

**GUJARAT NATIONAL LAW UNIVERSITY  
GANDHINAGAR**

Course: **Constitutional Law-I**

**Semester-III (Batch: 2019-24)**

**End Semester Online Examination: December 2020**

**Date: 12<sup>th</sup> December, 2020**

**Duration: 8 hours**

**Max. Marks: 50**

**Instructions:**

- The respective marks for each question are indicated in-line.
- Indicate correct question numbers in front of the answer.
- No questions or clarification can be sought during the exam period, answer as it is, giving reason, if any.

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| <b>Q.1</b> | <p>Kharak Singh is a partner in the firm M/s. Cawnpore which carries on the business of manufacture and sale of cotton cloth, their registered office being in Ahmedabad. The firm is a dealer as defined in S.2 9 (c) of the Gujarat Sales Tax Act, which by Sec. 3 lays down that every dealer shall be subject to the provisions of the Act, in every assessment year pay a tax on his, turnover of each year which shall be determined in such manner as may be prescribed.</p> <p>Under section 4(1) of the Gujarat Sales Tax Act, 1948 hereinafter called the 'Act', the State Government is authorised by a notification to exempt unconditionally under clause (a) and conditionally under clause (b) any specified goods.</p> <p>On December 14, 2007, the Government of Gujarat issued a notification under section 4(1)(b) of the Act exempting cotton cloth provided that the additional Central Excise Duties leviable under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 has been paid.</p> <p>This notification was subsequently modified and on November 25, 2008, another notification was issued unconditionally exempting from sales tax cotton cloth both handmade and machine-made with effect from July 1, 2008. The exemption of cotton cloth from sales tax was conditional under the notification dated December 14, 2007, for the period December 14, 2007, to June 30, 2008, but was unconditional as from July 1, 2008.</p> <p>The firm submitted its return for the quarter beginning April 1, 2008, to June 30, 2008. The firm claimed that with effect from December 14, 2007, cotton cloth had been exempted from payment of sales tax which had been replaced by the additional central excise duty and therefore no tax was leviable on the sale of cotton cloth.</p> <p>The Sales Tax officer on November 28, 2008, sent a notice to the firm for assessment of tax on sale of cotton cloth during the assessment period April 1, 2008, to June 30, 2008. On December 10, 2008, the firm submitted an application to the Sales Tax Officer stating that no sales tax was eligible under the Act on the sale of cotton cloth because of the notification dated December 14, 2007. By his order dated December 20, 2008, the Sales Tax Officer rejected this contention. He observed:</p> <p>"The exemption envisaged in this notification applies to dealers in respect of sales of cotton cloth provided that the additional Central Excise duties leviable thereon from the closing of business on 13-12-2007 have been paid on such goods. The assessee paid no such Excise duties. Sales of cotton cloth by the assessee are therefore liable to sales tax".</p> | <p><b>Marks</b><br/>(5+15+<br/>5=25)</p> |
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Against this order, there was appeal to the Court of the Judge (Appeals), Sales Tax, Ahmedabad, who, by his order dated May 1, 2009, dismissed the same on the ground that the exemption from sale tax under the notification related "to such classes of goods only on which the Additional Central Excise Duty was leviable."

While the appeal was pending, Kharak Singh also filed a petition under Article 226 in the High Court of Gujarat for a writ of certiorari to quash the assessment order dated December 20, 2008.

That was dismissed on January 27, 2009, by the learned Judges on the ground that, as the assessee could contest the validity of the order in appropriate proceedings under the Act, and an appeal had been made, and there was no ground for exercising the extraordinary jurisdiction under Article 226. In view of this the learned Judges did not decide the case on the merits, but observed that the "language of the notification might well be read as meaning that the notification is to apply only to those goods on which an additional Central excise duty had been levied and paid."

Kharak Singh then filed an application under Article 133 of the Constitution for certificate for appeal to this Court against the above order, and that was granted. But instead of pursuing that remedy, petitioner filed a writ petition under Article 32 challenging the validity of the order of assessment dated December 20, 2008. In the petition, petitioner alleged that the imposition and levy of tax aforesaid "amounts to the infringement of his fundamental rights to carry on trade and business guaranteed by Article 19(1) (g) of the Constitution". Therefore the prayer was made in the petition that this Court might be pleased to issue-

- (a) a writ of certiorari or appropriate order in the nature of certiorari quashing the order of the Sales Tax Officer, Ahmedabad, dated 20th December 2008;
- (b) a writ of mandamus directing the opposite parties not to realise any sales tax from the petitioner on the basis of the said order dated 20th December, 2008."

On the other hand the State of Gujarat raised a preliminary objection to the maintainability of this petition on the ground that laws of taxation which are protected by Article 265 fall outside the purview of Part III of the Constitution, and are not open to attack as infringing fundamental rights guaranteed therein, and even if they are subject to the restrictions in Part III, an order of assessment made by a Tribunal acting judicially under a statute which is intra vires such as the impugned order dated December 20 2008, does not infringe Article 19(1)(g), and that, further, a petition under Article 32 is not maintainable for challenging it, even if it is erroneous on the merits.

As a result of preliminary objection to the maintainability of the writ petition raised by the respondents, the five judge bench referred the matter to a larger bench. The bench framed two constitutional questions relating to the scope of Article 32 to be decided by the larger bench. The two questions which have been referred to this larger Bench are:

1. Is an order of assessment made by an authority under a taxing statute which is intra vires, open to challenge as repugnant to Article 19(1)(g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued there under ?
2. Can the validity of such an order be questioned in a petition under Article 32 of the Constitution?

Based on the above facts, answer the following:

- a) Place your argument in favour of both the sides. (5 Marks)
- b) Decide the petition with the help of Supreme Court judgments. (15 Marks)

- c) Explain, why the five judges bench referred the matter to a larger bench? (5 Marks)

Q.2 Greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes has been a matter of major concern. The number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to seats in private unaided institutions. It is laid down in article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of article 30 of the Constitution, it is proposed to amplify article 15. (5+10+10=25)

Clause (5) was inserted in Article 15 of the Constitution with the above object. The clause (5) is as follows:

“(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.”

**Answer the following questions:**

- a) Identify the case/cases in which the constitutional validity of clause (5) was challenged before the Supreme Court of India? (5 Marks)
- b) Critically analyse the majority opinion of the case/cases in which the Constitutional validity of clause (5) was challenged before the Supreme Court of India. (10 Marks)
- c) Critically analyse the minority opinion of the case/cases in which the Constitutional validity of clause (5) was challenged before the Supreme Court of India. (10 Marks)

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