

Lawyers cannot become Members of the GST Appellate Tribunal

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By Vijay Kumar

HAVE you heard these names?

1. S.M. Sikri, 2. S.C. Roy, 3. Kuldip Singh, 4. Santosh Hegde, 5. Rohinton Nariman, 6. UU Lalit, 7. L. Nageswara Rao, 8. Indu Malhotra and 9. PS Narasimha?

They are all lawyers who were directly appointed as Supreme Court Judges from the bar and were not High Court judges when they joined the Supreme Court Bench. Two of them, Justice Sikri and Justice Lalith went on to become Chief Justices and Justice Narasimha has a chance to become the Chief Justice in 2027.

A lawyer practising in a High Court or the Supreme Court can straight away be appointed as a judge of the Supreme Court or High Courts, but hold your breath, he cannot be appointed as a Judicial Member of the **to be constituted** GST Appellate Tribunal. Why? Nobody knows!

As per Section 110(1)(b) of the CGST [Act, 2017](#),

A person shall not be qualified for appointment as a Judicial Member, unless he-

- (i) has been a Judge of the High Court; or
- (ii) is or has been a District Judge qualified to be appointed as a Judge of a High Court; or
- (iii) is or has been a Member of Indian Legal Service and has held a post not less than Additional Secretary for three years;

So, only a judge or an 'Indian Legal Service' officer can be appointed as a Judicial Member. And no lawyer, however talented he is, could join the GSTAT as a Judicial Member This was challenged in the Madras High Court and the Court in [REVENUE BAR ASSOCIATION Vs UoI - 2019-TIOL-2188-HC-MAD-GST](#), observed:

61. Even though the constitutional validity of Section 110(1)(b) cannot be struck down on the ground of non-inclusion of advocates as being eligible for being considered for appointment as Judicial Member to the Appellate Tribunal under the CGST or TNGST, yet this court is of the opinion that the Union of India must evaluate as to why it is making a departure from the existing practice. 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 Service Tax Appellate Tribunal. Mr.Arvind Datar is justified in contending that 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. The Hon'ble Supreme Court in R.K. Jain vs. Union of India's case in paragraph 67 has held that the Members of the Tribunal must have a judicial approach and also knowledge and expertise in the particular branch of Law. A lawyer practising for 10 years in Taxation would definitely be well-equipped to grapple with the legal issues arising under the Act. **It is to be noted that there is no reason given by the Union of India in their counter as to why lawyers have been excluded from the zone of consideration.** For deciding the issues arising under the CGST Act and more particularly under Chapter III, it is necessary that the Judicial Member must have knowledge of various legal topics for which purpose a lawyer with sufficient experience and particularly with experience in Taxation Laws will be ideal to be appointed as a Judicial Member. 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, **we recommend** that the Parliament should reconsider the issue regarding the eligibility of lawyers to be appointed as Judicial Members in the Appellate Tribunal.

Obviously, the Government did not appreciate the recommendation of the High Court. On 24.03.2023, the Lok Sabha passed the amended Finance Bill 2023, in which certain provisions relating to the GST Appellate Tribunal were proposed to be amended.

It should be noted that in the same case (**Revenue Bar Association**), the Madras High Court struck down two provisions of the GST Act, related to the Tribunal. The High Court held:

- (i) **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, is struck down.**
- (ii) **Section 109(3) and 109(9) of the CGST Act, 2017, which prescribes that the tribunal shall consist of one Judicial Member, one Technical Member (Centre) and one Technical Member (State), is struck down.**

The High Court held that Indian Legal Service officers were not eligible to be appointed as Judicial Members and that the number of technical members in a Bench cannot be more than the number of judicial members.

Maybe, following the High Court judgement, the Government proposed amendments in the CGST Act, by the Finance Bill 2023. Section 109 of the GST Act is proposed to be amended to stipulate that:

1. Principal Bench of the Appellate Tribunal at New Delhi shall consist of the President, a Judicial Member, a Technical Member (Centre) and a Technical Member (State).
2. State Benches shall consist of two Judicial Members, a Technical Member (Centre) and a Technical Member (State).

So, now the Benches will consist of four Members, two judicial and two technical. Isn't it a little too technical? And isn't a four-member Bench a little too crowded? As is the practice now, why can't we have two-member benches with a judicial and technical member each?

As far as lawyers as members is concerned, though the government proposed to amend the law to exclude 'Indian Legal service Officers', lawyers are still not made eligible. The proposed amendment to Section 110 stipulates:

A person shall not be qualified for appointment as a Judicial Member, unless heâ€”

- (i) has been a Judge of **the** High Court; or
- (ii) has, for a combined period of ten years, been a District Judge or an Additional District Judge;

And what is **the** High Court? **The** High Court should refer to a particular High Court. Maybe we will need a judicial decision at the highest level to clarify that 'the High Court' means 'any High Court'

So, ILS officers are out, but lawyers are not in. Why? Most of the Judicial Members appointed in CESTAT were practicing lawyers and mostly in the CESTAT and this has given us highly competent Judicial Members. Now, you are blocking lawyers and going in search of District Judges and very soon you will find that not enough district judges are interested in this job.

When lawyers can be appointed as Supreme Court judges, why can't they be appointed as Members of the GST Appellate Tribunal? Why, but why? The Madras High Court noted that there was **no reason** given by the Union of India in their counter as to why lawyers have been excluded. Maybe GST law is a little too serious a subject to be left to lawyers.

As lawyers are kept away from the Benches of the GST Appellate Tribunal, let me get back to the stage of lawyers becoming Supreme Court Judges:

Nine years ago, Abhinav Chandrachud [wrote](#):

In December 1988, five judges, including Kuldip Singh and A.M. Ahmadi, were appointed to the Supreme Court on the same day. Kuldip Singh was practising at the Supreme Court Bar in Delhi as Additional Solicitor General of India, while Ahmadi was a High Court judge in Gujarat. It had often been the norm in the High Courts that when a Bar judge and a lower court judge were appointed to the court on the same day, the Bar judge got seniority. Thus, Kuldip Singh expected that he would be considered senior to Ahmadi. He was two months older than Ahmadi, and if he were given seniority over Ahmadi, he would have been the Chief Justice of India for over two years, while Ahmadi would have been the Chief Justice for only a few months.

However, this did not happen, and Ahmadi was given seniority over Kuldip Singh, probably because it was considered unfair that a lawyer should steal a march over a judge who had toiled away for several years in a High Court. Thus, when Chief Justice M.N. Venkatachaliah retired in 1994, Ahmadi became the Chief Justice of India. Kuldip Singh was disappointed, and he even subtly referred to this episode in his judgment in the famous Second Judges case (

Supreme Court Advocates on Record Association vs Union of India, AIR 1994 SC 268).

The subtle reference by Justice Kuldip Singh in the Second Judges case was this:

When Judges are appointed to the Supreme Court from two sources, and they take oath the same day, no one knows how the inter-se seniority is fixed. On an earlier occasion appointee from the Bar was placed senior but on a later occasion the process was reversed. These instances are not by way of criticism but only as a pointer with a view to straighten the exercise of discretion in the future.

Anyway, it is not as if the GST Appellate Tribunal is to start tomorrow. It's a long process. This amendment has to be enacted in the Centre and then by the State legislatures, process has to be initiated to select Members of the Tribunal, Infrastructure - buildings, computers, staff, finance etc., have to be arranged and perhaps the law has to be again amended if the new provision is struck down by any High Court or Supreme Court.

Until then, lawyers relax; though you are not eligible to be in the Bench, you are not barred from the bar and you still have the Supreme Court!

Until Next week