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Treading the GST Path – XXXIX

Tribunal at crossroads



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Tribunalisation of Justice is a hot topic of discussion. Whatever may be the experience in any other field, the contribution of Tribunals in the domain of taxation, in terms of evolving tax jurisprudence, dispensation of justice and laying down uniform principles is yeomen.

The disputes on Central indirect taxes, viz., Customs, Central Excise and Service Tax are currently being adjudicated by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) set up under Section 129 of the Customs Act 1962 and the State level disputes on VAT are being adjudicated by the VAT Tribunals set up by the State Governments.

With the introduction of Goods and Services Tax (GST), Section 109 of the Central GST Act, 2017 seeks to constitute "GST Appellate Tribunal" which would have a National Bench at New Delhi and various regional benches. The National bench and its regional benches shall have jurisdiction to hear such matters, where one of the issues involved relates to place of supply. Further, there would also be State Bench and Area Benches in all the States. The State bench and its area benches would have jurisdiction to decide all issues, other than those which fall within the jurisdiction of the National Bench and its Regional benches, i.e. all issues other than place of supply would be within the jurisdiction of State Bench and its Area benches. As per section 109 of the respective State GST Acts, the State Tribunal and its area benches also should be constituted by the Central Government, under section 109 of the CGST Act.

The National bench, its regional Benches, the State Bench and its Area benches would comprise of three Members, viz., Member Judicial, Member Technical (Centre) and Member Technical (State).

As per Section 20 of the IGST Act, all provisions of the CGST Act, 2017, including those relating to Appeals and Revision would apply for the IGST also.

From a reading of the above provisions, the following observations could be made.

- CESTAT would continue to function which would have jurisdiction to deal with Customs disputes and old disputes under Excise and Service Tax.
- Under GST, there would be two levels of Tribunal, viz., (i) National Bench with its regional benches, having jurisdiction over Place of supply disputes; and (ii) State Bench and its area benches, having jurisdiction over all other issues.

Section 110 of the CGST Act lays down the mode of appointment of various members of the Tribunal, according to which,

- The President and Judicial members of the National Bench and its regional benches would be appointed by the Central Government, in consultation with the Chief Justice of India.
- The Technical Members (Centre and State) of the National Bench and its regional benches would be appointed by the Central Government on the recommendations of the selection committee consisting of such persons and in such manner as may be prescribed.
- The Judicial Members of the State bench and its area benches shall be appointed by the State Government in consultation with the Chief Justice of the High Court.
- The Technical Member (Centre) of the State Bench and its area benches shall be appointed by the Central Government and the Technical Member (State) of the State bench and its area benches shall be appointed by the respective State Government and the manner of such appointment is to be prescribed.
- The senior most Judicial Member in the State Tribunal will be nominated as the State President by the State Government.
- The Central Government and State Governments shall have the following powers as far as the transfer of members are concerned.

Central Government	State Government
Judicial Member of the National bench and its regional benches can be transferred within National bench and its regional benches	Judicial Members of the State bench can be transferred within the State bench and its area benches
Member Technical (State) of the National bench can be transferred within National bench and its regional benches	Technical Members (State) of the State bench can be transferred within the State bench and its area benches
Member Technical (Centre) can be transferred within National bench and its regional benches and State bench and its area benches	

- Age of retirement.

S.No.	Position	Tenure
(i)	President of the National Bench	3 years or till attaining 70 years, whichever is earlier. Eligible for re-appointment.
(ii)	President of the State bench	3 years or till attaining 65 years, whichever is earlier. Eligible for re-appointment.
(iii)	Judicial Members of the National bench / Regional benches / State bench / Area Benches	3 years or till attaining 65 years, whichever is earlier. Eligible for re-appointment.
(iv)	Technical Members (State) of the National bench / Regional benches / State bench / Area Benches	5 years or till attaining 65 years, whichever is earlier. Eligible for re-appointment.

