

# JOINT NOTE ON THE CONSTITUTION OF THE GST APPELLATE TRIBUNAL

By  
*Coalition for the GSTAT in India*

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# Executive Summary

There are both immediate and long term imperatives for creating the Goods and Service Tax Appellate Tribunal (GSTAT). It needs to be operational at the earliest to meet the needs of taxpayers who have had to take recourse to High Courts for regular GST appeals in its absence. The GSTAT also presents a greenfield opportunity to build a natively digital dispute resolution institution that can significantly ease doing business in the long term. It can signal India's intention to solve tax disputes fast and economically without compromising revenue interest.

The Coalition for GSTAT recommends the following with respect to the institutional design, the operating model and the legal framework for this brand-new institution (details for each recommendation are in Chapter 1):

- ***Single national tribunal with benches across the country***

The GSTAT must be created as a single national institution headed by a President, assisted by a leadership team consisting of Vice-Presidents, that will operate through benches located across the country.

*Next steps:* Resolution at the GST Council; Amendments to the GST Acts.

- ***Equal number of judicial and technical members***

Each bench of the GSTAT must have one judicial member and one technical member. The pool of technical members could be drawn equally from Union and state-level cadres.

*Next steps:* Resolution at the GST Council; Amendments to the GST Acts.

- ***Permanent GSTAT cadre with no option of returning to parent cadre/department***

The GSTAT Rules must ensure that members are not given the option of returning either to the judicial service or back to the IAS/IRS/state-level cadres.

*Next steps:* Resolution at the GST Council; To be incorporated in the soon-to-be-drafted GSTAT Rules.

- ***Involving state government representatives in search-cum-selection process***

The Chief Secretary of states should also be included in the Search-cum-Selection Committee on a rotation basis.

*Next steps:* Resolution at the GST Council; One of the ways this can be given effect to is by amendment to the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020 (as read with judicial pronouncements in this regard).

- ***Uniform jurisdiction***

All benches should have uniform jurisdiction with respect to the subject matter of disputes that they can adjudicate upon.

*Next steps:* Resolution at the GST Council; Amendments to the GST Acts.

The President should be empowered by the GSTAT Rules to create single-member benches to hear disputes below a monetary threshold and form special benches on application.

*Next steps:* To be incorporated in the soon-to-be-drafted GSTAT Rules.

- ***Appellate mechanism***

Appeals from orders/judgments of the GSTAT would lie with the High Courts that have jurisdiction over the physical location of the bench.

*Next steps:* Resolution at the GST Council; Amendments to the GST Acts.

- ***Natively digital***

The entire lifecycle of a case, from filing to disposal, digital signing of judgments etc., should be paperless and entirely digital using standardised online forms. It should also enable easy retrieval of case documents from central and state tax administration systems by integrating with GSTN. This will also require state level tax administrators to move completely to e-office suite of NIC or a similar tool where every stage of tax administration and first appellate level is completely digital. This will also require a dependable system of kiosks, citizen service centres with human assistance for easy transition.

*Next steps:* To be incorporated in the soon-to-be-drafted GSTAT Rules, Forms, and Schedules. Change management plan and system to be formulated through stakeholder consultations.

- ***Certainty of proceedings***

The GSTAT Rules must enable certainty of hearings and proceedings by enabling case flow management by the President, Bench and Registry.

*Next steps:* Stakeholder consultation on rules, norms, capacity, and tools; Where statutory amendments are required, to be incorporated in

the soon-to-be-drafted GSTAT Rules, Forms, and Schedules; guidance notes and checklists to be prepared in other cases.

- ***Strengthening administrative functions***

The new GSTAT should have well defined technology, analytics, financial, human resources, and infrastructure functions that are manned by specialists. A Chief Executive Officer or a Chief Operating Officer could also ease the administrative burden and provide continuity.

*Next steps:* Resolution at the GST Council; To be incorporated in the soon-to-be-drafted GSTAT Rules.

It is possible to imagine such administrative functions to be also carried out by a separate dedicated entity, just like the GSTN was set up to take care of the technology.

*Next steps:* Resolution at the GST Council; A dedicated entity for administrative functions will require amendment to the GST Acts.

- ***Rules for transparency and open data***

The GSTAT Rules should explicitly mandate the regular voluntary publishing of performance reports. The GSTAT Rules should also enable bulk access to GSTAT data for researchers and academics after suitable measures to guard privacy and security.

*Next steps:* May be incorporated in the GST Acts or the soon-to-be-drafted GSTAT Rules.



# About the Coalition for GSTAT

The GSTAT Coalition India has brought together experts from various domains – lawyers, chartered accountants, economists, policy makers and administrators – to advocate for the speedy constitution of, and development of an inclusive and shared imagination of a modern digital, GSTAT of global standards.

The members of this Coalition are:

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The Coalition has been convened by DAKSH, a civil society organisation working on law and justice system reforms, and accountability and transparency of institutions. For more details visit [www.dakshindia.org](http://www.dakshindia.org).

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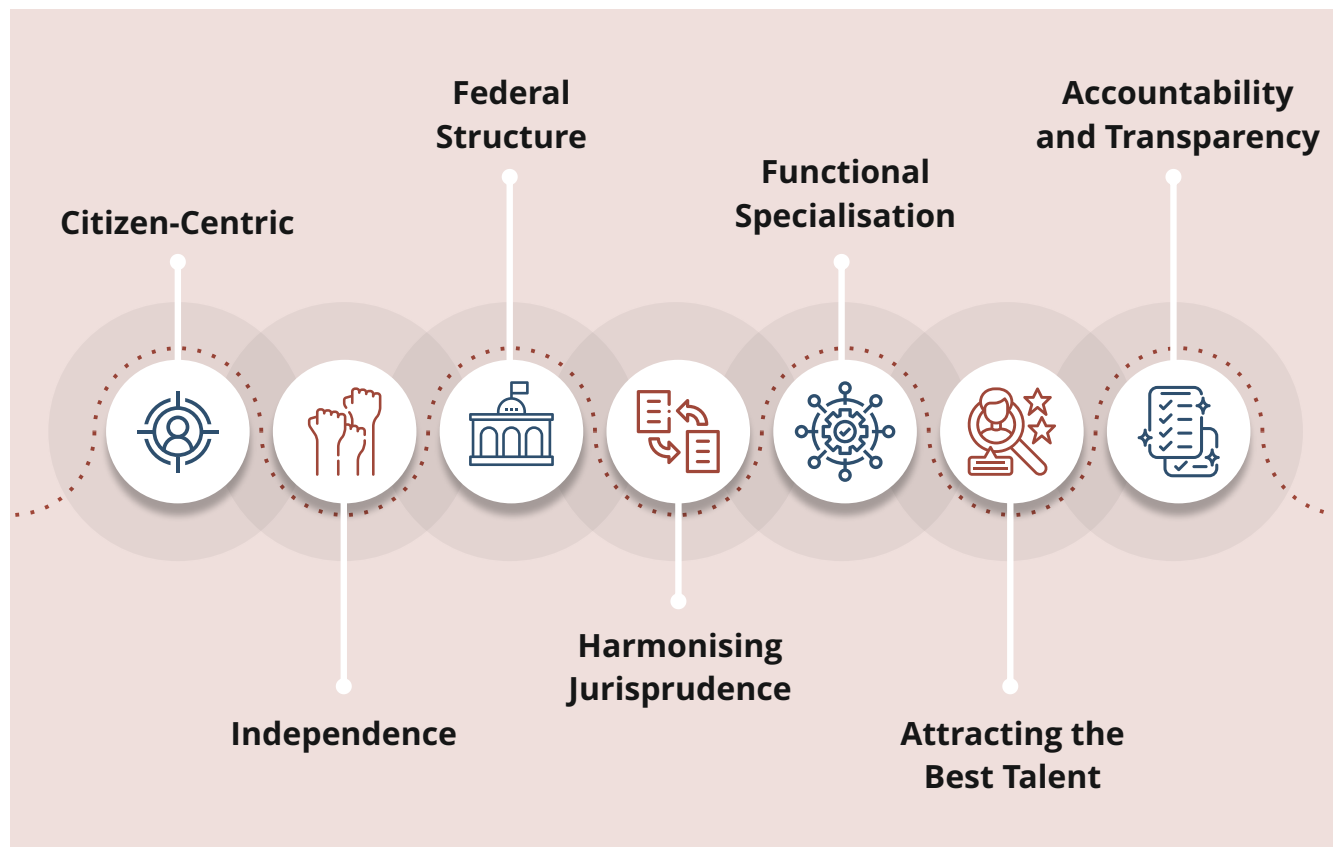
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## Chapter 1

# Institutional Design



The Goods and Service Tax (GST) is only five years old. Born in 2017, the GST aims to unify and centralise tax on both goods and services. Most indirect taxes have come under its ambit. As any newly enacted tax regime, it is still evolving. The GST Council including the ministers forming the Council and other stakeholders have consistently worked on refining and clarifying the contours of this new law.

However, the tax is still in a stage of development where disputes regarding its interpretation are natural. Queries regarding the nature and limits of various provisions of the GST law are flooding the courts. In this context, the need for the Goods and Service Tax Appellate Tribunal (GSTAT) is pressing.

The GSTAT needs to be set up to enable faster and effective dispute resolution. In several GST Council meetings, various ministers and representatives have deliberated on the structure of this tribunal. This chapter provides guidance on the institutional design of the GSTAT.

## **A. Guiding Principles for Institutional Design**

### **1. Citizen-centric**

The overriding principle of institutional design of the GSTAT should be that it must be accessible to citizens. This could take the form of making it digitally native, enabling virtual hearings, ensuring certainty of proceedings, as well as dispersing the physical location of benches across the country/states.

### **2. Independence**

The separation of powers between the legislature, executive, and judiciary is a fundamental tenet of the Rule of Law in India. Keeping in line with the concept of separation of powers while balancing the needs of a modern GSTAT, the institutional structure must empower the tribunal to make decisions independently. The requirement for independence of the GSTAT is of particular importance given that the executive (state and union governments) will likely be a party in all disputes heard by it.

### **3. Federal Structure**

The proposed institutional structure must take into consideration the needs of the states and the union while enabling a unified system. The GST is a unique tax born out of a negotiation between the states and the union. It replaced many taxes that were administered independently by state governments and dispute resolution through state-level tribunals. The new GSTAT will need to strike a balance between meeting the needs of these governments (such as location of the benches, selection of personnel, and cadre level aspirations) and retaining independence.

