



Tax Controversy

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Tax Controversy 2014

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Overview

1 What is the relevant legislation and who enforces it?

The Income Tax Act, 1961 (the Act), along with the Income Tax Rules, 1962 (the Rules) made thereunder as enforced by the Department of Income Tax form the main legislation. For proceedings beyond the level of the assessing officer (AO) and the commissioner (appeal) (ie, the first two levels within the assessment and appellate hierarchy), separate rules govern the proceedings: the Income Tax (Appellate Tribunal) Rules, 1963 are one example. The Central Board of Direct Taxes (CBDT) is charged with the general administration of the Act, and has powers to issue circulars and notifications for, among other things, the proper administration of the Act.

2 Other than legislation, are there other binding rules for taxpayers and the tax authority?

The CBDT has the authority to issue circulars, notifications and orders (which may be specific to certain cases under section 119) from time to time. These are binding upon all tax authorities. The circulars may also be used by the tax authorities against taxpayers (to the extent that the circular is adverse to the taxpayer); however, the taxpayer can challenge such a circular if it is contrary to any provision in the Act or the Rules. Tax treaties duly entered into by the government of India are binding, to the extent that taxpayers can choose to have the provisions of the relevant treaty or of the Act, whichever is more beneficial to them, to be applied.

3 How is the tax authority organised?

The 'tax authorities' under the Act consist of the following authorities:

- the CBDT;
- Directorate General of Income Tax or Chief Commissioner of Income Tax;
- commissioner of income tax (appeals);
- additional commissioner of income tax;
- joint commissioners of income tax;
- deputy commissioner of income tax;
- income tax officer; and
- income tax inspector;

The hierarchy of these authorities is in the order provided above. The highest authority is the CBDT. This authority has powers of administration, supervision and control that extend over the whole department of income tax; it can also make rules and issue orders, instructions and directions to all authorities and persons employed in the execution of this Act.

Enforcement

4 How does the tax authority verify compliance with the tax laws? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

A tax authority may make an assessment of and determine the tax payable by the taxpayer by any of the following methods:

Returns filed by the assessee (under section 139 of the Act)

In this situation, the AO may, even in the absence of the assessee or the production by him or her of any evidence, make an assessment solely on the basis of returns filed after making prescribed adjustments, if any.

Evidence adduced under section 142

If the assessee objects to an assessment under section 139, or where the AO considers it expedient to verify the correctness and completeness of a return filed by the taxpayer, the AO may serve a notice upon the assessee requiring him either to attend the AO's office or to produce any evidence on the basis of which the assessee wants to rely in support of his returns. After weighing all such evidence that is produced, the AO may assess the total income, or make a fresh assessment if the assessment already made is found to be incorrect, adequate or incomplete.

Where returns have been filed under section 139 or evidence has been adduced under section 142, the AO proceeds to make an assessment in a manner prescribed by section 143 of the Act. This provision governs the powers of the AO to make inquiries and assessments of returns under the Act; the proceedings conducted by him are not judicial proceedings in the strict sense, however, they are governed by general judicial principles.

On the basis of best judgment under section 144 of the Income Tax Act

Where there are no returns of income filed by the assessee under section 139, or where there have been no proceedings under section 142 or section 143, the AO is bound to make an assessment to the best of his or her judgment and determine the sum payable by the assessee on the basis of such assessment. Before doing so, the AO is to issue a notice to the assessee to show cause to the assessee as to why a 'best judgment' assessment should not be proceeded with.

The word 'assessment' as used in the Income Tax Act has a very comprehensive meaning and includes computation, reassessment, review, etc.

The time limit for completion of an assessment pursuant to the rules under section 153 is two years from the end of the assessment year in which the income was first assessable.

5 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Preliminarily, the rule governing filing returns of income states that all companies or firms are required to furnish returns of their income, while all persons, other than companies or firms, are required to file returns of their income or lease income that exceeds the maximum amount not chargeable to tax in a prescribed year. Such maximum amount not chargeable to tax for the year 2013–2014 is 500,000 rupees. There are different reporting requirements in the form of audit reports etc, which differ depending on the type of taxpayer and the extent of its income etc. Separate reporting requirements exist in the case of international transactions that are or may be subject to transfer pricing regulations.

