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(Judgment reserved on 25.01.2021)

(Judgment delivered on 09.02.2021)

Court No. - 48

1. **Case :-** WRIT TAX No. - 655 of 2018

Petitioner :- M/S Torque Pharmaceuticals Pvt. Ltd.

Respondent :- Union Of India And 5 Others

Counsel for Petitioner :- Nishant Mishra,Rahul Agarwal,Vipin Kumar Kushwaha

Counsel for Respondent :- A.S.G.I.,Akhilesh Kumar Mishra,C.S.C.,Krishna Ji

Shukla,Om Prakash Srivastava,Ramesh Chandra Shukla

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2. **Case :-** WRIT TAX No. - 90 of 2018

Petitioner :- M/S Shivhare Traders Through Prop. P.K. Shivhare

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Mr Shubham Agrawal

Counsel for Respondent :- C.S.C.,Munna Kumar Singh

3. **Case :-** WRIT TAX No. - 212 of 2018

Petitioner :- M/S R.G. Carrying Corporation

Respondent :- State Of Up And 3 Others

Counsel for Petitioner :- Shubham Agrawal

Counsel for Respondent :- C.S.C.,A.S.G.I.,Devendra Gupta

4. **Case :-** WRIT TAX No. - 223 of 2018

Petitioner :- M/S Lakhota Transport Co.Ltd. And Anr

Respondent :- Union Of India Through Its Secretary And Ors

Counsel for Petitioner :- Rishi Raj Kapoor

Counsel for Respondent :- A.S.G.I.,C.S.C.,Om Prakash Srivastava

5. **Case :-** WRIT TAX No. - 243 of 2018

Petitioner :- M/S Krishna Tar Products

Respondent :- State Of U.P. And 3 Ors

Counsel for Petitioner :- Shubham Agrawal,Lokesh Mittal

Counsel for Respondent :- C.S.C.,Anant Kumar Tiwari

6. **Case :-** WRIT TAX No. - 390 of 2018

Petitioner :- M/S Maa Vindhyaasini Tobacco Private Ltd.

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Shubham Agrawal

Counsel for Respondent :- C.S.C.,A.S.G.I.,Anant Kumar Tiwari

7. **Case :-** WRIT TAX No. - 479 of 2018

Petitioner :- M/S Panna Lal And Company

Respondent :- Additional Commissioner Grade-2 And 3 Others

Counsel for Petitioner :- Ankur Agarwal,Suyash Agarwal

Counsel for Respondent :- C.S.C.,A.S.G.I.

8. **Case :-** WRIT TAX No. - 121 of 2019

Petitioner :- M/S Parasdas Jain And Sons

Respondent :- Additional Commissioner And Another

Counsel for Petitioner :- Ankur Agarwal,Suyash Agarwal

Counsel for Respondent :- C.S.C.

9. **Case :-** WRIT TAX No. - 327 of 2019
Petitioner :- M/S Hindustan Coca-Cola Beverages Pvt. Ltd.
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Nishant Mishra,M.P. Devnath
Counsel for Respondent :- C.S.C.
10. **Case :-** WRIT TAX No. - 332 of 2019
Petitioner :- M/S Akshay Steels
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Vishwjit
Counsel for Respondent :- C.S.C.
11. **Case :-** WRIT TAX No. - 368 of 2019
Petitioner :- Shreegirraj Supari Traders (Regd.)
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Nishant Mishra,Tanmay Sadh
Counsel for Respondent :- C.S.C.
12. **Case :-** WRIT TAX No. - 457 of 2019
Petitioner :- M/S Hindustan Colas Private Limited
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Shubham Agrawal
Counsel for Respondent :- C.S.C.
13. **Case :-** WRIT TAX No. - 631 of 2019
Petitioner :- M/S Malbros Furnitures
Respondent :- Additional Commissioner Grade-2 And Another
Counsel for Petitioner :- Suyash Agarwal,Ankur Agarwal
Counsel for Respondent :- C.S.C.
14. **Case :-** WRIT TAX No. - 634 of 2019
Petitioner :- M/S Malbros Furnitures
Respondent :- Additional Commissioner Grade - 2 And Another
Counsel for Petitioner :- Suyash Agarwal,Ankur Agarwal
Counsel for Respondent :- C.S.C.
15. **Case :-** WRIT TAX No. - 717 of 2019
Petitioner :- M/S Shiv Traders
Respondent :- Additional Commissioner Grade-2 (Appeal) And Another
Counsel for Petitioner :- Suyash Agarwal,Ankur Agarwal
Counsel for Respondent :- C.S.C.
16. **Case :-** WRIT TAX No. - 969 of 2019
Petitioner :- M/S Amit Metals
Respondent :- Additional Commissioner Grade-2 And Another
Counsel for Petitioner :- Ankur Agarwal,Suyash Agarwal
Counsel for Respondent :- C.S.C.
17. **Case :-** WRIT TAX No. - 970 of 2019
Petitioner :- M/S Dev Rubber Factory Pvt.Ltd
Respondent :- Additional Commissioner Grade_2 And Another
Counsel for Petitioner :- Ankur Agarwal,Suyash Agarwal
Counsel for Respondent :- C.S.C.
18. **Case :-** WRIT TAX No. - 971 of 2019
Petitioner :- M/S Shambhavi Automotive Engineers
Respondent :- Additional Commissioner And Another
Counsel for Petitioner :- Suyash Agarwal,
Counsel for Respondent :- C.S.C.

19. **Case :-** WRIT TAX No. - 993 of 2019
Petitioner :- M/S Hindustan Zinc Limited
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Atul Gupta,Abhishek Kumar Tripathi
Counsel for Respondent :- C.S.C.
20. **Case :-** WRIT TAX No. - 1019 of 2019
Petitioner :- M/S Lamba Door To Door Dogown Service
Respondent :- Additional Commissioner Grade-2 (Appeal) And Another
Counsel for Petitioner :- Suyash Agarwal,Ankur Agarwal
Counsel for Respondent :- C.S.C.
21. **Case :-** WRIT TAX No. - 1286 of 2019
Petitioner :- M/S Anamika Sugar Mills (P) Ltd.
Respondent :- Union Of India And 4 Others
Counsel for Petitioner :- Atul Gupta,Abhishek Kumar Tripathi
Counsel for Respondent :- A.S.G.I.,Gaurav Mahajan,Gyanendra Kumar Dwivedi
22. **Case :-** WRIT TAX No. - 1333 of 2019
Petitioner :- M/S Sigtia Enterprises
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Rohan Gupta
Counsel for Respondent :- C.S.C.
23. **Case :-** WRIT TAX No. - 1386 of 2019
Petitioner :- M/S Advance Infrastructure Pvt. Ltd.
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Amit Mahajan,Manish Chandra,Niraj Kumar Singh
Counsel for Respondent :- C.S.C.
24. **Case :-** WRIT TAX No. - 1387 of 2019
Petitioner :- M/S Advance Infrastructure Pvt. Ltd.
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Amit Mahajan,Manish Chandra,Niraj Kumar Singh
Counsel for Respondent :- C.S.C.
25. **Case :-** WRIT TAX No. - 1388 of 2019
Petitioner :- M/S Advance Infrastructure Pvt. Ltd.
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Amit Mahajan,Manish Chandra,Niraj Kumar Singh
Counsel for Respondent :- C.S.C.
26. **Case :-** WRIT TAX No. - 316 of 2020
Petitioner :- M/S Kay Pan Fragrance Pvt. Ltd.
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Pooja Talwar
Counsel for Respondent :- C.S.C.,A.S.G.I.
27. **Case :-** WRIT TAX No. - 319 of 2020
Petitioner :- M/S Panchwati Nutrients Gram Through Its Power Of Attorney Holder Mr. Praveen Kumar Srivastava
Respondent :- Additional Commissioner And 2 Others
Counsel for Petitioner :- Suyash Agarwal,Ankur Agarwal
Counsel for Respondent :- C.S.C.,A.S.G.I.
28. **Case :-** WRIT TAX No. - 335 of 2020
Petitioner :- Tractors And Farm Equipment Limited
Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Shubham Agrawal
Counsel for Respondent :- C.S.C.

29. **Case :-** WRIT TAX No. - 416 of 2020
Petitioner :- M/S Hari Metal And Chemical Industries
Respondent :- State Of U P And 2 Others
Counsel for Petitioner :- Shubham Agrawal
Counsel for Respondent :- C.S.C.

30. **Case :-** WRIT TAX No. - 716 of 2020
Petitioner :- D.R. Polymers Pvt. Ltd.
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Harishchandra Dubey
Counsel for Respondent :- C.S.C., Krishna Agarawal, Navin Sinha (Senior Adv.)

