

# International Association of Tax Judges 3rd Webinar (9 April 2021)

Tax Procedures and Landmark International Case Law  
in India

# **CHAIR & PANELLISTS**

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**Chair: Philippe MARTIN, Section President, Conseil d'Etat (France)**

**Hon'ble Dr. Justice Vineet Kothari, Gujarat High Court**

**Hon'ble Mr. Justice Bhargav Karia, Gujarat High Court**

**Mr. Pramod Kumar, Vice President, Income Tax Appellate Tribunal**

# TOPIC 1: THE WIDE RANGE OF DISPUTE RESOLUTION PROCEDURES.

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**Que. 1 Non Judicial Mechanisms**

- (a) Authority for Advance Rulings**
- (b) Dispute Resolution Panel (transfer pricing)**

**Answer by Mr. Pramod Kumar, Vice President ITAT (Mumbai), India.**



## Q.2 Judicial system for tax cases.

- (a) Income Tax Appellate Tribunal – ITAT
- (b) High Courts
- (c) Supreme Court

### Ans by Hon'ble Dr. Justice Vineet Kothari, Gujarat High Court

- ITAT under Income Tax Act, 1961 is the final fact finding Tribunal and bench of ITAT comprises of one Judicial Member (selected from the cadre of District Judges or Advocates) and one Accountant member (from C.As or CITs)
- ITAT, also has power to interpret law, including provisions of Treaties, Questions of Residence, PE, Taxability in Source Country or Residence Country etc.
- India has **25 High Courts**, who can decide Appeals against ITAT orders on question of law. They also have writ jurisdiction under the Constitution of India, under Article. 226/227 and can entertain Writ Petition at any stage of any proceeding. Tax cases are a comparatively small case load of High Courts, besides other Civil and Criminal law matters. We have about **700 Judges in 25 High Courts and 400 vacancies as of now.**
- Supreme Court is the Highest Court and decides all questions of facts and law finally. Leading cases on International Taxation and other taxes have been decided by Supreme Court at New Delhi, comprising of about **30 Judges.**

**Q.3 Are Authority for Advance Rulings (AAR) and Dispute Resolution Panel (DRP) seen as effective in preventing litigation before courts ? Do courts take into account the doctrine and opinions of AAR (and DRP ?)**

**Answer by Hon'ble Mr. Justice B.D Karia, Gujarat High Court**

- This depends on case to case basis. AAR now Board for Advance Ruling (BAR) is a fact finding body, whereas Hon'ble Supreme Court and Hon'ble High Courts entertain only questions of law.
- Courts have affirmed several rulings delivered by AAR.
- For instance, in *Linde Engineering Division And Anr. Vs DDIT, W.P. (C) No. 3914/2012* the Hon'ble High Court of Delhi affirmed the ruling of AAR in *M/s Hyundai Rotem., (AAR/798/2008)* to hold that for a group of companies to be treated as an Association of Persons for taxation purpose, the companies must pursue a common purpose through a common action by a joint management.
- Further, the court also urged AAR not to deviate from its own rulings, when a query with similar set of facts arises

## Q.4 Will the shift in constitution of Authority for Advance Ruling, which will now be known as Advance Ruling Board, impact the nature of advance ruling mechanism?

**Answer by: Hon'ble Dr. Justice Vineet Kothari, Gujarat High Court**

- Data on AAR rulings suggests that it had gained popularity among the Tax Payers only during last decade. From its inception in **1992-93 until 2009-10**, the number of Applications received annually was in **two digits**. It was only from the year 2010-11 the number of applications surged to three digits with 2011-12 being the highest with applications above **240**, but only to slump to double digits after three years later.
- However, the rate of disposal of the applications before AAR was low in the recent past years, it was below **10 percent** in four years out of 10 years of last decade. Even though the law requires the AAR to deliver its ruling within six months, in reality, the applications were being disposed post three years.

## Continued.....

- Therefore, this new Board for Advance Ruling (BAR) has been introduced from April 2021 and the Appeal against the orders of BAR would lie to the High Court as per **section 245W** of the Income tax Act, 1961. Therefore at first level of Advance Rulings may come faster and it would smoothen the process of Dispute Resolution.