In addition to the above-mentioned statutory requirements to file returns, the CBDT in a circular announced that all non-residents, to the extent that they do business in India and would like to claim benefits under a tax treaty, would also have to mandatorily file tax returns on their income.

6 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

Pursuant to section 133 and 142 of the Income Tax Act, the assessing officer may require a taxpayer to furnish certain accounts, documents and information in cases either where the return has been made or where the time allowed for filing the return has expired. Such powers enable the AO to serve a notice directing the taxpayer to produce or cause to be produced any evidence to verify the correctness of the return filed. Such evidence may include the business books and financial records of the taxpayer, copies of transaction documents, and any other evidence that the officer finds necessary to test the veracity of returns filed. All proceedings under the Act are judicial proceedings and the powers to demand information under the above provisions are analogous to that of a judicial court. Subject to the rules of evidence, any material evidence may be required to be submitted.

Wilful failure to produce evidence as required by the AO is punishable under section 271(1)(B) of the Act. A failure on the part of the taxpayer to comply with such a notice also gives the AO that right to enter the taxpayer's premises and to search for and seize accounts. Furthermore, having regard to the nature and complexity of accounts of the taxpayer and the interests of the department, the AO may direct the taxpayer to have accounts audited by an accountant nominated by the commissioner of income tax.

7 What actions may the agencies take if the taxpayer does not provide the required information?

In a situation where the taxpayer fails to furnish the return of income or information as required by the AO, pursuant to section 271(1)(B) of the Act, though the AO has the power to levy a penalty of 10,000 rupees for each such failure.

8 How may taxpayers protect commercial information, including business secrets, from disclosure?

All privileged communication between an attorney and a client is protected by the overarching principles enshrined in the Indian Evidence Act, 1872 (Evidence Act) under sections 126–129. As regards protections afforded to commercial information, including business secrets and confidential information, that is not otherwise protected by the Evidence Act, the powers under the Act to procure and review information are rather broad and subject to few safeguards. The safeguards are illustrated in some provisions such as section 133 for requisitioning information from banks in that

information may be requested only to the extent that it would be useful towards proceedings against the taxpayer under the Act.

However, when tax authorities seek to retrieve information on taxpayers from other countries, all the circumstances given in the tax information exchange agreement are required to be met. These conditions are introduced to prevent fishing expeditions by the authorities and establish some reasonable basis or show the relevance of the information sought to enforce domestic laws.

9 What limitation period applies to the review of tax returns?

The time limit for completion of assessment by the AO:

- where the assessee enters into international transactions and the case is referred to the transfer pricing officer, the assessment is to be completed within three years from the relevant assessment year; or
- where no such reference has been made, the assessment is to be completed within two years from the end of the relevant assessment year.

In case of income that has escaped assessment, section 147 of the Act empowers the AO to assess such income, subject to a limitation period of:

- four years from the end of the relevant assessment year;
- six years from the end of the relevant assessment year where the amount of income that has escaped assessment amounts to the 100,000 rupees or more for that particular year; or
- 16 years, where the assets in relation to which income tax is to be paid is located outside India.

In case the taxpayer has failed to deduct the required amount of tax at source, pursuant to section 201, no order may be passed against him for such failure after the expiry of:

- two years from the end of the financial year in which a statement to the effect of such deduction is made; or
- six years from the end of the financial year in which any payment is made, or credit given.

10 Describe any alternative dispute resolution (ADR) or settlement options available.

There are two major alternative means of dispute resolution under the scheme of the Act, the Authority for Advanced Rulings (AAR) or a settlement commission.

Chapter XIX-B of the Act deals with the AAR, which was instituted in 1993 to enable non-residents to obtain an advance ruling on specific issues that could arise in determining their tax liability. The AAR is constituted under section 245O and subject to conditions contained in section 245R, any question relating to the tax liability of a non-resident may be presented to the AAR. The conditions precluding it the jurisdiction to try cases include:

- parallel proceedings by another authority under the Act;
- determination of the fair market value of property; and
- if it relates to transactions that are prima facie designed to avoid tax.

