LAW COMMISSION OF INDIA

ONE HUNDRED AND FIFTEENTH REPORT

ON

TAX COURTS

1986

D.O. No. F.2(6)/85-LC

Shri Ashok Kumar Sen,
Minister for Law and Justice,
Government of India,
Shastri Bhavan,
NEW DELHI.

August 28, 1986

Dear Minister for Law and Justice,

I have great pleasure in forwarding the second report of the present Law Commission (One Hundred and Fifteenth Report of the Law Commission) suggesting structural changes in the hierarchy of courts dealing with conflicts and controversies arising out of the levy and collection of direct taxes, indirect taxes and the enforcement of legislation relating to exports and imports.

You will be happy to know that the Commission is continuing its search for finding out ways and means with a view to reducing workload in the High Courts and Supreme Court. Diversification of judicial administration is one amongst many methods for achieving this result. While assigning the task for recommending judicial reforms to the present Law Commission, it was suggested that the Commission may examine the need for decentralisation of the system of administration of justice by amongst others establishing other tiers or systems within the judicial hierarchy to reduce the volume of work in the Supreme Court and the High Courts. In its search for diversifying administration of justice, the Commission came across a stark reality that there are numerous stages of appeals in the tax litigation. The litigation in this behalf is practically unending and in the course of an upward movement of the litigation, the revenue to the tune of thousands of crores has remained frozen by the interim orders granted by the courts.

The Commission, accordingly, examined the existing vertical hierarchy of tribunals and courts involved in tax litigation. The delay was found at the High Court level. Accrdingly, the Commission examined the feasibility of setting-up a Central Tax Court for Direct and Indirect Taxes.

I would like to recall your attention to your D.O.1914/MLJ/86 dated May 5 1986 forwarding therewith the copy of a letter dated 23rd April, 1986 from Shri Ramus Deora, Chairman, Federation of Indian Export Organisations, Western Region drawing your attention to the delay in disposal of disputes arising under various Import/ export laws. The Commission was requested by you to take this aspect into consideration in making, its recommemdation on Tax Courts.

Chaper IV of the report deals with disputes and method of resolution arising under various export/ import laws. The reference made by you thus in this behalf would stand disposed of.

With regards,

Yours faithfully,

Sd/-

D.A. DESAI

Encl : *A Report*

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CHAPTER I

INTRODUCTION

1.1. Government of India was toying with an idea of setting-up a separate Judicial Reforms Commission. In Fabruary, 1986, Government of India decided to assign the task of studying and recommending judicial reforms to the Law Commission. Terms of reference in the context of studying judicial reforms which were drawn-up were forwarded to the Law Commission. On receipt of the terms of reference, the Law Commission drew-up its own programme of action and commenced work according to the schedule set out in the programme. Introducing reforms in the judicial system requires a multi-pronged approach. Before undertaking the task of recommending reforms, it is necessary to apprise oneself about the present judicial administration in vogue; its infirmities, deficiencies, deformities and weaknesses as well as its strength and retainable features, causes that contributed to the present disconcerting situation; whether repairing the system can improve the situation or restructuring it as a whole or in parts is inevitable. The changes to be introduced must not only have newness and utility, but also they must be result-oriented. It is, therefore, inevitable to approach the question of reforms in judicial administration from different angles. Unless the disease is diagnosed, the remedy, if any prescribed, is likely to prove infructuous.

1.2. Numerous causes have been identified by the Law Commission which have individually and cumulatively contributed to making the present administration of justice stratified, highly expensive, inaccessible, unduly formal, protracted and dilatory. Each of these causes is individually dangerous enough to destroy the judicial administration but in their cumulative effect, have made administration of justice a preserve of the rich and the well-to-do to be used generally for shadow-boxing. Poorman can ill-afford the luxury of modern litigation. He is wholly alienated from the system. Judicial reforms to be effective must make the system resilient, speedy, inexpensive, result-oriented and the access to it unimpeded. While drawing-up the terms of reference in the context of studying judicial reforms, each of these contributory factors have been kept in view so that each one can be tackled by a definite and separate report.

1.3. Amongst the terms of reference, Item Nos/ 1(iii) and 2 read as under:

"1. The need for decentralisation of the system of administration of justice by—

(*i*) .....

(*ii*) .....

(*iii*) establishing other tiers or systems within the judicial hierarchy to reduce the volume of work in the Supreme Court and the High Courts.

2. The matters for which Tribunals (excluding services Tribunals) as envisaged in Part-XIVA of the Constitution need to be established expeditiously and various aspects related to their establishment and working."

1.4. The genesis of Term No. 1(iii) appears to be the mounting backlog of cases in the Supreme Court and the High Courts. Any proposed reform in the administration of justice must amongst others take note of the fact that the present system of disposal of cases have an inbuilt tendency of piling-up arrears because the inflow and the outflow are not coordinated. The Law Commission is accordingly asked to examine the present hierarchy of courts in relation to the question of inflow of work in the High Courts and the Supreme Court and the incapacity of the system to deal with the same. As a corollary, by Term No. 2, the Law Commission was required to examine the question of establishing Tribunals as envisaged in Part XIV-A of the Constitution so as to diversify the administration of justice with a view to reducing the volume of work in the Supreme Court and the High Courts.

1.5. Administration of justice primarily aims at providing mechanism for resolution of disputes arising in the society. Different form have been set-up to deal with different types of disputes e.g. civil courts, criminal courts, labour courts, tax tribunals etc. Specific forum specially devised to deal with specific disputes caters to the needs of persons who seek resolution of these specified types of disputes.

Judicial Administration as envisaged by Constitution

1.6. The judicial administration envisaged by the Constitution of India is one integrated pyramidic structure. Base level fora operating under different nomenclature cater to the needs of different types of persons in search of justice in relation to their disputes. There is generally a vertical hierarchy of courts in each branch. Historically speaking in some sections, there are number of stages of appeals e.g. direct tax laws, and in some others e.g. criminal cases, very few. Constitution provided for setting-up a High Court for each State. The jurisdiction of the High Court was so devised as to permit anyone aggrieved by the decision of different forum to invoke its jurisdiction for redressal of wrong. While invoking civil jurisdiction, the aggrieved party may reach High Court by way of a first appeal or a second appeal, as the case may be. In criminal matters, an aggrieved person can invoke the jurisdiction of the High Court by an appeal or a revision petition, as the case may be. In the matter of direct taxes, the aggrieved person can approach the High Court by way of a reference as provided in Sec. 256 of the Income-tax Act, 1961, Sec. 26 of the Gift-tax Act, 1958, Sec. 27 of the Weatlh-tax Act, 1957, Sec. 130 of the Customs Act, 1962 etc. An aggrieved person may as well invoke the jurisdiction of the High Court under Art. 226 of the Constitution complaining of breach of fundamental rights or for any other purpose. The fall-out of this vertically structured administration of justice is that every conceivable type of legal dispute reached the High Court. If there are numerous inlets into one reservoir of work, there is bound to be accumulation and congestion of work unless the disposal outlet functions with equal if not higher speed. Experience shows that disposals did not keep pace with admissions.

1.7. Supreme Court stands at the apex of the judicial administration. It has been described as the sentinel on quivive. Its jurisdiction is so wide that it can reach and curb injustice perpetrated by any judicial or quasi-judicial or administrative tribunal. The jurisdiction of the Supreme Court of India can be invoked by any person aggrieved by a decision of the High Court or of any Tribunal. Art. 136 of the Constitution confers very wide jurisdiction on the Supreme Court of India to grant special leave to appeal against any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or Tribunal in the territory of India. It has been conceded on all hands that Supreme Court of India enjoys the widest jurisdiction compared to any of its counterpart anywhere in the world. Add to this the original jurisdiction conferred on the Supreme Court of India under Art. 32 of the Constitution to seek redress in the matter of violation of fundamental rights and the width and ambit of its jurisdiction can be gauged.

