

ROLE OF THE JUDICIARY IN INDIAN TAX POLICY – AN EVALUATION OF THE EFFICIENCY OF JUDICIAL OUTCOMES

*Roopashi Khatri**

The Indian tax system suffers from an excessive incidence and pendency of tax disputes before civil courts. A certain degree of disputes is unavoidable since the tax code and policy of any jurisdiction (being the outcome of various competing factors) inevitably contains a certain degree of ambiguity. However, a significant amount of unnecessary tax litigation is caused by the development of inconsistent tax jurisprudence. The author details the permissible scope of litigation expected in a tax system that truly complies with the rule of law. Following this, the author surveys two major areas of disputes – namely, the distinction between a “tax” and “fees”, and the interpretation of exemption notifications. This demonstrates the significant likelihood of judicial activism by appellate courts in tax disputes, which contributes to a tax policy that is doctrinally incoherent. It is submitted that inconsistent tax jurisprudence contributes to a larger number of disputes since both the taxpayers and the revenue department are uncertain of the outcomes in a tax system where the judiciary enjoys extraordinary jurisdiction in tax disputes. The solution proposed is to identify and enforce a broad set of principles concerning an efficient and fair tax system at the level of the judiciary, in line with international best practices.

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* Special Counsel, CounsePro Bangalore and Assistant Professor (Law of Taxation), National Law School of India University, Bangalore. The author would like to thank Professor Vincent Ooi (Lecturer of Law, Singapore Management University) for his valuable inputs and comments in the process of finalising this paper.

I. INTRODUCTION

The Indian jurist Soli Sorabjee noted that the judges of the Supreme Court of India have, in many landmark decisions, read their personal preferences into provisions of statutes and the Constitution of India, 1950 ('Constitution').¹ He further noted the 'atrocious' arrears of disposal of cases by courts in India.² Nonetheless, he notes that "despite dissatisfaction, disillusionment almost bordering on disgust with the laws' scandalous delays and the working of the legal system and the judicial process, the common person still turns to the judiciary."³

In tax matters, it is not only the common person, but also the Department of Revenue, (under the Ministry of Finance, Government of India) that relies on the discretionary jurisdiction of civil courts for remedies against unfavourable tax orders. According to the Economic Survey of India 2017-18,⁴ the vast majority of tax matters pending before Indian civil courts are appeals preferred by the Department of Revenue itself. Such appeals are preferred against orders of lower authorities (including administrative tribunals), though the Department of Revenue does not win such appeals in nearly eighty-five percent of such appeals.⁵ A high incidence of appeals (especially unsuccessful ones) being preferred by revenue authorities is an undesirable trend, since such litigation adds to excessive compliance and leads to additional costs that must be paid off against tax revenues.

In the design of an efficient tax system, it is important for the judiciary to render rulings that balance taxpayer rights with the goal of securing adequate public revenue. I submit that rulings of the Indian judiciary do not apply appropriate legal principles in tax matters. There are at least two possible and mutually incompatible outcomes in tax litigation. On the one hand, courts may apply the argument of the 'interest of public revenue' in a manner that is inconsistent with the legitimate expectations of ordinary taxpayers. On the other hand, courts may inappropriately apply the principles of purposive interpretation in securing taxpayers' rights in the interpretation of a tax code (including an exemption notification), thus, negatively impacting the interest of public revenue. Uncertain judicial outcomes in tax disputes make it difficult to measure expected national revenues and consequently govern the application and distribution of such revenues. Hence, I emphasise on the importance of a comprehensive review of the limited role that civil courts must play in tax disputes and the manner in which

¹ Soli J. Sorabjee, *Role of the Judiciary: Boon or Bane?* 38(3/4) INDIA INTERNATIONAL CENTRE QUARTERLY 126 (2012).

² *Id.*, 14.

³ *Id.*, 14.

⁴ MINISTRY OF FINANCE, GOVERNMENT OF INDIA, *Economic Survey of India 2017-2018* (Vol. I) available at <http://mofapp.nic.in:8080/economicsurvey/> (Last visited on April 31, 2019) ('Economic Survey of India').

⁵ *Id.*, 136.

common law principles or tax code may be employed to improve the efficiency of civil courts in this regard.

The division of this paper is as follows. Part II concerns the constitutional framework of taxation. The Constitution comprises various general provisions, tax-specific provisions as well as fundamental rights that may all form the basis of a claim for discretionary judicial remedy in a tax matter. It is submitted that these provisions provide a limited scope for preferring tax appeals. Nonetheless, as demonstrated in Part III, I seek to demonstrate the practical considerations of taxpayers and revenue authorities in seeking wide discretionary remedies by civil courts as opposed to relying on the established administrative mechanisms in resolving tax disputes. Firstly, the various influences in the design of a tax policy means that for any jurisdiction, a tax code may not be drafted in a manner that clearly identifies mutually compatible revenue goals. Secondly, it is submitted that the design of Indian tax administrative tribunals (particularly advance ruling authorities) increases the possibility of taxpayers and the Department of Revenue preferring appeals before civil courts in tax matters.

Parts IV and V of this paper examine two areas where judicial interference may be considerably reduced if not avoided. Part IV discusses the jurisprudence developed by the Supreme Court in the levy of a 'tax' and 'fees' by a State Legislature. It is argued that the incidence of such disputes may be reduced if had both terms been defined in the Constitution of India, 1950. Part V delves into the process of drafting and the interpretation of exemption notifications. Following an overview of the process by which competent authorities determine exemptions, I seek to demonstrate how purposive interpretation may be inappropriately applied in disputes concerning exemption notifications and how this may result in uncertainty as regards the balance between the interest of public revenue or the concerns of taxpayers in tax disputes. The concluding section addresses the way in which the efficiency of civil courts in tax disputes may be improved – by making appropriate amendments to the tax code and the Constitution, or by developing a common law framework that enforces the principles of an efficient and fair tax system.

II. THE CONSTITUTIONAL FRAMEWORK OF TAXATION

The Parliament and State Legislatures of India cannot levy and collect a tax without the '*authority of law*'.⁶ In this context, the '*authority of law*' is to be understood in the context of the provisions of the Constitution. The foregoing key provisions of the Constitution in this regard are discussed below:

- *Fundamental rights* – The fundamental rights guaranteed under the Constitution encompass the sphere of taxation as well. In particular, the

⁶ The Constitution of India, 1950, Art. 265.

Constitution guarantees the freedom of a person not to be compelled to pay such tax, the proceeds of which are specifically appropriated to pay expenses in order to promote or maintain any particular religious or religious denomination.⁷

- *Tax-specific provisions* – These include, for instance:
 - a. The exemption of property of the Union from taxation by a State Legislature,⁸ as well as the property and income of the State from Union taxation;⁹
 - b. Exclusive jurisdiction of the Parliament in terms of levying taxes on the supply of goods or services or both;¹⁰
 - c. Prohibition of State Legislatures from levying and collecting taxes on electricity that is sold to/consumed by the Government (except as provided by the law of the Parliament)¹¹
- d. Limitations on the power of a State Legislature to tax professions, trades, callings and employments.¹²
- *Other provisions related to tax matters* – Certain constitutional provisions concerning trade, commerce and intercourse within the territory of India are applicable to tax statutes.¹³ Imposition of restrictions on the freedom of trade, commerce or intercourse by either the Parliament¹⁴ or the State Legislature¹⁵ must be reasonable and necessary in public interest. Further, the Parliament¹⁶ and State Legislatures¹⁷ may not pass laws that discriminate between States as regards inter-state trade. Substantial controversy has arisen (prior to the introduction of the nation-wide goods and services law) regarding the validity of state tax legislations that accorded

⁷ The Constitution of India, 1950, Art. 27.

