Nishith Desai of Nishith Desai Associates initiated the debate on General Anti-Avoidance Rule [Hereinafter, “GAAR”] with a simple query as to why it was so called. He questioned the methodology followed behind framing the law. The lack of a specified mandate combined with the complete absence of garnering of opinion from professionals impacted by the law did not reflect the best practices from around the world that the Direct Tax Code [Hereinafter, “DTC”] sought to incorporate. He observed that the new law should attempt to rectify the manifold problems with the current legislation than incorporate the best practices. Having set the context, Mr. Desai proceeded to explain the often confused distinction between tax evasion, tax avoidance and able tax planning.

Quoting Justice Hand in Commissioner v. Newman¹, “Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury”, Mr. Desai explained that an individual within the framework of the existing law may arrange his financial affairs in such a manner so as to reduce his tax burden. Agreeing with Justice Chandrachud's opinion in Vodafone International Holdings BV v. Union of India², “Indian law recognizes that an assessee who engages in legitimate business activity and organizes business around accepted legal structures is entitled to plan his transactions in a manner that would reduce the incidence of tax”, Mr. Desai termed efficient tax planning of such nature as the right of an individual. He posited the role of tax firms as playing the role of advisors who help individual assesses in tax planning.

Subsequently, the concepts of tax evasion and tax avoidance came to the forefront. First, outlining the reasons behind checking tax evasion, he opined that revenue loss, horizontal inequity, distortions in resource, moral obligations and

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¹ Commissioner v. Newman, 159 F.2d 848 (2nd Cir., 1947), [Circuit Court of Appeals, 2nd Circuit].
² Vodafone International Holdings BV v. Union of India, Writ Petition No. 1325 of 2010 (8th September, 2010), [Bombay High Court].
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the necessity for preserving the rule of law and democratic processes form the basis for laws prohibiting tax evasion. In detailing the current approach to tax evasion, Mr. Desai relied on Craven v. White, MacNiven (H.M. Inspector of Taxes) v. Westmoreland Investments Ltd. to delineate the clear distinction that the judiciary has drawn between tax planning and tax evasion. He elucidated that working within the legal framework to curtail tax does not amount to tax evasion. The focus on tax avoidance began with the judicial doctrines used in order to implement anti-avoidance measures.

The various formulations of the judiciary in this regard include lifting the corporate veil, labeling incomplete or legally ineffective transactions and procedures as 'colorable devices', evolving the step transaction doctrine and laying down the 'economic substance' or the 'business purpose' test. Mr. Desai then explained the specific anti-avoidance measures reflected in Ss.92, 93, 94, 61 of the Income Tax Act which talk about transfer pricing, transfer of assets to a non-resident, bond washing and revocable transfers respectively. He then elaborated on approaches such as criteria for residence, adoption of the arm's length standard, beneficial ownership, limitation of benefits, and exchange of information and tax information exchange agreements which have been borrowed from international treaties.

Having outlined the framework for anti-avoidance measures, Mr. Desai proceeded to examine the rationale behind GAAR, the general anti-avoidance rule as evidenced from the direct tax code discussion paper; which is to curtail the increasingly sophisticated forms of tax avoidance being made possible due to tax avoidance agreements across multiple jurisdictions. While elucidating on the scope of the powers vested under GAAR, Mr. Desai said that any "impermissible avoidance agreement" shall give authorities multiple powers which include disregarding/combining/re-characterizing the whole or part of such an agreement, treating the arrangement as if it had never been carried out, disregarding any accommodation party or clubbing any accommodating party with the taxpayer, clubbing related parties, reallocating, amongst the parties to the impermissible avoidance arrangement, any accrual, receipt, expense, deduction, relief or rebate and finally re-characterizing debt into equity and vice-versa.

The key phrase which forms the basis for action under GAAR is "impermissible avoidance agreement". This phrase is defined to include any step or part of an arrangement whose main purpose is to obtain a tax benefit and which contains any of the following elements: creation of rights or obligations not normally created between persons dealing at arm's length, resulting directly/indirectly in misuse

3 Craven v. White, [1988] 3 All ER 495 [House of Lords].
4 MacNiven (H.M. Inspector of Taxes) v. Westmoreland Investments Ltd., [2001] 1 ALL ER 865 [House of Lords].
or abuse of the DTC, lacking commercial substance in whole or in part and finally, being entered into or carried out by means which are not normally employed for bona-fide purposes.

