CHAPTER - II
Constitutional Provisions and the Indirect Taxes

1. Scheme of the Constitution and Indirect Tax

For any statute to be legally enforceable in India, it has to be first Constitutional. The constitutionality of the statute is judged on the facts that there must be specific provision in the Constitution of India for the enactment of the statute.

There is one categorical and specific provision under Article 265 of the Constitution of India that, “No tax shall be levied or collected except by authority of law”.¹ The Hon’ble Supreme Court of India has held that the provision under Article 265 of the Constitution of India is applicable not only for levy but also for the collection of taxes and the expression “assessment” within its compass covers both the aspects carried out by the executive functionary.² This provision has withstood the tests of legality in later judgments also.

Therefore, it is required that whole of the process of taxation must follow the procedures which are valid under the law and must adhere to law i.e. substantive one as well as procedural one too. Therefore, in other words it is provided in the Constitution of India that every step should be taken to ensure that levy and collection of the taxes is strictly in accordance with law – not only substantive one but the procedural law, as well. Hon’ble Supreme Court of India has also held that an act done in violation of constitutional mandate is void and no right flows out of that void act to the State.\(^3\) It has also been held that Constitutional right of citizens should not be watered down, however desirable the end result of a particular case may be and denial of right to recover unlawfully collected tax is denial of the protection given to a citizen by Article 265 of the Constitution.\(^4\)

Further, it has been held that because of inherent complexity of fiscal adjustments of diverse elements in the field of tax, legislature is permitted a large discretion in the matter of

\(^3\) Mafatlal Industries Ltd. v Union of India, 1997, ELT, p 0247 S.C.

\(^4\) Supra note 2.
classification to determine not only what should be taxed but also the manner in which tax may be imposed.  

The Constitution of India is Federal in nature. Powers of the Central government as well as those of the State government have been bifurcated. There are three lists to the Seventh Schedule of the Constitution, the first list is known as Union List, the second list is known as State List and the third list is known as Concurrent List.

In respect of matters given in Union list, only Parliament has the power to enact the law. In respect of matters given in State List, only the State Legislatures have the power to make the law. And in respect to Concurrent List both the Central government and the State governments have the power to make the law.  

However, in relation to matters concerning Concurrent List if there is any conflict or repugnancy in the laws passed by the Parliament and the State Legislature, the law passed by the

\[5 \text{ Gujarat Ambuja Cements Ltd. v. Union of India, 2005, ELT, p 33 S.C.} \]
\[6 \text{ See Article 246 of the Constitution of India, supra note 1, p 732.} \]
Parliament shall prevail over the law passed by the State to the extent of that repugnancy, conflict or inconsistency.\(^7\)

There are 97 entries in the Union List\(^8\), 66 entries in the State List\(^9\), 47 entries in the Concurrent List\(^10\). However, the entries in all the three lists are generally given in the wide possible terms. Not only that as the matters concerning those lists are to be taken into consideration for framing law in future by different wings, it is utmost necessary to give widest amplitude to the words of different entries. However, as it is always found that there is overlapping, the doctrine of ‘pith and substance’ is applied to find out the true scope of the words used in different entries.

The doctrine of the ‘pith and substance’ means that whatever is specifically provided in a particularly entry prevails over anything, though incidental or connected does not fall within the scope of that entry if the said incidence of the matter is specifically covered by any other entry in other list.

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\(^7\) See Article 254 of the Constitution of India, supra note 1, p 756.
\(^8\) Id., p 1075.
\(^9\) Id., p 1079.
\(^10\) Id., p 1081.
2. Competency of Parliament to pass the law relating to Indirect Taxes:

The relevant entries in these three lists for collection and levy of indirect taxes by the Central government are provided in the Union list.

(i) Customs Duty

The customs laws are enacted with an authority drawn from the constitution. It is seen that entry 83 of the Union list\textsuperscript{11} provides for the levy and collection of duties of customs including export duties. These taxes are indirect taxes as it has been held that the Customs duties are, in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is extracted.\textsuperscript{12}

(ii) Central Excise Duty

Similarly, the Central Excise duty is also collected with authority of the Constitution. It is seen that entry 84 of the Union

\textsuperscript{11} Id., p 1078.
List\textsuperscript{13} provides for the levy and collection of another important indirect tax i.e. duties of excise on tobacco and other goods manufactured or produced in India except –

(a) Alcoholic liquors for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics,

But including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry,

(iii) Service Tax

Although, entry 92–c of the Union List\textsuperscript{14} provides for the levy and collection of taxes on services but this entry has been included recently and the date from which it will be effective is to be notified later on. Therefore, this tax is still collected as per Finance Act, 1994. After the imposition of this tax, its validity on various counts i.e. levy, mode of levy, collection etc. was tested in various cases before the courts but the same has been approved to be correct but for few shortcomings noticed in the judgments and the most significant on this is case of Laghu

\textsuperscript{13} \textit{Supra} note 1, p 1078.
\textsuperscript{14} \textit{Id.}, p 1078.
Udyog Bharati. These shortcomings have been dealt with by passing of various legislations by the parliament with retrospective effect.

