

**THE JUDICIARY COLD-SHOULDERED FOR THREE DECADES – ALL HOPES
ON THE AUSPICIOUS OCCASION OF AZADI KA AMRIT MAHOTSAVA**

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The Judiciary is one of the pillars involved in the process of Nation building and it has not been given its deserved recognition. On the auspicious occasion of *Azadi ka Amrit Mahotsava* in 2022, i.e., 75 years of Independency, it is hoped that the Hon'ble Minister of Law & Justice will put forward the cause of Judiciary which is essential to improve administration, attract foreign investment and enhance the economic growth of our Nation.

During the Union Budget speech on July 24, 1991, Hon'ble Shri Manmohan Singh, the then Finance Minister **(1991) 190 ITR 89 (St)** stated that, *"The foreign exchange crises constitutes a serious threat to sustainability of growth process and orderly implementation of our development programs. Due to the combination of unfavorable internal and external factors, the inflationary pressures on the price level have increased very substantially since mid-1990. The people of India have to face double digit inflation which hurts most of the poorer sections of our society. In sum, the crises in the economy are both acute and deep. We have not experienced anything similar in the history of independent India"*.

The Economic Liberation of 1991, has helped the country to grow in right direction. India has attracted foreign investments ever since. Indian entrepreneurs are also able to build tech-companies which are recognized globally.

One must also acknowledge that the successive Governments have embraced the liberal economic policies. The recent, [Taxation Laws \(Amendment\) Bill, 2021](#) introduced to nullify the retrospective tax demand vide Finance Act, 2012 is a brilliant move, which will fortify the MNC's trust to invest in the India. Further, digitalization has helped India to face the challenges during

the pandemic induced lockdown. Hon'ble Finance Minister Smt. Sitharaman during her budget speech on February 01, 2021 (**2021) 430 ITR 33 (St)**) has expressed her vision for *Atma Nirbhar Bharat*, to be achieved when we celebrate *Azadi ka Amrit Mahotsava* in 2022, on the occasion of 75 years of independence. Hon'ble Finance Minister stated that budget proposal for 2021-22 rests on 6 pillars:

- i. Health and Wellbeing
- ii. Physical & Financial Capital and infrastructure
- iii. Inclusive Development for Aspirational India
- iv. Reinvigorating Human Capital
- v. Innovation and R& D
- vi. Minimum Government and Maximum Governance

Vision of the Government is acknowledged and appreciated by professionals and industry leaders. However, the moot question is whether the vision is achievable ignoring the development of the Judiciary.

If one reads the Budget speeches of the successive Finance Ministers since 1991, there is no reference or discussion on the future of the Judiciary. The Hon'ble Supreme Court in the case of **Noor Mohammed vs. Jethanand and Anr. AIR 2013 SC 1217** observed that expeditious justice is a Constitutional command. Therefore, speedy Justice is mandated under Article 21 of the Constitution of India.

In 1999, on the occasion of Golden Jubilee of the Income tax Appellate Tribunal, Shri. K. K. Venugopal, Senior Advocate (Present Attorney General of India), in the souvenir of the ITAT, published an article titled, "*Access to Justice the Indian Experience*", few lines from the Article are reproduced below:

"Any number of laws may be passed by the legislatures for the welfare of the people but if non-implementation of the same cannot be remedied

except 10 or 15 years, then surely the judicial system itself needs drastic overhaul.

It is unfortunate that Governments have not been setting apart the necessary funds in the financial budgets for expanding the Court system to keep space with veritable litigation explosion. The advance planning that Governments do in the regard to the economy generally, including the industries run by it for meeting the increasing demands for its products is absent when it comes to the area of litigation which, by and large, receives a step-motherly treatment at the hands of the Government.”

Further, [Shri Harish Salve, Senior Advocate while sharing his views on the subject of on the subject of “Constitutionality of tax laws”](#) before the ITAT Bar Association Mumbai on June 25, 2021, had expressed the view that Financial Independency to the judiciary is the need of the hour.

Professionals have on several occasions made an attempt to highlight the difficulties faced by the judiciary along with their humble suggestions before the Hon’ble Prime Minister, Hon’ble Finance Minister and the Hon’ble Minister for Law & Justice with a view to have a road map for the Judiciary and achieving mandate of the Constitution.

