# TAX DISPUTE RESOLUTION – AN INDIAN JUDICIARY VIEW

**Note: This is the full text of the pre-recorded presentation by Mr. R V Easwar, President, Indian Income Tax Appellate Tribunal, for the 2010 Conference of the Foundation for International Taxation at the ITC Maratha Hotel, Mumbai. Extracts of this presentation will be played at the conference on December 3rd, 2010.**

**Mr. Dastur, Senior advocate, and chairman of the session, other distinguished members of the panel, delegates to this conference who have come from all over the world, tax professionals, officers of the IRS, ladies and gentlemen:**

**I thank you for the opportunity given to me to speak on the subject "Tax Dispute Resolution – an Indian Judiciary view". I feel diffident and humble at the same time, for I am aware that sitting on the dais and in the audience are persons of eminence in the field of international taxation and transfer pricing who have come from all over the globe. These are subjects with which I am not quite familiar. However, the topic given to me is somewhat broadly titled and I assume that it is not confined to the view of the Indian judiciary on transfer pricing and international taxation issues but is concerned about the view of the Indian judiciary generally towards resolution of tax disputes. It is on the basis of this assumption that I proceed to put forth my views. In any case, the basic principles, which I propose to refer, would be the same from the point of view of the judiciary, whether the case involves issues arising out of the domestic law or relates to international taxation or transfer pricing issues.**

**In India, the Income Tax Act, 1961 provides for and regulates the procedure for resolution of tax disputes. It makes no distinction between a case which involves domestic law issues or issues of international taxation, transfer-pricing and the like. Before this Act, it was the Indian Income Tax Act, 1922 which made provisions for the same. Basically, there is a 5-tier structure under these statutes through which tax litigation has to travel. At the bottom of the tier is the assessing authority who earlier used to be called the "Income Tax Officer" and who is now called the "Assessing Officer". He is the person who examines the return of income and applies the Income Tax Act in order to assess the income. The Act uses the word "assessee" to denote the person who files the return of income and is liable to pay the tax and in some dispensations he is referred to as the "taxpayer".**

**If the assessee is dissatisfied with the assessment of the income made by the assessing officer, he is entitled to appeal to an authority, who functions within the department of income-tax. He is called the "Commissioner of Income Tax (Appeals)" and is the second tier in the structure. Obviously, it is only the taxpayer who can file an appeal to him. Now the Commissioner of Income Tax (Appeals), though he functions under the administrative control of the Ministry of Finance and is invariably an officer of the Indian Revenue Service (the "IRS"),**

**he is expected to act independently, fairly and judicially. While dealing with the appeal, he is not supposed to be "revenue-minded", if I may use the expression, but is expected to see both points of view. He is of course entrusted with powers akin to an assessing officer to a limited extent which he can exercise subject to fulfillment of certain conditions, but basically he is an appellate authority.**

**Anyone who is dissatisfied with his decision is entitled to file an appeal to the Income Tax Appellate Tribunal, which constitutes the third tier of the structure. The Tribunal is placed under the Ministry of Law & Justice to ensure, inter alia, independence in its judgments. Now the decision of the Tribunal could be wholly against the taxpayer or the department of income-tax or partly in favour of the taxpayer and partly in favour of the tax department. Therefore, an appeal against his decision can be filed by the taxpayer or by the income tax department to the Income Tax Appellate Tribunal. From the decision of the Tribunal, the aggrieved party can file an appeal to the High Court having jurisdiction, but only on a substantial question of law.**

**The High Court constitutes the fourth tier. Normally the High Court would entertain an appeal only if it involves a substantial question of law, as against a simple question of law and the question as to what is a substantial question of law is well-settled by a series of judgments of the Supreme Court of India. On questions of fact, normally an appeal to the High Court is not admitted; however, an appeal would lie if the findings of fact entered by the Tribunal are perverse or are such that no person, properly instructed, could come to such a finding. Before the year 1998, the procedure was different. The party aggrieved by the decision of the Tribunal could not appeal to the High Court but could only ask for a reference to the High Court of a question of law. The High Court was vested with advisory jurisdiction and would express its opinion on the question of law and the Tribunal had to pass an order in conformity with the opinion expressed. The appeal was considered to be pending with the Tribunal, notwithstanding the reference to the High Court, and was finally disposed of only when it passed an order to give effect to the opinion expressed by the High Court.**