Mr. Desai highlighted multiple flaws with GAAR. The lack of certainty strikes at the very root of GAAR’s functional efficacy, especially given the inclusive definition of commercial substance. The judiciary’s interpretation of characterizing certainty as a basic principle of legal jurisprudence lends credence to Mr. Desai’s position. Furthermore, GAAR’s retrospective application to pre-DTC structures cannot be ruled out. Mr. Desai’s concerns included, the possibility of GAAR provisions overriding any tax treaty signed by India, the absence of high level scrutiny (evidenced from the fact that GAAR can be invoked by the Commissioner of Income Tax) and the onus of proof imposed on taxpayers and the scope for burdensome litigation due to the uncertainty in GAAR. A natural consequence of the aforementioned flaws leads to GAAR possibly violating constitutional or international law principles (The possible grounds of violation may include: being void for vagueness, incorporating excessive discretion and arbitrariness, being a stimulus for corruption and attempting excessive delegation of core legislative powers).

GAAR was then examined in light of similar provisions elsewhere. In Canada, GAAR cannot be invoked except by a reference to the GAAR Committee which is a technocratic, non-statutory and advisory committee consisting of representatives from the Canada Revenue Agency, Department of Finance and lawyers from the Department of Justice. Apart from this, the burden of showing that a particular transaction resulted in misuse/abuse is on the governmental authority. In the UK, the 1999 report of the Tax Law Review committee characterized GAAR as the representation of a balance of interests and the output of legislative simplification of common law jurisprudence on anti-avoidance.

The UK model places undue emphasis on the non-statutory guidance by the Inland Revenue and does away with the additional burden on tax authorities to apply GAAR only in the situation where other provisions do not apply. The committee specifically mentions that a re-characterization of transactions under GAAR should take into account consequences such as double taxation, third party rights and enduring consequences of transactions subject to GAAR. In 2010, UK initiated a study on the effectiveness of GAAR in terms of whether it would be an effective tool for the government to deter and counter tax avoidance. The study also looked into GAAR’s effect on the business climate in UK and the level of certainty about the tax treatment of transactions without undue compliance costs.
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for businesses and individuals. The US codified the Doctrine of Economic Substance in the US Internal Revenue Code wherein party autonomy to choose between meaningful economic alternatives is largely or entirely based on comparative tax advantages.

According to Mr. Desai, neither the DTC nor the discussion paper contain any provisions which consider the rights of the taxpayer including enforcement of tax laws in a fair, equitable and non-arbitrary manner, non-retroactive imposition of taxes, certainty and stability in tax laws, guarantee against double taxation, good faith interpretation and enforcement of tax treaty provisions and efficient redressal of tax disputes within a reasonable time frame. Mr. Desai concluded by opining that the incorporation of the rights of the taxpayer is key to the success of the DTC.

After Mr. Desai, Mr. Sunil Jain, partner, J. Sagar Associates, commenced his presentation by stating that Mr. Desai's clear analysis precluded other speakers from saying much. Mr. Jain began with an analysis of the legislative background and necessity for the DTC. Subsequently, Mr. Jain highlighted certain key aspects of the DTC. For purposes of taxation, while the present legislation took into account control and management of affairs situated wholly in India, the DTC introduced the concept of "place of effective management of the company". The place of effective management has been defined as the place where the board of directors of a company makes their decisions or in a case where the board of directors routinely approves the commercial and strategic decisions made by the executive directors or officers, the place where such a function is performed.

The impact of such an introduction is that the residency of non-corporate entities continues to be based on "control and management" test and the wide import of the expression "routinely"/ "commercial and strategic decisions" leads to multiple places of effective management both in India and abroad. While provisions of the current income tax act prevail over tax treaties to the extent that they are beneficial to the taxpayer, the DTC provides a very limited treaty override as a tax treaty is not to have preferential status where the GAAR or the controlled financial corporation's [Hereinafter, "CFC"] provisions are invoked and when branch profits tax is levied.

Consequently, Mr. Jain began a comparative analysis of the tax rates. With respect to taxation of corporate income, the introduction of the branch profit tax reduces the effective tax rate for a company from 42.04% to 40.5%. The DTC introduces a uniform rate of 20% for interest, royalty, fee for technical services and dividend on which the dividend distribution tax (DDT) is not paid; and a rate of
15% for DDT. There is no specified code for the taxation of foreign institutional investors and it is governed by the normal tax provisions applicable to foreign companies. Under the DTC, the income of FIIs from transfer of securities will be capital gains and not business income, apart from which there will be no withholding tax applicable on capital gains. Also, the FIIs shall continue to pay advance tax on capital gains. While the reinstatement of concessions on capital gains tax on listed equity shares is a relief, the treatment of capital gains to impact FIIs based out of jurisdiction, where the treaty does not provide for a capital gains exemption might prove to be a problem.

