

**GIB/TN/Revenue Bar/20-09-2018/HC-99**

**High Court Category :** Others

**State :** Tamil Nadu

**Order No.:** GIB/TN/Revenue Bar/20-09-2018/HC-99

**Name of Entry :**  
Revenue Bar Association

**Date :** 20-09-2018

**Breif Issue :**

**Facts & Issue of the case**

Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of declaration, to declare Chapter XVIII of the Tamil Nadu Goods and Services Tax Act, 2017, more particularly, Sections 109 and 110 of the Tamil Nadu Goods and Services Tax Act, 2017 relating to constitution of the Appellate Tribunal and qualification, appointment and condition of services of its members as void, defective and unconstitutional, being violative of Articles 14, 21, 50 of the Constitution of India, and doctrines of separation of powers and independence of judiciary, which are parts of the basic structure of the Constitution and further contrary to the principles laid down by the Hon'ble Supreme Court in Union of India Vs. R.Gandhi (2010) 11 SCC 1.

Issues which arose for consideration before the Hon'ble High Court

(i) 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.

(ii) 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 Union of India Vs. R.Gandhi reported in 2010(11) SCC 1.

(iii) 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

**Decision of Advance Ruling Authority :**

**Decision:**

- On the first issue raised through this petition:
- The High Court held that even though 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 the court was 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 Tribunals. The Counsel 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. No reasons were given by government for excluding Lawyers from the zone of consideration.
- 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.
- On the second issue, HC decided that:

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 reported in 2010(11) SCC 1, categorically states that a person who has held a position under the Indian Legal service cannot be considered for appointment as judicial members. This dictum of the Hon'ble Supreme Court would apply to the appellate tribunal constituted under the CGST and TNGST also. The Members of Indian Legal Service cannot be considered for appointment as Judicial Members

- On the third issue, it was held that:

All the tribunals regardless of the fact that they are tribunals constituted under Article 323-A, 323-B or under any statute, are a part of justice delivery system and for effective justice delivery system, there is a need of an independent impartial tribunal. As stated earlier all the cases coming before the CGSTAT or TNGSTAT deals with adjudication of cases against the State. In such circumstances to have more number of members who are expert members (not Judges) will raise a reasonable apprehension in the minds of the assessee that they might not get fair justice and that the decision making, might be more oriented towards the State.

The High Court further observed that Hon'ble Supreme Court of India, in R.K. Jain Vs. Union of India, reported in 1993 (4) SCC 119, Union of India Vs. R. Gandhi reported in 2010(11) SCC 1 and Madras Bar Association Vs. Union of India, reported in 2014 (10) SCC 1, more or less echoed the same feelings.

It also observed that Article 50 of the Constitution of India which provides for separation of the judiciary from the executive, must be interpreted in such a way that the dominance of the departmental / technical members, cannot overwhelmingly outweigh the judicial members.

The Court can take judicial notice of the fact that now the tribunals are taking over the subjects which

were initially being dealt with / adjudicated by Courts. These subjects were adjudicated by Judicial Officers. Viewed in this angle, tribunals which primarily decide disputes between State and citizens cannot be run by a majority consisting of non-judicial members.

Thus, law has been settled by the Hon'ble Supreme Court, insofar, as the creation of alternative institutions which would exercise judicial function, would be that the alternative institutional mechanism must not be less effective than the High Court. The Parliament, therefore only has the power to set up an alternative institutional mechanism, insofar as such institution offers an effective mechanism which is no less effective than a High Court.

To be as effective as a High Court, would not be limited to having powers akin to High Court, it would also include the ability to exercise judicial function akin to a High Court, in the sense of being impartial and independent.

The principle which emerges is that while deciding issues as to whether the decision making process by the adjudicating authority or the appellate authority was just, fair and reasonable and to decide issues regarding interpretation of notifications and sections under the CGST Act a properly trained judicially mind is necessary which the experts will not have. The number of expert members therefore cannot exceed the number of judicial members on the bench.

In the result the High Court held as under

- (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.
- (iii) The argument that Sections 109 & 110 of the CGST Act, 2017 and TNGST Act, 2017 are ultra vires, in so far as exclusion of lawyers from the scope and view for consideration as members of the tribunal, is rejected. However, we recommend 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.