**The fifth and last tier of the litigation structure is the highest court of India – the Supreme Court. The decision rendered by the Supreme Court of India is final and is binding on all courts and tribunals functioning in the country and this position is expressly recognised in the Constitution of India. There are of course nuances and legal subtleties as to the binding nature of the judgments of the Supreme Court such as the ratio decidendi of the judgment, the obiter dicta, the passing or casual observations or remarks and so on, but those are beyond the scope of the present subject.**

**Let me now move on to some of the basic postulates of the approach of the Indian judiciary to the resolution of the tax disputes. I include, in the word "judiciary", the Income Tax Appellate Tribunal, the High Courts and the Supreme Court of India. As I have already mentioned, the judgments of the Supreme Court are binding precedents so far as the courts and tribunals below**

**are concerned and they are bound to apply them in their decisions. Judicial discipline has been one of the strong-points of the Indian judiciary and in tax litigation, this point has been stressed by the Supreme Court in several judgments, notable among them being Union of India v Kamlakshi Finance Corporation (AIR 1992 SC 711), a case which arose under the central excise law where the court cautioned that "if this healthy rule is not followed the result will only be undue harassment to assessees and chaos in the administration of tax laws".**

**In the case of High Courts, the general rule is that the judgment of one High Court is not binding on another High Court, though it may be of persuasive value. But it appears to me that by and large the High Courts in tax matters have adopted the practice of following the judgments of other High Courts on the footing that as far as possible, the interpretation of the provisions of an all-India statute such as the Income Tax Act must be uniform so that there is certainty and consistency permitting the taxpayers to plan their affairs accordingly.**

**Notable amongst the decisions of the High Courts are the judgments of the Bombay High Court in Manekhlal Chunilal & Sons v CIT (1953) 24 ITR 375 and CIT v Chimanlal J. Dalal & Co (1965) (57 ITR 285) where, despite disagreeing with the views expressed by the Madras and Gujarat High Courts, the Bombay High Court nevertheless decided the cases in accordance with the views expressed by those High Courts because the Income Tax Act was an all-India statute and uniformity of construction was desirable. The other judgment which comes to my mind is that of the Karnataka High Court in the case of B.C. Srinivasa Setty (1974) (96 ITR 667) where the case was adjourned for some time to enable the counsel for the department of income-tax to ascertain if they have accepted a judgment of the Madras High Court deciding the issue against them. It ultimately turned out that the income-tax department did not press the appeal before the Supreme Court against the Madras judgment and had not even preferred appeals against similar decisions rendered by the Delhi, Calcutta and Kerala High Courts. That weighed considerably with the Hon'ble Chief Justice of the Mysore High Court while giving his judgment against the income-tax department.**

**The Supreme Court in Berger Paints v CIT (2004) 266 ITR 99 insisted on the income-tax department being consistent in the matter of accepting the judgments of the High Courts and held that if it had not filed any appeal against the judgment of a High Court, it cannot file an appeal on the same point against the judgment of another High Court without just cause. The advantage in having judicial consensus on a point arising under the tax law is that it enables those who wish to do business in India to be reasonably certain as to their tax liabilities and that helps them take decisions relating to business investments in India.**

**Just as the Supreme Court and the High Courts strive to achieve uniformity of interpretation in matters relating to direct taxes, they are strict in their expectation that the Income Tax Appellate Tribunal also decides issues consistently by following the rules of judicial discipline and decorum. In several**

**judgments the Supreme Court and the High Courts have reminded the Tribunal about the need to follow its own earlier decisions on the same set of facts and when the legal position has remained unchanged. Any departure without proper justification from the earlier views is not easily tolerated and the Tribunal is required to "atone" for its error by appropriately rectifying its order.**

