

# INCOME TAX APPELLATE TRIBUNAL IN INDIA – CHALLENGES AHEAD

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## Abstract

The 82-year-old Indian Income Tax Appellate Tribunal (ITAT) is regarded by taxpayers as an efficient and fair forum. This article describes challenges faced by the ITAT, for example, growing pains due to its rapid expansion during the past three decades, recent changes to the tenure of its adjudicating members and to the eligibility criteria for appointing such members, and anticipated challenges in light of the proposed changes to its operating model. The article relies primarily on interviews with retired tax officials, former ITAT adjudicators, retired judges, and tax practitioners.

## 1. INTRODUCTION

The first level of appeal for taxpayers in India against the Income Tax Department (ITD) is before the Commissioner of Income Tax (Appeals) [CIT(A)], a quasi-judicial authority (Deloitte, 2020). The next level of appeal for taxpayers wishing to challenge the CIT(A)'s decisions is before the Income Tax Appellate Tribunal (ITAT), which is independent of the ITD and is the first level of appeal for the ITD against the CIT(A)'s orders (Deloitte, 2020). Unlike the CIT(A), who is a senior ITD official, the ITAT is under the Ministry of Law and Justice, which is independent of the Ministry of Finance (Butani, 2016). The ITD and the Central Board of Direct Taxes (CBDT) fall under the Ministry of Finance.<sup>2</sup> Decisions made by the ITAT can be appealed to the jurisdictional High Court, whose judgments can be appealed to the Supreme Court, which is the highest court in India (Deloitte, 2020).

This article begins with a description of the research methodology, followed by an introduction to the ITAT. The challenges faced by the ITAT to its adjudicatory function and its independence are then described. A brief discussion of challenges anticipated due to proposed changes to the ITAT's operating model follows. To the best of the author's knowledge, based on a review of academic literature, the discussion undertaken in this article is the first of its kind in academic literature. This article makes a case for reforming the ITAT and lays the foundation for further research. The article concludes with recommendations to improve the selection of ITAT adjudicators and to preserve the independence of the ITAT's functioning.

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<sup>2</sup> The CBDT is the apex decision-making body for income tax matters in the ministry and oversees the ITD.

## 2. RESEARCH METHODOLOGY

This research, which is part of a larger project that studied the tax appeal system in India, refers to 33 interviews, including interviews with eight former income tax officials, 18 tax practitioners, including seven lawyers, seven chartered accountants, and four tax practitioners with both legal and chartered accountancy qualifications, and former adjudicators, including eight former ITAT adjudicators, three former High Court judges, and a retired Supreme Court judge.<sup>3</sup> Ethics approval was secured for the larger project to collect data using interviews.<sup>4</sup>

Semi-structured interviews were employed to gather the thoughts of the interviewees, as this method allows an interviewer to manage the interview in a manner that achieves the goals of the interviewer and the research while respecting the right of interviewees to share their perspectives. According to Qu and Dumay (2011), “the semi-structured interview involves prepared questioning guided by identified themes in a consistent and systematic manner interposed with probes designed to elicit more elaborate responses” (p. 246). The breadth of the interview guide helps the interviewer to conduct the interview without prompting interviewees with specific questions, whereas the probes enable interviewees to recount their experiences during the interview.<sup>5</sup> Semi-structured interviews were used in this research project as they helped the researcher to elicit details that would have been difficult to obtain using, for example, a written questionnaire or a survey. Furthermore, semi-structured interviews enable the use of follow-up questions and provide the researcher with an opportunity to connect different parts of the interview in real time.

Interviewees were selected using convenience and snowball sampling, with the initial interviewees identified through the author’s personal and professional networks. The author contacted all of the potential interviewees identified through their networks as well as by the interviewees.<sup>6</sup> More than three-quarters of those contacted agreed to be interviewed. Interviews were conducted online between December 2020 and June 2021, with interviewees located in Bengaluru, Chennai, Delhi, Mumbai, and Hyderabad. The interviews took around an hour and a half on average and were transcribed verbatim. These transcripts were coded and analysed using NVivo. After the data had been categorised using descriptive coding, thematic coding was used to develop themes across categories, with some themes straddling categories (Gibbs, 2007; Saldaña, 2014).

Given that the sample of interviewees was not random but was instead based on convenience and snowball sampling, the qualitative results of this research cannot be generalised. However, to the author’s knowledge, based on a review of academic literature, this research, especially with regard to the challenges faced by the ITAT, is the first of its kind and therefore develops the groundwork for further qualitative, as well as quantitative, research.

The next section introduces the ITAT and describes its functions and operations.

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<sup>3</sup> To preserve the confidentiality of interviewees, their names have been replaced by codes corresponding to their professional backgrounds. A legend of these code names is included in Appendix A.

<sup>4</sup> Ethics approval for the research project was given by the Human Ethics Committee of Victoria University.

<sup>5</sup> See Qu and Dumay (2011), pp. 246-47.

<sup>6</sup> The author approached all tax professionals known to them as well as those who were referred to the author by others, including interviewees. Although the author took care to avoid introducing a bias into the selection process, the pool of interviewees is not immune to the bias introduced by interviewees when suggesting other potential interviewees. This is a limitation of the process of snowball sampling.

### 3. THE INCOME TAX APPELLATE TRIBUNAL

The ITAT was established in January 1941 and is a quasi-judicial institution (ITAT, n.d.-a). It is known as the “Mother Tribunal” and its success led to the institution of many other tribunals in India, such as the Customs, Excise, Service Tax Appellate Tribunal (CESTAT) and the Central Administrative Tribunal (CAT) (ITAT, n.d.-a). Originally consisting of six adjudicating members, also known as “ITAT members”, and three benches, it now has “63 benches in 27 different stations, covering almost all the cities having a seat of the High Court” (ITAT, n.d.-a).

The ITAT’s motto is “Nishpaksh Sulabh Satvar Nyay”, which means “impartial, easy and speedy justice” (ITAT, n.d.-a). The organisation has a reputation for delivering justice efficiently and in a cost-effective manner. A senior tax practitioner asserted that the “ITAT is a fantastic forum” where justice can be sought.<sup>7</sup> Even retired ITD officers have a high regard for the ITAT.<sup>8</sup> 70% of the ITAT’s orders are accepted by both parties, with only 6% of the orders being accepted for review by the High Courts, and around 30% of the reviewed orders being overturned (Shivaram, 2017). A tax practitioner who had previously served as an adjudicating member on ITAT benches remarked that “objective, judicious, conscientious, fair, and reasonable” orders are rendered by the ITAT.<sup>9</sup> In addition, tax practitioners have observed that the ITAT expeditiously disposes of appeals.<sup>10</sup> One tax practitioner remarked that the ITAT benches “have been doing a brilliant job, both in terms of quality of justice and speed of justice” and that it “is really the first stage where one can expect some justice”.<sup>11</sup> For this reason, many taxpayers consider the ITAT to be their first, not second, level of appeal following the ITD’s assessments.<sup>12</sup>

Most of the appeals at the ITAT are heard by division benches comprising two adjudicating members: an accountant member and a judicial member (Income Tax Appellate Tribunal (n.d.-b)).<sup>13</sup> An accountant member is drawn from pools of chartered accountants or serving senior ITD officials and a judicial member is selected from the bar (i.e. a practising lawyer) or the judiciary (Income Tax Appellate Tribunal, n.d.-b). Tax practitioners and retired ITD officials note that recruitment from the above streams is conceptually quite good, as it builds diversity of experience among ITAT members.<sup>14</sup> Given that appeals before the ITAT may involve questions of fact or law, accountant members provide expertise vis-à-vis factual accounting issues and judicial members contribute legal or judicial expertise.<sup>15</sup> Retired ITAT members, tax practitioners, and retired ITD officials note that the judicial member brings to the bench

<sup>7</sup> Interview with A5, a tax accountant practitioner (January 2021). The ITD is colloquially referred to as the revenue.

<sup>8</sup> Interview with IT2, a retired ITD official (January 2021); Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021).

