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# LITIGATION LANDSCAPE IN GST

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# THE JOURNEY SO FAR

# Issues came up before the High Court



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- Natural Justice [Vague SCN, Hearing Notice under the wrong tab of GST Portal, Ex-parte Orders, Non-Speaking Order, various orders passed without due process of law]
- Jurisdictional Issues [Parallel assessment proceedings by Central and State Tax Authorities on same subject matter for same period, interpretation of the proper officer]
- Arbitrary actions like bank attachment, E-way bill related issues, issuance of SCN post ASMT-12, etc.
- Challenging the vires of the provisions [corporate warranty related provisions, online gaming related provisions]
- Writ against AAAR orders

# Issues came up before the AAR



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- Taxability
  - E-commerce Operators – Uber, Rapido, etc.
  - Liquidated Damages
- Admissibility of Credit
  - Issues pertaining to Section 17(5)
  - Canteen & Transport facility
- Valuation
  - Value of free supplies

# Issues came up before the AAR



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- Classification & Rate
  - Goods vs. Service like taxability of body building operations
  - Works contract Service
  - Benefit of concessional rate of GST like Solar power related products
  - Availability of the exemption notification
  - Instant Food Mix: Flour 1106 (5%) or Others 2106(18%)
  - Flavoured Water (28%) or Fruit Juice (12%)

# Issues adjudicated by the Department so far



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- Tran-1 related issues [Tran credit taken in wrong column, CENVAT credit not taken in legacy returns, etc.]
- Reconciliation related issues [GSTR 2A v. GSTR 3B, GSTR 1 v. GSTR 3B ]
- Fake Invoice
- ITC related issues [credit on elevators, credit on non-civil work for construction of hotels, buildings, factories, etc., cancellation of vendor GST registration, trade payables outstanding after 180 days, non-payment of tax by vendor, etc.]
- Refund denial on account of various reasons
- Classification related issues [electronic v. non-electronic toys; khari v. toast; parts of automobile ]
- Corporate Guarantee
- Composite vs. Mixed Supply [Mini bar sales, taxi services in hotels, etc.]

# WHY IS LITIGATION STILL AT A NASCENT STAGE IN GST?

# Litigation is at Nascent stage



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- Inherent limitation of the Writ Court
- Given the wide discretion of the High Court in writ jurisdiction, there is inconsistency in various interim orders or relief by way of remand orders passed by different High Courts
- Inconsistent or contrary positions taken by the Central and State Government Authorities
- No uniformity in the positions taken by the Tax Authorities in each state
- AAR lacks the precedential value in view of the specific provisions in the law itself.
- Scope of jurisdiction of AAR
- Advance Ruling Authorities decisions created more confusion within taxpayers and tax officials than settling the issues in advance.
- Hence, at present there is no clarity per se on the interpretation of the core issues of GST Scheme of law.

# Absence of GSTAT- Consequential impact



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- Due to non-constitution of the GSTAT, the taxpayers are deprived of their statutory remedy to file appeal against the order of the Appellate Authority.
- Due to state of no precedence and lack of clarity- the Tax payer is at the mercy of the revenue officers or of the Writ Courts
- In such situation, taxpayers were constrained to file WP before the jurisdictional High Courts under Article 226/227 to either quash the orders, SCN or obtain stay on recovery proceedings.
- No opportunity to decide the cases which are either purely facts specific disputes or dominated by the factual aspects and also on the core interpretational issues, where the interpretation can go either ways.
- Due to year-on-year pendency of the issues before the Departmental Authorities, businesses have to carry lot of contingent liability in absence of any legal clarity on the issue

# GST APPELLATE TRIBUNAL

# What is a Tribunal?



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- **Objectives of a Tribunal:**

- Speedy justice, uniformity of approach, predictability of decisions, specialist justice

- **Constitutional Scheme:**

- Article 323-A – Administrative Tribunals for service disputes
- Article 323-B – Other Tribunals (tax, EXIM, land reform, labour disputes, etc. as specified)
- Exclusion of the jurisdiction of all courts
- Exception: Jurisdiction of the Supreme Court under Article 136 (SLP)

# Powers of the Tribunal- In General



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## ▪ **L. Chandrakumar [SC: Constitution Bench]**

- Tribunals established under Article 323-A and 323-B are competent to hear matters where the vires of statutory provisions are challenged.
  - Exception: Tribunal cannot decide questions with respect to vires of their parent statute.
- Order of Tribunal can be challenged before DB of jurisdictional HC under Articles 226 and 227.

## ▪ **Whether GSTAT is a Tribunal under Article 323-B?**

- The UOI in *Revenue Bar Association* contended that GSTAT is a creature of Art.246-A, constituted under S.109 of the CGST Act. It is not a substitute to the HC and therefore not a Tribunal under Art. 323-B.
- *Calcium India (Private) Ltd. – Mad HC* – Since, CEGAT not a tribunal under 323-B. Therefore, no bar to approach HC under 226. Similar view has been taken by Bombay High Court in the case of *Spacewood Funshiers*.
- GSTAT not competent to hear challenge to vires of the Act or notifications, etc. which are creations of the Act.
- Writ Courts would continue to be relevant given the limitation of the jurisdiction of the appellate forum [GSTAT].

