CHAPTER - VII
DUE PROCESS THEORY IN ADMINISTRATIVE PROCEEDINGS

The authorities to whom powers are delegated exercise three kinds of powers under delegated authority; one is the power to make rules; the other is to enforce the rules and the third one is the authority to adjudicate upon disputes arising between the individuals and the administrative agencies.

The discussion here is presented first to the application of the safeguard in relation to the rule making process of Administration under delegated authority.

As a result of the developments resulting in the vast application of the doctrine of Due Process a culture developed in the Common Law world of observing the requirement of due process in all matters where power is exercised by the authorities of State in relation to the individuals. Same thing has happened in India which is division of the general law scheme of law.

In the beginning, the safeguard of Due Process was considered to be relevant to matters of Constitutional Law, more particularly with regard to matters of determining the disputes which were governed by Constitutional Law only, but in course of time the Due Process Theory was considered to be relevant to determination of the rights and duties governed by Criminal Law and then to matters covered by the other areas of Public Law such as Administrative Law too.

In India, there has been a serious debate as to whether the principle of Due Process of Law is relevant to matters of protecting the freedoms of individuals. For that matter, the question has been whether the safeguard is relevant to the question of Fundamental Rights. In the beginning the Supreme Court had taken the view while deciding the cases like A K Gopalan v/s state of Madras Constitution of India follows the principle of ‘Procedure established by law’ and not so much the principle of Due Process of Law. It was however in Maneka Gandhi’s case the trend of judicial thinking has changed and it has been considered by the court necessary to introduce the safeguard of due process in the matter of protecting the rights against arbitrariness of administrative action.

Like its effective role in matters of Constitutional Law in other branches of law also the doctrine of due process has worked as an effective safeguard to the individuals against arbitrary actions of the administrative agencies. So much so that in the sphere of Administrative Law it has been adopted in quite a good number of matters and has received a wider application as a safeguard to the individuals against governmental action.

As far as Administrative Law is concerned, the three important aspects of Administrative Law which bring the agencies of State Administration in contact with the individuals are the system of making rules,
applying the rules to individual cases and interpreting the scope of the rules when disputes arise between individuals and the agencies of State Administration. Of all the important aspects of Administrative Law the most significant is the system of making rules which usually is done under delegated authority and is known as Delegated Legislation. This particular function of making rules is known as Quasi-legislative function and the function of enforcing the rules through a new set up of officials of the administrative agencies are known as Quasi-Executive functions, and the third important function is that of deciding the disputes which is known as Quasi-judicial function. For the purpose of performing the quasi-judicial functions the State has established a new set of agencies to perform the judicial functions which usually are the Tribunals, Boards or Authorities.

The methodology followed in presenting the discussion on this subject is to present first the rule position concerning the relevance of the doctrine of Due Process to administrative proceedings in general and then how the rule of due process is followed in relation to specific kind of functions of the administrative agencies, i.e., the quasi-executive, quasi-legislative and quasi-judicial functions:

I. Relevance of the Doctrine of Due Process to administrative proceedings in general:

The first requirement of Due Process is that of Notice with regard to a proposed rule and an invitation to the person to be affected by the rule to present their views about the rule being made. The second requirement is that of hearing for considering the points of view of the administration and the affected interests. A third requirement is that of making public the findings of the administration after considering the views and the fourth requirement is that of publishing rule or regulation which has been devised by the administration as a result of consultation with the affected interests.

The Doctrine of Due Process has lent its support to Principles of Natural Justice which have been recognized in various branches of law, particularly the Administrative Law. The elements of the Principles of Natural Justice which has become another name for Due Process of Law may be analysed as follows:

(a) Principles of Natural Justice

The doctrine of natural justice seeks to render justice and to prevent miscarriage of justice as well. The object of developing principles of natural justice by the judiciary was to protect the rights of the general public at large against the arbitrary ruling by the administrative authorities. The principle of Natural Justice refers to fairness, reasonableness, equity and equality. However the applicability of the principles of natural justice depends upon the circumstances of particular case. The principle of natural justice are based on twipillars:
(i) The deciding authority shall be free from any kind of bias:

(ii) Audi alteram partem,-means 'no man should be condemned un heard' or both the sides must be heard before passing any order',

(iii) Nemo judex in re sua :Bias disqualifies an individual from acting as a judge, flows itself from two considerations:

(a) No man shall adjudicate his own cause; and
(b) Justice shall not only be done but should seen to be done.

Bias manifests itself variously and may affect the decision in a variety of ways. The rule against bias may be classified under the following three heads:

I. Pecuniary bias:

Pecuniary bias arises, when the adjudicator has monetary or economic interest in the subject matter of the dispute. In other words a judge who has pecuniary interest in the subject matter of litigation stands disqualified.

II. Personal bias:

Personal bias arises in a number of circumstances involving a certain relationship between the deciding authority and one of the persons before him. Here a judge may be a relative, friend or business or professional associate of a party. Such relationship disqualifies a person from acting as a judge.

III. Bias as to subject matter:

When the adjudicator or the judge has general interest in the subject matter in dispute on account of his association with the administration, he will be disqualified on the ground of bias. However, in order a person to be disqualified on the ground of bias as to subject matter there must be intimate and direct connection between the adjudicator and the subject matter in dispute.

1. Notice: The importance of notice is that a person or persons to be affected by the proposed action of the Administration must know in advance the substance of the proposed rule or regulation so that he may present his views about the proposed action of the Administration.