⁸ The Constitution of India, 1950, Art. 285.

⁹ The Constitution of India, 1950, Art. 289.

¹⁰ The Constitution of India, 1950, Art. 279A (§12 inserted vide The Constitution (One Hundred and First) Amendment Act, 2016); Constitution of India, 1950, Art. 286 (§13 inserted vide The Constitution (One Hundred and First) Amendment Act, 2016).

¹¹ The Constitution of India, 1950, Art. 287.

¹² The Constitution of India, 1950, Art. 276.

¹³ The Constitution of India, 1950, Part XIII.

¹⁴ The Constitution of India, 1950, Art. 302.

¹⁵ The Constitution of India, 1950, Art. 304(b).

¹⁶ The Constitution of India, 1950, Art. 303(1). (However, in terms of Art. 303(2) of the Constitution of India, 1950, the Parliament is not prevented “from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.”)

¹⁷ The Constitution of India, 1950, Art. 304(a).

preferential tax treatment to intra-state traders or created a higher effective tax liability for inter-state traders.¹⁸ Taxes as such are not to be understood as *restrictions* on free trade that must be justified as ‘reasonable’ – rather, they are laws that must satisfy the test of being non-discriminatory.¹⁹ Since a recent amendment to the Constitution has limited the powers of State Legislatures to pass laws in respect of certain taxes applicable to inter-state transactions,²⁰ the question of whether a tax law passed by a State Legislature discriminates between taxable goods and services generated within that State and taxable goods and services from other States does not arise.

- *Entries of the Seventh Schedule* - Parliament and State Legislatures may pass laws concerning tax matters in compliance with the Seventh Schedule of the Constitution,²¹ which lists the matters on which the Parliament and State Legislatures exercise either exclusive or concurrent jurisdiction to make laws. Where both a State Legislature and the Parliament have concurrent jurisdiction to make a law and there is inconsistency between the laws enacted by both on a particular matter, the law enacted by the Parliament shall prevail (whether enacted before or after the law of the State Legislature) so long as the law enacted by the Parliament continues to have effect.²²

It is submitted that the aforementioned provisions provide a limited scope of appeals in tax disputes. Accordingly, litigation on tax matters may be broadly classified under two headings. The first comprises of constitutional challenges, which in turn consists of the following:

- Competence-based challenges (i.e. challenge to the power of a federal State or the Union government to legislate on a particular fiscal matter); and
- Rights-based challenges (i.e. challenges to the tax statute on the ground that it violates fundamental rights).²³

The second category comprises substantive tax challenges, involving appeals based on questions of law, which are entertained within the scope of Articles 32 and 226 of the Constitution (as well as any statutory provisions

¹⁸ *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232, *Shree Mahavir Oil Mills v. State of J&K*, (1996) 11 SCC 39; *Video Electronics (P) Ltd. v. State of Punjab*, (1990) 3 SCC 87 : AIR 1990 SC 820.

¹⁹ *Jindal Stainless Ltd. v. State of Haryana*, (2017) 12 SCC 1 : AIR 2016 SC 5617.

²⁰ The Constitution (One Hundred and First Amendment) Act, 2016, §17(b).

²¹ The Constitution of India, 1950, Art. 246.

²² The Constitution of India, 1950, Art. 251.

²³ Harish Salve, *Retrospective Taxation—the Indian Experience*, available at https://www.biicl.org/files/6722_panel_two_harish_salve.pdf (Last visited on October 13, 2019).

governing the right to appeal before higher courts in tax disputes).²⁴ However, as demonstrated in the subsequent part, the choice of preferring an appeal before higher courts in tax disputes is incentivised by practical considerations faced by both the taxpayer and the tax administration.

III. THE LURE OF THE COURT'S REMEDIES

Codified tax policy will always be imperfect. A code will be plagued by many artificial rules that are retained for the purpose of administrative expediency²⁵ and vestiges of rules that no longer serve their purpose as the concerned government gains experience in better tax administration.²⁶ Tax policy may be the outcome of several factors, including but not limited to: administrative feasibility; the level to which economic activities can be taxed (keeping in mind the structure of the economy, the prevalence of the shadow economy or unreported activities, etc.); political influence and lobbying; and desired behavioural control (such as control on certain kinds of consumption through customs, excise and VAT). Edward Zelinsky, a prominent tax commentator describes such factors in the following manner:

“(I)deology, accident, history, inertia, partisanship, public opinion, cultural norms, bureaucratic aggrandisement, the idiosyncrasies of legislators and the legislative process, and the personalities and proclivities of individual decision-makers, as well as their concern for the public interest, all affect the outcomes of political and administrative processes.”²⁷

Due to the competing factors that influence a tax policy, the statutes and delegated legislation of a jurisdiction may not always be efficient in raising the required public revenue. Hence, in practice, a lengthy and complex tax code is likely to take the shape of a catalogue rather than legislation governed by a set of clear, predictable and overarching tax principles.²⁸ This factor contributes to a certain amount of tax litigation that is unavoidable.

Excessive litigation in tax matters stems from the preferences of litigants for the expansive jurisdiction of civil courts. The process of administrative appeals against a demand of tax entails significant costs for taxpayers. Although tax statutes prescribe time limits for completion of proceedings before administrative appellate tribunals, the requirement of complying with the time limit is

²⁴ See Central Goods and Services Tax Act, 2017, §117; Central Goods and Services Tax Act, 2017, § 118; Customs Act, 1962, §§130-§130(a); The Income Tax Act, 1961, Chapter XX, Parts CC and D.

²⁵ Victor Thuronyi, *Drafting Tax Legislation* in TAX LAW DESIGN AND DRAFTING (1st ed., 1996).

²⁶ Richard K. Gordon & Victor Thuronyi, *Tax Legislative Process* in TAX LAW DESIGN AND DRAFTING (1st ed., 1996).

²⁷ Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defence of Tax Expenditures and Tax Institutions*, 102(5) YALE L.J. 1165, 1167 (1993).

²⁸ John Avery Jones, *Tax Law: Rules or Principles?*, 17(3) FISCAL STUDIES 63 (1996).

qualified with often the phrase ‘where it is possible to do so’.²⁹ There are no provisions entailing consequences for authorities that do not adhere to the stipulated time limits in deciding cases. Moreover, appeals before administrative tribunals require the deposit of a percentage of the amount demanded by authorities,³⁰ with only a few legislations empowering tribunal members to grant waiver of this requirement if such payment causes undue hardship to the applicant-taxpayers.³¹

Tax statutes also make provision for the application of ‘advance ruling’, which is understood either as a ‘determination’³² or a decision with respect to specified questions relating to tax liability and other statutory obligations.³³ Such questions may be on law, on fact or both.³⁴ There is a common authority designated for advance rulings in matters concerning income tax, customs duty and excise law.³⁵ This advance ruling authority must comprise of members with stipulated number of years of experience in the judicial and the Indian legal service³⁶—however, proceedings and pronouncement of advance rulings in such matters will not be invalid solely on the grounds of vacancies or defects in the constitution of the advance ruling authority.³⁷

In matters concerning goods and services tax law, the Authority for Advance Ruling as well as the Appellate Authority for Advance Rulings comprise of members who are serving as tax officers and does not comprise of any members from judicial or legal service.³⁸ Various state authorities have rendered contradictory decisions on the same legal issue, creating uncertainty for taxable businesses that operate in more than one State or Union Territory.³⁹ Curiously, in the case of advance rulings in goods and services tax matters, if an appeal lies to

²⁹ Central Excise Act, 1944, §35A(4A), §35C(2A); Central Goods and Services Tax Act, 2017, §107(13); Central Goods and Services Tax Act, 2017, §113(4); Customs Act, 1962, §28A(4A), §129B(2A); The Income Tax Act, 1961, §254(2A).