Hon'ble Surya Prakash Kesarwani, J.
Hon'ble Dr. Yogendra Kumar Srivastava, J.

1. Heard Sri Navin Sinha, learned Senior Advocate assisted by Ms. Kalpana Sinha, Sri Nishant Misra, Sri Vishwjit, Sri Harish Chandra Dubey, Sri Suyash Agarwal, Sri Atul Gupta, learned counsel and other learned counsel for the petitioners, Sri Shashi Prakash, learned Additional Solicitor General of India assisted by Sri Krishna Agarwal, Sri K.J. Shukla, Sri R.C. Tiwari, Sri Anant Kumar Tiwari, learned counsel and other learned counsel for the Indirect Taxes/Central Government and Sri Manish Goel, learned Additional Advocate General assisted by Sri C.B. Tripathi, learned Special Counsel appearing for the State-respondents.

2. With the consent of learned counsels for the parties, **Writ Tax No.655 of 2018 has been treated as the leading writ petition and only the relief relating to the constitution of the Goods and Services Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') under the Central Goods and Services Tax Act, 2017** (hereinafter referred to as 'the CGST Act')/ U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as 'the U.P. GST Act'), **is being decided and all other questions are left open.**

3. **Reliefs sought in Writ Tax No.655 of 2018**, are reproduced below:

“A- Issue a writ, order or direction in the nature of mandamus commanding respondents No. 1 & 2 to constitute 'Regional Bench' and 'State Bench' for the State of U.P, at the seat of jurisdictional High Court and also such number of ‘Area Benches’ in the State of U.P, as may be recommended by Respondent No. 6;

*B- Issue a Writ, order or direction in the nature of certiorari quashing the impugned order dated 2.4.2018 & 7.2.2018 (**Annexure-1 & 2**) passed by Respondents No. 4 & 5 respectively;*

C- Issue a writ, order or direction quashing the Circular dated 6.2.2017 issued by Respondent No. 2, to the extent it directs that Rule 138 of UPGST Rules under which Notification No.1014 dated 21.7.2017 was issued prescribing e-way bill 01, gets automatically revived on rescinding of Notification No.138 dated 30.1.2018;

In the Alternative

Issue a writ, order or directing declaring that Notification No. 1014 dated 21.7.2017, as amended, is directory and not mandatory, in so far it requires carrying e-way bill 01 for inter-State transaction covered by IGST Act, 2017;

D- Issue any other writ, order or direction, which this Hon'ble Court may deem fit in the facts and circumstances of the case;

*DI. Issue a writ, order or direction the nature of certiorari calling for and examining DO No. 20/GST dated 29th May 2020 dated 29.5.2020 submitted by Respondent No. 2 before Respondent No. 6 and also the approval of Respondent No. 6 in its 40th meeting held on 12th June, 2020, in so far it relates to creation of State Bench of Goods and Services Tax Appellate Tribunal at Lucknow and **quashing the said DO No. 20/GST dated 29th May 2020 dated 29.5.2020 and approval of Respondent No. 6l, as without authority of law and contrary to Section 109 (6) of the Central Goods & Services Tax Act, 2017;***

E- Award costs of the petition to the Petitioner.

E1. Issue a writ, order or direction in the nature of mandamus directing Respondent No.6 to restore the decision taken in its 39th meeting held on 14th March' 2020 in respect of creation of State Bench of Goods and Services Tax Appellate Tribunal at Allahabad and 4 Area Benches at Ghaziabad, Lucknow, Varanasi and Agra AND further issue a writ, order or direction in the nature of mandamus commanding Respondent No.1 to forthwith issue necessary notification for the same.”

4. Briefly stated facts of the present case are that the impugned orders passed in this batch of writ petitions are appealable before the Appellate Tribunal under Section 112 of the CGST Act/ U.P. GST Act but the petitioners have filed these writ petitions for reason that the Tribunal under Section 109 of the CGST Act has not been constituted so far by the Government, i.e. the Central Government, under Section 109 of the CGST Act. Since the challenge to the impugned orders relates to questions of fact and the Appellate Tribunal is the last fact finding authority, therefore, we leave it open for all the petitioners to challenge the impugned orders before the Appellate Tribunal under Section 112 of the CGST Act/ U.P. GST Act as and when the State Bench and Area Benches of the Appellate Tribunal are constituted in the State of Uttar Pradesh.

Relief being considered in this bunch of writ petitions:-

5. Now we proceed to consider the **reliefs (A), (D1) and (E1)** which at the cost of repetition, are reproduced hereunder:

“A- Issue a writ, order or direction in the nature of mandamus commanding respondents No. 1 & 2 to constitute 'Regional Bench' and 'State Bench' for the State of U.P, at the seat of jurisdictional High Court and also such number of ‘Area Benches’ in the State of U.P, as may be recommended by Respondent No. 6;

***DI.** Issue a writ, order or direction the nature of certiorari calling for and examining DO No. 20/GST dated 29th May 2020 dated 29.5.2020 submitted by Respondent No. 2 before Respondent No. 6 and also the approval of Respondent No. 6 in its 40th meeting held on 12th June, 2020, in so far it relates to creation of State Bench of Goods and Services Tax Appellate Tribunal at Lucknow and quashing the said DO No. 20/GST dated 29th May 2020 dated 29.5.2020 and approval of Respondent No. 6, as without authority of law and contrary to Section 109 (6) of the Central Goods & Services Tax Act, 2017;*

***E1.** Issue a writ, order or direction in the nature of mandamus directing Respondent No.6 to restore the decision taken in its 39th meeting held on 14th March' 2020 in respect of creation of State Bench of Goods and Services Tax Appellate Tribunal at Allahabad and 4 Area Benches at Ghaziabad, Lucknow, Varanasi and Agra **AND** further issue a writ, order or direction in the nature of mandamus commanding Respondent No.1 to forthwith issue necessary notification for the same.”*

6. We have heard learned counsels for the parties at length. Arguments were heard in the leading writ petition by this court on 17.04.2018, 13.02.2019, 28.02.2019, 03.07.2019, 19.07.2019, 18.01.2021, 20.01.2021 and 25.01.2021. High Court Bar Association, Allahabad was also heard on 03.07.2019 and 19.07.2019. **The order dated 19.07.2019** passed by this court, is reproduced below:

“Heard Shri Nishant Mishra, learned counsel for the petitioner, Shri Gyan Prakash, learned Assistant Solicitor General of India assisted by Shri K.J. Shukla and Shri R.C. Shukla learned counsel for the respondent nos.1 to 6, Shri Vikas Chandra Tripathi, learned Chief Standing Counsel assisted by Shri Nimai Dass, learned Additional Chief Standing Counsel and Shri B.P. Singh Kachhawah, learned Standing Counsel, Shri C.B. Tripathi, learned Special Counsel for the State.

Shri Navin Sinha, learned Senior Advocate assisted by Shri Rahul Agrawal, Advocate and Sri Akhilesh Kumar Mishra, Senior Vice President, High Court, Bar Association Allahabad are also present to assist the Court.

The status report along with an affidavit has been filed by the State Government today, which is taken on record. The Counsel for the Central Government has also placed a letter, which is also taken on record.

Learned Counsel for the petitioner, Sri Nishant Mishra has drawn the attention of this Court to the provisions of Section 109 (6) of Central Goods & Services Tax Act, 2017 which reads as hereunder:-

“(6) The Government shall, by notification, specify for each State or Union territory except for the State of Jammu and Kashmir, a Bench of the Appellate Tribunal (hereafter in this Chapter, referred to as ‘State Bench’) for exercising the powers of the Appellate Tribunal within the concerned State or Union territory:

Provided that for the State of Jammu and Kashmir, the State Bench of the Goods and Services Tax Appellate Tribunal constituted under this Act shall be the State Appellate Tribunal constituted under the Jammu and Kashmir Goods and Services Tax Act, 2017:

Provided further that the Government shall, on receipt of a request from any State Government, constitute such number of Area Benches in that State, as may be recommended by the Council:

Provided also that the Government may, on receipt of a request from any State, or on its own motion for a Union territory, notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or Union territory, as may be recommended by the Council, subject to such terms and conditions as may be prescribed.”

*From a bare reading of the provision of the Act itself it is clear that **it is not in the domain of the State Government to make a recommendation for deciding the place of the State Bench of the Tribunal. The role of the State is confined to determine the place of area benches.***

Insofar as the determination of location of the State Bench is concerned, it remains in the domain of the Central Government for which the matter is under consideration before the Central Government.