The Statutes generally lay down the requirement of notice to be given to the affected interests about any rule that is in the process of being formulated as a legislation under delegated authority. The idea is the
affected individual must have an opportunity to present evidence about the effect of a proposed rule. Without such notice there can be no valid exercise of delegated authority in the matter of making the rules. The practice developed at present by the Courts in determining the validity of the rules is that the courts will not demand that an administrative agency give notice before exercising its rule-making authority if the Statute has not provided for such a notice to be given.

2. Hearing In some legal systems, the requirement of ‘hearing’ is also known as ‘consultation’. This requirement is based on the principle of democracy which envisages the participation of the people through their representation in the process of legislation. On the same principle the process of subordinate legislation also in certain situations envisages ‘consultation’ with those whose interests are affected by the rules and regulations made by the administrative bodies. The advantage in the method of consultation is that it can control the Administration from acting arbitrarily and it can secure the participation of people in the process of making delegated legislation.

3. Findings The administrative authorities are required to make public their findings before a rule is promulgated by them. These findings should present a summary of the evidence presented and recite the basic considerations which have led to a particular rule or regulation. The idea underlying such a requirement is that the purposes and reasoning behind a rule accord with statutory authority. Such findings may help to convince the affected parties that the agency making the rule has given due consideration to their point of view. The finding of fact may serve as an important element of due process followed by the administrative agency if the action of the administration is called in question at a later stage.

4. Publication The rule formulated by the administrative agency after observing the requisites of Due Process needs to be given due publicity so that the affected parties have knowledge of the rule formulated and comply with the norms laid down in the new rule. In most legal systems of the world the principle followed is ‘Ignorance of law is no excuse’ (Ignorantia juris non excusat’). The implementation of this principle requires that the rules framed by the administrative bodies must be made known to the people so that they do not plead ignorance of law. While in the case of legislation by the law making bodies things come to the knowledge of the persons from the time a policy is evolved by the Government, a Bill is introduced in the Legislature and discussion takes place on the floor of the house, in the case of subordinate legislation however things do not come to the knowledge of the persons as to the type of rule that is being made by the Executive. Since subordinate legislation has the same effect on the rights and duties of the citizens as the principal legislation has, it is necessary that adequate publicity be given to the subordinate rules as well.

II. Applicability of Due Process of Law to Quasi Legislative Functions

There is no Statute generally laying down the rule that in all matters of law making the
administrative bodies must consult the affected interests in the process of legislation. Sometimes the requirement of ‘consultation’ is prescribed by the parent Statute while authorizing the making of subordinate legislation.

For example, the All India Services Act, 1957 lays down that the rules under the Act shall be made in consultation with the State Government; the Representation of Peoples Act, 1951 lays down the requirement of rules to be made by Government in consultation with the Election Commission and the Industries (Development & Regulation) Act, 1951 requires rules to be made by Government after in consultation with the Advisory Council.

When a Statute lies down that ‘draft rules’ shall be published for the information of all concerned, the publication of the rules can facilitate consultation because those who would be affected by the rules would come forward and assert their point of view. This is how consultation can be said to have been sanctioned by law.

In State Board of Milk Control v. Newark Milk Company the defence of a milk producer that it had not been given an opportunity to be heard on a milk control board order fixing minimum prices for the sale of milk was not allowed as a justification for violation of the order.

In some countries this requirement has been incorporated in a Statute in certain others it is followed on the authority of judicial decisions. In United States of America the Federal Register Act established the Federal Register as the official means for publishing administrative rules. In India however there is no Statute of a general nature requiring publication of a rule as a mandatory requirement but the court insist upon such a publication for the purpose of affording a safeguard to the individuals.

Where the Statute dealing with a certain subject specifies the requirement of publication the courts insist upon such a rule to be followed by the Administration In Narender Kumar v. Union of India the Non-Ferrous Metal Control Order issued under the Essential Commodities act, 1955 had prohibited through clause 4, acquisition of copper without a permit issued by the Controller in accordance with the provisions specified by the Central Government from time to time. The Act under which these principles had been issued provided that all orders of a general nature made under Sec. 3 should be notified in the official gazette. The Court held that the principles were not legally effective as they were not validly specified due to their non-publication in the Gazette as envisaged in Section 3 of the Act.

The question regarding publication of sub-delegated legislation figured in the case of State of Maharashtra v. Hans Mayer George which was a case of prosecution of the respondent under the provisions of Foreign exchange Regulation Act, 1947.
The Act in question had stipulated publication of rules to be made in the official gazette but it did not stipulate anything about the publication of sub-delegated legislation framed under the Act.

But even where consultation is provided by statute, whether the requirement is mandatory or directory depends upon the interpretation of the rule by the Court. In Raza Buland Sugar Company v. Rampur Municipality, the statutory provision required the Municipality to publish the draft rules imposing a tax in consultation with the inhabitants of the area was held to be mandatory for the purpose of such publication obviously was to further the democratic process and to provide reasonable opportunity to those who were likely to be affected by the tax before it is imposed on them.

In D.S. Garewal v. The State of Punjab & another. The point for determination in this appeal was whether the All India Services Act, (LXI of 1951), enacted by the provisional Parliament, was a constitutionally valid legislation. As there was only one House during the transitional period, the President in exercise of his powers under Art. 392 of the Constitution passed the Constitution (Removal of Difficulties) Order No. II, on January 26, 1950, and made, amongst others, an adaptation of Art. 312(1) omitting the following there from, “” XXX if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so XXX “.

The appellant, who was appointed to the Indian Police Service in 1949, held the post of Superintendent of Police in the Punjab in 1957 when he was reverted as Assistant Superintendent of Police and informed that action was proposed to be taken against him under r. 5 of the All India Services (Discipline and Appeal) Rules, 1955, framed under s. 3 Of the All India Services Act, (LXI of 1951). He was, thereafter, placed under suspension and an Official was directed to hold a departmental enquiry against him. On receipt of notice of the said enquiry, he moved the High Court under Art. 226 of the Constitution and challenged the constitutional validity of the Act and the legality of the enquiry.