<sup>9</sup> Interview with IM4, a former ITAT adjudicator (January 2021).

<sup>10</sup> Interview with L3, a tax lawyer practitioner (February 2021).

<sup>11</sup> Interview with TP4, a tax practitioner (January 2021).

<sup>12</sup> Interview with IM6, a former ITD official and a retired ITAT adjudicator (December 2020).

<sup>13</sup> The ITAT also constitutes single member benches (SMCs) to decide issues of fact of lesser importance. For example, SMCs decide disputes that amount to less than Rs.500,000 and are staffed with experienced members. See “Steps for reduction of pending cases in ITAT” (2001).

<sup>14</sup> Interview with IM6, a former ITD official and a retired ITAT adjudicator (December 2020); Interview with IT5, a former ITD official and a retired CBDT member (December 2020).

<sup>15</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

judicial principles that accountant members may not be familiar with.<sup>16</sup> Decisions of division benches require the concurrence of members (“Steps for reduction of pending cases in ITAT”, 2001).<sup>17</sup> When the two bench members have different opinions, the matter is referred to a third ITAT member and the majority view is pronounced as the final decision (“Steps for reduction of pending cases in ITAT,” 2001). The combined experience of the division benches leads to quick decision making, thereby contributing to the ITAT’s efficiency.<sup>18</sup>

The following section presents the results of a qualitative analysis of case law and data collected from interviews with the income tax professionals described in detail in section 2.

#### 4. THE ITAT’S CHALLENGES

When the ITAT was established (prior to India’s independence), it was first placed under the Finance Department, the predecessor to today’s Ministry of Finance, which also houses the ITD, one of the litigants in every appeal.<sup>19</sup> Following public opposition over the lack of independence of the ITAT from the ITD, as both shared the same parent ministry, the ITAT was soon shifted to the Legislative Department, the predecessor to today’s Ministry of Law and Justice.<sup>20</sup> Over the years, the ITAT’s challenges primarily dealt with preserving its independence from the Ministry of Law and Justice (its administrative parent), as well as from the Ministry of Finance and the ITD. For example, a secretary of the Ministry of Law and Justice tried to interfere in the workings of the ITAT, which led to a case being filed against him by the ITAT.<sup>21</sup> The Supreme Court rebuked the secretary for illegal interference in the ITAT’s adjudicatory function and penalised him for contempt.<sup>22</sup> This is because the Ministry of Law and Justice is only a nodal ministry for administrative purposes and cannot interfere in the adjudicatory function of the ITAT.<sup>23</sup> A senior tax practitioner noted that the Ministry of Finance would also like the ITAT to “toe their line and their way of thinking” instead of being independent.<sup>24</sup> A former ITAT member and retired High Court judge concurred, citing past attempts made by the Ministry of Finance to undermine the ITAT.<sup>25</sup> For example, the Ministry of Finance tried to replace the Ministry of Law and Justice as the ITAT’s administrative parent, but the then formidable Minister of Law and Justice scuttled that attempt.<sup>26</sup> In addition, via amendments made through the Ministry of Finance to the Income Tax Act 1961 (India), the ITD tried to curtail the ITAT’s discretion to stay matters as well as to admit fresh evidence.<sup>27</sup>

<sup>16</sup> Interview with IT6, a former ITD official and a retired CBDT member (December 2020); Interview with IT5, a former ITD official and a retired CBDT member (December 2020); Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>17</sup> Interview with IM1, a retired ITAT adjudicator (April 2021).

<sup>18</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>19</sup> See “Appointment of ITAT members for only five years will undermine the independence of the ITAT: AIFTP” (2017); Interview with TP2, a tax practitioner (February 2021).

<sup>20</sup> See “Appointment of ITAT members for only five years will undermine the independence of the ITAT: AIFTP” (2017).

<sup>21</sup> See *Income Tax Appellate Tribunal v K. Agarwal & Another*, [1998] SC Writ Petition (Civil) No. 2350 of 1996 (17 November 1998) (Supreme Court of India); Interview with TP2, a tax practitioner (February 2021).

<sup>22</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>23</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>24</sup> Interview with L3, a tax lawyer practitioner (February 2021).

<sup>25</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>26</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>27</sup> Interview with IM3, a retired ITAT adjudicator (February 2021); Interview with HJ2, a former ITAT adjudicator and a retired High Court judge (March 2021).

Today, the ITAT faces new challenges. First, the ITAT has grown considerably over the past three decades and this rapid growth has brought with it some growing pains (“Steps for reduction of pending cases in ITAT,” 2001). Second, the Government of India changed the role of an ITAT member from a permanent position to a fixed tenure posting and altered the ITAT member application eligibility requirements, resulting in potential challenges to the independence of the ITAT. In addition, the fact that the ITAT is under the Ministry of Law and Justice has traditionally preserved its independence from the Ministry of Finance, which oversees the ITD.<sup>28</sup> However, a tax practitioner has expressed concern that there appears to be growing interference by the government, possibly at the behest of the ITD, in the adjudicatory function of the ITAT.<sup>29</sup>

## A. The ITAT’s Growing Pains

The rapid increase in the number of ITAT benches, from 28 to 63, in the past few decades is said to have adversely impacted the recruitment and training of new ITAT members. The quality of ITAT members is also said to have suffered as a result.<sup>30</sup> Several tax practitioners agree that the ITAT has lost some of its sheen during this period.<sup>31</sup>

### 1. Member recruitment

#### (a) Selection committee

ITAT members used to be selected by a committee that included a sitting Supreme Court judge nominated by the Chief Justice of the Supreme Court,<sup>32</sup> the President of the ITAT, and a secretary of the Ministry of Law and Justice.<sup>33</sup> The committee made its selection based on interviews and a review of the candidates’ backgrounds and achievements.<sup>34</sup> A former ITAT member and a retired ITD official said that selecting a person for the senior position of an ITAT member primarily based on a personal interview, which lasts anywhere between 15 minutes and an hour, may not be the most appropriate selection mechanism.<sup>35</sup> A key concern is that, once appointed, being quasi-judicial authorities, ITAT members cannot easily be held accountable for their decisions and are difficult to remove.<sup>36</sup> The quality of the selection process thus impacts the quality of the members and, consequently, their orders.<sup>37</sup> A former ITAT member and a retired High Court judge observed that “if your recruitment is bad, then,

<sup>28</sup> Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021); Interview with L4, a tax lawyer practitioner (February 2021).

<sup>29</sup> Interview with L2, a tax lawyer practitioner (April 2021).

<sup>30</sup> Interview with A3, a tax accountant practitioner (February 2021); Interview with A1, a tax accountant practitioner (March 2021); Interview with L2, a tax lawyer practitioner (April 2021); Interview with A7, a tax accountant practitioner (January 2021); Interview with L6, a tax lawyer practitioner (January 2021).

<sup>31</sup> Interview with A3, a tax accountant practitioner (February 2021); Interview with A1, a tax accountant practitioner (March 2021); Interview with L2, a tax lawyer practitioner (April 2021); Interview with A7, a tax accountant practitioner (January 2021); Interview with L6, a tax lawyer practitioner (January 2021).

<sup>32</sup> Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021).

<sup>33</sup> Interview with IM6, a former ITD official and a retired ITAT adjudicator (December 2020).

<sup>34</sup> Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021).

<sup>35</sup> Interview with IM4, a former ITAT adjudicator (January 2021); Interview with IT3, a retired ITD official (January 2021).

<sup>36</sup> Interview with IT3, a retired ITD official (January 2021).

