

NATIONAL JUDICIAL ACADEMY



E-lecture series for officers posted at AR Offices and Field Officers of CBIC

(SE-12)

22nd April, 29th April, 6th May & 20th May 2022

PROGRAMME REPORT

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Programme Report

The National Judicial Academy (NJA) organized the first ever online “E-lecture series for officers posted at AR Offices of CESTAT and Field Officers of CBIC” on 22nd April, 29th April, 6th May & 20th May 2022. The participants were from revenue side posted at AR offices throughout India and field officers of CBIC.

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 discourse enabled deliberations through clinical analysis of statutory provisions, case studies and critical consideration of relevant judgments.

Session – 1

Constitutional Authority to Tax and Basis of Taxation

Speakers- Justice G. Raghuram & Justice Mohammed Shafiq

The session commenced with drawing contrast between a highway robber and tax collector as one that of authority to collect which only the latter enjoys under Article 265. It was averred that containing socio-economic inequalities and not merely harvesting should be the intent behind any levy. Hence, the cannons of a good taxation policy can be noted as follows:

1. Equality in taxation under Article 14 whereby tax should be applicable to like persons along with equitable distribution of burden of tax flowing from ability of taxpayer.
2. Progressive taxation regime to reduce economic inequalities.
3. Tax administration should run on economic lines and not exorbitant or disproportionate to taxpayer.
4. Certainty in administration of tax obtained through simplicity and clarity of language of tax statute.
5. Tax collection should be hassle free and the policy must incentivize the production *vis a vis* businesses in the light of *golden egg principle*.

Furthermore, the participants were upskilled through the discussion on the fundamentals in the light of *Jindal Stainless Ltd. v. State of Haryana*¹ such as- definition of tax as the compulsory extraction of money to defray the expenses of the government; the authority to tax is an inherent attribute of sovereignty and the provisions enshrined in the constitution are mere limitations upon this unfettered power. The purpose of taxation is the unimpaired sustenance of government to continue to undertake welfare measures. Additionally, the limitation on taxation should be express and unless absent the doctrine of silence cannot be applied.

The session then embarked upon the paradigm shift brought forth by the Constitution (One Hundred and First Amendment) Act, 2016 in the scheme of taxation through drawing dissimilarities between pre and post amendment era/times as follows:

1. Pre 2016, there existed a clear cut demarcation of powers between Union and States without entrenchment and the *Double Aspect Theory* governed transgression, if any as stated in *Federation of Hotel & Restaurant Association of India v. Union of India*². But post the amendment a taxable event for both the legislative bodies is the same and concurrent without any overlap.
2. Earlier, three separate provisions namely- Article 245 for the extent of power, Article 246 for the conferment of power and Schedule VII had to be referred to deduct the fields of legislation ascribed to the Union and States. Now, the entire gamut of power is enshrined in Article 246A without any overlapping.
3. In pursuance of Article 246, primacy and an overriding effect was accorded to the Union over the state in the light of *Govt. of A.P. v. J.B. Educational Society*³. Whereas, Article 246A inserted by the 2016 amendment has detracted any such preferences.

The session continued with apprehensions on the overarching extent of powers of the GST Council over the legislative authority of the states. In the light of the tests laid down in *GVK Industries Ltd. v. ITO*⁴ the extra territorial operation of a taxation statute where any levy by the sovereign power has to be scrutinized on the basis of source rule and nexus theory was also discussed.

¹ (2017) 12 SCC 1

² 1989 3 SCC 634

³ (2005) 3 SCC 212

⁴ (2015) 11 SCC 734

The deliberations edified on the Rules of Interpretation were held within the spectrum ranging between *Commr. of Customs v. Dilip Kumar & Co*⁵ and *State of Kerala v. Mother Superior Adoration Convent*⁶. In *Dilip Kumar & Co* the apex court had appeared to have closed all alternate doors of interpreting exemption provisions by clearly stating that any benefit of doubt in interpreting the exemption provisions shall go to the revenue. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. However, *Mother Superior Adoration Convent* set the ball into the motion once again. The Supreme Court did not refer to the line of authority aforementioned, which made a distinction between exemption provisions generally and exemption provisions which have a beneficial purpose. Instead, the object sought to be achieved by the provision should be used to construe the statute. And on the assumption that any ambiguity arises in such construction, such ambiguity must be in favor of that which is exempted as exemption is based on user and not ownership.

Session – 2

Endemic Pathologies in Assessment Proceedings

Speakers - Justice Anita Sumanth & Mr. Sujit Ghosh

The session commenced by focalizing upon the literal meaning of the terms - *endemic* and *pathology* whilst bearing its comparison to a tax assessment proceeding as the need to identify those trends in assessment that are harmful to the integrity of process itself. Accentuating upon the dictum laid down by Lord Hewart “*Justice must not only be done, but must also be seen to be done*”, for an adjudicator it is imperative that the issues arisen have been addressed with due diligence and seriousness.