### **4. Harmonising Jurisprudence**

One of the most significant changes brought about by the GST regime is the harmonisation of highly disparate perspectives of erstwhile tax administrators across the country. This certainty is

vital for taxpayers and significantly contributes to ease-of-doing business and reduces cost of operations. The institutional design of the GSTAT should enable further progress in this direction, while allowing for independence of benches/members and their diverse viewpoints that will help in developing jurisprudence on GST.

### **5. Functional Specialisation**

Roles and responsibilities must be structured in a way that the functional specialisation of individuals is maximised without exhausting their time and effort in handling challenges outside of their core competencies. Technical manpower required to manage and operate next-generation dispute resolution will have to support the GSTAT leadership. This would require bringing in personnel with such competencies and creating an institutional structure that will attract the best talent from these domains.

### **6. Attracting the Best Talent**

The success of the GSTAT will ultimately rest on the quality of its rulings and the processes it will follow. This is closely related to the quality of the members who will choose this as a career. While the terms and conditions of service at the GSTAT will be the same as that of other union-level tribunals (consequent to the passing of the Tribunal Reforms Act, 2021), there is still scope to ensure that the best talent from the wide pool of tax administrators (IAS, IRS, and state level cadre), tax practitioners (chartered accountants and advocates) and researchers/academics are invited to contribute as members at the GSTAT. This will require a mix of both hardcoded rules, institutional culture and practice that will need to be fostered right from the inception.

### **7. Accountability and Transparency**

A framework to monitor, measure, and report on the functioning of the GSTAT is key to its success. A governance structure with an in-built accountability system can track GSTAT operations



effectively. The authorities and personnel at the GSTAT must have clear goals (this must not be confused with targets for case disposal) for performance assigned to them at the beginning of each year. There must also be adequate internal review mechanisms to ensure the quality of their performance and to collect feedback for improvement.

Robust documentation of the internal functioning of the GSTAT and its internal decisions is essential to maintaining transparency. Such documentation e.g., minutes of meetings of the committees and decisions on vendor agreements, should be made public on the tribunal websites to enable independent assessment and gain public trust. E.g., minutes of meetings of the committees and decisions on vendor agreements. Equally, consulting stakeholders should be a norm for critical decisions. This would also extend to regularly putting out reports on performance and sharing operational data with sufficient safeguards for privacy.

## **B. Suggestions on Institutional Structure**

Keeping the above principles, and the evolution of tribunals in India in mind (see Chapter 2 for details, in particular Page 16 on jurisprudence that has evolved and Part C on challenges faced by sales tax tribunals), the new GSTAT should be set up on the following lines:

### **1. Single national tribunal with benches across the country**

The GSTAT must be created as a single national institution headed by a President, assisted by a leadership team consisting of Vice-Presidents, that will operate through benches located across the country. Vice-Presidents may oversee the functioning of benches located in a state. Factors to consider while setting up benches have been detailed in Annexure A.

### **2. Equal number of judicial and technical members**

Each bench of the GSTAT must have one judicial member and one technical member. The pool of technical members would be drawn equally from union and state-level cadres. This parity could be at a national level if not at the state level. An exception may be made for smaller and newer states who do not have sufficient numbers of eligible cadres.

### **3. Permanent GSTAT members with no option of returning to parent cadre/department**

Members of the GSTAT would come from either judicial service or various cadres or from practice. The GSTAT Rules must ensure that these appointments do not give the members the option of returning either to the judicial service or going back to the IAS/IRS/state-level cadres. This is critical to develop a GSTAT cadre that will grow with the institution and with the area of law in whose development they will contribute. The only exits from the service must be elevation to the High Court/Supreme Court or resignations.

*A truly modern GSTAT would be built keeping the citizens in mind, retaining the federal nature of GST and reinforce its independence.*

#### **4. Involving state government representatives in search-cum-selection process**

Currently the Search-cum-Selection Committee for tribunals is headed by a retired Supreme Court judge or a retired High Court judge with assistance from secretaries of other relevant departments. In addition, the Chief Secretaries of states may also be included in this committee on a rotation basis.

#### **5. Uniform jurisdiction**

All benches should have the same jurisdiction with respect to subject matter of disputes that they can hear. Geographical jurisdiction for each bench may vary. The President should be empowered by the GSTAT Rules to create single-member benches to hear disputes below a monetary threshold. The threshold should be empirically derived and revisited periodically. There is no need for disputes pertaining to place of supply to be treated differently if the benches are formed with permanent members with no option to return to parent cadre/department. The President may be empowered by the GSTAT Rules to form special benches on an application by the taxpayer or revenue, consisting of three or more members to hear specific cases/types of cases where the opinion of two benches differ or where the members of a bench have different viewpoints on a matter. This power of the President must be balanced with obligation to record detailed reasons for each such special bench formed.

#### **6. Appellate mechanism**

Appeals from orders/judgments of the GSTAT would lie with the High Courts that have jurisdiction over the physical location at which the bench operates from.

#### **7. Natively digital**

The entire lifecycle of a case, from filing to disposal, digital signing of judgments etc., should be paperless and entirely digital. Filing of documents (procedure and language) and appeals using online forms and drop-down menus can be substantially

standardised to enable easy scrutiny and case management.

By integrating it with the GST Network (GSTN), the need for filing the first appellate order or other documents already filed before adjudicating authority/first appellate authority will not be required as the GSTN could pull those orders by quoting the unique order number given to the order of first appellate authority. Such integration will also ensure that the tribunal's order automatically flows into the GSTN, obviating any need to file the order and manual data entry. This will also require state level tax administrators to move completely to e-office suite of NIC or a similar tool where every stage of tax administration and first appellate level is completely digital.

Developing smart checklists to validate appeals can pre-empt errors that can derail the resolution of the matter late in the process. The GSTAT must have a seamless and paperless workflow where back-end functions like scrutiny and case management can be done online.

The GSTAT must operate on a single national platform that can both consume data through Application Programming Interface (APIs) and allow solutions to be configured/customised on top of it through APIs.

Going natively digital will also require a dependable system of kiosks, citizen service centres with human assistance for easy transition of tax practitioners, their office staff, and citizens. A robust change management plan and system needs to be in place prior to implementation.

#### **8. Certainty of proceedings**

The GSTAT Rules must enable active case flow management by the President, Bench and Registry by providing for:

- Norms/rules for prioritisation of cases – based on the subject matter, types of litigants, the amount under litigation, etc.;

- timelines for filing of the memorandum of appeal/ application, and written statement, timelines for different stages of appeal and adjudication of the matter etc.;
- the bifurcation between procedural and substantive work (some procedural work like early hearing applications, transfer applications, additional documents filing etc.) that can be handled by the Registry itself;
- limits on the number of cases to be listed on a particular day by the President who is the master of the docket;
- putting up two cause lists with stage-wise division indicating procedural and substantive stages;
- procedures for issuing notices to ensure that service and filings are taking place promptly without any delay and providing legal backing for delivery through technological media; and
- rules to discourage excessive adjournments.

Chapter 4 of this note provides the conceptual background and the practical aspects to be considered in implementing this.

Considering that one party to every case at the GSTAT will be the Revenue Department, coming up with practical case flow management rules and following them in practice should not be a challenge if these are deliberated upon at the design stage itself.

## 9. Strengthening administrative functions

A state-of-the-art GSTAT will have well-defined functions and clarity on how it will be staffed on the administrative side and supported financially. At present, the administrative staff is typically brought on deputation from the parent ministry. There is a shortage of sufficient personnel with adequate training and expertise. It would be unwise to build an administrative structure similar to the existing one and expect a radically different level of functioning of the GSTAT. The new GSTAT should have well defined technology, analytics, financial, human resources, and infrastructure functions that are manned by specialists. A Chief Executive Officer or a Chief Operating Officer could also be appointed to ease the administrative burden on the leadership and provide continuity. It is possible to imagine such administrative functions to be also carried out by a separate dedicated entity, just like the GSTN was set up to take care of the technology.

See Chapter 5 of this note for details.

## 10. Rules for transparency and open data

The GSTAT Rules should explicitly mandate the regular voluntary publishing of performance reports. The minimum information that is to be published should also be specified. The GSTAT Rules should also enable bulk access (of orders, rulings, case data, hearing data, etc) to GSTAT data for researchers and academics after suitable measures to guard privacy and security.

*The GSTAT presents an opportunity for India to put in place a truly world class dispute resolution institution*

## Chapter 2

# Tribunals in India



### A. Need for Tribunals

Tribunals in the Indian judiciary system are specialist dispute resolution bodies comprising subject matter experts including government administrators and judicial experts such as retired judges, who by virtue of their specialised knowledge can dispense speedy and efficient justice in cases of a certain type.<sup>1</sup>

They are designed to ease the burden of High Courts and the Supreme Court saddled with numerous cases on a common type of matter that can be decided faster by experts in that field.<sup>2</sup> To

this end, the tribunals have been freed from the shackles of legacy procedural and evidence laws. They can create their own procedures suited to the modern digitised era and the subject matter involved.<sup>3</sup>

In 2010, the Supreme Court noted that the tribunals are not an end in themselves but a means to an end.<sup>4</sup> It stated that the tribunals must retain their judicial character and inspire citizens' confidence as they strive to deliver speedy justice, achieve uniformity of approach, and attain predictability of decisions. Any scheme that decentralises judicial administration by providing

<sup>1</sup> L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.

<sup>2</sup> Madras Bar Association v. Union of India, 2020 SCC OnLine SC 962.

<sup>3</sup> Union of India v. R. Gandhi, 2010 (11) SCC 1.

<sup>4</sup> Supra Note 1.

an alternative to courts must follow existing judicial pronouncements to be constitutionally valid.

The Supreme Court has noted that the judicial members of a tribunal will act as bulwarks against apprehensions of bias and will ensure compliance with the basic principles of natural justice, including fair hearings and reasoned orders. The judicial members are also expected to be impartial, fair, and reasonable while hearing a case.

Apart from the judicial members, technical members are included in a tribunal for their expertise in their subjects. This improves the quality of adjudication and decision-making.<sup>5</sup> Technical members are equipped to appreciate the complexities of regulatory aspects and intricacies of commercial transactions.