<sup>37</sup> Interview with IM4, a former ITAT adjudicator (January 2021); Interview with SCJ, a former High Court judge and a retired Supreme Court judge (March 2021); Interview with A6, a tax accountant practitioner (January 2021).

if the seed sown is bad, then, you can't really complain that the fruit is rotten. It'll be rotten".<sup>38</sup> However, some believe that this selection process is quite rigorous and adequate.<sup>39</sup>

The Government of India changed the composition of the ITAT member selection committee in 2017, and further restructured the committee in 2020 (Kanzarkar, 2020). In the changes made through rules based on the Finance Act 2017 (India), the government added a nominee of the Ministry of Law and Justice to the committee along with up to two other nominees of the government (Government of India, 2017; Kanzarkar, 2020). Another change made in 2017 was the removal of the sitting Supreme Court judge from the committee that selects accountant and judicial adjudicating ITAT members from the applicant pool, leading to there being no representation of the judiciary on the committee (Government of India, 2017; "New ITAT members to get marginal salary hike but limited 3 year term for members, VPs and President", 2017). The removal of the involvement of the judiciary in selecting ITAT members, whose orders are subject to review by the judiciary, attracted criticism from the bar (Shivaram, 2017), as did the change introducing up to two nominees of the government into the selection committee.<sup>40</sup> In *Rojer Mathew v South Indian Bank Limited & Others* (2020),<sup>41</sup> the Supreme Court struck down the rules to appoint tribunal members, noting that "the role of the judiciary" was "virtually absent", "in direct contravention of the doctrine of separation of powers", and "an encroachment on the judicial domain" (*Rojer Mathew v South Indian Bank Limited & Others*, 2020, paragraphs 152-153). The Court added that "exclusion of the Judiciary from the control and influence of the Executive is not limited to traditional Courts alone, but also includes Tribunals since they are formed as an alternative to Courts and perform judicial functions" (*Rojer Mathew v South Indian Bank Limited & Others*, 2020, paragraph 153). The Court reasoned that the rules amounted to "excessive interference of the Executive" and "would undoubtedly be detrimental to the independence of judiciary besides being an affront to the doctrine of separation of powers" (*Rojer Mathew v South Indian Bank Limited & Others*, 2020, paragraph 84). The Court concluded that the rules were "an attempt to keep the judiciary away from the process of selection and appointment" (*Rojer Mathew v South Indian Bank Limited & Others*, 2020, paragraph 157).

In light of the above Supreme Court decision, the government reversed these two changes in rules framed in 2020<sup>42</sup> but, strangely, added a secretary of the Ministry of Finance to the original selection committee that existed prior to 2017 (Kanzakar, 2020). Given that the ITD, which falls under the Ministry of Finance, is a constant litigant in appeals before the ITAT, this addition introduces a conflict of interest. For example, the Supreme Court stated previously that "[t]he Executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in judicial appointments" (*Rojer Mathew v South Indian Bank Limited & Others*, 2020, paragraph 157). The low success rate of the ITD before the ITAT further adds to this concern (Ministry of Finance, Government of India, 2018). In fact, a senior lawyer observed that the composition of the selection committee prior to 2017 was free from the interference of the Ministry of Finance, thereby leading to "complete freedom from the finance ministry" with respect to "the constitution of the tribunal".<sup>43</sup> The Supreme Court

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<sup>38</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>39</sup> Interview with IT2, a retired ITD official (January 2021).

<sup>40</sup> Interview with IM2, a retired ITAT adjudicator (April 2021), who was concerned about political interference in the process.

<sup>41</sup> *Rojer Mathew v South Indian Bank Limited & Others*, [2020] 6 SCC 1 (Supreme Court of India). <https://indiankanoon.org/doc/36423291/>

<sup>42</sup> Government of India (2020).

<sup>43</sup> Interview with L7, a tax lawyer practitioner (January 2021).

ultimately decided that a secretary of the sponsoring or parent department, e.g. a secretary of the Ministry of Finance in this case, “cannot have a say in the process of selection” and would therefore function without a vote (*Madras Bar Association v Union of India & Another*, 2020).<sup>44</sup> The government incorporated the Supreme Court’s decision to limit the role of a secretary of the Ministry of Finance to a non-voting member-secretary in an ordinance promulgated on 4 April 2021.<sup>45</sup>

### **(b) Applicant pool**

The rapid growth of the ITAT has been accompanied by a perceived dilution in the selection of new ITAT members, especially in the new millennium.<sup>46</sup> When the ITAT was founded in 1941, only eminent tax practitioners were appointed as members.<sup>47</sup> Tax practitioners express concern that the quality of new ITAT members in the recent past has suffered due to the rapid increase in the number of benches.<sup>48</sup> Previously, there were fewer benches and a smaller ITAT member pool was required, so perhaps five to ten members would be recruited in one drive.<sup>49</sup> However, a doubling of the size of the ITAT member pool from fewer than 60 to more than 120 members meant that recruitment drives sometimes needed to result in the selection of up to 30 members.<sup>50</sup> Naturally, candidates who would previously not make the cut to become ITAT members now had the opportunity to be appointed.<sup>51</sup> A senior tax practitioner shared their views about the quality of recent ITAT member recruits as below:

I don’t think I would appoint half the members who get appointed because some of them really don’t have the quality, especially the newer appointments. ... But the approach is, and it’s sad, but the approach is, let’s fill up the vacancies even with not the best of candidates. So, ... one should not compromise competence for just filling up vacancies. Run with a smaller strength, use that strength more efficiently, but have good quality. (Interview with IM2, a retired ITAT adjudicator, April 2021)

A former ITAT member and a retired High Court judge agreed that the ITAT should only recruit good members and, when such candidates are not available, it should run at lower strength instead of filling vacancies with undeserving candidates.<sup>52</sup> A retired ITAT member concurred and remarked that sometimes the selectors recruit undeserving candidates from the initial applicant list instead of calling for a fresh list of applications.<sup>53</sup>

The pool of well-qualified and successful tax practitioners who would be interested in the position of an ITAT member has also shrunk over the past two decades. First, the post of the ITAT member carries with it a drawback in that candidates selected for the post are not usually posted in their domicile.<sup>54</sup> Second, like most government officials, ITAT members are

<sup>44</sup> *Madras Bar Association v Union of India & Another*, [2020] SCC Online SC 962 (27 November 2020) (Supreme Court of India).

<sup>45</sup> The Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance 2021 (India).

<sup>46</sup> Interview with L2, a tax lawyer practitioner (April 2021).

<sup>47</sup> Interview with IM3, a retired ITAT adjudicator (February 2021).

<sup>48</sup> Interview with TP3, a tax practitioner (January 2021).

<sup>49</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>50</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>51</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>52</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>53</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>54</sup> Interview with L4, a tax lawyer practitioner (February 2021).

transferred from one location to another every three to five years.<sup>55</sup> These constraints mean that ITAT members have to relocate their families frequently.<sup>56</sup> Tax practitioners who have spent most of their lives in their city of practice may be reluctant to do this.<sup>57</sup> Third, the pool of tax practitioners has always been small to begin with and tax law has become a lucrative practice, especially in the past two decades, resulting in successful practitioners being less interested in the post of an ITAT member.<sup>58</sup> For example, the remuneration of ITAT members, while fairly good by the standards of pay among government positions, pales in comparison to the earnings of tax practitioners in private practice or the private sector.<sup>59</sup> This has led to non-tax practitioners applying for ITAT member posts and a dilution in the extent of tax experience on ITAT benches.<sup>60</sup> In addition, some who become ITAT members despite “the disparity between what a professional earns and what a tribunal member earns” may have an agenda,<sup>61</sup> e.g. corruption. Lastly, ITAT members are often not afforded proper facilities, such as infrastructure (court rooms and technology) and staff (stenographers), that would enable them to work effectively.<sup>62</sup> The above factors have greatly reduced the attractiveness of the position of an ITAT member.

For lawyers, there is a drawback to becoming an ITAT member. A retired ITAT judicial member claimed that lawyers “who would aspire to be [a] judge of the High Court would avoid” being a member of the tribunal because “their chances of elevation to [the] High Court are reduced”.<sup>63</sup> This is due to the unwritten quotas that determine the percentage of High Court judges selected from the bar (around 40%) and the lower judiciary (around 60%).<sup>64</sup> ITAT members do not fall under either of these categories and therefore find themselves elbowed out by other applicants. Moreover, due to frequent transfers, ITAT members are not as visible to the High Court judges as lawyers and lower judiciary officials would be.<sup>65</sup> This further reduces the chances of ITAT members being appointed as High Court judges as the endorsement of appointments by sitting High Court judges carries a lot of weight. A retired ITAT member remarked that “only a person who is noticed by a Supreme Court judge or may be a Chief Justice of India ... is picked up from the tribunal”, which is a “very rare” occurrence, adding that one can “count on fingers how many people have been appointed as High Court judges from the [income tax appellate] tribunal”.<sup>66</sup> A senior tax practitioner, quoting a former ITAT

<sup>55</sup> Interview with L4, a tax lawyer practitioner (February 2021).