The High Court held against him and hence this appeal. It was contended on behalf of the appellant, (1) that the President had exceeded his power under Art. 392 in amending Art. 312 in the way he did; (2) that the provisional Parliament was incompetent to enact the impugned Act as there was no compliance with the condition precedent to such an Act being passed under Art. 312; (3) that the Rules were repugnant to Art. 312 as they were made at a time when the adaptation was no longer in force; (4) that the Parliament had no authority to delegate its function under Art. 312 to the Central Government (5) that, at any rate, S. 3 Of the Act was vitiated by excessive delegation and (6) that the Punjab Government had no authority under the Rules to institute the proceedings.

The Supreme Court held that the contentions were all without substance and must be rejected. The
power given to the President by Art. 392 Of the Constitution was wide enough to enable him to make any adaptation by way of modification, addition or omission he considered necessary or expedient with respect to a particular Article and if he did so in one way and not the other, it could not be said that he had exceeded his power. As the adaptation of Art. 312 by omission of the condition precedent was thus valid, no question of any compliance with it could arise and the provisional Parliament was quite competent, to pass the impugned Act.

Sankari Prasad Singh Deo v. Union of India and State of Bihar\(^8\), held inapplicable. The reappearance of the omitted part of Art. 312 before the framing of the Rules by the Central Government under the Act, could in no way affect their validity since the Act itself was valid and a permanent measure and the Rules derived their force from the Act.

It was well settled that the Legislature was competent to delegate to other authorities the power to frame rules to carry out the purposes of the law made by it. Such delegation could also be made to an executive authority within certain limits.


Use of such expressions as "Parliament may by law provide" or "Parliament may by law confer" by the Constitution did not necessarily mean that delegation was wholly excluded. It would be a matter for determination in each case whether the intention was that the entire provisions were to be made by law without recourse to any rules framed under the power of delegation. The numerous and varied provisions contemplated by Art. 312 made it impossible to hold that they were all intended to be enacted as statute law and nothing was to be delegated to the executive authorities. It was not correct to suggest that the Article laid down a mandate prohibiting Parliament from delegating authority to the Central Government to frame rules for the recruitment and conditions of All-India Services.

Nor was there any substance in the contention that S. 3 Of the Act was vitiated by excessive delegation of power and the Act did not lay down any policy. Section 4 of the Act read with s. 3(2) Of the Act showed that there was no delegation of power to the Central Government under s. 3(1) Of the Act in excess of what was justified by the special circumstances of the case.

There was no basis for the contention that the Central Government and not the Punjab Government could institute the enquiry. Rule 5 Of the Rules showed that the enquiry was to be initiated in all cases by the Government under which the Official concerned served, although the punishment as required by Rule 4(1) might have to be ultimately imposed by the Central Government.

II. Applicability of the rule of Due Process to Quasi Executive Functions
Under this requirement the affected parties, during the process of hearing; have to be given a full opportunity to present the details of their position. While the affected parties have to present the data in support of its point of view, the administrative agency has to present the data as evidence of the initiative taken by it. The administrative agency embarking upon a rule has to present complete record asserting its point of view.

By a notification issued by the Reserve Bank under the Foreign Exchange Act, the carrying of Foreign Exchange even in transit was forbidden and made punishable. Hans Mayer George, a passenger travelling on board a Swiss plane from Zurich to Tokyo via India was arrested and charged with the offence of carrying Foreign Exchange in transit. He pleaded non-existence of mens rea and ignorance of the Reserve Bank notification. He contended that prosecution under the Notification was impermissible because of its non-publicity outside India from where he had started by plane. But the plea of ignorance was rejected. The court held that it was true that statutory instrument should be published before it is applied; however, it was not provided by the law that the instrument should be published outside India as well. Since the passenger had been apprehended on the Indian soil he could not be permitted to plead lack of mens rea and the plea of non-publicity of the rule was held to be untenable.

In the case of A. K. Karaipak v. Union of India\textsuperscript{84} Hegde, J. rightly observed that the applicability of the natural justice principle depends upon the facts of the case, the enquiry and the applicable law to that enquiry, the framework of that law and the composition of the tribunal constituted for that purpose. On a complaint received by the court about contravention of the natural justice principle, it is the duty of the court to find out if the alleged rule was mandatory to follow to reach to a just conclusion.

\textbf{Audi Alteram partem:}
Generally this maxim includes two elements:

(I) \textbf{Notice}:

Before any action is taken, the affected party must be given the notice to show cause against the proposed action and seek his explanation. It is the sine qua non of the right of fair hearing. Any order passed without giving notice is against the principles of natural justice and is Void ab initio. The notice shall be given in the prescribed manner as per the law if the said notice is statutorily required. Thus the commencing point of right to fair hearing is the notice as served. The person cannot properly defend himself, if he is not aware of the issues involved and subjects of the case.

(ii) \textbf{HEARING}:
Hearing means ‘fair hearing’. The second requirement of audi alteram partem is that the opportunity of hearing shall be given to the concerned person prior to initiation of any action against him.

The golden triangle Article 14, 19 and 21 of the Constitution of India is the cornerstone from where the natural justice flows in India. Natural justice flows from Article 14, 19, and 21 of the Indian Constitution which lay down the cornerstone of natural justice in India. In the well known judgment of Maneka Gandhi v. Union of India85 the Hon’bl Supreme Court held that any law cannot be considered as procedure that is just fair and reasonable if it allow the administration to take any decision without providing valid reason for the same and which affect the rights of the people. Hence it will lead to infringement of Article 21 and 14.