*Insofar as the judgement dated 31.05.2019 of the Lucknow Bench in PIL (Civil) No.6800 of 2019 (Oudh Bar Asso. High Court, Lko. Thru General Secretary & Anr. vs. U.O.I. Thru Secy. Ministry of Finance & Ors.) is concerned, it appears that the aforesaid provisions have not been considered at all, hence, prima facie the judgement appears to be bereft with non-consideration of the above facts. **The Central Government shall proceed in accordance with Section 109 (6) of C.G.S.T. Act, 2017.***

List this matter on 19.08.2019.

A proposal has been made by the High Court Bar Association, Allahabad that as the principal seat is at Allahabad having larger territorial jurisdiction and there is a sufficient space available in the premises of Board of Revenue/Police Headquarter, Allahabad, which has been currently vacated, the State Bench may be housed in the said premises. The location of the premises is practically in the institutional area, centrally located having ample parking space and near Allahabad High Court. Their suggestion is welcomed by the members of the Bar.

Sri Gyan Prakash Srivastava, learned Assistant Solicitor General of India is granted three week's time to file status report regarding decision taken by the Central Government.”

Relevant Provisions:

7. For the purposes of the present controversy, the relevant provisions are Article 279A of the Constitution of India, Section 109 of the CGST Act and Section 109 of the U.P. GST Act, which are reproduced below:

“Article 279A of the Constitution of India:-

“279A. Goods and Services Tax Council (1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.

(2) The Goods and Services Tax Council shall consist of the following members, namely:—

(a) the Union Finance Minister..... Chairperson;

(b) the Union Minister of State in charge of Revenue or Finance..... Member;

(c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government.....Members.

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (c) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on—

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(b) the goods and services that may be subjected to, or exempted from the goods and services tax;

(c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under article 269-A and the principles that govern the place of supply;

(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(e) the rates including floor rates with bands of goods and services tax;

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(h) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed

diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.

(7) One half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:—

(a) the vote of the Central Government shall have a weightage of one third of the total votes cast, and

(b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of—

(a) any vacancy in, or any defect in, the constitution of the Council; or

(b) any defect in the appointment of a person as a member of the Council; or

(c) any procedural irregularity of the Council not affecting the merits of the case.

(11) The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute-

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other side; or

(c) between two or more States,

arising out of the recommendations of the Council or implementation thereof.”

Section 109 of the CGST Act:-

109. Constitution of Appellate Tribunal and Benches thereof.- (1) The Government shall, on the recommendations of the Council, by notification, constitute with effect from such date as may be specified therein, an Appellate Tribunal known as the Goods and Services Tax Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.

(2) The powers of the Appellate Tribunal shall be exercisable by the National Bench and Benches thereof (hereinafter in this Chapter referred to as “Regional Benches”), State Bench and Benches thereof (hereafter in this Chapter referred to as “Area Benches”).

(3) The National Bench of the Appellate Tribunal shall be situated at New Delhi which shall be presided over by the President and shall consist of one Technical Member (Centre) and one Technical Member (State).

(4) The Government shall, on the recommendations of the Council, by notification, constitute such number of Regional Benches as may be required and such Regional Benches shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).

(5) The National Bench or Regional Benches of the Appellate Tribunal shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases where one of the issues involved relates to the place of supply.

(6) The Government shall, by notification, specify for each State or Union territory, except for the State of Jammu and Kashmir, a Bench of the Appellate Tribunal (hereafter in this Chapter, referred to as “State Bench”) for exercising the powers of the Appellate Tribunal within the concerned State or Union territory:

Provided that for the State of Jammu and Kashmir, the State Bench of the Goods and Services Tax Appellate Tribunal constituted under this Act shall be the State Appellate Tribunal constituted under the Jammu and Kashmir Goods and Services Tax Act, 2017:

Provided further that the Government shall, on receipt of a request from any State Government, constitute such number of Area Benches in that State, as may be recommended by the Council:

Provided also that the Government may, on receipt of a request from any State, or on its own motion for a Union territory, notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or

Union territory, as may be recommended by the Council, subject to such terms and conditions as may be prescribed.

(7) The State Bench or Area Benches shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than those referred to in sub-section (5).

(8) The President and the State President shall, by general or special order, distribute the business or transfer cases among Regional Benches or, as the case may be, Area Benches in a State.

(9) Each State Bench and Area Benches of the Appellate Tribunal shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State) and the State Government may designate the senior most Judicial Member in a State as the State President.

(10) In the absence of a Member in any Bench due to vacancy or otherwise, any appeal may, with the approval of the President or, as the case may be, the State President, be heard by a Bench of two Members:

Provided that any appeal where the tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined in any order appealed against, does not exceed five lakh rupees and which does not involve any question of law may, with the approval of the President and subject to such conditions as may be prescribed on the recommendations of the Council, be heard by a bench consisting of a single member.

(11) If the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

(12) The Government, in consultation with the President may, for the administrative convenience, transfer—

(a) any Judicial Member or a Member Technical (State) from one Bench to another Bench, whether National or Regional; or

(b) any Member Technical (Centre) from one Bench to another Bench, whether National, Regional, State or Area.

(13) The State Government, in consultation with the State President may, for the administrative convenience, transfer a Judicial Member or a Member Technical (State) from one Bench to another Bench within the State.

(14) No act or proceedings of the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Appellate Tribunal.

Section 109 of the U.P. GST Act:-

109. Appellate Tribunal and Benches thereof- (1) Subject to the provisions of this Chapter, the Goods and Services Tax Tribunal constituted under the Central Goods and Services Tax Act, 2017 (12 of 2017) shall be the Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority under this Act.

(2) The constitution and jurisdiction of the State Bench and the Area Benches located in the State shall be in accordance with the provisions of section 109 of the Central Goods and Services Tax Act, 2017 (12 of 2017) or the rules made thereunder.”

Discussion and Findings:

8. Since the **submission** of learned counsels for the parties in the present batch of writ petitions is **mainly confined to the interpretation of Section 109(6)** of the CGST Act/ U.P. GST Act and facts of the case, **therefore, we now proceed to decide the controversy.**

9. Section 109(6) of the CGST Act mandates that the Central Government shall, by notification, specify for each State or Union Territory except for the State of Jammu and Kashmir, **a State Bench** of the Appellate Tribunal for exercising the powers of the Appellate Tribunal within the concerned State or Union Territory. Under the second provision to sub-Section (6) of Section 109 of the CGST Act, **area benches in that State** shall be constituted by the Central Government in such number **as may be recommended by the council on receipt of a request from the concerned State Government.** The third proviso to sub-Section (6) of Section 109 of the CGST Act provides that the Government may on receipt of a request from any State, or on its own motion for a Union Territory **notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other**

State or Union Territory, as may be recommended by the council, subject to such terms and conditions as may be prescribed. Section 109(2) of the U.P. GST Act provides that the constitution and jurisdiction of State Bench and the Area Benches located in the State shall be in accordance with the provisions of Section 109 of the CGST Act or the Rules made thereunder. Thus, **sub-section (6) of Section 109 of the CGST Act clearly mandates that “State Bench of the Goods and Services Tax Appellate Tribunal” shall be constituted and notified by the Central Government** but the **Area Benches** in such number as may be requested by the concerned State Government, may be constituted by the Central Government on the recommendation of the Council.