³⁰ Central Excise Act, 1944, §35F; Central Goods and Services Tax Act, 2017, §107(6), §112(8); Customs Act, 1962, §129E; Income Tax Act, 1961, §253(6).

³¹ Customs Act, 1962, Proviso to §129E. However, this waiver concerns demand “in respect of goods which are not under the control of the customs authorities or any penalty levied under (the Customs) Act” pending disposal of such appeal.

³² The Income Tax Act, 1961, §245N(a).

³³ Central Goods and Services Tax Act, 2017, §97(2); Central Excise Act, 1944, §23C(2), §28F; Customs Act, 1962, §28(2)(H); Model State Goods and Services Tax Act, 2016, §97(2).

³⁴ Income Tax Department, *Authority of Advance Ruling*, <https://www.incometaxindia.gov.in/pages/international-taxation/advance-ruling.aspx> (Last visited on April 31, 2019); The Central Goods and Services Tax Act, 2017, §97(2).

³⁵ The Income Tax Act, 1961, §245Q(1); Customs Act, 1962, §28(F) read with Customs (Advance Rulings) Rules, 2002 (as amended by Rule 2 Customs (Advance Rulings) Amendment Rules, 2017), Rule 2(b).

³⁶ The Income Tax Act, 1961, §245(O).

³⁷ The Income Tax Act, 1961, §245(P).

³⁸ The Central Goods and Services Tax Act, 2017, §96, §99; Model State Goods and Services Tax Act, 2016, §95, §96.

³⁹ For a comprehensive study of the contradictory rulings rendered by advance ruling authorities under the Goods and Services Tax law in India, see NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE, *Report on Goods and Services Tax – Probable Areas of Disputes* (2019).

the Appellate Authority for Advance Rulings and members of that authority differ on the points of the appeal or the reference, it will be deemed that no advance ruling can be given in that matter,⁴⁰ although appeals may lie from such a decision to the general appellate Authority constituted under the relevant legislation.⁴¹ Without the presence of a judicial member in advance ruling authorities, taxpayers are not afforded legal certainty and fairness in a process that is intended to reduce compliance burdens and avoid unnecessary legal disputes by obtaining a conclusive ruling as regards their tax liability.

Given the excessive costs and time taken by the administrative appellate process, the taxpayers may instead prefer to seek direct relief from High Courts or the Supreme Court where possible.⁴² Tax statutes stipulate the conditions under which applicants may approach these courts on substantive challenges to their liability—for instance, the taxpayer is required to mandatorily deposit a certain percentage of the disputed amount before the appeal may be entertained.⁴³ It is possible that the taxpayer is unable to prefer an appeal on questions of law—either because the higher courts do not find the matter fit for appeal on questions of law, or because the taxpayer has failed to comply with statutory pre-conditions for an appeal, review or revision of the concerned matter (including the prescribed limitation period). Under such circumstances, a taxpayer may prefer to challenge the *vires* of the law by claiming that contested provision of tax law violates a fundamental right of the taxpayer. The latter is advantageous for a taxpayer since revenue authorities are compelled to refund the entire amount collected under a law that is subsequently held *ultra vires*—whereas the right to refund, and otherwise challenge a tax assessment or collection, under a valid law is confined within the limits of the tax statute that provides such remedy.⁴⁴

The above reasoning explains why taxpayers would prefer seeking remedies under the expansive jurisdiction of civil courts, but does not readily justify why the revenue authorities prefers the vast majority of appeals (even though they unambiguously lose sixty-five percent of such cases).⁴⁵ A possible explanation is that once a taxpayer is successful in their matter before a lower authority, revenue authorities contest the decision before higher authorities in order to secure necessary public revenue. It is likely that the revenue authorities consider that the possible revenue gain from contesting taxpayer-favourable decisions outweighs the cost of litigation. It is also possible that the judiciary overreaches its jurisdiction in tax disputes or does not apply tax jurisprudence consistently—these

⁴⁰ The Central Goods and Services Tax Act, 2017, §101(3).

⁴¹ The Central Goods and Services Tax Act, 2017, §107(1). (Advance rulings from the authority constituted under the Income Tax Act, 1961 are not appealable in regular administrative tribunals in terms of §246 Income Tax Act, 1961).

⁴² The Constitution of India, 1950, Arts. 32, 226.

⁴³ See The Customs Act, 1962, §129E; The Central Goods and Services Tax Act, 2017, §107(6), §112(8).

⁴⁴ *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536.

⁴⁵ MINISTRY OF FINANCE, *supra* note 4, 138.

aspects may contribute to legal uncertainty and compel revenue authorities to continue contesting tax matters before civil courts.

It is not incorrect to state that the Indian tax administration treats judicial decisions in tax matters in a reactive and predictive way rather than a proactive way. For instance, in the case of excise law, a specific provision was introduced in Indian law by which the central government would be authorised not to reverse the central excise input credit to the taxpayer if the court of law finds (subsequent to tax assessment) that the goods for which the taxpayer was charged duty are no longer excisable.⁴⁶ This is applicable provided that the taxpayer has not preferred a refund application—which implies that the Central Government is authorised in law to retain input credit that is not claimed by taxpayers.⁴⁷

A similar amendment was made subsequent to the decision rendered in *Vodafone International Holdings BV v. Union of India*,⁴⁸ where the provision of law governing income deemed to accrue or arise in India⁴⁹ was held not to be extended so as to apply to indirect transfers of capital assets or property situated in India. The Parliament introduced a proviso to an explanation of the said provision, with retrospective effect from the date of the judgment, by which the judgment no longer had any effect with respect to direct and indirect transfers of capital assets held as investments in Foreign Institutional Investors.⁵⁰

Official data indicates that nearly \$1.04 trillion USD of public revenue remains uncollected due to pendency of tax disputes before courts.⁵¹ The response of the government has been to reduce the pendency of tax disputes before courts. The following sections explore two areas that illustrate the various factors contributing to excessive pendency of tax disputes—namely, constitutional litigation (challenging the *vires* of a tax law), and litigation involving the interpretation of ambiguous tax provisions.

IV. THE OMISSION OF DEFINITIONS OF ‘TAXES’ AND ‘FEES’

An important area of litigation in India is the distinction between ‘tax’ and ‘fees’. Fees⁵² and taxes⁵³ are designated as separate entries in the Seventh Schedule of the Constitution. Disputes often arise on the issue whether legislation

⁴⁶ The Central Excise Act, 1944, §5B.

⁴⁷ *Id.*

⁴⁸ *Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613 : (2012) 341 ITR 1.

⁴⁹ The Income Tax Act, 1961, §9.

⁵⁰ The Income Tax Act, 1961, §9(1)(i), Explanation 5, First Proviso.

⁵¹ MINISTRY OF FINANCE, *supra* note 4, 138.

⁵² The Constitution of India, 1950, Schedule VII, List I, Entries 77, 96; List II, Entries 3, 66; List III, Entries 44, 47 (relating to court fees, fees relating to other matters and stamp duty).