Settlement of cases, in the interests of the swift collection of dues by the tax department, is permitted pursuant to chapter XIX-A of the Act. Under this chapter, a settlement commission (the commission) is constituted as a statutory authority with quasi-judicial powers for the settlement of cases. Upon an application for 'settlement' by the taxpayer under section 245C of the Act, subject to fulfilment of conditions therein, the commission is empowered to facilitate the settlement of matters covered by the application. Towards this, the commission may call for a report from the Commissioner of Income Tax on the basis of which, having regard to the nature and circumstances of the case, or the complexity of the investigation involved, the commission can either allow or reject the application.

The jurisdiction of the settlement commission is confined to matters covered by the application before it, and in making an order pursuant to such application it is neither bound by the report of the commission nor limited to taking into consideration material not covered by the application. As far as possible, such an order must be passed by the commission within four years from the end of the financial year in which the application was allowed. The order passed by the commission must contain the terms of settlement including any demands by way of tax, interest or penalties, and the manner of payment of such sums, and any other matter that is required to make the settlement effective. The order of settlement under this chapter is conclusive as to the matters stated therein, and no matter that is covered in such an order can be reopened in any proceeding, subject to constitutional remedies.

11 How may the tax authority collect overdue tax payments following a tax review?

The modes of recovery of tax payable as a result of an assessment are set out in sections 222 and 223 of the Act. Such taxes may be recovered from the assessee by:

- attachment and sale of the taxpayer's moveable property;
- attachment and sale of the taxpayer's immoveable property;
- the arrest of the taxpayer and his or her detention in prison; or
- appointing a receiver for the management of the taxpayer's moveable and immoveable property.

The several modes of recovery specified above are not exhaustive or mutually exclusive and the authorities may proceed to pursue any or all of them concurrently. They are operative not only for recovery of tax but also as against interest, fines, penalties or any other sum payable under this Act. However, as stated above, recovery proceedings can only be taken against an assessee in default, an assessee deemed to be in default or any other person deemed to be an assessee in default. In addition to these modes, it is also possible for the tax authority to require a taxpayer's debtor to pay the debt due to the taxpayer to the tax authority instead. Compliance with such a request is considered to be a discharge of the debt.

12 In what circumstances may the tax authority impose penalties?

Penalties may be imposed by the tax authorities for the default in payment of tax, or for default in payment of interest. Such a penalty may be imposed pursuant to section 221 of the Act, in the form of an order specifying the exact sum that the assessee is required to pay by way of penalty. In addition to the above, penalties may also be imposed:

- on legal representatives for default in paying tax under an assessment of himself or herself, or of the deceased;
- for a delay in deposit of tax regardless of the fact that the business of the assessee is in loss; and
- for default in payment of advance tax.

The preconditions to the imposition of a penalty for the above are the application of judicial discretion, giving the parties a reasonable opportunity of being heard, serving notice for default, and the consequent default in payment of tax. Such an order for payment of penalties can be appealed against under section 246 of the Act, and there are also provisions under section 293 for the issuance of writs, directions or orders quashing an order of penalty.

The Act also provides for a scheme of penalties for failure to furnish returns, comply with notices and for concealment of income that is provided for under section 271 of the Act. In case of a failure to comply with notices issued (under section 142 or section 143 of the Act), the amount of the penalty, in addition to the tax, is the sum of 10,000 rupees for each failure. If details regarding income are concealed or inaccurate details of such income are furnished, in addition

to the tax payable, a sum not less than but not exceeding three times the amount of tax sought to be evaded may be imposed as a penalty.

Similarly there are various other circumstances provided for in the statute under which penalties may be imposed on the taxpayer, such as:

- failure to keep and maintain or retain books of accounts, documents;
- failure to keep and maintain information and documents and respect of international transactions;
- failure to have accounts audited;
- failure to deduct tax at source; and
- false estimate of, or a failure to state, advance tax.