**Q.5 Will the introduction of the Dispute Resolution Board by the amendments introduced through The Finance Act,2021 impact the resolution of international tax disputes as well ?**

**Answer by: Mr. Pramod Kumar, Vice President, ITAT (Mumbai, India)**

**Q. 6 Advance Pricing Mechanism and Mutual Agreement Procedures: are they seem as effectively preventing litigation ? Do they influence the legal reasoning held by courts on transfer pricing and tax treaty issues ?**

**Answer by: Mr. Pramod Kumar, Vice President, ITAT (Mumbai, India)**

**Q.7 How do you see Faceless Assessment and Appellate system being extended to ITAT as well and how could it change the judicial mechanism in the future ?**

**Answer by: Hon'ble Dr. Justice Vineet Kothari, Gujarat High Court**

- The **Faceless ITAT** has been envisaged by the Finance Act, 2021 wherein the same have been introduced to achieve **greater efficiency, transparency and accountability** in the appeal process, the same would result in effective utilisation of resources due to specialisation, equal spread of work and fuller utilisation of expert Members of ITAT like my colleague **Mr. Pramod Kumar**.
  
- It is a new scheme and it is possible that it will have some teething problems but **COVID-19** has changed how we are functioning with the **aid of technology in the virtual hearings of court cases**.
  
- **The Faceless Assessment and First Appeal before CIT (Appeals) is already working smoothly** with great success but for ITAT it will be an experiment, hopefully giving results as per the avowed objectives of faceless ITAT appeal, with some specified exceptions, like in search cases etc.

# TOPIC 2: THE LARGE NUMBER OF TAX CASES IN COURTS

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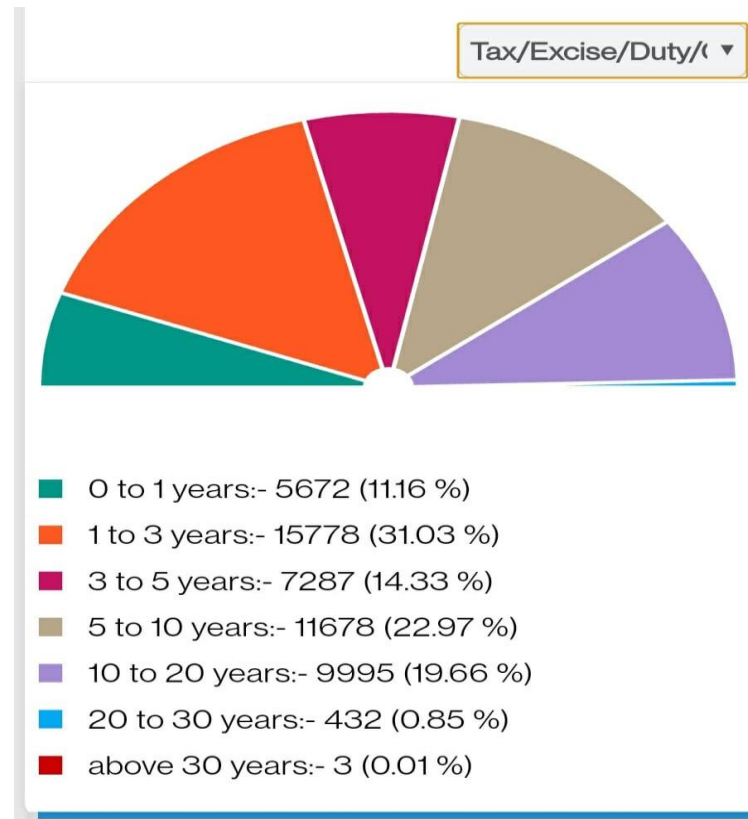
**Q. 1 (A) How many tax cases in India ?**

**Answer by Hon'ble Mr. Justice B.D Karia, Gujarat High Court**

- According to data released by *Economic Times* there were over **4.78 lakh** Income Tax Appeals at various judicial forums pending at the end of Mar. 2019.

- **Q.1 (B) (Number of International Tax Cases: No separate data available for that)**

Further, as per National Judicial Data Grid there are 50, 845 tax cases pending before various High Courts as on 7<sup>th</sup> of April, 2021. The pie chart below depicts the pendency of tax disputes as bifurcated in the time period of the disputes.



