

THE INCOME TAX APPELLATE TRIBUNAL – MR. PATIL CALLS FOR A JUDICIAL AUDIT

(By Justice R.V. Easwar, Former Judge, Delhi High Court and former President, Income Tax Appellate Tribunal)

I know I am stirring a hornets' nest. I know this will not go down well in certain quarters. I know because of this I may lose a few good friends. I know that I am treading a field where angels fear to tread! I know I will be reminded that once I was part of the Tribunal against which I am speaking up now.

But I owe it to Mr. V.H. Patil in whose honour I am writing this.

I must explain. Mr. Patil, with whom I had the good fortune to interact for several years, stood for all that is considered virtuous in life. In my book, he was an epitome of "Dharma", that elusive term which is difficult to define but for Mr. Patil, it came naturally. As all the anecdotes and opinions about him unmistakably show, he stood firmly for what he considered to be "dharma", both in his personal life and his professional career. Men like him do not enrich the earth often with their visits!

What would have been his reaction to what is happening these days in matters relating to the Income Tax Appellate Tribunal, of which he was a permanent and vital part for a very long time – may be five decades? He and several other distinguished members of the ITAT Bar of Bombay – that respected body - had stood for the independence of the Tribunal, coming to its rescue at crucial times when there were efforts to weaken it. I therefore ventured into putting myself into Mr. Patil's shoes, and think like him. This article, apart from being a respectful and humble homage to him, is the result of how he would have lamented at the recent developments.

Mr. Patil would certainly extol the virtues of the Tribunal, set up in 1941 as the first tribunal of the country and which has given birth to several tribunals. But he would not hesitate to introspect into its working, particularly in the recent past. In my humble opinion, he would perhaps call for a "judicial audit". I know this is an expression which I have not come across earlier; I am probably coining it for the first time. I will try and justify it.

In the following paragraphs, I am entering into an imaginary conversation with Mr. Patil. I thought it was an effective way of putting together his thoughts on the matters relating to the ITAT.

Question: Good morning Mr. Patil. What do you think are the vital aspects of the structure of the ITAT, with which you have been associated closely for several decades, and thus have had an opportunity to examine its functions critically?

Mr. Patil: (with his usual disarming smile): There are several vital aspects of the structure of the Tribunal, but these are very important: (i) appointment of Members; (ii) Appointment of the President and (iii) Headquarters of the President. There are several limbs to these aspects.

Question: Mr. Patil, what do you think of the appointment of Members of the Tribunal, considering the pendency and the number of benches?

Mr. Patil: The tribunal functions with 63 benches all over the country. That means 126 Members. That itself is a big number to manage, and the President has his hands full. But at any given point of time, there are at least 20 to 25 vacancies. I know that there was a time in

the early nineties when the tribunal had a pendency of 3 lakhs odd appeals with only 46 Members to deal with them. That kept the Members busy with no time to think about anything else. It was another matter altogether that someone took advantage of the situation to get an extension of 18 months at the top post! Then started the trend to fill up the posts to the brim, sometime in 2010. I remember that the selection committee, headed by a senior sitting judge of the Supreme court, used to conduct interviews of more than 400 applicants for filling up around 25-30 posts; and the interviews were held all over the country at considerable expense and effort. At that time, the pendency had fallen considerably to about 90 thousand to one lakh appeals all over the country, and it was not necessary to have the tribunal functioning at full strength. This may sound blasphemous, but I have reasons. More number of Members means more issues of transfer-posting with pulls and pressures. It was disheartening to hear reports that many of the Members had no compunctions in putting pressures of all kinds, including political pressure for getting a posting of their choice. It must have been a tough time for the President to deal with all of them, if he wants to resist those pressures. I am sure there must be conduct rules that no kind of pressure shall be brought to bear by government servants, but those are only in paper. Mercifully, the Supreme Court laid down guidelines in Ajay Gandhi's case for transfer-postings and I understand that the decision considerably helped in neutralising those pressures. What the President needs is the power and authority to take action against the errant Member and mete out punishment for flouting the conduct rules without reference to the Ministry or the "competent authority". The protection given to such Members must be removed and the word of the President must be treated as the last. Recruitment of large number of Members at one go has one more disadvantage in the matter of constitution of benches. It becomes difficult to find the right balance of experience and there was a time when the number of members with less than 5 years of experience was more than those with more than 5 years' experience.

