

E-BOOK

On

Drafting of Adjudication Order (Some Basics)

Drafting of Adjudication Order: Some Basics

Note:

1. In this E-book, attempts have been made to explain and provide some basics about **Drafting of Adjudication Order**. It is expected that it will help departmental officers in their day to day work.
2. Though all efforts have been made to make this document error free, but it is possible that some errors might have crept into the document. If you notice any errors, the same may be brought to the notice to the NACEN, RTI, Kanpur on the Email addresses: rtinacenkanpur@yahoo.co.in or goyalcp@hotmail.com (Email address of ADG, RTI, NACEN, Kanpur). This may not be a perfect E-book. If you have any suggestion to improve this book, you are requested to forward the same to us.
3. In preparing this e-book, we have used the knowledge and case laws shared in the Adjudication workshop held at Lucknow on 25.03.2015 by **Shri B. B. Agarwal, ADG, Centre of Excellence, NACEN, Delhi**. We, at RTI, Kanpur express our gratitude to him for readily agreeing to the use of material shared by him for the preparation of this e-book.
4. If any officer is interested in preparing E-book on any topic relating to Customs, Central Excise or Service Tax, he may forward the E-book prepared by him to the Email addresses mentioned above. After necessary vetting, we will include the same in our E-book library for benefit of all Departmental officers.

Sd/-

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Remember: *Three Most Important three words for any Adjudicating Authority:*

“Read the Law”

1. Normally, any adjudication order has following distinct Parts:
 - (i) Brief Facts of the Case, charges against the noticee, action proposed against him etc. with respect to specific nature of contravention of statute & specific penalties thereof.
 - (ii) Written Submission by the Noticee
 - (iii) Personal Hearing and submission made during personal Hearing
 - (iv) Discussion and Findings {by the Adjudicating Authority}
 - (v) Order.

2. Before starting the process, it may be ensured that a copy each of the RUDs has been given to the noticees and non-RUDs have also been returned to the noticee. Further, it may also be ensured that there should not be any unsettled issue, which has been raised by the noticee and may result in the violation of principles of natural justice. This may vitiate the process as well as product (i.e. adjudication order) of adjudication. **It may always be kept in mind that any violation of principles of natural justice by quasi-judicial authority will result in return of the case to the adjudicating authority for fresh adjudication at a later date by way of remand for de-novo adjudication by Tribunal/HC/SC, as the case may be.**

3. The process of adjudication and issuance of adjudication order may be summarized in the following steps.

1. Step No.1: Careful Consideration of the Material on Record

4. Adjudicating authority should give careful consideration of all the material on record as mentioned below:
 - (i) Facts of the case.
 - (ii) Evidence on the record against each noticee with respect to specific provisions of Statute
 - (iii) Charges against each noticee
 - (iv) Reply furnished by each noticee

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- (v) Case laws relied upon by each noticee in his/her defence (issue-wise).
- (vi) Record of personal hearing- any fresh documents submitted by noticee at the hearing stage {which is not known or not in the knowledge of the Department]
- (vii) Carefully read the legal provisions relevant to the case. If the legal provisions have gone through the amendment over a period of time, consider the legal provision which existed at the material time i.e. at the time of booking of case.

2. Step No.2: Listing of the Issues to be decided [with respect to facts and provisions of statute contravened]

5. Having carefully considered all material on record, the Adjudicating authority should list all issues to be decided upon in the impugned case. Sometimes, in addition to charges made by the Department against the noticee, certain issues such as lack of jurisdiction of SCN issuing authority or adjudicating authority, SCN being time barred, non-delivery of SCN in time, non-supply of copies of RUDs, non-return of non-RUDs etc. are also raised by the noticee. If so, then the adjudicating authority is also required to consider these issues raised by the noticee and give its finding and order on these issues. Before initiating the process of adjudication, it should be ensured by the adjudicating authority that a copy of each of the RUDs is supplied to the noticees and non-RUDs are returned to the concerned noticee from whom it has been resumed during investigation.

3. Step No.3: Segregation of the Issues on which there is no dispute between the Department and Party

6. After listing all issues to be decided upon, the adjudicating authority should segregate the issues in two categories- one on which there is no dispute between Department & noticee and other –on which there is dispute between Department and noticee. The issues, on which there is no dispute, may be summarized in one or two paragraphs of the findings and there is no need to discuss the same in great details.

7. The remaining issues, where dispute (i.e. lis) between the Department and noticee exists, should be listed. At this stage, the question of sequencing of issues to be decided is required to be considered carefully.