The principles with respect to tribunals that can be distilled from the jurisprudence that has evolved over the years (see Annexure B for full details) can be summarised as follows:

- Tribunals can replace the jurisdiction of courts only if there are at least as many judicial members on the tribunal as there are technical members. Procedure of appointment and conditions of service of members must be akin to those of the judges of the courts that were sought to be substituted by the tribunals.
- To guard the members' independence and fairness, the union government should not have any administrative control over them.
- There is a need for a single nodal agency to govern all tribunals (National Tribunals Commission or "NTC"). To prevent conflict of interest, the NTC has to ensure that a tribunal is not under the financial department that is a litigant in a case.

- A Judicial Impact Assessment needs to be carried out before passing new legislation to set up new tribunals.

Under the Central Goods and Service Tax Act, 2017, disputes raised by the assessee are brought before "adjudicating authorities" that are appointed from within the revenue department itself. As an appellate body, the GSTAT will become the first independent body in the litigation hierarchy for GST related disputes. Once the Departmental Authorities (Adjudication and First Appeal) render their orders, the appeal against the same lies before the Appellate Tribunal.

## **B. Brief Overview of Existing Tribunals – Constitution, Scope of Work and Jurisdiction**

### **1. Customs Excise and Service Tax Appellate Tribunal (CESTAT)**

The Customs Excise and Service Tax Appellate Tribunal (CESTAT), formerly known as Customs, Excise and Gold (Control) Appellate Tribunal, is a quasi-judicial body formed under Article 323(B) of the Constitution of India, 1950. It can resolve disputes, complaints and offences about levy, assessment, collection and enforcement of central excise, service tax and customs.

CESTAT, which got its life as Common Appellate Tribunal under the Customs Act, 1962, the Central Excise Act, 1944 and the Finance Act, 1994, can scrutinise appeals against orders passed by the First Appellate Authority (generally a Commissioner) of the Customs, Central Excise and Service Tax.

The CESTAT's order can be challenged in the High Court. However, disputes about classification and valuation can be filed before the Supreme Court.

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<sup>5</sup> Supra Note 3.

This quasi-judicial body is headquartered in New Delhi and headed by a President. It has regional benches in Mumbai, Kolkata, Chennai, Bangalore, Ahmedabad, Allahabad, Chandigarh and Hyderabad.

The benches have different compositions and rules, depending on the number of members. For instance, a single-member bench can only adjudicate disputes involving no more than Rs 50 lakh. All the other matters fall within the purview of the division bench, which comprises a judicial member and a technical member. In specific instances, matters may be referred to a larger bench which can be constituted on a case-to-case basis.

### **Qualification, Selection and Tenure:**

The requirements to be eligible for the various posts of the CESTAT are as follows:

#### *i) Judicial member*

A person can be appointed to this post if he/she has held a judicial office for at least 10 years in India. He/she is considered eligible if he/she has been a member of the Indian Legal Service and has held a Grade I post or any equivalent or higher post for at least three years. A person is also deemed eligible if he/she has been a lawyer for at least 10 years.

#### *ii) Technical member*

A person who has been a member of the Indian Customs and Central Excise Service, Group A, and has held the post of Principal Commissioner of Customs or Commissioner of Customs or Central Excise or any equivalent or higher post for at least

three years is eligible to become a technical member.

#### *iii) President*

The union government shall appoint a person who is or has been a judge of a High Court or one of the members to be the President of the tribunal. The Union government may also appoint one or more members to be the Vice-President(s).

Over the years, the CESTAT has become an indispensable appellate body for administering justice in the areas of central indirect tax litigations. Moreover, the number of cases pending before the CESTAT currently is relatively low. This can partially be attributed to setting up of additional benches across India and the introduction of the GST from 1 July 2017, which subsumed many of the central indirect tax laws under its ambit.

### **2. Sales Tax Tribunal**

To resolve disputes stemming from interstate or intrastate sale of goods, the Central Sales Tax Act, 1956, and the State General Sales Tax Act or the State Value Added Tax Act lay down the foundation for the Sales Tax Tribunal, often referred to as the Commercial Tax Tribunal.

An aggrieved person could approach a Sales Tax Tribunal if he/she did not agree with a Deputy Commissioner's or a Joint Commissioner's order on Sales Tax. The Sales Tax Tribunal adjudicates issues about valuation of sale of goods, point of incidence of sale, stock transfers of goods and other disputes. The Sales Tax Tribunal has territorial or pecuniary jurisdiction as prescribed by the state government from time to time.

*Tribunals must retain their judicial character  
and inspire citizens' confidence*



The Sales Tax Tribunal of each state consists of a principal bench and a number of additional benches as the state government may deem fit. The benches comprise a Chairperson or a President, who sits at the principal bench. The state government can also appoint other members.

### **Qualification, Selection and Tenure:**

The following persons may be appointed as a member of the Sales Tax Tribunal:

- i) A High Court or a District Court judge;
- ii) a person who has held civil judicial office for not less than 10 years; or, who is qualified for the position of the High Court or District Court judge;
- iii) a practising advocate or a Chartered Accountant with experience of not less than 10 years;
- iv) a person who has served or has been serving in the Commercial Tax Department in a post not lower than that of a Joint Commissioner, provided that he/she has served as the Deputy Commissioner or a higher post for not less than five years;
- v) an officer of the Indian Revenue Service not below the rank of an Additional Commissioner or member of the Central Legal Service with experience of at least three years.

The members are appointed for a tenure of three years or up to the age of 60 or 65 years, whichever is earlier.

### **3. Central Sales Tax Appellate Authority (CSTAA)**

The Union government has formed the CSTAA under the Central Sales Tax Act, 1956, to settle disputes between state governments about

transactions involving branch transfer by assesses (or taxpayers). An appeal to the CSTAA lies against the order of the highest appellate body of the state (the State Sales Tax Tribunal).

### **Qualification, Selection and Tenure:**

The union government appoints the following members to the CSTAA:

- I) A Chairperson, who is a retired Supreme Court judge, or a retired Chief Justice of a High Court;
- ii) an officer of the Indian Legal Service who is, or is qualified to be an Additional Secretary to the union government; and,
- iii) an officer of a state government not below the rank of Secretary or an officer of the Union government not below the rank of Additional Secretary, who is an expert in Sales Tax matters.
- iv) The union government has also clarified the terms and conditions of service along with salary and allowances of these members. In addition, the union government is empowered to appoint such officers and staff for CSTAA as may be necessary for efficient exercise of its powers.

### **4. Income-tax Appellate Tribunal (ITAT)**

The ITAT is the last fact-finding authority in the litigation hierarchy for disputes related to income tax. The facts admitted by it have material bearing on outcome in further appeals about 'questions of law'. Its role has been of paramount importance at a time when experts have increasingly observed that cases are becoming complex with many parties involved. They believe that it is important to highlight facts from the information. While parties in a case may present their understanding of the facts, evidence available in contemporary records, including accounting and financial reports, greatly improves or adversely affects the probative value of the facts.

In an Income-Tax Appellate Tribunal, the President and the members provide judicial oversight. They also provide insights into the treatment of matters of law and jurisprudence. Free from the rigours of strict procedure, it is perhaps easier to separate the wheat from the chaff when both members examine the appeal jointly.

The accountant members, who serve until their superannuation, bring to the table their specialised knowledge of accounting, finance and tax treatment. Given the expertise required for the tasks, Chartered Accountants, Company Secretaries and Cost Accountants with experience of over 10 years are appointed to these roles.

### **5. National Company Law Tribunal (NCLT)/National Company Law Appellate Tribunal (NCLAT)**

The Company Law Tribunal acts as the adjudicating authority in matters about corporate laws and doubles up as the oversight body in Insolvency and Bankruptcy Code cases. This tribunal has a balance of judicial and technical members that inspires confidence in the parties.

The judicial members consider issues of abuse or misuse of law. The technical members consider issues about mergers and acquisition (M&A) transactions, involving review of overall fairness in the scheme of arrangement to all stakeholders, especially the state government and those who do not participate in proceedings, such as employees or creditors. Technical members essentially expose any imprudent consideration of stakeholders' interests.

While conflicts are not characteristic of proceedings before the NCLT, it is important to convince the petitioners to undertake equitable arrangements. In cases of violations, the NCLT is vested with the power to impose fines and penalties commensurate to the gravity of a case.

### **C. Challenges Faced by Existing Sales Tax Tribunals**

Tribunals face many problems. However, for the purposes of designing the GSTAT, it is relevant to consider the major challenges faced by Sales Tax Tribunals which are the main structures that are to be replaced by the GSTAT. In creating the GSTAT, care must be taken to tackle these issues.