3. Constitution of Tribunals and its legislative competence

Due to rising number of pending cases in the courts of law, a need was felt for the speedy and alternate machinery for the redressal of the disputes. Therefore, part XIV-A was added to enable Parliament to constitute administrative tribunals for dealing with the disputes regarding recruitment and condition of service of persons appointed to public service by the 42nd Amendment to The Constitution of India 1976. Parliament may by law provide for the jurisdiction, power and authority of such tribunals and prescribe the procedure to be followed by them. This Article provided for the exclusion of jurisdiction of all courts except that of the Supreme Court under Article 136. It was further provided that similar tribunals may be established with respect to matters such as tax, foreign exchange, industrial or labour disputes, land reforms, elections of legislative bodies, etc.

16 Supra note 1, p 904.
17 Ibid.
18 Id., p 501.
While administrative tribunals falling within the scope of Article 323-A\textsuperscript{19} can be established only by Parliament, tribunals under Article 323-B\textsuperscript{20} may be established both by Parliament and State Legislatures with respect to matters falling within their legislative competence. Again, while under Article 323-A only one tribunal for the Union and one for each State or two or more States may be established under Article 323-B, a hierarchy of tribunals may be created. The parliament, therefore, has powers to make laws, to provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters of levy, assessment, collection and enforcement of any tax under Article 323B(2)(a).\textsuperscript{21} The Customs Excise and Service Tax Appellate Tribunal earlier Customs Excise and Gold (Control) Appellate Tribunal was also established for these purposes in the year 1982.\textsuperscript{22} It is important to mention here that Customs Excise and Gold (Control) Appellate Tribunal now Customs Excise and Service Tax Appellate Tribunal has been established under section 129 of the Customs Act, 1962\textsuperscript{23}.

\textsuperscript{19} Id., p 904.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid.
\textsuperscript{23} Ibid.
Therefore, there are two types of Tribunals, i.e. one formed under Articles 323A or 323B of the Constitution of India and the other ones formed under any statute. The Tribunals formed under Articles 323A or 323B of the Constitution of India are high power Tribunals as compared to the tribunals established under any statute other than the Constitution of India. But nevertheless the functioning of both type of tribunals in effect is similar for all purposes.

The Constitution of India further provides for the exclusion of the jurisdiction of all courts except the jurisdiction of the Supreme Court of India under Article 136\textsuperscript{24} of the Constitution of India with respect to all or any of the matters falling within the jurisdiction of the said tribunals.\textsuperscript{25}

This exclusion of the jurisdiction of the High Courts was propounded as theory of ‘alternative institutional mechanisms’ to defend the establishment of Administrative Tribunals which were conferred jurisdiction over service related matters. In respect of

\textsuperscript{24} Supra note 1, p 501.
\textsuperscript{25} See Article 323-B(3)(d) of \textit{the Constitution of India. Id.}, p 904.
the grave concern with the increasing pendency of litigation before the various High Courts in India, the Hon’ble Supreme Court of India accepted the policy of choice of creation of separate administrative tribunals which were characterized as ‘substitutes’. The Hon’ble court even went one step further and approved the provisions of exclusion of the ‘judicial review’ by the High Courts in these matters.\(^{26}\)

This position was later on reconsidered and was changed and it was finally resolved by the Hon’ble Supreme Court of India that judicial review is part of basic structure of the Constitution, and declared that this clause 3(d) of Articles 323-B\(^{27}\) was unconstitutional to the extent that excluded the jurisdiction of the High Courts under Articles 226 and 227 and that of the Supreme Court under Article 32.\(^{28}\) Therefore, the judicial remedies under Articles 32, 226 and 227, wherever appropriate, are now available against the decisions of all tribunals constituted under Article 323-A and 323-B. Also Certain other exceptional circumstances warranting interference by the High Court under Article 226 recognised by judicial pronouncements are, the

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27 Supra note 1, p 905.
decision is mala fide, the decision is prompted by extraneous
considerations, the decision is made in contravention of
principles of natural justice or any constitutional provisions.\textsuperscript{29}

4. Concluding Remarks

Since the tribunals started functioning and replaced the
High courts, the need arose that there is necessity that Law
Commission looked into their functioning and it was also
necessary that they were in no way less independent and
competent than the High Courts. Therefore, it was necessary
that they were presided over by a judicial member of the rank of
a sitting or retired judge of a high court. Even other members, as
far as possible, could be taken from amongst the judges.
Induction of the judges would ensure independence, efficiency
and fair administration of justice and also confidence of people in
them. This was necessary because the only available remedy
against the decision of the Tribunals under Article 136 could not
be easily availed by every one.\textsuperscript{30}

\textsuperscript{29} Basheer Ahammed v. Collector Of Custom & Central Excise, 1992, ELT, p 583
Kerala.

It has been observed by even the hon'ble High Court of Karnataka that a remedy by way of appeal to Supreme Court becoming nugatory on account of high costs even for an economically viable and profit making company, this may be indicative of failure of Indian judicial system and amounts to denial of constitutional rights of citizens of India as enshrined in Constitution.\textsuperscript{31} Moreover, the Constitution guarantees free and independent judiciary and the constitutional scheme of separation of powers can be easily and seriously undermined, if the legislatures were to divest the regular courts of their jurisdiction in all matters, entrust the same to newly created Tribunals which are not entitled to protection similar to the constitutional protection afforded to the regular Courts.\textsuperscript{32}

\textsuperscript{31} Premier Irrigation Equipment Ltd. v. Union of India, 1998, ELT, p 29 (Karnataka).
\textsuperscript{32} Pareena Swarup v. Union of India, 2008, ELT, p 210(SC).