1.8. With the introduction of a Bill of Rights in the Constitution of India (Part III of the Constitution), a wind of change swept over the country. The sequiter of an awakening or awareness about one's own rights inevitably goads one to seek enforcement of the rights, meaning thereby, a resort to forum devised for the purpose for redress of grievance. Litigation was thus bound to multiply. Year after year, more and more cases landed into the courts. The court system as in vogue prior to independence continued to perform its function according to the same leisurely process as it was doing during the colonial days. A wide gap developed between the incoming litigation and the outflow by way of disposals.

1.9. Independent India was bound to enact numerous laws for translating the goals of the Constitution into reality. Economic planning with the emphasis on industrialisation could focus attention on the resources of the country available for development programme. Direct and indirect taxes, the principle sources of revenue were bound to multiply. The Income-tax Act which had extended its coverage to a microscopic minority of the country till 1947, expanded its tentacles far and wide from year to year. The Wealth-tax Act made its appearance in 1957, the Gift-tax Act in 1958 and the ill-fated Estate Duty Act in 1953. The First Schedule to the Central Exeises and Salt Act, 1944, specifying the excisable goods on which duty of excise is levied and chapters of First Scheduled to the Customs Tariff Act, 1975 proliferated from year to year. Extensive coverage of tax laws coupled with the known human tendency not to pay or pay as much less as possible or recover as much as possible resulted in an avalanche of litigation in this branch of law, congestion was inevitable. It has acquired high visibility.

1.10. Numerous labour laws for ameliorating the conditions of work for assuring social security and for eliminating exploitation were enacted. Large number of labour courts and industrial tribunals were set up for obtaining relief under various

labour laws. The organised industrial labour initiated numerous actions before such tribunals for seeking relief. As the pace of industrialisation increased, simultaneously adding to the strength of organised labour, the paradox of growing educated unemployment resulted in large number of actions coming before the labour and industrial tribunals.

1.11. The facility for higher education did not keep pace with the seekers of admissions to the institutions for scientific or technical education. Affirmative action under Art. 15 of the Constitution by the State generated an area of conflict between the votaries of meritocracy and supporters of positive discrimination in favour of the members of the Scheduled Castes, Scheduled Tribes and other backward classes. Admission to the centres of higher education being an annual phenomenon, number of actions were initiated year after year seeking relief and redress in this behalf.

1.12. An exhaustive written Constitution may provide fruitful source of varying interpretation of its provisions. Specific enumeration of matters in Union List, State List and Concurrent List coupled with power of judicial review of legislative and executive actions brought to fore a new and hitherto unknown kind of litigation. No sooner the ink was dry on a legislative measure either Central or State, the court was moved on the allegation that it is Constitutionally invalid on diverse ground including legislative incompetence.

1.13. With the first flush of independence and an entrenched bill of rights coupled with conferment of jurisdiction on the High Court under Art. 226 and Supreme Court of India under Art. 32, numerous petitions were filed complaining contravention of fundamental rights. Till the deletion of Art. 31 incorporating fundamental right to property read with Art. 19(1)(g), every agrarian reform statute enacted by the State was challenged on the ground of contravention of fundamental right to property. Even acquisition of sick industries with a view to infusing fresh life into them did not escape the scrutiny by the court.

1.14. The inevitable fall-out of what is herein stated was a phenomenal increase in the causes and controversies coming before the High Court and reaching the Supreme Court via Art. 136. The graph of pendency in each High Court without an exception rose from year to year. As the pendency piled-up, the period between the initiation of action and its final disposal expanded. Today it can be said that almost in any branch of litigation, if the matter moves vertically from the base level to the Apex court, the time spent averages between 15 to 10 years. Sporadic efforts at streamlining the procedure which was said to be the root cause of delay and increase in the manpower strength of the High Courts, did not make any dent in the mounting arrears. A shrill cry rose that 'justice delayed is justice denied'. It shook not only the Judiciary but also the Parliament. In paragraph 5 of the Statement of Objects and Reasons accompanying the Constitution (Forty-Fourth) Amendment Bill, 1976, a note of the situation was taken. It was said :

> "To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other 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 Art. 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under Art. 226."

1.15. The assumption that the High Court ,the highest court at the State level with its all expansive jurisdiction, would be able to handle litigation coming to it from diverse sources, has been belied. A further upward revision of the strength of the High Court judges is likely to attract Parkinson's law. Need for diversification in the matter of administration of justice, in specialist fields, is now keenly felt. Litigation arising under tax laws, so also under labour laws, educational activities necessitate a special skill to deal with it. It is not for a moment suggested that the Judges of the High Court would not be able to deal with the same, but frequent changes in benches, non-availability of benches round the year to deal with revenue matters and recurring phenomena of admissions to higher centres of learning could be better dealt with by a specialist body exclusively devoted to this work. It will have two distinct advantages; (i) it would avoid repeated enunciation of the same

principle over and over again by different benches and (ii) citation of the precedents, a time consuming exercise, repeatedly before different benches. Additionally, it would provide continuity, consistency and certainty in the matter of relevant principles to be dealt with in such matters. It must be a judicial body composed of apart from judges of High Courts, legal technocrats such as legal academics, Vice-Chancellors of the Universities, experts in labour law and experts in taxation laws as also those who have dealt with the subject for a long time. It will be a body composed of experts who, on account of their expertise, would accelerate the pace of handling the cases.

CHAPTER II

DIRECT TAXES

2.1. Chapter XIV of the Income-tax Act, 1961 prescribes procedure for assessment. There are corresponding provisions prescribing procedure for assessment in the Wealth-tax Act, Gift-tax Act and Companies (Profits) Surtax Act. On a return being filed by the person who under the Law is required to file the return, the Income Tax Officer proceeds to assess the tax payable by the assessee.

2.2. Section 252 of the 1961 Act provides for setting up an Appellate Tribunal, consisting of Judicial and Accountant Members. The Income Tax Appellate Tribunal is, as its name indicates, an appellate authority. An appeal lies to the Appellate Tribunal against the orders of Appellate Assistant Commissioner/Commissioner (Appeals) at the instance of the assessee as well as Revenue. The width and ambit of the judicial powers conferred on the Appellate Tribunal may be gauged from the language used in Section 254 which provides that "the Appellate Tribunal may, after giving both the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit". Thus, the Appellate Tribunal can interfere with finding of facts, as well as, on question of law.

2.3. On a decision rendered by the Appellate Tribunal either the assessee or the Revenue may require the Appellate Tribunal to refer to the High Court, any question of law, arising out of such order. If the appellate Tribunal agrees to make a reference, it shall draw up a statement of the case and refer it to the High Court under Section 256(1). If on the other hand, the Appellate Tribunal is of the opinion that no question of law arises from its order and, therefore, refuses to make a reference, the aggrieved person may approach the High Court under Section 256(2) and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it to the High Court. If the High Court declines to call for a reference, the aggrieved person can approach the Supreme Court of India under Article 136 of the Constitution. Cases are not unknown when the Supreme Court of India differed with the decision of the High Court and remitted the case with a direction to the Appellate Tribunal to draw up the case and to refer it to the High Court.

2.4. Section 257 confers powers on the Appellate Tribunal to make a direct reference to the Supreme Court if it is of the opinion that on account of a conflict of judicial dicta amongst various High Courts, it is expedient that the matter may be decided by the Supreme Court.

