SEMINAR K – JUDGES SEMINAR
PRACTICAL PROTECTION OF TAX PAYERS IN THE LITIGATION PROCESS
CURRENT ISSUES CONCERNING EXPERT EVIDENCE IN INDIAN TAXATION CASES

Justice Dr.Vineet Kothari

The tax litigation in Indian judicial system occupies an important and large portion of judicial time. Dividing between adjudicating and appellate authorities as fact finding bodies created under the Income Tax Act, 1961 and the Constitutional Courts for deciding the substantial questions of law in 24 High Courts and one Supreme Court in India has laid down number of judicial precedent for resolving various tax disputes in the country.

However, the 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 some landmark judgments barring a few which I would like to refer to this Congress.

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 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.

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 to 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.

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.

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.

Dr. Justice Vineet Kothari

Judge Rajasthan High Court

Jodhpur, India

Practical Protection of Taxpayers in The litigation Process – Seminar K

Expert Evidence and Testimony

Current issue concerning expert evidence in Indian Tax Cases

Seminar K - Part B

Speaker : Justice Dr. Vineet Kothari, India

The Indian Evidence Act 1872

- Section 45 of the Indian Evidence Act provides for admissibility of expert evidence.
- When the Court has to form an 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 art,** or in questions as to identity of handwriting [or finger impressions] **are relevant facts**. Such persons are called experts.

“Who is an Expert……”

- 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, observation or careful study.
- Therefore , in order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a **special study of the subject** or acquired a **special experience** therein or in other words that he is **skilled and has adequate knowledge of the subject**.
- Expert Assistance is NOT Expert Evidence.

Case Laws for Expert Evidence in Tax Litigation

- ***Chuhurmal v. CIT [1988] 172 ITR 250 (SC)***
- In a search of residential house of assessee, 584 watches of foreign make were found & assessee was held to be the ostensible owner there of & despite notice he did not avail opportunity of cross examination of the authority concerned. The court held that s. 110 of the Evidence Act [which provides that where a person is found in possession, the onus of proving that he was not the owner was on the person who affirmed that he was not the owner] could be invoked in income tax proceeding also.

- Though the rigor of the rule of evidence contained in the Evidence Act did not apply to the proceedings under Income Tax Act but that did not mean the taxing authorities were barred from invoking the principles of the Evidence Act in proceedings before them.
- Section 110 of Evidence Act embodies the statutory principles of Common Law jurisprudence, which could be attracted to a set of circumstances that satisfy its conditions.

Apples' Scam Case

- State of Himachal Pradesh Vs. Jai Lal & Others (1999) 7 SCC 280
- A Criminal Prosecution was dropped by S.C. in the State of Himachal Pradesh, an apple producing State in India, where under a Scheme to support growers in a particular year 1983, When a disease known as 'scab' affected apple orchards, the State framed a scheme to reimburse the growers at particular rate, if the diseased apples were deposited at given centers, where they were destroyed. A scam was discovered by the Prosecution & it was found that the quantity much more than the possible production of that area was allegedly brought to such centers & destroyed & the State compensation was paid.

- On the Prosecution lunched against growers & colluding govt. officials, the prosecution relied upon the Expert Evidence of District Horticulture Officer, shimla for assessing bearing capacity of the orchards in question.

- The expert Mr. Panwar claimed to be B.Sc (Agriculture) M.Sc (Hons.) qualified & having worked as Research Assistant in Agricultural Department also stated that he had done 3 months' training course in the Apple technology in the University of Tasmania, Australia. He carried out the inspection in Nov. 1984 & on the basis of sample counts of the 'spurs' on the apple trees in orchards, he estimated the production of apples in last year 1983.
- Not relying upon such expert evidence in the form of a Report, & quashing the prosecution & acquitting the accused persons, the Supreme Court held 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 & the Report submitted by Expert does not go in evidence automatically.

- Merely on the basis of estimation of the produce by him in his Report the excess quantity of apples could not be assumed to have been brought to centers for the purpose of getting the State compensation.

- Similarly, french High Court in **Dasreef Vs. Hawchar** (2011) 277 ACR 611 in an interesting case of tort liability held that speculative opinion or "guesstimates" of experts are not admissible evidence. Mr. Hawchar a stonemason claimed damages from employer Dasreef as he was diagnosed with disease **scleroderma & silicosis** which he claimed to have resulted on account of he being exposed to silico dust over a period of six years of working as stonemason for Dasreef .

- As expert evidence produced by him beside of a Pathologist, he produced Dr. Basden, a Chemical Engineer who was founding member of Clean Air Society of Australia & he had conducted many field & laboratory investigations in to air pollution & workplace atmospheric contamination. It was accepted that Dr. Basden was experienced in the measurement of respirable dust concentration, but no such measurement were done for Dasreef's work place. He never measured the respirable factor of dry ground sand - stone, which stone was worked by Hawchar.

