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February 22, 2021

To

Smt. Nirmala Sitharaman,
The Hon'ble Finance Minister of India,
North Block New Delhi, 110001

Re: The proposed 'Faceless Income-tax Tribunal' in the Finance Bill, 2021. Clause 78 of the Bill, seeks to amend the section 255 of the Income-tax Act, 1961 (**Act**) relating to procedure of the Tribunal.

Sub: An appeal to drop the proposed amendment in the section 255 of the Act.

Respected Madam,

1. About All India Federation of Tax Practitioners (AIFTP)

The All India Federation of Tax Practitioners (**AIFTP**) is an Apex body of Tax Practitioners of India which was established on November 11, 1976, which is registered under Bombay Public Charitable Trust Act, 1950 as well as Society Registration Act, 1860. The members of the AIFTP include Senior Advocates, Advocates, Solicitors, Chartered Accountants, and Tax practitioners who actively practice on Direct and Indirect Taxes laws. AIFTP is the only voluntary professional organisation in our country which has 138 Professional Organisations as its affiliated members and more than 9000 individuals as Life members from 27 States and 4 Union Territories.

The main object of the AIFTP is *"To educate its members and the public towards a better compliance with Direct tax laws and also to provide an effective forum for discussion of the matters pertaining to tax laws and other laws, accountancy and to aid the collection and dissemination of information relating to there to"*. One of the other objects of the AIFTP is also *"To strive and*

work for independence of Honourable Courts, Quasi-judicial authorities, Appellate Authorities, the Settlement Commission, Tribunals, the Authority for Advance Ruling or other similar Authorities”

Hon'ble Madam, at the very outset, we, the members of the AIFTP wish to congratulate you on the Budget. This budget, in a difficult year, has managed to be both idealistic and dynamic.

Madam, at the National Executive Committee meeting of the AIFTP which was held on 17-2-2021 where in 69 members from across the Country were present and passed the unanimous resolution to drop the proposed Clause 78 of the Bill, that seeks to amend the section 255 of the Income-tax Act relating to procedure of the Tribunal may not achieve its desired objects. Accordingly, we are making an appeal to your honour to drop the proposed amendment.

We respectfully submit our reasons why the proposed amendments may not achieve the desired objectives, as under:

2. A brief background of the Income-Tax Appellate Tribunal

The Income-tax Appellate Tribunal (ITAT) was established on January 25, 1941, has completed 80 years of its purposeful existence on January 25, 2021, in 80 years it has gained the confidence of both the taxpayers and the Revenue authorities alike by rendering the impartial decisions in very transparent manner. Exhibit 'A' is the few messages from the eminent personalities are the testimony for judging the performance of the ITAT.

Exhibit A

3. Pendency of the Appeals before the ITAT

The pendency of Appeals before the ITAT as on January 1, 2021, is only 79,754 appeals all across the country. This

pendency was 3,00,597 appeals as on 1998-99. The total sanctioned strength of the ITAT is 63 benches and 126 members whereas the number of members as on February 8, 2021 is only 78. There are 48 vacancies, and another 7 members will be retiring in the year 2021. Accordingly, by the end of 2021 there will be a vacancy for 55 members. If the vacancy of the members is filled, the tax payers can get the justice from the ITAT within six months of the filing of Appeals. This is one of the only Tribunals where the pendency has reduced on a year-on-year basis by adopting a case management system.

4. Acceptance of the orders of the ITAT.

As per the data published in the Platinum Jubilee Souvenir of the ITAT on January 25, 2016, at Page No 37 it has shown that on an average 96.10 % of the Orders of the Tribunal are accepted. (**Exhibit -B** is a copy of Appendix-9 which was published in the Souvenir.)

The Appendix-6 which was published in the Souvenir page No 31 & 32 shows the Number of Benches, institution and disposals since 1941 to up to December 2015 (Hereto marked as **Exhibit -C**)

Even after insertion of appeal provision under Section 260A of the Act with effect from October 1, 1998, 70% of the appeals from the order of the Tribunal were dismissed by the various High Courts at the stage of admission itself.