Thus a hearing to be fair must fulfill several requirements-

(I). **Right to present own case as well as evidence:**

The party shall get a reasonable opportunity to be heard by the adjudicatory authorities which may be done orally or in written format. If the party is denied of such right of hearing then it will be considered that the mandates of natural justice principle are not followed.

(II). **Right to have notice of the evidence against him:**

When an administrative authority carrying out its adjudicatory duties, it shall provide or every person shall have right to have knowledge of know about the evidences to be used against him. It cannot use any material unless the opportunity is given to the party against whom it is sought to be used.

(III). **Rebuttal of adverse evidence:**

For fair hearing it is not enough that the party should know the adverse material but it is further necessary that he must be given an opportunity to rebut the evidence. The adjudicating authority must give right to the party concerned to rebut the evidence. The opportunity to rebut evidence involves the consideration of two factors viz., cross-examination and legal representation.

A. **Right to cross-examination:**

Cross examination is a most powerful weapon to elicit and establish the truth. However, courts do not insist on cross examination in administrative adjudication unless the circumstances are such that in the absence of it a person cannot put up an effective defence. Whether the opportunity of cross examination is to be given or not depend upon the circumstances of the case and statute under which hearing is held.
B. Right to Legal Representation:

The right of representation by a legal practitioner is not considered as part of principles of natural justice system and it cannot be claimed as of right, unless the said right is conferred by the statute. But if the legal practitioner or counsel was not allowed to appear then the right to be heard will be of little importance and can be benefitted by it, as every individual is not capable to represent the case. Few legislations in India as the Industrial Disputes Act allows it with the permission of the tribunal and some statute s permit legal representation as a matter of right. These are the essential elements of due process in the rule making process as may be evident from the following discussion.

III. Applicability of Due Process of Law to Quasi Judicial Functions

A significant aspect of the expansion of functions of the administration in the modern era is the power of adjudication by administrative authorities. Normally, the function of adjudicating upon disputes between two individuals or between the state and an individual is vested in the courts, and the Indian Constitution makes provisions for a well-ordered, and well-regulated, hierarchical judicial system, but the courts do not enjoy a monopoly of the entire business of adjudication. Side by side with the courts, innumerable administrative bodies have sprung up to carry on the function of adjudication in a variety of situations.

These bodies, created by legislation, determine a variety of applications, claims and controversies. Sometimes, the task of adjudication is merely incidental to administration; sometimes, it is more than incidental and it begins to assume a very close resemblance with the work usually assigned to the judiciary. This tendency or practice of vesting adjudicatory functions in persons, bodies or institutions outside the ordinary hierarchy of regular courts is becoming increasingly pronounced with the passage of time. This development has not yet exhausted its momentum; every day some new adjudicatory body is created for one purpose or the other and, therefore, the system of adjudication by bodies outside the system of courts is becoming more and more important and pervasive with the lapse of time.

The reasons for evolution of the system of adjudication outside the courts generally are the same as have led to the emergence of delegated legislation, that is, extension in governmental operations, activities and responsibilities, because of the socio-economic changes which are taking place in the country. As for example, government is engaging itself more and more in planning, in providing social services to the people, in controlling the conditions of employment, in providing and promoting health, safety and general welfare of the community. Along with the expansion in governmental operations, tax-base has also been broadened resulting in the levy of new and new taxes and, consequently, leading to a vast proliferation of tax-assessing authorities. The modern government has come to undertake many functions and regulate many
matte rs which generate a number of occasions when and individual may be at issue with the administration, or with another citizen or body as to his rights, and this creates, the ne ed to adjudicate on disputes sometimes between citizens and the government, and som etimes between citizen and citizen.

This, in turn, has necessitated the development of the technique of administrative adjudication which may better respond to social needs and requirements than the elaborate and costly system of decisions through court-litigation. If all the cases generated by the operations of the newly enacted socio-economic legislation of to-day were to be left to the courts for adjudication, then not only will it place a huge burden on the judicial machinery clogging it beyond redemption, but it will also slow down the administrative process because of long delays which usually occur in the court proceedings.

The courts are already faced with a large backlog of cases, and further entrusting to them the task of adjudicating upon the many newly rising controversies as a result of the expansion of the operations of the state would have made matters worse. It is proverbial that an ordinary judicial proceeding is tardy, dilatory as well as expensive and, consequently, in most of the cases arising in the course of administrative functioning such a procedure would be completely inadequate. The formality of atmosphere in a court is not always conducive to the quick disposal of the innumerable problems which the modern administration generates. In many cases what is needed is an informal atmosphere untramelled by too elaborate and technical rules of procedure or evidence. Effective implementation of new policies often demands speedy, cheap and decentralized determination of a large number of cases which advantages are offered by the administrative adjudication.

Another important reason for the new development is that while the courts are accustomed to deal with cases primarily according to law, the exigencies of the modern administration often make it incumbent that some types of controversies be disposed of by applying not law, pure and simple, but considerations of policy as well, for example, what is in the “public interest”, what is “expedient”, or what is “reasonable”. Such questions often arise and these have to be answered not only on the basis of law and fact but also by applying policy considerations such factors as position of finance, position of foreign exchange, priorities and allocations between competing claims and the like. It is only adjudication outside the ordinary judicial system which can take care of such matters.86

An ordinary court is hardly a fit instrument for such an exercise. The judges often tend to be too literal or technical in their interpretation of legislation and such an approach may not be suitable to most of the modern socio-economic legislation which is of an experimental nature. All this leads to entrusting the task of determining disputes under such legislation to bodies (other than the ordinary courts) which can have flexibility of approach.