<sup>56</sup> Interview with L4, a tax lawyer practitioner (February 2021).

<sup>57</sup> Interview with IT4, a retired ITD official (December 2020).

<sup>58</sup> Interview with L4, a tax lawyer practitioner (February 2021).

<sup>59</sup> Interview with L4, a tax lawyer practitioner (February 2021); Interview with L3, a tax lawyer practitioner (February 2021); Interview with IT4, a retired ITD official (December 2020); Interview with A7, a tax accountant practitioner (January 2021); Interview with TP4, a tax practitioner (January 2021).

<sup>60</sup> Interview with L4, a tax lawyer practitioner (February 2021); Interview with L3, a tax lawyer practitioner (February 2021); Interview with IT4, a retired ITD official (December 2020); Interview with A7, a tax accountant practitioner (January 2021); Interview with TP4, a tax practitioner (January 2021). L2, a tax lawyer practitioner also remarked that “today, the appointments on the judicial member side are people who’ve probably never practiced tax in their lives” and added that tax lawyers are no longer interested in taking up ITAT member posts.

<sup>61</sup> Interview with L3, a tax lawyer practitioner (February 2021); Interview with TP4, a tax practitioner (January 2021).

<sup>62</sup> Interview with A1, a tax accountant practitioner (March 2021); Interview with IM4, a former ITAT adjudicator (January 2021); Interview with L2, a tax lawyer practitioner (April 2021).

<sup>63</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>64</sup> Interview with IM2, a retired ITAT adjudicator (April 2021). Lower judiciary refers to non-tax judicial fora below the level of the High Court, e.g. district courts.

<sup>65</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>66</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).



member and a retired High Court judge, stated that fewer than 40 ITAT members may have been appointed as High Court judges in the past 80 years.<sup>67</sup>

The diminishing allure of the post of an ITAT member has led to a decline in the quality of recent ITAT member recruits as per practitioners, who are concerned about the downturn.<sup>68</sup> A retired member of the CBDT agreed that the quality of the ITAT members who have been appointed to the ITAT in the recent past is “leaving much to be desired”.<sup>69</sup>

## 2. Member training

The ITAT usually trains new members by pairing them with experienced members.<sup>70</sup> A senior tax practitioner explained that “there is a glide path for [new] members” as they are “slowly blooded” over a couple of years before they are fully ready to take up all types of matters.<sup>71</sup> For example, new members are tasked with drafting simple orders until they are ready to take up the more complex matters.<sup>72</sup> This on-the-job training of new members is critical because not all member recruits come with a knowledge of income tax law, which is complex to begin with.<sup>73</sup> The ITAT’s rapid growth made such training difficult to offer as there may not always have been enough experienced members to pair with the new ones.<sup>74</sup> This further impacted the quality of newly recruited members as well as their adjudication.

## 3. Quality of decisions

A consequence of the inevitable compromises in the recruitment and training of ITAT members is a perceived decline in the quality of orders passed by ITAT benches.<sup>75</sup> For example, inconsistent ITAT decisions have increased over time. Traditionally, in cases where the analysis of an earlier ITAT bench on a point of law was not palatable to a subsequent bench, the latter bench would request the president of the ITAT to convene a special bench in order to resolve the disagreement.<sup>76</sup> In such cases, the ITAT’s president subsequently convenes a special bench comprising three or five ITAT members,<sup>77</sup> and the decision of the special bench becomes binding precedent for all ITAT benches.<sup>78</sup> A retired ITAT member commented that, at least until the early years of this century, by and large, the ITAT benches used to follow the precedent laid down by the other benches, in line with High Court and Supreme Court decisions insisting on such adherence.<sup>79</sup> Another former ITAT member added that, at least until 2010, judicial discipline was mostly adhered to among the ITAT benches, who respected the

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<sup>67</sup> Interview with L1, a tax lawyer practitioner (April 2021). This translates into fewer than 10% of the number of past and present ITAT members (around 500) of the ITAT having been appointed as High Court judges.

<sup>68</sup> Interview with L1, a tax lawyer practitioner (April 2021).

<sup>69</sup> Interview with IT6, a former ITD official and a retired CBDT member (December 2020).

<sup>70</sup> Interview with TP2, a tax practitioner (February 2021); Interview with IM2, a tax lawyer practitioner (April 2021).

<sup>71</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>72</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>73</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>74</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>75</sup> Interview with L1, a tax lawyer practitioner (April 2021).

<sup>76</sup> Interview with IM3, a retired ITAT adjudicator (February 2021); Interview with IM4, a former ITAT adjudicator (January 2021).

<sup>77</sup> Interview with IM3, a retired ITAT adjudicator (February 2021).

<sup>78</sup> Interview with IM3, a retired ITAT adjudicator (February 2021); Interview with TP1, a tax practitioner (January 2021).

<sup>79</sup> Interview with IM3, a retired ITAT adjudicator (February 2021).

decisions of other ITAT benches for the most part.<sup>80</sup> However, this interviewee argued that members recruited over the past decade or so do not appear to have the same regard for judicial discipline vis-à-vis decisions of other benches, leading to inconsistent ITAT bench decisions becoming more and more frequent.<sup>81</sup>

A tax lawyer explained that “in many cases, ... the tribunal will ... somehow distinguish” the cases on fact, with the result that similar issues “are decided differently”, and noted that the reasons for such inconsistency are not always clear.<sup>82</sup> A retired chief commissioner of the ITD added that some ITAT members even contradict their own decisions sometimes.<sup>83</sup> Another retired chief commissioner concurred.<sup>84</sup> A tax lawyer had a similar experience and suggested that such ITAT members may have integrity issues.<sup>85</sup> The second retired chief commissioner recommended that ITAT members who contradict their own decisions should be subject to an investigation,<sup>86</sup> alluding to the idea that corrupt practices may be involved. On a separate note, a retired ITAT member stated that an ITAT bench may sometimes disregard the ITAT precedent if they doubt the integrity of the ITAT members comprising the precedent bench but insists that judicial discipline be adhered to.<sup>87</sup> A senior tax lawyer concluded that conflicting ITAT decisions have now become “very common”.<sup>88</sup>

When ITAT members disagree with precedent, they have the prerogative to ask the president of the ITAT to constitute a special bench, but they do not have the “power to decide” a case contrary to the ITAT precedent.<sup>89</sup> Retired ITAT members advocate judicial discipline<sup>90</sup> and suggest that not following this is not only wrong<sup>91</sup> but also immoral.<sup>92</sup> A retired ITAT member advised that “strong administrative action” should be “taken against those members who disobey judicial discipline”.<sup>93</sup> However, another retired ITAT member said that questioning an ITAT member, who is a quasi-judicial official, may be a difficult proposition<sup>94</sup> unless the legal contradiction or inconsistency is irreconcilable. Tax practitioners urge the president of the ITAT to constitute a special bench to resolve the conflict among such decisions<sup>95</sup> as the

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<sup>80</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>81</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021). A retired member of the CBDT (IT6) agreed that there is, at times, a divergence among the legal conclusions of different ITAT benches. A former ITAT member who retired as a High Court judge (HJ2) concurred that ITAT benches sometimes contradict decisions made by other benches.

<sup>82</sup> Interview with L4, a tax lawyer practitioner (February 2021).

<sup>83</sup> Interview with IT3, a retired ITD official (January 2021); Interview with L2, a tax lawyer practitioner (April 2021).

<sup>84</sup> Interview with IT1, a retired ITD official (March 2021).

<sup>85</sup> Interview with L2, a tax lawyer practitioner (April 2021).

