

S.D. College, Legal Awareness Camp 02. 02. 2008

My esteem colleague Hon'ble Mr. Justice Vinod Sharma, Judge of Punjab & Haryana High Court, Dr. A. C. Vaid, Principal of the college, other dignitaries on the dais, off the dais and dear students.

I am thankful to Dr. Vaid and the college authorities for giving me an opportunity to be with you this fine morning. A college or school is a place where either one goes for learning or teaching. Teacher I am not. I still consider myself to be a student and by coming to the college I think I shall learn something more by sharing my little knowledge and experience with you. As is an old saying that the knowledge increases with sharing.

Now you may think as to how I shall learn by sharing my little knowledge with you. Answer is simple – in routine our job is to hear and decide cases. We judges speak through our judgments but for delivering a lecture to you I had to study which enabled me to refresh my memories and also learn more.

At the first place I concede that I am not an expert on the subject. In my opinion if you start considering yourself expert on the subject that means you do not know anything. The process to hear, be receptive and learning stops.

Subject given to me is tax. This also means 'taxing' Money wise when you are required to part with your hard earned money in the form of taxes and time wise-when you start dealing with a tax problem where some times sections and sub-sections run into pages and pages and then adding explanations to the same as if the pages and pages of the section were not enough to explain the meaning of the provision.

Now I shall give you a brief idea of taxation in general starting from historical background. I will share with you certain things which you may not read in your books. For the purpose of exams you can very well get the material in the text books and the teachers in the college are better equipped than me to take care of your syllabus.

HISTORY

In the evolution of mankind ever since the man realized the importance and benefits of living in an organized society, the question arose as to how to find the Organization upon which the responsibility is cast to govern. By necessary implication it was realized that money is required to be collected and utilized for the purpose of running the society in an organized manner.

Kautilya's Arthashastra throws light on several principles for the levy of tax and is complete code in itself on financial matters of the State. Similarly, Manusmriti also throws light in this regard. In Chapter 6, Section 24 of the Kautilya Arthshastra the following Main Sources of Income of the State stands mentioned – Mines, Irrigation Works, Forests, Herbs, Trade Routes. The others are – Custom Duties; Minting Charges, Fines, Prices of Weights and Measures; Fees for examination of Coins Spirituous Liquors, Animal Slaughter, Yarn, Oil, Ghee, Sugars, Market Establishment. It also talks of Profit for the State from Gold Smithy, Prostitutes, Gambling, groups of Artisans & Artists, Gate Receipts and Receipts from Outsiders.

In "Manu Smriti", it is said, "a King (i.e. State in the present context) should not take higher taxes and duties than the law permits". Manu says that "Let the King not cut up his own root by levying no taxes nor the root of the subject by excessive taxing". Giving examples, Manu says "As the calf and the bee take their food little by little, so must the King draw moderate taxes from his subject." (Manusmriti Ch.VII-127).

During the period of Manu the subjects undertook to pay 1/6th of the grains grown and 1/10th of the merchandise transacted and in return, the King made himself responsible for the security and well being of his subjects, and of being answerable for their sins.

“Maharshi Parashar in “Parasher-Smrity” also equates the King with a “Maalakar” (Mali), who simply plucks few of the flowers and not uproots the whole plant with all flowers.

“Pushpam Pushpam Vichinuyaan

Moolchedam Na Kaaryate,
Maalakar Iwaraame
Nayathaam Gaarkaarkam.”

The most beautiful exposition of the elementary rule of taxation was given by “Kalidas” in “Raghuvansh” where he says the King takes to give it to the subject.

Clarifying the nature of taxation in his immortal words, Kalidas says.

“Prajanaamev Bhootyartham
Sahtaabhyo Balimgraheet,
Sahastra Guna Utsharastam
Adadiye Rasam Ravi.”

The meaning of the above shloka is that “The sun collects water by evaporation process, little by little from sea and rivers, and then by multiplying, it pours back it, through rain. So must do the King.

According to the Smritis the King could not levy taxes at his pleasure and sweet will. The rates of taxes varied according to the commodities and also according to the times if they were normal or there was danger of invasion or some other calamity impending. In Udyogaparva of Mahabharatha we have the following shalokas:

Udyoga Parva 34, 17-18 (the English translation reads as follows):

Just as the bee draws honey but the same time leaves the flowers uninjured, so the King should take wealth from men without harming them. One (a bee) may search each flower (for honey) but should not cut the very root, just like a garland-maker but not like a coal maker.

Our ancient texts insisted that the King should not be moved by greed in levying taxes lest the very source should dry up in due course. They laid down rules in detail

regarding the mode of taxation, rates of taxation and exemptions from taxation. We have only to see those texts to understand how equitable those rules were.