Then, there is also the question of expertise. A judge is a generalist, while many cases arising out of
the modern administrative process need an expert knowledge of particular subjects to which these cases relate. An expert may be in a better position to adjudicate upon such matters than a generalist lawyer-judge in a regular court. Thus, technical problems or questions involving complicated accountancy or economic factors may have to be better left to be determined by specialized adjudicatory bodies than the judges of the courts who, by their training and approach, may not have enough expertise to deal with them. For example, under the Tariff Act, the proper determination of the question as to under what entry of the schedule to the statute a particular commodity falls for imposing customs duty or confiscation requires knowledge of science and technology.

Perhaps because of the lack of such expert knowledge, the Supreme Court in Collector of Customs v. Ganga Setty was prompted to give due deference to the executive determination and say that it would interfere only where the executive adopted an interpretation which no reasonable person could adopt or which was perverse.

Some of the reasons, therefore, for entrusting adjudication of certain matters by the legislature to bodies other than the courts are cheapness, accessibility, expertise, freedom from technicality, flexibility of approach, etc. These adjudicatory bodies have grown not to satisfy any political dogma or philosophy, but out of practical necessity to cope with certain problems of public concern.

In the backdrop of these factors the emergence of tribunals as adjudicatory bodies has become a reality. Before discussing the structure of Tribunals as adjudicatory bodies and the procedure followed by them in the matter of deciding the disputes between the individuals and the taxing authorities a reference may be made to the powers and functions of certain officials of the Revenue departments who exercise the appellate powers, or revisional or reference jurisdiction in regard to disputes relating to the taxation matters.

The following are the officials and institutions in the Revenue Sector who exercise quasi-judicial powers and deal with the disputes arising between the individuals and the institution.

Under the Customs Traffic, 1975 enacted by the Parliament the duties which may be levied on the goods exported and imported is prescribed in the Schedules to the Act. But the Act has given authority to the Central Government to alter the Tariff. It says, the proper authority to Duration of protective duties and power of Central Government to alter them.

Apart from the powers which may be exercised in normal circumstances, the Act also gives emergency powers to the Government to alter the duties; by increasing or levying the export duties.

Under the Customs Act, the customs official exercise various kinds of powers which are the powers of a penal nature; the officials may arrest a person, search a premises, confiscate the goods and do various things necessary for the effective implementation of the Customs Act. But the superior officials are vested
with the powers to overturn the actions of the Customs officials. 

Apart from the superior officials of the Customs Department the Board of Revenue may also exercise certain revisional powers.

**Income Tax Appellate Tribunal**

The Income Tax Appellate Tribunal was established as the second appellate authority in the hierarchy of the administrative machinery under the Income Tax Act by the Income Tax (Amendment) Act, 1939. It was constituted in consonance with the recommendations of the Income Tax Enquiry Committee, 1936 for providing a specialized and independent agency for dealing with tax matters. It actually started functioning in 1941. The tribunal now functions under the Income Tax Act, 1961. The tribunal hears appeals from cases relating to four direct taxes income, wealth, gift and estate duty. It is composed of “as many judicial and accountant members” as the Central Government thinks necessary to appoint.

The qualification for a judicial member is that he should be a person who has held a civil judicial post for at least ten years, or who has been a member of the Central legal Service for at least three years, or who has been in practice as legal practitioner for at least ten years. The qualification for an accountant member is ten years’ practice as a chartered accountant or service as assistant commissioner for at least three years. Prior to 1950, the members were appointed on a term basis, the contract being for a period of five years. Now, the status of the members is that of ordinary full-time civil servants, and they retire at the age of 60 years. However, the tribunal is not regarded as an income tax authority and is thus not subject to the control and supervision of the Board of Direct Taxes. The tribunal functions under the control of the Ministry of Law and not Ministry of Finance which is the administrative department concerned with the collection of income tax and this arrangement, to some extent, insures independence of judgment by its members.

Ordinarily a judicial member is appointed as the president of the tribunal by the Central Government. The president of the tribunal is empowered to divide it into separate benches. A bench ordinarily comprises of 1(one) judicial member and 1(one) accountant member, and hears appeals in the territories allotted to it. Any member of the tribunal can be authorized sitting singly to dispose of a case of an assessed whose total income does not exceed Rs. 25,000. The president in order to dispose a case, may form a special bench of the tribunal consisting of three or more members, of whom at least 1(one) shall be judicial member and 1(one) accountant member.

The benches of the tribunal hold their sittings in several major cities of India. Bombay, Delhi, Calcutta, Madras, Ahmadabad, Hyderabad and Allahabad have more than one bench of the tribunal. About 33 benches of the tribunal are functioning in the country. Decisions by a bench are by majority. If there is no
majority and there is equal division, the members state the points of difference and the president then refers to matter to the hearing of one or more of other members. The matter is then decided by majority of all the members that has heard the case. The proceedings of the tribunal are not open to public. There is no provision for reporting the decisions of the tribunal. It is, therefore, not inconceivable that on the same point of law, two benches of the tribunal may unknowingly give conflicting opinions. Appeal to the tribunal may be filed both by the aggrieved assessee as well as the I.T.O. against an order of the A.A.C. if directed to do so by the commissioner. The tribunal is required to give hearing opportunity to the parties before deciding the case. The taxpayer is entitled to appear before the tribunal through an authorized representative including a lawyer. The tribunal is not governed by the rules of evidence applicable to the courts of law. It is empowered to control its own procedure and of the benches as well. Accordingly, it has promulgated the Income tax (Appellate Tribunal) rules, 1963 to regulate its procedure.