<sup>86</sup> Interview with IT1, a retired ITD official (March 2021).

<sup>87</sup> Interview with IM1, a retired ITAT adjudicator (April 2021).

<sup>88</sup> Interview with L7, a tax lawyer practitioner (January 2021).

<sup>89</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>90</sup> Interview with HJ2, a former ITAT adjudicator and a retired High Court judge (March 2021); Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021); Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>91</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021); Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>92</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>93</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>94</sup> Interview with IM1, a retired ITAT adjudicator (April 2021).

<sup>95</sup> Interview with L7, a tax lawyer practitioner (January 2021); Interview with TP1, a tax practitioner (January 2021); Interview with L4, a tax lawyer practitioner (February 2021).

president has the power to suo moto constitute a special bench if they identify a conflict among the decisions of different ITAT benches.<sup>96</sup>

The growing pains of the ITAT, including issues with the quality of selection as well as the training of ITAT members, have therefore taken some of the sheen off of the ITAT and introduced inconsistency into the quality of its orders as well as its precedent.

## B. Member Tenure Criteria

During most of the ITAT's history, ITAT members have held permanent posts and have typically worked until retirement.<sup>97</sup> Currently, the retirement age for ITAT members is 62 years.<sup>98</sup> However, recently, the Government of India changed the ITAT member role from that of a permanent position to a fixed tenure position ("New ITAT members to get marginal salary hike but limited 3 year term for members, VPs and President", 2017). The only other time when ITAT members were hired for a fixed tenure instead of on a permanent basis was in 1941, when the ITAT was established (with three benches and six members).<sup>99</sup> However, that initial five-year tenure-based posting did not prove to be "workable",<sup>100</sup> leading to it transitioning to a permanent role-based posting from 25 February 1950 ("Appointment of ITAT members for only five years will undermine the independence of the ITAT: AIFTP", 2017). The return to a fixed-term posting echoes the past unsuccessful experiment,<sup>101</sup> but it has larger ramifications today as the ITAT fields 63 benches which, at full strength, require 126 members.

A former ITAT member asserted that a fixed tenure posting will not "augur well" for the growth of the ITAT.<sup>102</sup> Even prior to this change, attracting the best talent to the ITAT was a difficult proposition, as explained above.<sup>103</sup> Some retired members claim that this change may render the position of ITAT member even less attractive to tax practitioners, i.e. chartered accountants and lawyers who apply for the roles of accountant and judicial members respectively.<sup>104</sup> For example, the recruitment of ITAT members may pose problems due to the uncertainty that a fixed tenure brings to career prospects of new members.<sup>105</sup> Moreover, a chartered accountant or a lawyer who leaves their practice to become an ITAT member will effectively have lost their clients by the time they have completed their fixed-term posting, so it will be necessary for them to build a practice from the scratch after leaving the ITAT.<sup>106</sup>

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<sup>96</sup> Interview with L7, a tax lawyer practitioner (January 2021); Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>97</sup> Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021).

<sup>98</sup> Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021).

<sup>99</sup> Interview with L5, a tax lawyer practitioner (February 2021).

<sup>100</sup> Interview with L5, a tax lawyer practitioner (February 2021); Interview with HJ2, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>101</sup> Interview with L5, a tax lawyer practitioner (February 2021).

<sup>102</sup> Interview with IM4, a former ITAT adjudicator (January 2021); Interview with IM1, a retired ITAT adjudicator (April 2021).

<sup>103</sup> Interview with L7, a tax lawyer practitioner (January 2021); Interview with L6, a tax lawyer practitioner (January 2021).

<sup>104</sup> Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021).

<sup>105</sup> Interview with TP3, a tax practitioner (January 2021); Interview with L5, a tax lawyer practitioner (February 2021); Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>106</sup> Interview with L5, a tax lawyer practitioner (February 2021); Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021); Interview with IM2, a retired ITAT adjudicator (April 2021).

Furthermore, ITAT members are not allowed to practice before the ITAT after they leave, so ex-members have fewer career options.<sup>107</sup> A senior practitioner said that a successful chartered accountant would not apply for the position of an ITAT member given that they would be barred from practising before the ITAT after leaving it.<sup>108</sup> Unlike lawyers, who can at least appear in the High Courts after leaving the ITAT, chartered accountants can only appear before the CIT(A) after leaving the ITAT, but not in the ITAT and High Courts.<sup>109</sup> However, those interested in the charm of government service and the prestige associated with being a government functionary may apply,<sup>110</sup> perhaps towards the end of their careers. In addition, given that an ITAT member will typically be posted in a city other than their domicile, practitioners may not be keen on uprooting their family for a short, fixed tenure posting.<sup>111</sup> Due to these constraints, a tax practitioner with a good practice may not be interested in serving in the ITAT for a short tenure,<sup>112</sup> which may be as low as five years (*Madras Bar Association v Union of India & Another*, 2020; *Rojer Mathew v South Indian Bank Limited & Others*, 2020). In fact, the Supreme Court said that “it will be illusory to expect a practising advocate to forego his well-established practice” in order to become a member of a tribunal for a short tenure (*Rojer Mathew v South Indian Bank Limited & Others*, 2020, paragraph 176).

Consequently, those on the verge of retirement from government or judicial service may apply to be ITAT members.<sup>113</sup> Senior tax practitioners remarked that the ITAT will become a “parking lot” for government or judicial officials who primarily want to pass time before they retire.<sup>114</sup> A retired ITAT member concurred, adding that those “at the fag end of their career” may not take the role as seriously as those in earlier stages of their career.<sup>115</sup> Alternatively, Indian Revenue Service officials from the ITD or Indian Legal Service (ILS) officers from the Government of India may be appointed as accountant and judicial ITAT members respectively for a fixed tenure, and they would subsequently return to their bureaucratic positions.<sup>116</sup> A tax practitioner argued that those holding short, fixed tenure positions “will be at the beck and call of the law ministry”, the nodal ministry for appointing ITAT members, particularly if the fixed term is renewable.<sup>117</sup> For example, in *Rojer Mathew v South Indian Bank Limited & Others* (2020), the Supreme Court noted that a “short tenure” may increase “the influence and control of the Executive over Members of Tribunals, thus adversely affecting the impartiality of the Tribunals” (paragraph 175). A dearth of independent ITAT members would sound a death knell to the independence of the ITAT.<sup>118</sup> Lastly, the view of practitioners and former ITAT members is that there is no need to fix something that is not broken (“Appointment of ITAT members for only five years will undermine the independence of the ITAT: AIFTP”, 2017).

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<sup>107</sup> Interview with L5, a tax lawyer practitioner (February 2021).

<sup>108</sup> Interview with A4, a tax accountant practitioner (February 2021).

<sup>109</sup> Interview with A4, a tax accountant practitioner (February 2021).

<sup>110</sup> Interview with A4, a tax accountant practitioner (February 2021).

<sup>111</sup> Interview with IM3, a retired ITAT adjudicator (February 2021).

<sup>112</sup> Interview with IM2, a retired ITAT adjudicator (April 2021).

<sup>113</sup> Interview with L5, a tax lawyer practitioner (February 2021); Interview with IM1, a retired ITAT adjudicator (April 2021).

<sup>114</sup> Interview with TP2, a tax practitioner (February 2021); Interview with L5, a tax lawyer practitioner (February 2021).

<sup>115</sup> Interview with IM1, a retired ITAT adjudicator (April 2021).

<sup>116</sup> Interview with IM3, a retired ITAT adjudicator (February 2021), who remarked that members of the ILS should not even be recruited as judicial ITAT members because they do not have experience in judicial matters and mostly do legal work.

<sup>117</sup> Interview with L2, a tax lawyer practitioner (April 2021).

<sup>118</sup> Interview with IM3, a retired ITAT adjudicator (February 2021).

Training will also become a challenge. As discussed above, it takes around two years of on-the-job training for a new ITAT member to be able to handle all types of matters.<sup>119</sup> If around half of the fixed tenure is lost to training the new members, going forward, the ITAT will benefit from the full experience and expertise of each new member for around half of their term.<sup>120</sup> This portends inefficient and, possibly, ineffective functioning of the ITAT, likely leading to larger pendency and more appeals to High Courts.