2.5. When the reference is made, the High Court will hear the question of law and render its advisory opinion. Anyone aggrieved by the decision of the High Court on the reference, can appeal to the Supreme Court under Article 136 of the Constitution. If the Supreme Court entertains the appeal and decides the question of law, the same will be remitted to the Income Tax Appellate Tribunal who must dispose of the case in accordance with the opinion of the Supreme Court.

2.6. To appreciate the numerous stages through which an assessment proceeding moves, one may briefly recount the stages such as Income Tax Officer, Appellate Assistant Commissioner/Commissioner (Appeals), Income Tax Appellate Tribunal, reference under Section 256(1), reference under Section 256(2), a possible appeal at that stage under Article 136 to the Supreme Court of India and then back to the High Court. Vertically, there are as many as 8 stages of review with regard to an assessment order. It is said that the finding on a question of fact by the Appellate Tribunal is final and the advisory jurisdiction of the High Court in a reference under section 256(1) or 256(2), as the case may be, is confined to a question of law. Though broadly stated the statement is correct, but anyone who has dealt with tax references knows how under the guise of inviting opinion on a question of law, findings of facts are tinkered with. One has merely to look at the form of reference on question of law either drawn up by the Appellate Tribunal or called for by the High Court. It always starts with : 'whether on the facts and in the circumstances of the case etc.'

2.7. Probably, this long cumbersome procedure has been borrowed from corresponding provisions of the Income Tax Act, 1952 of the United Kingdom with minor variations.

2.8. Apart from the relief by way of statutory appeals, a large number of writ petitions are filed questioning the correctness of the orders of the tax authorities under Article 226 of the Constitution to the High Court or Article 32 to the Supreme Court. Numerous writ petitions have been filed at the stage of issue of a mere notice invoking the extraordinary jurisdiction of the High Court or the Supreme Court on the ground that the mere issuance of notice is wholly without jurisdiction. If the matter is entertained, stay of further proceedings follows as matter of course. Proceedings at the initial stage are thus held up for decades and if the writ petition is finally rejected, the proceedings from the stage of notice would start after lapse of a decade or decades. If initially the jurisdiction of the High Court is invoked under Article 226 and the High Court declines to interfere at the stage of notice, not infrequently a petition for special leave to appeal under Article 136 is moved in the Supreme Court and cases are not unknown where it is entertained. It is equally not unknown that finally the contention was found to be frivolous. Yet and unscrupulous litigant delays the decision adverse to him by decades and wants undeserved respite from the tentacles of revenue laws.

2.9. It would thus appear at a glance that the numerous stages of appeals statutorily prescribed, inheres an in-built potentiality for delay in finalising assessment proceedings.

2.10. There is one additional reason for the delay in disposal of tax proceedings and accumulation of work not only in the High Court but especially in the Supreme Court. The Benches of Appellate Tribunal hold sittings in all the States. Against the decision of the Appellate Tribunal, as stated herein before, an application for reference to the High Court having jurisdiction over the Appellate Tribunal, can be made. Each High Court hears the reference and disposes it of in the light of its own understanding of the relevant law. High Courts are known to differ frequently from each other. The discomfiture suffered by Members of the I.T.A.T. because of this situation is really agonising. Members of the Appellate Tribunal are liable to be transferred. When a Member sits in a bench in one State, the bench in that State is bound to decide in conformity with the law laid down by the High Court of that State. On his transfer when he is posted in another State, he is bound to decide the same point in conformity with law laid by the high Court of that other State. And if the two High Courts differ, he has to decide the same point in a contradictory manner with no regard for his own view. Certainly this would cause discomfiture.

2.11. This undesirable situation can be demonstrably established by reference to the functioning of Appellate Tribunal bench at Delhi. Couple of benches of the Appellate Tribunal hold sittings in Delhi. Different benches are assigned jurisdiction over different areas. Some benches have jurisdiction over Delhi Metropolitan area. One bench has jurisdiction over Madhya Pradesh. Another bench has jurisdiction over part of Uttar Pradesh. One bench has jurisdiction over part of Madhya Pradesh and part of Uttar Pradesh. Now, when an appeal comes before the last mentioned bench, if the appeal is from Madhya Pradesh, the decision of the M.P. High Court would be binding on the bench. If the same bench is hearing an appeal from Uttar Pradesh, the decision of Allahabad High Court would be binding on it and the two decisions may be irreconciably contradictory. If on the same point there is decision of Delhi Court, the Appellate Tribunal is not bound by it though holding the sitting at Delhi. This introduces a sort of functional disintegration in the application of law. The situation is attributable to a glaring lacuna in the Income-tax law in that till the matter reaches the Supreme Court, there is no intermediate judicial authority which can develop an all India perspective with regard to the interpretation of various provisions of Direct Tax Laws. Conceptually, the Supreme Court was broadly to concern itself with constitutional questions or questions of law of general public importance. It was not to be a body for reconciling dissent between High Courts on trivial questions of law. Today it has to perform that role. When there is a difference of opinion between two High Courts, even on a minor point, the Supreme Court grants special leave to appeal for asking. A need was, therefore, felt for a long time for a body having an all India jurisdiction but at a stage lower than the Supreme Court.

2.12. Wanchoo Committee toyed with the idea of abolishing reference procedure and in its place to set up a tax court. It did not pursue the proposal further for the fear o *f* extensive amendments needed to give effect to it.

The 12th Report of the First Law Commission deals with the Income Tax Act. At that time, the Income-tax Act of 1922 was on the statute book. Dealing with the topic relevant to this Report, the commission obeserved that the 'existing system of appeals to the Appellate Tribunal and thereafter a reference ot the High Court on a question of law either under Section 66(1) or under Section 66(2) of the Income-tax Act of 1922 is very cumbersome and causes unnecessary delay in the disposal of appeals so as to finalise the assessment'.(1)

It recommended the abolition of the Appellate Tribunal and in substitution of it, recommended an appeal to the High Court from the orders of the Appellate Assistant Commissioner, both on question of facts as well as law.(2) While enacting Income-tax Act, 1961, it appears that recommendation for abolition of the Appellate Tribunal itself was not accepted. The appellate Tribunal was retained simultaneously retaining the procedure of reference.

2.13. In June, 1977, the Government of India consituted what is styled as the Direct Tax Law Committee, popularly known as Choksi Committee. In its report, while dealing with the Appellate Tribunal, the Committee recommended that section 252 of the Income Tax Act should be deleted and a separate statute should be enacted to deal with the constitution and composition of the Appellate Tribunal.(3) While examining the procedure of reference, the Committee took notice of the dilatory, cumbersome reference procedure which caused enormous delay in disposal of tax litigation and recommended its abolition, The Committee recommended the setting up of a Central Tax Court with all-India jurisdiction to deal with tax litigation to the exclusion of the High Courts.(4) It also recommended that the proposed Central Tax Court should have benches located at important centres. It further recommended that the persons to be inducted to man the Central Tax Court should be from amongst the persons who are High Court Judges or who are eligible to be appointed as High Court Judges. It further recommended that in the matter of conditions of service, scales of pay and other privileges, Judges of the Central Tax Court should be on par with the High Court Judges.(5) It therefore recommended that the proposed Central Tax Court should be entrusted with jurisdiction to decide questions of contitutional validity of the provisions of the Tax laws or of the rules framed thereunder.(6) As the proposed Central Tax Court will be a creature of a statute, it may be handicapped in dealing with the question of constitutionality of a tax statute or rules made thereunder. The then prevailing situation called for a radical change in the structure of court system dealing with tax laws. That recommendation is still not implemented. In the interregnum the situation has worsened. The pendency for the year 1984-85 may be set out for comparison with the situation presented before Choksi Committee.