The memorandum of appeal has to be submitted in writing on a prescribed form within 60 days of the communication of the impugned order. The respondent has a right to file a memorandum of cross-objections. The tribunal gives oral hearing to both the parties. It has extensive powers of inspection and summoning of witnesses as it has been given the same powers as that of civil court under the C.P.C. 1908, when deciding a suit regarding inspection and discovery, to compel the attendance of any person and his examination on oath, compelling the books of accounts, issuing commissions, etc. to be produced thereof in case of objection to the valuation of property there is a provision for decision on the matter through arbitration.

The decisions of the tribunal are final on questions of fact but not on those of law. There is no regular appeal to the court from the orders of the tribunal, but a reference is to be made, at the request of a party (assessee or the commissioner), to a High Court regarding any issue of law arising out of “the order of the tribunal”, and also directly to the Supreme Court if the tribunal deems it fit, on account of a contrast of opinions amongst the High Courts, a reference should be made to that court. From the judgment of a High Court, on a reference from the tribunal, an appeal lies to the Supreme Court in any case in which the High Court deem it to be fit case for appeal to the Supreme Court.

The tribunal has no discretion in the matter of making a reference on a question of law to the High Court. It can refuse to do so on one ground only that question of law did not arise. If the tribunal refuses to make a reference to the High Court, the assessee or the commissioner may apply to the High court which may require the tribunal to state the case to it and the tribunal is then bound to state the case.

The reference provision is a time consuming and inconvenient procedure. It has been criticized by the Law Commission. The Direct Tax Laws Committee in its Interim Report was also critical of the procedure, and suggested various changes in the existing procedure. The committee in its Final Report also
recommended the creation of a Central Tax Court due to several reasons lack of expertise on the part of judges in tax matters, constitution of the benches of High Court on an ad hoc basis, delay in disposal of cases by the High Court, and giving of conflicting opinions on the same point by the different benches of the same High Court.  

From time to time criticism has been levelled against the functioning of the tribunal and doubts have been created in respect of the competency of its members. Reviewing the working of the tribunal, the Law Commission has observed that men of requisite calibre and independence are not recruited to it. Often, the judicial and independent approach necessary in a final fact-finding authority is not displayed by the tribunal. Very often the determination of complicated questions of fact and law and it done in a very perfunctory manner by the tribunal and it does not clearly record its findings of fact or its reasons for arriving at its findings. There is considerable delay in disposing of the appeals. The High courts have on several occasions adversely commented on the orders passed by the tribunal. The Law Commission accordingly recommended that the tribunal should be abolished and that direct appeal should be provided on questions of fact as well as of law to the High Courts. From the decisions of the A.A.C. where the amount in dispute is Rs. 7,500 and above, and in other instances, appeal should lie to the High Courts on questions of law alone.

(2) No order passed by Custom official shall be revised under this section by the Board of its own motion and no application for the revision of any such decision or order shall be entertained, beyond the two years expiry to be evaluated from the date of passing of such order.”

Under the Customs Act, only the competent customs official can confiscate any goods, on valid reasons that those goods shall be seized, under the provisions of this Act. The collector or a deputy collector acts as the competent adjudicating authority upon all confiscations or penalty without any limit. The assistant Custom collector is competent to dispose of the cases of seizure of goods, in which the amount does not exceed Rs. 10,000, and the penalty not exceeds Rs. 2,000/-. Cases in which value of confiscation of goods does not exceed Rs. 10,000/- and penalty not exceeding Rs. 200/-, may be disposed of by a gazette customs official, who is junior in hierarchy than an assistant collector. However, the order of seizure of any goods or punishment of any penalty shall not, in any case, be made unless a notice in writing is served on the owner of the goods for informing him about the grounds on which the goods are proposed to be confiscated or penalty is imposed. Serving a notice on the owner is essential so as to give him an opportunity to show cause or to represent in writing within such specified time in the notice in response to the grounds of seizure or punishment of fine as mentioned, and an opportunity to be heard in the matter.

For the enforcement of the Excise laws effectually, a new mechanism has been introduced by the Finance Act of 19940. To analyze the proper application the provisions of the Finance Act, it has not only empowered several kinds of officials, but at the same time also enables some of the Excise Officials and the
Board of Revenue to exercise such appellate and Revisional powers. The following pointers sum up the powers conferred upon these officials and institutions by this Act:

Under the Act, all those persons who are entrusted with the responsibilities of collecting the Service Tax are required to furnish the prescribed returns within the period of 15 days of the finish of the quarter preceding showing:

a) The cumulative of entire payments collected for the amount of taxable services;

b) The entire value of service tax accumulated.

c) The specified value of service tax paid to the credit of the Union; and

d) Such other details as may be prescribed from time to time.

(2) If in case, any person deemed fit by the Central Excise Official, under this Chapter having a duty of collecting service tax, has not furnished a return as per sub-section (1), a notice shall be issued to such person and serve upon him by the Central Excise Official before the expiry of the quarter in which the return is to be furnished, requiring him to furnish the return in the prescribed form and verified in the prescribed manner setting forth the prescribed particulars within thirty days from the date of service of the notice.

(3) The person who is entrusted with the responsibilities of collecting the service tax but has not furnished the return within the time allowed under sub-section (1) or sub-section (2) discovers any omission or wrong declaration therein, is needed to furnish a return or a revised return, as the case may be, at any time but before the assessment is made.

With regards to assessment of Service Tax, this Act has clearly stated that “(1) For the purposes of making an assessment under this Chapter, the Central Excise Official may, on any person who has furnished a return under section 70 or upon whom a notice has already been served under sub-section (2) of section 70 (no matter whether a return has been furnished or not by him), serve a notice, compelling him on the date to be specified therein, to produce or cause to be produced such documents or accounts or other evidence as the Central Excise Official may for the purposes of this Chapter, require, or may from time to time, serve further notices requiring the production of such further accounts or documents or other evidence as he may require.