Tax practitioners also express concern that a fixed tenure post may adversely impact the judicial discipline and the independence of ITAT members.<sup>121</sup> For example, a member with a fixed tenure post may be anxious about their future career prospects<sup>122</sup> and may act in a manner that increases the chances of their tenure being renewed for another fixed term, e.g. by favouring the government in appeals.<sup>123</sup> In this context, a retired High Court and Supreme Court judge made the following comment on the need for independent ITAT members:

If the tenure of a member is dependent on the whims of the employer, they become ... bonded labourers. ... [T]he tendency would be to [say], ... why take a risk, whatever be the law, I will save my skin and decide in favour of the revenue. That should not happen. (Interview with SCJ, a former High Court judge and a retired Supreme Court judge, March 2021)

Alternatively, ITAT members may not invest adequate time and effort to do justice to a transitory role that is only for four years, leading to the quality of adjudication suffering.<sup>124</sup> A senior practitioner also expressed concern that a fixed tenure may “open the floodgates to people ... with ulterior motives” applying for the post of an ITAT member.<sup>125</sup> The senior practitioner added that the fixed tenure “is an ATM” for those who apply to become ITAT members with the objective of earning a pension for the rest of their life during the short, fixed term,<sup>126</sup> ostensibly through corrupt practices, which are not unheard of in the ITAT.<sup>127</sup>

Some retired ITAT members and senior tax practitioners object to the argument that the government changed the permanent role of an ITAT member to a fixed tenure posting to harmonise the tenure of members of different tribunals in the country, on the grounds that the

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<sup>119</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>120</sup> Interview with TP2, a tax practitioner (February 2021). For example, the Supreme Court of India advised that “prescribing such short tenures precludes cultivation of adjudicatory experience and is thus injurious to the efficacy of Tribunals” (*Roger Mathew v South Indian Bank Limited & Others*, 2020, paragraph 175).

<sup>121</sup> Interview with L4, a tax lawyer practitioner (February 2021); Interview with L3, a tax lawyer practitioner (February 2021); Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>122</sup> Interview with L4, a tax lawyer practitioner (February 2021).

<sup>123</sup> Interview with IM3, a retired ITAT adjudicator (February 2021); Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>124</sup> Interview with L4, a tax lawyer practitioner (February 2021).

<sup>125</sup> Interview with TP2, a tax practitioner (February 2021); Interview with IM3, a retired ITAT adjudicator (February 2021); Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>126</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>127</sup> Interview with A1, a tax accountant practitioner (March 2021); Interview with IT1, a retired ITD official (March 2021); Interview with IT3, a retired ITD official (January 2021); Interview with IT2, a retired ITD official (January 2021); Interview with L3, a tax lawyer practitioner (February 2021); Interview with L2, a tax lawyer practitioner (April 2021); Interview with L6, a tax lawyer practitioner (January 2021); Interview with A6, a tax accountant practitioner (January 2021).

ITAT stands apart from the remaining tribunals.<sup>128</sup> For example, the ITAT deals with tax, a complex and specialised subject, and therefore needs its members to be experts in either law or accounting.<sup>129</sup> In addition, as discussed above, new ITAT members need to be trained for at least two years before they are fully equipped to deal with all types of tax matters.<sup>130</sup> This is not the case with most of the other tribunals, where such expertise or training is not critical. Moreover, the ITAT has 63 benches, unlike most of the other tribunals, which have one or two benches (“Appointment of ITAT members for only five years will undermine the independence of the ITAT: AIFTP”, 2017). Lastly, the ITAT is the final fact-finding authority in tax matters (“Appointment of ITAT members for only five years will undermine the independence of the ITAT: AIFTP”, 2017). These reasons justify taking a “horses for courses” approach instead of just seeking uniformity for the sake of it.<sup>131</sup> However, some believe that the fixed tenure system may have some merit. A retired ITD official commented that a fixed tenure system will enable corrupt ITAT members to be fired and new ITAT members to be hired more easily than a system consisting of permanent positions.<sup>132</sup> A tax practitioner also said that a fixed tenure system enables the government to retain the flexibility to either ramp up or scale down ITAT benches in order to dispose of the backlog of appeals.<sup>133</sup>

Nevertheless, tax practitioners and retired ITAT members argue that the disadvantages of the fixed tenure system appear to overshadow any advantages that it may have. The Supreme Court struck down a fixed four-year tenure proposal, noting that the rules were:

not in compliance with the principles of law... in respect of the tenure of the members of the Tribunals in spite of this Court repeatedly holding that short tenure of members is detrimental to the efficiency and independence of the Tribunals. (*Madras Bar Association v Union of India & Another*, 2020, paragraph 35)

However, the government’s Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance 2021 (India) did not give effect to the Supreme Court’s decision, leading to the Court again striking down the four-year tenure rule as being “void and unconstitutional” (*Madras Bar Association v Union of India & Another*, 2021, paragraph 55).<sup>134</sup>

### C. Member Eligibility Criteria

The Government of India recently revised the experience level criteria for potential ITAT members. The minimum experience level required for practising chartered accountants and lawyers wishing to apply to become ITAT members was increased from 10 years to 25 years. A former ITAT accountant member and current tax practitioner said that this increase in experience level is “arbitrary” and does not “augur well” for the growth and development of

<sup>128</sup> *Roger Mathew v South Indian Bank Limited & Others* (2020); Interview with TP2, a tax practitioner (February 2021); Interview with IM3, a retired ITAT adjudicator (February 2021); “Appointment of ITAT members for only five years will undermine the independence of the ITAT: AIFTP” (2017). In *Roger Mathew v South Indian Bank Limited & Others* (2020), the Attorney General of India submitted to the Supreme Court of India that the tenure of ITAT adjudicators was reduced to a fixed term to rationalise the functioning of tribunals.

<sup>129</sup> Interview with IT3, a retired ITD official (January 2021).

<sup>130</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>131</sup> Interview with TP2, a tax practitioner (February 2021).

<sup>132</sup> Interview with IT1, a retired ITD official (March 2021).

<sup>133</sup> Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021).

<sup>134</sup> *Madras Bar Association v Union of India & Another*, [2021] SC Writ Petition (Civil) No. 502 of 2021 (14 July 2021) (Supreme Court of India), 70.

[https://main.sci.gov.in/supremecourt/2020/16100/16100\\_2020\\_35\\_1501\\_24869\\_Judgement\\_27-Nov-2020.pdf](https://main.sci.gov.in/supremecourt/2020/16100/16100_2020_35_1501_24869_Judgement_27-Nov-2020.pdf)

the ITAT.<sup>135</sup> A retired ITAT judicial member concurred, noting that “members should be selected at an early [age], at 40-45” as “that is the right age for the person to join the tribunal” in order to learn and to develop their adjudicatory skills.<sup>136</sup> Those joining the ITAT much later in their careers may be less inclined to adapt and learn, possibly leading to a further deterioration in the quality of orders. A retired ITAT member also asserted that the new criteria may reduce the independence of the ITAT by making the post of an ITAT member unattractive to independent professionals, leading to retired government officials or those on the verge of retirement being appointed.<sup>137</sup> This is because practitioners may be unwilling to leave their practices at the peak of their careers. Interestingly, the Supreme Court asserted that:

as the qualification for an advocate of a High Court for appointment as a Judge of a High Court is only 10 years, we are of the opinion that the experience at the bar should be on the same lines for being considered for appointment as a judicial member of a Tribunal. (*Madras Bar Association v Union of India & Another*, 2020, paragraph 41)

However, in the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance 2021 (India), the government tried to get around the Supreme Court’s decision above by setting the minimum age for being able to apply to the post of a tribunal member at fifty years, in effect increasing the experience level required of tax practitioners, i.e. lawyers or chartered accountants, to 25 years or even more. This led to the Supreme Court striking down this requirement as being “in violation of the doctrine of separation of powers” (*Madras Bar Association v Union of India & Another*, 2021, paragraph 49). The Court explained the basis for its ruling as follows:

Fixing a minimum age for recruitment of Members as 50 years would act as a deterrent for competent advocates to seek appointment. Practically, it would be difficult for an advocate appointed after attaining the age of 50 years to resume legal practice after completion of one term, in case he is not reappointed. Security of tenure and conditions of service are recognised as core components of independence of the judiciary. Independence of the judiciary can be sustained only when the incumbents are assured of fair and reasonable conditions of service, which include adequate remuneration and security of tenure. (*Madras Bar Association v Union of India & Another*, 2021, paragraph 49)

The following section discusses recent amendments (made in 2021) to the operating model of the ITAT proposed by the Government of India and explores their likely impact on the ITAT.

