For Private Circulation - Educational Purposes Only

(SE-16)

NATIONAL JUDICIAL ACADEMY

E-LECTURE SERIES FOR OFFICERS POSTED AT AR OFFICES OF CESTAT AND FIELD OFFICERS OF CBIC

14.10.2022; 21.10.2022; 04.11.2022; 18.11.2022; 09.12.2022; 16.12.2022; 23.12.2022 and 30.12.2022

Dr. Amit Mehrotra & Ms. Jaya Rishi

Faculty, National Judicial Academy

National Judicial Academy organized eight "e-lecture series for officers posted at AR offices of CESTAT and Field Officers of CBIC." The programme focused to educate the department officers operational in the field and undertaking the implementation of law including quasi-judicial functions while discharging their duty within the precincts of the law. The programme emphasized equipping the officers posted in AR offices, assisting the CESTAT in addition to enhancing the quality of representation by Revenue. The program aims to refine the taxation proceedings by weeding out unnecessary litigation. The e-lecture series involved discussions on issues including Constitution and Taxation; Endemic Pathologies in Assessment Proceedings; Evidence in Taxation Proceedings including electronic evidence; and Judicial Ethics, Judging Skills and Objectivity in Decision Making.

The programme upgraded the understanding of the law and legal concepts on the law of precedents and Stare decisis. The programme provided a platform to enable participants to understand legal issues and interpretation of taxing statutes comprising both external and internal tools of interpretation.

The theme for session 1 was **Constitutional Authority to Tax.** The drawing of contrast between a highway robber and a tax collector as that of legitimate authority to collect which only the latter enjoys under Article 265 marked the commencement of the session which was also the first one in the series of 8 e-lectures for the officers posted at AR Offices and Field Officers of CBIC. It was averred that containing socio-economic inequalities and not merely harvesting tax should be the intent behind any levy. The canons of a good taxation policy can be noted as (i) Equality in taxation under Article 14 whereby tax should be applicable to like persons along with equitable distribution of the burden of tax flowing from the ability of the taxpayer; (ii) Progressive taxation regime to reduce economic inequalities. (iii) Tax administration should run on economic lines and not exorbitant or disproportionate to taxpayers; (iv) Certainty in the administration of tax obtained through simplicity and clarity of language of the tax statute; (v) Tax collection should be hassle-free and the policy must incentivize the production *vis-á-vis* businesses in the light of the *golden egg principle*.

The novel concept of pooled sovereignty under the GST Regime was explained in detail to the participants. India being a federal set up, both the center and states work as federal partners in a constitutional framework clearly assigning and demarcating each one's role and functions alongside laying down their limitations. Tracing the roots from the Raja Chelliah Committee on Tax Reforms, the speaker informed that the term has been coined by the late finance minister of India Shri Arun Jaitley and stands today, as imbibed under Article 279 E of the Constitution. It stands for a scheme through which an obligation has been cast upon both partners that the same transaction will be considered as a taxable event for both where each would apply the same tax rates and share the proceeds equally in two halves.

The speaker opined that in any democracy there must be a cross-tension wherein the federal units are interdependent upon each other as also enshrined under Article 279A which brings about the characteristics of inter plugged unity and unanimity. Through a pooled sovereignty each unit retains its own sovereign powers whilst willing to share it in a common pool.

The speaker flagged two fundamental and landmark judgments of the apex court in *Union of India & Ors. v. VKC Footsteps India Pvt. Ltd* 2021 SCC Online SC 706 which upheld the constitutional validity of Rule 89(5) of the CGST Rules and that refund is not available in respect of credit on input services and *Union Of India v. M/s Mohit Minerals,* 2022 SCC OnLine SC 657 which held that the recommendations of the GST Council are not binding on the Union and States as the two judgments which must be read by all the tax authorities.

The session concluded with the speakers opining that the purpose of taxation is the unimpaired sustenance of government to continue to undertake welfare measures. Additionally, the limitation on taxation should be expressed and unless absent the doctrine of silence cannot be applied. A caveat that merely because taxation authorities have a pan-India jurisdictional power, the same assesse should not be attacked by different jurisdictions was also reiterated to the participants in the end.