**The Tribunal, which is recognised as a judicial body, has its own procedure in disposing of the appeals. The procedure to be followed is sacrosanct and comes up for critical appraisal by the High Courts and the Supreme Court. It is beyond the scope of this topic for me to dwell deep into the nuances of the statutory provisions relating to the functioning of the Tribunal but I will make a brief reference to how our functioning is supervised and regulated by the higher courts. There are some important judgments handed down by the Supreme Court (as also High Courts) as to what are the 'do-s and don't-s'. Basically our duties are: (a) to hear patiently both the parties; (b) to hold discussions among ourselves after the hearing; (c) to consider each and every argument and evidence thoroughly and dispassionately; (d) to record clear findings of fact; (e) to apply the relevant law and the binding precedents to the facts found and finally (f) to pass a speaking order, recording our conclusions both of fact and law. Every step in this process is indispensable.**

**The general rule that the Tribunal is the ultimate fact-finding body and its findings of fact cannot be lightly disturbed is subject to the exception that if those findings of fact are perverse it is open to the High Court and Supreme Court to disturb them. This puts the Tribunal under the strict duty to take due care and caution while recording findings of fact and to avoid remaining smug in the belief that the findings, even if they are not based on evidence, are binding on the higher courts.**

**In recognition of the onerous duty placed on it, the Tribunal has framed its own rules governing the procedure to be followed in hearing appeals. The rules are aimed at transparency and providing full opportunity to both the sides – the taxpayer as well as the revenue – to put forth their rival viewpoints effectively as also to get the facts properly brought on record. There is provision in the rules for receiving additional evidence, evidence that was not adduced before the revenue authorities for various reasons. There is provision enabling the parties to file additional grounds of appeal. There is a procedure prescribed for filing affidavits when required and when pleas contrary to the recorded findings are sought to be raised. The rights of a respondent to defend the impugned decision are set out. In actual practice, I believe that it is the general experience of those who are familiar with the working of the Tribunal that by and large a broad and informal approach is adopted keeping in view the ends of justice – what you may call a "justice-oriented approach".**

**While on the functioning of the Tribunal as part of the mechanism for tax dispute resolution, an important aspect deserves mention. The proceedings before the Tribunal are conducted not in the manner of a "lis" or an adversarial litigation, which is the hallmark of any civil litigation, but in realisation of the true position that the proceedings are aimed only at the adjustment of the tax**

**liability of the assessee. There are some eminently readable judgments on this aspect of the matter, the most remarkable – if I may say so with greatest respect – being that of the Madras High Court in the case of Indian Express (140 ITR 705), following the view taken in some English cases. Once we are able appreciate that it is not a "lis" but we are only asked to determine or adjust the ultimate tax liability of the assessee, with the assessee and the officers of the revenue assisting us in doing so, the true purpose of the appellate exercise comes to the fore. The well-settled legal position that the Income Tax Appellate Tribunal is not bound by strict rules of evidence helps matters move faster, shorn of technicalities. The finished product – the ultimate decision of the Tribunal – is one of substantial justice.**

**One of the important consequences of an assessment to income-tax is the demand and recovery of the tax assessed. To borrow Sir Frederick Pollock's expression, assessment of the tax is to the collection what a lighted matchstick is to a trail of gunpowder and nothing can stop it! Now business is done mostly with borrowed funds and a taxpayer may find it difficult to pay huge taxes, especially if he feels that he has been unjustly asked to pay the huge amount. The Supreme Court of India in the important case of ITO v Mohamed Kunhi (71 ITR 815) made it clear that the Tribunal has the power to grant stay of recovery of taxes on the footing that it is part and parcel of the appellate power. It opined that the fruits of the litigation would be rendered nugatory if the taxpayer finds himself succeeding in the case but the taxes have already been recovered from him. It declared that the Tribunal can, in a fit case and subject to certain parameters, stay the recovery of taxes till the disposal of the appeal. There have been amendments to the provisions of the Income Tax Act recently with a view to regulating this power and without going into them in detail, I may merely mention that the recovery of taxes cannot be stayed by the Tribunal beyond a period of one year.**