The introduction of provisions with regard to CFCs as an anti-avoidance measure is important. CFC provisions apply to ‘passive income’ earned but not distributed by a foreign company ‘controlled directly or indirectly’ by a resident of India. Such an income will be considered as deemed distribution and shall be taxable in the hands of resident shareholders as dividends. These CFC provisions impact outbound investment structures and provide relief from double taxation when passive income is actually distributed. Mr. Jain elucidated on the rationale behind the introduction of the CFC which is to limit the possibility of deferring tax in home country by receiving certain passive income in an entity set-up in a low tax jurisdiction. Thus, the CFC’s role is to prevent loss of revenue and achieve neutrality between overseas and domestic investment.

With respect to transfer pricing, the DTC is introducing the Advanced Pricing Agreement [Hereinafter, “APA”], which is an agreement between the taxpayer and the tax authorities for an upfront determination of the pricing methodology with respect to an international transaction. An important change in income tax provisions post the 2011 budget is that both SEZ developers and SEZ units will now have the Minimum Alternate Tax [Hereinafter, “MAT”] applicable to them. Under the DTC, the profit linked deduction extended to existing SEZ units for the unexpired period of the tax holiday. The threshold for levying wealth tax under the DTC has been increased from INR 3 million, as under the Income Tax Act to INR 10 million. It shall apply to all tax payers except non-profit organization and the tax rate is 1% of the net wealth in excess of INR 10 million. The DTC introduces multiple changes to transfer of assets by non-residents. So far, the income has been deemed to accrue or arise, directly or indirectly, in India from the transfer of a capital asset situated in India but the DTC includes income from the transfer, outside India, of shares or interest in a foreign company where the fair market value (FMV) of assets in India represent at least 50% of the FMV of all assets owned by the company. Having thoroughly covered the DTC provisions, Mr. Jain concluded his presentation.
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Mr. Ravishankar Raghavan, Principal-Tax Group, Majumdar & Co sought to reiterate what had been covered in the symposium by the preceding speakers. After a brief coverage of the legislative history of the DTC, he underscored that his primary problem with the DTC was that of its uncertainty. Mr. Raghavan sought to focus on what “tax benefit” meant, as one of the grounds for invoking GAAR is entering into an agreement, the main purpose of which is to gain a tax benefit. He interpreted a tax benefit to mean either of the following: (i) a reduction, avoidance or deferral of tax or other amount payable under the code, (ii) an increase in the refund of tax or other amounts under the code, (iii) a reduction, avoidance or deferral of tax or other amount payable under the code but for a tax treaty, (iv) an increase in a refund of tax or other amount as a result of tax treaty or a reduction in the tax base. Thus, this inclusive definition of a tax benefits allows for possible abuse of the GAAR.

Another concern outlined by Mr. Raghavan pertained to the presumption of tax avoidance. Herein, the presumption that an arrangement has been made for the purpose of gaining a tax benefit unless the assessee can show otherwise extends to where even a step in or part of the arrangement is to get a tax benefit. This is notwithstanding the fact that the main purpose of the transaction is business related.

Mr. Raghavan linked back the safeguards against the misuse of GAAR which include approaching the dispute resolution panel against the application of GAAR and awaiting the prescription of guidelines by the tax authorities as to the application of GAAR to the three broad concepts within the framework of which, the GAAR can be understood; Tax Evasion, Tax Avoidance and Tax Planning. Since Mr. Desai had covered all of these concepts in depth, Mr. Raghavan opined that a further elucidation on these concepts may not be necessary. Further, he said that GAAR should not become a revenue raising measure nor should it be considered to be a charging section because it is meant to protect the tax base and not expand the tax base. While this may seem radically opposed to the objectives of GAAR, Mr. Raghavan’s statement indicated that while the aforementioned may be the consequences of GAAR, they should not be the reason behind the operation of GAAR. He included efficient and effective application, clarity in interpretation and providing conducive atmosphere to commercial activity as the reasons which could make GAAR, a success.