Firstly, it was discussed that in the light of ‘*Audi Alteram Partem*’, the Right to Personal Hearing is one of the manifestations of 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. If a hearing is made before X then Y cannot pass the order despite the two authorities sharing the identical ranks or proximity of their nature of work as it amounts to a violation of Principles of Natural Justice as held

⁵ (2018) 9 SCC 1

⁶ (2021) 5 SCC 602

in the case *Gullapalli Nageswara Rao v. A.P. State Road Transport Corporation*⁷ .

Furthermore, it was also deliberated that a show cause notice that comes with an attendant conclusion of the receiver's guilt and adjudication based on presumption is a violation of 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*⁸. Time given to an assessee 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 lack of timeline and perspicuity. A Show cause notice without Relied Upon Document (RUD) is a denial of opportunity to be heard amounting to violation of Principles of Natural Justice.

During the deliberations it was stated that the adjudicating authority must consider all the grounds put forth by the assessee in his defense before reaching the conclusion as parrying of arguments without taking due cognizance is a violation of Principles of Natural Justice as cited in *Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India*⁹ and *Goodwill Team Paper Ltd. v. Cus. and C. Ex. Settlement Comm.*¹⁰ Additionally, application of generality while determining tax liability based on assumption made out of one invoice or document by ignoring the rest is also a violation of the same citing the case *TELCO v. CCT*¹¹.

Thereafter, it was asserted that statements made under summons, search and seizure proceedings are not cast in stone and shouldn't be used to implicate a person. It is subject to rebuttal and the denial of cross examination of such an evidence is denial of Principles of Natural Justice. Additionally, the judgements used by an assessee in his pleadings shouldn't be spurned merely by declaring it 'distinguishable on fact' without adequate mention of the methodology or rationale used to label it so.

Further, it was underlined that an assessment proceeding is for determination of liability and not an

⁷ AIR 1959 SC 308

⁸ 2010 13 SCC 427

⁹ (1976) 2 SCC 981

¹⁰ 2008 SCC OnLine Mad 1153

¹¹ (1970) 1 SCC 622

opportunity to harvest tax. In compliance of principles of natural justice the eyes have to be in tune with what is proper determination apropos 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 deliberations on interpretation of statutes comprised of meaning, scope and application of statutory interpretation. It is a rule that taxation statutes must always be interpreted strictly and only if an ambiguity arises that purposeful or contextual interpretation must be resorted to. During the session several other significant topics were deliberated upon such as-the importance of definitions provided in any statute as that of torchbearers in the light of *Union of India v. VKC Footsteps (India) (P) Ltd.*¹²; role of proviso in both carving out an exception to something from the main enactment or to qualify something enacted therein which but for the proviso would be within it as held in *S. Sundaram Pillai v. V.R. Pattabiraman*¹³. The difference between *may* and *shall* in adherence to *Julius v Lord Bishop of Oxford and Another*¹⁴ was pressed upon. When *may* can be used to mean *shall* or vice versa and their varied meanings must be borne in mind whilst adjudicating. The speakers reiterated the importance of *Commr. of Customs v. Dilip Kumar & Co*¹⁵ whereby, in case of an ambiguity of charging provision the benefit is in favor of assessee but for an exemption notification/clause the benefit must be strictly interpreted in favor of Revenue/State as also in *State of Kerala v. Mother Superior Adoration Convent*¹⁶

Furthermore, in the light of *Nabha Power Ltd. v. Punjab SPCL*¹⁷ it was also mooted that determining tax is a mix question of both fact and law. Drawing from *Ex Praecedentibus et Consequentibus Optima Fit Interpretation* the adjudicating authority should use in conjunction the principles of statutory interpretation and principles of interpretation of contract in their entirety and not vacillate between. Unless it is alleged to be a sham strictly in accordance with the evidence on record, the intention of parties in a contract must be paramount in an adjudication.

Lastly, following in the footsteps of *Barak's theory of judicial discretion* and *Hard Case Doctrine* the

¹² (2022) 2 SCC 603

¹³ (1985) 1 SCC 591

¹⁴ HL 23 Mar 1880

¹⁵ (2018) 9 SCC 1

¹⁶ (2021) 5 SCC 602

¹⁷ (2018) 11 SCC 508

discussion 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. However, if the views expressed in matter are competing, equally sound and not ambivalent that is when the judge's discretion is applicable.

