



# INCOME TAX APPELLATE TRIBUNAL BAR ASSOCIATION

C/o. Income Tax Appellate Tribunal  
Pratishtha Bhawan, Old C.G.O. Building, Fourth Floor, Room No. 445-448, Maharshi Karve Marg, Mumbai - 400 020.  
Tel. : 22036119 / 46033902 • Website : www.itatonline.org • E-mail : itatonline.manager@gmail.com



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Subhash S. Shetty

Dr. Sunil M. Lala

15 July 2024

To,  
Honourable Shri Arjun Ram Meghwal,  
Hon'ble Minister of State (Independent Charge)  
Ministry of Law and Justice,  
Government of India

Subject: Request for an Appointment to discuss the effects of short-term appointments of Income-tax Appellate Tribunal (ITAT) Members

Respected Sir,

We, the ITAT Bar Association, Mumbai, are writing to request an appointment with you to discuss a matter of significant concern regarding the appointment of new members to the Income Tax Appellate Tribunal (ITAT) for a brief period of four years.

It was a pleasure interacting with you during your visit to Mumbai on 29 June 2024 at ITAT, Mumbai. During your visit, we had requested your appointment to highlight a few issues that are relevant for the smooth and efficient functioning of the Tribunal.

We have shared a detailed representation that outlines the problems caused by these short-term appointments and provides an in-depth analysis of the situation. We would like to present this representation to you personally and discuss potential solutions to maintain the sanctity and efficiency of ITAT.

We kindly request you to grant us an appointment at your earliest convenience. We believe that a personal meeting will allow us to convey our concerns more effectively and explore feasible solutions with your esteemed guidance.

Thank you for your time and consideration. We look forward to the opportunity to meet with you and work together.

Thanking you

For ITAT Bar Association

  
Porus Kaka

President



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To,  
Honourable Shri Arjun Ram Meghwal,  
Hon'ble Minister of State (Independent Charge)  
Ministry of Law and Justice,  
Government of India

Subject: Representation on the effects of short-term appointments of  
Income-tax Appellate Tribunal (ITAT) Members.

Respected Sir,

We, the ITAT Bar Association, Mumbai, are writing to bring to your esteemed attention the unintended ill effects resulting from the appointment of new members for a brief period of four years to the Income Tax Appellate Tribunal (ITAT). We believe this issue requires your kind consideration and intervention.

As an association of professionals practising before the Tribunal, we have been closely observing the impact on ITAT, which is revered as the mother of all Tribunals. The short-term appointments hanging on 80-year system on the judicial forum has led to various undesirable consequences. This situation undermines the efficiency and effectiveness of the Tribunal, ultimately affecting the justice delivery system. It also will undermine the Independence of the Institution leading to grave erosion of faith by foreign investors who rely upon the institution and also all taxpayers.

We kindly request your support in reviewing the current legislation and considering a policy change to maintain the sanctity of ITAT. It is imperative to ensure that the appointments of ITAT members are made for a longer duration to promote stability, consistency, and the overall integrity of the Tribunal.

Enclosed with this letter is a detailed representation that provides an in-depth analysis of the issue at hand. We also request you to kindly grant us a personal hearing so that we can brief you on the matter in more detail at your convenience. We would be grateful for the opportunity to meet with you to explore potential solutions.



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Thank you for your time and consideration. We look forward to your positive response and are hopeful that together we can effect meaningful change.

Thanking you

For I'T'A'T' Bar Association

Porus Kaka

President

CC:

- 1) Justice (Retd.) Shri C. V. Bhadang  
President, Income Tax Appellate Tribunal,  
Pratishtha Bhawan, Old C.G.O. Building,  
4<sup>th</sup> Floor, M. K. Marg, Mumbai - 400 020.
- 2) Shri G. S. Pannu,  
Vice-President (Delhi Zone)  
Income Tax Appellate Tribunal,  
10<sup>th</sup> & 11<sup>th</sup> floor, Loknayak Bhavan  
Khan Market, New Delhi - 110 003.

## INDEX

Sr. No.	Particulars	Page No.
1	About the Association and need for representation	2
2	Importance and performance of the Income Tax Appellate Tribunal so far	4
3	Unique position of the Income Tax Appellate Tribunal	11
4	Adverse impact of the Tribunal Reforms Act, 2021 and the Tribunal (Conditions of Service) Rules, 2021	14
5	Effective functioning of the Tribunal	15
6	Independence of the Judiciary	18
7	Other miscellaneous provisions	31
8	Our suggestions	34