## C. Which are the most common kinds of tax disputes before various forums ?

### Answer by Hon'ble Mr. Justice B.D Karia, Gujarat High Court

- Disputes regarding the correct comparable and method for determining ALP in transfer pricing. [Issues regarding applicable method in transfer pricing i.e. either the CUP or TNMM method form a bulk before the DRP.]
- Ascertaining existence of Permanent Establishment.
- [**New Delhi DIT v. Samsung, (2020) 7 SCC 347.** Hon'ble SC held test for preparatory activities to determine P.E is 'factual'. Considered RBI registration and accounts of project office.]
- Characterisation or re-characterisation of an item of expense or payment as a taxable expense or payment (like Royalty or Fee for Technical Services (FTS) or Interest).
- [**Engineering Analysis case** clarified that amount paid by Indian Companies to purchase foreign softwares not royalty. Not liable to be taxed in India. Tax liability of foreign software seller without a PE in India would reduce to the 2% equalisation levy].
- Meaning/interpretation of provisions of domestic law.

**Q. 1 (D) Do you think there is any frivolous litigation before your court, do you make any efforts to de-incentivize such litigation and what are the systematic reforms, if any, in this direction ?**

**Answer by Hon'ble Mr. Justice B.D Karia, Gujarat High Court**

- Only matters pertaining to substantial question of law are entertained by the higher judiciary.
- Judgement of **PCIT v. Softbrands India P. Ltd., [2018] 94 taxmann.com 426 Hon'ble Kar. HC delivered by Hon'ble Dr. Vineet Kothari, J** considered landmark in this regard.
- The following was held:

*“Unless perversity in the findings of the Tribunal is established the appeals under Section 260-A of the Act cannot and should not be entertained at the instance of either of the parties. Unless the High Court is satisfied that a substantial question of law is arising from the order of the Tribunal, the appeal under Section 260-A cannot be entertained at the instance by either the Revenue or the Assessee and the exercise of fact finding or 'Arm's Length Price' determination or 'Transfer Pricing Adjustments' should be allowed to become final with a quietus at the hands of the final fact finding body, i.e. the Tribunal.”*

- Imposition of costs is another power utilised to discourage frivolous litigation



**Q.2 What do you think can be done to ensure tax finality is reached faster, and the process of dispute resolution be expedited ?**

**Answer by: Hon'ble Dr. Justice Vineet Kothari, Gujarat High Court**

- To do so the Government and Assessee both must not pursue certain matters which are not required to be pursued at higher forums aggressively and fast tracking the procedure by creating special benches would help in this regard as it helped the Supreme Court of India in the year 2015 after creating specialised bench for tax. (**Special bench of Justice AK Sikri and Justice R. F Nariman decided 197 cases in one year**).
- Fast Tracking tax matters and giving rulings in fixed time periods as envisaged by the Income Tax Act at lower levels for the Authorities would help in this regard. This is possible only with the cooperation of Assesseees, their Representative Assessee/Chartered Accountants and Assessing Authorities/Boards/Appellate Authorities.
- Imposition of costs at staggering levels of pending cases after certain period by suitable Legislative Amendments can help.

**Q.3 Is the drafting of court decisions adapted to the number of cases, e.g. a choice between elaborate decisions or simplified decisions with quick references to precedents ? Or is the drafting systematic in terms of length and wording ?**

**Answer by: Hon'ble Dr. Justice Vineet Kothari, Gujarat High Court**

- Yes. Consolidation of cases involving common questions is generally done and disposed of by Common Judgements.
- Long and well considered and reasoned decisions generally form good precedents for subsequent such cases.
- Short orders for covered cases is a norm.
- But sometimes '**Cut and Paste**' orders, without application of mind can be open to criticism and remands.

## Q.4 How is the consistency of tax case law ensured ?

### Answer by Hon'ble Mr. Justice B.D Karia, Gujarat High Court

To ensure that there is consistency of tax case law there are a lot of features embedded in the Indian Legal system

- Following precedents strictly whenever applicable in the given facts
- If there is any deviation from the precedents then the same is discouraged by the Higher Authorities
- There is also adherence to the decision rendered by the co-ordinate benches so as to limit contradictory decisions on the same point of law by different benches.