The theme for session 2 was **Principles of Natural Justice: Applicability in Quasi-Judicial Proceedings.** Accentuating upon the dictum laid down by Lord Denning "justice is not temporal but eternal. It is what the right-minded members of the community—those who have the right spirit

within them—believe to be fair." the session commenced with underscoring the imperativeness and indispensability of principles of natural justice in any procedure seeking justice.

Firstly, it was discussed that in the light of '*Audi Alteram Partem*', the Right to Personal Hearing is one of the manifestations of the Principles of Natural Justice and is not an end in itself. An effective personal hearing is a fair procedural law and shouldn't be merely reduced to a formality. Hearing and adjudication must be rendered by and to the same authority and not multiple ones despite any two authorities sharing identical ranks or proximity of their nature of work, which amounts to a violation of the Principles of Natural Justice.

Furthermore, it was also deliberated upon that a show cause notice that comes with an attendant conclusion of the receiver's guilt and adjudication based on such a presumption is a violation of the Principles of Natural Justice as it renders the reply to a show cause or the hearing a mere exercise in futility. Additionally, the semblance of a show cause notice to a body of order is counterproductive for sustaining the show cause as it leads to the discovery of loopholes by the counsels of the parties and derailing the entire procedure as referenced in *Oryx Fisheries (P) Ltd. v. Union of India*, (2010 13 SCC 427). Time given to an assesse to respond to a show cause notice should practically be sufficient to enable him to respond. It should not be an impossibility in terms of both lacks of timeline and perspicuity.

An opportunity to rebut and cross-examine evidence is mandatory, and any denial of the same is tantamount to a violation of the Principles of Natural Justice. Furthermore, in the light of *Nabha Power Ltd. v. Punjab SPCL*, (2018) 11 SCC 508 it was also mooted that determining tax is a mixed question of both fact and law. The discussions also entailed the duty of an adjudicator not to presume any judicial discretion upon himself whilst discharging their judicial or quasi-judicial functions in upholding 'rule of law' unless the views expressed in the matter are competing, equally sound, and not ambivalent.

Lastly, it was underlined that an assessment proceeding is for the determination of liability and not an opportunity to harvest tax. In compliance with principles of natural justice, the eyes have to be in tune with what is proper determination to a particular issue. The crown or the finishing touch of process is

the fairness an adjudicating authority brings to tax determination. Similarly, a reasoned order is a sine qua non to exclusion of arbitrariness. Such an order need not be verbose but should be based only on the material put on record and should be averse to material not available on record as it renders the decision perverse and against the Wednesbury Principle.

The theme for session 3 was ***Effective Appreciation of Evidence: Onus and Burden of Proof.*** The session commenced highlighting the judgment *Bareilly Electricity Supply Co. Ltd. v. Workmen*, (1971) 2 SCC 617 in which it was observed by the Apex court that Tribunals are not supposed to strictly comply with the principles of the Indian Evidence Act, 1872 (IEA) as it does not apply to the proceedings. In the quasi-judicial authority or tribunals, the application of the principles of natural justice does not mean that what is not evidence should also be acted/accepted. With reference to the appreciation of Evidence, the word *appreciation* and *evidence* was explained. It was iterated that the word appreciation means assessment, valuation, nature, magnitude, quality, or, credibility. The word evidence is defined under Section 3 of the IEA as oral and documentary evidence. It was stated that the documentary evidence includes the electronic report also. Appreciation of evidence requires basically three things, *viz.* Facts of the case, law points related to the case, and the points for determination. For the appreciation of evidence, the marshaling of facts is necessary. The appreciation should be systematically done in a scientific and methodical manner. The various criteria for appreciating the evidence were deliberated upon. It was stated that as per Section 134 of the IEA, no particular number of witnesses is required to prove a particular fact. It is the quality of the witness and not the quantity that matters.