## **1. About the Association and need for representation**

- 1.1. The ITAT Bar Association, Mumbai is an Association formed by the Advocates, the Chartered Accountants and the Tax Practitioners practising primarily before the Mumbai Benches of the Income Tax Appellate Tribunal (the ITAT). The Association was formed on 18.11.1965 and has actively taken various steps in the past with a view to inter alia protect and preserve the independence of the ITAT and ensure its smooth functioning. Stalwarts like N. A. Palkhivala, Y.P. Trivedi, and S. E. Dastur, Senior Advocates have served as former Presidents of the Bar Association. Their expertise and leadership have been pivotal in shaping the legal landscape, particularly in tax jurisprudence.
- 1.2. Section 252A of the Income-tax Act, 1961 (the Act) read with the Tribunal Reforms Act, 2021 and the Tribunal (Conditions of Service) Rules, 2021 dealing with the qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the President, the Vice President and the Members of the ITAT are a matter of concern to our Association and its members, since, in our view they are adversely affecting the functioning of the ITAT.
- 1.3. Considering the importance of and the role played by the ITAT in the justice delivery system and the adverse effects that the implementation of the aforesaid provisions is having on its functioning, a unanimous resolution has been passed in the meeting of the Managing Committee of the Association to the effect that a detailed representation be made to the

respective Ministries with a request to drop and/or withdraw ITAT from the application of the Tribunal Reforms Act, 2021 and the Rules (hereinafter referred to as the Act and Rules respectively) made thereunder or suitably amend the said Act and Rules.

## **2. Importance and performance of Income Tax Appellate Tribunal so far**

2.1. The importance of the ITAT as an appellate Institution is shown by the following:

2.1.1. The ITAT has been often described as the mother Tribunal as it is the first of such Institutions in the country and its formation dates back to January 1941. It is a role model for all the other Tribunals presently functioning in India. Its role and manner of functioning have received uniform appreciation from all sections including the higher judiciary, the executive, the professionals as well as the taxpaying community. The Souvenir published on the occasion of the Platinum Jubilee Celebrations of the ITAT in 2016 confirms this position. The said Souvenir also has "Snippets from past Souvenirs" which is also revealing. The speech delivered by the then Law Minister in the Lok Sabha on 01.11.1976 in support of the 42<sup>nd</sup> amendment to the Constitution, inserting articles 323A and 323B which enabled legislation for the formation of Tribunals, also appreciated the functioning of the ITAT. These references have been made to show that the ITAT has been consistently meeting its objective of providing 'easy, speedy and impartial justice'. It is submitted that the changes made under the Act and Rules with the functioning of the ITAT after nearly 80 years of its history have been and would adversely affect the Institution and cause of justice.

2.1.2. In this regard, statements made by the high Functionaries in the present Union Government which depict their views and commitments with respect to the ITAT, may also be relevant:

a) The Hon'ble Prime Minister in his message in the Souvenir published on the occasion of the inauguration of the residential-cum-office complex of the Cuttack Bench in Odisha i.e., on 11.11.2020 has acknowledged the importance of the ITAT by observing "**Tribunals are torchbearer's of people's trust as their sensitive and humane approach in the administration of justice strengthens the mechanism of grievance redressal.**"

This is followed up by his commitment in the following words "*An overwhelming majority of people in the country are law abiding. **They wish to comply with laws in the interest of the nation and it is with this spirit, that we have taken comprehensive measures towards a transparent taxation. Our emphasis has been to reform and simplify our tax system** so that the law-abiding citizens' hard work propels and powers a strong and self-reliant India.*" (emphasis supplied). In the message published in the Souvenir released on the Platinum Jubilee Celebrations of the ITAT, in January 2016, the Hon'ble Prime Minister also observed "**I am sure, the Tribunal will continue to play a pivotal role in speedy and impartial resolution of tax disputes.**" (emphasis supplied).



b) The Hon'ble Union Home Minister in his message in the said Souvenir published on 11.11.2020 referred to above has observed

"आयकर अपीलीय अधिकरण देश का सबसे पुराना अधिकरण है जिसे अन्य सभी अधिकरणों की जननी कहकर भी संबोधित किया जाता है। निष्पक्ष, सुलभ और शीघ्र न्याय के लक्ष्य को आत्मसात किये हुए आयकर अपीलीय अधिकरण अपनी सतत और उत्कृष्ट कार्य संचालन द्वारा न्याय प्रक्रिया के क्षेत्र में पूरे देश के समक्ष एक उदाहरण है। इस संगठन के महत्व और कार्यकलापों को देखते हुए इसकी अजति और विकास के लिए भारत सरकार का विशेष ध्यान है और भविष्य में भी इस संस्था के निरन्तर उन्नति के लिए हर संभव प्रयास करते रहेंगे।"

It requires consideration that whether introducing the concept of appointment of the Vice Presidents and the Members of the Tribunal for a fixed term reflects a step in the direction of its progress and development which has been unconditionally committed in the aforesaid message or reflects a loss of confidence by the Government in the impartial functioning of the appellate Institution.

c) In the message from the Hon'ble Minister of Law and Justice as published in the said Souvenir it has been stated "*The adjudication process of the Tribunal is marked by **easy accessibility and less expensive procedure making it a litigant friendly forum that strives to achieve*** निष्पक्ष, सुलभ, सत्वर न्याय " (emphasis supplied).

