Tax Tribunals have rendered many decisions but the Constitutional Courts of India are yet to produce landmark judgments. This is barring a few which are referred to below herein.

Indian Evidence Act

The Indian Evidence Act, 1872 enacted by the British Government, when India was a British colony, is a comprehensive law dealing with production of evidence in the courts of law in India and the principles enacted therein are adopted by the Income Tax authorities also because such authorities are vested with the powers of Civil Court to the limited extent of summoning of witnesses and examining the same while deciding the tax disputes.

Section 45 of the Indian Evidence Act, 1872 deals with the production of expert evidence and talks of admissibility of expert evidence as a relevant fact. It says that when the court has to form the opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or law, or in questions as to identity of handwriting or finger

* Judge, Rajasthan High Court.

impressions are relevant facts and such persons are called Experts.

The emphasis on the words ***'persons specially skilled in such subjects'*** about which the opinion of Experts is taken as a relevant fact is subject to the examination of such Experts by the court. An Expert is a person who devotes his time and study to a special branch of learning. He might have also acquired such knowledge by practice, observations or careful study.

Actually, the Judge concerned has to form his independent opinion on the advisory or opinion of the Expert upon being satisfied that such Expert has the requisite information & experience of the particular subject and skill and has the adequate knowledge, so that his opinion can be taken as worthy of reliance in the process of judicial determination of such disputes.

One has to be careful in drawing cautious distinction between the Expert Assitance and Expert Evidence and it should be noted that Expert Assistance is not Expert Evidence.

The Court or the authority has to maintain a balance while evaluating the opinionistic evidence of Expert, as there are chances of such Experts giving a biased opinion in favour of the person, who has produced or called them in evidence and has paid for their labour or report.

Therefore, it is ultimately the judgment of the Judge himself and the Expert opinion is only of assistance to the Judge to arrive at the right conclusion weighing the finer aspects on the technical issues before him, as the Judge being a lay man though judicially trained mind does not have the experience & knowledge on that issue & possibly has no other means, but to depend upon such opinion of Expert.

Applicability of Evidence Act to Tax Proceedings

The Indian Supreme Court in 1988 in ***Chuharmal vs. Commissioner of Income Tax (1988) 172 ITR 250 (SC)*** authoritatively pronounced that the principles of Indian Evidence Act, 1872 while interpreting Section 110 of the Evidence Act, which provides that where a person is found in possession of some property, he will be deemed to be the owner thereof and the onus of proving that he was not the owner was on the person who

affirmed that he was not the owner, the Court held that Section 110 of the Evidence Act, which mandates that statutory principle of common law jurisprudence could be applied while dealing with the controversy arising under the Income Tax Act.

The facts of the case in brief are that in a search of residential house of the assessee, 584 watches of foreign make were found and the assessee denied its ownership and assessee also did not avail the opportunity of cross examination of the authority concerned who seized such foreign goods. The Court upheld the decision of assessing authority that applying the principles of Section 110 of the Evidence Act, the assessee will be deemed to be the owner of such foreign goods, since he failed to discharge the onus of proving, while he affirmed that he was not the owner and the Court held that though the rigor of the rule of evidence contained in the Evidence Act did not apply to the proceedings under the Income Tax Act but that did not mean that the taxing authorities were barred from invoking the principles of the Evidence Act in the proceedings before them.

Apples' Scam case

In ***State of Himachal Pradesh vs. Jai Lal & Ors. (1999) 7 SCC 280***, the Supreme Court of India was dealing with an interesting controversy. In the year 1983 on account of wide spread disease known as ***'Scab' affected the apple orchards*** in the State of Himachal Pradesh and to support the apple growers, the State of Himachal Pradesh framed a ***Scheme to reimburse the growers*** at a particular rate, if the diseased apples were deposited at the notified centres, where they were destroyed. The scam was discovered by the prosecution and it was found that the quantity of apples much more than the possible production of that area was allegedly brought to such centres and destroyed and the State compensation was paid.