4. Step No. 4: Sequencing of Issues to be decided

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8. If any ground (s) raised by the noticee has implication resulting in setting aside the entire SCN such as grounds of non-jurisdiction of SCN issuing authority, non-jurisdiction of adjudicating authority, SCN being time barred etc., then the adjudicating authority has to decide these issues first before deciding the charges involved in the SCN.

9. For example, if any noticee contends that entire SCN is time barred and extended period cannot be invoked by the Department. In such a situation, it will be appropriate to decide the issue of time bar first, before deciding the SCN on merit. Similarly, in any case of grant of refund, normal sequencing of issues to be decided by the adjudicating authority is (i) time bar, (ii) admissibility of refund claim on merit, and (iii) issue of unjust enrichment. This sequencing of issues to be decided is important. For example, in refund matter, the issue of unjust enrichment cannot be decided first and time bar at the last.

5. Step No. 5: Consideration of Each Issue in Sequential Manner

10. Once issues to be decided have been listed and sequenced, then, the adjudicating authority should proceed issue-wise -by considering the following:-

- (i) Charge made by the Department;
- (ii) Evidence relied upon in support of the charge by the department;
- (iii) Noticee's submission and defence against the charge
- (iv) Evidences and case laws relied upon by the noticee in his defence;
- (v) Provisions of laws in respect of that issue (which existed at the material time).

6. Step No. 6:

(a) Careful Consideration of Case Laws

11. Case laws relied upon by the noticee in his defence should be carefully gone through. Each order of the High Court and Supreme Court, inter alia, has two important portion—(i) **obiter dictum** (plural- **obiter dicta**) —(it is by way of observation and it is not an issue under consideration of the court) and (ii) **ratio decidendi**- ratio laid down by the court. For the purposes of judicial precedent, *ratio decidendi* is binding, whereas *obiter dicta* are persuasive only. While considering the case laws quoted by the party, entire case has to be gone through thoroughly, not the head notes alone.

12. Each case law relied upon by the noticee has to be examined from the consideration of its applicability to the facts and circumstances of the impugned case. On consideration, if the adjudicating authority finds that it is not applicable to the impugned case, then the

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authority should mention in its order as to why the case law relied upon by the noticee in its defence is not applicable to the impugned case. If the adjudicating authority finds that the case law is relevant and is in favour of the assessee, but there is another case which is contrary to the case law quoted and relied upon by the noticee, then it must be mentioned in the order.

(b) Maintaining Judicial Discipline/Judicial Precedence

13. Judgement delivered by Hon'ble Supreme Court is of the highest precedence as it becomes law of the land. If, under any circumstances, the Hon'ble Apex Court reverts its own judgement, then the lordships discuss the earlier judgement and also give reasons for reverting the earlier Judgement and more often, the orders are reverted by larger bench. In that case, the last Judgement becomes the law.

14. As regard interpretation of any law, sometimes different high courts may take different view. In that case, normally, the issues go to Hon'ble Supreme Court which finally decides the issue. But in other cases, the jurisdictional High Court Judgement is binding upon all in its jurisdiction. If contrary judgements exist on the same issue at the same level (i.e. High Court/Tribunal), then two more aspects comes into play:

- (i) Number of judges/Members in the bench delivering the Judgement; and
- (ii) Date of the Judgement.

15. Sometimes, the case laws of lower appellate authority lower than Supreme Court are stayed by higher forum on department appeal against that order. Then it must be checked as to whether it is so in the case law relied upon by the party. If it is so, then the case law need not be applied on ground of stay.

(c) Order of Commissioner/Tribunal/High Court accepted on Low Monetary consideration not to have any precedence value

16. As part of the National Litigation Policy, monetary limits have been laid down by the Board wherein if it has been provided that if the amount of duty involved is lower than the limit prescribed and order is against the department, in such cases, department cannot file appeal against the order on account of low monetary consideration. In such a situation, the order of commissioner/Tribunal /High Court has no precedence value. Each case law quoted and relied upon by the noticee should be considered on this ground also before deciding its precedence value.

(d) Case Law to be considered with Reference to the Law existed at Material time

17. Since the law as well as its interpretation by Court/Tribunal is dynamic, the case law must be seen in the light of law (i.e. text of legal provision) which existed at the time of the case. Or in other words, the case law must be seen in the light of law with reference to which it was given. At times, the relevant provisions of law which existed at the time of booking of impugned case is not the same with reference to which the case law relied upon by the noticee (in his/her defence) pertains.