⁵³ The Constitution of India, 1950, Schedule VII, List I, Entries 82, 83, 84, 86, 89, 90, 97; List II, Entries 46, 49, 50, 54, 57, 58, 60, 61, 62; List III, Entries 35, 43.

enacted by the State Legislature that purports to levy fees is, in substance, imposing a tax that transgresses the limits imposed under the Seventh Schedule on such legislature's ability to levy particular taxes. 'Fees' is not defined in the Constitution. 'Taxation' is defined as follows: 'the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly'.⁵⁴ Hence, the definitions provided under the Constitution do not give sufficient guidance as to the true distinction between taxes and fees.

Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt ('Shirur Mutt') was the first decision rendered by the Supreme Court that provided some guidance on the distinction between 'tax' and 'fees' under the Constitution.⁵⁵ The case concerned a challenge to various provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951 ('MHRCE Act') and involved disputes on a number of questions of law. In so far as the tax dispute raised in this case, §76 of the MHRCE Act made it compulsory for all religious institutions to pay to the State an annual contribution not exceeding five percent of their income. This contribution was purportedly levied in lieu of the services rendered to such religious institutions by the State government and their officers functioning under the MHRCE Act.⁵⁶ On behalf of such religious institutions, the chief contention raised against the said levy was that it outside the competence of the State Legislature.⁵⁷ Since the said levy was a tax, the Union Legislature alone was competent to charge it by virtue of Entry 97 of List I or Article 248(1) of the Constitution. The Supreme Court found that §76 of the MHRCE Act was void as it was beyond the legislative competence of the Madras State Legislature.

While considering the validity of §76 of the MHRCE Act, the Supreme Court in *Shirur Mutt* considered the basis of distinguishing between a tax and a fee under the constitutional framework. The Apex Court held that this distinction could not lie in the element of compulsion in their payment. It acknowledged that neither ordinary parlance nor technical literature ascribed any special meanings to the terms 'taxes', 'fees' or special assessments of any other designation.

As such, subsequent cases have clarified that the measure of the levy does not distinguish between a tax and a fee either—hence, a fee does not become a tax merely because it is calculated on a value-added basis or directly proportionate to the income level of the person/institution paying the fees (which are common feature of taxes). Hence, in another matter concerning the challenge against a cess on coal-bearing land (that the State Legislature concerned was competent to levy), the Supreme Court held that such a cess could be levied with reference to

⁵⁴ The Constitution of India, 1950, Art. 366(28).

⁵⁵ *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

⁵⁶ *Id.*

⁵⁷ *Id.*

the annual value of such land without losing its character as a cess and becoming a 'tax'.⁵⁸

Instead, the Supreme Court in Shirur Mutt sought to distinguish a 'tax' and 'fees' on the basis that "a tax is levied as a part of a common burden, while a fees confer a special capacity, although the special advantage...is secondary to the primary motive of regulation in the public interest".⁵⁹ In other words, fees are *quid pro quo* payments for services rendered by the Government in a select capacity.

In Shirur Mutt, the Madras legislation sought to levy the concerned fees in respect of services rendered by the State Government to religious institutions. It was argued that religious institutions did not want these services, and that being compelled to pay fees for services it did not wish to consume was the same as paying a compulsory tax. The Supreme Court observed in this regard that "(i)f in the larger interest of the public, a State considers it desirable that some special service should be done for certain people, the people must accept these services, whether willing or not".⁶⁰ This ruling did not clarify the manner in which a court of law could determine whether a compulsory and special service for a section of society was distinct from general duties of the State for which taxes are utilised.

Subsequent decisions of the Supreme Court have clarified that the special benefits provided by the State Legislature must have a 'direct, close and reasonable correlation' between the persons who must be the fees and the expenditures from the proceeds of the fees.⁶¹ This replaced the strict application of the *quid pro quo* test laid down by the Supreme Court in Shirur Mutt. There was a necessity to establish a 'broad, reasonable and general relationship' (not with precise, mathematical exactitude) between the levy and the class of people on which the fee is levied.⁶² A validly levied 'fees' still retains its character if incidental benefits are available to the public at large as a result application of the proceeds for special benefits.⁶³

It has been clarified by the Supreme Court that fees must be segregated and not merged with the public revenue of the States.⁶⁴ The methodology used by courts of law for distinguishing between a tax and a fee has been to

⁵⁸ State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201 : AIR 2005 SC 1646.

⁵⁹ Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, 47.

⁶⁰ *Id.*, 51.

⁶¹ Kewal Krishan Puri v. State of Punjab, (1980) 1 SCC 416.

⁶² See Bangalore Development Authority v. Aircraft Employees' Coop. Society Ltd., (2012) 3 SCC 442; Kishi Upaj Mandi Samiti v. Orient Paper & Industries Ltd., (1995) 1 SCC 655; Sreenivasa General Traders v. State of A.P., (1983) 4 SCC 353.

⁶³ See Bangalore Development Authority v. Aircraft Employees' Coop. Society Ltd., (2012) 3 SCC 442; ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476.

⁶⁴ Govt. of Madras v. Zenith Lamp and Electrical Ltd., (1973) 1 SCC 162 : AIR 1973 SC 724.

evaluate expenditures by the State Government out of the proceeds of the 'fee'. In one case,⁶⁵ the constitutional validity of a license fee for plying rickshaws for hire within the municipal limits of the city of Varanasi was challenged. As per the findings of the Supreme Court, expenditures made by the Municipal Board constituted only forty-four percent of the revenue from the 'fees'. Hence, it could not be established that the license fees were *quid pro quo* payments in exchange of special services.

State authorities must show with reasonable certainty that they have spent 'at least a good and substantial portion of the amount collected on account of fees' (i.e. within the broad range of two-third or three-fourths) on the purported special services for which the fees was collected.⁶⁶ Moreover, a State Legislature must follow a prescribed procedure in its application for appropriations from the Consolidated Fund of that State for the purpose of using any amounts as fees for a specific purpose as opposed to a general expenditure.⁶⁷

A broad test developed by the courts (as described above) in order to distinguish fees from a tax in order to address the lacunae in the Constitution, which does not clearly define the terms, 'fees', 'tax' or any similar terms. As demonstrated above, the position of law as regards the difference between a tax and fees has evolved over many years. In the present day, State legislatures must comply with the correct constitutional provisions and statutorily mandated procedure before they may levy a fees (provided that they are competent to do so in terms of the Seventh Schedule). However, this conceptual clarity may not be readily apparent to taxpayers, particularly if the provision of law levying fees is worded similarly to provisions that levy taxes. Taxpayers may believe that a constitutional challenge correctly lies against such levy as being outside the competence of the concerned State legislatures, leading to litigation that may possibly be avoidable with greater certainty in the legal system instead.

⁶⁵ Nagar Mahapalika, Varanasi v. Durga Das Bhattacharya, AIR 1968 SC 1119. (However, the Supreme Court subsequently examined the powers of taxation under the concerned statute (since the State had powers to levy a tax and a fee under separate entries of the Seventh Schedule). The concerned legislation required the Municipal Board to comply with specific procedures in order to levy taxes or fees. Since these procedures were not complied with in the levy of the license fees under consideration, the imposition was found to be not in the nature of a tax. This involved a purposive interpretation of a legislation that clearly distinguished the procedure for levying a tax and a fee.)

⁶⁶ Kewal Krishan Puri v. State of Punjab, (1980) 1 SCC 416.

⁶⁷ The Constitution of India, 1950, Art. 202.