It is often said that two things are certain in life death and taxes. But as someone said in lighter vein, physical death comes only once, but taxes bring apprehension of death at the time of every annual budget.

TAX STRUCTURE IN INDIA

1) Qus. : You are in profession
Tax : PAY PROFESSIONAL TAX.

2) Qus. : You are in business
Tax : PAY SALE TAX, CST, EXCISE DUTY,
CUSTOMS, OCTROI, ENTRY TAX,
TURN OVER TAX.

3) Qus. : You are earning income.
Tax : PAY INCOME TAX.

4) Qus. : You are residing or doing business
in Municipal area.
Tax : PAY MUNICIPAL, FIRE TAX, HOME
TAX

5) Qus. : Are you taking out over 25,000
cash from Bank ?
Tax : PAY CASH TAX.

6) Qus. : Are you paying for your employees
perquisites ?
Tax : PAY FRINGE BENEFIT TAX.

7) Qus. : Have you taken or provided any
service/s ?
Tax : PAY SERVICE TAX.

8) Qus. : You get gift in birthday or on any other occasion.

Tax : PAY GIFT TAX.

9) Qus. : Do You have any wealth ?

Tax : PAY WEALTH TAX.

10) Qus. To reduce tension, for entertainment where are you going ?

Ans: Cinema or Resort

Tax : PAY ENTERTAINMENT TAX.

11) Qus. : Have you purchased House ?

Ans: Yes

Tax PAY STAMP DUTY AND REGISTERATION FEE.

12) Qus. : How travel by bus, Air

Tax : PAY PASSENGER TAX, AIRPORT TAX ETC

13) Qus. : Any additional tax

Ans : Yes

Tax : PAY EDUCATIONAL, ADDITIONAL EDUCATIONAL & SURCHARGE ON ALL THE CNETRAL GOVT.'S TAX !!!

14) Qus. : Delayed any time paying any tax

Ans: Yes

Tax : PAY INTEREST AND PENALTY

15) Qus. : You are in profession

Tax : PAY PROFESSIONAL TAX.

16) Qus. : Use a newly constructed bridge or road

Tax : PAY TOLL TAX.

17) Qus: If you deal in securities?

Ans: Pay security Transaction Tax.

Different taxes at different stages

A tax is called compulsory extraction of money. Money collected goes to the consolidated fund of India as part of the general revenue and spent on general welfare of the public at large with no relation or benefit to any person or authority who paid the tax. Generally it is said that the taxes are of two types, namely – direct and indirect taxes.

Now, I give you a brief idea of various import taxing statutes.

Taxes customarily have been classified either as direct or indirect taxes. Direct tax is the one that is assessed upon the property, wealth or income of the individual who is to pay the tax out of his own pocket. Conversely indirect taxes are those which are levied upon commodities or service before they reach the consumer who ultimately pays the taxes as part of the market price of the commodity or the services availed of. Distinction between direct and indirect taxes relates to whether the person who actually pays the money either to the tax collecting authority suffers a corresponding reduction in his income. If he does, the impact and instance of tax is on him and therefore direct tax. If not, the burden is shifted and the impact and instance is on someone else and therefore an indirect tax.

Both direct and indirect taxes have their own merits and demerits. Adherents of capitalism have given preference to indirect taxes over direct taxes on the belief that direct taxes constitute a disincentive for creative mind and are intrinsically counter-productive towards intellectual and entrepreneurial activity. In the case of indirect taxes the burden is borne by the consumer, which means that one's tax liability depends upon the amount one consumes. The Socialists, by and large, profess in favour of direct taxes as compared to indirect taxes as the burden of indirect tax falls equally on rich and poor irrespective

of individual's capacity to pay. What is required is balancing between two types of taxes keeping in view the requirement of the society in which we live in. While balancing the equities to levy the taxes the effort should be to see that it does not pinch the pocket of the payer unreasonably otherwise he will carve out ways and means to evade payment of due taxes.

There is another type of indirect tax i.e. compensatory taxes. This kind of tax been evolved by judge made law by means of interpretation to Article 301 of the Constitution of India otherwise laws are framed either by the Parliament or the State Legislature. I shall deal with this branch of taxation briefly separately.

Constitutional Scheme

The Constitution of India in its very first Article i.e. Article 1, declares "India": i.e., Bharat, shall be a union of States.

Article 265 of the Constitution of India provides that no tax shall be levied or collected except by Authority of law.

Article 246 of the Constitution of India provides for legislative relations. It authorizes the Parliament and the State legislatures to make laws with respect to the matters enumerated in three lists forming part of Seventh Schedule of the Constitution of India. Article 246 confers exclusive power on the Parliament to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, known as "Union List". It further provides that as far as the matters enumerated in List II in the Seventh Schedule, the State Legislature shall have exclusive power to make laws. List III in the Seventh Schedule is named as "Concurrent List". Both the Parliament and State Legislature have authority to frame laws with regard to the subjects enumerated therein.