Session - 3

Appreciation of Evidence including Electronic Evidence in Taxation Proceedings

Speakers- Justice Vineet Kothari & Mr. Ajay Vohra

The session initiated by underlining the significance of electronic evidence in tax proceedings. It was emphasised that appreciation of evidence including electronic evidence in taxation proceedings is very much relevant in contemporary times. The discussion underscored that if tax adjudicators do not appreciate electronic evidence in an appropriate manner then the relevance of assessment orders at the later stage of examination and testing by the court of law may turn out to be difficult. Therefore, it becomes all the more relevant that tax adjudicators have sufficient know-how pertaining to electronic evidence. This will certainly be of immense help to tax adjudicators while discharging their duties. Conversely, it was highlighted that the strict rules of evidence do not apply to taxation proceedings but the evidence tendered must be credible, authentic as opposed to be fabricated, manipulated or morphed. It is important for tax adjudicators to understand the nuances with respect to the collection, appreciation, tendering of evidence. Significance of the Indian Evidence Act, 1872 and its applicability in tax matters was dwelt with. Consequently, various sources of electronic evidence alongside its applicability in tax matters was discoursed. Ways and means to check authenticity of electronic evidence, was also elaborated. Subsequently, importance of Section 65B of the Information and Communication Technology Act, 2000 was expounded.

The importance of preserving the authenticity of electronic evidence through several procedures such as identification of evidence, recovery of erased evidence, examination of such evidence, etc., was emphasised. Subsequently, it was underlined that two types of evidences exist on digital devices i.e., persistent evidence, which is the data stored on local drive. Such data is preserved when the computer

is switched off and volatile evidence, which is data stored in memory or in transit and is lost when the computer is switched off. Therefore, it was advised that in cases involving volatile evidence utmost care has to be taken. Admissibility, indisputability, genuineness, and reliability of Electronic Evidence and how to differentiate between original and duplicate database was also elaborated. While discussing the importance of standard procedures with regard to electronic evidence 'chain of custody' was highlighted. It was underscored that a minimum requirement to preserve chain of custody for electronic evidence requires that-

- ✓ The seized electronic evidence is untouched with no internal or external influence
- ✓ A true copy of the seized evidence is made
- ✓ While making the true copy of the seized evidence, a steadfast and authorized replication procedure is followed
- ✓ All files are protected and safe

Regarding admissibility of electronic evidence the landmark judgment of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors*,¹⁸ was expounded. In the said case the Supreme Court established the position of law on the admissibility of electronic evidence under Sec65 B (4) of the Indian Evidence Act, 1872. Correspondingly, the apex court elucidated the alternative for those who do not have any electronic device. It was emphasised that the court has the power to edict or ease out the production of mandatory certificate in the interest of justice and conferring to facts and situations of a specific case.

Session 4

Judicial Ethics, Judging Skills and Objectivity in Decision Making

Speakers- Justice Sunil Ambwani & Justice AK Jayasankaran Nambiar

The session rolled out by emphasizing that the need of judicial ethics came in the recent past due to many factors as earlier, people revered utmost faith in the judiciary. However, the concept is very old and the term 'ethics' has been derived from the Greek word 'ethos' meaning character. It was asserted that ethics is something more than a moral, religious and legal concept referring to the various definitions including those by John Locke, Aristotle, Canadian Law Dictionary, Black Law Dictionary

¹⁸ (2020) 7 SCC 1

and Justice Thomas of Queensland, Australia. In the context of the Bangalore Principles of Judicial Conduct, 2002, it was stated that the judges should follow: Independence, Impartiality, Integrity, Equality, Propriety, Competence and Due-Diligence while rendering decisions. Furthermore, it was underlined that reasoning is essential since it puts a check on human conduct. The essence of the Constitutional text is the reasoning. Recording reasons brings in discipline and one cannot be arbitrary. The distinction between legitimate alternative choices is judicial discretion. It was submitted that a reasoned order gives the litigants a clear picture of the decision; it demonstrates fairness and correctness of the decision; it excludes arbitrariness and bias, and enables the appellate court to pronounce upon the correctness of the decision. It was proposed that since the adjudicatory authorities perform a quasi-judicial function, therefore, it is their duty to give reasons. Subsequently, it was highlighted that writing of a judgment is an art. In addition to the command over the language, it demands knowledge of law and procedure. Judgment is based mainly on three components: findings of fact, application of principles of law, and decision on issues by the combination of both.

A judgment is not a subjective output on which a judge has no copyright and therefore, a judgment is a public document that belongs to the court and judicial system in general. Therefore, the requirements of good judgment drafting are scholarship, approach, professionalism, narrative skills, and judicial approach of a judge which are all illustrated in a judgment. A judgment is the most significant introduction of a judge to the bar, to the public at large, and to the litigants whose case they endeavor to resolve. The importance of clear thinking for clear writing and vice-versa was highlighted as an essential aspect of drafting judgment. It was stated that if a judge writes clear judgments it reduces litigation which is otherwise uncontrollable. An ambiguous, prolix and judgments including numerous quotations often tend to miss out on the point. Judges should avoid quoting numerous judgments to buttress their point in form of precedents.