V. EXEMPTION NOTIFICATIONS

A. THE PROCESS OF DRAFTING EXEMPTION NOTIFICATIONS

Indirect tax statutes empower the Central Government to make a general exemption in respect of any notified goods or services of any specified description, if it is satisfied that such exemption is necessary in public interest. This exemption may be with respect to the whole or part of the duty payable and may be subject to fulfilment of certain conditions. General exemptions must be granted by notification in the Official Gazette.⁶⁸ However, under exceptional circumstances, the Central Government may instead grant a specific exemption for goods or services in respect of which tax is payable by a special order, which must state such reasons for such exemption.⁶⁹

As regards direct tax, the Central Government is empowered to make special exemptions in certain circumstances;⁷⁰ in most cases, the heads of income that should be exempted from the tax base are specified in the statute.⁷¹ This is a departure from an earlier provision of the direct tax law that empowered the Central Government to make general exemptions.⁷²

⁶⁸ The Central Excise Act, 1944, §5A(1); The Central Goods and Services Tax Act, 2017, §11(1); Customs Act, 1962, §25(1); The Integrated Goods and Services Tax Act, 2017, §6(1); Model State Goods and Services Tax Act 2016, Cl. 10(1). (It may be noted, however, that in terms of The Central Excise Act, 1944, §5A(1), Proviso (as regards excise duty), a general exemption does not apply with respect to excisable goods that are a) produced or manufactured in a free-trade zone, special economic zone or a hundred per-cent export-oriented undertaking; b) then brought into India).

⁶⁹ The Central Excise Act, 1944, §5A(2); The Central Goods and Services Tax Act, 2017, §11(2); Customs Act, 1962, §25(2); The Integrated Goods and Services Tax Act, 2017, §6(2); Model State Goods and Services Tax Act 2016, Clause 10(1).

⁷⁰ The Income Tax Act, 1961, §293A (This is in respect of exemptions in favour of class of persons engaged in specified business in connection with "prospecting for or extraction or production of mineral oils" with, for or under authorisation of the Central Government); Income Tax Act, 1961, §294 (This is in respect of the power of exemption (for assessment years prior to 1967) in order to reduce the hardship of the application of the said Act in the Union Territories of India); Wealth Tax Act, 1957, §46A (repealed) (This is in respect of exemption in order to reduce the hardship of the application of the said Act in the Union Territories of India).

⁷¹ The Income Tax Act, 1961, Chapters IV, V, VI-A.

⁷² The Indian Income Tax Act, 1922, §60 (repealed). (This is in respect of powers of Central Government (prior to the year 1939) to make general exemption and provide relief of tax liability (in the specific circumstance where tax assessee has received salary in arrears/advance in a particular financial year and the applicable tax rate is higher as a result of this receipt.)

In accordance with the rules mandating the manner of conducting the business of the Government of India,⁷³ the Department of Revenue (Ministry of Finance) is responsible for administering tax matters.⁷⁴ The exceptions include:

- *Matters relating to Tax-Free Bonds*—allotted to the Department of Foreign Affairs under the Ministry of Finance;⁷⁵
- *The Income-Tax Appellate Tribunal*—allotted to the Department of Legal Affairs under the Ministry of Law and Justice;⁷⁶
- *Taxation of motor vehicles*—allotted to the Ministry of Road Transport and Highways;⁷⁷
- *Recovery of claims in a State in respect of taxes and other public demands that arise out of such State*—allotted to the Department of Land Resources under the Ministry of Rural Development.⁷⁸

However, previous concurrence, or approval by way of a general or special order, is required by the Ministry of Finance if any other Department seeks to issue any orders which have any ‘financial bearing’⁷⁹ (including, notably, ‘any grant of land or assignment of revenue or concession, grant, lease or licence of mineral or forest rights or a right to water power or any easement or privilege in respect of such concession’).⁸⁰

The Department of Revenue must mandatorily consult the Ministry of Law and Justice if, pursuant to a statutory power conferred on the Government, it seeks to make a rule or order of a ‘general character’.⁸¹ Moreover, the Department of Revenue cannot take decisions on a matter if the subject concerns another Department as well—i.e. if the decision of the Department of Revenue as regards that matter is likely to affect the transaction of business allotted to another Department.⁸² A decision with respect to such a matter can only be taken when all concerned departments have concurred or, in the absence of such concurrence,

⁷³ Government of India (Allocation of Business) Rules, 1961, Rule 2. (The said Rules are enacted in pursuance of The Constitution of India, 1950, Art. 77(3), enabling Parliament to enact rules for the purpose of convenient transaction of the business of the Government of India).

⁷⁴ Government of India (Allocation of Business) Rules, 1961, Schedule I, Item 30.

⁷⁵ Government of India (Allocation of Business) Rules, 1961, Schedule I, Sl. No.26, Item 28.

⁷⁶ Government of India (Allocation of Business) Rules, 1961, Schedule I, Sl. No.12, Item 48.

⁷⁷ Government of India (Allocation of Business) Rules, 1961, Schedule I, Sl. No.6, Item 64.

⁷⁸ Government of India (Allocation of Business) Rules, 1961, Schedule I, Sl. No.3, Item 66.

⁷⁹ Government of India (Transaction of Business) Rules, 1961; *See also* Government of India (Transaction of Business) Rules, 1961, Rule 4(2)(a) (Concerning matters involving “any abandonment of revenue or involve any expenditure for which no provision has been made in the appropriation act.”)

⁸⁰ Government of India (Transaction of Business) Rules, 1961.

⁸¹ Government of India (Transaction of Business) Rules, 1961, Rule 4(3)(b).

⁸² Government of India (Transaction of Business) Rules, 1961, Explanation Rule 4(1).

the Cabinet⁸³ takes or authorises a decision.⁸⁴ Unless the Minister-in-Charge, the President or the Prime Minister have not sought for the matter to be brought before the Cabinet,⁸⁵ the unanimous decision of the Department of Revenue and the Ministry of Law and Justice in respect of a particular matter (in exercise of the statutory power conferred on the Government) will be valid law.

B. THE INTERPRETATION OF EXEMPTIONS

1. Purposive Interpretation of Exemption Notifications

It is often stated that ‘there is no equity about a tax’.⁸⁶ This phrase is often cited by courts of law in order to support a plain meaning interpretation of a provision of tax law that is unambiguous.⁸⁷ The application of the principles of statutory interpretation do not differ in the case of tax provisions and exemption notifications.⁸⁸ In interpreting exemption notifications, a purposive approach involves a reading of the entire notification in order to determine the context in which the tax benefit is granted. A purposive interpretation is only applied when the language of the notification is ambiguous or renders more than one meaning.⁸⁹

In a case involving sales tax benefits to dealers of saleable steel under various exemption notifications issued by the government of Bihar during the period of 1995 to 2002, a dispute arose as to whether such exemption was to be given to existing manufacturers that had set up new/expanded/diversified/modernised units or only new manufacturers (having set up operations of dealing in saleable steel for the first time). The Apex Court applied purposive interpretation (involving a combined reading of the industrial policy developed by the concerned government over the years) in determining that the State legislature did not intend the extension of sales tax benefits to existing units.⁹⁰

Similarly, another dispute concerned the application of an excise duty exemption for certain capital goods (which were otherwise excisable) as long as they were used by hundred percent export oriented undertakings under certain conditions. Broadly, the dispute arose as regards the interpretation of the term “in

⁸³ The Constitution of India, 1950, Art. 352(3). (It defines the Union Cabinet as “the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under Art. 75 (of the Constitution).”