The 'Union List' contains as much as 97 entries and out of these, following entries pertain to taxation:-

82. Taxes on income other than agricultural income;

83. Duties of customs including export duties;

84. Duties of excise on tobacco and other goods manufactured or produced in India except –

a) alcoholic liquors for human consumption.

b) Opium, Indian hemp and other narcotic drugs and narcotics,

But including medicinal and toilet preparations

containing alcohol or any substance included in subparagraphs (b) of this entry.

85. Corporation tax.
86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.
87. Estate duty in respect of property other than agricultural land.
88. Duties in respect of succession to property other than agricultural land.
89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.
90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.
91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.
92. Taxes on the sale or purchase of newspapers and on advertisements published therein

92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

92B. Taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

92C. Taxes on services.

The 'State List' contains as much as 66 entries and the entries relating to taxes are from 46 to 63, which are as under:-

46. Taxes on agricultural income.

47. Duties in respect of succession to agricultural land.
48. Estate duty in respect of agricultural land.
49. Taxes on lands and buildings.
50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.
51. Duties of excise on the following goods manufacture or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-
 - a) alcoholic liquors for human consumption;
 - b) opium, Indian hemp and other narcotic drugs and narcotics,

but not including medicinal and toilet preparations containing alcohol or any substance included in subparagraph (b) of this entry.

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.
53. Taxes on the consumption or sale of electricity.
54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.
55. Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television.
56. Taxes on goods and passengers carried by road or on inland waterways.
57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.

58. Taxes on animals and boats.
59. Tools.
60. Taxes on professions, trades, callings and employments.
61. Capitation taxes.
62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.
63. Rates of stamp duty in respect of documents other than specified in the provisions of List I with regard to rates of stamp duty.

The Union Government levies various kinds of taxes primarily Income-tax, Central Excise, Central Sales-tax, Customs Duty, and service tax. Whereas the State Legislatures levies taxes primarily on sale or purchase of goods (now known as 'Value Added Tax'), tax on transportation of passengers & goods, octroi, entry tax, toll, stamp duty etc.

In the scheme of taxing statute, the provisions primarily provide for charging of tax, exemptions/deductions, assessment and levy of tax, appeal/revision against the assessment, recovery of tax and penalty/prosecution.

Income-tax Act, 1961

The Income-tax Act, 1961 which replaces the earlier 1922 Act contains 23 Chapters. As is customary in all the statutes, it contains definitions. Section 4 of the Act is the charging section.

Section 10 contains various types of incomes which do not form part of the total income. Meaning thereby they are not even taken into consideration for the purpose of taxation. Thereafter, the provision are computation of total income which provides various heads under the income is assessed, namely: salaries, income from house property, profits and gains from business or professions, capital gains and income from other sources. Section 80 with 60 Sections with same number is the route cause of maximum litigation as it contains various deductions. Section 119A of the Act is quite important for the reason that it enables the Central Board of Direct Taxes to issue instructions to the subordinate authorities for the purpose of administration of the Act. However, these can be general in nature and not case specific. Authority has also been given for relaxation of certain provisions of the Act. These instructions which are beneficial to the assesses are binding on the department. Section 132 of the Act provides for power to search and seizure to dig out concealed income. Chapter XIV provides for procedure for filing of returns and assessments. It also contains provisions as to how the recovery of tax is to be made which include deduction and collection of tax at source. The provisions for payment of advance tax i.e. self-assessed tax in three instalments is provided.

Chapter XIX provides for refund of excess amount paid.

Chapter XIX-A provides for setting up of Income-tax Settlement Commission, its jurisdiction and settlement of disputes. The authority has been given to the Settlement Commission to settle the

disputes of the assesses on an application made at any stage of the case containing full and true disclosure of income which had not been disclosed before the Assessing Officer. In case the Settlement Commission is satisfied that the disclosures made by the assesses, while assessing the income, it can also grant immunity from prosecution or penalty.

Section XIX-B is also quite important as it provides for advance ruling. The advance ruling authority chaired by a retired Hon'ble Judge of Hon'ble the Supreme Court with other members on Board.

Chapter XX provides for appeals, revisions, references etc.

Chapter XXI provides for various penalties.

Chapter XXII provides for offences and prosecution. Besides this, there are other machinery provisions in the Act which are in-aid to the other substantive provisions.

The relative provisions with regard to offence and prosecution on account of various offences committed under the Income-tax Act, 1961 are contained in Section 275A to 280(1), the punishment for various offences range from three months imprisonment and fine to seven years imprisonment and fine.