13 How are penalties calculated?

All penalties under the Act are leviable in accordance with the provisions of chapter XXI of the Act. The circumstances under which penalties may be imposed under the Act as provided for in the chapter, are an exhaustive list and no penalties may be leviable under circumstances not contemplated by the Act. Such provisions contemplate situations such as the concealment of income or fringe benefits, providing inaccurate particulars of income or fringe benefits, specific procedural defaults and non-payment of taxes, etc. There are also provisions to deal with penalties in cases of one-time default, as well as those which relate to repeat defaulters. However, the amount of the penalty levied may or may not be dependent on the period of default.

All penalties leviable are provided for under the Act and the provisions relating thereto must necessarily be strictly construed.

14 What defences are available if penalties are imposed?

Pursuant to an amendment brought about in 1986, in certain circumstances, no penalties imposable for any 'failure' as referred to in the specified provisions, if the assessee proves that there was 'reasonable cause' for the failure. The amendment shifted the initial burden on the assessee to prove that he or she had reasonable cause for the failure referred to in the specified provisions as against the tax authorities having to prove the opposite. Consequently, it is at the discretion of the authority to consider whether the explanation offered by the assessee as regards reasons for failure was an account of reasonable cause. The burden of proof, however, is predicated on the nature of penalties. In civil proceedings under the Act, it would be based on the preponderance of probabilities while in criminal proceedings, the same would have to be established beyond all reasonable doubt.

15 In what circumstances may the tax authority collect interest and how is it calculated?

Interest may be collected by the tax authorities on the amount of tax payable in case of the failure on the part of the taxpayer to deduct tax or a failure to pay the same after deduction. For instance under section 201(1A) any person who fails to deduct or pay tax as required by the Act is liable to pay simple interest at the rate of 1 per cent for every month in the case of failure to deduct tax, and at the rate of 1.5 per cent for every month for a failure to pay tax, leviable from the date on which such tax should have been paid under the Act.

Default in payment of advance or for deferment of advance tax would also attract interest as per the provision of section 234C.

16 Are there criminal consequences that can arise as a result of a tax review?

Criminal consequences can arise in the case of failure to comply with certain provisions of the Act. These are provided for under chapter XXII of the Act and are listed as follows:

- failure to comply with any orders for search and seizure;

- fraudulently removing, concealing, transferring or delivering to any person, any property or interest therein, intending thereby to prevent such property or interests from being taken in execution of recovery proceedings under the Act;
- failure to give notice of appointment as a receiver or liquidator of a company under liquidation; a failure to set aside the amount required by an order of the tax authorities in case of liquidation of the assets of the company; or any disposal of the assets of the company in contravention of the provisions of the Act;
- failure to comply with the restrictions on transfer of immovable property provided for under section 269 UC of the Act, property vested in the central government under section 269 UE, or the contravention of the provisions of section 269UL of the Act dealing with restrictions on registration of documents in respect of the transfer of immovable property;
- failure to pay tax collected at source to the credit of the central government;
- wilful attempt to evade tax, penalties or interest chargeable or impossible under the Act;
- wilful failure to furnish returns of income in due time;
- failure to produce accounts and documents pursuant to any notice served upon the taxpayer under section 142;
- wilfully made false statements regarding the verification of returns of income filed under the Act;
- where a taxpayer wilfully and with the intent to enable any other person to evade tax or interest or penalty chargeable or impossible, makes any statement that is false and suppresses any books of accounts or documents that may be used against the taxpayer; or
- abetting or inducing the taxpayer in any manner to make and deliver false statements with the intent to deceive the tax authorities.

17 What is the recent enforcement record of the authorities?

In the recent years, tax authorities have become increasingly aggressive in their enforcement of the Act. This increase is attributable to both a gradual change in the view on tax planning devices – which is as such viewed with suspicion – as well as tax authorities being better equipped with the ability to gather information. Specifically, areas of international tax planning and transfer pricing are being scrutinised with great suspicion in the recent past.

Third parties and other authorities

18 Are third parties involved in the authority's review of tax returns and what rights do taxpayers have with respect to their involvement?