Similarly, the message from the then Minister of Law and Justice Mr. D. V. Sadananda Gowda in the Souvenir published on the occasion of the Platinum Jubilee Celebration of the ITAT, in January 2016, it has been observed "*I am happy to note that **the***

***Income Tax Appellate Tribunal, which is one of the premier bodies in the hierarchy of dispute resolution system, is going to complete 75 years in its long and eventful journey. ... It is said that a guardian should not praise his child beyond a limit lest he may develop over confidence. Equally well, I cannot resist from mentioning the fact that the Income Tax Appellate Tribunal has earned praise of several jurists and law-makers in the past.*** (emphasis supplied).

- d) In the message from the then Minister of Finance, Corporate Affairs and Information & Broadcasting Late Mr. Arun Jaitley (who was also a leading Senior Advocate), in the Souvenir published on the occasion of the Platinum Jubilee Celebration of the ITAT in January 2016 it has been observed "... *It is a trite position that Income Tax Appellate Tribunal, being an appellate authority under the Direct Tax laws, has acquitted itself admirably considering that it has to cope with a maze of case laws as well as several amendments made each year in the Income-tax Act. Income Tax Appellate Tribunal has conducted itself in an unbiased and fair manner in the discharge of its duty of adjudicating disputes under direct tax laws, and is held in high esteem by the taxpaying fraternity as well as Revenue Department.*" (emphasis supplied).

These laurels have been given by high Functionaries in the Union Government who were directly concerned with the functioning of the

ITAT. Based thereon, one wonders whether the ITAT really required the reform relating to appointment of the President, the Vice President and the Members for a fixed term alongwith other incidental provisions. This cannot be a reward for an Institution that has successfully stood by its objective of easy, speedy and impartial justice now for almost eighty years in the past.

2.1.3. Emphasis has been laid in this section on the acknowledgements received by the ITAT from the administrative side of the Union Government. This does not mean that the higher judiciary, professionals and members of the public have any lesser degree of confidence in the Institution. Reference has been made to these acknowledgements to remind the present administration of their recent views with respect to the ITAT.

2.1.4. The ITAT has a unique role to play. It is the final arbiter of facts in a matter. Further, on account of the huge pendencies in the High Court and the Supreme Court with regard to the tax disputes, the time taken by them for disposal of such disputes and the costs involved in pursuing these remedies, it is for most assesseees the final court of appeal.

2.1.5. As per the statistics available in the Souvenir published by the ITAT in the year 2016, 72.98% of the Orders passed by the ITAT are accepted by the taxpayer as well as by the Revenue and no further

appeal is being filed therefrom to the High Court. Further, out of the balance matters which reached the High Court, in almost 66.55% thereof, the Orders passed by the Tribunal have been upheld. This is the degree of trust and confidence which the stakeholders presently hold in this appellate Institution. With this rich pedigree, the members of our Association feel that, at least insofar as the ITAT is concerned, it was inappropriate to change the earlier set up. The question that arises is, whether the provisions relating to term appointment and other incidental amendments strengthens or lowers the status of ITAT.

2.1.6. Without any disrespect to the CIT(A) who functions as the first appellate authority or the Dispute Resolution Panel for redressal of grievances at the first level, it is submitted that it has been the experience of assessees in general and of professionals that specially in matters involving high stakes relief is often not obtained by an assessee and he has to look up to the ITAT. They appear to be an extended arm of the Income-tax Department, though it ought not to be so. It may not be out of place to mention that this was the very reason the ITAT was created in the year 1941 so that the assessee has a remedy beyond the Income Tax Department. As the scheme things stand the ITAT is under the Ministry of Law and Justice for administrative purposes. Statistics also reveal that the number of appeals filed with the ITAT stood at 48,328 in the year 2016-17,

49,693 in the year 2017-18, 50,735 in the year 2018-19 and 45,842 in the year 2019-20 and the numbers are simply on the rise. The statistics thereafter are not relevant as the reduction in filing of appeals from the year 2020-21 is attributable primarily to the huge pendency and slow disposal of appeals by the CIT(A). This not only shows the importance of the ITAT in the administration of justice in Direct Tax matters but also the general dis-satisfaction with the Tax Department amongst the taxpaying community. Therefore, it is extremely essential that any step which would shake the public confidence in the effective and independent functioning and the ability to deliver quality justice by the ITAT should be avoided, as for majority of the assesseees this is the only place where they look upon for justice.

In view of the importance of the role played by the ITAT in the administration of justice, insofar as appeals arising under the Direct Tax Laws are concerned, it is essential to consider whether the scheme relating to the appointment of the Vice Presidents and the Members on a term basis is justified.