The prosecution was launched against the growers and the colluding Govt. officials and the prosecution relied upon the ***Expert Evidence of the District Horticulture Officer, Mr. Panwar*** for ***assessing the fruit bearing capacity of the Orchards*** in question. The Expert, Mr. Panwar claimed to be ***B.Sc. (Agriculture) M.Sc. (Hons.)*** qualified and having worked as ***Research Assistant in***

Agricultural Department. He also stated that he had ***three months training course in the Apple technology*** in the ***University of Tasmania, Australia***. He carried out the inspection in November, 1984 and ***on the basis of sample counts of 'spurs' on the apple trees in Orchards, he estimated the production of apples in the last year 1983***.

Ultimately, the matter reached the Hon'ble Supreme Court and the Supreme Court held, ***not relying on the expert evidence adduced*** by the prosecution, that the ***scientific opinion evidence given by an Expert has to give necessary criteria for testing*** the accuracy of the conclusions, so as to enable the Judge to form his independent opinion and the Report submitted by the Expert does not go in evidence automatically.

The Court held that since the inspection of the trees in the relevant year 1983 itself was not carried out and merely on the basis of estimation of the produce by the so called Expert, who did not make a ***special study of Apple Orchards of Himachal Pradesh itself***, such alleged excess quantity of apples brought to the notified centres and apparently destroyed for claiming State compensation ***could not result in conviction of accused persons on the charges of cheating*** and, thus, the Court upheld the acquittal of accused persons. This judgment shows that even the opinion of so called Expert has to be very tightly and closely scrutinized for basing the conclusions of the Court on such Expert Evidence.

Imposition of Tax in the hands of tax payers on the basis of such Expert opinion, which makes guesstimates or estimation is not far off from the case of criminal prosecution in the aforesaid judgment as determined by the Supreme Court of India.

French High Court case – Stonemason case

Similar was the case on tort law decided by the French High Court in ***Dasreef vs. Hawchar (2011) 277 ACR 611***, where Mr. ***Howchar, a stonemason***, claimed damages from the employer Dasreef as he was ***diagnosed with disease scleroderma & silicosis***, which he claimed to have suffered on account of he being exposed to ***silico dust over a period of six years of working*** as stonemason for Mr. Dasreef.

As Expert evidence produced by him besides one of a Pathologist, Mr. Howchar also produced ***Dr. Basden, a Chemical Engineer***, who was the founding member of Clean Air Society of Australia and he had conducted many field and laboratory investigations into air pollution & work place atmospheric contamination. It was accepted that Dr. Basden was experienced in the measurement of respirable dust concentration but no such measurements were done for Dasreef's work place. Dr. Basden never measured the respirable fraction of dry ground sandstone, which stone was worked by Mr. Howchar, the stonemason.

The trial Judge, however, relying upon ***Dr.Basden's speculative opinion awarded compensation of $ 131130.43 in favour of Mr. Howchar***.

The French High Court led by Chief Justice by a majority of 7:1 (Hayden, J. dissenting) held that such "***speculative opinion***" or "***guesstimates***" as Dr. Basden himself called them, ***ought not to have been admitted in evidence*** and the Court also held that even the trial Judge has allowed Dr. Basden to be cross examined as on a ***voir dire*** **(that is, in order to determine whether his evidence ought to be admitted)** but the Trial Judge did not make any ruling on admissibility, instead reserving the issue and publishing his decision as to admissibility in his final decision. The High Court though upheld the compensation in favour of Mr. Howchar on the basis of evidence of Pathologist produced by him but held that the ***evidence of Dr.Basden was not admissible***. The said French decision also draws the fine distinction between the production of & admissibility of the Expert evidence produced before the Court.

Indian Supreme Court – Latest Airlines Co. Case – TDS

In a recent judgment of ***4th August, 2015*** itself, the Supreme Court of India again decided another interesting point on the basis of Expert opinion in the form of documents and International Trade Agreements.