## 5. ANTICIPATED CHALLENGES

On 1 February 2021, the Government of India, through the Finance Bill 2021 (India), proposed amendments to the portion of the Income Tax Act 1961 (India) corresponding to the ITAT (referred to as “Appellate Tribunal” in the Bill and the Act). Through these amendments, which became part of the Finance Act 2021 (India), on 28 March 2021 (TG Team, 2021), the government proposed a new operational model for the ITAT, in which adjudication would be performed electronically (Vaitheeswaran, 2021). In 2020, the government had made adjudication at the level of the CIT(A), against whose orders appeals are filed to the ITAT

<sup>135</sup> Interview with IM4, a former ITAT adjudicator (January 2021).

<sup>136</sup> Interview with IM1, a retired ITAT adjudicator (April 2021).

<sup>137</sup> Interview with IM3, a retired ITAT adjudicator (February 2021).

electronically, without any right to a physical or a virtual hearing (Vaitheeswaran, 2021). As the results of this experiment are not yet available for evaluation, some feel that extending the experiment to the ITAT at this time is premature.<sup>138</sup>

A former ITAT member and retired High Court judge doubted the validity of the framing of faceless appeal procedures by the government because the ITAT is an independent body that has the power to frame its own rules without interference by the government.<sup>139</sup> In addition, many believe that a faceless system will violate the principle of natural justice relating to the opportunity to be heard (*audi alteram partem*, i.e. “to hear the other side”, or “let the other side be heard as well”).<sup>140</sup> However, some believe that an electronic hearing provides the opportunity to be heard and that such an opportunity need not be provided in person.<sup>141</sup> The author discussed, in detail, many of the arguments against the faceless system and some in favour of the faceless system in a separate article that was published in December 2021 (Mohan, 2021).

In response to the argument that the faceless appeal process is being introduced in order to combat corruption,<sup>142</sup> retired ITAT members, tax practitioners, and retired judges responded that corruption is a problem that ails not only the ITAT but also the High Court, the Supreme Court, and the government, as well as the larger society, and questioned whether the faceless system would be acceptable to the government or to the High Court or the Supreme Court.<sup>143</sup> In addition, senior tax practitioners remarked that the government should have fully tested the faceless system at the level of the CIT(A) before applying that model to the ITAT,<sup>144</sup> which is the final fact-finding body and the first stage at which taxpayers expect to secure justice.<sup>145</sup> Former ITAT members thus feel that the faceless system is not apt for an institution like the ITAT.<sup>146</sup> However, some retired ITAT members and practitioners accept virtual hearings via video conferencing even though they do not find faceless hearings appealing.<sup>147</sup> Others note that a faceless system is acceptable, provided that an opportunity to be heard through a virtual hearing is afforded to the taxpayer as a safeguard.<sup>148</sup>

The above faceless amendments were proposed without any prior consultation with relevant stakeholders, e.g. the tax bar, ITAT members, High Court judges, and taxpayers.<sup>149</sup>

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<sup>138</sup> Vaitheeswaran (2021); Interview with A3, a tax accountant practitioner (February 2021).

<sup>139</sup> Interview with HJ2, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>140</sup> Interview with L4, a tax lawyer practitioner (February 2021); Interview with HJ2, a former ITAT adjudicator and a retired High Court judge (March 2021), who noted that an oral hearing is mandatory according to, at least, the Delhi High Court.

<sup>141</sup> Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021); Interview with A6, a tax accountant practitioner (January 2021); Interview with A2, a tax accountant practitioner (March 2021).

<sup>142</sup> Interview with A6, a tax accountant practitioner (January 2021).

<sup>143</sup> Interview with IT1, a retired ITD official (March 2021); Interview with IM4, a former ITAT adjudicator (January 2021); Interview with TP2, a tax practitioner (February 2021); Interview with IM3, a retired ITAT adjudicator (February 2021).

<sup>144</sup> Interview with A3, a tax accountant practitioner (February 2021).

<sup>145</sup> Interview with TP4, a tax practitioner (January 2021).

<sup>146</sup> Interview with IM3, a retired ITAT adjudicator (February 2021); Interview with HJ2, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>147</sup> Interview with L4, a tax lawyer practitioner (February 2021); Interview with IM3, a retired ITAT adjudicator (February 2021).

<sup>148</sup> Interview with L2, a tax lawyer practitioner (April 2021).

<sup>149</sup> Interview with L4, a tax lawyer practitioner (February 2021).



## 6. RECOMMENDATIONS

Retired members of the CBDT, the apex body for income tax matters, a retired ITD official, and a tax practitioner recommended that, to improve the quality of recruitment of new ITAT members, the criteria for selection of members should be clear, e.g. experience level, and proposed better vetting of the background of ITAT applicants to validate their abilities and achievements.<sup>150</sup> A senior practitioner agreed, noting that the appointment of ITAT members should be “tightened” and made “more robust”,<sup>151</sup> e.g. via a multi-level screening and filtration process.<sup>152</sup> A former ITAT member and a retired ITD official suggested that, in addition to personal interviews, a more objective mechanism, e.g. a written test, should be used to assess the knowledge of applicants and reduce the subjectivity of the process.<sup>153</sup> We believe that the selection of ITAT members should be based on both objective and subjective criteria. Objective criteria may include: a written test; the number of cases won by ITAT applicants in their practice, especially before the ITAT; qualifications and credentials indicating academic excellence in law or accountancy; academic or professional publications authored by the applicants; and the size and the stature of the applicants’ clientele. Subjective criteria may include interviews and formal recommendation letters.

One suggestion for attracting better talent from the tax practitioner pool is to post the recruited ITAT members in their domiciles.<sup>154</sup> If a permanent posting in a member’s domicile is infeasible for administrative reasons, their initial posting can be in their domicile, as is typically done for High Court judges. In addition, the frequency of transfers should be reduced, again taking inspiration from the fairly lower frequency of transfers of High Court judges. Another recommendation is to increase the compensation of ITAT members in order to attract better talent.<sup>155</sup> The infrastructure available to members should also be improved, e.g. by modernising courtrooms and providing adequate secretarial and staff resources.

To better train new members, especially when there is a paucity of senior and experienced ITAT members to train them on the job, the ITAT should institute a formal training programme. A formal training programme may help to overcome the constraint of the number of new ITAT members exceeding the number of experienced ITAT members. For example, the knowledge and experience of retired ITAT members could be leveraged in order to train new members using a case study approach of reviewing past cases, with the new members discussing the arguments and counterarguments for each case. Retired accountant members could train new accountant members and retired judicial members could train new judicial members initially to orient the new members’ accountancy and judicial skills respectively to the rigours of the role. This could be followed by a joint training programme. Mock trials could also be enacted, with new members deciding cases to further their training.

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<sup>150</sup> Interview with IT6, a former ITD official and a retired CBDT member (December 2020); Interview with SCJ, a former High Court judge and a retired Supreme Court judge (March 2021); Interview with IT5, a former ITD official and a retired CBDT member (December 2020); Interview with IT4, a retired ITD official (December 2020).

<sup>151</sup> Interview with TP3, a tax practitioner (January 2021).

<sup>152</sup> Interview with IT3, a retired ITD official (January 2021).

