



## **CONSTITUTIONALITY OF GOODS AND SERVICES TAX APPELLATE TRIBUNAL (GSTAT)**

### **A. RATIONALE**

The new indirect tax regime i.e., Goods & Services Tax (“GST”) was implemented w.e.f. 01.07.2019, as the greatest tax reform in the Country. The unified tax structure has been designed as a dual system, wherein both the Centre and the States are empowered to impose taxes based on their respective constitutional mandate.

### **B. OBJECTIVE OF GST AND TEETHING PROBLEMS**

Though the objective of this unified tax structure includes lower legal compliances, reduction in litigation, transparency in tax structure etc., however, we all have been witnessing the teething issues with which the Government has been grappling and how the historic tax regime has been implemented in India in the midst of such bottlenecks. Those teething worries can be seen in the form of technical glitches, numerous notifications, circulars, press releases and excessive litigation (till now countless advance rulings have been issued and appeals against such advance rulings and various writ petitions have been filed before the Authorities and the Courts).

### **C. APPEALS UNDER GST**

Under the GST Regime, assessee or the Department may challenge the Adjudication Order before the Appellate Authority in terms of Section 107 of the CGST Act, 2017. The order of the Appellate Authority is also challengeable before the Appellate Tribunal in terms of Section 109 of the CGST Act, 2017.

### **D. GST APPELLATE TRIBUNAL**

The Central Government is empowered to constitute National Bench of the Appellate Tribunal, which shall be situated at New Delhi and on the recommendation of the GST Council may constitute such number of Regional Benches.

The Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, approved the creation of National Bench of the Goods and Services Tax Appellate Tribunal (GSTAT), which shall be situated at New Delhi and will be presided over by its President and shall consist of one technical member each from centre and state. The Regional Benches shall also consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).



It is relevant to mention here that GSTAT is a forum of second appeal and first common forum of dispute resolution between centre and states. The forum ensures uniformity in redressal of disputes.

## **E. CONSTITUTIONAL VALIDITY OF GST**

Though the Central Government has issued the Notification for constitution of benches of the Appellate Tribunal, however, with the creation of the GSTAT an anomaly arose, in which it has been construed that the constitution of GST Appellate Tribunal is unconstitutional.

The Madras High in the matter of *Revenue Bar Association v. Union of India and Others*, while holding the constitution in the current format of the GST Appellate Tribunal (GSTAT) as unconstitutional (since the number of judicial members must exceed the number of technical members), ruled that advocates do not have a fundamental right to become judges/judicial members of GSTAT.

### ***E.1 ISSUES BEFORE THE HIGH COURT***

The following issues, arose before the Division Bench of the Madras High Court:

- whether the composition of the National Bench, Regional Benches, State Bench and Area Benches of the GST Appellate Tribunal, which consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State), by which the administrative members outnumber the judicial member is violative of Articles 14 and 50 of the Constitution of India and the judgments of the Hon'ble Supreme Court of India;
- whether the exclusion of advocates from being considered for appointment as a Judicial Member in GST Appellate Tribunal, is violative of Article 14 of the Constitution of India;
- Whether Section 110 (b)(iii) which makes a member of the Indian Legal Service, eligible to be appointed as a Judicial Member of the appellate tribunal, contrary to the



law laid down by the Hon'ble Supreme Court in the matter of *Union of India Vs. R. Gandhi*.<sup>1</sup>

## ***E.2 HIGH COURT'S OBSERVATIONS***

The anomalies raised were carefully considered by the Hon'ble Madras High Court. The High Court stated that to have more technical members while constituting the GSTAT will create a reasonable apprehension in the mind of the assessee that the fair justice is compromised resulting in state centric decisions. Moreover, it was also observed that Article 50 of the Constitution of India which deals with Separation of Powers of the judiciary from the executive, must be construed in such a way that the dominance of the executive should not outweigh Judicial Member(s).

While looking into the provisions of section 110 (1)(b), the Hon'ble High Court believed that the section cannot be struck down merely on the grounds that it does not include advocates while constituting GSTAT. Therefore, the court was of the opinion that Union of India must evaluate as to why it is making departure from the existing practice as advocates are eligible to be appointed as Judicial members in other existing Appellate Tribunals as well, like Income Tax Appellate Tribunals (ITAT) which are one of the oldest Tribunals in the country and the Central Excise Service Tax Appellate Tribunals.

While deciding the validity of Section 110(1)(b)(iii), the Court noted that the matter is well settled that members of Indian Legal Service cannot be considered as Judicial Members. That in *Union of India Vs. R. Gandhi [2010(11) SCC 1]* the Supreme Court categorically held that a person who is holding a position under the Indian Legal service cannot be considered for appointment as a judicial member. This dictum of the Hon'ble Supreme Court would apply to the Appellate Tribunal as well.

## **F. CONCLUSION**

It is relevant to mention here that it is a settled law that the creation of alternative institutions, which act akin to High Courts, must not be less effective than the High Courts. The objective of establishment of such alternative institutions will go in vain if less number of Judicial

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<sup>1</sup> 2010(11) SCC 1



Members are appointed. The composition of GST Appellate Tribunal will create a troublesome situation in case technical members outnumber the Judicial members.

In my view, advocates having more than 10 years of experience or more as may be prescribed by the Central Government, should be considered for appointment as judicial members, as they are well versed and acquainted with the law and are also having judicial experience to understand and examine the complex questions of law. Advocates are not only officers of the Court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. Therefore, their appointment as judicial member(s) may with propriety be entrusted to the courts. The Courts while performing this duty may very justly be considered as engaged in the exercise of their judicial functions.

The Central Government in this scenario should make the necessary amendments in the GST Law while considering the Judgment of the Madras High Court. The Independence of the judiciary is a fighting faith of our Constitution and fearless justice is cardinal creed of our founding documents.

We all know the fact that a large part of the litigation in courts is generated from people being aggrieved against the governance, action and inaction of the Government including the executive and/or its instrumentalities. Thus, the courts must be kept free from any influence that the executive may be able to exercise by its actions, purely executive or even by its power of subordinate legislation.

What is most important is the independence of judiciary, its freedom from interference and pressure from other organs of the State. The courts and Judges, thus, must be provided complete freedom to act, not to do what they like but to do what they are expected to do, legally and constitutionally and what the public at large expects of administration of justice. Thus justice should not only be done, but it should seem that justice is being done both in letter and spirit.