# Powers of the Tribunal- In General



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## ▪ Inherent Powers of the Tribunal

- S.111 of CGST Act states that provisions of CPC will not be applicable.
- Can be exercised where ordinary rules of procedure result in injustice; no other remedy provided under the law
- Court has no inherent power to do that which is otherwise prohibited by the statute.
- *Mohammed Kunhi v. ITO*: It is not necessary that every power must be expressly provided and that every Tribunal has certain 'ancillary' or 'incidental' powers to make the exercise of a statutory function fully effective.

# GSTAT - General Overview



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- Second Appellate Forum constituted under provisions of CGST Act
- **Principal Bench located at Delhi**
- **31 State benches** located at various locations across States.
- First President, Justice (Retd.) Mishra (former Chief Justice of the Jharkhand High Court), was selected by a Search-cum-Selection Committee headed by the Hon'ble Chief Justice of India.
- **Likely to start functioning and hearing cases by the end of FY 2024-25**

# GSTAT - A Subject Matter Of Litigation



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- **The vires of the GSTAT Provisions in CGST Act were challenged**
  - Section 110(1)(b) – Lawyers not eligible for appointment as Judicial Member
  - Section 109(9) – Composition: two technical members and one judicial member [minority of judicial members]
  - Section 110(1)(b)(iii)– Officers of Indian Legal Services eligible for appointment as Member
  - Further the terms of appointment, qualifications, salary, tenure etc., have also been challenged as violative of the principles of separation of power enshrined in Article 50 of the Constitution.
  - Petition was also filed before the SC seeking constitution of the GSTAT

# GSTAT - A Subject Matter Of Litigation



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- **Corrective Measures/Amendments**

- Lawyers with ten years of relevant experience eligible to be Judicial Member [CGST (Second Amendment) Act, 2023]
- Change in Composition of State Benches : 2 Judicial Members; 2 technical members
- GSTAT constituted by Notification S.O. 3048(E) dated 31 July 2024

- **Current Status of Litigation surrounding the GSTAT**

- Cases are pending before the SC for disposal

# KEY PROVISIONS

# Subject Matter Jurisdiction



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- GSTAT can hear appeals against the orders passed by the Appellate Authority(S.107) or Revisional Authority (S.108)
- **Exclusive jurisdiction of Principal Bench**
  - examine or adjudicate matters referred to it under Section 171(2) [e.g. anti-profiteering]
  - cases involving issues related to ‘place of supply’
  - Other cases or class of cases as recommended by Government
- **Jurisdiction of 2-Member Bench [Judicial + Technical]**
  - Tax; ITC issues; Amount of fine, fee or penalty
- **Jurisdiction of Single Member Bench**
  - Where amount does not exceed INR 50L **and** does not involve any question of law
  - Upon approval of President

# Members (S.110)



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- **Qualifications** [CAs not eligible for appointments as Judicial/Technical members] [CAs are eligible as Technical Member in ITAT]
- **Term of Service** – President– 4 years or 67 years of age; Members – 4 years or 67 years of age (whichever is earlier)
- **Reappointment:** at the discretion of the Government (only up to total 6 years) on the recommendation of Search cum Selection Committee
- **Provisions are not in line with SC judgement in *Rojer Matthew*:**
  - Short tenure is anti-merit
  - Precludes cultivation of adjudicatory experience;
  - Injurious to the efficacy of the Tribunal.
  - Illusory to expect a practicing advocate to forego practice to serve as a Member for short tenure.

# Appeal (S.112)



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- **Statutory Appeal** – the appeal filed cannot be rejected unless specifically provided for;
  - Discretion to reject appeal – amount of tax or ITC does not exceed INR 50,000/-
  - Delay in filing – Tribunal may admit an appeal after expiry of time period if it is satisfied that there was sufficient cause.
- **Time period for filing appeal** – 3 months from date of communication of order and 6 months in case of Departmental Appeal
  - Current Status: the three-month period will start from **a date to be notified by the Government**
- **Department Appeal** to be filed upon order or direction of the Commissioner
- **Pre-deposit**- 20% of the tax amount; maximum cap- INR 20Cr

# Filing (Rule 110)



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- **Electronic Filing**
- Appeal : Form GST APL-05 along with necessary documents
- Memorandum of Cross-objections : Form GST APL-06
- Relevance of cross-objections?
  - Provides an opportunity to raise objection against part of the OIO not in favour without filing an appeal.
  - Cross objections have all the trappings of a regular appeal and must be considered in full by the court adjudicating upon the same
- Appeal is treated as filed only when final acknowledgement with appeal number is issued.