The Act has conferred upon the tax authorities various powers with respect to recovery of information from both the assessee and third parties. For instance, pursuant to section 133 of the Act, tax authorities have the power to:

- require any firm to furnish names and addresses of partners of the firm with the respective shares;
- require any Hindu undivided family to furnish details regarding the members of the family;
- require any trustee, guardian, agent to furnish details of persons of whom he is a trustee, guardian or agent;
- require any assessee to furnish details of all persons to whom he has paid any rent, interest, commission, royalty or brokerage, any annuity, or any other such payments;
- require any dealer, broker or agent or any such person concerned and management of stock or commodities to furnish details of all persons with whom he or the exchange has paid any sum in connection with the transfer of assets on whose behalf he or the exchange transacts; and

- require any person, including any bank to furnish information in relation to statements of accounts and affairs that in the opinion of the specified authorities are useful for any inquiry or proceeding under the Act.

19 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

There are some provisions under the Act whereby the authorities can direct requisition of information pertaining to any proceedings under the Act from any other officer under any other law prevailing in the country. Even regardless of such provisions, there is some level of exchange of information between various regulatory authorities that is not statutorily codified.

Under a tax information exchange agreement, the tax authorities cooperate with tax authorities of other countries. India has entered into extensive agreements of such a nature, especially in the recent past. However, for exchange of information to be permitted, there are certain requirements such as foreseeable relevance to enforcement of domestic laws and basic details about the information requested in order to prevent fishing enquiries by the authorities.

Special procedures

20 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

Under the Act, there are no such provisions specially catering to cases of financial hardship. However, under the Sick Industrial Companies Act, 1985 the Board of Industrial and Financial Reconstruction (BIFR) has the ability to recommend or direct certain relief in respect of income tax proceedings as well. To this extent, the CBDT has issued an order under section 119(2)(a) that BIFR 'recommendations' will also be considered as binding on the tax department, as long as the tax authorities have been heard by the BIFR before passing orders. Therefore any relief directed by the BIFR to be given to a party under the Income Tax Act would have to be given effect immediately. However, under the provisions of the Act, any losses incurred by an entity may be carried forward to the subsequent year and offset against any profits that the entity may make and to that extent may be leveraged against subsequent tax liabilities.

21 Are there any voluntary disclosure or amnesty programmes?

Provisions for such a scheme existed in the form of the Voluntary Disclosure of Income Scheme, 1997, which gave an opportunity to income tax defaulters to disclose their undisclosed income at prevailing tax rates. This scheme was closed down on 31 December 1998 and no other scheme has been instituted by the government since.

Rights of taxpayers

22 What rules are in place to protect taxpayers?

There are no specific principles in place to protect taxpayers under the Act. However, the principles of natural justice generally run through all proceedings under the Act. To this extent, the various rights afforded to the taxpayer, either under certain provisions or otherwise are:

- the right to be afforded a hearing before any action taken against him or her under the Act;
- the right to be given notice of proceedings under the Act;
- the right to examine all evidence procured and used against him for any proceedings under the Act; and
- the right to cross-examine witnesses.

23 How can taxpayers obtain information from the tax authority?
What information can taxpayers request?

The Act and all authorities under it are within the purview of the Right to Information Act, 2005. Accordingly, any taxpayer may request and obtain information held by the authorities that is in the public domain. There are, however, certain restrictions on the obtaining of information pertaining to other taxpayers, which unless deemed to be in public interest, will be protected.

24 Is the tax authority subject to non-judicial oversight?

The only statutorily instituted non-judicial oversight under the Act is by the CBDT. However, even the CBDT's functions do not extend to review of assessments and are limited to framing and execution of policies, and administrative aspects of the functioning of tax authorities.

Court actions

25 Which courts have jurisdiction to hear tax disputes?

The scheme of appeals under the Act confers jurisdiction upon specialised tribunals such as the ITAT, as well as the High Court and the Supreme Court to hear tax disputes. The Income Tax Appellate Tribunal is a quasi-judicial body specially constituted to deal with tax disputes appealed from the lower tax authorities. However, while the Income Tax Appellate Tribunal has jurisdiction to hear any appeals from the lower authorities, the jurisdiction of the High Court and the Supreme Court is restricted to matters that involve a 'substantial question of law'.

Jurisdiction to hear cases also lies with the Authority for Advance Rulings. However, these are not disputes in the strict sense and the Authority only hears matters on application by the taxpayer on questions of tax liability.