It was iterated that each and every time corroboration is not required. Where to seek corroboration and where not by the court was discussed in the light of the judgment of *Baldeo Singh v. State of Bihar*, 1957 SCR 995. It was stated that if the witness is wholly reliable then there is no need for corroboration, if it is wholly unreliable then the evidence should be rejected, but if it is partially reliable and partially unreliable it needs corroboration. The IEA does not put any distinction on the classification of witnesses that include interested witnesses, official witnesses, and police witnesses. Section 118 of the Indian Evidence Act enumerates the competence of the witness on two criteria that

include understanding the questions put to him and giving rational answers to the questions. The court should not out rightly reject the evidence as a whole. The maxim *falsus in uno falsus in omnibus* should not be applied and while appreciating evidence it is the duty of the court to separate the grain from the chaff.

The evidence of the dying declaration and its admissibility was discussed. The word *affidavit* was explained. With regard to the documentary evidence, it was stated that a document may be admissible but it is not necessary that the contents thereof have to be proved in order to make it admissible. The concept of primary and secondary evidence was deliberated upon.

The IEA applies to both civil and criminal proceedings. It was stated that admission is a substantive and best piece of evidence. It was iterated that the standard of proof in a criminal case is beyond reasonable doubt while in civil cases it is the preponderance of probabilities. It was stressed that the appreciation of evidence should be done with a judicious mind. The importance ad credibility of the expert evidence was discussed.

The onus and burden of proof were deliberated upon. It was stated that the burden of proof lies on the person who asserts the existence of a fact. The judgment of *Kundan Lal Rallaram v. Custodian, Evacuee Property*, AIR 1961 SC 1316 was discussed in this regard. The reverse burden of proof was also discussed and explained to the participants.

The concept and overview of the law of presumptions were deliberated upon. What and how presumptions can be raised to enable the justice was emphasised upon. It was stated that presumptions are an inference which court has to draw out of necessity because the court does not have a better or proper set of evidence before it. But for having presumption certain foundational facts have to be proved.

The theme for session 4 was on **Electronic Evidence: New Horizons, Collection, Preservation, and Appreciation.** The session discussed the evolutionary process of the law on electronic evidence. The relevancy, authenticity, and admissibility of electronic records were emphasized. Challenges in the collection & preservation of electronic evidence were also discussed during the discourse. It was

iterated that preservation, admissibility, and relevancy of the electronic evidence is of utmost importance because most of the transactions that come for scrutiny or adjudication either by the courts or by the quasi-judicial authorities have been a matter of consideration and analysis of the electronic records. The definition of electronic evidence was explained to the participant officers. It was stated that for appreciating the evidence The IEA has not provided any rule but it is a matter of experience. The appreciation of evidence depends on the common sense that the officer applies along with the general knowledge. It was stated that there are different perceptions for looking out the things and there may be possible that an officer while appreciating evidence may miss out on something. Thus, appreciation of evidence depends upon the quality of evidence. It was suggested that an officer has to read the evidence as a whole and cannot pick and choose while appreciating the evidence. It was iterated that documentary evidence includes electronic evidence.

It was highlighted that no one actually owns the internet, and no single person or organization controls the internet in its entirety. A practical demonstration of a phishing email, sending a false WhatsApp Spoofing and modification of the date and time of the message was shown to the participant officers. The quasi-judicial officers were cautioned while appreciating this as a piece of evidence. The methods, veracity, and authenticity to check and verify such frauds were deliberated upon. Transactions done through the dark net were emphasized and it was stated that there are various techniques through which the transactions of the 'dark net' can be traced. The procedure for the collection of cyber evidence was deliberated upon. The various steps for cyber investigation were deliberated upon that includes pre-investigation assessment, evaluation of the scene of the crime, collection of physical evidence, precaution for collecting digital evidence, collection of digital evidence, forensic duplication, seizure of digital evidence, packaging, labelling and transportation, legal procedure after seizure and gathering information from various agencies. It was advised that one should not be hyper-technical while appreciating the evidence. Minor discrepancies in trivial matters may be overlooked. It was stated that Section 3 (2) of The IEA deals with electronic evidence which speaks about the records that are produced before the inspection. The collection of digital evidence was deliberated upon. It was stated that the first step for the collection of electronic evidence is to

