SE-10: NATIONAL SEMINAR FOR MEMBERS OF THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

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The Academy organized a National Seminar for Members of the Customs, Excise and Service Tax Appellate Tribunal. The Seminar aimed to provide a forum for judicial and technical members of the Customs, Excise and Service Tax Appellate Tribunal [CESTAT] to discuss and share experiences, knowledge and best practices. The seminar facilitated deliberations on issues including constitutional and statutory mandate of the Tax Statutes including scope for equitable construction; generic pathologies in assessment proceedings/departmental adjudication: role of the CESTAT; appreciation of evidence including electronic evidence in taxation proceedings; judicial ethics, judging skills and objectivity in decision making and the art, craft and science of judgment writing.

Session 1: Constitutional Authority to Tax, Basis of Taxation and Interpreting Tax Statutes including Scope for Equitable Construction

The session began with discussion on the history of taxation laws in India. The speakers opined that tax collection by the government used to be the command of the sovereign. However, the scenario has changed. The speaker discussed Article 265 of the Constitution for imposition of tax. Behind legislative framework, the tax policy is very important. The speakers dwelt on the objectives of taxation i.e. equity, convenience, economy and certainty as the basis of a fair taxation system. The speaker emphasized on the importance of equity and rationality in the interpretation of tax statutes.

The canons of taxation – elasticity, productivity, simplicity, diversity and expediency which are fundamental in tax policy were emphasized upon. The attributes of a fair taxation system i.e. equal distribution of burden of tax (progressive taxation), vertical equity (the rich pay more than the poor) and horizontal equity (persons on the same level bear the same burden of tax) in view of the mandate of Article 38 of the Constitution were discussed to emphasise the role of tax in ensuring social and economic justice. Thereafter the speakers discussed features of the taxation system. They said that State cannot have absolute equality. Quoting Rawls "*sometimes you need to have inequality because at certain point of time the lower pedestal people will come above to become rich*". Secondly, the speakers explained the concept of distribution of power by highlighting how the Finance Act is affected when government levy tax and how immunity can be granted under this Act. The speakers highlighted how Article 246 precedes Article 253 of the Constitution of India.

The speakers explained the concept of delegated legislation and stated that there is a need for the legislature to delegate some tasks to the Executive. The speakers then focused on the problems faced by local authority such as municipality, while deciding the rate of tax. The issue of control on tax levied by the Central Government was discussed. The speakers then discussed the issue of equity in tax law and imposition of tax with due authority of law. Various aspects of judicial discretion were discussed and it was emphasised that it has to be applied within the four corners of law. The speakers focussed on the issues of interpretation and equitable construction which can affect tax collection and the revenue generation of the country. Thereafter the speakers highlighted Article 39 of the Constitution with respect to public trust doctrine

according to which the resources should be used for common and maximum good of the public. The need of therapeutic jurisprudence for attaining objectives of the judicial system regarding trust and confidence of the parties and litigants was highlighted. The session concluded by discussing the relationship between law and equity and emphasising that equitable distribution is a necessary aspect to achieve therapeutic justice.

Session 2: Generic Pathologies in Assessment Proceedings/Departmental Adjudication: Role of CESTAT

The session began with the query of a participant regarding subsequent legislation and whether that can be taken into consideration for interpreting the earlier legislation. The speakers explained that the principal of subsequent legislation applies only when previous legislation is ambiguous and will not apply in situations where the previous legislation is clear. The speakers referred to a few judgments of the Supreme Court regarding this issue. The participants further raised the query that whether the tribunal has power of equitable interpretation and when the law says that a particular thing is to be done in a particular manner then whether equitable interpretation can be done and relief can be granted? The speakers responded that tribunal has given equitable interpretation in a case which has been endorsed by the High Court. The interpretation has to be done only within the legal jurisdictional limit that are also the *laxman rekha* of the judicial role.

The speakers expressed concern of commissioners regarding pro-revenue tendencies, fixation of target with time limits and imposition of huge penalty amount. Another concern shared was regarding tax authorities' insistence on collection of taxes and influencing commissioners' behaviour in this regard. Tax can only be collected on the basis of authority of law and it should not be driven by any other consideration. Many a times despite setting aside the order of commissioner by the Tribunal, the commissioner keep passing same kind of orders. It was suggested that the tribunals should set aside bad orders with either instruction for training of the concerned commissioner or should impose costs. The assessee should not pay despite having declaration of law in his favour.

The speaker said that there was a circular for increasing the threshold to ` 50 Lakhs for filing appeals. Subsequently 40% to 50% of appeals in high courts between 2004 and 2012 under the influence of this circular were getting dismissed. It may not have ramifications post 2012-13. Regarding reduction in pendency of cases, it was suggested that CESTAT can follow the method of direct tax tribunal i.e. ITAT for resolving matters involving common issues. The traditional practice of CESTAT from 1984 is that the constitution of larger bench is only to decide judicial order of conflict. But if there are matters of common importance then it requests the concerned parties to argue before one bench. Most of the issues before the tribunal are batch issues and they should be put together and disposed of in one go. Some participants said that they are following this practice in their respective benches. Tribunal needs to work with the Department to ensure that the parties submit a joint memo. Another concern was raised on lawyers arguing irrelevant issues.

It was suggested by the speakers that process should involve common show cause notice and issues of common interest and then only the matter should be put before the tribunal. The speaker referred to FICCI's report which mentions that 85% to 90% of departmental appeals are lost which shows the low quality of orders. The adjudicator is part of the legislative and executive wing. Instead the adjudicating authority i.e.

the commissioner should be separated from the control of Ministry of Finance to improve the quality of adjudication. The grass root level training of adjudicating officers should be strengthened.