The figures clearly demonstrate that the ITAT is discharging its duty to the satisfaction of the tax payers as well as the Tax Department.

5. Final fact-finding Authority and transparency in hearing

Under the Act, the ITAT is the final fact-finding authority as per Section 254 (4) of the Act, except as provided in Section 260A where orders passed by the

Appellate Tribunal are considered final. The assessee or the department can file an appeal before the High Courts as per Section 260A (1) of the Act and this appeal can be entertained by the High Court only if the Court is satisfied that the case involves a substantial question of law. According to us more than 80% of matters which are argued before the ITAT on facts. There are instances where for ascertaining facts, the ITAT has had to requisition the original record of recorded reasons, the sanctions given by the tax authorities, and in some of the instances, the Hon'ble Members have visited the actual fields to verify whether the agricultural activities are carried on or not! In some cases, the Hon'ble members have summoned witnesses and examined them in the witness box. Often, the paper-books filed before the Tribunal are of more than 1000 pages, and an appreciation of most of the pages if not all, may be required to ascertain the correct facts. At present the arguments of opposing representatives are made in open court. When the argument of the appellant is over, the respondent gives their reply and the appellant has right to bring correct facts or positions of law on record in rejoinder. In the course of hearing, the case laws cited by the both the sides are discussed often intricately about the provisions of law and the interpretation to be given to them.

The present system is working very smoothly following the honour, dignity and convention of the open Court, which is so integral to the common law system. There is complete transparency in the proceedings of the ITAT. The assessee as well as the public can watch proceedings as they happen. The tax payers have reposed their confidence in the institution for over 80 years due to continuous efforts on the part of the institution to improve the justice delivery system. The times have evolved and so has the Tribunal.

We wish to draw your attention to the recent decision of the Hon'ble Supreme Court in the case of **Pradyuman Bisht v. UOI & Ors. (2020) 1 SCC 443**. The Hon'ble Court was observing the question of closed-circuit television cameras to be put up in courts. The Court specifically brought out

that the installation of CCTV cameras would be in the interest of justice and specifically asked the learned Additional Solicitor General as to why the Union of India had not installed CCTV cameras in Tribunals where open hearing takes place like Court such as ITAT, CESTAT, etc. as the Tribunals stand on the same footing as far as object of CCTV camera is concerned. It was further observed that recordings would help the constitutional authorities and the High Courts exercising jurisdiction under Articles 226 and 227 of the Constitution over such Tribunals if required. The bench directed that this aspect be taken up by the then learned Additional Solicitor General with the authorities concerned so that an appropriate direction is issued by the authority concerned for installation of CCTV cameras in Tribunals in same manner as in courts and an affidavit filed in this Court.

6. ITAT was established by continuous study and considering the various reports.

The idea of setting up the Income -tax Appellate Tribunal was first mooted in the Income-tax Enquiry Report 1936, which was submitted to the Government of India. The select committee was appointed to consider the Bill to amend the Indian Income-tax Act 1922. The report was presented to the Legislature Assembly on 10th November 1938. In pursuance of these recommendations, Section 5A was introduced in the Income-tax Act, 1922 and on 25-1-1941 was notified as the appointed date from which that section came in to force. The section remained unchanged in its essentials till the repeal of the Income-tax Act 1922, with effect from April 1, 1962. In the Income-tax Act, 1961, the Constitution and functions of the Tribunal have been set out in sections 252 to 255 of the Act. There is no fundamental change either in the constitution or functions of the Tribunal due to enactment of the new Income tax Act, 1961.

7. Opportunity of Hearing – Tribunal has the trapping of court.

Section 254(1) of the Income -tax Act, 1961 reads as under

“The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.”

Further, Rule 33 of ITAT Rules, 1963, clearly states that the proceedings before the Tribunal shall be open to the public. Relevant portion of the rule is usefully extracted as under:

“Proceedings before the Tribunal.

