

The Elusive GST Appellate Tribunal and the Uniformed Officer

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By Vijay Kumar

IF a Superintendent in the CGST Department is summoned by the GST Appellate Tribunal, should he appear before the Tribunal in uniform?

This question seems to be a little premature, for now there is neither the Tribunal, nor a uniform for the GST Officer.

The Supreme Court is reported to have told the Government last week:

The CGST Act came into force about 4 years back, you have been unable to create any appellate tribunal at all.

The concern is that we want to know it clearly from you whether you want the tribunals or you want to close them down. The impression that we gather is that the bureaucracy does not want tribunals at all. Just tell us and we will entrust their jurisdiction to the high court once again. It is a very sorry state of affairs.

The fact is even after four years of the grand launch of the GST, we have not been able to create the Appellate Tribunal. As, when and if the Tribunal is established, it will start with a huge pendency. All the orders passed by the field GST appellate authorities are eagerly waiting for active hibernation in the yet-to-be created tribunal. What is a tribunal if it does not have a huge number of cases pending? So, we have waited for four years so that the tribunal will start with a humungous opening balance. And probably we will wait for another four years, by which time the High Courts will be totally flooded with GST cases.

On 9.2.2021, the Allahabad High Court - [2021-TIOL-322-HC-ALL-GST](#) directed that:

The respondents shall ensure that the State Bench and the Area Benches of the Appellate Tribunal (Goods and Service Tax Appellate Tribunal) in the State of Uttar Pradesh are made functional as far as possible from 01.04.2021.

Obviously, **as far as possible**, it was not possible for the Union of India to make the GST Appellate Tribunal functional from 01.04.2021.

The High Court had concluded,

We hope and trust that the respondents shall ensure compliance of this order within the stipulated time frame.

Hope belied! The petitioner had won the case, but what happened? He is exactly in the same position as he was before he filed the writ. What has he won?

No Refund because there is no Tribunal

Have a look at this case:

The Commissioner (Appeals) allowed a refund claim of nearly Rs. 1.5 crore in July 2019. Even after nearly a year, the GST Department has not been pleased to make the refund in spite of an order by its own Commissioner (Appeals). The harried taxpayer approached the Delhi High Court.

What were the options before the Department?

1. Give the refund (which is not the norm)
2. Get a Stay from a higher authority like the GST Appellate Tribunal.

But there is no Tribunal. Why is there no Tribunal? Because the Government has not constituted the Tribunal. Whose fault is it? And what happens when the Government fails to create the Tribunal? Simple, don't give refund.

And this is what the Government told the Court:

1. Inaction on their part of not disbursing the refund amount was owing to the non-functioning of the GST Appellate Tribunal which is beyond their control. (Then whose control is it in?)
2. The competent authority in pursuance to the opinion of the review branch has directed filing of an appeal before the Appellate Tribunal challenging the order in appeal passed by the Commissioner (Appeals).

You understand how helpless the poor government is and still you have the audacity to ask for refund!

The High Court in its order delivered on 10th July -[2020-TIOL-1168-HC-DEL-GST](#) stated

It is apparent that the petitioner has succeeded in appeal vide order dated 23rd July, 2019. Though nearly a year has passed, yet no proceeding has been filed challenging the said order till date.

In the opinion of this Court, the petitioner cannot be asked to wait endlessly for the respondents to challenge the order dated 23rd July, 2019. Consequently, the present writ petition is disposed of with a direction to the respondents to refund the amount as directed by the Commissioner (Appeals) vide order dated 23rd July, 2019 within four weeks.

The Jest Tribunal

Each bench of the GSTAT will have two technical members and one judicial member. The Technical Members are from the GST Departments and the Judicial Members are to be selected from High Court Judges, District Judges and Indian Legal Service officers of Additional Secretary level. Why should these distinguished dignitaries join the Tribunal to sit along with Additional Commissioners of the GST Department, is a question we will have to answer in the days to come. And the fun is the bench will have a majority of these additional commissioners who can overrule the decision of the minority Judicial Member who is a judge of a High Court or District Court. Another funny feature is that lawyers are not eligible to be appointed as Judicial Members of this mighty Tribunal. A lawyer can be straight away catapulted from the Bar to Bench. He can be appointed as a Supreme Court Judge, a High Court Judge or a Judicial Member in many of the Tribunals, but not the GST Appellate Tribunal. No. There is a bar on bar.