Mr. Raghavan then took an international perspective. He compared the formulation of GAAR in India with that of GAAR in Australia. In Australia, there exist three requirements for invoking GAAR. While the existence of a scheme
which should necessarily give rise to a tax benefit is present, the redeeming factor is that the scheme must have been entered into for the sole purpose of gaining a tax benefit. All the factors of determining a tax benefit are based on objective tests unlike the Indian scenario where there exists immense scope for uncertainty. Mr. Raghavan then detailed the American approach, which is based on the development of common law doctrines such as assignment of income, sham transactions, economic substance doctrine, business purpose and substance over form and the mini-GAAR provisions in the US tax code which contains targeted anti-avoidance legislative fixes.

Mr. Raghavan then proposed alternatives to the GAAR. First, the need to introduce GAAR does not exist as the DTC has done away with profit linked incentives, reduced tax rates and treated profits from business capital assets at par with business income. Secondly, a consultative committee should be appointed to explore the possibility of bringing in Specific Anti-Avoidance Rules (SAAR) instead of GAAR. Having stated these possibilities, Mr. Raghavan left the delegates with the question of whether or not there was an overwhelming need for GAAR.

Mr. Swaminathan K, Direct Tax-Head, Laxmi Kumaran and Shridharan clarified at the outset that though he agreed with the previous speakers, he would play the role of a devil’s advocate by supporting the introduction of GAAR. He argued that the GAAR should be characterized as an addition to the existing legal framework since there is no non obstante clause present. While addressing the concerns related to uncertainty, Mr. Swaminathan opined that the main purpose behind a particular arrangement needs to be avoidance in order to invoke GAAR. He emphasized the need for such an inclusion as the present framework has enough loopholes for avoiding tax by restructuring income whereas the GAAR shall invalidate any structure irrespective of its legal validity if the purpose behind entering into such an arrangement is to avoid the payment of tax. Herein, he sought to distinguish between legal substance and legal form by saying that the validity of the latter should not automatically lead to a presumption as of the validity of the former. Having made a succinct presentation in favor of GAAR, Mr. Swaminathan ensured that the delegates were subject to reasoning both for and against GAAR.

Mr. Mihir Naniwadekar, Advocate, Bombay High Court moderated the second session of the NLSIR symposium. He set the context of the discussion on taxation of e-commerce by identifying two primary issues of focus. First, to address the question of which country has the right to tax and secondly, the characterization of the tax imposed. With regard to the characterization of the tax, the requirement
of physical presence as an essential requirement of taxation and the importance of specific transactions within e-commerce was emphasized.

Mr. Padam Khincha, CA, Bangalore took over from Mr. Naniwadekar to look at the specific issues troubling taxation of software. He identified time-frame, place and activity as attributes necessary for taxation and mused that taxation which used to be based on physical presence and delivery has undergone a paradigm shift in light of improved communication technology which led to physical delivery but no physical presence of an individual. He then discussed software, a category in which where there is absence of physical meeting and physical delivery, thus making the determination of underlying economic activity difficult.

Mr. Khincha emphasized that establishing territorial nexus is important for the source based system of taxation. Territorial basis is determined by the place of economic activity. Further, he questioned whether a particular country has a right to tax if there is no physical presence of the taxable entity in that country. This is especially pertinent given the concern expressed by numerous countries about shrinking tax bases if they were not allowed to tax on the basis that there was no physical presence of the entity. Mr. Khincha identified incorporation and the place of effective management/place of control as the two factors determining taxability. Then, he narrated how the determination of place of control or management has become extremely difficult in the digital age where decision making may be made through video conferencing.

Giving the example of selling a book (business income) as against selling software and comparing it to whether it would continue to remain business income or would turn into royalty income in the latter case, Mr. Khincha stressed upon the importance of characterizing tax. Characterization of income should also address multiple dilemmas, for instance, whether interaction with a machine would constitute business income or service income.

Mr. Khincha said that S.9 of the Income Tax Act which determines income that can be deemed to be taxed in India can be interpreted to include artificial person, artificial locale, artificial time and even an artificial shift of jurisdiction. The AAR ruling in Dassault Systems\(^5\) contributed immensely to the depth of discussion on S.9. Mr. Khincha emphasized on the importance of S.9(1)(6) of the Income Tax Act which defines royalty. Sub- clause 5 which talks about knowhow, patents, processes, franchises and similar property is extremely important in this context. The phrase 'similar property' is expansive in nature and can be interpreted widely.