1. Appointment of Judges

One of the road blocks for the development of the economy is the huge pendency of litigation before various courts. No doubt the Government is taking measures to reduce the litigation, however the process is very slow and is not able to achieve its desired objects. One of the reasons for delay in disposal of matters is in not appointing the required judges on time. As the Government is aware of the requirement of judges on a year-on-year basis, the process of appointment can be done well in advance so that vacancies do not affect dispersion of justice and transition is smooth.

Mumbai is considered as financial capital of India. For disposal of tax matters in Direct and Indirect taxes, the High Court needs at least three tax benches i.e., one for Direct taxes, one for Indirect taxes and the other one for disposal of Writ Petitions.

The tax appeals which are admitted in the year 2000 are still pending for final disposal. On account of shortage of judges, the High Court is not in a position to have even two tax benches. There are more than 5,000 tax appeals which are pending for final hearing and more than 5,000 tax appeals are pending for admission. Some of the matters which are pending for final hearings may require considerable time. It may be practically difficult to dispose more than five matters per day. One cannot comprehend as to when an appeal admitted in the year 2021 will be fixed for final hearing.

The Government could also consider on the elevation of meritorious members of the Tribunal to the High Court. Their expertise and experience would help in speedy disposal of tax matters.

Further, as per Section 245R (6) of the Income-tax Act, 1961 (**Act**), Authority for Advance Rulings has to pronounce its ruling in writing within six months of the receipt of application. However, the Authority for Advance Ruling could never decide the issue as per the mandate of the Act due to non-appointment members, Vice-Chairman and Chairman. It can be observed in some of the recent reported cases where an application for Advance Ruling which was filed in the year 2012, admitted in the year 2017 and decided in the year 2020. **(2021) 434 ITR 441 (AAR)**. How can a taxpayer can decide their tax liability if the Authority for Advance Ruling takes eight years an issue to decide instead of six months?

The Finance Act, 2021 abolished then Authority for Advance Ruling and introduced the new section 245-OB of the Act, Board of Advance Rulings. Time will tell the efficacy and effectiveness of the new Board.

Shri N.A Palkhivala, Senior Advocate in his Article titled, [“The Maddening Instability of Income tax law”](#) which was published in the Souvenir of the Members conference 1991, reads, “*One of the main reasons for India’s backwardness and stunted development is that we as a nation have no sense of time at all. We are individually intelligent and collectively foolish. It is characteristic of us that in our national language the word ‘kal’ is used both to denote yesterday and tomorrow. I attribute this absence of time sense to two factors. We were the first country in the world to evolve the concepts of eternity and infinity: against the backdrop of eternity what does the waste of even several decades matter? Secondly, we were the first to evolve the doctrine of reincarnation: if you waste this life, you will have several ‘more in which to make good.’*”

In the year 1999, Income tax Appellate Tribunal had pendency of 3,00,597 cases; as on July 2021 it is only 65,000 cases. The interview for appointment of new members were held on July 6, 2018, selection process was completed in November 2019. Hon’ble Supreme Court in the case of **Madras Bar Association v. UOI 2020 SCC Online 962 dated November 27, 2020** has directed the Union of India to appoint the Judicial and Accountant Members within period of three months. The Hon’ble Supreme Court once again in the case of **Madras Bar Association v. UOI (2021) 128 Taxmann.com 218 (SC) (Order dated July 14, 2021)** directed that the vacancies in the Tribunals are filled up, without delay. The Hon’ble Court observed that “Access to justice and confidence of the litigant public in impartial justice being administered by Tribunals need to be restored”.

Recently, the Centre has introduced the [Tribunal Reforms Bill, 2021](#). A third round of litigation between the Madras Bar Association and the Union can be anticipated.

If the Government appoints the required members, the pendency may reduce to less than 50,000 cases. The tax payers will be able to get the justice from the ITAT which is Final Fact Authority within six months of the filing of an

appeal before the Appellate Tribunal. All India Federation of Tax Practitioners (AIFTP) in their letter addressed to the Hon'ble Law Minister made an appeal to the Hon'ble law Minister to appoint the Hon'ble Members at the earliest.

2. Appointment of Retired Judges and re-appointment of Members of the Appellate Tribunal.

Article 224A of the Constitution of India gives power to Chief Justice of a High Court with the prior consent of the President to request any person who held the office of a Judge to sit and act as a Judge. One of the suggestions made by the tax professionals before the Government from time to time is for appointment of Retired judges for disposal of taxation matters. Former Chief Justice of India Hon'ble Justice Mr. Shard A. Bobde had suggested [for appointment of Retired Judges with expertise on those fields of laws as an *ad hoc* judge](#). The term of such a judge could be extended.