⁸⁴ Government of India (Transaction of Business) Rules, 1961, Rule 4(1).

⁸⁵ Government of India (Transaction of Business) Rules, 1961, Rule 7, read with Government of India (Transaction of Business) Rules, 1961, Schedule II, Item (j), (k) and (n).

⁸⁶ See Cape Brandy Syndicate v. Commissioners of Inland Revenue, (1930) 12 TC 358.

⁸⁷ CIT v. Ajax Products Ltd., AIR 1965 SC 1358.

⁸⁸ Hansraj Gordhandas v. H.H. Dave, AIR 1970 SC 755, ¶5.

⁸⁹ See Hico Products Ltd. v. CCE, (1994) 4 SCC 578 : AIR 1995 SC 400; Union of India v. Wood Papers Ltd., (1990) 4 SCC 256 : AIR 1991 SC 2049; Tata Oil Mills Co. Ltd. v. CCE, (1989) 4 SCC 541 : AIR 1990 SC 27.

⁹⁰ TISCO v. State of Jharkhand, (2005) 4 SCC 272 : AIR 2005 SC 2871.

connection with manufacture”. In other words, it was unclear whether the taxpayer could claim an exemption for capital goods that were being used indirectly for manufacture (such as air conditioners, typewriters, tables and chairs), where the main product being manufactured by the applicant was filament yarn. The Supreme Court adopted a purposive test approach and determined that the exemption notification, read as a whole, intended for the tax benefit to be given only as regards capital goods directly used in the manufacture of the final product (thus denying the tax benefit to the said applicant in this case).⁹¹

2. Substantive Preconditions and Procedural/Technical Provisions of an Exemption Notification

However, a unique principle as regards the interpretation of tax exemption notifications is the distinction between conditions of a substantive character (which a taxpayer must satisfy in order to be eligible for an exemption) and provisions of a procedural or technical nature (the non-compliance of which does not necessarily disentitle the taxpayer from the benefit of the tax exemption).⁹² A case that demonstrates the shortcomings of the said principle is *Commr. of Customs v. Tullow India Operations Ltd*⁹³ (“Tullow”). Here, an importer of seismic data tapes and seismic survey vessels could not procure an essentiality certificate from the Department of Hydrocarbons (Government of India) in time prior to the import (which took place in 1999). While provisional clearance was granted for moving the imported goods into the domestic tariff area, the duty concession was denied. This was because the relevant notification stipulated a condition that importers of such items must avail an “essentiality certificate” in order to gain the benefit of the concession. It was found that although the importer had duly applied for a certificate, the Department of Hydrocarbons had not awarded the certificate to the importer on time (not on account of any fault of the importer).

It is relevant to note that the local Customs Clearing House had issued a notification stating that concessions and exemptions would not be denied due to delay in time alone (although no reference was given to delay in procuring a necessary certificate prior to date of importation). The Supreme Court observed that the Customs House was not the appropriate authority to issue instructions and that only the Central Board of Indirect Taxes and Customs is entitled to issue such instructions by authority of statute.⁹⁴ However, the Supreme Court believed that denial of an exemption due to delays in grant of certificate was an unfair outcome.⁹⁵ The Tribunal went by the strict terms of the exemption notification and rejected the benefit of the exemption, even though it observed that this outcome

⁹¹ *CCE v. Ginni Filaments Ltd.*, (2005) 3 SCC 378 : AIR 2005 SC 1330.

⁹² *Mangalore Chemicals and Fertilisers Ltd. v. CCT*, 1992 Supp (1) SCC 21 : AIR 1992 SC 152, ¶13.

⁹³ *Commr. of Customs v. Tullow India Operations Ltd.*, (2005) 13 SCC 789 : AIR 2006 SC 536.

⁹⁴ *Commr. of Customs v. Tullow India Operations Ltd.*, (2005) 13 SCC 789 : AIR 2006 SC 536, ¶20.

⁹⁵ *Commr. of Customs v. Tullow India Operations Ltd.*, (2005) 13 SCC 789 : AIR 2006 SC 536, ¶31-33.

would be unfair.⁹⁶ The Supreme Court observed that the importer ought not to have been denied the tax exemption merely because a government authority failed to issue a mandated certificate in a timely manner—however, the matter was remitted to the Commissioner of Customs. To this end, the Supreme Court in *Tullow* relied on precedent to support the conclusion that the benefit of a tax exemption ought not to be denied because a department failed to issue a mandated certificate in a timely manner.⁹⁷

3. The strange notion of “equitable conduct” in *Tullow*

In the opinion of the Supreme Court, the importer, being a government company, had procured the items for purposes that had already been approved by other government agencies. In other words, the Supreme Court did not consider that any significant public interest would be damaged if a concession were to be granted to the assessee when the “formal” approval of a single authority (namely the Department of Hydrocarbons) was not obtained in time. However, this approach ignored the separation of duties among different departments of the government that is envisaged in the concerned tax legislation. It is submitted that the function of the court of law in such a circumstance ought to have been restricted to reviewing the importer’s strict compliance with such legislative scheme. The requirement of a separate certificate for the purposes of a tax exemption need not be dismissed as a mere formality, since such certification could be necessary. For instance, certification by a separate authority may be required for the purpose of correct valuation of imports or any other aspects relevant to the taxation of imports that the Department of Revenue may not be competent to verify through its limited resources, authority or permitted verification processes.

It is submitted that the correct approach in the aforementioned case would have been for the Apex Court adhere to the principle of administrative deference by rejecting the appeal of the importer. The administration could have used its ordinary powers (described above) in issuing a retroactive exemption notification or a department circular *de novo*, providing an exemption to the specific importer having regard to the unique circumstances (which resulted in a denial of exemption for no fault of the importer) and the general public interest in providing the exemption retroactively.⁹⁸ It was also possible for the importer to seek a direct remedy against the undue delay by the department responsible for issuing the certificate (for instance, through the writ jurisdictions of higher courts challenging the delay caused by the Department of Hydrocarbons). It is submitted that by denying the benefit to the importer, the Supreme Court would have issued a ruling that was consistent with the rule of law (where taxpayers would have to

⁹⁶ *Commr. of Customs v. Tullow India Operations Ltd.*, (2005) 13 SCC 789 : AIR 2006 SC 536, ¶34.

⁹⁷ *CCE v. M.P.V. & Engg. Industries*, (2003) 5 SCC 333 : (2003) 153 ELT 485, ¶11.

⁹⁸ Customs Act, 1962, §25(1).

approach appropriate forums and follow prescribed procedure in order to receive legal remedies).

Instead, by bypassing the appropriate procedure to address the delay in issuing the essentiality certificate (and hence directly awarding the tax benefit to the taxpayer), the ruling of the Supreme Court in *Tullow* diminishes the conceptual clarity of remedies in tax disputes. An applicant can be considered to have satisfied a strict exemption condition if the applicant displays “equitable conduct” or has done “everything the applicant could have reasonably done to comply with the law”.

