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Analysing developments impacting business

RECENT LEGAL DEVELOPMENTS VIS-A-VIS CONSTITUTION OF THE LONG AWAITED GOODS AND SERVICE TAX APPELLATE TRIBUNAL

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As per news reports, the bill for amending sections 109 and 110 of the CGST Act in line with the recommendations of the GST Council in its 52nd meeting pertaining to establishment and functioning of GST Appellate Tribunal (GSTAT) benches are likely to be introduced and passed in the ongoing winter session of the Parliament. Earlier, the Central Government vide Notification No. S.O. 4073(E) dated 14 September 2023 had constituted 31 benches of GSTAT. This was pursuant to the recommendations in the 50th GST Council meeting. Given that more than 6 years have elapsed since implementation of GST, one hopes that this is one of the last few steps towards creation of a functioning GSTAT would pave the way for faster and effective appellate level dispute resolution under GST. Currently, taxpayers aggrieved with the order of the First Appellate Authorities are constrained to move to the respective High Courts which are already over-burdened.

Background

Right since the introduction of Goods and Services Tax (GST) regime, the creation of GSTAT has been mired in controversies. The original Sections 109 and 110 of the Central Goods and Services Tax Act, 2017 (CGST Act) which dealt with the constitution of GSTAT and the terms and conditions of appointment of members of GSTAT respectively were challenged by the Madras Revenue Bar Association before the Hon'ble Madras High Court by way of a writ petition in W.P. Nos. 21147-21148 & 14919 of 2018 and W.M.P. Nos. 24826-24827 & 17635-17636 of 2018. The Hon'ble Madras High Court vide its order dated 20 September 2019 eventually 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, has been struck down.
- (ii) Section 109(3) and 109(9) of the CGST Act, which prescribes that the tribunal shall consist of one Judicial Member, one Technical Member (Centre) and one Technical Member (State), has been struck down.
- (iii) The argument that Sections 109 and 110 of the CGST Act and Tamil Nadu Goods and Service Tax Act (TNGST Act, 2017) are ultra vires, in so far as it excludes lawyers from the scope and view for consideration as members of the tribunal, has been rejected. However, the Hon'ble Court recommended that the Parliament must consider amending the section to 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.

Key Amendments to Section 109 and Section 110 of the CGST Act that were brought into effect from 1 August 2023

- (i) The National Benches, Regional Benches, State Benches, and Area Benches of the GSTAT have been reorganised as Principal Benches and State Benches.

The strength of the judicial Members (including the president) has been increased
- (ii) from 1 (one) to 2 (two) so that the number of Technical Members is not more than the judicial members.
- (iii) Member of Indian Legal Service holding a post not less than Additional Secretary for 3 (three) years is no longer eligible to be appointed as a Judicial member.
- (iv) Lawyers are not eligible for being appointed as judicial member.

In terms of the amended provisions, the Principal Bench and the State Bench shall hear appeals against the orders passed by the Appellate Authority or the Revisional Authority. The cases in which any one of the issues involved relates to the place of supply shall be heard only by the Principal Bench. Further, the cases where tax or input tax credit is involved or the amount of fine, fee or penalty determined in any order appealed against, does not exceed INR 50,00,000 (Fifty Lakh Rupees) and which does not involve any question of law may, with the approval of the President, and subject to such conditions as may be prescribed on the recommendations of the GST Council, be heard by a single Member and in all other cases, shall be heard together by one Judicial Member and one Technical Member.

Challenge to Constitutional Validity of amended Section 109 and Section 110 of the CGST Act

The Madras Revenue Bar Association has once again challenged the constitutional validity of amended Section 109 and Section 110 of the GST Act before the Hon'ble Supreme Court in W.P.(C) No. 900 of 2023 primarily on the ground that lawyers are not eligible for appointment as judicial members. The Hon'ble Supreme Court has issued notice in the matter.

Recommendations in the 52nd GST Council Meeting for further amendments to Sections 109 and 110

In the meanwhile, the GST Council recommended further amendments to 109 and 110 of the CGST Act in the 52nd GST Council Meeting held in October. The key highlights of the same are mentioned below:

- (i) Advocates for 10 years with substantial experience in litigation under indirect tax laws in the Appellate Tribunal, Central Excise and Service Tax Tribunal, State VAT Tribunals, by whatever name called, High Court or Supreme Court will be eligible for the appointment as judicial member. This amendment should help dispose of the latest constitutional challenge from the Madras Revenue Bar Association as mentioned above.
- (ii) Further, the maximum age cap of president is proposed to be increased from 67 years to 70 years while the age limit for members is also proposed to be increased from 65 years to 67 years.

The bill for the aforementioned proposed amendments is expected to be moved and passed in the ongoing winter session of the Parliament.

Comment

The foregoing legal developments do raise a glimmer of hope for the taxpayers, particularly the smaller ones many of whom have had to wait for 6 (six) years (and continuing) for

enforcement of their statutory right to appeal against an order of the appellate authority. While these legal developments are a welcome step in the right direction, the wait seems far from over as other significant steps starting from the appointment of members to creating infrastructural facilities are yet to be acted upon. As per news reports quoting government sources, the GST Appellate Tribunal benches are expected to be commissioned by April 2024. It is anticipated that over one hundred thousand appeals involving more than Rs. 1 Lakh crores will reach the GST Appellate Tribunal once it becomes functional. It is sincerely hoped that appropriate planning and special operating procedures will be in place to handle the initial deluge of appeals so that the whole system doesn't get bogged down at the very start.

- *Sudipta Bhattacharjee (Partner) and Rahul Dhanuka (Partner)*

For any queries please contact: editors@khaitanco.com