Double Taxation - Treaty-making powers - Shiva Kant Jha questions Govt's constitutional competence in a PIL in Delhi HC

By TIOL News Service

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Advocate and former Chief Commissioner of Income Tax Shiva Kant Jha has questioned the Central Government's constitutional competence to enter into the Double Taxation Avoidance Agreements, and adopt and ratify the Uruguay Round Final Act (the WTO Treaty). He has pleaded that the High Court may hold such treaties domestically inoperative as they violate various fundamental rights, and the basic structure of the Constitution. As a sequel to his stand he has prayed that the provisions relating to the Mutual Agreement Procedure, as prescribed in the tax treaties, be held as done without statutory and constitutional competence. He has also questioned the *vires*
of the substitution and insertion by the Finance Act, 2003 in Section 90 of the Income-tax Act, 1961, and Section 90A inserted into the said Act by the Finance Act, 2006. Further he has sought a declaration on the law governing the Central Government's Treaty-making Power.

Mr Jha has asserted in this petition that the State has no Sovereign power, unbridled and unlimited, to enter into a treaty even at the international plane; it has only a Treaty-making *capacity* under the constitutional limitations. As the Executive represents our State at international plane, it acts only as *the authorized agent of the State*
, and as such it is incompetent to transgress the obvious limitations on its power imposed by the Constitution which creates it and keeps it alive only with controlled competence. He has pleaded that our Constitution does not grant the Executive, a creature under our Constitution, Â a ¶blank check' as the executive has no unbridled power in its 'hip-pocket' to be exercised at the international plane.

The Writ Petition seeks remedies under Art 226 of the Constitution of India praying:

•Â that the provisions relating to Mutual Agreement Procedure (MAP) be held *ultra vires*
and without a statutory foundation (vide Art 25 of the OECD Model of Â the Double Taxation Avoidance Agreements (DTAAs for short) adopted in most of the DTAAs) (the Indo-Mauritius DTAA is a most relevant illustration)]; and that, as a matter of express consequence, Â the Instruction [No 12 of 2002 dated Nov. 1, 2002 Â F. No. 480/3/2002- FTD Â issued by Government of India, Department of Revenue and the Rules (prescribed in Part IX-C Â of the Income-tax Rules, 1962) pertaining to them be held bad for being *ultra vires* and violative of Articles 14, 19, and 21 of the Constitution;

•Â that certain substitution and insertion made in the Finance Act 2003 in Section 90 of the Income-tax Act 961, and Section 90A of the Â said Act, are bad as they Â transgress constitutional limitations ensuing from the Articles 14, 19, 21 and 226 of the Constitution of India, and suffer from the vice of excessive and unguided delegation;

•Â that the Double Taxation Avoidance Agreements entered into by the Central Government be held domestically inoperative on account of the Â fact that that our Executive lacked competence to enter into such Agreements, and also on account of the violations of the Â Fundamental Rights under Articles 14, 19,21, and also Art 265 of the Constitution of India;

•Â that Â it be declared that Â Â the Central Government was constitutionally incompetent to sign/ratify/adopt the Uruguay Round Final Act on account of its trespass on topics to which the writ of the Executive-government does not run on account of express constitutional limitations;

•Â that it be held that it was wrong Â to bypass our Parliament in treating -making process having deep and long-lasting domestic impact on the lives of our people, and having deep impact on the operative laws, and on Â the legislative fields under the 7 th Schedule of the Constitution of India,, and also by Â overriding /threatening many constitutional provisions and institutions in the process of making our polity WTO-compliant.; and

•Â that the Hon'ble Court may declare the valid principles governing treaty-making; with a direction that it is high time that Â Parliament should frame law in exercise of its legislative power determining the zones:

•Â where the agreements are routine and administrative which can be done at the executive level;

•Â where treaties can be made through Parliamentary ratification, or through legislative enactment as has been done in the USA in the case of Agreements with wide domestic and commercial impact ; and

•Â where a treaty affects the structure of our polity and the basic structure Â of our Constitution it be ratified by Parliament/ adopted by the Executive after obtaining a specific mandate from our people through a referendum (as was done in the Â U.K. through the Referendum Act 1975).

***Locus Standi* of the Petitioner:**

The Petitioner, SK Jha has submitted that he belongs to a family that produced some distinguished freedom fighters; he too had made sacrifice in the Struggle for India's Independence. He is Â a public-spirited taxpayer having Permanent Account No ACGPJ 5126 Q; who served the nation as a member of the Indian Revenue Service for more than 34 years, and retired with credit superannuating in March 1998 from the post of the Chief Commissioner of Income-tax.

The Petitioner considers it his fundamental duty to bring to the notice of the Hon'ble Court through this Petition the gross illegality and unreasonableness of the Instruction and the Rules; and the remissness on the part of the Central Government in discharge of certain public duties:

In Shiva Kant Jha & Anr v. Union of India, the High Court had words of appreciation for the petitioner which for him is a joy forever.

¶We would Â however like to make Â an observation that the Central Govt will Â be well advised to consider the question raised by Shri Shiva Kant Jha who has Â done a noble job in Â bringing Â into focus Â as to how the Â Govt. Â of India Â had been Â losing Â crores and crores of rupees by allowing opaque syste to operate.¶Â Â Â Â

(Click here to download the entire text of the PIL as filed in the Court)