33. Except in cases to which the provisions of section 54 of the Indian Income-tax Act, 1922, and/or section 137 of the Act are applicable and cases in respect of which the Central Government has issued a notification under sub-section (2) of section 138 of the Act, the proceedings before the Tribunal shall be open to the public. However, the Tribunal may, in its discretion, direct that proceedings before it in a particular case will not be open to the public.”

In the case of **Ajay Gandhi v.B. Singh (2004) 265 ITR 451 (456)** the Supreme Court observed that the Income tax Appellate Tribunal exercises judicial functions and has the trapping of a court.

In the case of **ITAT v.V.K.Agarwal (1999) 235 ITR 175 (SC)**, before the Court the counsel for Union of India conceded that the Income Tax Appellate Tribunal performs judicial functions and was a court subordinate to the High Court. The Court held that the Tribunal is competent to initiate contempt proceedings under Contempt of Courts Act, 1971.

The Hon'ble Supreme Court in the case of **Rajesh Kumar v. DCIT [2006] 287 ITR 91 (SC)** has re-iterated based on Section 136 of the Income-tax Act, 1961, that proceedings before Income-tax Authorities are judicial proceedings. Section 255(6) states that “The Appellate Tribunal shall, for the purposes of discharging its functions, have all of the powers that are vested in the Income-tax authorities referred to in Section 131”. It continues to

state that “any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Section 193 and 228 and for the purpose of Section 196 of the Indian Penal Code and the Tribunal proceedings shall be deemed to be a civil court for all the purposes of Chapter XXXV of the Code of Criminal Procedure, 1898”. The language employed in the latter part of Section 255(6) is virtually identical to that used in Section 136 of the Act. Section 293 of the Act provides for a specific bar of suits in the civil court. An extension of the logic seems to make it clear that the Court exercises at least ‘quasi-judicial’ function. It is therefore important that the independence of the Tribunal is zealously preserved. Section 254 (1) of the Income -tax Act 1961 states that Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

In the case of **Nareshbhai Bhagubhai & Ors v. UOI (2019) 15 SCC 1**, The Hon’ble Supreme Court has held that the right to be heard even in an administrative decision-making process is not mere formality. The right of hearing is mandatory and substantive right and must be strictly followed and not following the same is violative of principle of natural justice.

When an assessee approaches the ITAT Justice must not only be done but also be seen to be done. The current open court system is in consonance with the said principles said down by the Hon’ble Supreme Court from time to time.

8. Functioning of the ITAT cannot be compared with the functioning of the Commissioner (Appeals).

The proceedings before the Commissioner (Appeals) are a continuation of assessment proceedings, whereas appeal before the ITAT is an independent adjudicating body. The former proceedings are internal proceedings in as far as the Income tax Department is concerned. The Tribunal is the first truly independent body free from pressures of the Income tax Department in the

process of adjudication of tax disputes, allowing them to be empowered to administer justice.

The not giving an opportunity of personal hearing before the Tribunal is a violation of principles of natural justice and contrary to the safe guard guaranteed by the Constitution of India under Articles 14, 19 and 21 of the Constitution of India. It is imperative to meet the test of Constitutional validity.

9. Power to constitute the Bench with Honourable President of the ITAT

As per section 255(5) of the Income -tax Act, 1961 it is the Appellate Tribunal that shall have the power to regulate its own procedure and procedure of the Benches thereof, in all matters arising out of the exercise of its powers or in the discharge of its functions, including the places at which the Benches shall hold their sittings. The ITAT functions under the Ministry of Finance whereas the ITAT functions under the Ministry of law and Justice. The Income tax department is always one of the parties before the ITAT either as appellant or respondent. If at all any scheme is to be framed it should be by the Ministry of law and Justice and not by the Ministry of Finance headed by the CBDT. In the case of **Madras Bar Association v. UOI(2014) 109 DTR 273/ 227 Taxman 151**, the Court held that the dispensation of justice by the Tribunals can be effective only when they function independent of any executive control. The Court also observed that the Parliament must ensure new Tribunal conforms to salient characteristics and standards of court sought to be substituted. A failure to do so will be violative of "Basic structure" of Constitution of India and the said ratio is also applicable to the Income tax Appellate Tribunal. We therefore make an appeal that that the dispensation of justice in an open court hearing is a must in before the ITAT.