**Q.5 What is the policy for the publication of tax decisions by courts ? Very selective ? Publication with or without ratings or comments by court services ? With every decision being uploaded on the official website, is there any justification for making the cases as ‘fit for publication’?**

**Answer by: Mr. Pramod Kumar, Vice President, ITAT (Mumbai, India)**

**Q. 6 What do you see as the emerging trends in India in the area of tax dispute resolution?**

**Answer by: Hon'ble Dr. Justice Vineet Kothari, Gujarat High Court**

- India is a fast growing economy and huge market in the world economy and to attract foreign investment and provide **Ease of Business** India is making best efforts and adopting Best practices of Developed economies and Tax Reform is an important step in that direction.
- Amending Income Tax laws and providing for monetary limit to withdraw litigation from courts, Dispute Resolution Schemes like *Vivad se Vishwas* (Vivad = Dispute and Vishwas = Confidence) and *Kar Vivad Samadhan* (Tax Dispute Resolution) schemes in Direct and Indirect tax systems are big steps.
- **Authority for Advance Ruling (AAR), Multilateral Instrument to prevent Base Erosion (MLI), Board of Advance Rulings (BAR), Central Board of Direct Taxes (CBDT)** are the methods and bodies which provides for quick Tax Dispute Resolution.

# TOPIC 3: THE SIGNIFICANT LITIGATION IN INTERNATIONAL TAX

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## Q. 1 Are some judges specialized in international tax?

**Answer by: Hon'ble Dr. Justice Vineet Kothari, Gujarat High Court**

- There is no specialisation which has been prescribed in the Indian Constitution at the High Court and Supreme Court Level.
  
- Though at the Tribunal Level the Judges are appointed based upon specialisation and they also specialise in International Tax, coming from 3 sources –
  - i. Judiciary
  
  - ii. Department
  
  - iii. Law Practitioners

## Q.2 Is there a standardization of principles of tax interpretation in India ?

### Answer by Hon'ble Mr. Justice B.D Karia, Gujarat High Court

- There is standardization on the first principles as seen in the decisions of the Courts being rendered and in case of there being any inconsistency between two forums at the same level the same the Higher Forums (High Court or Supreme Court) decide upon the issue so as to maintain consistency, therefore there is standardisation on the first principles of international tax.
- **Static v. Ambulatory interpretation.** The Hon'ble Bombay HC in **CIT Vs Siemens Aktiengesellschaft [(2009) 310 ITR 320 (Bom)]** upheld the ambulatory approach to domestic law meaning of undefined terms under article 3(2) of OECD model convention.
- However, **ITAT (Mumbai) in ACIT v. Jio Infocomm, (2019) 184 DTR** ruled that as per Art. 31 of VCLT the **context** of the treaty shall be looked into, rather than being confined only to static or ambulatory interpretation.
- If ambulatory approach is adopted any subsequent change in domestic law provision could potentially lead to unilateral treaty override.



**Q.3 How often do you think foreign decisions get cited before you and how often are these decisions reflected in your decision making ?**

**Answer by: Mr. Pramod Kumar, Vice President, ITAT (Mumbai, India)**

**Q. 4 Which two or three cases do you see as milestones in India's International tax jurisprudence and why?**

**Answer by Hon'ble Mr. Justice B.D Karia, Gujarat High Court**

**1. Engineering Analysis of Excellence Pvt. Ltd. v. CIT**

**(2021 SCC OnLine SC 159)**

**2. Union of India v. Azadi Bachao Andolan.**

**(2003) (263 ITR 706 SC)**

**3. CIT v. Vishakhapatnam Port Trust**

**(1983) 144 ITR 146 (A.P.)**

Citation: (2021 SCC OnLine SC 159)

Coram: R. F Nariman, J, Hemant Gupta, J and B.R. Gavai, J.

Author: R.F. Nariman, J.

Court: Supreme Court of India

Date: 2<sup>nd</sup> of March, 2021

• **Case deals with two major issues:**

1. Whether or not payment to foreign companies by Indian companies to use/purchase foreign software can be charged as royalty?
2. Whether or not TDS can be deducted for purchase of software from foreign software suppliers?

**Held:**

- The court held that payment for using foreign software did not amount to royalty which is taxable in India. The amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act, is required to deduct/withhold tax in India while making such payments.
- The court has ruled that software firms have now been exempted from deducting TDS for purchase of software from foreign software suppliers. The ruling will lower the cost of software purchases for Indian firms as the overseas sellers may choose to lower prices, taking advantage of the tax relief. This ruling is said to greatly benefit software firms. While citing the definition of royalties contained in Article 12 of the double taxation avoidance agreements (DTAAs), the Supreme Court clarified that, “there is no obligation on the persons mentioned in Section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright.”