**I must now move on to touch upon some fundamental principles that govern the approach of the judiciary to tax dispute resolution in India. All of them have been handed down by our courts, particularly the Supreme Court of India. The trend by and large has been to protect the rights of the assessee and subject him to a fair assessment to tax guided by the constitutional mandate that no tax shall be levied or collected except by the authority of law (Art. 265 of the Constitution of India). It is in this perspective that the following principles were laid down by the Supreme Court:**

a) **The assessing authority exercises quasi-judicial functions and should be governed in his functions by judicial considerations and must conform to the rules of natural justice.**

b) **He cannot make an assessment to tax without first giving an opportunity to the assessee to rebut the material or evidence gathered by him which he proposes to use against the assessee: Dhakeswari Cotton Mills v CIT (26 ITR 775).**

c) **The assessee must be given the right to inspect the record and all the relevant documents before he is called upon to lead evidence in rebuttal: Surajmall Mohta v Viswanatha Sastri (26 ITR 1).**

d) **The assessing officer, though strictly not bound by the Evidence Act, may still invoke the principles enshrined in that Act: Vasantlal & Co v CIT (45 ITR 206).**

e) **The assessment made by the assessing officer should not be based on bare suspicion, surmise or conjecture but should be based on materials: Dhakeswari Cotton Mills (supra).**

f) **It is expected of the assessing officer to help and guide the assessee in declaring his income after making proper claims for deduction or exemption: CIT v Mahendra Mills (243 ITR 56). He is not supposed to take advantage of the ignorance of the assessee in making the assessment.**

**The above principles are to be kept in view by the assessing officer. Principles for the guidance of the appellate authorities functioning under the Income Tax Act have also been formulated by the Supreme Court. Some of them which are relevant for the functioning of the Income Tax Appellate Tribunal are:**

a) **The Tribunal's power to interfere with the orders of the lower authorities must be exercised on judicial considerations. It is bound to set out the reasons for its decision so that the aggrieved person knows the case against him: CIT v Walchand & Co Pvt. Ltd. (1967) 65 ITR 381 and Esturi Aswathaiah v CIT (66 ITR 478).**

b) **The Tribunal must consider every fact for and against the assessee and must not act on irrelevant considerations or conjectures: Omar Salay Mohammed Sait v CIT (37 ITR 151).**

c) **While appreciating the evidence, the Tribunal is not expected to put on blinkers and even where there is documentary evidence one way or the other, it is open to the Tribunal to apply the test of human probabilities and the normal course of human conduct in ascertaining the veracity and reliability of such evidence: CIT v Durga Prasad More (1971) (82 ITR 540).**

d) **The Tribunal cannot record findings of fact by their mere *ipsi dixit* irrespective of whether they are sustainable in law or on the materials on record: CIT v S.P. Jain (1973) 87 ITR 370**

e) **Judgments of the Supreme Court and the jurisdictional High Court are binding on the Tribunal and they should be followed. Similarly, an order of a co-ordinate bench rendered on the same set of facts should be followed. In case the correctness of the earlier order is doubted for valid reasons, the bench of the Tribunal should not dissent but should place the appeal before the President of the Tribunal with a request to constitute a larger bench of 3 or more Members to decide the appeal.**

**The procedure of constituting such larger benches of 3 or more Members either administratively or on a reference by a judicial order has helped resolve several issues which in turn has helped in bringing down the docket of the Tribunal in recent times.**

**In order to curb arbitrary or capricious actions on the part of the revenue authorities, the courts in India, and the High Courts in particular, have not hesitated to invoke the extraordinary jurisdiction of issuing writs under Art. 226 of the Constitution of India. Under section 293 of the Income Tax Act, no proceeding taken under the Act can be questioned in a civil court, but this section is subject to Art. 226. In Pooran Mall v Director of Income Tax (1974) 96 ITR 390 the Supreme Court pointed out that the remedy by way of writ has become part and parcel of the established judicial procedure and cannot be considered as something outside it. The writ jurisdiction can be invoked only where the facts are not disputed and against arbitrary action or action without jurisdiction.**