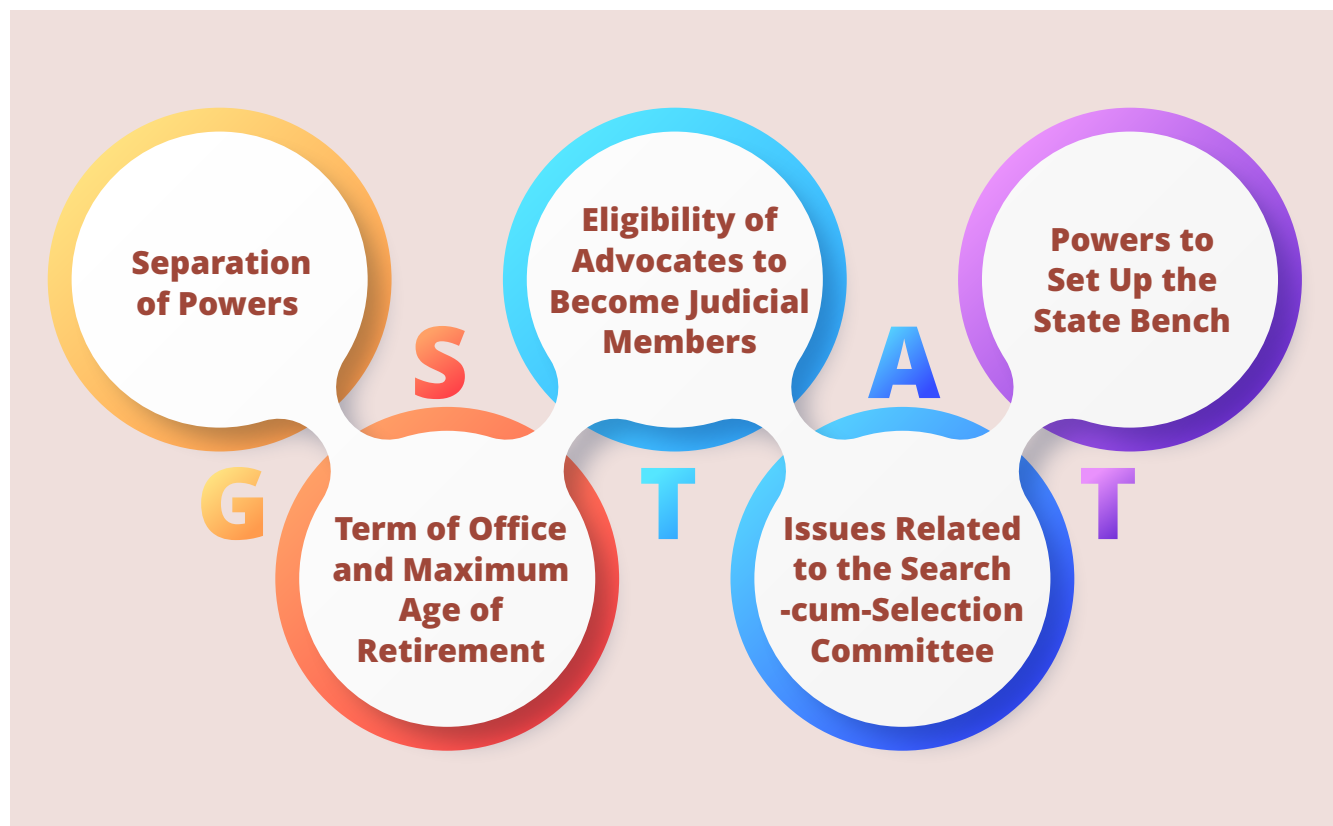
- a) Each state government has its rules to set up the Sales Tax Tribunals, which leads to additional compliance and difficulty for the dealers to understand the procedure and functions of the quasi-judicial body. There is no uniform model that guides in constituting and functioning of the Sales Tax Tribunal.
- b) The short tenure of the members and their return to the parent departments leads to instability in the functioning of the Sales Tax Tribunal.
- c) Other challenges include pending cases, constant rotation of members and in some cases, tribunals' contrasting view, especially for Sales Tax matters.

*Short tenure of members and their return to the parent department is one of the downsides of current state level sales tax tribunals*



## Chapter 3

# Current Legal Position of GSTAT



The following legal considerations need to be kept in mind while establishing GSTAT benches:

### 1. Separation of Powers

In *Revenue Bar Association v. Union of India* (the “Revenue Bar Association case”),<sup>6</sup> The Revenue Bar Association challenged the constitution of the GSTAT and the appointment of its members before the Madras High Court in 2019. The Madras High Court stated that since the GSTAT is a quasi-judicial body, the number of technical members should not exceed the number of judicial members. The imbalance could dilute Article 50 of the Constitution of India, 1950, which separates the

judiciary from the executive, the court added. The court also said that appointing more technical members will be unconstitutional.

Pursuant to this ruling, it is important to note that a single-member bench (to hear cases in which the disputed amount is less than a specified amount) should have a judicial member only. Similarly, in other instances, the number of technical members should not exceed the number of judicial ones.

The Madras High Court also pointed out that it will be inappropriate for the union government to have a role in forming (deciding location and jurisdiction) of the benches and deciding on transfer of members, since it will be a stakeholder in every appeal filed before the GSTAT. Currently,

<sup>6</sup> Revenue Bar Association v. Union of India, 2019 4 LW 689.

the union government under Section 109 of the CGST Act is vested with these powers – making the executive branch powerful in the equation and raising concerns regarding effective separation of powers. In the case of *Madras Bar Association v. Union of India*<sup>7</sup> (“The Madras Bar Association 2020 case”), the Supreme Court held that the Union government should not be burdened with the responsibilities of composing the bench, determining the location of benches and territorial jurisdiction, owing to such powers’ impact on separation of powers.

## 2. Eligibility of Advocates to Become Judicial Members

An individual can only be appointed as a judicial member of the GSTAT, under Section 110(1)(b) of the CGST Act, if he/she:

- a) Has been a High Court judge; or
- b) is or has been a district judge qualified to be appointed as a High Court judge or;
- c) is or has been a member of the Indian Legal Service and has held a post not less than that of an Additional Secretary for three years.

These requirements make advocates ineligible to become GSTAT members.

Advocates’ eligibility as judicial members of GSTAT was discussed at length in the Madras Bar Association 2020 case. In that case, the High Court held that lawyers with at least 10 years of experience could be appointed to the GSTAT.

However, the Madras High Court had put forth a different view while hearing the *Revenue Bar Association v. Union of India*.<sup>8</sup> It held that:

a) Excluding lawyers from judicial members’ appointments in the GSTAT does not violate the Article 14, Constitution of India, 1950 – hence, Section 110(1)(b) is valid. However, the court recommended that the Union government consider making lawyers eligible to become GSTAT judicial members to resolve various issues that may arise in the CGST Act disputes.

b) The court also said that members of the Indian Legal Services are not eligible to become judicial members and so, Section 110(1)(b)(iii) of the CGST Act was struck down.

The Supreme Court in its verdict in *Union of India v. R. Gandhi*<sup>9</sup> held that only High Court judges who have served as a district judge for at least five years, and advocates with 10 years of experience were eligible to become judicial members. Moreover, the High Courts’ jurisdictions were transferred to the GSTAT tribunals.<sup>10</sup> Thus, a certain standard is expected from the judicial members when it comes to imparting justice. A rigorous scrutiny is also required while appointing these members. Just like a High Court, they must have extensive experience in law, an independent outlook, integrity, character and a good reputation.

## 3. Powers to Set Up the State Bench

According to the current provisions, the union government forms the state bench and decides on the location as has been laid down in the Allahabad High Court verdict in the *Torque Pharmaceutical* case.<sup>11</sup> The state government can only decide on the location of the area benches.

However, it is pertinent to note that a state government will have a better understanding of its geographic and economic circumstances. In such a

<sup>7</sup> Madras Bar Association v. Union of India, 2020 SCC OnLine SC 962.

<sup>8</sup> 2019 4 LW 689.

<sup>9</sup> [2010] 6 SCR. 857.

<sup>10</sup> For National Company Law Tribunal and National Company Law Appellate Tribunal.

<sup>11</sup> M/S Torque Pharmaceuticals Pvt Ltd v. Union of India, Order in Writ TaxNo. 655 of 2018 by High Court of Allahabad delivered on 09.02.2021.

scenario, empowering the union government to determine the state GSTAT bench locations is not feasible. Moreover, such concentration of power in the union government is an encroachment on the state governments' jurisdiction and detrimental to their autonomy. Therefore, this issue requires reconsideration.

#### **4. Term of Office and Maximum Age of Retirement**

The Madras Bar Association in 2020 challenged the tenures of the President (three years with mandatory retirement age of 70) and judicial members (three years with mandatory retirement age of 65) saying that they were very short. The association argued that the limited duration could affect a member's efficiency, in turn impacting the functioning of the tribunal.

Accordingly, the Supreme Court has ordered a tenure of five years for the President and the judicial members. It has also said that the retirement age for the President will be 70 years and for the members, it will be 67 years. These terms and retirement ages sound appropriate and should find a place in the final rulebook.

#### **5. Issues Related to the Search-cum-Selection Committee**

With regard to the Search-cum-Selection Committee constituted for the appointment of the technical members, the executive branch of the Union government seems to have a larger say when it comes to appointing the technical members.

The Supreme Court while hearing the case of *Rojer Mathew v. South Indian Bank Ltd*<sup>12</sup> said that the Search-cum-Selection Committee must include more judicial members to maintain the

independence of the panel and to limit the role of the executive. The apex court further said that executive interference will harm the judiciary's independence, which is the only means to maintain a system of checks and balances between the legislature and the executive.

The nuances of the Search-cum-Selection Committee also came up during the hearing of the Madras Bar Association's petition in 2020. The Madras High Court suggested a different composition from the panel that has a balance of the executive and the judiciary. It made the following suggestions:

- a) Chief Justice of India or his/her nominee could be the Chairperson (with casting vote);
- b) Secretary to the Ministry of Law and Justice could be a member;
- c) Union Secretary from a department other than the parent or sponsoring, nominated by the Cabinet Secretary could be a member;
- d) Secretary to the sponsoring or parent ministry or department could be the Member Secretary and/or Convener.
- e) Till amendments are carried out, the 2020 Rules shall be read in the manner indicated;
- f) Outgoing Chairperson of the tribunal (if the case may be)].

The court also said that the Secretary of the parent department will not have voting rights in the Search-cum-Selection Committee in order to maintain its independence. If the outgoing Chairperson who seeks a re-election or the Chairperson is not a judicial member, then a retired Supreme Court judge or a retired Chief Justice of a High Court is to be nominated by the Chief Justice of India to take the Chairperson's place.

<sup>12</sup> 2019 (11) TMI 716; Order in Civil Appeal No. 8588 of 2019 by the Supreme Court of India delivered on 13.11.2019.