In the appeals filed by ***M/s Japan Airlines Co. Ltd. (JAL) & Singapore Airlines Company (SAL)***, the issue raised was about the rate of TDS (Tax Deduction at Source) from the payments made by them to the Airport Authority of India (AAI). Section 194 I of

the Income Tax Act provides for the rate of ***20% of TDS*** from such payments if the payments are to be taken as ***'Rent'*** for the ***"use of land"*** but the rate of TDS under Section ***194-C*** is ***only 2%*** if the payments are to be taken for the ***"package of services"*** given by the AAI in accordance with the International Protocols for the landing & parking of aircrafts with Passengers Safety Standards.

The Hon'ble Supreme Court of India relying upon the ***Expert evidence in the form of Airport Economic Manual (AEM) & International Airport Transport Agreement (IATA)*** applicable to all the contracting States on the charges for airport & air navigation services including the ***complex system of lighting, landing equipments & signals etc.,*** the Court analyzed various services and the Court held that such services provided by the AAI under the International Protocol ***cannot be narrowly construed*** and the amounts paid are not merely ***'rentals' for the 'use of land'*** but for the ***'package of service contract'*** provided by the AAI, therefore, payments made by JAL & SAL are for the ***'package of services'*** and ***'use of land' is only incidental*** and, therefore, rate of TDS of 2% was upheld in favour of the assessee.

The higher rate of TDS was thus not applied by the Supreme Court only on the basis of services provided by the AAI under the International Protocol and the ***'use of land'*** since the point of time the aircraft touches the ground was held to be merely incidental and the payments were made for the ***'package of services'*** to be provided by the AAI and not merely for the use of land and, therefore, lesser rate of TDS was rightly applied to the assessee. This avoided the huge payment of interest and penalties on the Airline Companies.

Need of Tax Expert Evidence Emphasized by Supreme Court – Airtel Case

The Supreme Court of India emphasized the use of Expert evidence in the form of International Taxation for the first time in ***Commissioner of Income Tax vs. Bharti Cellular Ltd – (2011) 330 ITR 239 (SC)*** in its decision on ***12/8/2010*** and emphasizing such need, the Supreme Court set side the Delhi High Court decision and remanded back the case to the Assessing Authority to first determine whether the ***interconnection/access/port charges for***

providing the facility of connecting calls of the consumers from one circle to another was ***"fees for technical services"*** paid by the ***Airtel (Bharti Cellular) to BSNL/MTNL – the Service Providers***. If it amounted to *fees for technical services*, it would require TDS under Section 194 J of the Income Tax Act, otherwise not.

The Delhi High Court on 31 / 10 / 2008 held in favour of the assessee that since providing of ***interconnection/access/port services did not involve any human intervention***, therefore, the expression ***'technical services'*** used in Section 194 J read with Explanation (2) to Section 9 (1) (vii) of the Act used in juxtaposition with the expression "managerial, technical, consultancy services" which will have to be read ***edjusdem generis & noscitur a sociis*** and would refer only to technical services rendered by humans and not by machines or robots and, therefore, Airtel was not required to make any TDS on such payment made to BSNL / MTNL.

The Supreme Court within two years on ***12/8/2010*** set aside that judgment of Delhi High court and remanded the case back for determination with the help of Expert evidence or by examining Technical Expert in this regard as to whether such interconnection services required human intervention at any stage or not and then only apply Section 194 J of the Act to the assessee Bharti Cellular.

The Supreme Court realized the importance of evidence of Technical Experts in such cases in view of technical advancements made in the world and emphazied the need to examine Technical Expert in such matters involving high revenue stake and, therefore, ***issued directions to the Central Board of Direct Taxes (CBDT) that the Department need not proceed*** only on the basis of the contracts placed before the adjudicating authority but it should examine the Technical Expert, so that the matter could be disposed of expeditiously and it would further enable the appellate forum / the Courts of law also to decide the issues based on factual foundation.