**Broadly speaking, a writ of "mandamus" will be issued when the applicant shows non-compliance with a mandatory provision of the statute which requires the authority to act in a particular way. An instance where mandamus was issued is the Supreme Court case of Bhopal Sugar Industries Ltd v ITO (1960) 40 ITR 618 where the assessing officer was refusing to comply with the directions issued by the Tribunal. There have been instances where the writ of "certiorari" was issued to quash an order passed by the Commissioner of Income Tax in revision or to quash certificates issued for recovery of taxes. This writ can be issued when there is patent error in the order or where a question of jurisdiction is raised or there is allegation of infringement of fundamental rights.**

**A writ of "prohibition" will issue to stop an authority from proceeding further where he has no jurisdiction or where he has exceeded his jurisdiction or where he seeks to enforce an illegal order levying taxes. Such writs have also been issued to stop the assessing officer from proceeding further pursuant to notices issued for reopening the assessment where the necessary conditions precedent to the issue of notice are not fulfilled and thus there is patent lack of jurisdiction. The power to issue writs also extends to the passing of all consequential orders in order to mould the relief according to the facts and circumstances of the case. The writ remedy thus affords protection to assesses against arbitrary or ex-facie illegal or erroneous actions or where there is absence of jurisdiction. The advantage of the writ remedy is that the assessee need not go through the entire appellate procedure, involving time, energy and money and the action complained of is nipped in the bud.**

**The tax law reports abound with instances of writs issued by High Courts in India and perhaps the largest number of writs has been issued against notices for reopening the assessments under sec.148 of the Income Tax Act. Writs have also been issued questioning the searches carried out under section 132 or against recovery actions under sections 220, 226(3) etc. Several non-residents have questioned notices issued to them in writs. It must however be remembered that the remedy by way of writ is a discretionary remedy. It will not normally be entertained where there is an effective alternative remedy by way of appeal, revision etc. Further, there should be no *laches* on the part of the person approaching the writ court. One more condition is that the facts should be undisputed, for no writ court will investigate into the facts. It should also be remembered that ultimately the writ court will not pass an order as an appellate authority and will not substitute its view for those of the revenue authorities.**

**Having said that, it seems to me that the writ remedy which is an extraordinary remedy can be invoked in extraordinary circumstances.**

**One of the main tasks undertaken by the courts and tribunals while dealing with tax matters is that of interpretation or construction of the statutory provisions. The Income Tax Act contains charging provisions, penal provisions, machinery provisions, provisions for deduction or exemption from tax and those relating to collection and recovery of the tax. The charging provisions – those which provide for the charge of the tax – have received strict interpretation, founded on the words of Lord Cairns in Partington v AG (1869) LR 4 HL 100, Lord Halsbury in Tenant v Smith (1892) (AC) 150 and Rowlatt J in Cape Brandy Syndicate's case (1921) 1 K.B. 64 that in a taxing statute one has to look at what is clearly said without giving any room for intendment and without presuming the charge to tax. I have already referred to Art.265 of the Constitution of India under which no tax shall be charged or collected except by the authority of the law.**

**The Supreme Court held in CIT v Elphinstone Spg. & Wvg.Mills (1960) 40 ITR 142 that when the words of a taxing statute fail, so must the tax. In the case of ITO v K.P. Varghese (1981) 131 ITR 597, the Supreme Court held that no tax can be imposed by inference or analogy and while imposing tax one must have strict regard to the letter of the law. But once the charge is clearly laid, considerations of equity and hardship have no place. Another principle arising out of this fundamental principle is that no tax shall be imposed by subordinate legislation such as executive notification or a rule or an agreement: Bimalchandra Banerjee v State of Madhya Pradesh (AIR 1971 SC 517).**

