

All Gujarat Federation of Tax Consultants

President : Adv. Bakul R. Parikh

303, Narayan Complex, Opp. Havmor Restaurant,
Navrangpura, Ahmedabad-09. Ph. : 079-26443637
M. : 98250 32326 Email : bakulrparikh@yahoo.com

Secretary : Adv. Kaushal P. Vyas

407, Vraj Plaza, Opp. Sahajanand Plaza, Paldi,
Ahmedabad-07. Ph. : 079-2660 0258
M. : 99256 03257 Email : vyas.kaushal@yahoo.com

Dt. 20-6-2017

Shri Arun Jaitley

Honourable Finance Minister of India,

North Block,

New Delhi -110001

Ref. Notification of the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other conditions of service of Members) Rules, 2017 vide G. S.R. 514(E) dated 01.06.2017, in exercise of the powers conferred by section 184 of the Finance Act, 2017 (7 of 2017) read with section 252 A of the Income-tax Act, 1961

Sub- Terms and conditions of service of President, Vice –President and Members of the ITAT and selection process of members of the ITAT.

Respected Sir;

The All India Federation of Tax Practitioners (AIFTP) is an Apex body of Tax Practitioners of India. The main object of the Federation is to spread education in the matters relating to tax laws, other allied laws and accountancy. One of the objects of the AIFTP is to strive and work for

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independence of the Honourable Courts, quasi-judicial Authorities, Appellate Authorities, etc. The ITAT Bar Associations' Co-ordination committee of the Federation plays an active role in the matters of vital importance to the Tribunal.

Sir, we have sent a detailed representation vide our letter dated May, 3, 2017 requesting your honour to drop the proposal of appointing the members of the ITAT on a tenure basis and continue the present system of appointing the members of the ITAT without any change. The present system is transparent and the Chairman of the selection committee being a senior sitting judge of the Supreme Court nominated by the Chief justice of India, it is acknowledged as one of the best method of selection of members which has made the institution proud. All the stake holders have bestowed confidence in the selection process which is in existence for more than 76 years.

Sir, the Rules notified on 1st June, 2017, have made far reaching changes in respect of procedure for appointment of members of the ITAT and also their service conditions. We are of the considered opinion that if the said rule is implemented, it will affect the impartial functioning and integrity of the ITAT, which is the mother Tribunal of all other Tribunals of our Country. The detailed reasons are as under.

1. Appointment of Members of the ITAT on tenure basis for three years.

- a. The first proviso to section 184(1) of the Act inter-alia provides that the President, Vice President or Member of the Tribunal would hold office for

such term as may be specified in the Rules framed by the Central Government, but not exceeding five years from the date on which he enters upon his office and that he shall be eligible for reappointment. In the said Rules as notified by the Central Government, the term of office of member for ITAT is fixed as three years; and the said Rules give wide powers to the Executive, which would seriously interfere with the independence of the ITAT.

The Income tax Appellate Tribunal is the final fact finding authority under the Income Tax Act and an appeal can be filed to High Court only upon a substantial question of law. The Income tax Act, refers to 92 Central Acts and various State legislations. At present when a member is appointed he sits with a senior member who has more experience and gets trained. If the term of appointment is only for three years, when he completes the said three years he may not be reappointed. Your honour may consider the situation where after 15 years, when all present members will retire and there may not be members who have the experience and expert knowledge on taxation to hear matters, hence defeating the whole purpose of constituting a specialised Tribunal. It may be appreciated that an appeal can be filed to the High Court only upon a substantial question of law. On facts, the Tribunal is the final fact finding authority.

2. Appointment for a fixed term with eligibility for re-appointment

Before the Income tax Appellate Tribunal, in all the appeals, the revenue is a litigant either as appellant or respondent. Therefore, the functioning of the Income Tax Tribunal cannot be compared with other Tribunals. When a member decides a tax matter, if his term is to be renewed by the committee appointed by the Govt , he may lean in favour of the revenue due to fear that if he decides against the revenue, his term may not be renewed further. This will affect the impartial justice delivery system.