obtain proper authorisation for search and seizure. It was suggested that the investigating officer should have a basic knowledge of hardware and software tools for collecting and storing electronic evidence. The electronic evidence should be tampered proof. It was stated that the server contains all the data and sometimes the investigating team has limited access. It was stated that the electronic evidence which is in the form of primary data does not require a certificate under Section 65 B of IEA. The importance of hash value was explained while appreciating the electronic evidence. It was advised that the expert should be consulted in case of any doubt in order to check the veracity of the evidence. The precaution to be taken while collecting digital evidence was discussed during the discourse. It was stated that for the preservation of electronic evidence, the chain of custody is very important. The prosecution must be able to show that chain of custody should be well documented and well established. It was iterated that the date, time, venue of collection of electronic data, and tracking of the documents and record is very important. The judgment *Tukaram S. Dighole v. Manikrao Shivaji Kokate,* (2010) 4 SCC 329 was discussed during the discourse in which the Supreme Court observed that

> it *is well settled that tape-records of speeches are "documents" as defined in Section 3 of the Evidence Act and stand on no different footing than photographs. There is also no doubt that the new techniques and devices are the order of the day. Audio and videotape technology has emerged as a powerful medium through which first-hand information about an event can be gathered and in a given situation may prove to be a crucial piece of evidence. At the same time, with fast development in the electronic techniques, the tapes/cassettes are more susceptible to tampering and alterations by transposition, excision, etc. which may be difficult to detect and therefore, such evidence has to be received with caution. Though it would neither be feasible nor advisable to lay down any exhaustive set of rules by which the admissibility of such evidence may be judged but it needs to be emphasised that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence.*

The Judgment *Shafhi Mohammad v. State of HP*, (2018) 2 SCC 801 and *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantayal***,** (2020) 7 SCC 1 were also discussed in the light of the authenticity and admissibility of the electronic evidence.

The theme for session 5 was on **Law of Precedents and *Stare Decisis*.** The concept of ratio decidendi of the case was explained to the participant officers. It was iterated that the ratio decidendi is the underlying principle, *viz.* the general reasons or the general grounds upon which a decision is based, on the test or abstract from the specific particularities of the particular case which gives rise to the decision. It was highlighted that the judges in the absence of legal rules, rationalized their decisions in terms of ratio decidendi of the past decisions decided by the superior courts. It was stated that the object of following binding precedents is to ensure broad consistency and uniformity in deciding questions of law. The principles laid down by prior decisions are also used by courts to justify and give credence to their decisions. Article 141 of the Constitution of India was focused upon which speaks that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The meaning of *Obiter Dicta* was enumerated and it was delineated that Obiter is passing observation in a decision on a collateral or unconnected issue. Judgments and orders that are not binding precedents were deliberated upon. It was emphasized that decisions should not be read as a statute. It was advised that judgment should be read as a whole to ascertain the dictum and the decision should be read in the context in which it is rendered. It was highlighted that a small difference in facts may lead to a different conclusion. Decisions rendered as per incurium became part of the discourse in the session. It was iterated that per incurium means 'through inadvertence means a decision which fails to notice any statutory provision or binding precedent. In light of the judgment *Sundeep Kumar Bafna v. State of Maharashtra,* (2014) 16 SCC 623, it was iterated that *per incurium* rule is strictly applicable to *ratio decidendi* and not to *obiter dicta* and when two mutually conflicting decisions of the Supreme Court are cited at Bar the earlier judgment should be applied.

It was delineated that when a particular point of law involved in a decision of a case is not presented before the court and /or the necessary premise for the decision by that court was neither perceived nor present in the mind of the court and the decision is rendered without adverting to that point of law or

the premise, such decision is said to pass sub silentio. Decisions rendered/passing *sub silentio* on a point of law, not presented, argued, or discussed are not binding and need not be followed. Precedents to follow in criminal law and when precedents cease to be binding were also discussed during the discourse. It was iterated that judges as public adjudicators need to have experience, maturity, judicial independence, and freedom from prejudice and bias. With experience, they learn to decide more cautiously with a rational approach.

