

IN THE HIGH COURT OF JUDICATURE AT MADRAS WP No.21147 & 21148 of 2018

Revenue Bar Association

...Petitioner

Versus

Union of India and others

...Respondents

Objective: Analysis of the validity of the Writ Petitions challenging the constitutional of the GST Appellate Tribunal (GSTAT).

ISSUES:

1. Whether creation of tribunals by divesting powers of a civil court would violate Article 50?
2. Whether expert/technical members in a tribunal can be in the majority in a bench?

RELEVANT RULES/ CASE LAW:

1. **Article 50 of Constitution of India**

Article 50 states that “*the State shall take steps to separate judiciary from the executive in the public services of the State*”.

2. **Kihoto Hollohan v. Zachillhu [1992 SCR (1) 686]**

“*Where there is a lis-an affirmation by one party and denial by another and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a tribunal, if it does not have all trappings of a court.*”

3. **Law Commission of India, Report No. 272**

In Tribunals, the Technical Members should be appointed only and only when service/advice of an expert on technical or special aspect is required. “*The appointment of Technical/Expert members in addition 2to the judicial members be made only where the Tribunals are intended to serve an area which requires specialized knowledge or expertise or professional experience and the exercise of jurisdiction involves consideration of, and decisions into, technical or special aspects*”.

4. **Section 110 of Central Goods and Service Tax, 2017.**

ANALYSIS:

The issue which was under the consideration in front of the Supreme Court in the case *Kihoto Hollohan v. Zachillhu* was the Constitutional validity of the Tenth Schedule introduced by the Constitution (Fifty Second Amendment) Act, 1985. The Constitution (Fifty-second Amendment) Act changed four articles of the Constitution, viz. 101(3) (a), 102(2), 190(3)(a) and 191(2) and added tenth schedule thereto. It is while adjudicating this issue that the Supreme Court held that creation of tribunals by divesting powers of the civil courts would not per se erode independence of judiciary. It is in this context that the Supreme Court held that specialized tribunals “*may not strictly come within the concept of the judiciary, as envisaged by Article 50*”. This is true more so because in the same sentence, the Supreme Court states that “*but it cannot be presumed that such Tribunals are not an effective part of the justice delivery system*”. In other words, what the Supreme Court tried to say that creation of tribunals by divesting powers of a civil court would not violate Article 50. It is submitted

that a tribunal, which exercises judicial power, is covered under Article 50.

Furthermore, the role of expert members is to help the judicial members there cannot be a situation where the number of technical members in a bench is more than the number of judicial members. It is submitted that this is applicable to all tribunals alike and not confined to only those tribunals that have been set up after divesting the powers of the High Court.

The above can be best explained via an example wherein The National Bench is presided by the President and two Technical Members (State and Centre). The net effect is that a decision of the President can be overruled by two technical members who do not have any judicial qualification. The National Bench of the Appellate Tribunal takes away powers of the High Court. This is because, under Section 109(5), the National Bench will have jurisdiction to hear matters “where one of the issues involved relates to the place of supply”. Thus, if there are five issues involved, and out of which one issue is related to place of supply, the litigant would be required to approach the National Bench. An appeal from the National Bench lies to the Supreme Court. To this extent, the High Court's jurisdiction is indeed taken away by the National Bench.

ARGUMENTS PRESENTED BY PETITIONERS:

The main contention in these writ petitions is that the constitution of the GSTAT is in violation of principles laid down by the Supreme Court in *R Gandhi v Union of India*. Currently, Sections 109 and 110 of the CGST Act mandates that every bench of GSTAT to consist of one judicial member and two technical members. It is submitted such a composition is violative of Article 50 of the Constitution. Also, under Section 110 of the CGST Act, an advocate is now ineligible to apply for the post of judicial member. On the other hand, a member of the Indian Legal Service, who has held a post not less than Additional Secretary for three years, can apply for the post of judicial member of GSTAT, which is violative of Supreme Court directives and impact on the functioning of final fact finding authority GSTAT.

<http://gstcouncil.gov.in/sites/default/files/CGST.pdf>

<https://www.livelaw.in/supreme-court-upholds-constitutionality-of-the-national-company-law-tribunal-and-the-national-company-law-appellate-tribunal/>

- Mr. Ravi Mediratta (Senior Counsel) And Mr. Prabhjot Singh (legal Intern)

For any queries please contact: +91-96501-97716, E-mail: ravimediratta@inmacslaw.com

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Registered office (Delhi)

4696 Brij Bhawan, 21A Ansari Road Darya Ganj, New Delhi-110002. INDIA
Tel : 23288101, 23265320 | Fax : +91-11-23265320
E-mail : legal@inmacslaw.com, ravimediratta@inmacslaw.com

Corporate office (Gurugram)

GLOBAL BUSINESS SQUARE, Building No. 32, Sector 44, Institutional Area Gurugram, 122002. INDIA
Tel : +91-124-4786200
E-mail : legal@inmacslaw.com, ravimediratta@inmacslaw.com