It may be argued that *Tullow* merely expands on the principle of distinguishing substantive and technical/procedural pre-conditions in an exemption notification. In other words, the Supreme Court in *Tullow* considered the essentiality certificate to be a mere procedural provision:

“The principles as regard construction of an exemption notification are no longer *res integra*; whereas the eligibility clause in relation to an exemption notification is given strict meaning where for the notification has to be interpreted in terms of its language, once an assessee satisfies the eligibility clause, the exemption clause therein may be construed liberally. An eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning.”⁹⁹

However, this observation was not based on a careful consideration of the true nature of the pre-condition to produce an essentiality certificate issued by the Department of Hydrocarbons. The Supreme Court in *Tullow* did not offer a complete reasoning as to why the importer was deemed to have satisfied the eligibility clauses in the exemption notification. Although the Supreme Court had perused notifications and the procedural/case history, the counsel for the importer had not produced any specific material or raised an argument to support the conclusion of the Supreme Court. The case was remitted to jurisdictional commissioner, thus repeating the process of assessment proceedings and litigation. The Supreme Court qualified this order by stating that:

“It is made clear that in the event the order of the Commissioner goes against the contentions of the assessee *Tullow*, it will be open to it to question the correctness thereof before an appropriate forum.”¹⁰⁰

⁹⁹ *Commr. of Customs v. Tullow India Operations Ltd.*, (2005) 13 SCC 789 : AIR 2006 SC 536, 18.

¹⁰⁰ *Commr. of Customs v. Tullow India Operations Ltd.*, (2005) 13 SCC 789 : AIR 2006 SC 536, 21.

The jurisdictional commissioner rejected the importer's application for exemption benefits and the matter once again reached the stage of appeal before the Supreme Court of India in a division bench that comprised of a judge common to both proceedings ('Tulow II').¹⁰¹

In Tulow II, the Commissioner of Customs rejected the grant for exemption notification, finding that the essentiality certificate was rejected by the Department of Hydrocarbons because the importer had not obtained a valid oil exploration license ('License') at the relevant time. The importer was first required to obtain the License before the Department of Hydrocarbons could issue an essentiality certificate. The License was issued in 2000, having retrospective effect since 1997. The Department of Hydrocarbons rejected the importer's application for an essentiality certificate in the year 1999 (because the License had not been issued then), but granted an essentiality certificate in 2004—however, such essentiality certificate issued in 2004 did not have retrospective operation similar to the License. Once again, the Supreme Court in Tulow II considered that the importer had a License in law due to its retrospective effect as of the time of the contested import (being the year 1999). In Tulow II, the Supreme Court categorically emphasises that the "equitable conduct" of the taxpayer is sufficient in order to gain a tax exemption:

"The conduct of the Appellant must, therefore, be judged from the factual matrix obtaining therein...Once it is held that the Ministry of Petroleum had renewed the licence and the Directorate General of Hydrocarbons had issued the essentiality certificate (in 2004), the conditions precedent for obtaining exemption in terms of the exemption notification stood fully satisfied".¹⁰²

To summarise, the Supreme Court in Tulow and Tulow II did not explicitly distinguish the essentiality certificate as either substantive precondition or a procedural/technical provision in interpreting exemption notifications (leading to doctrinal obscurity). Rather, the Apex Court introduced the element of "equitable conduct" in satisfying the conditions necessary for obtaining a tax exemption.

4. No equity in tax under Indian law

As such, the usage of 'equity' by Supreme Courts may be misleading in this context. Under English law, equity is said to retain some distinction from common law (at least an 'intellectual' one) due to its history.¹⁰³ In India, there is

¹⁰¹ ONGC Ltd. v. Commr. of Customs, (2006) 7 SCC 403.

¹⁰² ONGC Ltd. v. Commr. of Customs, (2006) 7 SCC 403, ¶8.

¹⁰³ ALASTAIR HUDSON, EQUITY AND TRUSTS 16, 19 (4th ed., 1995).

no similar separation of legal rights and equitable rights,¹⁰⁴ and equitable remedies take the form of statutory rights.¹⁰⁵ Courts may mollify the harsh effect of tax laws under ‘equitable considerations’,¹⁰⁶ but the better view is that these remedies nonetheless stem from statute. For instance, the decision of the Supreme Court in *Mafatlal Industries Ltd. v. Union of India*¹⁰⁷ (‘Mafatlal’) considers that equitable consideration of unjust enrichment for mistaken payments of tax¹⁰⁸ stems from §72 of the Indian Contract Act, 1872. The said provision falls under the chapter of the Indian Contract Act, 1872, on relations resembling those created by contract. Mafatlal differs from the approach taken under English common law of identifying an equitable basis of relief in case of mistaken payments of tax,¹⁰⁹ particularly when the applicant has demonstrated equitable conduct in a timely manner.¹¹⁰

The Supreme Court has on another occasion held that a government may withdraw concessions in public interest without being liable to claims of promissory estoppel from taxpayers that have relied on these concessions to their detriment.¹¹¹ Although a challenge against the withdrawal of a tax concession may be sustained on the grounds of the violation of the taxpayer’s fundamental rights or statutory rights, overwhelming public interest will override concerns regarding the violation of a legitimate expectation of a taxpayer to receive a particular tax benefit.¹¹² Taxes that are validly levied at one point of time have been said to create a vested right in favour of the State¹¹³—delay in collection of those taxes (whether attributable to administration or taxpayer’s fault) or subsequent amendments to the law under which the tax was originally levied¹¹⁴ may not result in a loss of the vested right in the government’s favour (or may conversely mean that taxpayers are not guaranteed a vested right under earlier laws).¹¹⁵

In contrast to such decisions that are favourable to the government, the suggestion by the Supreme Court in Mafatlal that a tax may be considered as payments resembling those under contract or contract-like relationships, for which

¹⁰⁴ R.B. Jodha Mal Kuthiala v. CIT, (1971) 3 SCC 369 : AIR 1972 SC 126.

¹⁰⁵ See generally The Specific Relief Act, 1963.

¹⁰⁶ R.B. Jodha Mal Kuthiala v. CIT, (1971) 3 SCC 369 : AIR 1972 SC 126.

¹⁰⁷ Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536.

¹⁰⁸ Mistaken payments of tax were distinguished from unconstitutional levies (for which relief was available since the levy fell outside legislative powers) and illegal levies (for which statutory remedy was available).

¹⁰⁹ Woolwich Equitable Building Society v. Inland Revenue Commissioners, [1992] 3 WLR 366.

¹¹⁰ Test Claimants in the FII Group Litigation v. Revenue and Customs Commissioners, [2012] UKSC 19; Graham Virgo & Amy Goymour, Avoiding Restitution of Tax, 71(3) CAMBRIDGE LAW JOURNAL 488, 491 (2012).

¹¹¹ Sharma Transport v. Govt. of A.P., (2002) 2 SCC 188 : AIR 2002 SC 322.

¹¹² Bannari Amman Sugars Ltd. v. CTO, (2005) 1 SCC 625.

¹¹³ The General Clauses Act, 1897, §6; CIT v. Shah Sadiq and Sons, (1987) 3 SCC 516 : AIR 1987 SC 1217.

¹¹⁴ Prosper Jewel Arcade LLP v. CCT, (2019) 1 KCCR 252; Willowood Chemicals (P) Ltd. v. Union of India, (2018) 19 GSTL 228; Sheen Golden Jewels (India) (P) Ltd. v. State Tax Officer, 2019 SCC OnLine Ker 973 : (2019) 23 GSTL 4.

¹¹⁵ TVS Motor Co. Ltd. v. State of T.N., (2009) 13 SCC 403 : AIR 2018 SC 5624.

a remedy of unjust enrichment can be found in case of mistaken payments to the government. It is reiterated that the principle of unjust enrichment under Indian law does not expand the scope of taxpayer right for refund in any way. However, equating a tax to a payment under contract or contract-like relationships is incompatible with the understanding that tax payments are amounts to which the government has a right if it is collected under a valid levy. It is unclear whether the understanding of the nature of tax in terms of Mafatlal or the extension of equity to tax under Indian law will provide an opportunity for taxpayers to seek creative remedies or complicate the principles concerning the nature of tax in future cases.