3. Appointment of President, Vice -Presidents and Members of the Tribunal.

- (a) The appointment and re-appointment of the President, the Vice-President and the Member of the Tribunal is to be made by a Search and Selection Committee.
 - i. The said committee for the post of the President and the Vice-president would comprise of a sitting judge of the Supreme Court to be nominated by the Chief Justice of India as the Chairperson of the committee, the President of the ITAT and Secretary to the Government of India, Ministry of Law and Justice (Department of Legal Affairs). In the case of appointment and reappointment of President of the Tribunal, he himself cannot be a part of the said committee. Therefore, there would only be two persons in the

committee for appointment of a President and it is not clear what would happen if there is a difference of opinion.

- ii. The Search and Selection Committee for appointment and re-appointment of an Accountant Member and a Judicial Member would comprise of a nominee of the Ministry of Law and Justice who shall act as the Chairperson, Secretary to the Government of India in the Ministry of Law and Justice (Department of Legal Affairs), President of ITAT and such other persons, if any, not exceeding two, as the Minister of Law and Justice may appoint. Therefore, the only judicial functionary in the said committee comprising of 3 to 5 members would be the President of ITAT who will always be in a minority position. This further reinstates the fear which may always persist in the mind of the Members of the ITAT that if they antagonise the reappointing authority, by passing an adverse order their reappointment would be in jeopardy.
- (b) Normally, the Tribunal itself should be able to decide about the number of vacancies in the judicial posts and their manner of filling it up. However, as per rule 4(2) of the said Rules, if any requirement/ vacancy arises in the posts of the Tribunal, then, it will have to plead before the Secretary to the Government of India in the Ministry of Law and Justice (Department of Legal Affairs) for convening of a Search and Selection Committee which would enable appointment or reappointment of the President, Vice President and the Members of the ITAT.

- (c) In the Search and Selection Committee, the majority of which comprises of the Executive, Rule 4(4) provides that no appointment shall be regarded as invalid merely by reason of any vacancy or absence in such committee. Therefore, it is theoretically possible that the judicial functionary in the committee may be kept out of the selection process.

4. Retirement age, President and Members of the ITAT.

It may be noted that, in the Rules, President of the Customs, Excise and Service tax Appellate Tribunal under the Customs Act, 1962, the age limit is fixed at 67 years where as President of the ITAT at 65 years. With respect it is desired that the age limit of all members of the ITAT should be equal to the ITAT President as, both the members and the President perform judicial functions. In the High Court and Supreme Court, Chief justice and other judges retire at same age. Such a discrimination may be avoided.

5.Rule .7 : Removal of member from office.

The Rules says that Central Govt., on the recommendation of a committee constituted by the Govt., can remove the ITAT members. The constitution of such a committee is not specified. The proviso states that only the Chairperson or member of the National Company Appellate Tribunal shall be removed in consultation with chief Justice of India. Hence the Chairman or President or members of the Tribunals of any other Tribunal, thus can be removed without consultation of judiciary. Rule 8 of the Rules leaves it to the discretion of the Central Government to make preliminary scrutiny in the case and the concerned Ministry to make 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. It is desired that the committee must consist of independent persons, preferably retired judges of the Apex Court or the High Courts.

6. Rule. 14 : Leave sanctioning authority - As per Rule 14, the sanctioning authority for leave of Chairman, President etc shall be the Central Govt. In the absence of the Chairman or President, the members of the ITAT may have to obtain sanction from the Central Govt. When the ITAT President is on leave, he has to intimate and not take sanction from the Govt. This would also influence the decision making process in the administration and adjudication of disputes by the President. The word sanction may be removed and only intimation may be added. When members are taking leave in case the President is not available, respective Vice President of the Zone may be authorised to sanction leaves. Giving power to Govt. to sanction leaves may lead to interference with the administrative function of the Tribunal.


Sir, most of the provisions of the Rules are contrary to the guideline prescribed by the Apex court in *UOI v R.Gandhi / Madras Bar Association* (2010) 156 Comp Case 392 (SC)/ 11 SCC 1. We therefore request your honour not to implement the proposed Rules in respect of appointment of members of the ITAT at least.

Sir, when the present system is working well there is no need to change the system.

We request your honour that;

- (a) Section 252A of the Income-tax Act, as inserted by Finance Act, 2017, may be omitted; or
- (b) The provisions of part XIV of Chapter VI of the Finance Act, 2017, may not be made applicable to the ITAT.
- (c) The members of the ITAT may be appointed with same terms and conditions as were prevalent earlier.
- (d) The retirement age limit of members of the ITAT may be made same as that of the President of the ITAT.

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President