1984-85

	Opening balance	Institution	Total for Disposal	Disposal	Pendency
	1	2	3	4	5
High Courts:					
(*a*) Reference application u/s 256(2) (cases where ITAT declines to refer)	7214	2506	9720	2490	7230
(*b*) Cases u/s 260 (admitted references) .	24935	3146	28081	1942	26139
(*c*) Petitions u/s 261 (Certificate for appeal to SC) . . .	525	240	765	276	489
(*d*) Writs . . .	4116	616	4732	888	3844
					37702

(1) LCI Twelfth Report, paragraph, 90, P. 44.

(2) LCI Twelfth Report, paragraph 6, p. 53.

(3) Direct Tax Laws Committee Final Report, Chapter 6, para II-6. 7. (1978).

(4) *Ibid*, para II-6.15.

(5) *Ibid*, para II-6.17.

(6) *Ibid*, para II-6.18

	1	2	3	4	5
Supreme Court:					
(*a*) Appeals u/s 261 (filed on certificate of High Court) . .	1264	46	1310	4	1306
(*b*) Special Leave Petitions (where High Cou Court declines to refer or in other cases) .	1346	265	1611	19	1592
(*c*) Writs . . .	335	9	344	8	336
					3234

Pendency of tax appeals/petitions in the Supreme Court of India as on 30-6-1986

Tax appeals . .	6502	Oldest pending appeal is of 1972.
Constitutional Tax matters	113	Oldest pending writ petition is of 1970.

2.14. Two peculiar features of tax litigation deserve specific notice. In the matter of direct taxes such as Income Tax and Wealth Tax, the assessee has to submit his return every year. By the time the next return becomes due, in all probability, the assessment in respect of the earlier years is generally not finalised. If the assessee has raised some legal contentions and if there is a variance in the approach as to fact-situation, the pendency of the proceedings of the earlier year will entail repetition of the same contentions. When the first assessment is finalised and the decision is adverse to the assessee, he would ordinarily prefer an appeal. By the time the appeal is disposed of, more returns have become due and the litigation multiplies at an yearly rate. If the litigation moves vertically upto the Supreme Court, the dispute raising its head year after year will be pending for an average duration of 15 to 20 years. In the meantime, same contention has multiplied into numerous appeals, and if the Supreme Court finally accepts the view of the assessee, all the earlier assessment orders at whatever stage pending will have to be brought in conformity with the decision of the Supreme Court.

2.15. A company registered or deemed to be registered under the Companies Act, 1956, or a corporation set up under a statute will have to finalise its balance sheet and profit and loss account. It has to file its return. If the controversy arises about the stand taken by the company on the one hand and the revenue authority on the other and the litigation moves upward, question would arise how long the balance sheet can be kept in a state of flux. Finally, when the matter is disposed of by the highest court and the decision imposes some additional liability, the company will have serious difficulty in adjusting its financial affairs. the judgment of the Supreme Court in *Lohia Machines Ltd.* v. *Union of India*, (1) interpreting the expression "capital employed" in rule 19A of the Income-tax Rules, 1962 and retrospective amendment of Sec. 80 J incorporating rule 19A in the section effective from April 1, 1972, would necessitate numerous companies reopening their balance sheets in respect of the intervening period of 13 years. This is bound to cause dislocation in the financial and economic planning of the corporate sector.

2.16. The failure of the system to dispose of tax litigation finally within a reasonable time creates hardship both for the revenue and for the assessee. The delay over a period results in multiplicity of proceedings causing avoidable harassment. The special feature of tax litigation must induce a thinking as to how to provide for a disposal of tax litigation which may deal with the same expeditiously. Viewed from this angle, the present system is dilatory and prolix. In terms of results, it is counterproductive.

(1) AIR 1985 SC 421.

2.17. One additional unfair advantage flowing from the delay in disposal of tax litigation and which often appears to be the prime motive for filing an appeal is the interim stay order granted by the High Court or the Supreme Court, as the case may be, against payment or recovery of tax found due already by two or in some cases three authorities. Occasionally, a blanket stay is granted. If ultimately, the assessee loses, a fresh round of litigation for recovery of tax starts.

2.18. Having brought into focus some of the ugly features of the present assessment and recovery of direct tax proceeding, the question that surfaces itself is whether all these ugly features can be eradicated and the system can be restructured so as to make it effective, time-bound and result-oriented.

2.19. From the discussions that the Commission has with the President and Members of the Income Tax Appellate Tribunal and a comprehensive note submitted by the former President of the Income Tax Appellate Tribunal, it transpires that the time lag between the date of assessment order and the order of the Income-Tax Appellate Tribunal disposing of the appeal is about three years, The delay really occurs after the decision is rendered by the Income Tax Appellate Tribunal, when either the assessee or the revenue moves an application for reference and the matter lands into the High Court. The bottleneck is at the level of reference under secs. 256 (1) or sec. 256(2) as the High Court is unable to handle the reference within a reasonable time. Tax experts, leading tax advocates and speakers at symposia workshops and seminars broadly concurred in the same opinion but there was wide divergence of views in the matter of remedial measures. There is a concensus amongst concerned interests that the reference procedure has outlived its utility.

2.20. Having given the matter anxious consideration the Commission has not been able to find valid, convincing and cogent reasons for retention of reference procedure.

2.21. This procedure found its way in the Indian law at a time when legislation was fashioned on colonial model. Sec. 64 of the Income Tax Act, 1952 of United kingdom conferred a right both on the assessee as well as on the surveyor, if dissatisfied with the determination of appeal as being erroneous in point of law, to declare his dissatisfaction to the Commissioners who heard the appeal and on payment of the prescribed fee was entitled to give notice in writing addressed to the Clerk of the Commissioners requiring the Commissioners to state and sign a case for the opinion of the High Court thereon. It is not open to the Commissioners to reject the request. Simon described this procedure as conferring a right of appeal to the High Court against the determination by General or Special Commissioners, as the case may be. Even though an appoal, if it can be so described under sec. 64, lies against a determination only on a point of law alleged to be erroneous, in truth and substance, a determination of facts may become the subject matter of appeal. To take one illustration, in *Bomfordev. Osborna,* (1) Viscount Simon, L.C., observed that where the Commissioners deduce further conclusions of fact from the facts proved or admitted, they should state that the question of law is whether their further conclusions can be supported by the facts proved or admitted. Whatever be the garb, this permits reopening of determination of facts. In such a situation 'the question of law is whether the facts found or admitted can support their further conclusions of fact.' This view has almost bodily permeated in the decisions of the High Court and Supreme Court while deciding the contours of what constitutes 'question of law'. Once a device is devised to reopen determination on questions of fact, the whole determination becomes open-ended. Therefore, in this procedure, apart from anything else, there is an inherent tendency to delay the disposal of cases and to widen the area of jurisdiction of the High Court under sec. 256(1) and (2).

2.22. What then is the justification for such a long drawn out procedure ? Till very recently, property was considered so sacrosanct that its deprivation even by lawful means for lawful purpose was to be discouraged at all costs. Deprivation of property in contrast with danial of liberty has caused greater flutter in the courts. A.K. Gopalan (2)in search of liberty did not secure liberal interpretation of Constitution. R.C. Cooper (3) (Bank Nationalisation) in search of property reversed the trend. The history of Art. 31 of the Constitution is replete with instances where

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(1) (1941) 2 All E R 426.

(2) *A. K. Gopalan* v. *State of Madras,* 1950 SCR 88.

(3) *R. C. Cooper* v. *Union of India,* 1970 (3) SCR 530.

every socially beneficient legislation met its waterloo on the touchstone of Arts. 31 and 19(1) (f) of the Constitution. These two articles built-up such an insurmountable roadblock in the pursuit of socio-economic justice that ultimately they had to be given a decent burial. Secs. 256(1) and (2) are a relic of those bygone days.