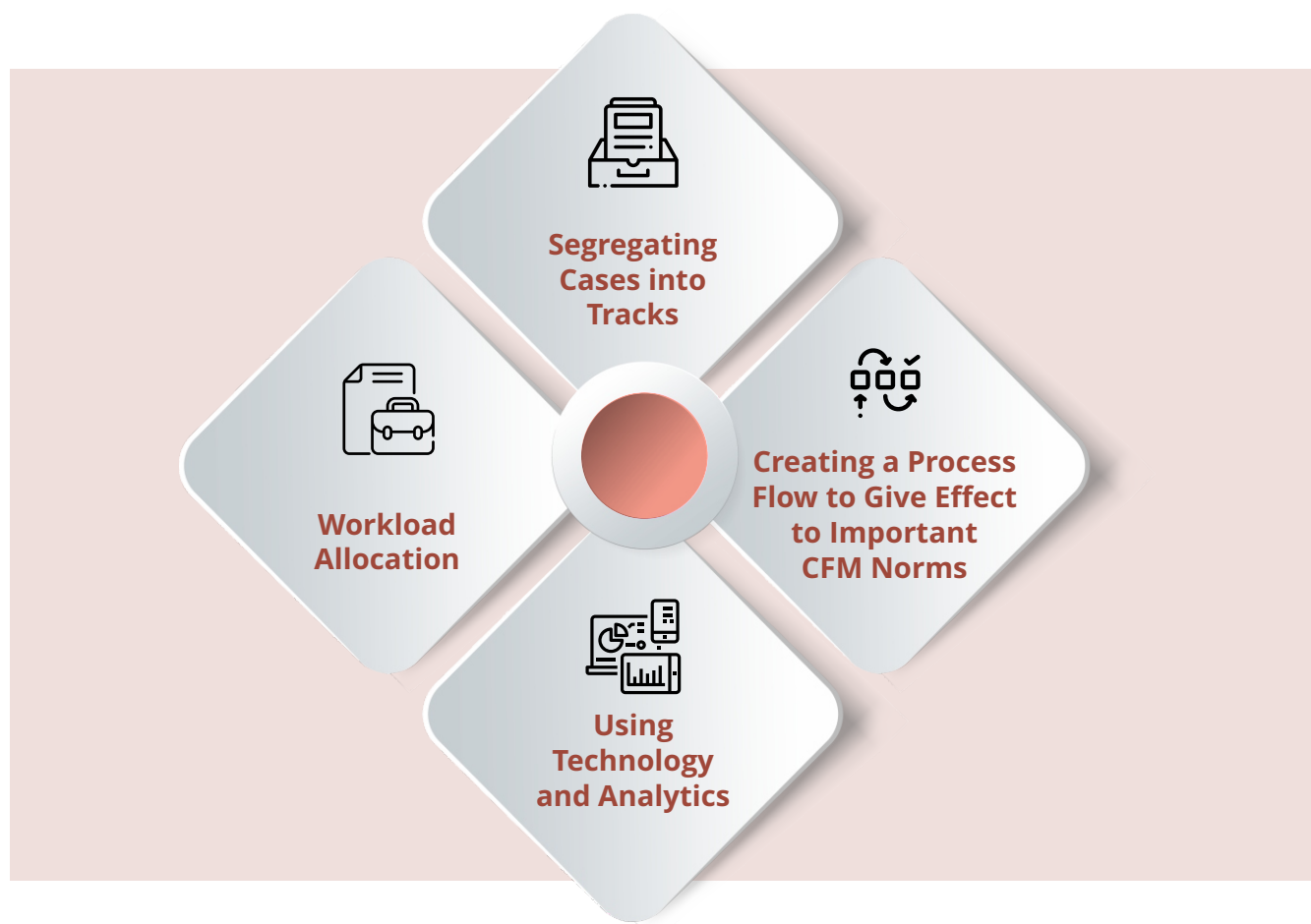
Even in the *Revenue Bar Association* case, the GSTAT Rules have been challenged on the ground that the Search-cum-Selection Committee excludes judicial representation, and the executive selects the members. However, the matter is sub judice.

Giving greater importance upon the executive in the committee violates the doctrine of “separation of powers”. Far greater judicial representation in the Search-cum-Selection Committee is needed to comply with this doctrine.

*A rigorous scrutiny is required  
while appointing GSTAT members*

## Chapter 4

# Court and Case Management<sup>13</sup>



### A. Background

Court management is a sum of many intertwined functions. It essentially deals with leadership inside a court, the relationship between the judges and the court staff, the allocation of cases, the evaluation of judges and the court staff, the court budget, the real estate, the maintenance and security of the building, the technology, human resources and the judicial communication.<sup>14</sup>

Time is of the essence in resolving a case. It should be the primary goal of a court management system to reduce delay and ensure effective adjudication. Merely being able to initiate a case in a court does not ensure access to justice. This makes court management and case flow management (CFM) fundamental tools to aid the delivery of justice in India.<sup>15</sup>

<sup>13</sup>The points in this chapter have been extracted from Sandhya P R, Rupam Vaid Sharma, Maulshree Pathak. 2022. 'Draft Paper on Court Management and Case Management – The Past, Present, and the Future,' available online at <https://daksh-lawtech-iitd.org/wp-content/uploads/2022/06/Court-management-and-CFM.pdf> (last accessed on 7th December, 2022).

<sup>14</sup>Emmanuel Jeuland. 2018. 'Towards a New Court Management? General Report' Université Paris 1 - Panthéon Sorbonne, available online at <https://hal.archives-ouvertes.fr/hal-01680418/document>

<sup>15</sup>Salem Advocates Bar Association v Union of India (2005) 6 SCC 344 para 20,21; Sangram Singh v Election Tribunal, Kotah AIR (1955) SC 425.

Indian courts and tribunals have a proclivity to hear cases without paying heed to procedural efficiency. There are no mandatory restrictions on adjournments or cost sanctions for violating timelines. The consequences of this approach are obvious in how the civil justice system functions. There should be an awareness that procedural efficiency is an important aspect of justice.<sup>16</sup>

CFM involves organising hearings of cases and allocating timelines in various stages of the case. This allows for streamlined disposal of a case. CFM is about ensuring efficiency in the justice system for all cases.

The power of technology in enabling CFM to transform the conduct of civil cases is already recognised in international jurisdictions where they have started using technology-oriented CFM. It is also acknowledged that CFM in terms of technology should permeate through the entire lifecycle of a civil case and include the filing, pre-hearing, and hearing stages of the case.

In other words, part of developing an improved approach to handling cases is to discover how it would change the work that people do, especially if technology is deployed. The role of the various stakeholders needs to be analysed and the challenges faced by them ought to be conquered if we are to attempt case management and court management. Some of the important stakeholders and ways of engaging with them are listed below:

### 1. Judges

The defining feature of CFM is that it enables the judges and court to retain control over the management of time and events in the proceedings

of a case from the start to finish. The presiding judge's leadership is critical for effective case management and avoiding delays. The judge must actively engage with key participants in the justice delivery mechanism, including the court staff, the lawyers, etc. to successfully implement CFM. But this is a difficult task as the various stakeholders' priorities are different. When many argue for judges to not grant adjournments, they overlook the fact that the judges face a lot of ire from lawyers if they refrain from granting adjournments. The caseload of the judges can also prevent them from committing time to oversee the CFM system and play a leadership role in it. These challenges need to be taken head-on if judges are to be actively involved in case management.

### 2. Court Staff

The functioning of a court depends heavily on the interplay between judges and administrative staff. It is important to set up a system capable of building a shared responsibility between the head of the court and the court administrator for the overall management of the office.<sup>17</sup> A study on CFM and delay reduction in urban trial courts in the United States of America found that successful courts involved staff members at all levels – from court managers through secretaries and courtroom clerks – in their efforts to address problems of delay.<sup>18</sup> It is necessary to train and sensitise the court staff to make them understand the demands of CFM, especially when technology is involved.<sup>19</sup> They need to be made aware of CFM's purposes and fundamental concepts. The role of court staff needs to be delineated well. The institutional structure should also ensure that the judges do not have to spend their time and energy on administrative and technological matters.

<sup>16</sup> Tidmarsh J. 2010. 'Resolving Cases "On The Merits"' 87 Denver University Law Review 411

<sup>17</sup> David C. Steelman. 2008. 'Improving Caseflow Management: A Brief Guide, National Center for State Courts' p. 32-33, available at <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1022/>.

<sup>18</sup> Mahoney et al. 1988. Changing Times in Trial Courts, pp. 202-203.

<sup>19</sup> GN Nthomiwa, 'Presentation on Case Flow Management System: An Efficient and Transparent Means to Deliver Justice, South Africa,' available at [https://sacjforum.org/sites/default/files/reports/files/2020/PRESENTATION\\_CASE\\_FLOW\\_%20MANAGEMENT.doc](https://sacjforum.org/sites/default/files/reports/files/2020/PRESENTATION_CASE_FLOW_%20MANAGEMENT.doc).



### 3. Litigants and Lawyers

Case management can only become purposeful with the support of the litigants and their lawyers. The judges ought to conduct special hearings with lawyers to discuss the complexity and nature of the case and the evidence required. These pre-case hearings are fundamental to creating a case management schedule. While the courts have tried to balance efficiency with opportunities for the parties and lawyers to present their cases, they are yet to identify the underlying tension CFM can cause.

Sensitising litigants and lawyers about how CFM will not hinder their access to justice and allowing for a transparent case management schedule are essential for the effective implementation of CFM. The Central Board of Indirect Taxes and Customs (CBIC) and the department representative will need to be sensitised especially given that in most cases it is the taxpayer who approaches the GSTAT seeking relief against a GST Department order. The operational elements required for an effective CFM system in the GSTAT would be:

*a) Establishing time limits:* Realistic time limits for case disposal and movement of hearings through different stages bring certainty to the system. The time limits would have to vary based on the type of case. Given the regional variation in litigation culture, one could consider the idea of having state-wise time limits.

*b) Procedural and substantive caseload:* While the members should handle the cases in the substantive stages, the registry should handle the

cases in the procedural stages (issuance of notices, curing defects and issuing summons). Such a system maximises judicial time by placing only those cases on the member's docket that require immediate attention while allocating the rest of the cases to the registry.

*c) Controlling adjournments:* One of the cardinal principles of CFM is 'court-controlled' progress of the case. The GSTAT must be able to curb frequent adjournments to avoid stagnation of cases at any given stage.

*d) Case-related statistics:* Data of a case is critical to evaluate the performance of the tribunal. Hence, it is important that courts record information methodically. Digital workflows will help in using analytics for case flow management.

*e) Active supervision of case progress:* Identifying roles and setting up procedures to check the status of a case periodically – to be carried out at different stages of the case's lifecycle – and laying down a standard operating procedure for the GSTAT to actively rectify any problem are essential.

*f) Commitment:* For case flow management to be successful, it is vital that the members and the staff dedicatedly work towards a shared vision. The GSTAT as an institution must work together as a team for an efficient overall system. Without such a commitment, case flow management rules will not get implemented.

*g) Technology and analytics:* Adoption of CFM is also facilitated by the usage of technology and analytics.

*There should be an awareness that procedural efficiency is an important aspect of justice.*

## B. Steps for Designing and Implementing CFM Rules

### STEP 1. Segregating Cases into Tracks:

The first step of the process is to segregate all the cases into different tracks based on the nature and complexity of the cases. These could be based on monetary levels, the nature of taxpayers (small businesses prioritised over large corporations), the grievance involved (question of fact, question of law, or both), priority to be assigned, and more.

### STEP 2. Creating a Process Flow to Give Effect to Important CFM Norms

*a) Tagging cases in tracks:* Once the cases are bifurcated and timelines devised, the track-wise bifurcation should be shared with the filing/pending branch. Based on the nature of the dispute, cases should be tagged to help identify the track to which the case belongs. This becomes simpler with the use of digital workflows.