10. Oral hearing – A statutory right -Cannot be dispensed with

One will appreciate that since the establishment of the ITAT in the year 1941, the appeals have been disposed of by orally hearing the parties in appeal. In **Automotive Tyres Manufacturers' Association v. Designated Authority (2011) 2 SCC 258**, the Honourable Court has held that even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witness etc. and also clear up his doubts during the course of arguments. In **G.N Rao v. Andhra Pradesh State Road Transport Corporation AIR 1959 SC 308** the Court held that personal hearing enables a party appearing at such hearing to persuade the Authority concerned by reasoned arguments to accept his point of view by removing the authority's doubt and by answering the question. In **P.N. Eswara Iyer v. Registrar, Supreme Court of India (1980) 4 SCC 680**, the Court held that the normal rule of judicial process is oral hearing and its elimination an unusual exception. The Apex Court further held that justicing is an art even as advocacy is an art. It was held that no judicial 'Emergency' can jettison the vital breach of spoken advocacy in an open forum and there is no judicial cry for extinguishment of oral argument all together.

Accordingly, the decision to deny oral hearing at the Income Tax Appellate Tribunal stage needs to be reconsidered as otherwise the same shall not only be in violation of principle of natural justice but the same shall also suffer from the vice of unfairness.

11. Proposed amendment of faceless hearing without deliberation and without taking in to feedback from the stake holders.

The proposed amendment to faceless hearing is proposed without consulting various stake holders. Now, while the ITAT is hearing the Virtual hearing of matters, a number of technical problems, such as poor internet connectivity and other technological and technical difficulties are often encountered. The filing of appeal by email is not implemented even as of

today. The assesses must first be made aware of the use of technology, development of software etc in order for them to have confidence in the system. Both the faceless assessment and faceless appeals [before the Commissioner of Income tax (Appeals)] are yet to be tested and stand the trial of time. When Virtual hearing themselves have not proven to be confidence inspiring, the proposed Faceless functioning of the ITAT may prove to be a step that does not benefit the taxpayer. The desire for speedy disposal of cases can not be at the cost of fairness. Speedy disposal of cases does not mean that one should decide the case in violation of principle of natural justice and fairness.

12. Suggestions.

1. The proposed amendment may be dropped.
2. In case the Government is keen to introduce the faceless ITAT, the following procedures may be followed:
 - (a) The law commission may be requested to prepare the report on the Virtual and face less hearing of the ITAT, after interacting with the stake holders across the country.
 - (b) After receipt of the report the proposed amendment may be referred to a select committee.
 - (c) After receipt of the report from the Parliament committee the suitable amendment if any desired may be introduced.

Madam, we request your good self to consider our representation and we also request for a personal hearing to consider our representation at Delhi or any other place for put forward our suggestions

Thanking you

For All India Federation of Tax Practitioners

M. Srinivasa Rao

National President

Copy to Copy

1. Hon'ble Shri Anurag Thakur, Minister of State Finance and Corporate Affairs, North Block New Delhi, 110001

2. Hon'ble Shri Pramod Chandra Mody
Chairman CBDT, North Block, New Delhi-11002

Separate letter to Hon'ble Prime Minister of India and Hon'ble Law Minister of India

Exhibit - A

The then Honourable President of India, Shri Pranab Mukherjee, on the occasion of platinum Jubilee Celebration on January 25, 2016 in a message which was published in the Souvenir of the ITAT reads as under –

“Over the last more than seven decades, the Income Tax Appellate Tribunal has shown exemplary diligence in dealing with intricate domestic as well as International taxation issues and rendering decisions which balances the interests of the taxmen and citizens. The Tribunal has been adjudicating disputes in the field of direct taxes in affair and impartial manner. It has been discharging its functions not only to the satisfaction of the Executive but also that of the taxpayers at large.”