Section 138 of the Act contains provisions regarding disclosure of information of the respective assesses to various authorities or on the asking of other authority or by an application made by a person to the Chief Commissioner or Commissioner on the prescribed form. In case of violation of provisions of Section 138(2) provides that the Central Government vide its notification in the official gazette directed that no information or document shall be furnished or produced in respect of certain specified matters or assesses. Violation of provisions of Section 138(2) is punishable under Section 280 of the Act to the extent of imprisonment for six months and fine. However, the prosecution can not be initiated except with the previous sanction of the Central Government.

Sections 278A to 279B provide for a certain general provisions, which related to punishment for second and subsequent offences, situations where punishment is not to be imposed, provisions relating to offences by the companies and Hindu Undivided Families and presumptions as to assets, books of account and as to culpable mental state. If further proves that notwithstanding anything contained in Cr.P.C. the offenses punishable under Sections 276B, 276C or 276CC or 277 or 278 shall be deemed to be non-cognizable within the meaning of that Code. Section 279B provides that entries in records or other documents in the custody of an income-tax authority shall be admitted in evidence in any proceedings initiated for prosecution of any person.

The total revenue receipts in the Central Government for the year 2007-2008 were estimated at Rs. 4,86,422/- crores and the share in percentage from various sources was estimated as income-tax including corporation tax – 34%, customs, excise & service – 36%, making it a total of 70% out of the total revenue receipts. That means a major source of revenue is taxation. The average cost of collection of income-tax has gone down from 1.83% to 0.74% for the year 2005-2006, which has reduced further with the growth in revenue. The total assesses are just over 3 crores.

Central Excise Act

The Central Excise Act provides for levy and collection of duty on all excisable goods produced or manufactured in India. It contains a usual definition clause. Section 3 being charging Section, Section 9 is for offences and penalties. This Act also provides for provisions of advance ruling, settlement of cases besides provisions of appeals, revision, references and penalties.

The Custom Act provides for levy of custom duty on import and export of case. The scheme of this Act is also in line with the other tax statutes.

The penal provisions are contained in Sections 9, 9A to 9D, 10, 13, 14, 18 to 21. The relating provisions of Customs Act being Sections 104, 108, 132, 135, 137, 138, 138A to C and 139. The offences under the Act have been made non-cognizable and compoundable. Section 14 of the Act provides for recording of statements as provided by Section 108 of the Customs act. The Excise/Customs Officers are not police officers. Accordingly, the statement tendered before them is not hit by Section 25 of the Evidence Act. But in case the ingredients of Section 24 of the Act are found, the statement can be ignored. In terms of Section 5 of Cr.P.C., the Custom Officers cannot invoke the provisions of IPC as they are not Police Officers who could file challan under Section 173 Cr.P.C. as it is only complaint which is filed under these Acts.

The power to arrest is also conferred under the provisions of the Act and in IPC. Reasons are required to be recorded before arresting the person which the Court below should see when an arrested person is presented. The complaints can be filed with the prior approval of the competent authority. As per the circular of the Board, the complaints are to be filed after completion of adjudication proceedings though legally there is no such power. The reason there for is that in case the adjudication proceedings fail, the prosecution automatically will fail. However, in case a complaint is filed before adjudication

proceedings attained finality finally terminate in favour of assessee, and still the Court is to see as to whether the same has been adjudicated upon merits or merely technical ground.

Section 468 Cr.P.C. provided for limitation for initiation of proceedings is relevant. As these are complaint case, pre charge evidence is necessary. Section 9C of the Excise Act and 138A of the Customs act raises a presumption of guilty mind and it is the accused who has to prove otherwise. In terms of Section 36B of the Central Excise Act and 139 of the Customs Act, microfilms, facsimile copies of documents and computer print outs as documents have been made admissible as evidence in proceedings under the Act without further proof or production of the original under certain specified circumstances contained in Chapter VI-B of the Act.

VAT – IN INDIA

VAT has replaced the earlier sales tax laws in India. Earlier there was single-point system of tax levy, the manufacturer or importer of goods into a State was liable to sales tax. Generally, there was no sales tax on further distribution channel. VAT, in simple terms, is a multi-point levy on each of the event in the supply chain with the facility of set off of input tax – that is, the tax paid at the stage of purchase of goods by a trader and on purchase of raw materials by a manufacturer. Only the value addition in the hands of each of the entities is subject to tax. For instance, if a dealer purchases goods for Rs. 100 from another dealer and a tax of Rs.10 has been charged in the bill, and he sells the goods for Rs.120 on which the dealer will charge a tax of Rs.12 at 10 per cent, the tax payable by the dealer will be only Rs.2, being the difference between the tax collected of Rs.2, being the difference between the tax collected of Rs.12 and tax already paid on purchase of Rs.10. Thus, the dealer has paid tax at 10 per cent on rs.20 being the value addition in his hands.