Further, the courts generally leaned in favour of giving any benefit of doubt in the interpretation of taxing statutes to the assesee. The court went so far as to hold that "avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality but on the operation of the Income-tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be avoided, but it may lawfully be circumvented.".(1) More often tax evasion donned the robe of tax avoidance. If the transaction is a device to avoid tax, then judicial process need not accord its approval to it. This was first hinted in *Wood Polymer Ltd.* v. *Bengal Hotels Ltd.*(2) Finally, a Constitution Bench unanimously laid the ghost of Westminster in *Mc Dowell & Co. Ltd.* v. *The Commercial Tax Officer.*(3) Conceding that there is no equity about tax, let it not be forgotten that no civilised society can exist unless taxes are paid without undue delay. This approach recently disclosed would provide an additional reason for doing away with the reference procedure which is a colonial relic.

Approach to Taxation Law

2.23. Approach to taxation law has to undergo a sea change. While evasion of tax was frowned upon, avoidance by legal devices was pampered. 'The large hidden loss to the community' (as pointed out by Master Cheatcraft in Modern Law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax- avoider and his expert team of advisers, lawyers and accountants on one side and the tax- gatherer and his perhaps not so skilful advisers on the other side. (4) A dilatory process provides a haven for these tactics. A developing society must find resources for its development projects. Taxes, direct and indirect, provide the main source of revenue from which socially beneficient activities can be undertaken by the State. Therefore, taxes must be recovered expeditiously. If court proceedings intervene to delay payment of taxes, the budgetary exercise 'is likely to transfer the burden of tax liability to the shoulders of the guideless good citizens from those of the artful dodgers'.(5) It is, therefore, necessary to reiterate what Justice Holmes said "Taxes are what we pay for civilized society. I like to pay taxes. with them, I buy civilization".(6)

2.24. Reducing one of the numerous stages of appeal and review may, to some extent, help in improving the situation. Human fallibility generated the concept of appeal. Therefore, court of appeal was styled as a court of error. But somewhere it must stop. At some stage, faith has to be reposed in adjudicating authority. Too many appeals do not guarantee non-erroneous decisions. Revarsal of decisions at every upward stage may induce doubt about the system. Therefore, some stages have to be cut out. The one considered as the most superfluous and yet time-consuming must be axed first. Reference procedure under sec. 256 of the Income-tax Act and the corresponding provision of the Gift Tax and Companies (Profits) Surtax Act deserve to be abolished and must be abolished. That would remove two unnecessary stages in the upward journey of tax litigation. It would simultaneously render the procedure for direct reference to Supreme Court under sec. 257 *otiose*.

2.25. The lacuna felt in the present day tax litigation, as pointed out earlier, is the absence of an all-India perspective till the matter reaches the Supreme Court of India. Even if reference procedure is abolished, the High Court may interpose

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(1) *Commissioner of Income Tax* v. *A Raman & Co.*, 1968 (1) SCR 10 at 15.

(2) 40 Company Cases 597 (Gujarat High Court).

(3) 1985 (3) SCR 791.

(4) *Me. Dowell & Co.* Vs. *Commercial Tax Officer;* 1985 (3) SCR 791 at 809.

(5) *Ibid,* 809.

(6) *Ibid,* 809.

itself under Art. 226 and defeat the very purpose for which the reference procedure deserves to be abolished. Interference of the High Court having statewise jurisdiction is the fruitful source of conflict in the matter of interpretation of tax laws. Every such apparent or real conflict adds to the workload in the Supreme Court much as tax law, like any other law, should have certainty in its application throughout the country. Therefore, the jurisdiction of the High Court under Art. 226 must equally be abolished.

Central Tax Court

2.26. Having eliminated the possible source of delay and conflict in the interpretation of tax laws, a suitable forum must be created at a stage above the Income Tax Appellate Tribunal and below the Supreme Court of India which will have a nation-wide jurisdiction. A Central Tax Court having an all-India jurisdiction would have two disinct advantages; (1) that it will introduce an all-India perspective in the matter of interpretation of tax laws and (2) conflicts of decisions amongst various High Courts making it obligatory for the Supreme Court to deal with the matter would be eliminated. There are some more incidental advantages which may be briefly narrated. A body dealing with specialist litigation round the year will acquire both speed and consistency in its views. A possibility of difference of opinion amongst benches of the Central Tax Court can be easily resolved by a dissent being examined by a larger Bench of the Central Tax Court. Common questions of law arising in a number of appeals coming before it can be dealt with by a common judgment. There will be thus unanimity in decisions, continuity and consistency in dealing with common questions arising before it. Therefore, a Central Tax Court at a stage midway between Income Tax Appellate Tribunal and Supreme Court of India must be set up.

2.27. What must be the format of the Central Tax Court ? It appears that since the introduction of Part XIV-A in the Constitution by the Constitution (Forty-second Amendment) Act, 1976, a belief has gained ground that appropriate legislature may set up Tribunals in respect of all or any of the matters specified in clause (2) of Art. 323 B with respect to which such legislature has power to make laws. Amongst the subjects referred to in clause (2), is levy, assessment, collection and enforcement of any tax. The appropriate legislature can also be the Parliament in the matter of levy, assessment, collection and enforcement of any tax referable to entries in the Union List. It is not disputed that a Tribunal having all-India jurisdiction can be set up to deal with levy, assessment, collection and enforcement of any centrally leviable tax. But this should not impede a further enquiry whether a court can be set up for the same purpose within the framework of the Constitution. And let it be remembered that there is a recognisable and visible difference between a court and a tribunal both with respect to its capacity, credibility and impact.

2.28. Parliament has powers to enact direct tax laws such as Income-tax Act, Gift-tax Act, Wealth-tax Act and the Companies (Profit) Surtax Act and set up a machinery for its levy, assessment and recovery. Entries 82, 85, 86 in the Union List in the Seventh Schedule of the Constitution confer power on the Parliament to levy tax on income, tax on corporation, tax on the capital value of the assests exclusive of agricultural land, on individuals and companies, and tax on the capital of companies. Where Parliament has power to levy tax it comprehends the power to provide machinery for the collection of tax and for resolution of disputes or complaints arising out of the levy and recovery of tax. The Central Tax Court herein envisaged will be a court with jurisdiction to deal with disputes or complaints arising out of the levy, assessment and recovery of the aforementioned taxes. Entry 95 in the Union List reads

> "Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in the List."

When the entry deals with jurisdiction and power of court, it comprehends both the creation of courts, conferment of power and jurisdiction or extinguishment thereof. Entry 95 enables the Parliament to deal with the jurisdiction of a High Court. Therefore, on a conspectus of all these entries, Parliament will have power by law to set up a Central Tax Court or as the office of the Ministry of Finance would like to describe it as National Court of Direct Taxes. Undoubtedly, the officers of the Ministry of Finance conceived it as an administrative tribunal under Art.

323B of the Constitution. The Commission is of the firm opinion that such a Central Tax Court should not be a tribunal, but a Court of Appeal with all its trappings and having an all-India jurisdiction. Those who favoured to set up a national tribunal under Art. 323B appeared to have overlooked the fact that suitable legislation will have to be enacted for that purpose. If law has to be enacted, it would be comparatively advantageous to set up a Central Tax Court rather than a tribunal envisaged by Art. 323B. Now that it is intended to confer jurisdiction on the proposed Central Tax Court to deal with constitutionality of tax legislation, a tribunal would be of no use. Tribunal cannot examine the constitutionality of a statute or subordinate legislation. This approach may, as a whole, defeat the charge of tribunalisation of justice. Therefore, the Commission is of the firm opiniom that a Central Tax Court/National Court of Direct Taxes be set up under an Act of Parliament having all-India jurisdiction.