### **3. Unique position of ITAT**

3.1. The position of the ITAT is unique compared to other Tribunals. Every citizen of India with an income over Rs. 2.50 lakh is chargeable to income tax under the Act. Such a citizen is often listed as an appellant/respondent before the ITAT. Further, orders passed by the ITAT have wide ramifications as they are binding on the Income-tax Authorities functioning under the Act while discharging assessment, appellate and other functions under the said Act in respect of other assesseees where similar issue arises. Since the Income-tax Act has application all across India, the orders passed by them also have application throughout the country where similar issue arises even in the case of any other assessee. The need to refer to the orders of the ITAT is higher insofar as direct tax matters are concerned as compared to any other specialised Tribunal where the parties affected by the orders would be limited.

3.2. With regard to the tax disputes, it is for most assesses, the final court of appeal on account of the pendency, the cost and the time involved in pursuing litigation before the High Court and the Supreme Court. Sample analysis showing the result of the review of the orders of the Tribunal by the High Courts, during the last 75 years being Appendix-10 of the above referred souvenir shows that the High Courts have affirmed the judgment of the ITAT in 66.55% of cases which have come up before them. With this rich pedigree, the members of our Association feel that at least

insofar as the ITAT is concerned it was not appropriate to change the earlier set-up and applicable rules.

3.3. Income-tax Act, 1961 is the only Act wherein the amendments are made every year and it refers 106 Central Acts and various State Legislations. The specialized knowledge on the subject will help to deliver speedy justice. Income tax is an aspect that is not only complicated in its application but also in its Interpretation. It also encompasses fields of International Treaty law and transfer pricing. The process of learning and being able to administer the law also takes time. Hence even in the Tax department that administers the law seniority and years of experience are an expectation.

3.4. Its constitution is also unique in as much as every Bench save and except a Bench hearing Single Member cases comprises of a Judicial and an Accountant Member. The qualification for being appointed as a judicial member are the same as for appointment as a judge of the High Court. To be appointed as an Accountant Member a person must have had exposure as a Chartered Accountant in the field of accountancy for at least 25 years. The unique position of a Member of the ITAT is seen from the fact that a Judicial Member can be, appointed as a High Court judge. Statistics show that 33 Judicial Members of the ITAT have been elevated to the High Courts in the last 75 years. The credit for the success of the ITAT in duly discharging its functions goes to the fact that it has a combination of professionals (Advocates and Chartered Accountants) and

those from the Legal Service or the Revenue Service manning it. The scheme relating to appointment for a term will adversely affect the professionals in joining the Institution thereby distorting the equilibrium.

- 3.5. Insofar as the ITAT is concerned, it has to decide questions of fact and intricate questions of law which would require application of and consideration of issues which are often connected with provisions of allied laws such as the Transfer of Property Act, the Negotiable Instruments Act, the Companies Act, the Partnership Act, the Limited Liability Partnership Act, the Trademarks and Copyright Act, the Indian Trusts Act, the Indian Contract Act and the Sale of Goods Act etc. In addition, issues under personal laws including Succession and Marriage Acts have to be also adjudicated. Of late, the ITAT has been also adjudicating on issues arising from the several Double Taxation Avoidance Agreements India has entered into with other countries as well as special subjects such as Transfer Pricing. The Tribunals constituted under other Acts cannot be compared to the unique position of ITAT.

It is, therefore, submitted that the ITAT be excluded from the Tribunal Reforms Act, 2021 as well as Tribunal (Conditions of Service) Rules, 2021.



**4. Adverse impact of the Tribunal Reforms Act, 2021 and the Tribunal (Conditions of Service) Rules, 2021**

4.1. We highlight certain issues which the legislation, as framed, raises. They may be summarised as follows:

4.1.1. Section 5 of the Tribunal Reforms Act, 2021 inter-alia provides that the Chairperson (including the President) or Member (which expression also includes the Vice President) of the ITAT would hold office for a term of four years from the date on which he enters upon his office. Further, as per section 6 thereof, they shall be eligible for reappointment.

4.1.2. The said Rules give wide powers to the Executive, which would seriously interfere with the independent discharge of judicial function by the ITAT.

These aspects are being placed for your kind consideration.

## **5. Effective functioning of the Tribunal**

5.1. As stated above, the issues which arise for consideration before the ITAT touch upon various streams of law including specialised subjects which require substantial expertise and experience on the subject. Further, ITAT is the final fact finding appellate authority under the Income-tax Act. Ability to identify the facts relevant to the issue and evaluate them for giving a finding of fact also requires considerable experience. For this reason also, experience plays an important role in effectively discharging the duties of a Member of the Tribunal. It has been observed that considerable time and effort on the part of both existing and more so, on the part of newly appointed Members of the ITAT is required to acquire knowledge and expertise on innumerable intricate and complex issues not only under the annually changing Income Tax Act but also allied laws. The term of office of four years as fixed by the said provisions would be too short a period for a person to gain expertise and utilise it in the course of rendering of justice. If the term of appointment is restricted to four years, then, even before the person would acquaint himself with the intricacies of the Income Tax Act and issues connected with these varied streams of law and acquires the specialised knowledge his term would expire.