VAT system of collection of tax on sales/purchase of goods is primarily consumption based. Contrary to the general perception VAT by itself is not a tax in replacement to sales tax but an efficient tax collection system. The Entry 54 of List II of the Seventh Schedule to the Constitution under which the State legislature derives authority to impose the tax, the incidence of tax; i.e. on sale or purchase of goods or the system of levy or the authorities who are administering the tax, etc. all remain the same. This system of collection of tax is being adopted for the reason of its being more efficient and to some extent having less cascading effect (since it eliminates collection of tax on tax). Similar system is already in vogue under the Central Excise in the form of MODVAT and CENVAT.

It has been seen that (what is evident from the newspaper reports) the fears of the State Governments that with the introduction of VAT the revenues may fall as compared to the existing revenues from the sales tax were factually found to be without any basis as the buoyancy in the collection was to the extent of 15% to 20% in first year of introduction itself. As per figures available for Haryana State which introduced VAT first of all w.e.f. 1-4-2003, annual growth rate is about 20% as compared to collection under the traditional Sales Tax Act. Reason is simple here every value addition is taxed. Now it is in force in every state. The future is now GST i.e. Goods and Service Tax. Details are being worked out.

Compensatory tax

I am sure you know that taxes generally we call as compulsory extraction of money. Concept of quid-pro-quo is not present as corresponding service is required to be given to the payer of the tax. The collection goes to the general revenue of the state and spent on the general welfare of the public at large. However, by judicial interpretation concept of compensatory tax is evolved.

Article 301 of the Constitution of the India provides that trade and commerce through out the country shall be free. Way back in 1960 Hon'ble the Supreme Court of India held that taxes do hamper trade and commerce. In the sense if heavy taxes are imposed for trade between two states or even within the state, the trade shall certainly be affected. The only escape route for levy of taxes affecting trade is Article 304 of the Constitution of India which provide that either such taxes could be levied with the previous assent of the President of India or such taxes should not discriminate between the taxes levied on the goods manufactured locally as compared to those imported from outside the state.

However, by process of judicial interpretation taxes levied in the course of inter-state trade on transportation of goods were upheld by devising a new tax i.e. 'compensatory tax'. First judgment on the issue came in *Atiabari Tea Co. Ltd. Vs. State of Assam* (AIR 1961 SC 232) (5 Judges) and thereafter came *Automobile Transport (Rajasthan) Ltd. Vs. State of Rajasthan* (AIR 1962 SC 1406) (7 Judges). In these judgments the issue was levy of tax on transport of goods, which according to the petitioners did hamper trade and commerce. However, Hon'ble the Supreme relying on Article 92 of the Australian Constitution evolved the concept of compensatory taxes. This is term which is between tax and fee. More than a fee but less than a tax. For fee mathematical exactitude is not required as even if some remote

connection of service is available with the payer of the fee the same is good. For taxes no service is required to be provided. However, for compensatory taxes in return of payment of tax, service is required to be provided which should be close to the amount collected. The concept of compensatory was diluted by Supreme Court in *Bhagatram Rajivkumar Vs. CST* (1995 Suppl. (1) SCC 673) and *State of Bihar Vs. Bihar Chamber of Commerce* ((1996) 9 SCC 136) while considering the issue of validity of entry taxes (a replacement of octroi) it was held that entire taxes collected by the state go to the general revenue of the state and in turn spent on the welfare of the public at large so these are compensatory.

The issue came up for consideration before Hon'ble the Supreme Court again in *Jindal Stainless Ltd.'s* case and the matter was referred to be heard by a Constitution Bench, which vide judgment reported as ((2006) 7 SCC 241) overruled *Bhagatram Rajivkumar* and *Bihar Chamber of Commerce* judgments and again reiterated that for compensatory taxes.

This extract from Constitution Bench Judgment in *Jindal Stainless Ltd. (3) v. State of Haryana,*

To sum up, the basis of every levy is the controlling factor. In the case of "a tax", the levy is a part of common burden based on the principle of ability or capacity to pay. In the case of "a fee", the basis is the special benefit to the payer (individual as such) based on the principle of equivalence. When the tax is imposed as a part of regulation or as a part of regulatory measure, its basis shifts from the concept of "burden" to the concept of measurable/quantifiable benefit and then it becomes "a compensatory tax" and its payment is then not for revenue but as reimbursement/recompense to the service/facility provider. It is then a tax on recompense. Compensatory tax is by nature hybrid but it is more closer to fees than to tax as both fees

and compensatory taxes are based on the principle of equivalence and on the basis of reimbursement/ recompense. If the impugned law chooses an activity like trade and commerce as the criterion of its operation and if the effect of the operation of the enactment is to impede trade and commerce then Article 301 is violated.