2.29. There is near unanimity of opinion that Income Tax Appellate Tribunal has immensely justified its existence and largely vindicated the trust reposed in it. It has, therefore, to be retained with its regional jurisdiction. It would be the last fact finding authority.

2.30. The proposed Central Tax Court will have jurisdiction to entertain appeal against the decision of the Income Tax Appellate Tribunal on a question of law. As a at present provided, findings of facts by the Income Tax Appellate Tribunal shall be final. Every appeal filed before the Central Tax Court shall be listed for addmission before a Bench of the Court. If the Bench is satisfied that the appeal does not disclose a question of law, it would have jurisdiction to dismiss it *in limine*. If at the time of admission, the Bench of the Central Tax Court hearing the appeal is satisfied that the appeal discloses a question or questions of law, it should frame the question or questions and the appeal would be admitted limited to those questions. Guidance in this behalf may be obtained from sec. 100 of the Code of Civil Procedure, 1908. Final hearing of the appeal will be confined to the question or questions of law so framed unless the bench hearing the appeal considers, in the circumstances of the case, appropriate to allow any other question of law arising from the judgment of the Income Tax Appellate Tribunal which needs to be examined by it.

2.31. Who would man the Central Tax Court is a question of primary importance. Judges of the High Courts may be inducted in the Central Tax Court. The principal judge of the Central Tax Court will always be a person who is or has been a judge of the High Court. Members of the Income Tax Appellate Tribunal who have rendered not less than seven years of service in the Appellate Tribunal may be eligible for being elevated to the Central Tax Court, subject to the further condition that they were qualified for being elevated as a Judge of the High Court. Those who are eligible for being appointed as Judges of the High Courts would equally be eligible for membership of the Central Tax Court.

2.32. The terms and conditions of service of the members of the Central Tax Court would be on par with the conditions of service, in the matter of pay, perquisites, pension and leave, in force at the relevant time for the Judges of the High Court. Similarly, the terms and conditions of service of the Principal Judge of the Central Tax Court will be on par with the Chief Justice of a High Court.

2.33. In order to attract Judges of the High Court coming over to the Central Tax Court, some incentive is necessary. It can be provided in the form of age of retirement fixed at 65 years, as has been done under the Administrative Tribunals Act.

2.34. The Headquarters of the proposed Central Tax Court should be, of course, at Delhi. But, in order to make access to justice nearer to the doorstep of the consumers of justice, it must have benches in the first instance, at places like Ahmedabad, Bombay, Calcutta and Madras.

2.35. Some of the persons with whom the Commission held discussions relevant to the subject were of the opinion that specific statutory appeal to the Supreme Court against the decision of the Central Tax Court must be provided in the legislation setting up the Central Tax Court. The Commission did not find any justification for this approach. Whenever a statutory appeal is provided, as the law now stands, it will have to be admitted as a matter of right even if the appeal is wholly frivolous. In *Sita Ram & Others*, Vs. *State of U.P.*, (1) a five Judges Constitution Bench of

(1) 1979 (2) S.C.R. 1085.

the Supreme Court held that such an appeal cannot be disposed of in the light manner as is done under Article 136 of the Constitution. Art. 136 confers a discretionary jurisdiction on the Supreme Court which may be exercised for weighty reasons. While exercising jurisdiction under Article 136, Supreme Court is not a regular court of appeal. Now if a statutory appeal is provided, the Supreme Court would be a regular court of appeal and in view of Sita Ram's decision, records will have to be called, notice will have to be issued to either side and both sides will have to be heard before the appeal can be disposed of. If Central Tax Court, a High Court level appellate forum, has heard the appeal, there is no necessity nor justification for providing a statutory appeal to the Supreme Court. To correct any error of law, the Supreme Court will always have jurisdiction under Art. 136 of the Constitution. Therefore, it is made crystal clear that no statutory appeal to the Supreme Court should be provided against the decision of the Central Tax Court.

2.36. On the setting up of the Central Tax Court, all present references pending in any High Court shall stand transferred to the Central Tax Court.

2.37. One interesting feature of the Central Tax Court which attracted a good number of conflicting opinions is with regard to the question whether the Central Tax Court should be invested with jurisdiction to examine the contention as to the constitutional validity of a taxing statute or any rule or regulation made thereunder. The Central Tax Court is conceived as an all-India body replacing various High Courts. The High Court today has jurisdiction to examine the question of constitutional validity of a statute or rules or regulation made thereunder. If the Central Tax Court is not to be a Tribunal under Art. 323-B, but a court, it can be confidently conferred with jurisdiction to examine the question of constitutional validity of taxing statutes and subordinate legislation thereunder. If, as suggested by the officers of the Ministry of Finance, it were to be a Tribunal, it could neverbe invested with jurisdiction to examine the constitutional validity of provisions aforementioned. This is one additional reason why there has to be a Central Tax Court and not a Tribunal as envisaged by Art. 323 B. It will have an added advantage in that those who would complain about the abolition of the jurisdiction of the High Court, can be effectively answered by saying that an equally competent forum is created to deal with constitutionality of taxing statute.

2.38. The officers of the Ministry of Finance also discussed some suggestions for restructuring tax authorities at the level below the Income Tax Appellate Tribunal. There is enough scope for the same in as much as when it comes to deprivation of life (Capital punishment) only one appeal on facts is available while more than one appeal on facts is available in the matter of tax litigation. The Commission has, however, not undertaken this exercise because at present, it is dealing with the question of inflow of work in the High Court and the Supreme Court, as stated at the Commencement of this Report.

2.39. Setting up of a Central Tax Court will make a deep dent on the arrears in the High Court and the other pending proceedings will get accelerated treatment

CHAPTER III

INDIRECT TAXES

3.1. The most important and extensive revenue generating indirect taxes are customs and excise duties. The bulk of the tax revenues of the Central Government to the tune of 80% of the revenue receipts is derived from the customs and central excise duties. Sec. 12 of the Customs Act, 1962 empowers the Government to levy duty of customs at such rates as may be specified in the First and Second schedules of the Customs Tariff Act, 1975. Similarly, Sec. 3 of the Central Excises and Salt Act, 1944 empowers the Government to levy and collect excise duty on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule.

3.2. Both the aforementioned Acts designate officers, confer power on them and precribe procedure for levy and collection of tax as authorised by each of the Acts. Comprehensive rules have been made under both the Acts providing for their effective implementation. The First and Second schedules of the Customs Tariff Act, 1975 and First Schedule of the Central Excises and Salt Act,1944, which specify the goods imported into and exported from India and excisable goods respectively which become dutiable have undergone extensive amendments and revisions and numerous additions have been made in them over years. It is an undeniable fact that duties of customs and excise are major sources of revenue in the budget of the Central Government. With the escalating industrialisation of the country, different types of goods which were not manufactured in India or were not required to be imported are now being manufactured in India or are being imported in India. Similarly, numerous manufactured goods are exported out of India. The tariff schedules in both the Acts keep pace with this development.

3.3. Both the Acts provide for a hierarchy of officers empowered to deal with disputes and controversies arising in the implementation and enforcement of the Acts. This report is concerned with the stage at which provision for appeals have been incorporated in both the Acts.