**Union of India v. Azadi Bachao Andolan.**

**Citation: (2003) (263 ITR 706 SC)**

**Coram: Ruma Pal, J and B.N. Srikrishna, J.**

**Author: B.N. Srikrishna, J.**

**Court: Supreme Court of India**

**Date: 7<sup>th</sup> of October, 2003**

**Brief Facts:**

- Government of India – Mauritius DTAA, 1-4-1983.
- CBDT issued circular – clarified that capital gains of Mauritius' resident by alienation of shares of Indian company, shall be taxed in Mauritius only. (Article 13 of the DTAA provided the same)
- Tax authorities issued show cause notice to companies that operated in India and Mauritius, as to why they should not be taxed.
- Caused panic and withdrawal of funds by foreign institutional investors.

**Question of Law involved:**

- Whether the provisions of the Income Tax Act, 1961 prevail over the DTTA?
- Whether the clarification issued by CBDT affirming Article 13 of DTTA is ultra-vires of the powers granted to Central Government under S. 90?

## Continued.....

### **HELD:**

- The court held that since there is a specific provision in the DTAA, it will prevail over general provisions of the Income Tax Act, 1961.
- Further, held that as per S. 90 the Central Government is empowered to enter into convention with any other country to avoid double taxation. Clause (a) - granting relief for income tax paid in India as well as the foreign country.
- Clause (b) is broader - avoidance of double taxation of income under the Act as well as the law in the foreign country. Thus, in this light Central Government can act as per the Treaty to avoid double taxation.
- Finally, it held TRC is sufficient enough for accepting status of residence and beneficial ownership. Genuineness of TRC not a matter to be looked into by courts.

**CIT v. Vishakhapatnam Port Trust**

**Citation: (1983) 144 ITR 146 (A.P.)**

**Coram: Seetharam Reddy, J. and Jagannadha Rao, J.**

**Author: Jagannadha Rao, J.**

**Court: Andhra Pradesh High Court**

**Date: 17<sup>th</sup> of June, 1983**

## **Facts:**

- The Assessee-Port Trust entered into a contract with a German company for the purchase of a plant known as '**Bucket Wheel Reclaimer**'. The contract entered into provided that the said plant shall be assembled by the Assessee at his own expense. The German company employed a sub contractor. An Indian company which was neither a subsidiary of the German company nor under its control was employed.
- The ITO held that the Assessee should have deducted TDS from payments made to the German Company. Tribunal rejected the ITO's view and held that the Assessee was immune from any tax liability in light of the India-Germany DTAA.

## Continued.....

### Held:

- Article 18 of the DTAA which provides for MAP is based on Article 25 of OECD Model Convention, provides an additional remedy for claiming benefit of the DTAA by moving to the competent authority.
- MAP does not oust the jurisdiction of domestic courts – like Income Tax Tribunals to consider applicability of the agreement.
- Under the DTAA the profits of an enterprise in one country are not taxable in other unless derived through a PE.
- ‘Permanent Establishment’ denotes the existence of substantial element of an enduring permanent nature of a foreign enterprise.
- The words ‘**any other form of indebtedness**’ and ‘**from sources**’ in the other territory used in Article could only mean interest arising or accruing from separate source. It could not include interest payable on unpaid purchase money agreed to be part of the sale consideration.

**Q.5 Which is the most interesting international tax decision that you have authored and what was so interesting about it?**

**Answer by: All Panellists**

- **Dr. Vineet Kothari, J:** *Softbrands Case* (2018) 94 Taxmann.com 426 (Kar. HC) (**Authored: Dr. Vineet Kothari, J.**) on Transfer Pricing issue. The selection of comparables and adoption of most Appropriate Method, (CUP, TNMM etc.) The findings of ITAT are final and binding on High Court and unless they are shown to be perverse findings, based on no evidence or absolutely arbitrary application of wrong law or legal principles – no substantial question of law would arise and appeal to the High Courts under section 260A of the Act would not lie.
- This judgement, has curtailed drastically the number of frivolous appeals to the High Courts, against orders of ITAT allowing quicker finality of Tax Dispute Resolution.