- Still Dr. Besden's speculative comments were used by the Trial Judge to award the compensation of $ 131130.43 in favor of Mr. Hawchar.
- By a majority of 7:1 – (Heyden, J dissenting) ,it was held such '**speculative opinion**' or "**guesstimates**" could not be admitted in evidence.
- Though compensation was upheld by the High Court as the basis of evidence of the Pathologist, but Dr. Basden's evidence was held to be inadmissible.

Recent Airline Company Case of M/s Japan Airlines Co. Ltd. Vs. CIT

- In a recent judgment of 4th Aug 2015 the Supreme Court of India allowed the appeals filed by Japan Airlines Company (JAL) & Singapore Airlines Company (SAL) deciding the issue of rate of TDS from that payments made by them to Airport Authority of India (AAI).

- TDS rate of 20% u/s 194 - I was applicable, if the payment made by JAL & SAL to AAI was to be taken as "**rent**" for the '**use of land**' of runways & hangars used for the of parking of aircrafts, but the rate of 2% only was to be taken, if it was a payment for **package of services** rendered by AAI in accordance with the International Protocols for the landing & parking of aircrafts with Passenger Safety Standards.

- Relying upon the various technological aspects with expert documentary evidence contained in **Airport Economic Manual & International Airport Transport Agreement (IATA)** applicable to all contracting States on the charges for airport & air navigation services including a complex system of lighting, landing equipments & signals etc. Relying upon these “expert opinion” documentary evidence the SC upheld the TDS rate of 2% only.

- The court held that such services under International Protocol can not be narrowly construed as a mere "**use of land**" of runways & parking place, but amounts to a package of service contract provided by AAI & therefore payment by JAL & SAL are not merely "**rentals**" but are payments for the package of services & "**use of land**" is only incidental.

Bharti Cellular (Airtel) case for Expert Evidence

- The Supreme Court of India in the case of *CIT* v. *Bharti Cellular Ltd.* [2011] 330 ITR 239 (SC) in its decision of 12 Aug 2010 emphasized & directed CBDT to issue necessary instruction to all the assessing authorities necessarily examining the technical experts, where the issue of technical nature involving huge revenue, arise for adjudication.
- The issue before Delhi HC & later on in appeal before SC in this case was whether payment made by Airtel (Bharti Cellular) to BSNL/MTNL toward **interconnection/access/port charges** for providing the facility of connecting calls of consumers from one circle to another , was "**fees for technical services**" requiring TDS u/s 194 J of the ITA.

- Delhi HC held on **31.10.2008** in favor of assessee that since it did not involve any human intervention, therefore the expression “technical service” used in section 194 J r/w Explanation 2 to S.9(1)(vii) used in juxtaposition with expression “managerial, technical, consultancy services”, would refer only to technical services rendered by humans & not by machines or robots. Therefore Airtel was not required to make any TDS on such payment made to BSNL/MTNL.

- SC on 12.08.2010 however, reversed that Delhi HC judgment & remanded the case back to Assessing Authority to **first determine, with the help of expert evidence or by examining technical experts** whether such interconnect services require human intervention at any stage & then only apply S. 194 J of the Act to Bharti Cellular.
- CBDT in compliance has issued the **Instruction no. 5/2011 dt 30.03.2011,** directing All Assessing Officers/TPOs to frame assessment only after bringing on record technical evidence that may be required in a case. The case & initiation of proceedings to obtain the technical evidence should be taken up well in advance before the date of limitation. Further such evidence shall be made available to the assessee & provide him reasonable opportunity.

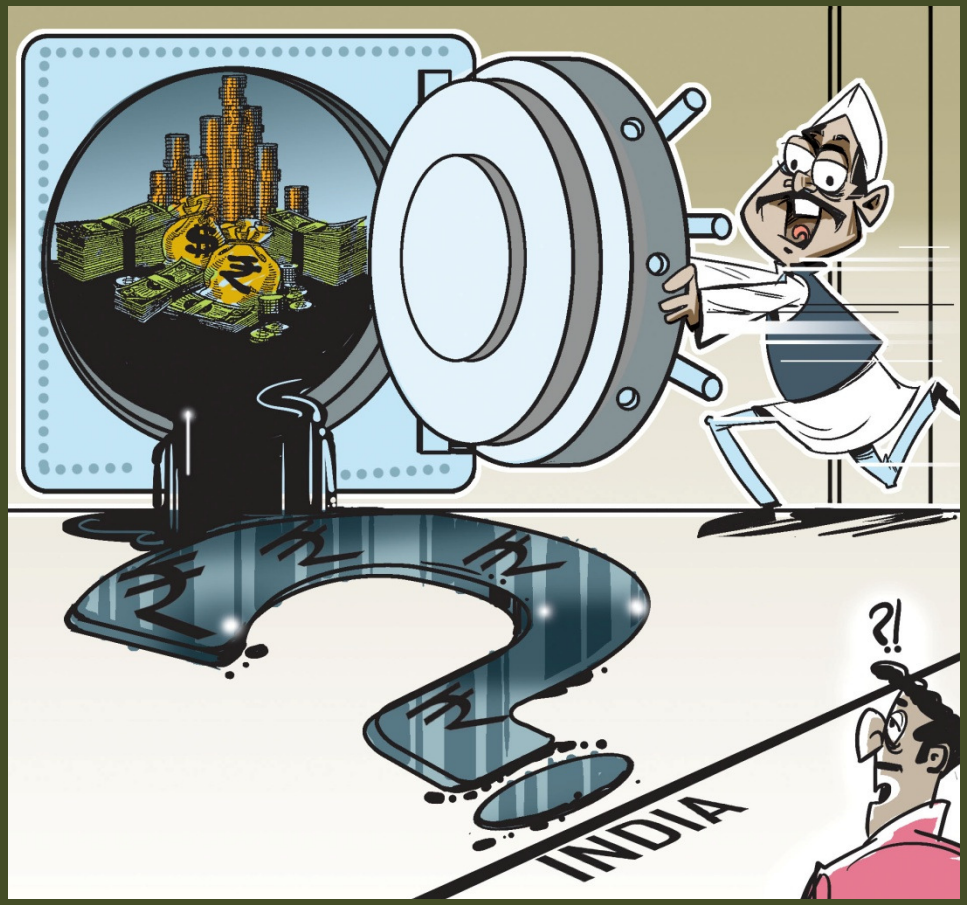
The Current legislations in India - For Prevention Of Tax Evasion

