

In the year 2021, 21 Hon'ble members have been appointed. Shri S. E. Dastur, Senior Advocate one of the legends of the tax profession had shared his thoughts titled "*My Ideal Tribunal Member*" - which was Published at Platinum Jubilee Souvenir of ITAT in 2016 at Delhi dt. 25-1-2016] and also in the publication of the ITAT Bar Association "Income Tax Appellate Tribunal – A Fine Balance, law, practice, procedure and conventions- Frequently asked questions" Revised edition, December, 2017 P. 364 to 367. Editorial Board has published the said article for the benefit of readers, which will be an inspiration to young professionals.

Editorial Board.

My "Ideal" Tribunal Member

(A reflection by Sohrab Erach Dastur)

When I was a child in school - which most unfortunately was a long time ago - a favourite subject for an elocution or an essay competition was "If I were the Prime Minister of India" which could be paraphrased to say "Who would be the best Prime Minister for India" because, when young, one always thinks of oneself as the best! The Vice-President (CZ) In-charge Souvenir Committee, has been rash enough to ask me to contribute an article for the Tribunal's Diamond Jubilee publication and has been even "rasher" in giving me the freedom to write on a topic of my choice. The realist amongst the readers, if any, would, of course, say that my choice of subject is a reflection of the proverbial second childhood!

The constitution of the division bench of the Tribunal - an accountant and a judicial member - is unique and has resulted in a very fine "blend." My ideal member (the Algebraic Mr. X) if an Accountant Member from the Revenue Service would be of the rank of Commissioner prior to his appointment. The 1998 amendment which qualifies an Additional Commissioner for the high post of Tribunal Member is in my view ill-conceived. The requirement of having held the office of the rank of at least the Commissioner has served us well as is evident from the fact some of the finest members (Judicial or Accountant) that we have had have been those who were earlier with the Revenue Department. I do not like to take names but may just mention Mr. V. Gopinath, Mr. A. M. Rao and Mr. M. P. Argikar. It is remarkable how very quickly they grew out of the

habit of thinking themselves to be the Lord Protectors of the Revenue once on the Bench of the Tribunal. I appreciate that this is not easy - even some judges in our High Courts don this mantle!

On the Bench he should be courteous and fair and deal with an even hand with those who appear before him howsoever senior or junior he may be. Mr. G. L. Pophale who was rather curt and didactic on the Bench was so uniformly with all! The failure to treat all as equal is to some extent a universal phenomenon. The Courts in exercising their contempt jurisdiction often excuse or overlook the most offensive remarks from the powerful, who can stir up further trouble, but are uncompromising when dealing with the submissive and compliant contemnor.

Whilst on the Bench Mr. X should express his views so that the representative appearing before him has an opportunity to clarify any doubt which he entertains, but he should not try to convince the representative that he is wrong. Very often a fine median has to be evolved between the silent and the much talkative judge, who was dubbed picturesquely by the late Mr. F. E. Smith (later Lord Birkenhead) as an ill tuned cymbal. If given the choice I would definitely plump for the talkative rather than the "vow of silence" Member because the former's reaction to an argument does give the representative an opportunity to meet the point which is troubling him. It would be a good idea for Mr. X to remember that a little more time taken in hearing a case would in the long run save his time when he comes to write his judgment. This is because by making appropriate enquiries, he would be able to garner all the facts and take note of the relevant part of any judgment which is cited.

Mr. G. R. Desai was a classic example of a Member who insisted that all the facts be properly placed before him in the course of the hearing and by judicious questioning he was able to fulfil his role as the final fact finding authority. Mr. X should of course remember that he must not overdo this as he may lose the wood for the trees. My ideal Member would insist that the proposition in favour of which a case is cited is made clear. This will put an end to the practice prevalent with some representatives of just mentioning several volumes of ITRs, ITDs etc. with the page numbers without specifying the ratio of the case for

which reliance was placed on these decisions. The example set by Mr. T. Venkatappa when sitting in Poona (now Pune) is worthy of emulation by Mr. X. He directed that the representatives should submit to the Bench clerk a list of authorities to be cited and the clerk was instructed to keep two copies of the relevant citations in Court for the Members to follow and they indeed did follow the case with the representative.