5.2. We are further of the view that, the success of the ITAT lies in a fair combination of its Members having been selected from the two professions (being Law and Accountancy) and also from the

administration. In case of fixed term tenure, it is possible that a person who has joined the ITAT from the administration could be again absorbed as an administrative functionary after he has completed his tenure in the ITAT. However, insofar as a professional is concerned, upon completion of his tenure after four years or eight years (if re-appointed) he would have hardly any prospect to re-enter the profession. This would discourage professionals to look upon joining the ITAT as a career. If the number of professionals joining the ITAT reduces and the ITAT is substantially manned by persons from the administration or other bodies/Courts it would seriously affect the standards and the quality of the Institution.

5.3. Considering the intricate and complex issues arising before the ITAT, it is extremely important that the Bench comprises of a combination of senior experienced Members and others. The handholding by the Senior Members is also an essential feature of the Institution. If the scheme relating to term appointment is continued to be applied, then, after a period of        years no such Senior Members would be left in the Institution and all the Members would be those appointed on a term basis.

5.4. Further, the Law Commission of India in Report No. 232 dated 22.08.2009 has emphasised that the professional experience gained by the judiciary should be fully tapped for the good of the society. It has also been acknowledged that the Government incurs a lot of expenditure

on the orientation and training of Members which should be fully utilised for the common good. Based thereon, it was suggested that the age for superannuation should be increased. The present move, prescribing a term of office of only four years with re-appointment for another term of four years would also be contrary to this philosophy of the Law Commission.

## **6. Independence of the Judiciary**

6.1. In view of the said provisions, one of the litigants before the Member, the Vice-President or the President of the ITAT, in every case that comes up before them, i.e., the Central Government will determine whether their appointment after the period of three years should be renewed. Apart from it being unfair and counterproductive to expose the judicial functionary to this "temptation", it goes against the cardinal principle that a judge should be free to decide as per his conscience and independent appreciation of the law without having the sword of possible non-reappointment hanging over his head perpetually. It is for this reason that the Judges of the High Court are shielded from any type of executive interference in their functioning and since the Members of the ITAT perform functions very closely allied, at a subordinate level, to those of High Court Judges they should not be subjected to tenure service with a prospect of reappointment provided the Executive is satisfied with their 'performance'. Incorporation of such a provision will shake the high confidence which the ITAT enjoys in the public perception and will lower the dignity of the time-honoured Institution. In a lighter vein, it may be stated that it is like giving power to a cricket team to decide that a particular umpire will not function in their future matches! Also a feeling may be engendered in a Member or Vice-President or President that, if he is not reappointed he may find it difficult to resume his old calling or to rejoin a firm of which he was a member. This would probably

unconsciously make him feel that it would be advisable to do nothing which may antagonise his reappointing authority.

6.2. This provision would also be unconstitutional as violating the basic structure of the Constitution which requires that independence of the judiciary should not be interfered with.

6.3. Without any disrespect to the Commissioners who function as the first appellate authority, it is submitted that it has been the experience of assesses in general and of professionals that specially in matters involving high stakes relief is often not obtained by an assessee and he has to look to the ITAT. Therefore, nothing should be done which in any way shakes the public confidence in the independence of the ITAT.

6.4. The Hon'ble Supreme Court in the case of **S.P. Gupta vs. Union of India & Ors. AIR 1982 SC 149** has held that the independence of the judiciary depends to a great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour.

6.5. The Hon'ble Supreme Court in the case of **Union of India vs. Sankalchand Himatlal Sheth & Ors. (1977) 4 SCC 193** has held as under:

*“53. ... There are also other provisions in the Constitution which clearly disclose the anxiety of the Constitution makers to secure the*

*independence of the judiciary. ... It will thus be seen that even with regard to the Subordinate Judiciary the framers of the Constitution were anxious to secure that it should be insulated from executive interference and once appointment of a Judicial Officer is made, his subsequent career should be under the control of the High Court and he should not be exposed to the possibility of any improper executive pressure."*

- 6.6. The Hon'ble Supreme Court in the case of **UOI vs. R. Gandhi & Ors. (2010) 11 SCC 1 held** that Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of Judiciary. If 'Impartiality' is the soul of Judiciary, 'Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects but also upon several mundane things - security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the Judiciary) and without (from the Executive).