3.4. Sec. 128 of the Customs Act, 1962 provides for an appeal at the instance of an aggrieved person by any decision or order under the Act by an officer of customs lower in rank than a Collector of Customs to the Collector (Appeals) within the period of limitation prescribed therein. Sec. 129 envisages the constitution of an Appellate Tribunal to be called the Customs, Excise and Gold (Control) Appellate Tribunal consisting of as many Judicial and Technical Members as it thinks fit, to exercise the powers and discharge the functions conferred on the Appellate Tribunal by the Act. Sub-sec. (2) of Sec. 129 prescribes qualifications for being eligible to be a Judicial or Technical Member of the Appellate Tribunal. The Appellate Tribunal will have a President and one or more Vice-Presidents as may be necessary. Sec. 129A confers appellate jurisdiction on the Appellate Tribunal against the orders enumerated therein. Every appeal to the Appellate Tribunal has to be heard by the Appellate Tribunal implying that it does not enjoy the power to dismiss an appeal at the admission stage *in limine* even if it is of the opinion that it is of a frivolous nature. The Appellate Tribunal enjoys wide jurisdiction to interfere with questions of law and facts arising from the decision under appeal. It has power to remand the matter for a fresh adjudication or decision after taking additional evidence, if necessary. It enjoys the power to *suo motu* rectify or amend its own order or exercise the same power if the mistake is brought to its notice by the Collector of Customs or by the other party to the appeal, with this limitation that it can be exercised within a period of four years from the date of the order sought to be rectified. Sec. 129C envisages benches of the Appellate Tribunal to be constituted for dealing with the appeals. Ordinarily each bench to be composed of a Judicial Member and a Technical Member. It also envisages a special bench to be set up in respect of certain specified appeals. Sec. 129D confers revisional jurisdiction on the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 to examine the record of any proceeding in which a Collector of Customs as an adjudicating authority has passed any decision or order for the porpose of satisfying itself as to the

legality or propriety of any such decision or order and in excercise of this jurisdiction, the Board may direct such Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Similar revisional jurisdiction is conferred on the Collector of Customs which can be exercised *suo motu* with reference to the record and proceedings of an adjudicating authority subordinate to him. Such revisional jurisdiction can be exercised within a period of two years from the date of the decision or order of the adjudicating authority. Sec. 129E provides that a person desirous of appealing against a decision against which an appeal lies under Chapter XV, shall, pending the appeal, deposit with the proper officer the duty demanded or the penalty levied. The Appellate Authority has power to dispense with the deposit or direct the deposit subject to conditions.

3.5. Sec. 130 confers power on the Collector of Customs or the other party to the proceeding before the Appellate Tribunal to make an application accompanied by a fee therein prescribed requiring the Appellate Tribunal to refer to the High Court any question of law arising out of such order and subject to the other provisions contained in the section, the Appellate Tribunal shall, within 120 days of the receipt of such application, draw up a statement of the case and refer it to the High Court The Appeliate Tribunal may decline to make the reference, if it is satisfied that no question of law arises from its order which requires to be referred to the High Court. Briefly, the procedure prescribed under Sec. 130 is analogous to the procedure prescribed under Sec. 256(1) and (2) of the Income-tax Act, 1961 which has been extensively dealt with in Chapter I of this report. Sec. 130A is in *pari materia* with sec. 257 of the Income-tax Act, 1961 enabling the Appellate Tribunal to make a direct reference to the Supreme Court of India in the circumstances mentioned therein Sec. 130E provides for an appeal against a decision of the High Court to the Supreme Court of India.

3.6. Chapter VIA was introduced in the Central Excises and Salt Act by the Amending Act 44 of 1980 with effect from 11th October, 1982. Sec. 35 envisages a Collector (Appeals) to whome an appeal would lie at the instance of an aggrieved person against any decision or order passed under the Act by a Central Excise Officer lower in rank than a Collector of Central Excise. Sec. 35A prescribes procedure for hearing of the appeals. Sec. 35B provides for appeals to the Appellate Tribunal, which has been defined to mean Customs, Excise and Gold (Control) Appellate Tribunal constituted under Sec. 129 of the Customs Act, 1962. After the decision by the Appellate Tribunal, there is a provision for reference to the High Court under Sec. 350 and an appeal to the Supreme Court of India against the decision of the High Court under sec. 35L.

3.7. Sec. 81 of the Gold (Control) Act, 1968 provides for an appeal to the Appellate Tribunal meaning the Customs, Excise and Gold (Control) Appellate Tribunal constituted under Sec. 129 of the Customs Act, 1962 against any of the orders enumerated therein. Sec. 82B is in *pari materia* with Sec. 130 of the Customs Act and Sec. 350 of the Central Excise and Salt Act providing for a procedure for reference to the High Court by the Tribunal. Sec. 82C is in *pari materia* with Sec. 130 A of the Customs Act which enables the Tribunals to make a reference direct to the Supreme Court in the circumstances mentioned therein.

3.8. The Customs, Excise and Gold (Control) Appellate Tribunal has been set up on October 16, 1982. It has a heavy backlog of cases. Roughly 25,000 appeals were pending on 31st March, 1986.

3.9. The Appellate Tribunal was conceived on the same lines as the Appellate Tribunal under the Income-tax Act and identical reference procedure is prescribed for the direct and indirect taxes under the relevant statutes. While the Appellate Tribunal under the Income-tax Act has numerous Banches, the Benches of the Customs, Excise and Gold (Control) Appellate Tribunal have been set up at Bombay, Madras, Calcutta with Headquarter at Delhi. However, even if the appeal is filed at Delhi and is heard and disposed of by a bench at Delhi, the reference, if any, to the High Court will have to be made to the High Court of that State from which the appeal before the Appellate Tribunal arose. (See Sec. 131 C of the Customs Act,1962). The fall out of this parallel procedure is the same as in the case of Appellate Tribunal under the Income-tax Act. A Bench of the Customs, Excise and Gold (Control) Appellate Tribunal at Delhi may hear appeals from Delhi, Rajasthan,

Madhya Pradesh, Uttar Pradesh etc. Depending upon the decision of the aforementioned High Courts, the Bench will have to render conflicting decisions on the same point depending upon the State from which the appeal arises and relevant to which the High Court of that State has rendered its decision. The Appellate Tribunal will not be able to provide an all-India perspective, as it has to render conflicting and contradictory decisions depending upon the conflict of opinion amongst various High Courts. Till the matter reaches the Supreme Court, an all-India perspective will not develop. The reasons therefore, given for setting-up Central Tax Court for direct taxes will *mutatis mutandis* apply for setting-up a Central Tax Court for indirect taxes, The benefits accruing from the setting up of such a court would far outweigh the additional costs that may have to be incurred in setting-up the Central Tax Court. Once the Central Tax Court is set up for the reasons mentioned in Chapter II,the reference procedure has to be abolished under various provisions of the various statutes herein indicated. The reference procedure, it is generally conceded is the prime cause of delay. It entails an additional disadvantage in that the private party seeking the reference shall move for interim stay of the recovery proceeding till such time as the reference is disposed of. There is enormous delay in disposing of the references. The revenue is held captive during this period causing dislocation in budgetary estimates. A chart compiled by the office of the Finance Ministry on the question of delay and blocked recovery of revenue revealed the following position:

(Rs. in lakhs)

	Customs		Central Excise	
	No. of Cases	Amount Blocked	No. of Cases	Amount Blocked
Supreme Court ..	925	4178.19	2181	78288.99
High Courts ..	6974	21640.30	5389	277489.23
	7899	25818.49	7570	355778.22

	No. of Cases	Amount Blocked
Grand Total of Customs & Central Excise ..	7899 7570	25818.49 355778.22
In Supreme Court & High Courts (Both) ..	15469	381596.71

Approximately, 15,000 cases involving indirect taxes are pending in the High Courts and the Supreme Court blocking roughly a revenue of Rs.3816.17 crores. It may incidentally be mentioned that the Central Govt. spent on litigation Rs. 22,96,000 in cases arising under the Customs Act and Rs. 22,17,000 in cases arising under the Central Excises and Salt Act. This information reinforces the case for abolition of reference procedure to High Courts which has in fact now totally outlived its utility.