Madras High Court held the constitution of the GST Appellate Tribunal unconstitutional. -[2019-TIOL-2188-HC-MAD-GST](#)

Lawyers as Judicial Members: Advocates are eligible to be appointed as Judicial Members in the ITAT which is the oldest Tribunal in the country. Lawyers are eligible for appointment as Judicial Member in the Customs, Excise and Service Tax Appellate Tribunal. When the constitution provides that lawyers are eligible to be appointed as Judges of the High Court, then there is no reason to exclude them from being considered for appointment as Judicial Members. Keeping in mind the existing practice in appointing lawyers to various Tribunals as Judicial Members and the various issues that are likely to arise while adjudicating disputes under the CGST Act, the High Court recommended that the Parliament should reconsider the issue regarding the eligibility of lawyers to be appointed as Judicial Members in the Appellate Tribunal.

Indian Legal Service Officers as Judicial Members: The challenge to appointment of a person, who is or has been a member of Indian Legal Service and has held a post not less than Additional Secretary for a period of three years, is no longer res integra. The issue stands settled. Paragraph No.120 in *Union of India Vs. R.Gandhi* categorically states that a person who has held a position under the Indian Legal service cannot be considered for appointment as judicial members. And the High Court had no difficulty in striking down this provision.

Majority of Technical Members: The High Court observed that tribunals which primarily decide disputes between State and citizens cannot be run by a majority consisting of non-judicial members.

In the result, the High Court -

- (i) Struck down Section 110(1)(b)(iii) of the CGST Act which states that a Member of the Indian Legal Services, who has held a post not less than Additional Secretary for three years, can be appointed as a Judicial Member in GSTAT.
- (ii) Struck down Section 109(3) and 109(9) of the CGST Act, 2017 which prescribes that the tribunal shall consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State).
- (iii) Rejected the argument that Sections 109 & 110 of the CGST Act, 2017 and TNGST [Act, 2017](#) are ultra vires, insofar as exclusion of lawyers from the scope and view for consideration as members of the tribunal.

However, the High Court recommended that the Parliament must consider to amend section for including lawyers to be eligible to be appointed as Judicial Members to the Appellate Tribunal in view of the issues which are likely to arise for adjudication under the CGST Act and in order to maintain uniformity in various statutes.

When can the GSTAT be launched?

The following steps are required:

1. The laws (Central and States) have to be amended. That is not an easy process. Some Under-secretary in the Board should draft an amendment and it has to go through various levels till the FM. Almost the same process has to be repeated in the Law Ministry and then GST Council. Then the law has to be passed in both houses of Parliament, signed by the President, and then notified. The States will have to repeat the process.
2. Government has to notify the Tribunal.
3. Process has to be initiated to select Members of the Tribunal
4. Infrastructure - buildings, computers, staff, finance etc., have to be arranged.

This will take at least two years, if the government shows some respect to the Courts.

Until then, tribunalised justice in GST will have to wait.

Why do CGST Officers wear uniform?

A Lok Sabha Member wanted to know from the Finance Minister about the laws, rules and guidelines related to wearing of khaki uniform by the officers in Central Goods and Services Tax (CGST) department, guard of honour, control room duty, parade and escort in force at present.

The Hon'ble Finance Minister replied:

- a. Khaki uniform has not been prescribed under any specific provision of CGST [Act 2017](#). The Central Excise Act is still in force. As per the proviso to Section 3 of CGST Act 2017, the Central Excise officers are deemed to be officers under the CGST Act 2017. Khaki uniform has been prescribed under Chapter 7 of the 'Central Excise, Circle and Divisional Office Procedure Manual, 1975'.
- b. The CGST officers deal with the tax evasion matters related to Central Excise, Customs and CGST which entails search of a premise/person, stopping a vehicle/vessel, arrest of an offender, border patrolling and guarding of premises. Uniform helps the trade identity of departmental officers and prevents impersonation. It also helps the departmental officers in discharging their official duties. Further, uniform was also prescribed to maintain and encourage a proper sense of discipline and to ensure proper turnout.

c. No order/instructions have been issued by the Department relating to guard of honour and control room duty in the last three years.

All these functions are performed by the officers of DRI, DGGI also and for some strange reason, they need not wear uniform. Similarly, CBI officers don't wear uniform; Income Tax officers don't wear and above all, there is no uniform for the State GST Officers. Obviously, there is no uniformity even in uniforms.

Until Next Week.