The Government has introduced new uniform policy of the Members of the various Tribunals. As per the new policy the appointment of members will be on tenure basis and retirement age will be 67 years and the President will retire at the age of 70. At Income tax Appellate Tribunal there are a good number of members whose knowledge and integrity are beyond doubt. As those members who are appointed on prior to [The Tribunals Reforms \(Rationalisation and Conditions of Service\) Ordinance, 2021](#) will retire at the age of 62 years and similarly, the President at the age of 65 years, it is worth considering that selection committee may reappoint these honorable members till the age of 67 years and the Hon'ble President till the age of 70 years, if all other conditions are satisfied. Further, the current members need not be subjected to an interview which would be applicable to fresh applicants. Further also, the current Hon'ble members' seniority should not be impacted upon the enactment of [the Tribunal Reforms Bill, 2021](#). This will help to reduce the pendency of matters before Income Tax Appellate Tribunal.

3. Financial Independency for the judiciary

AIFTP has made number of representations to the Government for a separate allocation of funds to be made for the Judiciary, as in the case of Defense and other Sectors. This will help the judiciary to improve their infrastructure and better the administration of justice. The Hon'ble Law Minister could interact with various Bar Associations and consider the needs of the Judiciary. India can only progress if villages are made self-sufficient, similarly the basic infrastructure must be improved in the Courts that are situated in smaller cities and towns.

One of the topics for the Dr. Nani Palkhivala Research Paper Competition is on "*Access to Justice in Tax matters (Direct taxes, Indirect taxes (With special reference to GST) and Prosecution)*". AIFTP will be inviting research article from law students from more than 300 law colleges. A consolidated paper with the best ideas will be presented to the Government for consideration.

4. Linking of Supreme Court with High Courts – E Benches of the Supreme Court to deal with direct and indirect taxes.

E-bench of the Supreme Court can be an effective alternative for the regional benches of the Apex Court. The E-Benches of the Apex Court will help render speedy justice to the litigants thereby saving huge cost incurred on travelling back and forth to New Delhi.

A common man cannot think of approaching the Apex Court for justice as it is beyond his reach. The minimum cost for single adjournment costs about Rs. 1 lakh rupees. Thus, one can fathom how expensive it would be for a citizen to approach the Supreme Court. One may consider constituting e-benches of the Supreme Court. The hearing of the matter before the Apex Court can be done by linking various High courts and affording facilities for arguing the matter before the Apex Court from the respective High Courts. The Supreme Court can take up issues location wise e.g., a day could be for matters arising from the Hon'ble Bombay High Court, another day could be

for matters from the Hon'ble Madras High Court or other High Courts, etc. Initially, an option may be given to the parties to hear the matters through the e-Bench or the regular Bench.

The ITAT has started the e-proceedings at Mumbai through which the matters of the Nagpur Bench are heard by the Hon'ble Members situated at Mumbai. The experience has been satisfactory for both the tax payers and the Department. The E-Bench of Supreme Court may initially be started for hearing on SLPs related to tax matters. One Court room of each High Court may be converted in to an E-Bench of the Supreme Court.

Due to Pandemic, several matters are argued through the virtual mode. Many advocates & assessee representatives will believe that the future of tax litigation will be through a combination of virtual as well as physical mode.

5. Goods and Service tax (GST)

GST is one of the major reforms in the taxation of Indirect taxation the concept being *One Nation One Tax*. Though the new Act was introduced in the year 2017, till date the Government is not able to establish a GST Tribunal, which is the need of the hour. The decisions rendered by the Appellate Authority for Advance Ruling has brought an amount of uncertainty. Writ Petitions are filed before various High Courts across the Country; this shows the difficulties faced by the traders. The need of the hour is to constitute the GST Tribunal at the earliest. Similar to the Hon'ble ITAT, the GST Tribunal should be made functional under the Ministry of law & Justice.

The Hon'ble Supreme Court in the case of **Amit Sahni vs Union of India** on August 06, 2021 questioned the Centre on non-creation of a GST Tribunal although the Act was introduced 4 years ago.

Dénouement

All those who are concerned with judicial independency may share their thoughts with AIFTP so that the Representation Committee can take up the cause with the Hon'ble Ministry of Law & Justice. Views can be shared at aiftpho@gmail.com