- The Black Money (Undisclosed Foreign Income & Assets) And Imposition of Tax Act, 2015 (to be forced from 1st April 2016)
- The Prevention of Money Laundering Act,2002
- The Prevention of Money Laundering (Amendment) Act,2012 (15 Feb 2013)
- Foreign Exchange Management Act, 1999
- Multilateral Competent Authority Agreement (MCAA) on Automatic Exchange of Information (AEOI)(July 2015)
- The Benami Transaction (Prohibition) Act, 1988
- The Benami Transaction (Prohibition) (Amendment) Bill, 2015 (Date yet to be notified)

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 jewellery, valuation of immovable properties is frequently used in India to bring to tax undisclosed income oon the basis of such Expert evidence.

The Black Money (Undisclosed Foreign Income & Assets) And Imposition of Tax Act, 2015



- 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 in to 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 and 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. Discloser before 30 sept 2015 & payment of 60% including penalty before 31st Dec 2015.
- Afterwards , penalty of 90% of such undisclosed income or assets with 30% tax i.e. 120% of such income & imprisonment up to 3 to 10 years.

The Benami Transaction Act. 1988

- Benami (without real name)Transaction 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 in to any benami (without real name) transaction shall be punishable with imprisonment for a term up to 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)

The Benami Transction (Prohibition) Bill 2015

- 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 the adjudicating authority decides the objections if any. The properties held by a person in fiduciary capacity is 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 descendent or ascendant or member of HUF(Hindu Undivided Family)

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 up to 10 years, in case of anti-national activities & confiscation of property acquired out of such tainted money is provided in said Act.

- Section 56 & 57 authorises the State to enter into agreement with Foreign Government, for exchange of information for prevention of such offence.

The Prevention of Money – Laundering Bill, 2011

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

Current Issues – Steps by Indian Govt.

- Govt. seriously pursuing GST enactment - Likely to be in place before 1st Apr 2016.
- Multilateral Competent Authority Agreement finalised in July 2015.
- Black Money Act 2015 enacted - to be enforced from 01.04.2016. Voluntary Disclosure before 30th Sept 2015.
- Providing for automatic exchange of information with Contracting States to prevent evasion of taxes.

- ADR system in resolution of International Tax Disputes introduced in some DTAA Treaties
- Govt. serious in inviting foreign investment by liberalizing policies & therefore needful mechanism will be put in place for that.

Current Issues – Short Comings

- Sufficient No. of Experts in the field of International Taxation - not available
- Sufficient data of comparables not available in public domain
- Large number of cases /disputes generating due to increase in international trade & services.
- Number/Tier of Hierarchies in Tax Disputes determination/resolution – 5 tier from AA to SC
- Delay/Long time taken in resolution of international tax disputes.

- Judiciary in India already overloaded/overburdened
- No specialized Tax court at HC/SC levels – Though HC/ SC have dedicated Tax benches.
- Govt./CBDT slow in issuing clear Instructions
- Due to Parliament logjams – important legislations like GST - stuck.

Hierarchy of Income Tax Authorities in India – For Remedies to Taxpayers

- Assessing Officer (AO)
- Commissioner of Income Tax (Appeals)(CIT(A))
- Income Tax Appellate Tribunal (ITAT)
- High Court (HC)
- Supreme Court (SC)

Alternate Dispute Resolution Mechanisms

- Dispute Resolution Panels (DRP)
- Settlement Commission
- Authority for Advance Ruling (AAR)
- Mutual Agreement Procedure (MAP)

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.