# Filing (Rule 110)



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- Where order appealed against is not uploaded on the portal:
  - Final acknowledgement indicating appeal number shall be issued in FORM GST APL-02
  - Date of provisional acknowledgement shall be date of filing appeal
  - Provided: Appellant submits a self-certified copy of the order appealed against within 7 days of filing Form GST APL-05.
- Fees:
  - Appeal or restoration of Appeal: INR 1000/- for every one lakh of tax or ITC [Minimum: INR 5000; Maximum: INR 25,000/-]
  - INR 5000/- for appeal not involving tax, ITC, fees, interest, penalty
  - No fees for application for rectification of errors or any other application

# Authorized Representative (S.116)



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- Person may appear before the GSTAT himself or appoint inter-alia any of the following as an authorized representative:
  - relative or regular employee
  - Chartered Accountant
  - Advocate
  - Retired officer of Commercial Tax Department or State Government ; not below rank of Gazetted Group-B Officer

# Procedure of GSTAT



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- Not bound by procedure laid down in CPC
- Shall regulate its own procedure
- Bound by principles of natural justice
- Powers of Civil Court - summons, discovery & production of documents, evidence, examination of witness/documents, setting aside ex parte orders passed by it.

# Procedure of GSTAT



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- **Admission of new evidence [Rule 112]:**
  - Appellate Authority refused to admit evidence which ought to have been admitted
  - Appellant was prevented by sufficient cause
  - Appellant not given sufficient opportunity to adduce relevant evidence
- **Adjournment:** for sufficient cause, maximum 3 times.
- Tribunal shall decide appeal within **1 year** from date of filing.

# Procedure Of GSTAT



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- **Withdrawal of Appeal**: Application to be filed before the Tribunal in Form GST APL-05/07W.
  - Where final acknowledgement of appeal is issued, withdrawal is subject to approval of the Tribunal.
  - After withdrawal, any fresh appeal shall be filed as per time period mentioned in Section 112.
- **Order**: The jurisdictional officer shall issue FORM GST APL-04 clearly indicating the final amount of demand confirmed by the Appellate Tribunal.
- **Rectification of mistake**: error apparent on face of the record; within 3 months from date of order [S.113(3)]
- **ROM itself is a subject matter of controversy?**

# Appeal To High Court (S.117)



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- Appeal against order of the State Bench will lie before the High Court.
- Condition: involves substantial question of law
- Time period of filing: 180 days from receipt of order
- GST Council 50<sup>th</sup> Meeting: It was clarified that for states having a common GSTAT Bench but separate High Court, an appeal arising out of GSTAT order will fall within the jurisdiction of the High Court of the State where the taxpayer is located.
- *What will happen if the Assessee falls under a particular Bench of the High Court but the GSTAT is located in different jurisdiction? For example, assessee based out of Nashik*

# Appeal To Supreme Court (S.118)



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- Appeal against order of the Principal Bench of GSTAT
- Appeal against Order of HC under S.117; certificate of HC
- Generally, the assesseees do not take Certificate but approach the SC by way of SLP

# Monetary limits: Dept Appeal (S.120)



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FORUM	LIMIT (in INR)
GSTAT	20,00,000/-
High Court	1,00,00,000/-
Supreme Court	2,00,00,000/-

- Applicability: Appeal before GSTAT, HC, SC; SLP

## Exclusions:

- Challenge to vires of the provisions
- Matter relating to valuation, classification, refund, place of supply, any other issue of recurring nature which requires interpretation.
- Adverse comments passed about Department
- Any other case, for interest of justice/revenue in the opinion of the Board

# CESTAT & GSTAT: COMPARATIVE ANALYSIS

# Comparative Analysis



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CESTAT	GSTAT
Fees for filing Appeal: Minimum INR 1000 and Maximum 10,000	Fees for filing Appeal: Minimum INR 5000 and Maximum INR 25,000
Fees for rectification application: INR 500	Yet to be notified
Pre-deposit: 10% [7.5+2.5%]	Pre-deposit: 20% [10%+10%]
Principal Bench: Delhi	Principal Bench: Delhi
5 Regional Benches: Mumbai, Chennai, Kolkata, Bangalore, Ahmedabad, Chandigarh, Allahabad and Hyderabad	31 State Benches: across the states  Circuit Benches : operative on Order of the President depending on number of appeals filed in certain locations
Rule 41: inherent powers to secure the ends of justice	No express provision

# LITIGATION LANDSCAPE AFTER INTRODUCTION OF GSTAT

# Core Interpretational Issues for the GSTAT



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- Fundamental issues in GST Scheme
  - Taxability
  - Classification
    - Composite Supply and Mix Supply
    - Exemption
  - Valuation
  - Time of Place
  - Place of Supply
  - Input Tax Credit

# Core Interpretational Issues for the GSTAT



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- Interest on Debit Note
- Cross-Charge and ISD
- Defence of revenue neutrality
- Whether Substantive benefit can/cannot be denied on account of procedural lapse
- Clarity on various procedural aspects
  - Job Work
  - Refund

# WHAT NEXT FOR US AS PROFESSIONALS?

# Lessons for Professionals



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## Learning from the past

- Continuing relevance of established legal principles

## Unlearning the Past

- Distinction between manual regime v. online regime

## New Learning

- Despite One Nation, One Tax: Each State is still a different State
- Law of the Portal
- Online filing
- Cross charge related issues
- Faceless Proceedings??



**THANK YOU!**