(2) The Central Excise Official shall only by an order in writing, calculate the value of taxable service and the amount of service tax payable on the basis of assessment, only after taking into consideration
all such documents, accounts, or other evidence, if any, obtained by him under sub-section (1) or after taking in to account all or any relevant materials gathered by him.”

“In the course of any proceedings carried out under this Chapter, if in case the Central Excise Official found that any person has, intentionally evaded to disclose or make payment of service tax, or had purposefully suppressed or concealed the accurate value of taxable service or has disclosed the value of such taxable service incorrectly, he may direct that such person shall, by way of penalty, in addition to service tax and interest, if any, payable by him, pay an entire amount. While calculating the entire amount payable by such person, it should be noted that such amount shall not be less than and shall also not exceed twice the total amount of service tax which is tried to be evaded by reason of suppression or concealment of the value of taxable service or the furnishing of inaccurate value of such taxable service:

Provided that if the entire amount of taxable service that has been determined by the Central Excise Official on assessment, in respect of which the value has been suppressed or concealed or inaccurately disclosed by any person, exceeds a sum of twenty-five thousand rupees, the official shall not issue any direction for making its payment by way of penalty, without obtaining the previous approval of the Collector of Central Excise.”

In course of proceedings under this Chapter, if the Central Exercise Official is satisfied that a person has failed to comply with a notice under sub section (1) of section 71, he may direct that such person shall pay by way of penalty, in addition to the service tax and interest, if any payable by him, an amount which shall not be less than ten per cent, but not exceeding fifty per cent, of the entire amount of the service tax, which have been avoided if the value of taxable service stated in the return by such person had been accepted as the correct value of taxable service.

The Finance Act, 1994 also empowers the Central Excise Official to cause search, if in case, he has reason to believe that any things, documents or books which in his opinion are quite useful for or relevant to the proceedings. Again, under this chapter, if any things, documents or books are secreted at any other place, then he may also authorize any other Central Excise Official to search on his behalf or may himself search for such things or documents or books.

All the provisions related to searches under the Code of Criminal Procedure, 1973, shall, so far as may be, also apply to the searches carried out by Central Excise Official under this section, as they apply to searches under that Code.

Besides this, the Collector of Central Excise also has the powers to revise the orders of the Collector of Central Excise. The Act says,
(1) The Collector of Central Excise have powers that he may call for the record of a proceeding under this Chapter, which has been searched and collected by the Central Excise Official subordinate to him. He may also make an inquiry himself or may cause such inquiry, subject to the provisions of this Chapter, pass such order thereon which in his opinion is fit.

(2) No order which prejudice the interest of the assessee shall be passed by the Collector of Central Excise, in any case, under this section, unless and until an opportunity of being heard is given to the assessee.

(3) The order passed by the Collector of Central Excise shall be communicated by him to the assessee, the Central Excise Official and the Board, under sub-section (1).

(4) The Collector of Central Excise shall not pass an order under this section, in respect of any issue, if an appeal against which is pending before the Collector of Central Excise (Appeals).

The Act also provides for a system of appeals; it says, “(1) Any person aggrieved by any assessment order passed by the Central Excise Official under section 71, section 72 or section 73, or denying his liability to be assessed under this Chapter, or by an order levying interest or penalty under this Chapter, may appeal to the Collector of Central Excise (Appeals).

Admittedly, this Act also provides for a system of appeals. This Act says, “(1) A person may appeal to the Collector of Central Excise (Appeals), if he thinks he is aggrieved of any assessment order passed by the Central Excise Official, under section 71, section 72 or section 73, or is denying his liability to be assessed under this Chapter, or is charged to pay interest or penalty by an order, under this Chapter.

(2) Every appeal made to the Collector of Central Excise (Appeals) shall be made in the prescribed form and verified in the prescribed manner.

(3) An aggrieved person shall present an appeal within three months from the date of the decision made or order passed by the Central Excise Official, relating to imposition of service tax, interest levied or penalty charged under this Chapter;

Provided, if the Collector of Central Excise (Appeals) is satisfied that the appellant has sufficient cause, which prevented him from presenting the appeal within the aforesaid period of three months, then he shall allow appellant to present it within a further period of three months.

(4) The Collector of Central Excise (Appeals) has power to hear and decide the appeal made to them.
Subject to the provisions of this Chapter, he shall also pass an appropriate order as he may thinks fit. Such orders may include a modified order even enhancing the service tax, interest or penalty levied by the Central Excise Official;

Provided that the Collector of Central Excise (Appeals) cannot pass an order enhancing the service tax, interest or penalty, unless the person affected thereby has been given a reasonable opportunity to show cause against such enhancement.

5. Subject to the provisions of this Chapter, the Collector of Central Excise (Appeals) shall, while hearing the appeals made to him and making an order thereby under this section, shall exercise the same powers and follow the exact procedure as he may exercises and follows while hearing an appeal and making order under the Central Excises and Salt Act, 1994.