Burden on the State

46 [43]. Applying the above tests/parameters, whenever a law is impugned as violative of Article 301 of the Constitution, the Court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis of which the compensatory tax is sought to be levied. The Act must facially indicate the benefit which is quantifiable or measurable. It must broadly indicate proportionality to the quantifiable benefit. If the provisions are ambiguous or even if the Act does not indicate facially the quantifiable benefit, the burden will be on the State as a service/facility provider to show by placing the material before the Court, that the payment of compensatory tax is a reimbursement/ recompense for the quantifiable/measurable benefit provided or to be provided to its payer(s). As soon as it is shown that the Act invades freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in public interest within the meaning of Article 304(b) [see para 35 (of AIR) of the decision in *Khyerbari Tea Co. Ltd. v. State of Assam* 6].

47 [44]. As stated above, taxing laws are not excluded from the operation of Article 301, which means that tax laws can and do amount to restrictions on the freedom guaranteed to trade under Part XIII of the Constitution. This principle is well settled in *Atiabari Tea Co.* 4 It is equally important to note that in *Atiabari Tea Co.* 4 the Supreme Court propounded

the doctrine of "direct and immediate effect". Therefore, whenever a law is challenged on the ground of violation of Article 301, the Court has not only to examine the pith and substance of the levy but in addition thereto, the Court has to see the effect and the operation of the impugned law on inter-State trade and commerce as well as intra-State trade and commerce.

48 [45]. When any legislation, whether it would be a taxation law or a non-taxation law, is challenged before the Court as violating Article 301, the first question to be asked is: what is the scope of the operation of the law? Whether it has chosen an activity like movement of trade, commerce and intercourse throughout India, as the criterion of its operation? If yes, the next question is: what is the effect of operation of the law on the freedom guaranteed under Article 301? If the effect is to facilitate free flow of trade and commerce then it is regulation and if it is to impede or burden the activity, then the law is a restraint. After finding the law to be a restraint/restriction one has to see whether the impugned law is enacted by Parliament or the State Legislature. Clause (b) of Article 304 confers a power upon the State Legislature similar to that conferred upon Parliament by Article 302 subject to the following differences:

(a) While the power of Parliament under Article 302 is subject to the prohibition of preference and discrimination decreed by Article 303(1) unless Parliament makes the declaration under Article 303 (2), the State power contained in Article 304(b) is made expressly free from the prohibition contained in Article 303(1) because the opening words of Article 304 contain a non obstante clause both to Article 301 and Article 303.

(b) While Parliament's power to impose restrictions under Article 302 is not subject to the requirement of reasonableness, the power of the State to impose restrictions under Article 304 is subject to the condition that they are reasonable.

(c) An additional requisite for the exercise of the power under Article 304(b) by the State Legislature is that previous Presidential sanction is required for such legislation.”

Service Tax

In 1994, a new source of revenue in the form of service tax was added to the existing list of indirect taxes. With such a short history of about 13 years the growth of revenue from this Sector is phenomenal. While piloting the Finance Bill, 1994 when the Service tax was introduced for the first time, the then Finance Minister, Dr. Manmohan Singh (now Hon. Prime Minister of India) observed in Para 87, Part B of the Budget Speech. – *“over the years while attempts have been made to widen the base for domestic indirect taxes the services sector has not been subject to taxation. Yet this sector accounts for about 40% of our G.D.P. and is showing strong growth”*. During the first year of its imposition in 1994 when only three sectors were covered for levy of service tax the tax collected was only Rs. 410 crores whereas collection of revenue during 2004-05 stood at Rs. 14,140 crores with 74 services under the net of taxation. Growth in revenue from this source is evident from the fact that during 2003-04 the collection was Rs. 7,890 crores which increased to Rs. 14,140 crores in 2004-05. To this nine more services have been added by Finance Act, 2005. The share of service tax is increasing year after year in the total revenue collection during 2006-2007, with more than 100 services for taxation net was about Rs.35,000 the revenue expected during 2007-2008 is about Rs. 50,000.

The basic feature of this levy is that it is wide spread. Even the people, who do not consume luxuries, which attract higher rates of taxes as they do not have surplus income or even do not pay income tax are also in this service tax net. Take for instance telephone Insurance etc.

Still the Parliament has not thought of bringing a comprehensive duly codified Legislation on the subject. Still the levy is being enforced by making amendments to the provisions of the Finance Act, 1994 year after year and applying the provisions of

the Central Excise Act for a number of things. There is an urgent need to bring a separate independent Legislation on the subject and also create separate independent authority to administer the same. Another aspect which needs consideration while adding more and more services to this tax net is that highly productive areas, which are conducive to the growth of the Country, should be avoided such as tourism and infrastructure. Taxation should be planned in the manner where it accelerate the growth of the economy and not retard the same.