6.7. The Hon'ble Supreme Court in the case of **Roger Mathew vs. South Indian Bank Ltd. and Ors. 2019 (369) ELT 3 (SC)** held that Principle of independence of judiciary/tribunal has within its fold two broad concepts, (i) independence of an individual judge, that is, decisional independence; and (ii) independence of the judiciary or the Tribunal as an institution or an organ of the State, that is, functional independence. Individual independence has various facets which include security of tenure, procedure for renewal, terms and conditions of service like salary, allowances, etc. which should be fair and just and which should be protected and not varied to his/her disadvantage after appointment. It also observed that this court had criticised the imposition of short tenures of members of Tribunals in **Union of India v. Madras Bar Association, (2010)** and a longer tenure was recommended.

6.8. The Hon'ble Supreme Court in the case of **Supreme Court Advocates on Record Association & Ors. vs. Union of India (2016) 5 SCC 1** held that It is not really necessary to trace the entire history of development of the concept of independence of the judiciary in democratic societies. It can be said without any fear of contradiction that all modern democratic societies strive to establish an independent judiciary. The following are among the most essential safeguards to ensure the independence of the judiciary-Certainty of tenure, protection from removal from office except by a stringent process in the cases of Judges found unfit to continue as members of the judiciary, protection of salaries and other privileges from



interference by the executive and the legislature, immunity from scrutiny either by the Executive or the Legislature of the conduct of Judges with respect to the discharge of judicial functions except in cases of alleged misbehaviour, immunity from civil and criminal liability for acts committed in the discharge of duties, protection against criticism to a great degree. Such safeguards are provided with a fond hope that so protected, a Judge would be absolutely independent and fearless in discharge of his duties.

6.9. The Hon'ble Supreme Court in the case of **Income-tax Appellate Tribunal vs. V.K. Agarwal (1999) 235 ITR 175 (SC)** the Court held that any act which tends to interfere with administration of justice or tends to lower authority of any Court can be punished with contempt. The Court observed that questioning of a decision given in a particular case, or conduct of a Member of Tribunal in deciding a case by Law Secretary who has power to write confidential reports of Tribunal Members, is bound to be perceived by Members as an attempt to affect their decision-making and it is a clear threat to their independent functioning.

6.10. The Hon'ble Supreme Court in the case of **Madras Bar Association vs. Union of India (2014) 10 SCC 1** held the provision of reappointment of a Chairperson/Member of the NTT as unconstitutional as the provision would undermine independence and fairness.

6.11. The relevant portion of the **Malimath Committee Report** is reproduced as under:

*“Functioning of Tribunals*

**8.63** *Several tribunals are functioning in the country. Not all of them, however, have inspired confidence in the public mind. The reasons are not far to seek. The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of calibre are not willing to be appointed as presiding officers in view of the **uncertainty of tenure**, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.”*

**(Emphasis supplied)**

6.12. The relevant portion of the **74th Parliamentary Standing Committee Report** is extracted as under:

**18.** *The Committee feels that the age of retirement should be to be the same for persons holding same positions in the Tribunals in a category as referred to in para 11 above. The Committee further suggests that the retirement age may be uniform for Chairperson and Members of Tribunals*

*included in the same category as in the case of National Consumer Dispute Redressal Commission and Supreme Court and High Court. The Committee notes the Chairman and Members of the Tribunals shall hold office as such for a term of 5 years and shall be eligible for reappointment for another term subject to the conditions that they would cease to hold the office of the Chairman or Members as the case may be on attaining the age of retirement. The Hon'ble Supreme Court in Madras Bar Association case has favoured a term of seven or five years for National Company Law Tribunal on the ground that considerable time is required to achieve expertise in the concerned field and a shorter tenure often leads to a situation that by the time the Members achieve the required knowledge, expertise and efficiency their term will be over. The Committee is of the view that a longer term of 7 years may be provided so that knowledge expertise gained by the Members may be gainfully utilized. The retirement age of Chairperson and Members of all Tribunals/Commissions should be 70 years.*

...

**21.** *Committee also dwelt upon at length on the need of making regular appointments in the Tribunals in place of tenure appointments. The Committee noted that system of regular appointment is in existence in Income Tax Appellate Tribunal, Customs Excise and Service Tax Appellate Tribunal. It was felt that such appointments may be needed to make Tribunals more vibrant and to facilitate induction of young and talented experts and judicial officers with a reasonable length of experience in the*

*related field. The tenure posting appears to be less attractive to the Advocates and other professionals.”*

6.13. The relevant portion of the **272nd Law Commission Report titled “Assessment of Statutory Frameworks of Tribunals in India”** is as under:

**“C. Reappointment**

**5.19** *Question of reappointment is one of the important aspects having a direct bearing on the independence and fairness in the working of the institution. It goes without saying that any provision for reappointment would itself have the effect of undermining the independence of the chairperson/member. One may be inclined to decide matters in a manner that would ensure their reappointment. Keeping this in view, matters relating to appointment and extension of tenure must be shielded from intervention of the executive.*