CBDT in compliance has issued the ***Instruction No.5/2011*** on ***30/3/2011*** directing the Assessing Officers / TPOs to frame assessments only after bringing on record the technical evidence that may be required in a case &. initiation of proceedings to obtain technical evidence should be taken up well in advance before the

date of limitation for such assessment and such Expert evidence produced by the Department should be made available to the assessee to provide him a reasonable opportunity of rebuttal thereof.

"The Hon'ble Supreme Court has made the following observations in an order dated 12-8-2010 in the case of CIT, Delhi v. Bharti Cellular Ltd. [2010] 193 Taxman 97 (SC):

1. "We are directing CBDT to issue directions to all its Officers, that in such cases, the Department need not proceed only by the contracts placed before the officers. With the emergence of our country as one of the BRIC countries and with the technological advancement matters such as present one will keep on recurring and hence time has come when Department should examine technical experts so that the matters could be disposed of expeditiously and further it would enable the appellate Forums, including this Court, to decide legal issues based on the factual foundation. We do not know the constraints of the Department but time has come when the Department should understand that when the case involves revenue running into crores, technical evidence would help the Tribunals and courts to decide matters expeditiously based on factual foundation."

2. The above directions of the Supreme Court may be brought to the notice of all the officers in your region. In view of these directions in all cases that are taken up for scrutiny, the Assessing Officers/Transfer Pricing Officers should frame assessments only after bringing on record appropriate technical evidence that may be required in a case. The process of identification of such cases and initiation of the proceedings to obtain the technical evidence should be taken up well in advance before the date of limitation. The Officer concerned shall bring such cases to the notice of the CCIT/DGIT concerned, who will look into the complexities of the technical issues and monitor the progress of the case and if required assist in obtaining the opinion of the technical experts in the relevant field of expertise and endeavour to arrange for the opinion of the concerned technical expert well within time. Further, the evidence so gathered shall be made available to the assessee and reasonable opportunity provided before the assessment order is passed.

3. After a reference is made to an expert in the above manner, intimation must be sent of the Board through Member (IT) in the following proforma:

Name of case and Assessment year	*Brief description of the technical issue involved of the expert*	*Name and address*	*Tax effect*

[F.No. 225/61/2011-IT(A-II)]"

Even the Indian judiciary is fully conscious of up taking the various technical issues arising in the realm of tax disputes and duly recognize the need of Expert evidence in such cases and the Tax Department in our country is duly instructed in this behalf to take the help of Expert evidence in such cases.

The Current Legislations in India – for prevention of Tax Evasion

1. **The Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015 (to be enforced from 1st April, 2016)**

- The new law enacted by Indian Parliament on 26th May, 2015.
- To be enforced from 1st April, 2016.
- Section 73 of Black Money & Imposition of Tax Act, 2015 authorises Central Government to enter into Agreement with Govt. of any other country for exchange of information for prevention of evasion or avoidance of tax on undisclosed foreign income.
- The Black Money & Imposition of Tax Act, 2015 provides for time frame for voluntary disclosure of undisclosed foreign income & assets & pay 30% tax & equal amount of penalty thereon. Disclosure before ***30th September, 2015*** & payment of 60% including penalty before ***31st December, 2015***.
- ***Afterwards***, penalty of 90% of such undisclosed income or assets with 30% tax i.e. ***120%*** of such income & imprisonment upto 3 to 10 years.

2. **The Prevention of Money Laundering Act, 2002.**

- Money Laundering Act, 2002 enacted by Indian Parliament seeks to effectively check money laundering or crime money specially connected with Drugs & Terrorist activity, in consonance with UN Convention against illicit traffic in NDPS & Basel Statement of Principles, 1989.

- The imprisonment between 3 to 7 years extendable upto 10 years, in case of anti-national activities and confiscation of property acquired out of such tainted money is provided in said Act.
- Section 56 & 57 authorizes the State to enter into agreement with Foreign Government for exchange of information for prevention of such offence.