Question: Thanks for your views which I hope will be duly taken note of. Now what do you think about the recently amended rules, under which the appointment of Members of the ITAT, is understood to be only for 4 years with possible extension or extensions?

Mr. Patil: Nothing can be more fatal to the independence of the Tribunal. The reasons are obvious.

Question: Turning to the appointment of the President of the ITAT, what are your views?

Mr. Patil: I am afraid my answer is going to be a bit long-winded. Hope you don't mind. Prior to 2013, the President of the ITAT was a person from the ITAT, chosen after following the selection process, from the Senior Vice-President and the Vice-Presidents. In 2013, section 252(3) was amended to enable the appointment of a sitting or retired judge of the High Court, who has completed 7 years of service as Judge, as President. The post of Senior Vice-President was abolished. The Vice-Presidents continued to be eligible to be appointed as the President. The amendment, subject to correction, was not proposed in the amendment Bill as originally introduced, but was introduced later and surprisingly, again subject to correction, there are no Notes on clauses or Memorandum explaining the reasons for bringing in the High Court judges as President. But whether there has been a qualitative change for the better in the manner of functioning of the Tribunal by the induction of judges of the High Court as Presidents, is a matter which needs to be objectively examined. To be fair to them, they came without much of an idea of the functioning of the ITAT and since they came after their retirement from the High Court (will any sitting judge aspire to come to the ITAT as President?, Mr. Patil asks with a wink!) they had less than 3 years to serve as President. They first took time to familiarise themselves with the functioning of the Tribunal and precious time was lost. It also led to an unintended, but undesirable effect – some of the Members upon

whom the President relied in order to understand the functioning of the Tribunal were perceived to have formed a sort of closeness with the President which they took advantage. This perception is natural, and it is common in all organisations. But it leads to a lot of heartburn which is not conducive to the efficient working of the tribunal. But the situation can be avoided and such perceptions can be nipped in the bud if the President sends a stern message, by appropriate conduct and not merely in words, that all his colleagues are equal in his eyes, that the rules applied equally to all of them, and no particular Member or Vice-President was “close” to him. The reports which one received in the recent past, as a stakeholder in the well-being of the Tribunal, in this regard were disturbing, to say the least. It will be worth the effort to find out how much judicial work they could do and how many Special Benches were headed by them. The load of administrative work cannot be an excuse for not doing judicial work. The Hon’ble Chief Justices of High Courts and the Hon’ble CJI preside over benches on a regular basis and also deliver judgments, besides bearing the brunt of administrative work.

Question: Mr. Patil, do you therefore think that the President of the Tribunal should preferably be from the Members/Vice-Presidents?

Mr. Patil: One must remember that nobody knows why the law was changed in this regard. Before venturing a categorical opinion, I would think that an objective study, which I may loosely refer to as “judicial audit”, of how the change in the law has benefitted the overall image of the Tribunal, in terms of its independence and focus on judicial work, should first be undertaken and compared with the position prior to the change in the law. You also have to remember that Members of the Tribunal should not lose their morale or inclination to do devoted work if their chances of heading the quasi-judicial body are removed.

Question: Mr. Patil, the headquarters of the President of the ITAT has always been a touchy point. Do you have any views on that?