*b) Discussing timelines with stakeholders:* For the case to move smoothly, it is important that various stakeholders cooperate with the bench members. It is important to work closely with the taxpayer's advocates and the department representatives to ensure that the cases get completed within a reasonable time. A plan can be charted out for the case establishing time frames for important stages in the case.

*c) Listing methods:* Effective listing practices are critical for the success of CFM. These are generally of two kinds: i) Dividing the cause list into two parts, with cases in substantive stages being listed with judges and cases in procedural stages being listed with a Registrar; ii) capping the number of cases that can be listed (listed of certain types of cases and at certain stages) in a day. This will help in freeing up judges' time and help him/her focus on the substantive stages of a case. Analytics and algorithms could also help in developing effective listing practices.

### STEP 3. Using Technology and Analytics

#### *a) Monitoring tracks:*

With the integration of the tracks system into the technology platform of the GSTAT, members can monitor the progress of cases online. Monitoring cases is important as it can pave the way for adopting measures to address the bottlenecks.

#### *b) Monitoring stages:*

Apart from following the above-mentioned steps, it would be necessary to monitor the flow of cases through different stages regularly. The technological tools available to judges can help in assessing the amount of time taken at different stages and identifying points where cases are getting stuck.

#### *c) Enabling better data collection and analysis:*

The GSTAT's technology and analytics teams should ensure data fidelity and usage. For instance, entering the reasons properly whenever an adjournment is sought can help the members understand the causes for delay in a case. These obstacles can be removed to ensure that cases get disposed of within the stipulated time frame provided in the CFM Rules.

### STEP 4. Workload Allocation

There is an imbalance in cases being handled across benches in a city or across cities. The GSTAT Rules should allow for the reallocation of cases to ensure their timely progress. Here, analytics and monitoring through dashboards can play a significant role.

The GSTAT Rules should provide for the following aspects of the CFM:

a) The various tracks for cases and timelines for each of them;

b) separation of cause lists between procedural and substantive stages;



c) a limit on the number of cases of different tracks and of different stages that may be listed before each bench on each day;

d) identifying roles responsible for monitoring case flow and the actions that they could take to ensure the smooth progress of cases;

e) procedures and templates for filing appeals/applications that allow the appellant to produce all documents and material so that there are no delays in the movement of files from adjudicating authority and the First Appellate Authority to the tribunal. This will become automated if the tribunal system is integrated with the GSTN system;

f) procedures for the hearing of appeals such as date and place of the hearing, recording of the hearing, cross-objections, ex-parte hearing, and production of evidence/additional evidence before the tribunal should be clearly spelt out;

g) filing of written statements, so that the respondent does not urge new grounds during hearings;

h) interlocutory applications should be allowed right from the first appeal for a limited number of grounds, such as questions on limitation, jurisdiction, etc., which are often glossed over.

#### References:

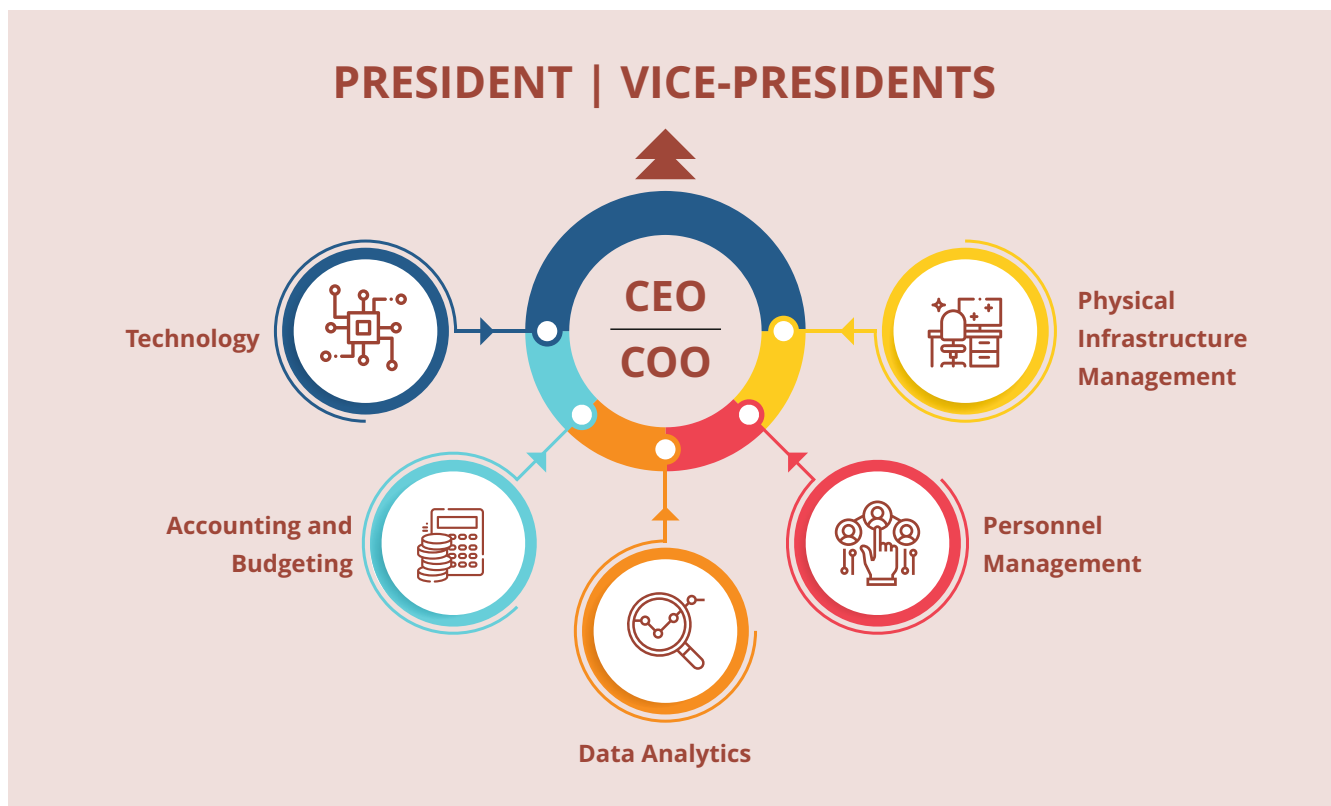
Zuckerman on Civil Procedure: Principles of Practice 3rd Edition – Chapter 11 (Court Management and Party Compliance – The Use of Technology in Case Management).

David C. Steelman. 2008. 'Improving Caseflow Management: A Brief Guide, National Center for State Courts'

*Court management and case flow management are fundamental tools to aid the delivery of justice*

## Chapter 5

# Strengthening Administrative Functions



A state-of-the-art GSTAT will have well-defined functions, including for administrative support, and clarity on how it will be staffed and financially supported. Concerns about vacant member posts are well known. The situation of the administrative support staff at tribunals, both at the union government and state government levels, is no better. There is a shortfall – both in numbers and in capability.

As per many parent legislations, the oversight of the tribunal administration, including the tribunal staff, is the responsibility of the President or the Chairperson. At present, the administrative staff is typically brought on deputation from the parent ministry. There is a shortage of sufficient personnel with adequate training and expertise.

It would be unwise to build an administrative structure similar to the existing one and expect a radically different level of functioning of the GSTAT.

The list of administrative and managerial support functions that the GSTAT would require includes:

### 1. Technology

Building the technological requirement of a digitally native GSTAT as envisaged in this paper requires managing not only IT infrastructure, but also the ability to contract and collaborate with other organisations from the public and private sectors.

Given that the process of digitisation will evolve with technological development and the changing needs of the stakeholders, it will be necessary to institutionalise a structure that can enable functional specialisation while reporting to the leadership of the GSTAT.

We recommend the setting up of the office of a chief technology officer (CTO) for the GSTAT. The role of the GSTAT CTO will be similar to the Digital Courts Technology Office at the national level and the Technology Office at the High Court level as envisaged in the Draft Digital Courts Vision & Roadmap Phase III of the eCourts Project (see pages 54 to 56, here <https://ecommitteesci.gov.in/inviting-suggestions-on-the-draft-vision-document-for-phase-iii-of-ecourts-project/>).

The CTO's office will enable the creation of a blueprint, which includes principles, architecture, identification of building blocks, standards, protocols and proof of concept studies, to design the digital infrastructure after consulting with the stakeholders. It shall ensure functional specialisation and be accountable for initiating technological development. For actual development and implementation, it will manage contracts with vendors from the market for specialised services while being completely responsible to the GSTAT leadership for committed deliverables and service levels.

As a public good, government departments, litigants, practitioners, and legal tech developers can adopt the CTO's digital infrastructure and platform. The GSTAT leadership will be responsible for policy formulation and strategic control. The CTO will not in any way perform any judicial function. The CTO should have an established track record in designing and building large information technology systems.

## **2. Accounting and Budgeting**

The GSTAT should appoint staff who have

expertise in public budgeting and accounting to implement effective, efficient budgeting and accounting practices. Budget preparation should be closely aligned with the needs of regular operations and modernisation and reform initiatives. Other needs, such as estimating the required strength of tribunals and filling vacancies, staff appointment, and infrastructure maintenance and improvement, need to be catered to. Codifying and implementing regulations governing the expenditure of the GSTAT would be an essential early objective if the tribunal is set up to work closely with organisations providing contractual services and other public institutions.

This function gains more significance when viewed in the context of tribunals repeatedly voicing concern over poor resource allocation from their parent department. The Supreme Court in the *Roger Mathew* case has expressly stated, "There must be a direction to allocate adequate and sufficient funds for each Tribunal to make it self-sufficient and self-sustainable authority for all intents and purposes. The expenditure to be incurred on the functioning of each Tribunal has to be necessarily a charge on the Consolidated Fund of India. Therefore, hitherto, the Ministry of Finance, in consultation with the Nodal Ministry/Department, shall earmark separate and dedicated funds for the Tribunals."

The GSTAT's uniqueness is that it will be resolving disputes at both the union government and the state government levels. Budgeting and allocation of funds for the GSTAT will need an innovation within the current public finance framework, not unlike the GST law itself.

## **3. Data Analytics**

Most organisations of the future already operate in an environment of data and information glut. The GSTAT will be no exception. The leadership of the GSTAT will need the support of a strong data analytics team to assist them in carrying out

functions. Some instances where data analytics could guide the leadership are monitoring case progress, workload allocation and rebalancing, and resource planning for the medium term. A data analytics team will also need to manage the information security and privacy of the GSTAT data.