10. **Vide DO Letter No.386/11-2-19-9(24)/19 – Institutional Finance, Tax and Registration Anubhag – 2 dated 05.03.2019**, the State Government requested/ proposed to the Secretary of the GST Council New Delhi for **creation of State Bench at Allahabad and 19 Area Benches at different places** in the State of Uttar Pradesh. By this letter, the State Government has revised its earlier proposal dated 21.02.2019. **The letter/ proposal of the State Government dated 05.03.2019** filed as annexure-2 to the affidavit dated 15.10.2019 of respondent No.1 (Union of India), **is reproduced below:**

“आलोक सिन्हा,
अपर मुख्य सचिव।

अर्द्धशा0प0सं0-386 / 11-2-19-9(24) / 19
संस्थागत वित्त, कर एवं निबंधन अनुभाग-2
उ0प्र0 शासन।
लखनऊ: दिनांक
05 मार्च, 2019

प्रिय महोदय,

उत्तर प्रदेश राज्य में जी0एस0टी0 अधिनियम के अंतर्गत प्राविधानित अपीलीय ट्रिब्यूनल के स्टेट बेंच एवं उनकी एरिया बेंचेज के गठन से संबंधित प्रेषित प्रस्ताव विषयक कृपया अधोहस्ताक्षरी के **अर्द्धशासकीय पत्र संख्या-334 / 11-2-19-9(24) / 19, दिनांक 21.02.2019 का संदर्भ ग्रहण करने का कष्ट करें।**

उल्लेखनीय है कि मा0 उच्च न्यायालय, इलाहाबाद द्वारा सर्वश्री टॉर्क फार्मास्यूटिकल प्रा0लि0 बनाम यूनियन ऑफ इण्डिया एवं अन्य, रिट याचिका संख्या-655 / 2018 के बाद में निर्णय दिनांक 28.02.2019 में यह अभिमत व्यक्त किया गया है कि सर्वश्री मद्रास बार एसोसियेशन बनाम यूनियन आफ इण्डिया एवं अन्य (2014) 10SCC पेज नं0-1, के सर्वोच्च न्यायालय के निर्णय के अनुसार ट्रिब्यूनल का गठन वहीं होना चाहिए, जहाँ हाईकोर्ट की प्रिन्सिपल बेंच कार्यरत है। राज्य द्वारा जी0एस0टी0 काउंसिल को प्रेषित प्रस्ताव में ट्रिब्यूनल का गठन लखनऊ में करते हुये 20 एरिया बेंचेज की संस्तुति की गई है, जिसे मा0 न्यायालय द्वारा उचित नहीं माना गया है। (न्यायालय के निर्णय की प्रति संलग्न)

मा0 न्यायालय द्वारा दिये गये निर्णय के दृष्टिगत स्टेट ट्रिब्यूनल के गठन हेतु पूर्व में प्रेषित प्रस्ताव को संशोधित करते हुये स्टेट ट्रिब्यूनल का गठन मुख्यालय,

इलाहाबाद निर्धारित किये जाने तथा इलाहाबाद के अतिरिक्त शेष 19 एरिया बेंचेज का गठन निम्नवत् किया जाना प्रस्तावित है:-

क्र०सं०	जोन का नाम	स्थान
1	नोएडा	नोएडा
2	गाजियाबाद प्रथम	गाजियाबाद
3	गाजियाबाद द्वितीय	गाजियाबाद
4	सहारनपुर	सहारनपुर
5	मेरठ	मेरठ
6	मुरादाबाद	मुरादाबाद
7	बरेली	बरेली
8	लखनऊ प्रथम	लखनऊ
9	लखनऊ द्वितीय	लखनऊ
10	कानपुर प्रथम	कानपुर
11	कानपुर द्वितीय	कानपुर
12	वाराणसी प्रथम	वाराणसी
13	वाराणसी द्वितीय	वाराणसी
14	अलीगढ़	अलीगढ़
15	आगरा	आगरा
16	इटावा	इटावा
17	फैजाबाद	फैजाबाद
18	गोरखपुर	गोरखपुर
19	झाँसी	झाँसी

कृपया उपरोक्तानुसार उत्तर प्रदेश राज्य में जी०एस०टी० अधिनियम के अन्तर्गत प्राविधानित अपीलीय ट्रिब्यूनल के स्टेट बेंच एवं उनकी एरिया बेंचेज के गठन के संबंध में आवश्यक कार्यवाही कराने की कृपा करें।

सादर।

भवदीय

ह०अप०
(आलोक सिन्हा)

श्री अजय भूषण पाण्डेय,
वित्त सचिव एवं
सचिव जी०एस०टी० काउंसिल,
भारत सरकार, नई दिल्ली।”

11. The aforequoted proposal dated 05.03.2019 was discussed by the State Government with the GST Council and, therefore, the State Government decided to propose only 4 Area Benches instead of 19 Area Benches. Consequently, proposal for 4 area benches, reiterating the State Bench at Prayagraj, was sent by the State Government to the GST Council vide DO Letter No.478/11-2-19-9-(24)/19 Institutional

Finance, Tax and Registration Anubhag-2, Government of U.P. dated 15.03.2019, which is reproduced below:

“आलोक सिन्हा,
अपर मुख्य सचिव।

अर्द्धशा0प0सं0-478 / 11-2-19-9(24) / 19
संस्थागत वित्त, कर एवं निबंधन अनुभाग-2

उ0प्र0 शासन।

लखनऊ: दिनांक 15 मार्च, 2019

प्रिय महोदय,

उत्तर प्रदेश राज्य में जी0एस0टी0 अधिनियम के अंतर्गत प्राविधानित अपीलीय ट्रिब्यूनल के स्टेट बेंच एवं उनकी एरिया बेंचेज के गठन से संबंधित प्रेषित प्रस्ताव विषयक कृपया अधोहस्ताक्षरी के अर्द्धशासकीय पत्र संख्या-476 / 11-2-19-9(24) / 19, दिनांक 15.03.2019 का संदर्भ ग्रहण करने का कष्ट करें।

2- उल्लेखनीय है कि मा0 उच्च न्यायालय, इलाहाबाद द्वारा सर्वश्री टॉर्क फार्मास्यूटिकल प्रा0लि0 बनाम यूनियन ऑफ इण्डिया एवं अन्य, रिट याचिका संख्या-655 / 2018 के बाद में मा0 उच्च न्यायालय, इलाहाबाद द्वारा पारित निर्णय दिनांक 28.02.2019 अर्द्धशासकीय पत्र संख्या-386 / 11-2-19-9(24) / 19, दिनांक 05.03.2019 से सचिव, जी0एस0टी0 काउंसिल को उत्तर प्रदेश राज्य में स्टेट ट्रिब्यूनल एवं एरिया बेंचेज के गठन के संबंध में प्रेषित संशोधित प्रस्ताव का संज्ञान लेते हुये जी0एस0टी0 काउंसिल सचिवालय द्वारा जी0एस0टी0 अपीलेट ट्रिब्यूनल (GSTAT) के गठन के प्रस्ताव जी0एस0टी0 काउंसिल की आगामी बैठकें के एजेण्डा में शामिल करते हुये ई-मेल के माध्यम से इस विषय पर प्रस्तावित एजेण्डा बिन्दु राज्यों के कन्फर्मेशन हेतु ई-मेल के माध्यम से सर्कुलेट किया गया है।

3- तत्कम में जी0एस0टी0 काउंसिल सचिवालय से दूरभाष पर हुई वार्ता में जी0एस0टी0 काउंसिल सचिवालय द्वारा अवगत कराया गया है कि उत्तर प्रदेश राज्य द्वारा 19 एरिया बेंचेज सहित कुल 20 बेंचेज के गठन का प्रस्ताव प्रेषित किया गया है जबकि महाराष्ट्र एवं पश्चिम बंगाल द्वारा एरिया बेंचेज सहित कुल तीन बेंचेज तथा शेष अन्य राज्यों द्वारा केवल एक बेंच के गठन का प्रस्ताव प्रेषित किया गया है। अन्य राज्यों द्वारा प्रेषित प्रस्ताव के दृष्टिगत उत्तर प्रदेश राज्य द्वारा प्रस्तावित बेंचेज की संख्या (कुल 20) बहुत अधिक है। जी0एस0टी0 काउंसिल सचिवालय द्वारा उत्तर प्रदेश में प्रस्तावित बेंचेज की संख्या कम करते हुये अन्य राज्यों के समरूप संशोधित प्रस्ताव प्रेषित करने की अपेक्षा की गई है।

4- यह भी उल्लेखनीय है कि स्टेट ट्रिब्यूनल एवं एरिया बेंचेज का गठन सी0जी0एस0टी0 अधिनियम की धारा-109 के तहत प्रदत्त शक्तियों का प्रयोग करते हुये जी0एस0टी0 काउंसिल की संस्तुति पर केन्द्र सरकार द्वारा किया जाना है। उत्तर प्रदेश एस0जी0एस0टी0 अधिनियम की धारा 109 के तहत सी0जी0एस0टी0 अधिनियम की धारा-109 के तहत केन्द्र सरकार द्वारा सी0जी0एस0टी0 अधिनियम के अंतर्गत गठित ट्रिब्यूनल को अंगीकार किया गया है। इस प्रकार स्टेट ट्रिब्यूनल एवं एरिया बेंचेज के गठन का दायित्व केन्द्र सरकार का है।