\(^5\) In re, 322 ITR 125, [Authority for Advance Ruling].
Since software is generally dealt in relation with copyright law, S.14 which amplifies the distinction between business income and royalty income is significant.

Mr. Khincha then focused on the distinction between the rights in a copyright and the rights in respect of a copyright. He clarified that an agreement to use a particular copyright for a consideration is different from devolution of rights contained in the copyright. An agreement to use a copyright does not affect the rights of the owner of the copyright under A.14 in any manner. It is only when the exclusivity attached to the article not only under A.14 but also S.52 and S.54 of the copyright is transferred to a licensee that the rights in a copyright can be said to be transferred.

Finally, Mr. Khincha raised the issue of associated tax problems which arise while determining assistance in the functioning of the software. A high powered committee rejected some of the 28 recommendations made by the OECD as unsuited to the Indian context. One should link this to the issue of copyrights (because if a person divests himself of all the ownership rights concerned in a copyright, it can be classified as capital gains Tax under S.9 of the ITA). To conclude, the nature, type and extent of the rights under S.14 lead to a characterization as business, royalty or capital gains tax.

Mr. S. Ananthanarayanan of Deloitte Haskins and Sells, the next speaker at the symposium, then sought to focus on indirect taxation of software. At the outset, he defined information technology software as a representation of instructions data sound or image including source code and object code recorded in a machine readable form and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine. He included branded/canned/packaged/off-the-shelf software as well as unbranded/customized software as taxable forms of software. Further, Mr. Ananthanarayanan sought to provide a background for understanding taxation of software by informing the delegates about software operations. To this effect, he elucidated that irrespective of whether software is a system operating software or application software, the sale, re-sale and transfer of the right to use software is subject to copyright regulations. Applicable regulations are dependent on whether the software is upgraded, licensed annually or given on a perpetual license. He listed the modes of sale/delivery as tangible media, electronic transfer/download or machine loaded. That software would be subject to applicable VAT/sales tax was clarified by the Supreme Court in *Tata Consultancy Services v. State of Andhra Pradesh*6. The judiciary has clarified that

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6 Tata Consultancy Services v. State of Andhra Pradesh, AIR 2005 SC 371 [Supreme Court of India].
whether software is customized or packaged/branded; it comes under the category of goods for the purpose of taxation.

IT Software Services [Hereinafter, "ITSS"] have been subject to service tax from 16th May, 2008. With the constitutional validity of ITSS being upheld, ITSS covers within its ambit development of software, upgradation, implementation and other related consultancy services. With regard to the indirect tax implications on import of customized software, Mr. Ananthanarayanan clarified that there would be no customs duty on import of customized software. Also, there would be no countervailing duty on customized software whether imported in physical medium like CD or downloaded through the web. However, countervailing duty would apply on import of branded or packaged software. Customs duty is not applicable to documents of title conveying the right to use information technology software. Even countervailing duty is not applicable on the import of such a title called paper license. Mr. Ananthanarayanan sought to illustrate the implications of indirect taxation on different options which can be chosen by individuals for the usage of software. Customs duty on software, customs duty on license and the value of license to be loaded on the value of the software are the particulars which will be affected by the choice of an individual (depending on the mode of procuring the software).

Mr. Ananthanarayanan then sought to highlight the key developments from 2010 which included Notification No. 30/2010-CE providing for MRP based assessment and Notification No. 53/2010-ST providing for conditional exemption for packaged and canned software. In 2011, the government vide Notification No's 14/2011 and 25/2010 detailed that in case of packaged or canned software on which MRP is not required, the excise duty/countervailing duty will be charged only on the value of the medium i.e. excluding the value representing consideration towards transfer of right to use the software as the same would be subject to service tax. To conclude, Mr. Ananthanarayanan proceeded to examine the customs and service tax implications of a case study which involved an MNC providing downloadable gaming software via internet to gaming companies situated in India. With regard to customs tax, the electronic transfer of digital content via internet is not liable for customs duty and with regard to service tax, sub-clause (vi) of S.65(105)(zzzze), Income Tax Act is attracted as it provides for taxing the right to use information technology software supplied electronically.