5. A case of judicial activism and not equity

The correct understanding is that the Supreme Court did not exercise any “equitable jurisdiction” in *Tullow and Tullow II* but engaged in judicial activism based on its preferences. This is evidenced by the fact that in a case with a similar fact pattern, non-compliance with registration rules disentitled a taxpayer from exemptions.¹¹⁶ In *Indian Oil Corpn. Ltd. v. CCE* (‘Indian Oil Corporation’), the appellant was entitled to an excise duty exemption if, *inter alia*, it obtained an excise registration certificate in terms of Rule 8 of the Central Excise Rules, 1944 (as it stood then). For the disputed period, the appellant had failed to renew this excise registration certificate.

The Supreme Court denied the excise duty exemption, in terms of Rule 192 of Central Excise Rules, 1944 (as it stood then) which mandated that the duty concession would cease on the expiry of the registration certificate. The Supreme Court in *Indian Oil Corporation* distinguished the matter from *Tullow* and correctly interpreted the provisions of the Central Excise Rules, 1944 (as they stood then) in strict terms. It is argued that the Supreme Court in *Tullow* and *Tullow II* ought to have been equally faithful to the strict conditions of the exemption notification. It ought to have considered that the Department of Hydrocarbons in the latter cases may not have been in a position to issue a retroactive essentiality certificate under law and that “equitable conduct” is not a satisfactory basis to grant a tax exemption to an appellant.

Tullow is now established precedent that has been cited in subsequent cases to justify a purposive interpretation in a wide variety of factual circumstances.¹¹⁷ The decision effectively permits courts of law to evaluate the conduct of a taxpayer and other surrounding circumstances to determine whether

¹¹⁶ *Indian Oil Corpn. Ltd. v. CCE*, (2012) 5 SCC 574.

¹¹⁷ *Mangalore Chemicals and Fertilisers Ltd. v. CCT*, 1992 Supp (1) SCC 21 : AIR 1992 SC 152; *State of Orissa v. Tata Sponge Iron Ltd.*, (2007) 8 SCC 189; *A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala*, (2007) 2 SCC 725; *IVRCL Infrastructure and Projects Ltd. v. Commr. of Customs*, (2015) 13 SCC 198; *Zuari Industries Ltd. v. CCE*, 2007 SCC OnLine CESTAT 3606 : (2007) 8 RC 568.

it had satisfied the requirements of equitable remedies,¹¹⁸ even though an appellate court is limited to questions of law and is not authorised to evaluate the eligibility of taxpayers to gain concessions by considering facts. Rather, it is submitted that Tullow (along with Tullow II) is correctly to be understood as an example of the dangers of uninhibited purposive interpretation (which is nearly indistinguishable from impermissible judicial activism).

There are valid circumstances in which courts may be entitled in principle to make choices based on its own policy considerations. For instance, in interpreting a double tax avoidance agreement, a jurisdiction may express preference of either a static interpretation of internal law (i.e. as the internal law existed on the date the treaty was executed) or an ambulatory interpretation (i.e. as the internal law exists at the time of interpretation, which may be several years after the date of execution of treaty). For a court of law in such a jurisdiction, this choice may depend purely upon the approach that appears to render the best purposive interpretation of a tax statute.

Inevitably, the choice of interpreting a tax treaty using the ambulatory method holds a country accountable to its bilateral/multilateral obligations (in the case of the treaties under European Union law) regardless of changes in the law. On the other hand, a static interpretation of tax treaties may sometimes (but not always) imply the protection of domestic concerns over bilateral/multilateral obligations under contemporary law. In other words, the way in which a domestic court interprets tax treaties unavoidably influences the tax policy of the concerned nation.¹¹⁹ However, policy choices by the courts of law are not always appropriate in so far as tax law is concerned, since it may contribute to inconsistency within the internal legal system (with taxpayers and the revenue departments having no certainty as to whether the legislation/administrative rule or judicial ruling having priority or a better chance of prevailing over the other).

VI. CONCLUSION

It is argued that the legislature is the appropriate authority to make the policy choices it considers necessary to increase public goods. Accordingly, courts bound by the principle of administrative deference would limit remedies in tax matters must, hence, be based on objective principles of legislative interpretation. However, given the overreaching jurisdiction that the Supreme Court has developed as a result of the principles in cases such as Tullow, the revenue authority and taxpayers are perhaps correct in viewing the court of law as an institution with unusual and extraordinary power to resolve tax dispute in their favour. Judicial

¹¹⁸ A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala, (2007) 2 SCC 725; IVRCL Infrastructure and Projects Ltd. v. Commr. of Customs, (2015) 13 SCC 198; Zuari Industries Ltd. v. CCE, 2007 SCC OnLine CESTAT 3606 : (2007) 8 RC 568.

¹¹⁹ Robert Thornton Smith, *Tax Treaty Interpretation by the Judiciary*, 49(4) THE TAX LAWYER 845, 882 (1996).

activism (that is enabled by ambiguous tax legislations) reduces conceptual clarity of a taxpayer's rights or a government's revenue entitlements under the Indian legal system. Litigants (including government authorities and taxpayers) must have certainty about the limited nature of the court's powers and should not be misled into lengthy litigation in the hope of extraordinary remedies.

If civil courts are to continue enjoying an extraordinary jurisdiction in tax matters (where administrative deference is more appropriate), the next best alternative is for the courts to actively enforce efficiency in the tax administration by identifying and enforcing a broad set of well-founded principles. According to the Organization of Economic Development (OECD), the international standards for an effective tax system include neutrality in tax outcomes, efficiency, certainty and simplicity, effectiveness and fairness, and flexibility in the tax system.¹²⁰ It is possible to enforce these standards in a way that does not require the court to overstep its limits in judicial review. For instance, if a particular department has unreasonably delayed the issue of a certificate that a taxpayer requires for obtaining a tax exemption (similar to the factual matrix in *Tullow*), it is appropriate for the courts of law to first evaluate the taxpayer's claims under such broad principles. This may help a court identify a better solution to the taxpayer's dispute caused by administrative delay—for instance, a writ remedy.

This principle-based approach will ensure that civil courts will be capable of self-regulation and may avoid awarding inappropriate rights and remedies in tax disputes. Further, government departments will be under stricter judicial scrutiny for ensuring an efficient tax system and tax disputes. Disputes that may be resolved at the stage of the departmental inquiry need not result in long years of pending litigation—a violation of a taxpayer's legitimate expectation to efficient tax collection may be remedied by sanctions against administrative authorities that unnecessarily delay the tax administration process. In essence, the principle-based approach reinforces conceptual clarity about the complex nature of a tax system and the importance of the judiciary to exercise administrative deference.

I acknowledge that a principle-based approach alone may not be sufficient to address the incompatibility of judicial remedies with coherence in the tax system. A long-term solution to reducing the incidence and pendency of tax disputes involves a deliberate cohesion between tax administrations and the judiciary. A tax policy that is taxpayer and business friendly, transparent and coherent will significantly reduce litigation. Till such time that cohesion is achieved in tax policy and tax jurisprudence, the remedies of the courts and administrative practices may remain incompatible to a great degree and result in national revenue undesirably being clogged in the appellate mechanism.

¹²⁰ OECD, *Addressing the Tax Challenges of the Digital Economy* (OECD/G20 Base Erosion and Profit Shifting Project, 2014).