#### 4. Personnel Management

The appointment of staff to support the tribunal is largely left up to the Union government, and such staff are typically overseen by the Chairperson or the President of the tribunal. At present, administrative staff are typically brought on deputation, and there is a dearth of personnel with adequate training and expertise.

The GSTAT would need to devise a procedure to forecast staffing requirements necessary to support tribunal members after estimating the number of required members for the forecasted caseload. At present, administrative oversight of tribunals suffers from two key problems: Lack of independence from the union government, and concentration of responsibility on the senior-most members.

A robust management of the GSTAT staff would be key not only to attracting the right talent and meeting the workplace aspirations of a young

workforce but also to ensuring effective day-to-day operations.

#### 5. Physical Infrastructure Management

The state of the physical infrastructure of tribunals at the central level has caused many practitioners to approach courts to seek relief. The Supreme Court in the *Rojer Mathew* case observed that for tribunals the “infrastructure provided is dismal”. To prevent the repeat of such a situation at the GSTAT, a team that can assess and predict the physical infrastructure needs of the tribunal, get the right workplaces in time, and manage its needs should be formed. Given that benches of the GSTAT would be dispersed widely across the country, a strong team that can maintain workplace quality standards would be important from the litigants’ and practitioners’ perspectives, too.

#### 6. Chief Executive Officer (CEO) or a Chief Operating Officer (COO)

While functional specialists will bring valuable domain expertise, the task of ensuring coordination and executing a strategy will need strong managerial leadership. This is best provided by a CEO or a COO. A CEO/COO will focus on delivering services and a level of continuity over time. The CEO/COO will report to the President of the GSTAT or a committee of the President and Vice Presidents.<sup>20</sup>

*It would be unwise to build an administrative structure similar to the one at other tribunals and expect a radically different level of functioning of the GSTAT.*

<sup>20</sup> How to Modernise the Working of Courts and Tribunals in India, Pratik Dutta, et al, NIPFP, 2019 accessed at [https://www.nipfp.org.in/media/medialibrary/2019/03/WP\\_2019\\_258.pdf](https://www.nipfp.org.in/media/medialibrary/2019/03/WP_2019_258.pdf)

### C. Separating Functions and Creating an Agency

The institutional structure seeks to inject functional specialisation in the administration and management of the new GSTAT while still reporting to the leadership of the GSTAT. The structure also separates the administrative and adjudicatory functions while still being integrated at the leadership level. Members of the bench being burdened with administrative tasks along with adjudicatory functions adversely affect the quality of both.

It is possible to imagine such separation to be also structured as a separate entity.<sup>21</sup> The Supreme Court has in various judgments asked the Union government to consider the idea of creating an independent agency to provide administrative support services to tribunals.

The structure of a separate agency will help in defining roles and responsibilities between the GSTAT and the agency. Both these measures would benefit the experience of litigants and practitioners.

The United Kingdom, United States, Australia and Canada, all nations with a common law background, have created dedicated organisations to support the judiciary and tribunals.

The GSTAT provides an excellent opportunity to pilot the idea of a separate agency (with majority board-level representation from the judiciary) for administrative functions. Over time, after tweaking its functioning based on feedback, this agency could take on administrative functions of other tribunals. It could eventually become an organ of the National Tribunal Commission that would support all tribunals as envisaged in the *Madras Bar Association, 2020*.

*Members being burdened with administrative tasks along with adjudicatory functions adversely affects the quality of both.*

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<sup>21</sup> A Framework For The National Tribunals Commission, DAKSH, April 2021 accessed at [https://www.dakshindia.org/wp-content/uploads/2021/04/Daksh\\_NTC-Layout\\_DraftV9.pdf](https://www.dakshindia.org/wp-content/uploads/2021/04/Daksh_NTC-Layout_DraftV9.pdf)

## Annexure A: Factors to consider in setting up benches

The GSTAT should have benches in different parts of a state so that citizens can easily exercise their right to appellate remedies. The Law Commission of India in its 272nd report on the 'Assessment of Statutory Frameworks of Tribunals in India'<sup>22</sup> (the "272nd Law Commission Report") underscored that multiple benches can reduce the burden of courts.

The Supreme Court and the Law Commission have time and again called for a Judicial Impact Assessment of the location and functioning of the tribunals. A Judicial Impact Assessment foresees the effect due to changes in procedural or substantive law, and an assessment of the likely costs to be incurred due to the change. Such assessments are beneficial to legislators, members of the judiciary and society.

The apex court and the Law Commission have also called for a system of tribunals in which benches are distributed in a fair and equitable manner.

The GST law empowers the Union government to notify a state bench for each state or union territory. Within a state, such a number of area benches may be constituted by the Union government upon a request from the state government and recommendations of the GST Council. The following parameters must be kept in mind while setting up the benches:

### **A) State benches or at least an area bench at the seat of every jurisdictional High Court:**

The 272nd Law Commission Report recommended that the tribunal benches should be

located in all places where the High Courts are situated. This recommendation is in the line with the observations of the Supreme Court in the *S.P. Sampath Kumar v. Union of India*<sup>23</sup>, *L. Chandra Kumar v. Union of India*<sup>24</sup> and *Madras Bar Association v. Union of India* (2014)<sup>25</sup> cases.

In these cases, the court has highlighted the need for permanent benches (such as Nagpur bench in Maharashtra) at the seat of every jurisdictional High Court. If that is impossible, it has also urged authorities concerned to set up a circuit bench (such as Port Blair bench in Kolkata).

The union government can also set up the state bench in the city with the principal bench of the High Court. In cases where there are two seats of the High Court (for example, High Court of judicature at Allahabad has two seats: Lucknow and Allahabad) then the Union government may establish the state bench in one city and the area bench in another, depending on the requirement in that state. The locations of these benches will cut short the travel time for litigants and lawyers.

However, there could be instances in which a state bench at the seat of the jurisdictional High Court may not be able to cater to the whole state. For example, Haryana and Punjab and the union territory of Chandigarh share a common High Court located in Chandigarh. A common state bench for the whole region could result in burdening that bench with many cases. In such instances, the Union government may set up the state bench in a different city (depending on various factors).

<sup>22</sup> Law Commission of India, Report No.272, Assessment of Statutory Frameworks of Tribunals in India (2017), available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081632-2.pdf>

<sup>23</sup> 1987 SCR (1) 435.

<sup>24</sup> AIR 1997 SC 1125.

<sup>25</sup> (2014) 10 SCC 1.

### **B) Geographical Area**

The number of area benches could depend on a state's geography – larger states like Maharashtra and Uttar Pradesh will require more benches and states like Goa and Sikkim will need fewer.

It is, however, pertinent to note that geographical area may not be the sole factor when deciding the number of benches in a particular state.

### **C) Population Density, Industry Clusters and Hubs**

The density of population can be used to determine the requirement for an area bench. For example, Nagpur in Maharashtra is densely populated and could require an area bench. However, the Supreme Court's direction in the *Rojer Mathew* case, about merging some existing tribunals which do not have many cases, also needs to be borne in mind.

In the 10th GST Council meeting, the ministers decided to form a common GSTAT for all the northeastern states since a small number of cases was reported from there. The union government notified the common bench in Guwahati.

The union government can also consider setting up benches in industrial regions and those with business hubs – such as Baddi or Shimla in Himachal Pradesh, Surat in Gujarat and more.

### **D) Accessibility to the Location of Benches**

Benches must be set up in regions that are easily accessible. The locations must have basic infrastructures such as transport, hotels, telecommunication services and internet facilities. For instance, Noida could have an area bench to cater to the needs of residents from western Uttar Pradesh as an area bench at Lucknow is not nearby.

### **E) Past Litigation**

The 272nd Law Commission Report said that the objective of setting up tribunals – to ease the High Court's burden of cases – has not been met because the tribunals are saddled with a lot of cases.

To ensure the availability of effective remedies under the GST law and speedy disposal of matters, the frequency and pendency of litigation in the tribunals under the indirect tax laws should also be an important factor in determining the number of area benches for a state.



## Annexure B: Jurisprudence on Tribunals

The term tribunal, originally used in Article 136 of the Constitution of India, 1950, had the same meaning as that of a court. It broadly referred to all adjudicating bodies as long as the government established them and they had a judicial rather than administrative or executive character.

Tribunals got their quasi-judicial (a non-judicial body that can interpret law) character through the 42nd Amendment made in 1976 to the Constitution of India, 1950. Articles 323A and 323B inserted through this amendment paved the way for the setting up of administrative tribunals. The Administrative Tribunals Act was passed in 1985, which provided for the establishment of these quasi-judicial bodies, appointing their members, salaries and more.

However, certain questions still plague the tribunals. Do they breach the powers of judicial review? Are these quasi-judicial bodies completely independent of executive control? How efficient are they when it comes to resolving grievances? Their position within the constitutional framework has also come under scrutiny. Some of these issues have been explored by the Supreme Court, which has subsequently established some guidelines. Let us look at the leading cases on this subject.

### **1. *Sampath Kumar Case*, 1987 SCR (1) 435: Supreme Court Upholds Importance of Judicial Review**

Sampath Kumar challenged the validity of the Administrative Tribunals Act, 1985, before the Supreme Court. He disagreed with the fact that the Act empowered exclusive tribunals – those which do not come under the jurisdiction of judicial review (Articles 226 and 227 of the Constitution of India, 1950) of High Courts. Judicial review is the power of the courts to examine the actions of the

legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the Constitution.

Section 28(1) of the Act deprived the High Courts of this power and thus, it was contested before the Supreme Court. While the petition was pending, Section 28 of the Act was amended to ensure that judicial review was available under Articles 136 and 32 of the Constitution.

The Supreme Court ruled that although judicial review is a fundamental part of the Constitution, alternate mechanisms were permissible if the tribunals could function on the lines of ordinary courts. The court also ruled that every bench of the tribunal should have one judicial member and one administrative member. It also laid down guidelines about eligibility for the Chairperson, Vice Chairperson and members of the tribunals. The court referred the matter to a larger bench to consider the challenge to equate the tribunals with High Courts.