3. **The Prevention of Money Laundering (Amendment) Act, 2012 (15th Feb. 2013)**

- The India has become a member of the Financial Action Task Force (FATF) & Asia Pacific Group on money laundering.
- The India has submitted an action plan to the FATF (Financial Action Task Force) to bring anti money laundering legislations of India at par with international standards. Hence, the new Amendment Bill of 2015.

4. **Foreign Exchange Management Act, 1999**

5. **Multilateral Competent Authority Agreement (MCAA) on Automatic Exchange of Information (AEOI) (July 2015).**

6. **The Benami Transaction (Prohibition) Act, 1988.**

- Benami (without real name) Transactions are those transactions in which property is held by or transferred to one person for a consideration paid or provided by another person.
- The Act prohibits such transactions. Whoever enters into any benami (without real name) transaction shall be punishable with imprisonment for a term upto 3 years or with fine or with both.
- There is no right with the real owner to recover back the property held Benami (In the name of other person).

7. **The Benami Transaction (Prohibition) (Amendment) Bill, 2015 (Date yet to be notified). (Pending consideration before Parliament).**

- Under the new Bill, upon its enactment would provide for confiscation & vesting of Benami Property in Central Govt., will confer power of civil court in the authorities under the Act, while barring jurisdiction of civil courts & will provide for Initiating Officer to hold property in custody till 90 days, till the Adjudicating Authority decides the objections, if any.

- The properties held by a person in fiduciary capacity or held by an individual in the name of spouse or child or if said property is acquired out of known source of income & is held in the joint name of brother, sister or lineal descendant or member of HUF (Hindu Undivided Family) – are excluded from the purview of this Act.

8. ***Income Tax Act, 1961*** – Search & Seizure Provisions & Additions to be made to disclosed income for unexplained income or expenditure or investments. ***Expert Evidence*** in the form of evaluation of seized Articles like Gold & Diamond jewelery, valuation of immovable properties is frequently used in India to bring to tax undisclosed income on the basis of such Expert evidence.

But there are certain issues about Experts in International Tax disputes.

CURRENT ISSUES: Shortcomings

1. ***Sufficient number of 'Experts'*** in the field of International Taxation – Not available.
2. ***Sufficient data of comparables*** not available in public domain.
3. ***Large number of cases/disputes*** generating due to increase in international trade & services & simultaneous evolution of Treaties & Tax Polices in this field.
4. Number / Tier of Hierarchies in Tax Disputes determination / resolution – 5 Tier from AA to SC.
5. Delay / Long time taken in resolution of international tax disputes. Technological developments & adoption of paper less working in tax department / courts not fully operational.
6. Judiciary in India already overloaded / overburdened with civil and criminal case litigation.
7. No specialized Tax Court at HC / SC levels – Though HC / SC have now dedicated Tax benches.
8. Govt. / CBDT slow in issuing clear Instructions.
9. Due to Parliament logjams due to party politics – important legislations like GST – Stuck.

Current Issues – Positive steps by Indian Government

1. Government seriously pursuing GST enactment – Likely to be in place before 1st April, 2016.
2. Multilateral Competent Authority Agreement finalized in July, 2015.
3. Black Money Act 2015 enacted – to be enforced from 1.4.2016. Voluntary Disclosure before 30th September, 2015.
4. Providing for automatic exchange of information with Contracting States to prevent evasion of taxes.
5. ADR system in resolution of International Tax Disputes introduced in some DTAA Treaties.
6. Govt. serious in inviting foreign investment by liberalizing policies & therefore needful mechanism will be put in place for that.

CASE STUDY

A moot court problem about the rights of parties in dispute under International Tax Laws as discussed in an International Tax Conference at Basel in 2015 is discussed below for better understanding of the issue involved.