I am aware that the Tribunal has necessarily to dispose of a large number of case and time therefore: always a constraint. The solution is for the Government to constitute a larger number of Benches, make them functional by providing the required infrastructure and to fill vacancies promptly. This will ensure that the Tribunal members have adequate time to hear cases and write judgments. Mr. X. would do well to remember the classic retort by Counsel in the English courts when he was told by the presiding High Court judge that he (the Judge) had several other cases on the list. Counsel solemnly pursued a copy of the list and remarked that his client did not appear to be interested in any of them!

The situation today is that an appeal against a decision by the Tribunal may not be heard for 12 to 15 years in view of the large pendency in the High Courts. The decision of the Tribunal, therefore, assumes a degree of finality in so far as most assessee are concerned. The delay prevalent in the Courts is worsened by the ill-advised recent step of vesting appellate jurisdiction as distinct from the reference jurisdiction in the High Courts without ensuring adequate availability of judges. If it was considered necessary to widen the High Court's jurisdiction to an appellate one, it should have been left to the Tribunal to certify a case as raising a substantial question of law.

When writing a judgment my ideal Member will ensure that it is self-contained. The assessee, the Revenue and the Bar are more interested in knowing a Member's reasons for his conclusion rather than what the Assessing Officer or Commissioner (Appeals) has decided. In hearing the matter and in writing a judgment, Mr. X should not feel overwhelmed with case law. Opportunity should be given to the representative to develop an argument on the basis of first principles and, thereafter case law may be looked at to discover if the conclusion so reached requires reconsideration. In this behalf I cannot recall a more innovative or "thinking" Member than Mr. R. C. Desai.

Lapse of time in pronouncing' orders sets tongues wagging (I am sure most unjustifiably). It is an unfortunate fact of life that there are always two ears willing to hear one wagging tongue! The working, rule that an order should be dictated within 2 months from the date of hearing would be a good one for the ideal member to adhere to.

In today's time and particularly on account of the atmosphere prevailing in our Country, the ideal Member would have to be extremely circumspect about his behaviour and conduct. He would subject himself to certain self-imposed restraints. He would avoid as far as possible meeting the assessee's or Department's representatives alone in his chamber. he would not accept private hospitality or gifts except from relatives and close friends of a standing before he became a Member. He would actively canvass for framing a code of ethics to be observed by the Members of the Tribunal and a machinery for enforcing the same. Such a code has been evolved by the judges of the High Courts and the Supreme Court and the Tribunal, bearing in mind its high position, should follow suit. He would also represent to the Government that sub-section (3) in section 252 of the Income-tax Act, which requires that ordinarily a Judicial Member of the Appellate Tribunal will be appointed to be the President thereof, should be omitted. Both Accountant and Judicial Members have to discharge judicial functions and the only additional responsibility on the President is of an administrative nature and an Accountant Member is as competent to deal with the same as a Judicial Member. Further, both class of Members are equal and this aura of "greater equality" conferred on a Judicial Member does not seem to be justified in the present context, whatever may have been the reason for inserting such a provision earlier. It also results in acrimony between the two "wings" constituting the "body" of the Tribunal. My ideal Member would staunchly oppose any suggestion to shift the Headquarters of the Tribunal from Mumbai, as was the move some time ago. It is not for any parochial or selfish reason that I advocate this. Apart from the fact that distance from the seat of the Central Government would lend greater independence to the functioning of the Tribunal and subject the Members to lesser pressures, it is but fitting that the Headquarters of the Tribunal should be situated in a town which contributes 35 to 40% of the Central Government's income-tax revenues. As a corollary, Mr. X, when he

becomes President would shift his own place of permanent. Sitting to Mumbai wherever he may have been posted prior to appointment as President.

I would in conclusion clarify that reference has been made only to former Members in this article as it would be improper to refer to Sitting Members in any manner. Also, it is by no means suggested that the desired qualities and the characteristics highlighted above do not exist in the present Members. Far from it indeed the Income - Tax Appellate Tribunal is today fairly considered to be the model for other Tribunals to emulate and this position could not have been reached and kept unless the Members and rare qualities of a high judicial nature.