Ms. Shreya Rao, Associate, Nishith Desai Associates then proceeded to examine the jurisdictional issue with regard to indirect taxation of software. Ms. Rao opined that the factum of the internet changing the way business is conducted
cannot be ignored. Rules regarding the source of income applied to individuals who are non-resident while determining the sovereign right of taxation. The principle of permanent establishment arose in Germany where interprovincial trade led to disputes between the rulers as to each other’s right to tax, thus, requiring a fixed place of business from where sales can be conducted all across. The most popular approach with regard to taxation with the advent of information technology seems to be tweaking the rules of permanent establishment to look at whether or not a server or website can be deemed to be a permanent establishment. With the advent of cloud computing, the concept of permanent establishment changed entirely.

Ms. Rao then provided the background behind economic allegiance and nexus in taxation. The need for fostering international trade which was hampered by taxation by individual countries on an independent basis was the necessity behind international taxation principles. When questioned about how the limited control of the government on the internet might not allow for regulation, she gave of the example of the EU wherein internet sales over a threshold are to be compulsorily registered to show that structured governmental control can exist. This threshold is a cross country threshold. Rejecting a delegate’s suggestion for international tax organizations, Ms. Rao opined that it would be difficult because of fiscal considerations as tax treaties are mainly bilateral and a worldwide fiscal consensus is difficult to achieve.

Ms. Rao clarified that internet removes audit trial and third party validation of the government. Thus, the origin of money circulating on the internet cannot be determined. The Government is concerned with this as an audit trial for all these multiple transactions cannot be done for the net cash transactions. Ms. Rao concluded her session by linking up her analysis on the difficulty of determining taxable entities given the role of the internet to Mr. Khincha’s exposition on copyrights.

Mr. Naveen Kumar, Advocate, Karnataka High Court assumed the role of the moderator for the third session of the symposium. He began by stating that assesses are perfectly willing to pay tax provided there exists ease and certainty in their payment. Mr. Kumar requested the speakers to look into different aspects of the GST based on different committee reports.

Mr. Ananth Padmanabhan, Advocate, Madras High Court sought to examine the constitutional perspective and GST’s effect on inter-state relations. Basically, he argued that the provisions in A.13 put restrictions on taxation by the Government and that entry tax and GST have to be examined in light of the judicially incorporated restrictions on A.301 to A.304 of the Indian Constitution. He laid
emphasis on the interpretation of "scope of restrictions" which can be imposed by
the government as envisaged under A.302 and opined that any preference cannot
be granted by the government under the ambit of A.303.

Mr. Padmanabhan then sought to detail significant constitutional interventions
with respect to taxation. He used the example of Atiabari Tea Co. Ltd. v. State of
Assam7 where the contention that tax laws could never be violative of Part XIII of
the Constitution of India was rejected as A.304 (a) and A.301 were subject only
to that part of the Constitution and not the remaining part of the Constitution.
Furthermore, A.303 (1) cannot be used to restrict the operation of A.301. The
Supreme Court clarified that Part XIII guarantees both intra- and inter-State trade
and commerce. Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan8 refined
the principles laid down in Atiabari when it held that regulatory taxes which do
not really affect the freedom of trade and commerce but on the contrary, facilitate
the free flow of trade and commerce, are permissible.

Mr. Padmanabhan raised the issue of compensatory taxes. Quoting from
Automobile Transport, he said that,

"While compensatory taxes are no hindrance to anybody's freedom so long
as they remain reasonable; they could be converted into a hindrance to
the freedom of trade. If the authorities concerned really wanted to hamper
anybody's trade, they could easily raise the amount of tax or toll to an amount
which would be prohibitive or deterrent or create other impediments which
instead of facilitating trade and commerce would hamper them".

Mr. Padmanabhan said that various formulae have been used levy entry tax.
In some cases, no entry tax is levied if the goods are subject to sales tax within
the local area, thus making it a countervailing levy. The entire State is normally
designated into different local areas for the purpose of entry tax. This has to
be read in context with the 115th Amendment Bill wherein an amendment was
proposed to Entry 52 of the State List in the 7th Schedule of the Constitution to
enable panchayats to collect entry tax. Further, despite the 115th Amendment Bill,
Entry 52 read with A.246 is subject to A.301 of the Constitution.