The Hon’ble Shri Arun Jaitley, the then Minister of Finance, Corporate Affairs and Information & Broadcasting, India

“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 tax paying fraternity as well as Revenue Department.”

The Hon’ble Shri R.K Malhotra, the then Secretary Government of India Ministry of law & Justice Department of Legal Affairs.

“Establishing the Income Tax Appellate Tribunal under the Income -tax Act 1922 i.e. prior to independence in 1947 and its continuation after the independence in 1947, without much change, itself, is an indication that functioning of the Tribunal has been a success. It has exhibited independence in its working, free from any pressure.

The pendency in the Appellate Tribunal has come down by adopting Case Management System and on an average appeal are decided with in a period of one to two years.”

Shri Philip Baker QC. Field Court Tax Chambers – The Income Tax Appellate Tribunal & International Taxation.

“75 years ago, no one could have predicted that the ITAT would become one of the most active Tribunals in the world dealing with issues such as interpretation of tax treaties and transfer pricing. The ITAT is developing expertise and experience in these areas. It will be interesting to see how this develops over next 25 years, and to see the comments that will be made when the ITAT reaches its century.”

On the occasion of Diamond Jubilee 25-1-2001:

The Hon’ble Shri A.B. Vajpayee, the then Prime Minister of India

“As a quasi -judicial body, the Income Tax Appellate Tribunal has been fulfilling an important duty ever since it was set up in January 1941. On this occasion, I urge everybody associated with the Income Tax Appellate Tribunal to rededicate themselves to their motto “Easy and Quick Justice.”

The Hon’ble Justice Dr. Adarsh Sein Anand, the then Chief Justice of India

“The Income Tax Appellate Tribunal, one of the oldest quasi-judicial institutions in this country is completing 60 years of its existence. This Tribunal has been earning accolades from various sections of the society more particularly from the litigant public for rendering quick and inexpensive justice in an extremely complicated area of law i.e. direct taxes.”

Golden Jubilee January 25, 1991

Shri Nani A. Palkhivala, Senior, Advocate: The Maddening Instability of the Income-tax Law

“On 25th January 1991 the Income -tax Appellate Tribunal completed fifty years of its existence. On its Golden Jubilee it is but fair to record that it has won golden opinions on all sides throughout the half a century that it has functioned. There is no doubt that over this long period, the Tribunal has been manned by some very able individuals. Quite a few of them were fit to be adorn any High Court Bench. No other Tribunal in India has won such well deserved popularity and confidence of the public as the Income -tax Appellate Tribunal.”

The Hon’ble Mr . Justice Y.V. Anjaneulu Former Judge, Andhra Pradesh High Court, Presently Member, Law Commission. In the Law Commission of India 115th Report on Tax Courts in the year 1986 dt 28 -8 1986 which was presented to the then Hon’ble Law Minter Shri Ashok Kumar Sen at page No, 12 dealing with the issues relating to the formation of the Central Tax Court observed as under:

The Commission hastened to add in para 2. 29:

“There is near unanimity of opinion that Income -tax Appellate Tribunal has immensely justified its existence and largely vindicated the trust

reposed in it. It has therefore, to be retained with its regional jurisdiction. It would be the last fact finding authority.”

Ruby Jubilee Souvenir-1981 (40th Anniversary)

The Hon'ble Mr. Justice Y.V. Chandrachud, Former Chief Justice of India

“.. The Income -tax Appellate Tribunal is a model administrative Tribunal whose illustrious example and commendable performance may well be emulated by similar other Tribunals in different disciplines. There is uniform praise of the manner in which the Tribunal functions and I suppose it is one of the few quasi -legal institutions which is not plagued by the problem of arrears.”