Prescription of a fixed tenure of 3 / 5 years and making them eligible for re-appointment is going against the fundamental principle of ensuring a fixed tenure to the judicial appointments and thereby interfering with their independence.

It may be observed that the GST law prescribes a complex web of Tribunals and its benches. It may be noted that the jurisdiction of the National Tribunal and its regional benches is limited only to issues involving place of supply. One crucial issue in place of supply is determination as to whether a particular supply is an inter-state supply or an intra-state supply. As per Section 77 of the CGST Act, if an inter-state supply is treated as intra-state supply and CGST and SGST is paid accordingly, the said taxes shall be refunded and the assessee shall pay IGST and no interest is payable. Corresponding provisions are contained in the SGST Acts also. This would make most of the disputes on place of supply, as merely academic, thereby making the National Tribunal and its regional benches as less important. The major litigation would fall only under the jurisdiction of the State bench and its area benches and with so many State Benches and its area benches throughout the country, uniformity of decisions would be a far cry.

Further, it may be noted that CESTAT would have jurisdiction to hear disputes on Customs. As per Section 5 of the IGST Act and section 3 (7) of the Customs Tariff Act, IGST is leviable on all imported goods. In case of any dispute on customs, say valuation or classification, it would have impact on both Basic Customs duties as well as IGST. In such cases, which Tribunal would hear such disputes?

Further, one conspicuous omission of persons who are qualified to be appointed as the Judicial Member is the practicing advocates. The functioning of the CESTAT for the past several decades would vouch for the effective contribution of practicing advocates who have been appointed as Judicial Members. Tax laws are complex by nature and is also dynamic with frequent changes. Advocates practicing in the field of indirect taxes, certainly have an edge over the District Judges, who hardly have any occasion to deal with tax laws. When practicing advocates are being considered even for elevation as High Court Judges, it defies logic as to why they should be barred from becoming Judicial Members of the GST Tribunal.

The above analysis shows that the entire law relating to GST Tribunal needs a complete revamp. The following suggestions are offered.

- i) There should be only one tier of Tribunal, with benches in every State capital and also in other towns of the State as may be required, which can be named as Indirect Taxes Appellate Tribunal or by any other suitable name, as already ITAT (Income Tax Appellate Tribunal) is in existence.
- ii) While the appointment of National President, all Judicial Members and Technical Members (Centre) of the Tribunal and all its bench shall be the responsibility of the Central Government, appointment of State President and Technical Members (State) of all the benches shall be the responsibility of the respective State Governments.
- iii) The existing Members of the CESTAT and VAT Tribunals of all states should also be absorbed by this Indirect Taxes Appellate Tribunal, as their rich experience is dealing with the disputes under Central Excise, Service Tax and VAT would be very much helpful.
- iv) All customs disputes also shall come under the jurisdiction of this Tribunal.
- v) This Tribunal should also deal with all pending disputes under Customs, Central Excise, Service Tax and VAT. Whenever disputes on Customs, Central Excise, Service Tax are dealt with, the bench shall comprise only of a Judicial Member and Technical Member (Centre) and whenever disputes on VAT are dealt with, the bench shall comprise only of a Judicial Member and Technical Member (State).
- vi) Disputes under Customs, without involvement of interpretation of any of the provisions of the IGST Act, but involving only Customs law, shall be heard by a bench comprising of Judicial Member and Technical Member (Centre).
- vii) Disputes under Customs involving interpretation of the IGST Act and all disputes under GST shall be heard by a bench comprising of three members, viz., Judicial Member, Technical Member (Centre) and Technical Member (State).
- viii) Practicing advocates shall be considered for appointment as Judicial Members.

- ix) The Members should be ensured a fixed tenure till they attain the age of superannuation, subject off course to removal on the ground of misconduct, etc.

As the first opportunity to amend the provisions of GST law is in the offing (Budget 2018), it is hoped that the Government would look into the issue and do the needful.

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