Tax Tribunals - triumph or turbulence

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HAVE you heard of Muhammad Munir? A little googling will tell you that he was the second Chief Justice of Pakistan. But what is he doing in a tax column in India? Well, he was the first President of the first tax tribunal in India, the Income Tax Appellate Tribunal.

As per Section 5A of the INCOME TAX ACT, 1922,

1. The Central Government shall appoint an Appellate Tribunal consisting ofÂ as many persons as it thinks fit to exercise the functions conferred on the Appellate Tribunal.

2. The Appellate Tribunal shall consistÂ of judicial members and accountant members.

3. A judicial member shall be a person who has for at least ten years either held a civil judicial post or been in practice as an advocate of a High Court, and an accountant member shall be a person who has for at least ten years been in the practice of accountancy as a chartered accountant.

4. The Central Government shall ordinarily appoint a judicial member of the Tribunal to be president.

5. A Bench shall consist of one Judicial Member and one Accountant Member:

> Provided that the president or any other member of the Tribunal specially authorised in this behalf by the Central Government may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member and which pertains to an assessee whose total income as computed by the Income-tax Officer in the case does not exceed Rs 15,000.
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> Provided further that the president may, for the disposal of any particular case, constitute a special Bench consisting either of two Judicial Members and one Accountant Member or of one Judicial Member and two Accountant Members.

6. If the members of a Bench differ in opinion on any point the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the president of the Tribunal for hearing on such point or points by one or more of the other members of the Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case, including those who first heard it.

7. Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure, and the procedure of Benches of the Tribunal in all matters arising out of the discharge of its functions, including theÂ places at which the Benches shall hold their sittings.

This was how the Income Tax Appellate Tribunal was born on 25th January, 1941. And this was the first appellate tribunal in the country. The Law and procedure prescribed eighty years ago look good enough even today.

Tax in India was introduced in July, 1860 as a small percentage of duty on ***profits arising from property, professions, trades and offices*** , initially by the Act of 1860 for a period of five years due to stress of financial difficulties consequent to the mutiny of 1857. It was then assessed by a Panchayat. A taxpayer feeling aggrieved by the assessment could appeal to the Collector of the district, whose order was final. The Act of 1868 provided for a petition of objections to the Collector, and then, for an appeal from the order of the Collector of the district to the Commissioner of Revenue of the division. The order of the Commissioner of Revenue was final. No reference was available to the High Court under these Acts.

Income Tax Act was for the first time, introduced by the Act No. VII of 1918. It brought the High Courts into the picture in an advisory capacity. Under this Act, an appeal lay to the Commissioner against an assessment and, from the order of the Commissioner, a revision petition lay to the Chief Revenue Authority.

Section 226 of the Government of India Act, 1935 specifically forbade interference of High Courts in revenue matters in exercise of their ordinary jurisdiction. The Indian Income-tax Act itself contained a prohibition against litigation in tax matters being initiated in civil courts.

The procedure and practice in the disposal of tax cases was that the Appellate Assistant Commissioner in a majority of the cases would decide against the taxpayer and the taxpayer would then go in revision to the Commissioner of Income-tax who also in majority of the cases decided against the taxpayer; and when an application would be made to the Commissioner for a reference to the High Court, generally the application for reference would be rejected on the ground that the question raised was a question of fact and not of law.

So, the Tribunal was created recognising the need of the tax-payers for an appeal to an independent body on important questions of fact and law - by the British Government.

To begin with, the Finance Department of the Government of India (the Central Board of Revenue) was initially in-charge of the Tribunal. However, from 30th May, 1942 in deference to public opinion, the Tribunal was put in the charge of the Legislative Department of the Government of India.

The success of the ITAT must have prompted the Government of India to constitute similar Appellate Tribunals for indirect taxes i.e. Customs, Excise, Service Tax Appellate Tribunal (CESTAT, originally known as CEGAT), Central Administrative Tribunal (CAT), Railway Claims Tribunal etc.,

Why Tribunalisation?

The Statement of objects and reasons for insertion of Articles 323-A and 323-B in the Constitution of India by the Forty-Second Amendment states:

> To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under Articles 136 of the Constitution.

The original constitution did not expressly - through any entry in the three legislative lists, deal with tribunals. This field of legislation, creating courts, was left to Parliament as well as the states. The absence of an entry pertaining to tribunals meant that the creation of administrative and quasi-judicial tribunals, or offices and agencies conferred with quasi-judicial functions - was recognised as part of legislative activity, whereby laws could create appropriate bodies for their enforcement in exercise of ***"incidental"*** and ***"ancillary powers"*** adjunct to the concerned legislative head. Thus, the Constitution (Forty Second) Amendment Act, 1976 introduced Articles 323A and 323B which paved the way for the creation of tribunals as substitutes for courts.

But is the jurisdiction of the High Courts ousted in tribunalisation? Not at all. In ***L. Chandra Kumar vs Union of India*** - **2002-TIOL-159-SC-CB** , the Supreme Court held that

> Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution.

In ***Madras Bar Association v Union of India*** - **2014-TIOL-82-SC-MISC-CB** , the complete divesting of High Courts' jurisdiction under tax enactments (income tax, customs, central excise and service tax etc) and parliamentary setting up of a National Tax Court was held to be unconstitutional. The court highlighted the quality of justice expected from such bodies and underlined that the divestment of such jurisdiction was prohibited by the Constitution.

So, Tax Tribunals are necessary and they have to be not only independent, but appear to be independent and must be within the constitution as interpreted by the Supreme Court, however much the bureaucrats running the government might think otherwise.

In Madras Bar Association v Union of India - **2020-TIOL-174-SC-MISC-LB**, the Supreme Court observed,

> Dispensation of justice by the Tribunals can be effective only when they function independent of any executive control: this renders them credible and generates public confidence. We have noticed a disturbing trend of the Government not implementing the directions issued by this Court. To ensure that the Tribunals should not function as another department under the control of the executive, repeated directions have been issued which have gone unheeded forcing the Petitioner to approach this Court time and again. It is high time that we put an end to this practice.
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> This Court expects that the present directions are adhered to and implemented, so that future litigation is avoided.

Difference between Tribunals and Courts :

Â Though both Courts and Tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and Tribunals as observed by the Supreme Court in UNION OF INDIA Vs R GANDHI, PRESIDENT MADRAS BAR ASSOCIATION - **2010-TIOL-39-SC-MISC**

> (i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore,Â**all courts are Tribunals. But all Tribunals are not courts** .
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> (ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions.
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> (iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act.

Then, where is our GST Appellate Tribunal? It can only start when the government realises that the Tribunal is not another Commissioner working in the department.

But till the Tribunal is formed, can the taxpayers approach the civil courts? No. Section 162 of the CGST Act bars it.

> 162. Bar on jurisdiction of civil courts.- Save as provided in sections 117 and 118, no civil court shall have jurisdiction to deal with or decide any question arising from or relating to anything done or purported to be done under this Act.

It has to be only the Tribunal - as, when and if it is created.

Until Next Week.