5- उक्त समग्र तथ्यों के दृष्टिगत उत्तर प्रदेश राज्य की ओर से जी0एस0टी0 अपीलेट ट्रिब्यूनल की स्टेट बेंच एवं एरिया बेंचेज के गठन का संशोधित प्रस्ताव प्रथम प्रस्तर में संदर्भित अर्द्धशासकीय पत्र दिनांक 15.03.2019 द्वारा प्रेषित किया जा चुका है। तत्कम में ट्रिब्यूनल की स्टेट बेंच एवं एरिया बेंचेज के अधिक्षेत्र में आने वाले उत्तर प्रदेश वाणिज्य कर के समस्त जोन का विवरण एवं गठन का प्रस्ताव निम्नवत् है:-

क्र0सं0	स्टेट बेंच/एरिया बेंच के अधिक्षेत्र में समाहित वाणिज्य कर जोन के नाम	स्टेट बेंच/एरिया बेंच हेतु प्रस्तावित स्थान
1	2	3
1	वाणिज्य कर जोन प्रयागराज एवं फैजाबाद	प्रयागराज (स्टेट बेंच)
2	वाणिज्य कर जोन गाजियाबाद प्रथम,	गाजियाबाद (एरिया बेंच)

	गाजियाबाद-द्वितीय, नोएडा, मेरठ, सराहनपुर एवं मुरादाबाद	
3	वाणिज्य कर जोन लखनऊ-प्रथम, लखनऊ द्वितीय तथा बरेली एवं वाणिज्य कर जोन कानपुर -प्रथम, कानपुर द्वितीय	लखनऊ (एरिया बेन्च)
4	वाणिज्य कर जोन आगरा, अलीगढ़, इटावा एवं झाँसी	आगरा (एरिया बेन्च)
5	वाणिज्य कर जोन वाराणसी-द्वितीय तथा गोरखपुर	वाराणसी (एरिया बेन्च)

यदि भविष्य में राज्य में और एरिया बेंचेज की आवश्यकता होगी तो तत्समय प्रस्ताव प्रेषित किया जायेगा। कृपया उपरोक्तानुसार उत्तर प्रदेश राज्य में जी०एस०टी० अधिनियम के अन्तर्गत प्राविधानित अपीलीय ट्रिब्यूनल के स्टेट बेन्च एवं उनकी एरिया बेन्चेज के गठन के संबंध में आवश्यक कार्यवाही कराने की कृपा करें।

सादर।

भवदीय

ह०अप०
(आलोक सिन्हा)

श्री अजय भूषण पाण्डेय,
वित्त सचिव एवं
सचिव जी०एस०टी० काउंसिल,
भारत सरकार, नई दिल्ली।”

12. Thus, initially, the State Government vide letter dated 21.02.2019 addressed to the Secretary, GST Council, New Delhi, proposed for creation of State Bench at Lucknow and 20 Area Benches in different districts of the State of Uttar Pradesh. In supersession of the aforesaid proposal, the State Government had sent a fresh proposal dated 05.03.2019 for constitution of the “State Bench” at Allahabad and “Nineteen Area Benches” in different cities. **Since GST Council Secretariat apprised the U.P. State Government that request for creation of 19 Area Benches is excessive, therefore, the State Government, vide letter dated 15.03.2019, revised its earlier request dated 05.03.2019 of Nineteen Area Benches and requested only for Four Area Benches in districts namely Ghaziabad, Lucknow, Agra and Varanasi and reiterated the proposal for the State Bench at Allahabad.**

13. The aforesaid letter-proposal dated 15.03.2019 was challenged in **PIL Civil No.6800 of 2019 (Oudh Bar Association through Secretary, and another vs. Union of India through Secretary, Ministry of Finance and others)**, the same was decided by the

Lucknow Bench of this Court vide judgment and order dated 31.05.2019. Taking note of the provisions of Section 109 of the CGST Act, the Hon'ble Bench opined that the seat where the Tribunal is to be established, is an issue which is within the domain of the executive in terms of Section 109 of the CGST Act and is not justiciable. The Bench observed that it was not concerned with the issue on merits as to where the Benches should be established but only with the issue whether the earlier proposal could have been reviewed and thereafter proceeded to quash the amended proposal dated 15.03.2019 observing, as under:

“44. Thus there are two Seats of the High Court of Judicature at Allahabad, one at Lucknow and the other at Allahabad, none of which is permanent.

*49. Now the seat where the Tribunal is to be established is an issue which is within the domain of the Executive in terms of Section 109 of CGST Act ordinarily and is not justiciable in view of the decision of the Supreme Court in the case of Lalit Kumar (supra), wherein it was held that "that the issue with regard to setting up of permanent Bench and Circuit Benches of the Tribunal is not to be the subject matter of consideration by the judicial forum unless facts of the case are so appalling that judicial interference would be called for." There were no exceptional circumstances existing in the case, so far as the proposal dated 21.02.2019 was concerned, which was not even under challenge, therefore the same did not fall for adjudication in Writ Petition No. 655 (TAX) of 2018, on merits. As far we are concerned, **we are not concerned with the issue on merits as to where the Benches should be established but we are only concerned with the issue whether the earlier proposal could have been reviewed on account of certain observations made in an interim order and whether on which count the revised proposal is sustainable as a valid exercise of power.***

*50. In the present case, the legislation, namely, GST Act, 2017 has been enacted and has come into force with effect from 01.07.2017. Under the said enactment, various authorities have to be set up, namely, GST Council, and **the GST Council was authorised to make recommendations to the Government for constitution of the regional Benches and State Benches.***

51. In view of the above discussion, the amended proposal dated 15.03.2019 sent by the Commissioner, Commercial Tax is quashed. Consequently the earlier proposal dated 21.02.2019, which was a reasoned and considered one, shall be acted upon and GST Benches shall be constituted accordingly, expeditiously, say within three months'."

14. **Thereafter**, in its 35th meeting held on 21.06.2019, vide Agenda Item No.8, the GST Council has noted in para-35.3 that “Sri Alok Sinha,

ACS Uttar Pradesh stated that although the State Government had proposed for setting up of a State Bench in Allahabad and 4 Area Benches in Ghaziabad, Lucknow, Varanasi and Agra, the same had been challenged before the Hon'ble High Court Lucknow Bench, the Hon'ble High Court has quashed the instant proposal and ordered for considering the earlier proposal of the State Government recommending constitution of one State Bench with 20 Area Benches. He informed that the State Government was contemplating filing an appeal in the Supreme Court and requested that Government of India may also file an appeal against the High Court's order, as it was respondent No.1." Therefore, the matter of constitution of State Bench and Area Benches was deferred. Consequently, in 35th meeting, no decision was taken by the Council regarding constitution of State Bench and Area Benches in the State of Uttar Pradesh. However, in 25 States and 5 Union Territories, State Benches of the Appellate Tribunal were constituted and notified by Notification No.2744 dated 21.08.2019 and published in the Gazette of India.

15. **Thereafter**, in its 37th meeting held on 20.09.2019, the GST Council vide Agenda Item No.18 observed that for the State of Uttar Pradesh, Department of Revenue would consider the records/ court orders issued by the Hon'ble High Court Benches of Allahabad and Lucknow taking a final view for the location of a State Bench of the Tribunal in view of the request made by the State of Uttar Pradesh.

16. Thus, even on quashing of the afore-quoted proposal of the State Government dated 15.03.2019 in PIL Civil No.6800 of 2019, the proposal of the State Government dated 05.03.2019, remained with the Council for establishing State Bench at Allahabad, which was neither under challenge in the PIL Civil No.6800 of 2019 nor it was withdrawn by the State Government.

17. **Thereafter**, the GST Council in 39th Meeting held on 14.03.2020, considered the issue of creation of State Bench and Area Benches in State of Uttar Pradesh vide Agenda Item No.6 and approved the proposal for creating State Bench of the Tribunal at Allahabad and

Four Area Benches at Ghazibad, Lucknow, Varanasi and Agra, as under:

“Agenda Item 6: Creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh

15. The Secretary introduced the agenda and stated that in terms of Section 109 of the CGST Act, 2017: Goods and Services Tax Appellate Tribunal (GSTAT) were being constituted by the Government on the recommendation of the GST Council. The Appellate Tribunal having National/Regional Benches at National level and the State / Area Benches at State level, to hear appeals against orders passed by the Appellate Authority or by the Revisional Authority (Enclosed in Agenda circulated for reference).

15.1. While the proposal of states and UTs for creation of State and Area Benches of Goods and Services Tax Appellate Tribunal was considered in the 35th and 37th meeting of the GST Council, the proposal for the State of Uttar Pradesh could not be considered as the Hon'ble High Court of Allahabad, Lucknow Bench **had quashed the proposal of State Government for setting up of State Bench in Allahabad and 4 Area Benches in Ghaziabad, Lucknow, Varanasi and Agra. The Department of Revenue had proposed to file SLP against the said judgment of the Allahabad high Court, Lucknow Bench.**

15.2. Hon'ble High Court of Allahabad **vide its judgement dated 16.01.2020** in Writ Tax NO. 942 of 2018 had inter-alia directed that the issue of creation of GSTAT Benches for the state of Uttar Pradesh be taken **up by the Central Government** as well as the GST Council, as expeditiously as possible.