CHOCOLATE GALORE (DOMESTIC) INC

Applicant

DOMESTIC REVENUE AGENCY

Respondent

SOFT DRINK DEVINE PLC

Third Party

1. The Domestic Revenue Agency ("the Revenue") has assessed *Chocolate Galore (Domestic) Inc ("the taxpayer")* to tax under the domestic transfer pricing rules. The taxpayer's assessment has been challenged and is pending for hearing in the Tax Court at IFA sitting in Basel.
2. The Taxpayer is a domestic subsidiary of *Chocolate Galore AG* ("the taxpayer's parent company"), a multinational Swiss public company which *sells chocolates throughout the world.*

3. The Revenue contends that the Taxpayer's domestic income is impermissibly reduced by excessive amounts charged by its parent for the intellectual property and know-how needed to produce *'Choc N' Roll' ("the product")*, a chocolate-infused pop drink that is aimed at the teenage market.

4. The Revenue proposes to rely at trial upon evidence of the internal pricing structure of *Softdrink Devine plc ("the third party")*, a soft drink manufacturer incorporated in the United Kingdom, which the Revenue contends is an appropriate comparator.

5. The third party has made agreements with its subsidiaries in North America under which it licences intellectual property and know-how needed by its subsidiaries to produce a soft drink called *'Sugar Hit'*. The Revenue contends that *'Sugar Hit'* is comparable to *'Choc N Roll'*.

6. The internal pricing structure of the third party that the Revenue proposes to rely upon in its assessment of the taxpayer has come to it in the normal course of its investigation into the affairs of the domestic subsidiary of the third party.

7. The information in the possession of the Revenue may include or refer to communications between the third party and its legal advisers, including views on the law expressed by the legal advisers partly in reliance on factual analysis performed by expert analysts to assist the legal advisers to give their advice.

8. The third party has a United States subsidiary called Softdrink Devine (US) Inc.

9. Some of the information available to the Revenue concerns the operations of the group of the third party in the United States which has been explicitly relied on for the United States tax filings of Softdrink Devine (US) Inc.

10. The taxpayer seeks from the tax courts access to the information to be used by the Revenue, to enable the taxpayer to prepare its case. The third party has become aware of that and wants to prevent its internal pricing structure from being disclosed to the taxpayer and from becoming public. The taxpayer has made interlocutory applications to the Court seeking access to

the details of the internal pricing structure of the third party from (a) the Revenue and (b) the third party. The Revenue wants to rely upon the information of the third party's internal pricing structure but is prepared to limit disclosure of that information to the taxpayer's legal advisers and for the information to be otherwise prohibited from being disclosed.

The three parties respectively proposed the following three orders for consideration of the Court.

REVENUE'S PROPOSED ORDERS

The Revenue seeks the following orders:

1. That the evidence it proposes to rely upon of the internal pricing structure of Softdrink Devine plc be received by the tax court in camera and not be disclosed to Chocolate Galore (Domestic) Inc except to its legal advisers upon them giving an undertaking that they not disclose the information to their client.

THE TAXPAYER'S PROPOSED ORDER

The taxpayer seeks the following:

1. That all material to be relied upon by the Domestic Revenue Agency in this proceeding be made available to Chocolate Galore AG, Chocolate Galore (Domestic) Inc and their counsel, legal advisers and experts.
2. That the information possessed by Softdrink Devine PLC of its internal pricing structure be made available to Chocolate Galore AG, Chocolate Galore (Domestic) Inc and their counsel, legal advisers and experts.

THIRD PARTY'S PROPOSED ORDER

Softdrink Devine plc seeks the following orders:

1. A declaration that the information in the possession of the Revenue about the internal pricing structure used by Softdrink Devine plc in connection with the licensing of its subsidiaries of the intellectual property and know-how to produce the soft drink "Sugar Hit" is commercial-in-confidence information.

2. That the information referred to in 1 above not be disclosed to Chocolate Galore (Domestic) Incand that it not otherwise be used in Court or otherwise be made public.