IV. The System of Tribunals for the adjudication of taxation disputes

The Direct Taxes administration Enquiry Committee, in its report, while accepting that there was scope for improvement in the methods and procedures of work of the tribunal as well as in its composition, has, nevertheless, favoured the continuance of the tribunal for the following reasons: taxing statutes are complicated and technical and they require a high degree of specialized knowledge of both accountancy and law, which can be gained only by a continual and exclusive concern with them; the judiciary cannot be expected to go into the minute technical and accounting aspects involved in tax appeals. The High Courts would not be able to devote sufficient time to dispose of the large number of cases now being dealt with by the tribunal as they are already overburdened. It is, however, important that tax appeals should be disposed of early as it is in the interest of the assessee as well as the revenue. All these arguments are quite valid and have been responsible for the creation of the tribunal system in other countries as well as in India. The committee made a number of recommendations to enhance the prestige and impartiality of the tribunal, e.g., that a serving High Court judge should be deputed to act as the president of the tribunal by the President of India for a fixed tenure; that serving district and sessions judges should be selected for the posts of judicial members; that the accountant members should be appointed from amongst the commissioners or assistant commissioners of income tax who have a span of 10 to 15 years of service ahead of them and they should not thereafter revert to the department; that the tribunal should give reasoned and detailed orders giving full facts and findings so that a clear picture of the issues involved, the arguments advanced and the conclusions arrived at might emerge; that to cope with the appellate work coming before it, the number of its benches should be increased. Not all the suggestions of the committee have yet been implemented and, by and large, status quo ante continues.

The proposal for the abolition of the tribunal was again raised in some quarters after the committee’s
verdict, on the ground that people had much greater faith and confidence in the impartiality of the High courts and the Supreme Court than they had in the fairness and integrity of the tribunals which were appointed by the executive to adjudicate upon disputes between its taxing authorities and private persons, and which lacked proper judicial atmosphere.

(ii) Customs, Excise & Gold (Control) Appellate Tribunal

The Finance Act, 1980 made a provision for the creation of a Customs, Excise and Gold (Control) Appellate Tribunal, on the lines of the Income Tax Appellate Tribunal, to hear appeals from the lower customs (as well as excise and gold) authorities. Till the creation of the tribunal the Central Government and the Central Board of Excise and Customs had the power of revision/hearing appeals from the lower customs authorities. This kind of purely departmental adjudication did not inspire the confidence of the people, and there had been persistent demands to substitute this system by an autonomous tribunal to hear appeals.

(iii) Appellate Tribunal under the Customs Act, 1962:

The Customs Act, 1962 had provided that

(I) “The Central Government shall constitute an Appellate Tribunal to be called the customs, excise and Service Tax Appellate Tribunal consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.”

In Banwarilal v. State of Bihar the appellant had challenged the validity of a Regulation that had been framed by the Respondent State under the Mines Act, 1952. The statutory authorization required that before a Regulation was made, the draft of it shall be referred to every Mining Board which in the opinion of the Central Government is concerned with the subject dealt with by the Regulation, and the Regulation shall not be published under such Board has had a reasonable opportunity of reporting as to the expediency of making the same and to the suitability of its provision. It was contended that the impugned Regulation had been made without prior reference to any Mining Board. The respondent State argued that reference was not made because no such Board had then existed in fact. Nevertheless, it was contended that the Regulation was invalid as the condition for reference to the Mining Board was mandatory. But the Court sustained the regulation and held it valid observing that the rule regarding consultation was not mandatory but directory.

The authorities to whom powers are delegated exercise three kinds of powers under delegated authority; one is the power to make rules; the other is to enforce the rules and the third one is the authority to adjudicate upon disputes arising between the individuals and the administrative agencies. The discussion here is presented first to the application of the safeguard in relation to the rule making process of Administration under delegated authority.

As a result of the developments resulting in the vast application of the doctrine of Due Process a
culture developed in the Common Law world of observing the requirement of due process in all matters where power is exercised by the authorities of State in relation to the individuals. Same thing has happened in India which is division of the general law scheme of law.

In the beginning, the safeguard of Due Process was considered to be relevant to matters of Constitutional Law, more particularly with regard to matters of determining the disputes which were governed by Constitutional Law only, but in course of time the Due Process Theory was considered to be relevant to determination of the rights and duties governed by Criminal Law and then to matters covered by the other areas of Public Law such as Administrative Law too.

In India, there has been a serious debate as to whether the principle of Due Process of Law is relevant to matters of protecting the freedoms of individuals. For that matter, the question has been whether the safeguard is relevant to the question of Fundamental Rights. In the beginning the Supreme Court had taken the view while deciding the cases like *A K Gopalan v/s state of madras* Constitution of India follows the principle of ‘Procedure established by law’ and not so much the principle of Due Process of Law. It was however in Maneka Gandhi’s case the trend of judicial thinking has changed and it has been considered by the court necessary to introduce the safeguard of due process in the matter of protecting the rights against arbitrariness of administrative action.

Like its effective role in matters of Constitutional Law in other branches of law also the doctrine of due process has worked as an effective safeguard to the individuals against arbitrary actions of the administrative agencies. So much so that in the sphere of Administrative Law it has been adopted in quite a good number of matters and has received a wider application as a safeguard to the individuals against governmental action.

As far as Administrative Law is concerned, the three important aspects of Administrative Law which bring the agencies of State Administration in contact with the individuals are the system of making rules, applying the rules to individual cases and interpreting the scope of the rules when disputes arise between individuals and the agencies of State Administration. Of all the important aspects of Administrative Law the most significant is the system of making rules which usually is done under delegated authority and is known as Delegated Legislation. This particular function of making rules is known as Quasi-legislative function and the function of enforcing the rules through a new set up of officials of the administrative agencies are known as Quasi-Executive functions, and the third important function is that of deciding the disputes which is known as Quasi-judicial function. For the purpose of performing the quasi-judicial functions the State has established a new set of agencies to perform the judicial functions which usually are the Tribunals, Boards or Authorities.

The methodology followed in presenting the discussion on this subject is to present first the rule
position concerning the relevance of the doctrine of Due Process to administrative proceedings in general and then how the rule of due process is followed in relation to specific kind of functions of the administrative agencies, i.e., the quasi-executive, quasi-legislative and quasi-judicial functions.

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