15.3. Accordingly, proposal for creating **State Bench** of Good and Services Tax Appellate Tribunal for **the State of Uttar Pradesh in Allahabad** and 4 Area Benches in Ghaziabad, Lucknow, Varanasi and Agra was placed before GST Council for consideration.

16. **For Agenda item 6, the Council approved the proposal for creating State Bench of Goods and Services Tax Appellate Tribunal for the State of Uttar Pradesh at Allahabad and 4 Area Benches at Ghaziabad, Lucknow, Varanasi and Agra.”**

18. It appears that in the meantime, the **Commissioner of Commercial Tax Uttar Pradesh Lucknow** wrote a DO Letter No.20/GST dated 29.05.2020 to the Joint Secretary of the GST Council, which is extracted below:

“Amrita Soni

I.A.S.

44/Dt.01-06-2020
(Do. No.20/GST
Commissioner
Commercial Tax Uttar Pradesh
Lucknow.
29th May 2020

SUBJECT- Agenda Item 6: Creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh of the 39th GST Council meeting.

Respected Sir,

*This is in reference to the **Agenda item 6: Creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh** of the 39th GST Council meeting, held on 14 march 2020 at Vigyan Bhawan, New Delhi.*

*In this regard, I would like to communicate you that **Government of Uttar Pradesh has decided to create total 04 benches of GSTAT including State Bench in the state i.e. State Bench in Lucknow and 03 Area benches in Varanasi, Ghaziabad, and Agra** respectively, instead of 05 benches of GSTAT proposed by the state earlier,*

Kindly acknowledge the decision as above from Government of Uttar Pradesh.

The above decision is being communicated with the due approval from the Government of Uttar Pradesh.

(AMRITA SONI)

To,
Shri S.K. Rahman,
Joint Secretary,
GST Council.

*Phone: (Off.) - 0522-2721147 / 2721149, Fax: 0522-2721167
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19. Thereafter in its **40th meeting held on 12.06.2020**, the GST Council vide Agenda Item No.7 recommended/ approved, as under:

“Agenda Item7: Creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh:

16. The Secretary introduced the agenda and stated that the Chapter XVIII of the CGST Act 2017 provides for the Appeal and Review Mechanism for dispute resolution under the GST regime. The proposal of

States and UTs for creation of State and Area Benches of Goods and Services Tax Appellate Tribunal was considered in the 35th, 37th, 38th and 39th meeting of the GST Council.

16.1. He further stated that in the 39th GST Council meeting the Council approved the proposal for creating State Bench of Goods and Services Tax Appellate Tribunal for the State of Uttar Pradesh at Allahabad and 4 Area Benches at Ghaziabad, Lucknow, Varanasi and Agra. He then asked JS, DoR, GoI to apprise the Council of the latest update.

16.2 JS, DoR, GoI stated that a fresh proposal was received from the State of Uttar Pradesh vide DO. No 20/GST dated 29th May, 2020 regarding creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh. As per this letter, the State Government of Uttar Pradesh has decided to create total 04 benches of GSTAT including State Bench in the State i.e. State Bench in Lucknow and 03 Area Benches in Varanasi, Ghaziabad and Agra respectively, instead of 05 benches of GSTAT proposed by the State earlier.

16.3. Hon'ble Minister for Finance from Uttar Pradesh intervened and further proposed to consider creation of another Area Bench at Prayagraj apart from Varanasi, Ghaziabad, and Agra with State Bench at Lucknow.

16.4. Accordingly, the proposal for creating the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh i.e State Bench at Lucknow and 04 Area Benches at Varanasi, Ghaziabad, Agra and Prayagraj was considered and approved by the Council.

7. For Agenda No. 7 the Council approved the creation of State Bench at Lucknow and 4 Area benches at Varanasi, Ghaziabad, Agra and Prayagraj for the State of Uttar Pradesh.”

20. The relief in the nature of certiorari to quash the aforesaid recommendation DO Letter No.20/GST dated 29.05.2020 issued by the respondent No.3 (Commissioner, Commercial Tax, U.P. Lucknow) and approval by the respondent No.6 (GST Council) in its 40th meeting held on 12.06.2020 for recommending to create State Bench at Lucknow and 4 Area Benches at Varanasi, Ghaziabad, Agra and Prayagraj, has been sought by relief No.(D1). By Relief No.(E1) and Relief No.(A), a direction has been sought to the respondent No.6 to restore its decision of the 39th Meeting held on 14.03.2020 and a direction to the respondent No.1 to forthwith issue necessary notification by creation of State Bench at Prayagraj and Area Benches at Ghaziabad, Lucknow, Varanasi and Agra.

Stand taken by the respondent Nos.1 and 6 (Union of India and GST Council) in their affidavits:-

21. The stand taken by the respondent Nos.1 and 6 in their counter affidavits/ affidavits is, as under:

(a) In **paragraph 12 of the counter affidavit dated 27.07.2018 and paragraph-3(H) and para-13 of the counter affidavit dated 16.08.2018**, it has been stated that under Section 109 of the CGST Act, the Central Government on the recommendation of the Council, has power to constitute “Appellate Tribunal”.

(b) In the **affidavit dated 15.10.2019 of Sri S. Bhowmik, Under Secretary**, Department of Ministry of Finance, North Block, New Delhi, **filed on behalf of respondent No.1** (Union of India), it has been stated in paragraphs 3, 4, 7 and 8, as under:

*“3.That in terms of section 109 of the CGST Act, 2017, the UP Government vide letter dated 21.02.2019 initially requested the GST Council to consider a proposal for constitution of State Bench of GST Appellate Tribunal at Lucknow and 20 Area Benches at 16 different locations. A copy of the proposal dated 21.02.2019 is enclosed herewith and marked as **Annexure No. I**.*

*4. It is submitted that the Hon'ble Court of Allahabad, Allahabad Bench vide its order dated 28.02.2019 in W.P. No. 655/2018 held that the Appellate Tribunal should be set up in Allahabad following the decision of Apex Court in the matter of Madras Bar Association which provides the Tribunal should be set up at the place where the Principal Bench of the High Court is situated. Accordingly, UP State vide their letter dated 05.03.2019 revised their proposal dated 21.02.2019 to the extent that the State Bench of the Appellate Tribunal should be constituted at Allahabad along with 19 Area Benches. On 15.03.2019, they again revised their proposal for constitution of 5 Benches of Appellate Tribunal i.e. one State Bench at Prayagraj and four area benches at Ghaziabad, Lucknow, Agra and Varanasi. A copy of the proposal dated 05.03.2019 and proposal dated 15.03.2019 is placed at **Annexure No. II** and **Annexure No. III** respectively.*

7. It is humbly submitted that the matter regarding deciding the location and number of Benches of the GSTAT is an executive prerogative. The GST Council is a constitutional Body under Article 279A of the Constitution of India, which alone can make recommendation to the Union and State Governments and it is the appropriate authority for recommending the location and number of benches of GSTAT.

8. It is submitted that in view of the above submissions, the Department is pursuing to file an SLP in the Hon'ble Supreme Court of India against the Hon'ble Allahabad High Court, Lucknow Bench judgement dated 31.05.2019 in PIL Civil No. 6800 of 2019 before the Hon'ble Supreme Court of India."

(c) In **paragraph-8 of the affidavit dated 16.01.2020** filed on behalf of respondent No.1 (Union of India), it has been stated as under:

"8. It is humbly submitted that the matter regarding deciding the location and number of Benches of the GSTAT is an executive prerogative. The GST Council is a constitutional Body under Article 279A of the Constitution of India, which alone can make recommendation to the Union and State Governments and it is the appropriate authority for recommending the location and number of benches of GSTAT."