The speaker expressed concern about the tendency of commissioners to go pro revenue. It was stated that if tax is not authorised by law then as per Article 265 it is counterfeit currency and such amount should not be deposited to the Consolidated Fund of India. The speakers concluded the session by giving following suggestions- a) institutional bias needs to be removed; b) tax payers should know what they are paying for; c) mentoring is required for efficient working of the departmental body and; d) strict adherence to the constitutional law.

Session 3: Appreciation of Evidence including Electronic Evidence in Taxation Proceedings including Common Errors in Appreciation of Evidence and Evolving Domains in Electronic Evidence

The session began with discussion about the meaning of electronic evidence and spoofing of emails and whatsapp messages. The speaker demonstrated how a selective message can be modified. The speaker stated that we all have our e-mails linked with our phone which helps the hackers to modify the messages in text or in whatsapp. The speaker stated that whatsapp claims that the chats done on whatsapp are fully encrypted but actually they are not. Thereafter, the speaker explained ways to protect oneself from such spoofed messages by hackers. The speaker discussed process of flow of information on the internet and role of servers in storing data. E-records were discussed including e-mails, ATM transaction logs, word processing documents, instant message history, files saved from accounting software, spreadsheets, internet browser history, VOIP call logs, Whatsapp chats, GPS, computer printouts and computer backup. Thereafter, the speakers discussed characteristics of digital evidences. It was emphasized that E-evidences tend to be voluminous, difficult to destroy and can be easily modified. Further, the speaker discussed offences covered under Sections 43(h) (i) (j), 65, 65B, 66B, 66C, 66D, 67 of the Information and Technology Act, 2000. Data recovery and hash technology was explained. The use of technology for tax evasion explained through the example of Airtel e-wallet fraud in which artificial e-wallets were created. Thereafter, the speakers highlighted statistics on tax evasion. A closer look at the government data reveals that the Central Board of Direct Taxes [CBDT] has registered an over six fold increase in the number of prosecution cases filed in courts to 4524 in 2017-18 from 669 in 2014-15. Search and seizure by CBDT has also seen a spurt. The speaker finally discussed ways to improve data protection over internet.

Session 4: Sitting in Judgment: Judicial Ethics, Judging Skills and Objectivity in Decision Making including Conducting the Court and Why Precedent is Important

The session began with discussion on Bangalore Principles which are followed by many common law countries. The Bangalore Principles of Judicial Conduct, 2001have been adopted by the judicial group on strengthening judicial integrity and have been revised at the round table meeting of Chief Justices held in Hague. These principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to provide a framework for regulating judicial conduct. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards. The Bangalore Principles of Judicial Conduct have increasingly been accepted by judiciaries across the world and by international agencies involved in strengthening integrity of the judicial

process. The speaker added that not only some countries adopted the Bangalore Principles, but have also modelled their own principles of judicial conduct according to the Bangalore Principles of Judicial Conduct.

Thereafter, the speaker emphasized two ways to look at these principles; firstly, from the point of view of stakeholders and the secondly from the point of view of judges. Judges have to decide maximum number of cases to the best of their ability by practising and upholding high ethical standards. A judge by his conduct and by his decision making process should render decisions fairly and equitably so as to earn trust and respect for the judiciary from the public and from the members of the Bar. For this purpose, a judge has to develop judicial skills, administrative skills and most importantly, strictly adhere to the canons of judicial ethics. The speaker shared several issues for ethics, judging skills and objectivity in decision making which included adequate training of the judges, proper case management, short and proper reasoned judgment, judgment in regional languages, proper management of court records, removal of biases and prejudices, social aloofness and avoiding mingling with litigants and advocates, removal of variation in imposition of penalties, care and caution in writing judgments and ensuring equal justice to all. The speaker emphasised the importance of precedent as the means of ensuring discipline in adjudication.

Session 5: The Art, Craft and Science of Judgment Writing

The speaker began the session by posing questions to the participants regarding judgment writing. The first question was why do you write a judgment? The participants cited many reasons for writing a judgment including that they write judgments for higher judicial forum, for the parties, for the stakeholders and for rendering justice to the parties. Second question posed by the speaker was how do they think litigants understand their judgments? The participants responded that litigants who come before CESTAT are big corporations or companies and hence, they are also capable enough to understand the judgments. The speakers suggested that judgment should be in such a language that each and every group of stakeholders understands it because judgments are not for a particular party but for the whole society. The judgment should not be written only keeping higher forums in mind and it is the duty of every judge to check that the work done by them can be understood by everyone.

The speaker further suggested that higher forums may disagree with the judgment but the important thing is that the judgment should be clear and well-reasoned. The litigants must know the reasons for winning or losing. Good judgments should satisfy all stake-holders. Thereafter, the speakers discussed the style in which the judgment is to be drafted. It was explained that one should write in a style in which one is comfortable. Different countries follow different method of writing judgments. In North America judges write issues first but in India judges write facts first to put in the forefront what the case is all about. The speaker then elaborated the use of heading in writing judgments. The speaker expressed concern on practice of writing lengthy judgments and stated that it is a myth that a long judgment is a good judgment. Short and properly reasoned judgment should be preferred over unnecessary long judgments.

Further the speaker stated some more important aspects of judgment writing including thorough knowledge of procedural laws, broad acquaintance with the substantive laws and fundamental legal principles, skill of giving due hearing, skill of marshalling of facts and arriving at findings, applying legal principles to those factual findings to arrive at the correct decision and putting the facts, reasoning and conclusions in a lucid, logical, precise and coherent manner in the form of an order or judgment. The litigants, the lawyers and the appellate/revisional courts should be in a position to understand what the judge has decided. It was

suggested that judgment should be read by the judge again and again and corrections should be made if required.