The theme for session 6 was **Principles of Interpretation of Taxing Statutes comprising of both External and Internal Tools of Interpretation.** The session started by underscoring the need and importance of Interpreting Taxing Statutes in light of Articles 265 and 366 (28) of the Indian Constitution. The process of interpretation commences with formulating a basic understanding of any statute developed by a plain reading of it and identifying the problem area if any by seeking the aid of statutory and non-statutory tools.

The rules of any statutory interpretation can be categorized into primary rules comprising of – literal rule/strict construction, harmonious construction, rule of purposive construction/golden rule, rules of beneficial construction/mischief rule and rule of exceptional construction, and secondary rules consisting of the effect of usage and wherein associated words are to be understood in common parlance.

The speakers significantly elaborate upon each of the rules with their sub-rules/tools. In a strict construction, the language of a statute should be read as it is; it is the cardinal rule of construction that words, sentences, and phrases of a statute should be read in their ordinary, natural, and grammatical meaning so that they may have effect in their widest amplitude. Charging provisions are to be interpreted strictly as it results in financial burden. The principal of equity has no role to play in the case of taxation law. It is because there is a lot of deeming legal fiction involved in tax laws. Whereas, in the case of exemption clauses, a strict rule does not apply rather a liberal rule is applied. The role of the Courts is not to apply the tax laws blindly and strictly but it should check whether the transactions of the assessee amount to an evasion of tax, avoidance of tax, or its just tax planning. In a harmonious construction, it was asserted that the provisions of a statute must be read harmoniously together.

However, if this is not possible then it is settled law that where there is a conflict between two sections, and one cannot reconcile the two, one has to determine which the leading provider is and which the subordinate provision is, and which must give way to the other. The 'golden rule' implies that if a strict interpretation of a statute would lead to an absurd result, then the meaning of the words should be so construed so as to lead to the avoidance of such absurdity. It is used by the courts where a statutory provision is capable of more than one literal meaning and leads the judge to select the one which avoids absurdity, or where a study of the statute as a whole reveals that the conclusion reached by applying the literal rule is contrary to the intention of Parliament. With regards to the beneficial construction or the 'mischief rule' it was stated that the rule directs the courts must adopt that construction which ‘shall suppress the mischief and advance the remedy’ as laid down in *Heydon’s case* (1584 3 Co. Rep 7a 76 ER 637). The rule of exceptional construction and its various methodologies were also deliberated upon in great detail.

In secondary rules, a usage or practice developed under the statute is indicative of the meaning recognized by its words by contemporary opinion. A uniform notorious practice continued under an old statute and the inaction of the Legislature to amend the same are important factors to show that the practice so followed was based on the correct understanding of the law. Furthermore, when two words or expressions are coupled together one of which generally excludes the other, the more generic term is used in a meaning excluding the specific one.

Elaborating upon the tools of interpretation the speakers explained that the internal aids to interpretation include: a long title, punctuation, schedule, explanation, proviso, illustrations, definitional sections, heading, and the preamble whereas the external aids include: historical settings, circulars, and interpretation by tax authorities, a speech of a minister, statement of objects and reasons, reports of the commission, integrated scheme of direct taxation and equities and dictionary meanings.

The theme for session 7 was the **Role of Ethics in Decision Making.** The session emphasised the ethical standards that are to be followed by the adjudicating authorities while discharging the onerous duty of the revenue. It was emphasized that greater power comes with great responsibility. It was

iterated that the standard of objectivity is to be maintained as against expediency, subjectivity and exercise of discretion are expected to be of a higher standard. The officers were advised to maintain a high ethical standard for saving themselves from unnecessary criticism and at the same time for reflecting the transparency in the system.

It was asserted that ethical decisions inspire trust, and depict fairness, responsibility and care for others. Norms that apply to the judiciary are much more stringent than those applies to quasi-judicial authorities. It was stated that the decisions must be relevant and just. It was highlighted that while evasion of tax is not uncommon, a quasi-judicial authority should proceed on the basis that the person who is before him is an honest person and come to the conclusion on merits after considering the material on record. It was emphasized that each case has to be decided on the facts of that case and not on the basis of the reputation of the assesse.