Stand taken by the State-Respondents in their counter affidavits/ affidavits

22. The stand taken by the State-respondents in their counter affidavits/ affidavits is, as under:

(a) In paragraphs-3, 6 and 7 of **the supplementary counter affidavit dated 27.02.2019** filed on behalf of respondent No.2 (State of U.P.), it has been stated as under:

*"3. That under Section 109 of GST Act, 2017 **the Central Government has to specify for each State and union territory, a Bench of Appellate Tribunal (hereinafter referred to as 'State Bench')** and on receipt of request from the State Government constitute such number of Area Benches in the State as may be recommended by the Council.*

*6. That thereafter the Addl. Chief Secretary sent a recommendation to the Secretary GST Council Government of India vide letter dated 21 February, 2019 for constitution of 20 Area Benches of the Tribunal in 16 Districts including one State Bench at Lucknow. Copy of the recommendation dated 21 February, 2019 is being annexed herewith and marked as **Annexure- S.C.A.-3** to this affidavit.*

7. That the ultimate decision in this regard is to be taken by the Central Government as provided under Section 109 of the ACT."

(b) In paragraphs-5 and 6 of the better **supplementary counter affidavit dated 13.03.2019** filed on behalf of the respondent

Nos.2 and 3 (State of U.P. and Commissioner), it has been stated as under:

*“5. That, thereafter Additional Chief Secretary, Government of U.P. sent a revised proposal dated 05.03.2019 to the Finance Secretary and Secretary, G.S.T. Council for constitution of State Bench of the Tribunal at Allahabad and 19 Area Benches in different districts. A copy of **revised proposal** sent by the Additional Chief Secretary, Government of U.P. dated 05.03.2019 is being filed herewith and marked as **Annexure No. S.C.A.-2** to this affidavit.*

*6. That, under Section 109 of the Goods and Services Tax Act, 2017, it is the **Central Government which has to specify for each State** and Indian Territory a bench of Appellate Tribunal **as State Bench** and on receipt of the request of the State Government, the Central Government has **to constitute such number of benches in the State as may be recommended by the Council**. Therefore the function of the State Government is only to recommend for the constitution of the benches.”*

(c) In **status report affidavit dated 18.07.2019** filed on behalf of State-respondents, it has been stated in paragraphs 10 and 11, as under:

*“9. That, in the mean time the matter of constitution of Tribunal in the States was considered by G.S.T. Council. In this regard Joint Secretary, G.S.T. Council wrote a letter on 11.07.2019 to the Joint Secretary, Revenue with endorsement to answering respondent. A copy of letter dated 11.07.2019 as well as copy of minutes of Agenda-8 are being filed herewith and marked as **Annexure No.-6** collectively to this affidavit.*

*10. That, **the State Government is also considering further action for filing S.L.P. against the judgment and order dated 31.05.2019**, passed by Hon'ble High Court at Lucknow.*

*11. That, under Section 109 of the Goods and Service Tax Act, 2017, **it is the Central Government which has to specify for each State** and Indian Territory a bench of Appellate Tribunal "**State Bench** and on receipt on the request of the State Government, the Central Government has to constitute such number of Area Benches in the State as may be recommended by the Council.”*

23. Learned Additional Solicitor General of India appearing along with other learned counsel for Indirect Taxes – Central Government has referred to the stand taken in the aforementioned affidavits to contend that the matter regarding the decision for location and the number of Benches of the GSTAT, is an executive prerogative and the GST Council being a constitutional body under Article 279A of

the Constitution of India, alone can make a recommendation to the Union in respect of the location and number of benches of GSTAT.

24. Learned Additional Advocate General appearing along with Sri C.B. Tripathi, learned special counsel for the State-respondents, has taken aid of the stand taken in the counter affidavits of the State-respondents to submit that under Section 109 of the CGST Act, the Central Government has to specify for each State and Union Territory, a Bench of Appellate Tribunal (i.e. 'State Bench') and on receipt of request on the State Government to constitute such number of Area Benches in the State as may be recommended by the Council.

25. From the pleadings as briefly noted above and also the submissions made by the learned counsels for the parties, it is evident that the petitioners as well as respondents are in agreement on the following points:

(a) The Central Government shall, by notification, specify a State Bench of the Appellate Tribunal in view of Section 109(6) of the CGST Act and Section 109(2) of the U.P. GST Act.

(b) The State Government has a role only in creation of Area Benches to the extent that it can request for such number of Area Benches it desires. The Central Government, on receipt of a request of any State Government, shall constitute such number of Area Benches in that State as may be recommended by the Council. Thus, the recommendation of the Council for creation of Area Benches on request of the State Government is required to enable the Central Government to constitute Area Benches.

(c) The creation of State Bench of Appellate Tribunal at Prayagraj (Allahabad) and Area Benches at Lucknow, Ghazibad, Varanasi and Agra was approved in the 39th meeting of the GST Council. After approval/ recommendation of the GST Council in its 39th meeting dated 14.03.2020, the matter fell within the powers of the Central Government alone to issue notification in exercise of powers under Section 109(6) of the CGST Act.

(d) The State Government has no power under Section 109(6) of the CGST Act or Section 109 of the U.P. GST Act to specify for State Bench of Appellate Tribunal. It is solely within the domain of the Central Government.

26. In the case of **Oudh Bar Association High Court, Lucknow (supra)**, vide order dated 31.05.2019, Luckow Bench of this Court **held vide para-44 that out of two seats of High Court of Judicature at Allahabad**, one at Lucknow and other at Allahabad, **none of which is permanent**. The provisions of Section 109 of the CGST Act/ U.P. GST Act, were not under consideration in the aforesaid case except that in concluding portion of the order, a reference to Section 109 has been made holding that the seat where the Tribunal is to be established is an issue which is in the domain of executive in terms of Section 109. The aforesaid case was filed by an Advocates Association. The present writ petitions have been filed by the dealers of different districts, namely Banda, Kanpur Nagar, Kanpur, Mathura, Lalitpur, Meerut, Aligarh, NOIDA/G.B. Nagar, Bijnor, Agra, Ghaziabad, Bulandshahar, Jhansi and Moradabad, against the order passed by authorities under CGST Act/ U.P. GST Act and their main argument is of interpretation of Section 109 of the CGST Act/ U.P. GST Act and the relief has been sought for establishing the State Bench and Area Benches. The reliefs so sought have already been quoted above.

27. It shall not be out of place to mention that in **Special Appeal No.1481 of 2007 (M/S Universal Insulator And Cereamics Ltd. vs. Official Liquidator High Court Allahabad)**, decided on 17.10.2019, a Division of this Court considered the following question:

“(I) Whether "Permanent Seat" and "Principal Seat" is one and the same thing and can it be said that there is no "Permanent Seat" as well as "Principal Seat" of this High Court at Allahabad and Lucknow?”

28. In the aforesaid case of **Universal Insulator and Ceramics Ltd. (supra)**, the Division Bench exhaustively considered the history of High Court of Judicature at Allahabad and Chief Court of Oudh, the entire legislative history and the relevant provisions, and answered the afore-quoted question, as under.

“117. The aforesaid historical backdrop, therefore, makes it clear that High Court at Allahabad was created by Royal Charter. Initially it was called as 'High Court of Judicature for North Western Provinces' which had the area of aforesaid Province but Oudh was a different Province, not governed by North Western Provinces. 'High Court of Judicature for North Western Provinces' subsequently became 'High Court of Judicature at Allahabad'. Judicial system at Province in Oudh area came to be governed by British system of justice after Oudh area was acceded to by Britishers (East India Company) in 1856. Judicial system for Oudh area was governed by Statute governing judicial system in Oudh, then changed by various statutes and commencing from Act No.XIV of 1865 and followed by Act No.XXXII of 1871 i.e. 'Oudh Civil Courts Act' and subsequent Statutes enacted thereafter. In 1925 vide Oudh Courts Act, a Chief Court for Oudh was constituted consisting of one Chief Judge and four Puisne Judges. They continued till U. P. High Courts (Amalgamation) Order, 1948 was enacted amalgamating both Courts at Lucknow and Allahabad in one High Court called as 'High Court of Judicature at Allahabad'. Though Government of India Acts were enacted from time to time and first one, being Government of India Act, 1800, was enacted with further Regulations for establishing British domain in India and better administration of justice within the same, but Chartered High Courts established under the provisions of Indian High Courts Act, 1861 came to be governed together for the first time by Government of India Act, 1919 i.e. 1915-1919 and Section 101 thereof provided that High Courts referred to in the said Act are such which were established in British India by Letters Patent.

118. By Section 130 of G.I. Act, 1915-1919, Acts specified in Fourth Schedule were repealed and Indian High Courts Act, 1861 and Indian High Courts Act, 1865 in entirety were repealed. The G.I. Act, 1915-1919 obviously did not cover Judicial Commissioner's Court for Oudh Province.