Mr. Patil: I think the practice of getting orders passed transferring the headquarters of the President from Mumbai to Delhi, for temporary periods which would be extended periodically, started sometime in the late eighties. The standard reason was that it facilitates co-ordination with the nodal ministry. When the Rules say that the official headquarters of the ITAT and its President is Mumbai, I believe that it was done with full knowledge that Delhi was the national capital. Facilitation and coordination were not affected. Then why should the President even think of getting it shifted to Delhi? The President is the administrative head of the ITAT with all financial powers. The nodal ministry (as held by the Supreme Court in L. Chandra Kumar’s case and Ajay Gandhi’s case) is merely to allocate budget and perform its nodal functions. Those Presidents who were functioning from Mumbai had no difficulty in this behalf. Moreover, the communication facilities today are so efficient, and good use can be made of internet, video-conferencing etc. The argument that the placement of the President in Delhi facilitates administrative co-ordination is therefore a complete non-starter.

Question: Yes, those are valid arguments Mr. Patil. Whilst at the functioning of the ITAT, is it also necessary to ask oneself whether the high-profile functions in luxury places got up to “self-glorify” its achievements behave its status?

Mr. Patil: It is a valid question, of course! A quasi-judicial body such as the ITAT does not need to project itself about its achievements in such high-profile manner. Praise for its work has already been well-documented. All that is needed is to strive to build a better image if possible, and if not, at least do nothing that will cause damage! The need of the hour is more self-discipline, less judicial adventurism and good behaviour from the bench.

Question: Mr. Patil, thanks for your frank answer. You may be aware that in the recent past there have been unusual postings of Vice-Presidents of the Tribunal, breaking established norms. The post of Senior VP which was abolished in 2013 or so was in Delhi and there was an official notification to that effect. Once the post was abolished, it was expected that the senior most VP would be posted in Delhi, and the next senior VP would be in Mumbai having regard to its importance as the HQ. The postings of other VPs should have followed the quantum of pendency of appeals – Ahmedabad, Calcutta, Chennai, Bangalore, Hyderabad etc. But unfortunately we have had a situation where the senior-most VP was kept in Pune and the VP next in line was posted in Calcutta. VPs who were junior to them got posted to Mumbai and Delhi, the two premier centres of the ITAT. An important centre, though officially has a VP, he does not function from that place. Do you think all this is a good policy? If not, what effect can it have on the functioning of the Tribunal?

Mr. Patil: I have no idea why this is happening. All I know is that it is not good administration to post VPs who are juniors in the line of seniority in the more important centres of the Tribunal, overlooking the seniors. I know it is not a matter of right for a VP to get the centre he wants, but at the same time preferring junior VPs for posting in the more important centres sends out wrong signals to the Members and to those who appear in the Tribunal regularly. It would be interesting to see the minutes of the proceedings of the committee (see Ajay Gandhi's case) as to how such postings are made; but again, the usual argument is that the Court in that case did not specifically deal with postings of VPs. You do not need a court order to tell you what is good administration. There are precedents. The other aspect which you mentioned – VP of a zone functioning from another place – is wholly unacceptable. When a member joins the Tribunal, he undertakes to be posted anywhere in the country without any preference. Neglecting an important centre in such matters again sends out wrong messages; it is not good administration.

Question: Now Mr. Patil, I come to a recent development in the appointment of the President of the ITAT. It is reported that Vice-President No.7 in terms of seniority has been assigned the charge of "Officiating President" by an order passed on 5th Sep., 2021, overlooking the first 6 Vice-Presidents who are all senior to him. He was functioning as Vice-President from Delhi, and this may be kept in mind. What do you think of this rather unusual appointment? Do you recall any past appointment of the President in this manner? Do you think it will set a bad precedent, unless reversed? What, in your esteemed opinion, is the damage likely to be caused by such appointments? If I can so request, I want a frank answer!

Mr. Patil: This certainly raises questions regarding the considerations which prevail in the appointment of Presidents. I do not recall any precedent of this gravity. The recent appointment does show that all is not well. There are 6 Vice-Presidents above him and the Vice-President No.1 was promoted as such in the year 2017. Therefore, it is for the Law Ministry, and the "competent authority" to clarify under what provision of law was the Vice-President No.7 appointed by the order of 5th Sep., 2021 as "Officiating President". The appointment does set a bad precedent.