It was delineated that in revenue matter, it is well settled that if two views are possible either in favour or against the assesse one should lean in favour of the assesse. It is important to take a balanced view and ensure that the decision is fair and just and is in accordance with the law. It was suggested that a judicial officer/quasi-judicial authority should not allow any family, social or political relationships to influence any judicial decision. A subordinate officer cannot sit over an appeal passed by a higher authority. It was stated that there may be various pressures and influences that have an effect on the conduct of the judge or on quasi-judicial authorities, however, neither a judge nor a quasi-judicial authority can decide as they choose. They are bound by the rule of procedure and precedent.

It was stated that the decision of the quasi-judicial; officer should be fair and impartial and should not be influenced by one's mood, public opinion, personal animosities, or compassion as it will abuse the official duty and the position as a member of the bench. It was emphasized that while exercising quasi-judicial powers there are certain factors that should not influence the decision-making process that includes the fear of the order being reversed on appeal; overall public opinion; the mood of the officer; and Gesture and tone of the lawyers and witness.

Bangalore's principles of judicial conduct which speak about the seven core values that judges must possess were discussed. It was stated that some of the principles should also be invoked by the quasi-

judicial authority. It was stated that judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial and impartiality is essential to the proper discharge of the judicial office. Competence and diligence are prerequisites to the due performance of the judicial office. Principles and guidelines that were laid down by the Supreme Court in reference to the role of ethics in decision-making were deliberated upon. The judgments *R.C. Chandel v. High Court of M.P.*, (2012) 8 SCC 58, *Tarak Singh v. Jyoti Basu*, (2005)1 SCC 201 and *Union of India v. K.K. Dhawan* (1993) 2 SCC 56 were referred and discussed during the discourse. It was iterated that the quasi-judicial functions include the element of judging. It was asserted that the qualities that are required to discharge judicial functions are equally applicable to quasi-judicial officers. It was suggested that participants should read the book authored by Amartya Sen on The idea of justice. The version of Socrates that enumerate four things belong to a judge: *to listen courteously, to answer wisely, to consider soberly, and decide impartially* were emphasized.

The theme for session 8 was **Art, Craft, and Science of Drafting Judgments.** The last lap of the series commenced with the Director highlighting the pan-India reach of the programme due to its current format which has led to the successful dialogue/lectures in a series of 12 (4 + 8) e- sessions undertaken by the NJA with the quasi-judicial authorities.

The art of court craft was the basic theme of this session which comprises three elements: drafting orders whilst loading orders with reasons, striking a balance between prayers of the bar and the law at hand, and justice dispensation with the demeanor of the judge being intact. Without venturing into equity beyond the law a quasi-judicial officer ought to deliver judicious and pragmatically written orders.

The speaker observed that the art of judgment writing involves art i.e., creativity, craft i.e., a skill, and science i.e., specificity and methodical approach in a balanced manner. The adjudicatory and judicial functions of the officers on a daily basis comprise passing orders which are categorically different from judgments in light of Article 141. Judgment is a final statement on the law of an issue raised vs order passed on an issue by the court is not a finality.

All statutory authorities through and within their order must perform a thorough job of marshaling the facts inclusive of assembling and presenting the facts in a categorical fashion followed by crystallization of legal issues that arise within the context of facts so marshaled and the third is the discussion in the law relating to each of these issues.

The session then embarked on ponderance over the question of why courts and appellate authorities interfere with orders passed by taxation authorities. The answer lay in the difference of approach/perspective of both the authorities i.e. field officers look at the problem and pass an order to solve it whereas Courts look at the process and check if it is satiated through the order. Therefore, the solution is to seamlessly integrate the process with the order. In doing so, one must check if they have the appropriate jurisdiction to pass the order. If affirmative, then one must adhere to the principles of natural justice by providing a lucid and specific show cause notice which is disclosing all materials on which reliance has been placed, providing an adequate opportunity of being heard through a mandatory personal hearing, and recording a reasoned order. A reasoned order must consist of three elements namely, brevity, simplicity, and clarity. The session ended with the speakers elaborating upon the demeanor of the Presiding Officer and how she/he should balance bar and bench relations.

****