3.10. In the discussion with the officers dealing with indirect taxes in the Ministry of Finance, it transpired that a model Bill has been drafted to provide for setting-up Customs, Central Excises Revenue (Appellate) Tribunal. The whole thinking appears to have been influenced by the provision in Art. 323B(2). For the detailed reaons given in Chapter II of this report recommending a Central Tax Court for direct taxes and not a Tribunal, the Commission is of the firm opoinion that no Tribunal should be set-up as envisaged in the draft Bill, but a Central Tax Court for indirect taxes on the lines set-out in the Chapter II of the report be set-up. While the power and jurisdiction of such a Central Tax Court in both the cases must be identical, they must maintain separate and distinct identity because there will be no functional integrality between them.

3.11. Clause 16 of the draft Bill provides for an appeal to the Supreme Court against the decision of the Central Tax Court For the reasons set-out in Chapter II of the report this provision deserves to be deleted. In fact, the bill will have to be recast to bring it in conformity with various aspects dealt with in this report.

CHAPTER IV

IMPORT-EXPORT CASES

4.1. The Minsiter of Law and Justice by his letter dated May 5, 1986 forwarded to the Commission a letter received by him from Shri Ramu S. Deora, Chairman, Western Region of the Federation of Indian Export Organisations set up by Ministry of Commerce and Supply, Government of India requesting the Commission to examine the feasibility of setting up of a Special Court to clear Import/Export cases. While forwarding the letter, the Minister of Law and Justice requested the Commission to take into consideration the suggestions put forth in the letter while making recommendations on Tax Court. The Commission by its reply dated May 14, 1986 agreed to examine the suggestions in the letter aforementioned while dealing with the feasibility aspect of setting up a Central Tax Court for direct and indirect taxes. Hence this part.

4.2. The Imports and Exports (Control) Act, 1947 was enacted to confer power on the Central Government to prohibit, restrict or otherwise control imports and exports and to deal with matters connected therewith. Sec. 3 of the Act confers power on the Central Government by order published in the Gazette to make provision for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order :—

(*a*) the import, export, carriage coastwise or shipment as ships, stores or goods of any specified description;

(*b*) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

The Act replaced Rule 84 of the Defence of India Rules under which control over imports and exports was imposed and subsequently extended under the Emergency Provisions (Continuance) Ordinance, 1946 which expired on 24th March, 1947. The power to regulate import/export sought to avoid any disturbance to the economy of the country during the transition from war time to peace time conditions. That apart, even during peace time, control over export and import has to be exercised for development of economy in a planned manner. Sec. 4B confers power to enter and inspect any premises in which imported goods or materials which are liable to confiscation under the Act are suspected to have been kept or concealed Sec. 4C confers power to conduct search and Sec. 4D confers power to seize imported goods or materials under circumstances mentioned therein. Sec. 4G confers power to confiscate any imported goods or materials in respect of which any condition of the licence or letter of authority, under which they were imported, relating to the utilisation or distribution of such goods or materials *et el* has been or is being contravened. Sec 4I provides for levy of penalty. Sec 4K provides for adjudication for confiscation or levy of penalty. Sec. 4M provides a forum of appeal against the decision of the Chief Controller or Additional Chief Controller to the Central Government and in any case to the Chief Controller or where he so directs to the Additional Chief Controller. Sec. 4N confers power of revision on the Chief Controller. This is the brief outline of the Act.

4.3. Since the escalation of the process of industrialisation of the country, exports and imports have multiplied manifold, both as in quantum and variety of goods. Numerous orders have been issued for control of export and import of various denomination of goods. A number of disputes have arisen and are likly to arise between the exporter and/or the importer on one hand and the authorities under the Act on the other with regard to the nature of goods, the degree of control *et el.* To illustrate, when total ban was imposed on the export of silver, ban order was challenged as violative of the fundamental right guaranteed by Art. 19(1)(g) of the Constitution. A question was also raised whether the administrative policy behind the ban is justiciable at all.(1) Gloves were imported and the question

(1) *Union of India* v. *Damani & Co.* AIR 1980 SC 1149.

arose whether they were prohibited goods and whether they were dutiable also.(1) Such illustrations can be multiplied manifold.

4.4. Whenever there is a dispute between the importer or exporter on one hand and the authorities under the Act on the other, it has to be adjudicated after giving opportunity to the owner of the goods to be heard before either confiscation is ordered or penalty is levied. (See secs. 4K and 4L of the Act). Any person aggrieved by the decision of the adjudicating authority may prefer an appeal as provided in sec. 4N. Thereafter, the aggrieved person may either invoke the jurisdiction of the High Court under Art. 226 or an appeal to the Supreme Court under Art. 136 of the Constitution. This is the present set up for adjudication and relief by recourse to judicial authorities after the matter has been dealt with by quasi-judicial authorities.

4.5. The Imports and Exports (Control) Act, 1947 is a statute cognate to the Customs Act, 1962 and various other statutes which deal with export or import such as Antiquities (Export) Control Act, 1947. There are numerous other cognate provisions which need not be enumerated here.

4.6. It would appear at a glance that as exports and imports proliferated, the area and quantum of disputes between the authority under the Act on the one hand and the exporter/importer on the other get wider. The power to confiscate goods or to levy penalty for contravention of the law is of a drastic nature. But it is equally useful to curb the tendency to recklessly import unnecessary goods as would disturb the economy or export essential goods and create shortages again disturbing the economy. Further till the dispute is resolved, goods may not be released. If the goods consist of essential raw material, the delay in its delivery pending the procedure would affect production of finished products. The federation on whose letter the Law Commission was invited to examine the question of setting up of a special court, has stated that there occurs divergence of opinion in the matter of imports/exports policies by different authorities such as Import Trade Control Organisation, Customs, Judiciary, Reserve Bank of India and Importers/Exporters. This causes delay in imports/exports clearance considerably affecting imports/exports and resulting into litigation. The author of the letter refers to the controversy about the import of Mutton Tallow and the consequent Debarment Orders issued by Chief Controller of Imports and Exports. Disputes also arise, according to him, in the case of certain canalised items. Such disputes arose in the case of diamonds, almonds *et el.* He points out that because of the disputes, the consignments are held up for 5/6 months at a stretch and the Supreme Court takes 4/5 months just to clarify the scope of the licences it itself and earlier ordered to be issued. During the period, according to him, the importers had to suffer double demurrage of BPT and container detention. He further pointed out that if the commodity is a perishable one, it gets damaged in quality inevitably resulting in national loss. These are certainly weighty considerations.

4.7. Now if the Import and Export Act, 1947 would operate in close collaboration with the Customs Act, 1962, the expertise in dealing with the provisions of the Customs Act would assist in dealing with the questions arising under the Imports and Export (Control) Act, 1947. Therefore, the Commission is of the view that the Central Tax Court for indirect taxes as envisaged in Chapter III of this report must also deal with the decision of the Chief Controller or the Additional Chief Controller, as the case may be, and the appeal to the Central Government under sec. 4N must be abolished. The Commission is therefore, of the view that the jurisdiction of the Central Tax Court for indirect taxes must be enlarged to include appeal against the decision of the Chief Controller or the Additional Chief Controller, rendered in appeal or as an adjudicating authority, as the case may be, must lie to that court and shall be dealt with in the same manner as it deals with appeals under the Customs Act or the Central Excises and Salt Act. This will provide a unified machinery for dealing with identical issues and reduce the time spent in the disposal of disputes arising under the Imports and Exports (Control) Act, 1947.

1. D.A. DESAI
Chairman

2. MRS. V. S. RAMA DEVI
Member Secretary

Dated the 28th August, 1986.

(1) *Ram Kirpal Bhagat* v. *State of Bihar,* AIR 1970 SC 951.

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