### **2. *L. Chandra Kumar Case*, AIR 1997 SC 1125: Supreme Court Reiterates Power of Judicial Review**

L. Chandra Kumar had contested that setting up of the tribunals took away the High Courts' and Supreme Court's power of judicial review which is a fundamental part of the Constitution. After hearing the case, the Supreme Court held that the High Courts' and the Supreme Court's power of judicial review is integral to India's constitutional scheme. It added that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also a part of the basic structure of the Constitution. The court also laid down some provisions for the members of the judiciary:



a) The judges of the subordinate judiciary and those who oversee tribunals are not entitled to the constitutional protections that guarantee the independence of the judges of higher courts. Therefore, they can never substitute the superior judiciary's duty of constitutional interpretation. Tribunals can perform a supplemental role and can never substitute the constitutional courts.

b) While administrative members were appointed for their specialised knowledge, the bench must have a judicial member.

### **3. R. Gandhi: Supreme Court Lays Down Specifications About Tribunal Members**

R. Gandhi, the President of the Madras Bar Association, in 2004 challenged the constitutional validity of Chapters 1B and 1C of the Companies Act, 1956, inserted by the Companies (Second Amendment) Act, 2002, to pave the way for the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT).

He argued that Parliament could not give a tribunal the judicial functions that have traditionally been with the High Courts. It also said that forming the National Company Law Tribunal and transferring the entire company jurisdiction of the High Court to the tribunal – which is not under the control of the judiciary – violates the doctrine of separation of powers and independence of the judiciary.

Gandhi also pointed out that Article 323B of the Constitution of India, 1950, which defines the composition and function of tribunals, is exhaustive and not illustrative. He added that the list has no laws for forming a tribunal for insolvency, revival and restructuring of a company. With no amendment to Article 323B enabling a national tribunal to revive and wind up companies, there is no legislative competence to provide for the constitution of the NCLT and the NCLAT, Gandhi argued.

A Constitution bench of the Supreme Court, which examined the plea, stated:

a) Only judges and advocates can become judicial members of a tribunal. Only High Court judges, or an individual who has been district judge for at least five years, or professionals who have practised law for 10 years can become judicial members.

b) The tribunal members should have a position and status similar to that of a High Court judge. This can be accomplished by ensuring that individuals who are roughly similar in rank, experience, or competency to High Court judges are appointed as members, and not only by providing the members with the salary and benefits of a High Court judge.

c) The Search-cum-Selection Committee should have a Chief Justice of India or his/her nominee as the Chairperson (with a casting vote). Members can include a senior judge of the Supreme Court or a Chief Justice of a High Court, the Secretary in the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Law and Justice.

d) The term of office of three years should be a term of seven or five years with an option for re-appointment for one more term.

e) The technical members should not retain a lien (the right of a government employee to hold a regular post, whether permanent or temporary) with their parent cadre, ministry, or department. The members should be prepared to disassociate themselves from the executive. The lien cannot, therefore, exceed one year.

f) The Chief Justice of India can suspend the President or the Chairperson of a tribunal. This regulation is necessary to maintain independence and security in service.

g) The Ministry of Law and Justice must provide administrative support to the tribunals. Moreover, tribunals or their members cannot seek facilities from sponsoring or parent departments.

h) Division benches of the tribunal should always have a judicial member. The number of technical members will not exceed the judicial ones in any large or special benches that may be formed.

#### **4. Madras Bar Association (2014) Case, (2014) 10 SCC 1: Supreme Court Talks About Guarding Tribunals' Independence**

The Madras Bar Association in 2014 had challenged the constitutional validity of the National Tax Tribunal Act, and the Constitution 42nd Amendment Act, saying that the union government violated the High Court's power of judicial review by impinging on it. The association also noted that the National Tax Tribunal – a quasi-judicial body – has the power to judge appeals from orders of the Appellate Tribunals (formed under the Income Tax Act, the Customs Act, and the Central Excise Act). Previously, the High Courts had this jurisdiction. The association said that an extra-judicial body could not strip the courts of these characteristics. It also said that the National Tax Tribunal undermines the independence and fairness of judicial authority.

After hearing the petitions, the Supreme Court reiterated its findings in the *R. Gandhi case* and laid down the following:

a) The procedure of appointment and conditions of service of members must be akin to those of the judges of the courts that were sought to be substituted by the tribunals.

b) Only individuals with legal qualifications and substantial experience in practising law can handle complex legal issues.

c) Conditions of service should be such that the members are able to function independently and impartially. There should be no executive control in appointment, removal, transfer, tenure and infrastructure.

d) The Union government should never participate in the appointment process of the tribunal members. Similarly, a provision to reappoint or extend the tenure is ipso facto (by the very fact) detrimental to a tribunal member's independence.

e) To guard the members' independence and fairness, the union government should not have any administrative control over them.

#### **5. Rojer Mathew Case, 2019 (11) TMI 716: Supreme Court Says Some Finance Act Provisions Are Faulty**

In this case, the petitioner challenged the constitutionality of Part XIV of the Finance Act, 2017, which governed the structure, organisation and functioning of tribunals. The arguments in the case were very similar to the ones mentioned before – the petitioners claimed that Part XIV violated certain basic features of the Constitution, including the independence of the judiciary and the separation of powers.

The Supreme Court declared the rules framed under the Finance Act, 2017, as illegal and stated that:

a) The executive is a litigating party and hence, cannot participate in judicial appointments.

b) The rules were described as defective as they allowed for the appointment of technical members with no adjudicatory experience. The union government had widened the eligibility criteria by making individuals with “ability, integrity and standing, and having special knowledge of, and professional experience of certain specialised

subjects which in the opinion of the Union government is useful” eligible for the members’ posts.

c) The appointment of High Court judges to a position occupied earlier by a Supreme Court judge affected the prestige of the judiciary.

d) The court also said that the rules weakened the tribunal’s independence. The union government has significantly diluted the role of the judiciary in the appointment of judicial members. Furthermore, in many quasi-judicial bodies like the National Green Tribunal, the judiciary’s role in selecting non-judicial members has been omitted. The rules do not specify who would be a part of the selection panel and what role the judiciary would play in the process.

e) The court struck down the short tenure of three years for the tribunal members as enumerated in the Schedule of Tribunals Rules, 2017.

f) The court reiterated the need for a single nodal agency to govern all tribunals. However, it clarified that tribunals should not approach the nodal agency for their daily requirements. The judges asked the Ministry of Finance to earmark separate funds for tribunals. The nodal agency has to ensure that a tribunal is not under the financial department that is a litigant in a case.

g) The court also called for controlling the ambit of the Supreme Court’s appellate jurisdiction. Currently, there are more than two dozen statutes which provide direct appeals to the Supreme Court from various tribunals and High Courts. Apart from burdening the apex court with cases, providing statutory appeals against tribunals’ decisions undermines the essence of forming tribunals. The court asked the union government to revisit the provisions for direct appeals to the Supreme Court against tribunal orders and instead provide appeals to division benches of the High Courts.

## **6. Madras Bar Association (2021) Case, 2020 SCC OnLine SC 962: Supreme Court Urges for Judicial Independence**

After the decision in the *Rojer Mathew case*, the union government on 12 February 2020, came up with the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2020, under Section 184 of the Finance Act, 2017. The rules provided for the appointment, salaries, selection committees and other components of the functioning of tribunals. The Madras Bar Association had challenged these provisions saying that they violated Articles 14 (equality before the law), 19 (freedom of expression) and 50 (separation of judiciary from executive) of the Constitution of India, 1950. After hearing the case, the Supreme Court gave the following directions:

a) The union government has to set up the National Tribunals Commission to enhance the image of the tribunals and instil confidence in the minds of the litigants. Judicial independence of the tribunals can be achieved only when they are provided with infrastructure and other facilities without having to lean on the executive.

b) To ensure effective administrative decision-making, as an interim measure, the court directed that there should be a tribunals’ wing in the Ministry of Finance to deal with and finalise the requirements of all the tribunals till the National Tribunals Commission is established.

c) A casting vote will be given to the Chief Justice of India or his/her nominee as the Chairperson of the Search-cum-Selection Committee. Normally, the Chairperson of a tribunal would be a retired judge of the Supreme Court or the Chief Justice of a High Court. In tribunals where the Chairperson is not a judicial member, the Search-cum-Selection Committee should have a retired Supreme Court judge or a retired Chief Justice of a High Court

nominated by the Chief Justice of India in place of the tribunal's Chairperson.

d) Further, the court urged the authorities concerned to modify the rule to state that whenever it is time to re-appoint a Chairperson or the President of the tribunal, the Search-cum-Selection Committee will choose a retired Supreme Court judge or a retired Chief Justice of a High Court nominated by the Chief Justice of India. The presence of the Secretary of the sponsoring or parent department in the Search-cum-Selection Committee will benefit the selection process. Ergo, the secretary of the sponsoring or parent department will serve as the Member-Secretary or the Convener of the Search-cum-Selection Committee and shall work in the panel without a vote. The Search-cum-Selection Committee will recommend the name of one person for each post. However, taking note of the Attorney General's submissions about seeking a report from the Intelligence Bureau on the selected candidates, the Search-cum-Selection Committee can choose another person and place him/her on the waiting list. In case, the report of the Intelligence Bureau regarding the selected candidate is satisfactory, then the candidate on the waiting list can be appointed.

e) The terms of the Chairperson and the President have to be five years or till they attain 70 years – whichever is earlier. And the terms of the members have to be extended by five years or till they attain 67 years – whichever is earlier. That way, a tribunal member who gets appointed when he or she was young can get reappointed for at least one term.

f) The union government has to provide suitable homes to the President, the Chairperson and members. If it cannot arrange for accommodations, the rent allowance for the Chairperson and the President should be increased to Rs 1,50,000 and for the members, it should be Rs. 1,25,000.

g) Advocates who do not have 25 years of experience are not eligible to become members under the 2020 Rules. The court has asked the union government to modify the rules so that advocates with a minimum of 10 years of experience can be eligible to become a judicial member.

h) Members of the Indian Legal Service will be considered for the judicial member's post if they fulfil the criteria that apply to advocates. The Search-cum-Selection Committee will look at the work and specialisations of the Indian Legal Service members while considering their candidature for a judicial member's post.

i) In case there is a complaint against any member of the tribunal, the union government has to conduct a preliminary inquiry and submit a report to the Search-cum-Selection Committee. It helps weed out frivolous complaints. The search panel can accept or reject the findings. If there is truth in the findings, the committee can conduct an inquiry on its own. The Search-cum-Selection Committee's decision will be final and the union government has to implement it.

j) All the appointments have to be made in three months after Search-cum-Selection Committee chooses the candidates for various posts in the tribunals.



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