Earlier the levy was only on the service provider, who used to charge from the service recipient and deposit with Department. But on protest of transporters, the recipients of transport service were made to comply with the provisions, which was struck down by the Supreme Court in Laghu Udyog Bharti. Thereafter Act amended now even recipient can also be made liable to comply provisions of Act for payment of tax on service availed of by him e.g. Transport and in case service provider is situate outside country but service available of in India.

Fringe Benefit Tax

A new tax called, "Fringe benefits Tax" has been introduced, which will be taxable in the hands of employer in respect of certain perquisites; i.e., in respect of facilities which are commonly provided for business as well as personal use. Such fringe benefits will be taxable at the maximum rate of 30% + 10% surcharge + 2% education cess. The tax so paid will not be allowed as deduction to the employer from his income. There is a lot of debate going on in the country regarding the justification for the levy of fringe benefit tax. In some of the countries fringe benefit taxes are taxed in the hands of the employees but in India as per the Finance Minister's proposal the fringe benefit taxes are to be taxed in the hands of the employer. A clear picture has not emerged as to how the fringe benefit tax would be worked out and regarding its merits and demerits. I am sure that the debate which takes place here in this august body would be of immense help to the lawyers and the tax-payers in so far as this tax is concerned.

State's unending efforts to generate more revenue, just with a view to feed wasteful expenditure, is also required to be checked. To avoid putting unnecessary burden of taxes on the subjects, the state should control wasteful or avoidable expenditure which will automatically decrease the need to levy more taxes or it may give an opportunity to the State to divert the revenue to create better infrastructural facilities for the subjects.

Interpretation of Taxing Statutes

The basic principle to be kept in mind while interpreting a taxing statute is that as far as charging Section is concerned, the same has to be given strict interpretation, whereas the exemption provision has to be given liberal construction. The Courts are not to add or subtract any words from the provisions. Each word has to be given its full meaning. It is not the duty of the Court to fill in the deficiencies in the Section. However, for harmonious construction and to avoid absurd meaning to a provision, deficiency can be filled in. The Court is not to add its own ideas in the Legislative policy rather it has to see that the object sought to be achieved by the Legislative is achieved. There is no room for any intendment or presumption in a taxing statute. Nothing is to be read in, nothing is to be implied. One has to look into fairly at the language used. No tax can be imposed by inference or analogy. There is no room for assumptions and presumptions. Purposive approach has to be adopted. In case of doubt, the benefit has to go to the subject. In case of doubt, sometimes help from the speech of the Minister in the Parliament, objects & reasons, explanatory memorandums and notes on Clauses are also referred for interpretation. However, these external aids are not resorted to when the plain language in the provision is clear.

Evasion of tax/ tax planning

There are three methods by which an individual tax-payer may seek to reduce his burden of tax. The first method is tax evasion. It is a criminal offence. The tax-payer conceals or fraudulently misrepresents to the Revenue the incidence and ambit of his tax affairs. Tax evasion a part from being unfair to the public by reducing the size of public purse and unfair to fellow tax-payers who pay their fair share of tax, may lead to corruption and lawlessness. Vigorous efforts are made by the law enforcement authorities to detect and convict tax evaders.

The second method is tax avoidance, which does not involve unlawful conduct. The tax-payer's advisers invent a scheme whereby he can hope to enjoy the benefit of a taxable event without becoming liable to pay the tax. A tax avoidance scheme does not leave the tax-payer any better or worse off but leaves the Revenue worse off. The avoidance involves one or more artificial steps, planned and implemented as a scheme, which result in avoiding payment of a tax which would otherwise have been payable. The tax-payer avoiding payment of tax may feel momentarily happy but he is certainly unfair to the public purse. Such schemes requires the inventing genius of expensive lawyers and accountants studying the fine print of tax legislation to find loopholes. It is immoral in the sense that it enables a tax-payer to claim a tax advantage without paying the price to the public exchequer.

The third method is tax mitigation, or tax planning popularly called, whereby a tax-payer incurs expenditure which reduces his taxable income or his taxable assets or whereby a tax-payer incurs expenditure which Parliament wishes to encourage or reward by a tax allowance or deduction. Tax mitigation may take a variety of forms but is distinguishable from tax avoidance; tax mitigation does not include any artificial step though the motive which inspires a tax payer may be mainly or wholly

the desire to reduce tax. The motive of tax-payer is irrelevant and mitigation is legal and moral. Like expenses on research, donations where you are benefitted at the cost of the State. On fresh investment of capital in certain specified areas or goods to encourage.