**5.24** *In view of the provisions of section 6(2)(b) of the Central Administrative Tribunal Act, 1985, an advocate, who is qualified to be a Judge of a High Court, can be appointed as a judicial member. His tenure would be five years and can be reappointed for another term, i.e., for a further period of five years and no more. In case he is appointed at the age of 40 years, he would cease to be a judicial member at the age of 45 years and if the term is renewed, at the age of 50. Thereafter, it would be difficult for such member to rebuild his practice after working maximum for 10 years in the Tribunal. It discourages a person having good practice to join such Tribunal. It is*

*desirable that, initially, an advocate be appointed for a period of two years as an ad hoc member and later be confirmed after assessing his performance and suitability, and he may be allowed to continue till he reaches the age of superannuation. In the alternative, the initial appointment should be for a reasonably long tenure and may also be subject to renewal, in suitable cases.”*

6.14. It is pertinent to mention that in the case of **Madras Bar Association v. Union of India & Anr 2020 SCC OnLine SC 962** the Petitioner filed the present petition challenging the constitutional validity of Tribunal, Appellate Tribunal and other Authorities Qualification, Experience and Other Conditions of Service of Members] Rules, 2020 (**Tribunal Rules**) on several grounds viz. exclusion of advocate for being considered as a judicial member in 10 out of 19 tribunals, a minimum of 25 years of experience for an advocate to be eligible to become a member in 7 tribunals (Central Administrative Tribunal, Income Tax Appellate Tribunal, Customs Excise and Sales Tax Appellate Tribunal, etc.) *inter alia*. It was held that The Hon'ble Supreme Court held that the exclusion of advocates in 10 out of 19 Tribunals for being appointed as a judicial member is contrary to the decision laid down in the case of **Union of India v. R. Gandhi, President, Madras Bar Association (2010) 11 SCC 1** and the case of **Madras Bar Association v. Union of India, (2014) 10 SCC 1**. Further held that the 2020 Rules shall be amended to make advocates with experience of at least 10 years eligible for

appointment as judicial members in the Tribunals. While considering advocates for appointment as judicial members in the Tribunals, the Search-cum-Selection Committee shall take into account the experience of the Advocate at the bar and their specialization in the relevant branches of law. They shall be entitled for reappointment for at least one term by giving preference to the service rendered by them for the Tribunals.

6.15. However, The Ministry of Law and Justice issued The Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 (**2021 Ordinance**) on April 04, 2021.

6.16. Chapter XI of the 2021 Ordinance seeks to amend section 185 of the Finance Act, 2017 which pertains to the appointment, etc of the Chairperson and Members of the Tribunal. It is proposed *inter alia* **that a person who has not completed the age of fifty years shall not be eligible for appointment as a Chairperson or a Member.**

6.17. This indirectly defeats the decision of the Hon'ble Supreme Court in the case of **Madras Bar Association (Supra)** which *inter alia* observed that advocates with experience of at least 10 years are eligible for appointment as judicial members in the Tribunals.

6.18. Subsequently, in a second round of challenge before the Hon'ble Supreme Court in the case of **Madras Bar Association v. Union of India & Anr (2021)** wherein a three-judge bench of the Supreme Court, comprising of

Justices L Nageswara Rao, S Ravindra Bhat, and Hemant Gupta, on 14th July 2021 struck certain provisions of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 unconstitutional, which fixed the term of the members of the Tribunals to 4 years, by a 2:1 majority.

6.19. Pursuant thereto, the **Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021** was replaced with the **Tribunal Reforms Bill, 2021**, passed by the Parliament in early August 2021, surprisingly contained most of the provisions originally struck down by the ruling of the Hon'ble Supreme Court.

6.20. Consider the situation when all the existing members of the ITAT attain superannuation after 15 years, the eligible members will be only on a tenure basis. The formalities and procedure usually take 2-3 years. One may be appointed as a member of the ITAT only at the age of 53 or 55. The issue for consideration is how many lawyers or Chartered Accountants will apply for the post of members when they are not sure what will be status after four years.

6.21. As per the present policy, the members appointed will not be allowed to be posted in the place where they are practising [**Ajay Gandhi v. B. Singh (2004) 265 ITR 451 (SC)**]. Around the age of 55, a member may be posted in a place which will keep them away from their families.

6.22. Similarly, as per the provisions of Rule 13E of Members (Recruitment and Conditions of Service) Rules, 1963, once you are appointed you cannot practice before the ITAT anywhere in India after retirement or on leaving the service [ **N.K.Bajpai v. UOI (2012) (278) E.L.T 3 (SC)(CA.No. 2850 of 2012 dated March 15, 2012 www.itatonline.org / P.C. Jain v. UOI 2009 (236) E.L.T. 737 (Delhi)(HC) itatonline.org/ Nanubhai D.Desai v. ACIT(2014) 149 ITD 16 (SB) (Ahd)(Trib)]**

6.23. A professional will be required to leave their well-established lucrative practice in order to join the Bench. Assuming a minimum term of 4 years, it may be very difficult for a member to once again establish his or her practice as such a member would be barred to practice before the ITAT as per Rule 13E of Members (Recruitment and Conditions of Service) Rules, 1963

6.24. Also, At present as per section 255 (3) of the Act a single member can decide if the issue involved is less than Rs. 50 lakhs i.e. SMC Bench. As we understand, the member should have been in service for at least five years. After a few years, no member of the ITAT may have more than five years of experience hence there will not be an issue with the functioning of the Single-Member Bench.