**I venture to think, subject to correction, that the argument frequently advanced before us in matters relating to interpretation of double tax avoidance agreements and its juxtaposition with the domestic law, to the effect that if there is no charge under the domestic law one cannot look at the treaty and interpret it in a manner that some tax liability can be imposed on the non-resident under the same, is founded on this principle, given the fact that the treaty between the two countries is entered into under the executive power of the State. The static and ambulatory rules of construction have also been applied by the Tribunal in a couple of cases to interpret double taxation avoidance treaties. In one tax case, the Supreme Court has applied the rule of "updating" construction to the concept of ownership of immovable property to stay tuned to the changing times and realities.**

**In respect of the machinery provisions such as the procedure for assessment, collection and recovery of the taxes the rule of strict construction stands excluded and in such cases an interpretation that will enable practical implementation will be generally favoured. In the case of penal provisions, they will be subjected to the rule of strict interpretation and the taxpayer will not be penalised unless he strictly falls within the letter of the law and not merely within the spirit of the law. The interpretation of the penal provisions of the tax laws is subject to the general rule that in case of doubt or ambiguity about the guilt of the assessee, the benefit thereof should be given to him and he should**

**be relieved of the penalty. In cases of penalty for concealment of income the law has almost always been that a guilty mind is necessary and mere difference between the declared income and the assessed income is not sufficient.**

**So far as the exemption or deduction provisions are concerned, the general position is that it is for the assessee to strictly prove that he falls within the provision so as to be entitled to the same and once that is done, the procedural and formal aspects need not be strictly shown to have been complied with and compliance in substance is sufficient. In other words, once the entitlement to the deduction or the exemption from tax is shown to exist, the procedural formalities have been looked upon by the judiciary as directory provisions and not mandatory provisions and the rule of liberal construction needs to be applied. For instance, some provisions for tax relief insist on an audit of the accounts of the unit claiming exemption as well as that the audit report should be attached to the return of income filed before the assessing officer.**

**The courts have held that while the conduct of the audit of the accounts is a mandatory condition for claiming the exemption, the filing of the same with the return is merely directory and it would be sufficient compliance with the provision if the audit report is placed before the assessing officer in the course of the assessment proceedings. Thus both the rules – the rule of strict construction and the rule of liberal or beneficial construction – apply to a claim for deduction/relief/exemption, but at different stages. At the stage of entitlement to the benefit, the rule of strict construction applies; at the stage of complying with the procedural formalities, the rule of liberal or concessional construction applies. This position has been recognised by the Supreme Court in Union of India v Wood Papers Ltd. (AIR 1991 SC 2049). I will not be wrong in saying that by and large a purposive approach has been adopted by the judiciary bearing in mind the object behind the provision granting relief/deduction/exemption.**

**A golden rule which has been adopted by the courts in India, starting from the Supreme Court judgment in CIT v Vegetable Products Ltd. (1973) 88 ITR 192 and CIT v Naga Hills Tea Co Ltd. (1973) 89 ITR 236 is that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. But more than one interpretation of the provision must be reasonably possible and one should not attempt to introduce into the provision some artificial or non-existent ambiguity and then proceed to decide in favour of the assessee. Thus the golden rule must be applied with proper caution and control.**

**While on the subject of interpretation of taxing statutes as applied by the courts in India for resolving tax disputes, I must mention about the approach of the judiciary to the circulars issued by the Central Board of Direct Taxes ("CBDT"). The approach has been to view them as having binding force upon the officers of the tax department and an assessee can ask for enforcing them if they are in his favour. The early decisions of the Supreme Court in Navnit Lal Jhaveri (1965) 56 ITR 198 and Ellerman Lines (1971) 82 ITR 913 held that beneficial or**

**benevolent circulars are binding on the officers of the revenue and they are bound to apply them in favour of the taxpayers.**

**Right up to the judgment in UCO Bank v CIT (1999) 237 ITR 889 this position has held good and it continues. Thereafter in one of the cases before the Supreme Court it was held that a circular would prevail even over the judgment of the Supreme Court and this position was doubted by one of the judges of the Supreme Court in a later case, but ultimately no firm view was expressed since the case could be disposed of on another aspect of the applicability of the circular. In UOI v Azadi Bachao Andolan (2003) 263 ITR 706 – a judgment of the Supreme Court with which, I am sure, all of you are familiar as it considered several issues including the treaty override – the circulars were held binding. I must clarify that they are not binding on the Tribunal or the higher courts.**