18. At times, adjudicating authority summarily dismisses all the case laws relied upon by the noticee by writing in the order as under:

“I have gone through the case laws relied upon by the noticee in its defence and find that the facts and circumstances of these case laws are different from the facts and circumstances of the impugned case and therefore the same are not applicable to the instant case.”

The case laws relied upon by the noticee cannot be dismissed summarily as explained above. Such approach by adjudicating authority may be interpreted as non-application of mind and order being non-speaking or non-reasoned order. It is important to discuss as to why and how the case laws relied upon by the noticee are not applicable to the impugned case. It is MUST for every adjudicating authority.

(e) Considering Case Laws in support of Charges made by the Department/ or contrary to the Case Laws Relied Upon by the Noticee

19. At the time of issuance of the SCN, the Departmental officers do not mention any case law in support of charges made by the Department in the SCN. The noticee in its defence only mentions those case laws which are in its favour. Therefore, for objectively reaching at a conclusion at the time of adjudication, it is necessary for the adjudicating authority to find out and consider all relevant case laws on the issue under consideration and pass a reasoned order.

7. Step No.7: Issuance of Speaking Order is must

20. The adjudicating authority is required to decide each and every issue in the same way and gives its finding on each issue along with reasons of arriving at a particular decision. In other words, it must be a speaking order. In this regard, supreme court direction in the case of **Kranti Associates Pvt. Ltd. Vs. Masood Ahmed**

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Khan{Citation:- 2011 (273) ELT 345 (SC)} must be kept in mind wherein the Hon'ble Supreme Court held as under: _

- (a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
- (b) A quasi-judicial authority must record reasons in support of its conclusions.
- (c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
- (d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- (e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
- (f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
- (g) Reasons facilitate the process of judicial review by superior Courts.
- (h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the Life blood of judicial decision making justifying the principle that reason is the soul of justice.
- (i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.
- (j) Insistence on reason is a requirement for both judicial accountability and transparency.
- (k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.
- (l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.
- (m) It cannot be doubted that transparency is the *sine quanon* of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to

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broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

- (n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and *Anya v. University of Oxford*, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, “adequate and intelligent reasons must be given for judicial decisions”.
- (o) In all common law jurisdictions judgements play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of “Due Process”.

8. Step No.8: Drafting of Adjudication Order

21. While drafting the order, the Supreme Court direction in the case of **JCIT Surat vs. Saheli Leasing & Industries Ltd. {Citation :- 2010 (253) ELT 705 (SC)}** must be kept in mind. These guidelines are only illustrative in nature, not exhaustive and can further be elaborated looking to the need and requirement of a given case:-

- (a) It should always be kept in mind that nothing should be written in the judgement/order, which may not be germane to the facts of the case; It should have a co-relation with the applicable law and facts. The ratio decidendi should be clearly spelt out from the judgement/order.
- (b) After preparing the draft, it is necessary to go through the same to find out, if anything, essential to be mentioned, has escaped discussion.
- (c) The ultimate finished judgement/order should have sustained chronology; regard being had to the concept that it has readable, continued interest and one does not feel like parting or leaving it in the midway. To elaborate, it should have flow and perfect sequence of events, which would continue to generate interest in the reader.
- (d) Appropriate care should be taken not to load it with all legal knowledge on the subject as citation of too many judgements creates more confusion rather than clarity. The foremost requirement is that leading judgements should be mentioned and the evolution that has taken place ever since the same were pronounced and thereafter, latest judgement, in which all previous judgements has been considered, should be mentioned. While writing judgement, psychology of the reader has also to be borne in mind, for the perception on

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that score is imperative.

- (e) Language should not be rhetoric and should not reflect a contrived effort on the part of the author.
- (f) After arguments are concluded, an endeavour should be made to pronounce the judgement at the earliest and in any case not beyond a period of three months. Keeping it pending for long time sends a wrong signal to the litigants and the society.
- (g) It should be avoided to give instances, which are likely to cause public agitation or to a particular society. Nothing should be reflected in the same which may hurt the feelings or emotions of any individual or society.

Aforesaid are some of the guidelines which are required to be kept in mind while writing judgements.

Note: This write up has been prepared by officers of the RTI, Kanpur on the basis of their practical experience and is meant to be used as training material for the newly recruited officers. It may not be a perfect write up and may require improvement. Please assist the NACEN, Kanpur in improving the same by writing to us at rtinacenkanpur@yahoo.co.in. Errors, if any, may also be brought to our notice.