There is perhaps a general answer not based on any specific provision of law, to the effect that the government always has the power to appoint a person as the head of a judicial or quasi-judicial body as an interim measure, called "officiating" capacity, till the post is filled up on a regular basis. But even then, in order to overlook 6 Vice-Presidents and appoint Vice-President No.7 albeit as "Officiating" President, there has to be strong reasons. The government could not have been unaware of the ripples it would cause amongst the regular practitioners before the ITAT (like me) and its Members and the 6 Vice-Presidents who have been "overlooked" and they still went ahead with no regard for established traditions and norms.

I have not examined the recent amendments to the law relating to the Tribunals minutely, but from what I have read in the journals and newspapers, it appears that the erstwhile Tribunal Recruitment Rules of 2020, framed under the erstwhile sections 183 and 184 of the Finance Act, 2017 do throw some light on the question of “officiating” President. Rule 10(a) refers to filling up of a casual vacancy in the office of a Chairman, Chairperson, President, Presiding Officer etc. In case of such vacancy, the central government is given the power to “appoint the senior most Vice-Chairperson or Vice-Chairman or Vice-President or *in his absence*, one of the Accountant Member, Administrative Member, Expert Member” etc. “to officiate as Chairperson, Chairman, President or Presiding Officer”. This clearly means that while framing the Rules of 2020 the central government was quite aware of the well-settled general principle that the normal rule is to appoint only the senior most Vice-President of the ITAT as officiating President; and it is only when there is no such person, that another person can be asked to “officiate” as President of the ITAT.

Whichever way one looks at it, the appointment of Vice-President No.7 as Officiating President of the ITAT under orders dated 5th Sep., 2021 smacks of arbitrariness. I make it clear that my opinion is based on principle, without having regard to the personalities involved.

I must hasten to add that I understand that the Tribunal Reforms Act, 2021 (replacing the Ordinance) is being examined by the Supreme Court, and hopefully, going by news reports, distortions will be set right. Off the cuff, it could be considered whether the appointment of Vice-President No.7 as Officiating President, overlooking 6 VPs senior to him, and without assigning any reason, may be brought to the notice of the Supreme Court. This is only my personal opinion, and only a prima facie view, and it is for the stakeholders to examine the legality and advisability of such a move.

Question: In light of what you have said, what do you think can be done?

Mr. Patil: There is too much at stake to let the appointment of the Officiating President under the order of the 5th September, 2021 pass without any objection. The stakeholders have to protest, even though the powers that be may brazen it out. As I have already said, it is not about any particular individual, but it is the principle involved. The appointment sends out a message that the stakeholders mean nothing to those powers, and anything can be done without any challenge or regard to the possible damage it may cause to the Tribunal. Executive arbitrariness should receive no support from the stakeholders. I can understand the position of the aggrieved persons. It is not easy to come out against the all-powerful government while serving it, as experience has shown. There can be repercussions. They may have to think a thousand times about their career and families. The powers are aware of that. That gives them the comfort to think that their action will go unchallenged. Again, there is the public perception about the 6 VPs to be considered. They have a legitimate right to be told why any of them was not found fit for being appointed the “Officiating President”. The stakeholders have an equal right to know. Today it may be the ITAT, tomorrow it may be any other quasi-judicial body. The stakeholders of the judicial system are fully justified in demanding an explanation for this serious faux pas! Let there be a “judicial audit” of the functioning of the ITAT and its position vis-à-vis the nodal ministry.

(The brief interview comes to an end with the interviewer thanking Mr. Patil for his forthright views.)

That was the man! His passion for distinguishing between right and wrong, and always choosing what is right, and being fearlessly open about it, defines his personality. It is always tempting to choose the easy path; but for Mr. Patil, that was just not right. Lord Krishna, the Geethacharya, of whom he was an ardent devotee, would not approve!

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