Shri N.A. Palkhivala, Senior Advocate, Bombay High Court – Forty Years of the Income Tax Appellate Tribunal

“The Tribunal functions as a judicial body under the Ministry of law and entirely beyond the control of the Income -tax Department. Happily, it is fully insulated from the pressures and influences of both bureaucrats and politicians. The Tribunal has shown great independence and courage in deciding cases according to law and in consonance with justice, regardless of the stakes involved. In short, it has fulfilled the purpose for which it was brought in to existence and fully justified the high expectations with which it was conceived.

While ten of thousands of appeals are instituted in the Tribunal every year, about 90 per cent of them do not go on reference to the High Court. The Tribunal's judgements on point of law are upheld on over two-thirds of the references heard by the various High Courts.

There is no doubt that over the period of 40 years the Tribunal manned by some very able men. Quite a few of them would be fit to adorn any High Court Bench. No other Tribunal in India has won such well-deserved popularity and confidence of the public as the Income -tax Appellate Tribunal. In fact, the time has come when a Tribunal, similarly functioning as a judicial body under the Ministry of Law, should be constituted to hear appeals under various other laws.”

Hon’ble Shri H.R. Gokhale, the then Union Law Minister

(Lok Sabha debates, 18th Session on the Constitution (42nd Amendment)

Bill in the Lok Sabha on 1st November, 1976)

“I have got the example of the Income -tax Appellate Tribunal. We have judicial members, we have the accountant members. The Tribunal is functioning extremely well and even those people who have gone before the Income -tax Appellate Tribunal have told me and have spoken on the public platform that the Income -tax Appellate Tribunal as it constituted to day, is the best example to show how the Tribunals, if properly constituted, can create confidence. I can say that the Income -tax Appellate Tribunal ‘s decisions are rarely interfered with by the High courts and the Supreme Court because the quality of their work has been found to be sufficiently good as to inspire confidence.”

Silver Jubilee – Souvenir - 23rd April 1966.

Hon’ble Dr. Sarvepalli Radhakrishnan, Former President of India

“Born as the Tribunal was, out of the strong and natural desire of the people to be able appeal to an independent body on important questions of fact, it provides a popular and informal forum for giving substantial justice, not bound by the rules of evidence, to persons aggrieved by decisions, of the Appellate Assistant Commissioners. The Tribunal, in the 25 years of its existence, has earned unstinted praise for the

independence of its decisions; and its fervent desire to do justice it has won well merited confidence of the public.”

The Hon'ble Shri A.K Sen, Member of Parliament (Lok Sabha) (Former Law Minister)

“I was associated as a Minister having the administrative charge of the Tribunal for nearly nine years. During this time, I have seen the Tribunal grow in stature, popularity and importance. It has been endeavor of the Government to keep the Tribunal absolutely independent, so that its adjudication is rendered not only fearless and independent but it also appears to be so. I have seen the working of the Tribunal both as a member of the Bar and as a member of the Government. I can say with confidence that amongst the administrative tribunals in the country it occupies a unique position. The confidence which it enjoys amongst the public and respect which it commands from the commercial community would be a matter of pride for any Tribunal in any country. I have every confidence and hope that the Tribunal would continue to serve the country and the litigant public without its working being interfered with or subjected to uniformed criticism.”

The Hon'ble Shri C.K. Dapthary, Former Attorney General of India.

“... though it is said that statistics support only the statistician yet some times they serve to underline a point and it will not be out of place to mention some figures. Various Benches have for five years from 1958 to 1963 disposed of over 66000 appeals and in only about 1175 of them, that is 4% have been reference to the High Courts. The Tribunal's orders have been reversed in only a small percentage and even where there have been further appeals to the Supreme Court, great majority of the decisions have been up held. These are figures which speak for themselves. The reasons are apparent. The Benches have been manned by men of ability whether they are Judicial or Accountant members “