119. However for the first time, G. I. Act, 1935 while declaring as to which Court shall be deemed to be High Courts for the purpose of G. I. Act, 1935, declared, besides others, existing High Courts, to include Chief Court of Oudh also. This status conferred upon Chief Court of Oudh as a 'High Court' came to be recognized vide U. P. High Courts (Amalgamation) Order, 1948 wherein Chief Court of Oudh at Lucknow and High Court of Judicature at Allahabad, both were termed as 'existing High Courts' and on amalgamation gave rise to a New High Court i.e. 'High Court of Judicature at Allahabad'. However, Chief Justice of Allahabad High Court became Chief Justice of New High Court and Chief Judge of Avadh/Oudh became one of the Judges though as per his priority, he was placed above other Puisne Judges of High Court of Judicature at Allahabad. Superintendence of New High Court by Chief Justice, who was sitting at Allahabad at that time, continued with him.

120. The entire discussions made above at the pain of repetition leads an undoubted inference that New High Court created by U. P. High Courts (Amalgamation) Order, 1948 did not declare any 'Permanent Seat' of New High Court, but considering the fact that Chief Justice of High Court of Judicature at Allahabad i.e. existing High Court became Chief Justice of New High Court also, we have no manner of doubt to observe that

'Principal Seat of Allahabad remained at Allahabad'. This is also evident from the fact that the number of Judges to sit at Lucknow would not be less than two but how much beyond that, has to be decided by Chief Justice. All other judges would sit at Allahabad. Similarly, territorial jurisdiction of New High Court at Lucknow is subject to determination of Chief Justice, which power could have been exercised for once. In respect of remaining areas, jurisdiction remained with New High Court at Allahabad. Further in a pending case, Chief Justice may transfer the matter for hearing to Allahabad but not vice versa. This shows that High Court at Allahabad has residuary authority. It can hear matters within jurisdiction of Judges sitting at Lucknow but not vice versa. All this go to show that New High Court at Allahabad can be termed as "Principal Seat" of High Court.

121. Question (1) therefore, is answered by holding that Allahabad or Lucknow cannot be said to be a "Permanent Seat" of High Court and no such permanence in respect of seat has been visualized or provided by U.P. High Courts (Amalgamation) Order, 1948 as held by Constitution Bench in Sri Nasiruddin (supra) but "Principal Seat" of 'High Court of Judicature at Allahabad' is at 'Allahabad'."

29. Thus, there is no conflict between the aforesaid two judgments, i.e. in the cases of **Oudh Bar Association (supra)** and **Universal Insulator and Ceramics Ltd. (supra)**. Both the judgments hold that neither Allahabad nor Lucknow can be said to be permanent seat of High Court **but principal seat of the High Court of Judicature at Allahabad is at 'Allahabad'**. Principal seat of the High Court of Judicature is at Allahabad, is also reflected from judgments of this court in **Vijendra Pal SC Singh vs. Senior Regional Manager, Food Corporation of India, Lucknow and another, AIR 2002 (All) 206, Ashok Pandey vs. Allahabad High Court, (2014) 3 All.LJ 507** and also from judgments of **Hon'ble Supreme Court in U.P. Junior Doctors' Association Committee vs. B. Sheetal Nandwani, (1990) 4 SCC 633 (Para-5) and L.P. Misra vs. State of U.P., (1998) 7 SCC 379 (Para-8)**.

30. Coming back to the proceedings before the GST Council; perusal of Agenda Item No.7 of the 40th Meeting of the Council held on 12.06.2020 as reproduced in Para-19 above, goes to show that the recommendation has been made on the basis of DO Letter No.20/GST dated 29th May, 2020 for creation of State Bench and Area Benches of the Goods and Services Tax Appellate Tribunal, for the State of Uttar Pradesh. The D.O. Letter No.20/GST dated 29.05.2020 as reproduced in Para-18 above would show that it is a letter written by the

Commissioner Commercial Tax, who is an Officer under the U.P. GST Act and appointed by the State Government by notification, as evident from the definition of the word “Commissioner” under Section 2(24) read with Sections 3 and 4 of the U.P. GST Act, 2017. The earlier proposals dated 05.03.2019 and 15.03.2019 were of the State Government through its Additional Chief Secretary, who is the competent authority. **The proposal of the State Government for creation of State Bench at Allahabad dated 05.03.2019 has neither been quashed by any court nor has been withdrawn by the State Government.**

31. As regards the proposal dated 29.05.2020 sent by the Commissioner, Commercial Tax U.P. Lucknow, it may be noticed that the same is in contradiction to the proposals of the State Government dated 05.03.2019 and accordingly, the same cannot be sustained. Upon a specific query made to the learned counsel appearing for the State-respondents as to whether the proposal sent by the Commissioner, Commercial Tax U.P. Lucknow could be said to be a proposal of the State Government as per the relevant “Rules of Business”, the counsel appearing for the State-respondents have fairly submitted that the proposal of the Commissioner, Commercial Tax U.P. Lucknow cannot be said to be the proposal of the State Government. **In view of the aforesaid position, the proposal dated 29.05.2020 forwarded by Commissioner, Commercial Tax, U.P. Lucknow being in contradiction to the proposals duly sent by the State Government on 05.03.2019, the said proposal dated 29.05.2020 is unsustainable and is accordingly quashed. Consequently, the Agenda Item No.7 of 40th Meeting of the Council, based on the aforesaid proposal of the Commissioner dated 29.05.2020, can also not be sustained and is hereby quashed.** The GST Council has taken the decision in its 39th Meeting dated 14.03.2020 vide Agenda Item No.6 for creation of the State Bench at Allahabad (Prayagraj) and Four Area Benches in Ghaziabad, Lucknow, Varanasi and Agra. Once the Council has recommended, vide Agenda Item No.6 of the 39th Meeting held on 14.03.2020, the matter automatically fell within the jurisdiction of the Central Government to exercise its powers under Section 109(6) of the CGST Act. This position also stands affirmed by own stand taken by the State-respondents in their counter affidavits/ affidavits, the relevant

portions of which have been quoted in foregoing paragraphs of this order/ judgment.

32. It is pertinent to mention that dealers in the State of Uttar Pradesh falling under the CGST Act/ U.P. GST Act and aggrieved with the orders of first appellate authority under Section 107, have been left remediless inasmuch as Appellate Tribunal under the Act is not available in the State of Uttar Pradesh for preferring appeals under Section 112 of the CGST Act/ U.P. GST Act. The Appellate Tribunal being the last fact finding authority and its not availability in the State of Uttar Pradesh, is causing serious prejudice to the rights of aggrieved persons for statutory appeal which is continuing since the enactment of the CGST Act/ U.P. GST Act. Therefore, in peculiar facts and circumstances of the case and in view of the legislative mandate of Section 109(6) of the CGST Act, we direct as under:

(i) The GST Council shall forward its recommendation of Agenda Item No.6 of the 39th Meeting held on 14.03.2020 to the Central Government/ respondent No.1 within two weeks from today.

(ii) Thereafter, the respondent No.1/ Central Government shall, within next four weeks, specify by notification in terms of sub-Section (6) of Section 109 of the CGST Act the “State Bench” at Prayagraj (Allahabad), of the Goods and Services Tax Appellate Tribunal and four Area Benches at Ghaziabad, Lucknow, Varanasi and Agra, in the State of Uttar Pradesh for exercising the powers of the Appellate Tribunal.

(iii) The respondent Nos.1, 2, 3 and 6 shall ensure that the State Bench and the Area Benches of the Appellate Tribunal (Goods and Service Tax Appellate Tribunal) in the State of Uttar Pradesh are made functional as far as possible from 01.04.2021.

(iv) Since the challenge to the impugned orders relates to questions of fact and the Appellate Tribunal is the last fact

finding authority, therefore, we leave it open for all the petitioners to challenge the impugned orders before the Appellate Tribunal under Section 112 of the CGST Act/ U.P. GST Act as and when the State Bench and Area Benches of the Appellate Tribunal are constituted in the State of Uttar Pradesh. However, till expiry of the period of limitation for filing appeals under Section 112 of the CGST Act after establishment of the State Bench and Area Benches or till appeals are filed, whichever is earlier, no coercive action shall be taken against the petitioners herein pursuant to the impugned orders passed by the first authority or the first appellate authority. Liberty is also granted to the petitioners to avail such remedy as available to them under law in respect of other reliefs which have not been considered and decided by this judgment.

33. For all the reasons stated above, **the writ petitions are disposed off** as indicated above. Accordingly, **the relief Nos.(A), (D-1) and (E-1), are granted.** There shall be no order as to costs.

34. We hope and trust that the respondent Nos.1, 2, 3 and 6 shall ensure compliance of this order within the stipulated time frame.

Order Date :- 09.02.2021

NLY