6.25. The loss of independence from the Executive will result in a grave erosion of faith in the Institution for independent adjudication of the tax disputes. The ITAT has been regarded globally, has an independent forum, and now



with the amendment giving short-term of 4 years, subject to re-  
appointment for a further 4 years through various procedures controlled  
by the executive, including representatives of the finance ministry will  
greatly erode the faith and trust that this Institution has had amongst  
global investors who invest in the country.

## **7. Other provisions**

7.1. The other provisions in the aforesaid Act and the Rules which would reflect serious interference by the Executive with the independent functioning of the Judiciary are:

7.1.1. The appointment and re-appointment of the President, the Vice-President and the Members of the ITAT is to be made by a Search and Selection Committee. The Search and Selection Committee for appointment and re-appointment of the Accountant Members and the Judicial Members of the ITAT would comprise of a Chairperson being the Chief Justice of India or a Judge of the Supreme Court nominated by him, two Members who are Secretaries to the Government of India to be nominated by the Government, President of ITAT and nominee of the Minister of Law and Justice who shall act as the Secretary to said Committee. Experience shows that a nominee from the Ministry of Finance is also a part of the said Committee. Therefore, the judicial functionaries in the said Committee comprising of 5 members would be only 2 viz., the Chief Justice of India or a Judge of the Supreme Court nominated by him and President of ITAT who will always be in a minority position. This is contrary to the view expressed by the Supreme Court and several High Courts that the composition of selection committees must be balanced with members from both the judiciary and the executive and not loaded in favour of the latter. Further, presence of the nominee from the Ministry of Finance is likely

to create an apprehension in the mind of the Members of the ITAT that if they antagonise the reappointing authority, their re-appointment would be in difficulty.

7.1.2. In the Search and Selection Committee in which the majority comprises of members of the Executives, section 3(8) of the Tribunal Reforms Act, 2021 provides that no appointment shall be regarded as invalid merely by reason of any vacancy or absence in such committee. Therefore, it is possible that the selection may be made only by members of the executive in the absence of the judicial functionary.

7.1.3. The enabling provision for removal of a Member from his office is in Rule 9 of the Tribunal (Conditions of Service) Rules, 2021. The Central Government may remove from office any Member on the recommendation of a committee which is constituted by it in this behalf. The Rule is silent about the composition of the Removal Committee. Further, Rule 9(1) of the said Rules leaves it to the discretion of the Central Government to make preliminary scrutiny in the case and the concerned Ministry to make a reference to the Removal Committee. Therefore, the Member against whom an enquiry is made will be at the mercy of the Central Government who is one of the parties in each and every dispute which comes before the ITAT.

7.1.4. As per rule 14(5)(c) of the said Rules, the Central Government shall be the leave sanctioning authority for the President of the ITAT. This is

likely to influence the decision-making process in the administration and adjudication of disputes by the President.

7.1.5. Though Form-II of the said Rules being the form of oath to be taken by inter alia the President, the Vice President and the Members of the ITAT states that they would discharge their duties “without fear or favour”, we submit that sufficient roadblocks have been placed in the said Rules so as to test their ability to stand by their oath.

We are therefore of the view that the Tribunal Reforms Act, 2021 and the Tribunal (Conditions of Service) Rules, 2021 particularly with reference to the selection, tenure and removal of the Members of the ITAT would adversely affect the judicial independence of the ITAT which exists today and has existed for past several decades and contributed to the track record achieved by the ITAT so far.

Honourable sir, we have objected to the proposed amendment when the provision was introduced. The stakeholders and professional organisations across the country have also strongly objected to the proposed amendments. The experience shows that the tenure appointment does not serve the desired object of the functioning of the ITAT.

## **8. Our suggestions**

In view of the above, we recommend the following for your kind consideration:

- a) section 252A of the Income-tax Act, as inserted by Finance Act, 2017, may be omitted; or
- b) the provisions of the Tribunal Reforms Act, 2021 and the Tribunal (Conditions of Service) Rules, 2021 may not be made applicable to the ITAT; and
- c) Alternatively and without prejudice to the above, appropriate amendments may be carried out to the Tribunal Reforms Act, 2021 and the Tribunal (Conditions of Service) Rules, 2021 so as to protect the independent and fair functioning of the ITAT.