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Interpreting Taxing Statute # 64 - Imperative and permissive provision (Shall / May)

If the law is imperative the proper auxiliary verb of the predicate (copula) is ‘shall’ or ‘shall not’, but if the law is permissive the auxiliary verb of the predicate would be ‘may’.

SYNOPSIS

Shall: If the law is imperative (mandatory, compulsory, obligatory), the proper auxiliary verb of the predicate is ‘shall’ or ‘shall not’. This ‘shall’ should not be confused with shall of future tense as an enactment has to be speaking one ie in past tense or present tense. Rather ‘shall’ should be taken in the sense of ‘must’.

May: If the law is permissive (discretionary, enabling, directory), the auxiliary verb of the predicate would be ‘may’. ‘May’ indicates option as well as discretion. For example, IT Sec 1(1) which reads – “This Act *may* be called the Income-tax Act, 1961.” – allows it be referred either by the short title ie Income Tax Act 1961 or by the serial number as allowed by GC Sec 28(1).

May as imperative: Not infrequently, courts have been obliged to construe ‘may’ as obligatory but these instances amount rather to judicial amelioration of drafting errors than to a licence to drafters to say one thing and mean another.

Where the law implies compulsion, the courts show inclination towards construing ‘may’ as imperative.¹

¹ Thring 1877 p 20

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 Enabling words are read as compulsory where they are to effectuate a legal right.<sup>2</sup>

A duty should not be disguised as a discretion or permission. ‘May’ should not be used where a duty is imposed which must be performed. The following example is indefensible –

Upon receiving an objection made under section 4, the Minister may consider it and . . .

So, where the context cast a duty then law makes it imperative and ‘may’ is read as ‘shall’.<sup>3</sup>

In order to remove the confusion, however, the legislature (draftsman) adds words such as ‘may in its discretion’ or ‘may if it thinks it expedient’, and so forth to distinguish clearly the imperative and permissive enactments. Eg CGST 168(1):

‘The Board **may**, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the central tax officers ...’

**Two functions of shall:** ‘Shall’ is a verbal auxiliary capable of performing two separate functions which should not be confused. ‘Shall’ may be—

- i. temporal and denote future time, or
- ii. modal denoting obligation (in traditional grammar referred to as the imperative mood).

The temporal use is not often necessary in legislation because of the convention that a statute is to be regarded as always speaking. Thus, although it may be known that acts or circumstances may occur long after the statute is passed, the present tense will in

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<sup>2</sup> Province of Bombay vs. Kusaldas S. Advani AIR 1950 SC 222

<sup>3</sup> State (Delhi Admn.) v I.K. Nangia (1980) 1 SCC 258

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most cases nevertheless be correct. These examples, therefore, are incorrect –

If any person shall give notice, that person may appeal . . .

If any balance shall have been found to be due . . .

A person who shall allow any animal to stray . . . shall be guilty of . . .

Correct forms are –

If any person gives notice, that person may appeal . . .

If any balance is found to be due . . .

A person who allows any animal to stray . . . is guilty of . . .

Must: It is preferable to use ‘must’ instead of ‘shall’ to impose an obligation. This is more in line with ordinary speech and avoids the confusion that the use of ‘shall’ may introduce. Eg:

If a balance is found to be due, the Commission **must** report that fact to the Minister.

Declaratory shall: The declaratory use of ‘shall’ in contexts that are neither temporal nor obligatory, although quite common, should be avoided. Thus –

The agreement shall be void.

May be improved as:

The agreement is void.

Is required to / is to: In some contexts where an obligation is intended, ‘is required to’ or ‘is to’ may be preferable to ‘shall’, particularly when the obligation is of an administrative character. Eg:

The registrar shall maintain the register in an up-to-date form.

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May be improved as –

The registrar is required to / must maintain the register in an up-to-date form.

Misuse of shall: The misuse of the word ‘shall’ can appear to convert a condition of a kind that may or may not be performed at the will of the party into a positive command. Eg:

Fourteen days’ notice in writing shall be given by every person entitled to appeal . . .

‘May’ should be used where a permission, benefit, right or privilege is to be given. Thus –

A licensee shall be entitled to . . .

May be improved as:

A licensee may . . .