So far as avoidance of tax within the four corners of Law is concerned, it cannot be frowned upon but evasion of tax can certainly be. Infact, the Tax Professionals should understand that they are the first law abiding citizens and next they are professionals. Firstly they have to perform their duty towards the nation and then their client. All of us know that the evil consequences of evading the tax causes substantial loss to the public revenue and to the welfare of the state. It causes great disturbance in the economy of the country and gives rise to black money which may cause inflation and the inflation affects all of us. Therefore, I call upon the Tax Professionals that their attempt should be not to advise their clients to evade tax but to avoid tax in legitimate manner. Evasion of tax has serious repercussion on the society, today in our country we are having an almost parallel economy of black money, which is primarily a cause for inflation and we all are victims of that inflation. It is also unethical to advice the tax-payers to evade tax. No profession would advice their professionals to act in an unethical manner. Lately, a tendency has developed that Tax Professionals have become expertise in advising their clients to evade tax by fair or foul means. I know some of my friends who have confided me that it is no pleasure to work in the Taxation side these days, keeping their ethics. Because, the situation have become so alarming that those who adhere to the ethics of he profession, are in a minority barring a very few who have acquired a very high position. But for the new entrants if they live with the ethics, then they will be starving. This is a very unfortunate feature in profession. Therefore, an occasion like this when you have an agenda to debate on 'The Role of Tax Professional'. I take this

opportunity to call upon all of you and the officials who are present here that you must listen to your own conscience, you owe a duty to the society and if you cannot live with the ethics, then you are leaving behind a very bad future for your next generation. The ethics in the profession has to be maintained for the benefit of the profession and if the ethics is lost in the profession, then Professionals will lose their respect in the society and they will be leaving behind a bad legacy.

It is unethical either to evade payment of tax or to conceal particulars of income. If proved, the evasion invites heavy penalties and even prosecution. In *IRC vs. Fisher's Executors*, (1926) AC 395, it was held that one is entitled to arrange his affairs in such a way so as not to attract taxes imposed by the Crown, so far as he can do so within the law and that he may legitimately claim the advantage of expressed terms or any omissions that he can find in his favour and in so doing, he neither comes under any liability nor incurs blame. Our Supreme Court in *Jiyaji Rao Cotton Mills vs. CIT and CEPT*, (1958) 34 ITR 888 (SC), held that every person is entitled to so arrange his affairs as to avoid taxation but the arrangement should be real and genuine and not a sham or make-believe. The real role of the Tax Professionals thus assumes significance as they have not only to safeguard the interest of their clients but also to ensure that the State should be paid its legitimate taxes and duties. Tax planning could be described as an arrangement of one's personal affairs in such a way that without violating in any way the legal provisions full advantage is taken of all exceptions, deductions, concessions, rebates, allowances and other reliefs or benefits permitted under the Acts so that the burden of taxation or duty on the assessee is minimal.

In *McDowell and Co. vs. Commercial Tax Officer* reported in 1985(3) SCC 230. Supreme Court observed on tax planning and colourable devices to avoid taxes as under:

*"The evil consequences of tax avoidance are manifold. First, there is substantial loss of much needed public revenue, particularly in a welfare State like ours. Next, there is the serious disturbance caused to the economy of the country by the piling up of mountains of black money, directly causing inflation. Then there is 'large hidden loss' to the community by some of the best brains in the country being involved in the perpetual war waged between the tax avoiders and his expert team of advisors lawyers and accountants on the one side and the tax gatherer and his, perhaps not so skilful, advisors, on the other side. Then again there is a 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it. **Last but not the least, is the ethics of transferring the burden of tax liabilities to the shoulders of the guideless, good citizens from those of the 'artful dodgers'.***

The Supreme Court of India in *Commissioner of Wealth Tax vs. Arvind Narottam* reported in 1988 (4) SCC 113 while dealing with the subject of tax avoidance observed that, "Unless waste and ostentation in Government spending are avoided or eschewed, no amount of moral sermons would change people's attitude to tax avoidance."

Para 13 of Commissioner of Wealth Tax, Gujarat II, Ahmedabad Vs. Arvind Narottam (Individual) (1988) 4 Supreme Court Cases 113.S

It is true that tax avoidance in an underdeveloped developing economy should not be encouraged on practical as well as ideological grounds. One would wish, as noted by Reddy, J. that one could get the enthusiasm of Justice Holmes that taxes are the price of civilization and one would like to pay that price to buy civilization. But the question which many ordinary tax payers very often in a country of shortages with ostentatious consumption

and deprivation for the large masses ask is does he with taxes buy civilization or does he facilitate the waste and otentatiousness of the few. Unless wastes and ostentatiousness in government's spendings are avoided or eschewed, no amount of moral sermons would change people's attitude to tax avoidance."