If tax authorities act without jurisdiction, remedies may also be available directly before the High Court through writ petitions under article 226 of the Constitution of India.

26 How can tax disputes be brought before the courts?

The ITAT is constituted by the central government as a quasi-judicial body to hear appeals from decisions of the lower tax authorities. Every appeal before the ITAT must be filed within 60 days of the date on which the order sought to be appealed against was passed by the tax authority, and may be filed by any party aggrieved by the order. There is no minimum threshold amount for claims brought before the ITAT. However, only orders from which substantial questions of law arise may be referred to the High Court. Similarly, only in instances of significant questions of law, or on account of a conflict in the decisions of various High Courts in respect of particular questions of law, would an appeal lie from the decision of the High Court to the Supreme Court.

27 Must the taxpayer pay the amounts in dispute into court before bringing a claim? Can the costs of a dispute be recovered?

Usually there is no such requirement prior to appeal, however, the mere fact that the taxpayer has preferred an appeal against an order does not automatically stay the recovery proceedings under the Act. Stay of recovery proceedings will be subject independently to the provisions of section 225 of the Act.

However, while approaching the court for a stay application for recovery of proceedings, general principles of balance of convenience such as financial hardship and the preponderance of evidence are taken into consideration.

28 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

The Indian judiciary does not permit jury trials for any cases and tax disputes are no exception to this rule. The decision maker in the ITAT or the High Court and Supreme Court is typically a bench consisting at least of two members. Before the ITAT, such a bench would necessarily be constituted of one judicial member and one technical member. However, in exceptional cases, pursuant to authorisation by the central government, the bench may also consist of a single judge, or three judges or more based on the circumstances. Appeals before the High Court and the Supreme Court must necessarily be decided by a bench consisting of at least two judges.

29 What are the usual time frames for tax trials?

At the first level, where an appeal has been preferred against assessment by the AO, while there is no mandatory time limit for disposal of the appeal, wherever and to the extent possible, such appeal is to be heard and decided within one year from the end of the financial year in which such appeal is filed.

Under the revisionary powers of the Commissioner of Income Tax, any order of the AO, if erroneous or prejudicial to the interests of the Revenue, may be revised, subject to a limitation period of two years from the end of the financial year in which the order sought to be revised was passed.

As regards appeals to the Income Tax Appellate Tribunal, while there is no mandatory time limit, every appeal, wherever possible, is to be heard and disposed of within a period of four years from the end of the financial year in which such appeal is filed.

However, due to a backlog of cases, the time taken for disposal of the cases is inordinately high.

30 Describe the discovery process for a tax trial.

Tax trials do not ordinarily involve a discovery process in India. However, rules of discovery may be invoked to the extent of the applicability of general principles in the Indian Evidence Act, 1882 to proceedings in the Act.

31 What testimony is permitted in a tax trial?

As per the Rules of the ITAT, any facts contrary to, or that cannot be borne out by the facts on record, may be admitted by way of an affidavit. Such affidavits may be submitted by any party as evidence purporting to support their claim, and such affidavits may be submitted on behalf of expert witnesses, and other third parties. However, the extent of the relevance of testimony of the taxpayer is very limited in the absence of evidence on record support his claim. The ITAT typically relies on documentary evidence; cross-examination of witnesses is not common at the level of the ITAT.

32 Who can represent taxpayers in a tax trial? Who represents the tax authority?

Under the Act, every taxpayer is entitled to represent himself or herself before any income tax authority, or the income tax appellate tribunal in connection with any proceeding under the Act relating to him or her. Additionally, the taxpayer is also permitted to attend through an 'authorised representative', specifically defined under the provisions of the Act as including, inter alia, lawyers, accountants, any person regularly employed by the taxpayer, officers of banks dealing with the taxpayer, or any other person acquiring such qualifications as may be prescribed by the CBDT from time to time. Before the High Courts or the Supreme Court, only duly qualified lawyers may represent the taxpayer (unless the taxpayer appears in person).