**There is another aspect of the matter. Circulars issued by the CBDT can be looked upon as "contemporanea exposito" to gather the intention of the statute as was done by the Supreme Court in K.P. Varghese v ITO (1981) 131 ITR 597 where it was held that the rule of construction by reference to "contemporanea exposito" is a well-established rule for interpreting a statute by reference to the exposition it has received from contemporary authority. In that case the CBDT issued a circular disapproving the application of an anti-avoidance provision by its officers even with regard to bona fide transactions. The Supreme Court held that the circular must be given effect to in striking down the action of the revenue authority as it represented an exposition from a contemporary authority. Thus, in certain circumstances, a circular has even controlled or aided the interpretation of a statutory provision.**

**Circulars issued by the CBDT have also helped minimise tax litigation at the level of the Income Tax Appellate Tribunal. In the recent past, the Board has come out with several of them setting monetary limits and stipulating that the income-tax department will file appeals to the Tribunal only if the tax involved exceeds those limits. Several High Courts have enforced these circulars and have dismissed the appeals *in limine* if they have been filed in contravention of the circulars. It is noteworthy that the courts have not gone by the strict principle that an appeal is a statutory right which cannot be denied on the basis of conditions that have not been laid down in the statute, but have preferred to take a practical view in the larger interests of tax litigation.**

**The rule of "piercing the corporate veil" has been applied by the courts in India in taxation matters in different contexts. The right of the income-tax authorities to lift the corporate veil and look into the economic reality behind the legal façade was upheld by the Supreme Court in Juggilal Kamalapat v CIT (1969) 73 ITR 702. That was a case of compensation ostensibly paid for premature termination of a managing agency but the revenue authorities found that in reality it was a colourable transaction for the avoidance of tax in the hands of the real beneficiaries. In Wood Polymer Ltd. In re: (1977) 109 ITR 177, the Gujarat High Court refused to accord approval for a scheme of amalgamation of two companies as it was found, on applying the rule of lifting the corporate veil, that the real object was the avoidance of substantial capital gains tax.**

**In Jindal v CIT (1987) 164 ITR 28 the Calcutta High Court pierced the corporate veil and found that there was an attempt to circumvent the provisions relating to taxation of deemed dividend and refused to give effect to the corporate identity. In Life Insurance Corporation v Escorts Ltd (1985) Supp (3) SCR 909 the Supreme Court explained the circumstances under which the courts can pierce the corporate veil and one such circumstance is where a taxing statute is sought to be evaded. It can therefore be taken as fairly well-settled that in tax matters such a power is available to the revenue authorities as also the courts and tribunals where the circumstances and the facts warrant it.**

**Closely connected to the theory of lifting or piercing the corporate veil is the approach of the judiciary in India to tax evasion. I believe that there can be no two opinions about the need to check and prevent tax evasion, but the question which often baffles the judiciary is whether on the facts and circumstances of a case it can be said that the line of tax planning was crossed and the field of tax evasion was entered. Sham transactions, smokescreens, colourable devices – these are how the steps taken by taxpayers are described by the revenue authorities. Evasion of tax by unethical or dubious means has always been disapproved, to my humble understanding, by the courts in India.**

**I believe that the approach of the judiciary still is the same, post McDowell and post Azadi Bachao Andolan. I am steering clear of the controversy as to what is the impact of the decision in Azadi Bachao Andolan on the earlier McDowell decision. I will only say that the judiciary – in India or elsewhere – will not be a mute spectator when the facts and circumstances of a particular case clearly warrant the inference that there has been a dubious, though seemingly legal, method adopted with the sole motive of evading taxes.**