7 Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232 [Supreme Court of India].
[Hereinafter, "Atiabari"]
8 Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, AIR 1958 Raj 114 [Rajasthan
High Court]. [Hereinafter, "Automobile Transport"]
Jindal Stainless Ltd. v. State of Haryana\(^9\) summed up the developments with regard to compensatory taxes. Mr. Padmanabhan clarified that while the pre-1995 decisions held that an exaction to reimburse/recompense the State the cost of an existing facility made available to the traders or the cost of a specific facility planned to be provided to the traders is compensatory tax and that it is implicit in such a levy that it must, more or less, be commensurate with the cost of the service or facility, the post-1995 decisions now say that even if the purpose of imposition of the tax is not merely to confer a special advantage on the traders but to benefit the public in general including the traders, that levy can still be considered to be compensatory. According to this view, an indirect or incidental benefit to traders by reason of stepping up the developmental activities in various local areas of the State can be brought within the concept of compensatory tax, the nexus between the tax known as compensatory tax and the trading facilities not necessarily being either direct or specific. To conclude, Mr. Padmanabhan stated that the compensatory taxes take within their fold, the principle of equivalence and they are based in paying for the value obtained.

Mr. K. Vaitheeswaran, Advocate, Madras High Court began by stating that the shared taxation powers between the centre and the state making the functionality of Goods and Services Tax [Hereinafter, “GST”] unique. Apart from banking, financial transactions and healthcare, GST covers everything with respect to taxable entities. GST is a simple system of single levy which originated in France and is now adopted by more than 140 countries. GST is difficult to adopt in the Indian scenario where a fragmented system of taxation with multiple levels of taxation at different levels exists apart from which we have a cascading system of taxation with a disconnect in the credit system.

Mr. Vaitheeswaran said that while the central sales tax will be subsumed within the GST, certain municipal levies including octroi are to be removed from the purview of GST. He took the example of how GST functioned in Canada wherein entire overall tax was collected by the centre and then redistributed. In India, there is going to be a dual GST under which all goods and services will have a dual levy by the state and by the centre. While there would be an Integrated GST [Hereinafter, “IGST”] for interstate transactions, there would be a separate central GST [Hereinafter, “CGST”] and State GST [Hereinafter, “SGST”] at the local level. Further, as there would be parallel credit mechanisms in place due to the levy of tax both by the centre and the state, the IGST cannot be used to set-off credits against the CGST or the SGST. After the creation of an empowered committee

\(^9\) Jindal Stainless Ltd. v. State of Haryana, AIR 2006 SC 2550 [Supreme Court of India].
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in 2009, a task force was mandated to detail the procedure for bringing GST into existence as a law. Significant developments with regard to IT infrastructure are being undertaken by the Government to administer the GST electronically. The 115th Amendment Bill should be read in the context of a shift from sale based levy to a supply based levy.

Mr. Vaitheeswaran detailed that no state shall have the power to levy GST for Interstate Trade. Thus said, certain products of the GST levy will continue to attract VAT and CENVAT. He argued that an individual cannot go to the proposed GST Dispute Settlement Authority and that a GST council is sought to be established which shall ensure that there is no disparity in taxation across all states despite different state-specific GST tax levels. Mr. Vaitheeswaran also addressed the issue of the point of levy for taxes. While there might not be any issues with respect to goods, a structured framework is necessary for services which are intangible in nature. Mr. Vaitheeswaran opined that the introduction of GST will reduce exemptions as area based exemptions will take the form of refunds or will have to be scrapped as there cannot be a break in the credit chain in terms of levying GST. To conclude, Mr. Vaitheeswaran stated that while uniformity is essential to ensure compliance, the interface for resolving has not been decided.

Ms. Jayashree Parthasarathy, Associate, BMR Advisors stated that she was a votary of tax reforms especially since what is stated in tax policy has come out to be vastly different in practice. From the introduction of MODVAT by V.P. Singh in 1986, Service Tax in 1994 to P. Chidambaram’s introduction of VAT in 2005, the legislative framework read very differently from the law as interpreted by the legislators. GST is supported by the states as they get to tax services for the first time. Ms. Parthasarathy stated that credit should be understood as a part and parcel of GST in terms of implementation. Then, she proceeded to identify the issues of concern with GST. She said that a warehouse may have to be created for stock transfers if the person to whom goods are supplied requires them on a just-in-time basis. Then, she questioned the supposed ease in determining whether the applicable tax would be IGST or CGST and SGST.

Ms. Parthasarathy questioned the rationale behind excluding petroleum products and services from the GST. With regard to services in GST, she said that a negative list should be created. Further, if every state seeks to tax services, compliance would be required in multiple states though operations are minor in each state. To conclude, Ms. Parthasarathy advocated higher penalties and a structured software platform in order to ensure the success of the GST.
Mr. Swaminathan K, Direct Tax-Head, Laxmi Kumaran and Shridharan, the moderator for the final session of the symposium set the theme for discussion as analyzing the changes happening in the area of tax laws.