<sup>153</sup> Interview with IM4, a former ITAT adjudicator (January 2021); Interview with L4, a tax lawyer practitioner (February 2021). However, in India, examinations are viewed unfavourably because the questions repeat over a period of time and examinees try to game the system by preparing for all of the questions asked in the past instead of earnestly learning the subject being examined.

<sup>154</sup> Interview with L2, a tax lawyer practitioner (April 2021).

<sup>155</sup> Interview with TP4, a tax practitioner (January 2021).

In addition, when ITAT members disregard precedent even after being given robust training, they should be sent back to training, perhaps at half pay, as a former ITAT adjudicator suggested.<sup>156</sup> As ITAT members have the option of referring a case to a special bench when they disagree with existing ITAT precedent, the only legitimate reason for members to disregard precedent is their inability to find, or properly apply, the precedent to the issues in a case. These inability point to a need for more training. Moreover, when ITAT members negligently or deliberately disregard precedent, sending them back to training at half pay may disincentivise members from doing this.

With regard to the fixed tenure posting of ITAT members, a senior tax practitioner noted that the government will have the flexibility of hiring and removing ITAT members in order to manage the pendency of appeals.<sup>157</sup> While a fixed tenure posting may enable optimal staffing, the flipside is that the independence of ITAT members is likely to be adversely affected. A permanent posting protects adjudicators from the vagaries of the government of the day and enables them to independently decide cases without fear or favour. The federal judges in the United States of America are appointed with life terms for this simple reason (The Federal Judicial Center, n.d.). We feel that, to preserve the independence of the ITAT, the permanent posting system should be restored. In addition, we propose an increase in the retirement age of ITAT members from 62 to 65 years.

As a senior tax practitioner rightly noted, “having an un-independent or an executive tribunal, if I may use the expression, is self-defeating”.<sup>158</sup> Therefore, attempts by either the ITD or the government to constrain the independence of the ITAT should be avoided. Such actions will lead to more appeals proliferating at the level of the High Courts,<sup>159</sup> which already have a long pendency of cases, and will further cripple the justice delivery system. However, retired ITAT members feel that the government does not want an independent ITAT.<sup>160</sup> A retired ITAT member and a former ITAT member who retired as a High Court judge both noted that a separate law for the ITAT along the lines of the separate statute for CAT may further improve the independence of the ITAT by allowing the ITAT to formulate its own rules and procedures, akin to an independent and autonomous institution like the judiciary.<sup>161</sup> A fair and independent ITAT is, in our opinion, a sine qua non for its efficiency and effectiveness.

## 7. CONCLUSION

The ITAT has overcome challenges to its independence in the past. However, in the last few years, new challenges have been brought to fore. These include changes to the eligibility criteria and the tenure of ITAT members. Such changes will further hamper the ITAT’s ability to attract independent tax experts to its benches, thereby further lowering the quality of its adjudication. Due to the rapid growth of the ITAT over the past two decades, the quality of recruitment appears to have suffered and this has had an adverse impact on the quality of the ITAT’s orders. The quality of recruitment over the past two decades has also suffered due to factors such as compensation levels and the drawback that judicial members of the ITAT are at a disadvantage when compared to practicing lawyers when it comes to appointment to the High Courts. In addition, as voiced by the Supreme Court, there are legitimate concerns that

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<sup>156</sup> Interview with HJ2, a former ITAT adjudicator and a retired High Court judge (March 2021).

<sup>157</sup> Interview with A4, a tax accountant practitioner (February 2021).

<sup>158</sup> Interview with L1, a tax lawyer practitioner (April 2021).

<sup>159</sup> Interview with IM3, a retired ITAT adjudicator (February 2021).

<sup>160</sup> Interview with IM3, a retired ITAT adjudicator (February 2021).

<sup>161</sup> Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).

changes to the eligibility criteria of ITAT members, the ITAT member selection committee, and the tenure of ITAT members may adversely impact the independence of ITAT members. In fact, the Supreme Court struck down changes to the tribunal selection committee that were aimed at increasing the grip of the government over the selection process for violating the doctrine of separation of powers and undermining the judiciary. Furthermore, the Court declared that the regressive changes made to the member eligibility criteria and the tenure of ITAT members were unconstitutional. The Government of India should consider reverting to the composition of the selection committee that existed prior to the changes made since 2017, and reverse the changes to the eligibility criteria and the tenure of ITAT members. The government should instead consider increasing the retirement age of all ITAT members to 65 and improving their compensation in order to attract the best talent to the ITAT, so that the ITAT can regain its past glory.

In addition, the process for selecting new ITAT members should be made more robust. For example, objective selection criteria should be introduced, formal training programmes should be instituted in the ITAT to supplement the on-the-job training of new ITAT members, and appropriate infrastructure and qualified staff should be provided to all ITAT members. Therefore, there is a need to reform the ITAT without impinging on its independence.

Before implementing the proposal to make the ITAT faceless, the government should consult relevant stakeholders, including retired members. Until then, the ITAT should optimise virtual courtrooms and leverage virtual hearings to the fullest. Furthermore, faceless ITAT appeals should not impinge on the independence of the ITAT. Independence in the dispensation of justice is a sine qua non of any adjudicatory system, and an independent ITAT is critical for the efficient and effective delivery of justice to taxpayers.

#### **A. Limitations of Research**

This research is mostly based on interviews with lawyer and accountant practitioners, retired tax officers, former ITAT members, and retired judges. Other sources used included news articles, case law, and reports. As this article is based on a limited number of interviews, the details referred to from the interviews are not conclusive but only indicative. Furthermore, the interviews do not constitute a random sample and the interview sample is not representative of the population of tax practitioners, retired tax officers, former ITAT members, or retired judges.

#### **B. Further Research**

This article was written prior to the implementation of changes to both the eligibility criteria and tenure of ITAT members. We intend to undertake follow-up research to understand the challenges faced by the ITAT in recruiting new members subsequent to such changes. This follow-up research will also track developments with regard to faceless ITAT.

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## APPENDIX A

Interview with L1, a tax lawyer practitioner (April 2021).  
Interview with L2, a tax lawyer practitioner (April 2021).  
Interview with IM1, a retired ITAT adjudicator (April 2021).  
Interview with IM2, a retired ITAT adjudicator (April 2021).  
Interview with IT1, a retired ITD official (March 2021).  
Interview with SCJ, a former High Court judge and a retired Supreme Court judge (March 2021).  
Interview with HJ1, a former ITAT adjudicator and a retired High Court judge (March 2021).  
Interview with A1, a tax accountant practitioner (March 2021).  
Interview with A2, a tax accountant practitioner (March 2021).  
Interview with HJ2, a former ITAT adjudicator and a retired High Court judge (March 2021).  
Interview with IM3, a retired ITAT adjudicator (February 2021).  
Interview with A3, a tax accountant practitioner (February 2021).  
Interview with L3, a tax lawyer practitioner (February 2021).  
Interview with L4, a tax lawyer practitioner (February 2021).  
Interview with A4, a tax accountant practitioner (February 2021).  
Interview with IT2, a retired ITD official (January 2021).  
Interview with TP1, a tax practitioner (January 2021).  
Interview with L5, a tax lawyer practitioner (February 2021).  
Interview with TP2, a tax practitioner (February 2021).  
Interview with IT3, a retired ITD official (January 2021).  
Interview with IM4, a former ITAT adjudicator (January 2021).  
Interview with TP3, a tax practitioner (January 2021).  
Interview with A5, a tax accountant practitioner (January 2021).  
Interview with IM5, a former ITD official and a retired ITAT adjudicator (January 2021).  
Interview with A6, a tax accountant practitioner (January 2021).  
Interview with L6, a tax lawyer practitioner (January 2021).  
Interview with L7, a tax lawyer practitioner (January 2021).  
Interview with TP4, a tax practitioner (January 2021).  
Interview with A7, a tax accountant practitioner (January 2021).  
Interview with IT4, a retired ITD official (December 2020).  
Interview with IT5, a former ITD official and a retired CBDT member (December 2020).  
Interview with IM6, a former ITD official and a retired ITAT adjudicator (December 2020).  
Interview with IT6, a former ITD official and a retired CBDT member (December 2020).