**In the preface to my speech I had indicated that I am not familiar with the issues arising under the international taxation questions and transfer pricing matters and therefore will not be able to cover them in this speech or tell you about the judiciary's approach to these issues. That is why I had confined myself to the general approach of the Indian judiciary to tax dispute resolution issues arising under the domestic law and the process evolved over the years to instill trust and confidence in the courts and tribunals. I am sorry that I am not able to rise to your expectations in matters relating to international taxation and transfer-pricing. So far as international taxation and transfer-pricing issues are concerned, I think they have been dealt with adequately by the Income Tax Appellate Tribunal in a large number of cases. Since I have never dealt with a transfer-pricing case, I am hardly competent to tell you about the approach adopted. With regard to tax treaty issues, some important issues are *subjudice.* I would therefore very briefly touch upon the approach of the judiciary regarding the other international taxation issues as I understand them.**

**In two leading judgments – CIT v P.V.AL. Kulandayan Chettiar (2004) 267 ITR 654 and UOI v Azadi Bachao Andolan (2003) 263 ITR 706 – the basic issues regarding treaty over-ride have been settled. As I understand the position, one has to first look at the domestic law to find out if the non-resident is taxable; if**

**he is, then one has to look at the treaty to find out if there is any exemption or benefit available to him. If there is, he should be given the benefit. A treaty can confer an exemption or benefit, but cannot impose a tax. If the non-resident does not fall under the taxing provisions of the domestic law, then there is really no need to look into the treaty. In this I think the approach of the Indian judiciary is not different from those in other countries. In Azadi Bachao, treaty shopping was not frowned upon and it was suggested that the remedy lies in amending the statute.**

**There is also a possibility of the view being expressed that in Azadi Bachao case the Supreme Court, impliedly approved of double non-taxation when it said that the non-resident was taxable only in Mauritius (and not in India) being fully aware that there was no capital gains tax payable there. A similar result followed when the Madras High Court held in the case of CIT v Laxmi Textile Exporters (2000) 245 ITR 521 that the finding of the Sri Lankan authorities that the Indian resident had a permanent establishment there and the income was exempt from Sri Lankan tax was binding on the Indian revenue authorities. The result was that neither the source State (Sri Lanka) nor the residence State (India) could tax the income. At present, till an authoritative pronouncement is made by the highest court in a case where the issue directly arises, it would appear that there is a debate as to whether a tax treaty can result in double non-taxation when its function is only to avoid double taxation.**

**As the law relating to tax treaties is at a developing stage, there is likely to be some uncertainty as to what are the aids of construction which the courts or tribunal can adopt. It is in this context remarkable, if I may say so with great respect, that the Andhra Pradesh High Court in the case of CIT v Vishakhapatnam Port Trust (1983) 144 ITR 146, decided in the year 1983, could find material to support their decision which obviously must have come after a good deal of research by counsel and the learned judges who decided the matter. On a personal note – if I am permitted to say so – when I had the privilege of assisting my senior before the Madras Special Bench of the Tribunal in the case of Kulandayan Chettiar in 1982 (1983) 3 ITD 426(SB) I recollect that we did not have much of case-law or rules of interpretation to start with on a subject that was quite novel at that time. All I remember is a thin book on double tax agreements written by Mr. Pophale and a couple of judgments of the Madras High Court on Indo-Ceylon tax relief arrangement. One had to develop the case on first principles.**

**Be that as it may, there are now model conventions and authoritative treatises which have been referred to as aids to construction in Azadi Bachao. The language used in another treaty entered into by the same country is often compared and contrasted to ascertain the meaning. The protocol attached to a treaty is also referred to as an aid to construction; so also is a memorandum of understanding attached to a treaty. Decisions of foreign courts are also to be taken note of. There are several orders of the Income Tax Appellate Tribunal in which all these have been referred to in attempting to arrive at a satisfactory interpretation of the treaty.**

**One can go on, but I think I must end now having regard to the time constraint as also the drying up of ideas! I have tested your patience enough; there is also the risk of exposing my ignorance on the subject more. I thank the IFA once more for giving me this opportunity and my only regret is that I could not be personally present in the conference and meet you all. I must add that what I have said in this speech of mine are my personal views and opinions and do not necessarily reflect the views of the Income Tax Appellate Tribunal. They are not to be quoted or held against me!**

**Thanks once again and good day!**