Justice Jayasimha Babu, Former Judge, High Courts of Karnataka & Madras began by saying that Nani Palkhivala, who was the foremost tax lawyer in the country, called the Income Tax Act a disgrace because of the amendments that took place and the incomprehensible nature of the Act. Further, Justice Babu highlighted the importance of speedy remedy for taxation issues as it constituted the base for governmental revenue whereas this aim is being negated by the Income Tax act which led to litigation.

Justice Babu termed the DTC as an attempt to revise the old and rather antiquated law. Having given the legislative background of the DTC, Justice Babu talked about the specific issues of avoidance and evasion and the provisions in the DTC which are intended to deal with these. The intricacies of this discussion were covered by Mr. Desai in the first session of the symposium. Justice Babu added to Mr. Desai's inputs by stating that the courts have rejected arrangements made with the specific intent to avoid tax even before the advent of the DTC by ruling that all that is not prohibited by law is not something permissible.

He called for a continuous examination of government policy as government policy should not be excessive in scope but aim at increasing the tax base within the exercise of legislative competence. Justice Babu called for more holistic changes to the implementation of taxation provisions because the execution of statutory mandate seems to very different from the statutory mandate, a concern flagged by Ms. Parthasarathy. While addressing the issue of a challenge of constitutional validity to the DTC, Justice Babu said that the while the assumption that it is constitutional will remain, the kind of issues and the debate that results in the court will be determinate in figuring out the future of the DTC.

Mr. Aseem Chawla, Partner, Amarchand & Mangaldas & Suresh A. Shroff & Co started his presentation by outlining the motives behind a new statutory formulation dealing with taxation. He opined that fair play and public trust are crucial ingredients in order to provide certainty to taxation and that the objective of taxation statutes should be to ensure a framework of fair and reasonable rates of taxation. Mr. Chawla argued that the enactment of the DTC may not prove to be a step in the right direction if India aspires to transform itself into an investment hub. He said that the new tax policy choices will bring about a change in the economy but that change will also be accompanied by new techniques of avoidance within the letter of the law. Mr. Chawla sought to focus on the inter-disciplinary nature of
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taxation and how such a multi dimensional focus should exist while drafting new
taxation provisions. He predicted that the job of the accountant and the lawyer
is going to be much tougher as the interplay between the new accounting system
and the new laws is not clear.

Mr. Rupesh Jain, Partner, Vaish Associates Advocates said that the aim of the
new code is to provide a change in the existing structure to meet the needs of the
fast moving economy that India has become. The capacity of the DTC to achieve
these objectives determines its success. He argued that the objective of reducing
litigation is not going to be achieved by the DTC on account of its language and
that the DTC does not address issues of trust and accountability, a problem that
existed with the old law.

Mr. Chawla supported Mr. Jain’s observation that the language of the law
is bound to cause trouble. Mr. Swaminathan opined that the drafting seemed to
proceed with a single minded objective of expanding the revenue of the state to the
expense of excluding other requisite objectives. Mr. Subramanian Krishnamani of
Deloitte Haskins and Sells explained the rationale behind the introduction of the
place of effective management test. Herein, he pointed out that the residency test
will lead to a person being liable to tax on worldwide income if he is an Indian
resident. The introduction of the place of effective management test can lead to
an entity becoming an Indian resident at any time of the year and thus, be liable
to full taxation.

Mr. Jain opined that a lot of detail needs to be added to the existing provisions
in order to effectively increase the tax base. Furthermore, Mr. Swaminathan said
that the expansion of the tax base is a consequence of expanding the ambit of
definitions and covering grey areas which have been used as loopholes to avoid
the payment of tax. Mr. Jain gave an instance of how one can be liable for branch
profit tax if they were to render service for more than 90 days (As they would be
considered to be a branch) as an example of the language of the law being possibly
misused (due to lack of certainty) by the authorities.

The panel then considered the issue of adopting tax treaties which might
be inconsistent with the way domestic law operates due to the manner in which
the definitions are interpreted. Justice Babu and Mr. Chawla opined that the
adoption of treaties is subject to the sovereign law of the parliament. Finally, the
panel discussed the issue of grievance redressal mechanisms and unanimously
concluded that the present mechanism needs to be revamped suitably to provide
for speedy disposal of taxation matters.