Update and trends

The current enforcement concerns mostly relate to the recently introduced 'indirect transfer provisions' vide explanation 5 to section 9(1) of the Act whereby any share or interest in a foreign company would be deemed to be situated in India if it derives substantial value from assets located in India. Since what would constitute 'substantial value' is not defined in the Act, this has led to a lot of confusion, even though a recent committee set up by Dr Parthasarathi Shome suggested that the threshold value should be more than 50 per cent in such cases.

Other concerns include the enactment of the General Anti-Avoidance Rules (GAAR), enforcement of which is on the horizon. The GAAR have been the subject of much controversy in India, and while their enforcement has been postponed to the 2015 financial year, it remains a major concern for all entities that engage in legitimate tax planning in India.

The tax authority is typically represented by lawyers or accountants, as appointed by the government based on prescribed qualifications and experience. Currently under the Act and the rules framed thereunder, there are no provisions for taxpayers who cannot afford legal representation for themselves.

33 Are tax trial proceedings public?

While tax assessment proceedings are privately conducted, the situation is different for appellate proceedings.

Typically all tax trial proceedings are conducted by way of public hearings. However, in exceptional circumstances as determined under the Code of Civil Procedure or the rules of the High Court and Supreme Court, as the case may be, certain proceedings may be conducted as in camera proceedings.

34 Who has the burden of proof in a tax trial?

The general rule in this regard is that it is for the tax authorities to show any income being accrued by, or arising from, the taxpayer. This shifts the burden to the taxpayer to either dispute the claims of the authorities per se, or to show that such income is exempt under the provisions of the Act. Furthermore, certain presumptions operate with respect to unexplained money, undisclosed investments and unexplained expenditure under the provisions of the Act that are for the taxpayer to disprove, as given under sections 69A, 69B and 69C.

Furthermore, the burden of proof in a tax trial, pursuant to an assessment under section 142 of the Act, is upon the taxpayer to not only establish the veracity of the returns filed by him, but also to disprove allegations of default, concealment etc, made by the tax authority in this regard.

35 Describe the briefing process for a tax trial.

In India, tax trials are governed by procedures prescribed under the Income Tax Act, and the accompanying Rules, 1961, as well as the rules of procedure of the ITAT and the AAR, which as such have the power to frame their own rules.

Tax trials at the level of the ITAT and the AAR are the final stage at which evidence may be appreciated, and at which determination of facts by the AO and the Commissioner of Income Tax (appeals) may be controverted. There is no system of summary proceedings under Indian law for tax trials, and all matters at this level typically involve disputing determinations of facts by the lower authorities. As such, questions of law and fact are taken together during such proceedings, with the parties having the right to submit additional evidence in terms of documentation and affidavits as testimony. After an appreciation of all evidence, all questions presented to the authorities are ruled upon. Equal opportunity of being heard, and of responding to claims of the other side, is afforded to both the taxpayer and the Revenue.

The rulings of the ITAT and the AAR are binding upon all authorities subordinate to them. With regard to the AAR, lower authorities are bound only to the extent of the specific case being dealt with and the specific questions answered.

Beyond the ITAT and the AAR, the rules of the High Court and the Supreme Court govern the appellate proceedings, and the proceedings here are restricted to adjudication on significant questions of law. Whether a case is fit to be appealed before the High Court from the ITAT depends on, for example, if a significant question of law has arisen, or if it is subject to determination in 'admission proceedings'. Only cases 'admitted' by the Court are taken up for adjudication on the merits.

36 Can a court decision be appealed?

Yes, a court decision can be appealed subject to certain conditions as specified above. All decisions from the commissioner of income tax (appeals) may be appealed before the ITAT within a specified time frame of 60 days from the date of the order which is sought to be appealed. However, appeals from the decision of the ITAT to the High Court will be permitted only in circumstances where the order of the ITAT presents substantial questions of law. Similarly, only decisions of the High Court, which present substantial questions of law, or deal with questions upon which there are conflicting decisions of the High Court, may be appealed against before the Supreme Court.

The statutorily prescribed time frame for disposal of cases by the ITAT is four years from the end of the financial year in which such appeal is filed. There is no such time frame prescribed for appeals before the High Court or the Supreme Court.

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