OPINION OF THE COURT

The three orders placed before the Bench, one by Revenue, the other by Tax Payer and the third one by Third Party present an interesting triangle of conflicting orders sought from the Bench and as all the three parties have their conflicting interests, where Revenue is trying, as in law entitled to do so, to collect the appropriate revenue, using the evidence in the form of internal price structure of the Third Party, a competitor of the Tax Payer producing a similar product, which is an appropriate comparable for determination of Arms Length Price (ALP) for imposition of tax in the hands of Tax Payer.

While the order proposed by the Tax Payer is one for a *'Total Disclosure Order'*, the order proposed by the Third Party is one for a *'Total Prohibition Order'* and the order proposed by the Revenue is of a *'Limited Disclosure Order'* in the aforesaid case in hand.

This Court would try to make three lines of the aforesaid triangle meet and remain as near as possible to the centre of justice, which is just and fair interest of all the three parties concerned before us.

It is necessary to maintain the privacy of internal data of the Third Party while its disclosure to the relevant extent to the Tax Payer for rebuttal purposes is also equally necessary to meet with the principles of natural justice and provide the Tax Payer an effective opportunity of hearing. While the Revenue Department is authorised to collect tax in accordance with the relevant provisions of the statute and use the comparable figures for a comparable case.

The solution to this triangular conflict is possible if the following course is adopted:-

(i) The information of internal pricing structure of the Third Party *should be received in camera* in the absence of Tax Payer and the Revenue authorities be directed to re-present such information

and data in a codified form - in a disguised name or identity, viz. X,Y,Z, instead of real name of the Third Party and place such codified information and data for approval of the court. After such approval by the Court, the codified information can be supplied to the Tax Payer and its authorized Legal Advisers. The codification will require change of name of Company, place & product in question. This is to protect the right of privacy of Third Party and to avoid misuse of the *'commercial-in-confidential'* information of the Third Party.

(ii) The Tax Payer and its Legal Advisers, to whom such codified information is supplied with judicial approval, be given an opportunity of rebuttal in comparison with its own disclosure made in the returns filed before the tax authorities. However, the Third Party will have no right of participation in such substantive hearing of the assessment of the Tax Payer.

(iii) The Tax Payer and its Legal Advisers should furnish a Declaration and Undertaking before the Court, that they will not make any effort to go beyond the codified information and will not misuse such commercial-in-confidential information relating to the Third Party for any other purposes, other than the tax dispute before the Revenue authorities and the misuse of such information for competition purposes will be treated as contempt of the Court and appropriate proceedings under the contempt law and also for imposition of a fiscal liability upon them may be initiated against them.

(iv) The Declaration and Undertaking of the Tax Payer and its Legal Advisers will bind them in case any such a misuse of the codified information is established by the Third Party in subsequently instituted misc. proceedings and will expose the Tax Payer and its Legal Advisers liable for an action under the contempt law and also to pay fiscal damages, either liquidated damages or quantified damages depending upon the loss caused to the Third Party. The share of such fiscal damages will go to the Revenue as an additional tax and another share to the Third Party to compensate the loss caused to it.

In case of breach of confidentiality by the Revenue authorities is also established by the Third Party resulting into the

loss on account of misuse of such information, then the aforesaid fiscal damages will be payable only to the Third Party and can be recovered in part from both the Tax Payer as well as the Revenue authorities responsible for such leakage of information & loss caused to the Third Party.

The aforesaid method & manner of supplying of information relating to the internal price structure of the Third Party in a *codified and disguised form* with the Undertaking for the bonafide use coupled with the condition of invoking the contempt law and fiscal damages, should adequately meet the ends of justice for all the three parties before us.

This is how we intend to resolve the conflict of interest yet meet the ends of Justice.

CONCLUSION :-

India being emerging & fast developing economy and large democracy of the world has an important role to play in the field of International Taxation and its Executives and Judiciary have tightened their belts to provide lead to the world and is certainly in a position to take such lead and guide smaller economies in cooperation with the developed economies of U.S., Europe, China and other G20 countries.

******