

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

DISTRICT: AHMEDABAD

SPECIAL CIVIL APPLICATION NO.7129 OF 2018

In the matter under Article
13, 14, 19, 50, 226 & 227 of
the Constitution of India;

And

In the matter under the Vires
of Section 109 and 110 of The
Central Goods and Services
Tax Act, 2017 & The Gujarat
Goods and Services Tax Act,
2017;

And

In the matter between;

1. Prateek Satayanarayan Gattani

Age: 28 years, Male, Occupation: Consultant,
Having address at: 111, University Plaza,
Vijay Cross Road, Navrangpura, Ahmedabad.

2. Abhishek Rajesh Chopra

Age: 33 years, Male, Occupation: Consultant,
Having address at: 403, Shaival Plaza,
Nr. Hope Neuro Care Hospital, Gujarat College
Road, Ellis Bridge, Ahmedabad-380 006.

...Petitioners

Versus

1. Union of India,

Notice to be served upon
The Ld. Secretary
Ministry of Finance
(Department of Revenue) No.137,
North Block, New Delhi-110001.

2. Union of India,

Notice to be served upon
The Ld. Secretary
Ministry of Law & Justice

4th Floor, A Wing, Rajendra Prasad Road,
Shastri Bhavan, New Delhi - 110 001.

3. The Goods and Service Tax Council (GST Council)
Notice to be served upon

The Ld. Secretary

Office of the GST Council Secretariat,

5th Floor, Tower II,

Jeevan Bharti Building, Janpath Road,

Connaught Place, New Delhi-110 001.

4. The State of Gujarat

Notice to be served upon

The Ld. Chief Secretary,

Finance Department,

Sachivalaya, Gandhinagar.

...Respondents

To,

The Hon'ble Chief Justice

And the other companion judges

of the High Court of Gujarat.

The humble Petition of
the Petitioners above
named;

MOST RESPECTFULLY SHOWETH THAT:-

1. The present Petition under Articles 226 and/or
227 of the Constitution of India is being filed
by the Petitioners to declare:

(a) Chapter XVIII of the Central Goods and Services
Tax (CGST) Act, 2017 more particularly Section
109 and 110 of the Central Goods and Services
Tax (CGST) Act, 2017 relating to constitution
of the Appellate Tribunal (AT) and

qualification, appointment and condition of services of its members;

(b) Chapter XVIII of the Gujarat Goods and Services Tax (GGST) Act, 2017 more particularly Section 109 and 110 of the Gujarat Goods and Services Tax (GGST) Act, 2017 relating to constitution of the Appellate Tribunal (AT) and qualification, appointment and condition of services of its members;

(c) Notification No. 09/2017 - Central Tax and Notification No. 09/2017- State Tax notifying provisions of Section 109 and 110 of the CGST and GGST.

as shall be *Ultra Vires* to the Article 13, 14, 19 and 50 of the Constitution of India as the same are void, defective and unconstitutional, being violative of doctrines of separation of powers and independence of judiciary which are parts of the basic structure of the Constitution and further contrary to the principles laid down by the Hon'ble Supreme Court in *Union of India v. R. Gandhi* (2010) 11 SCC 1 and *Kesavananda Bharati vs State of Kerala* [(1973) 4 SCC 225]

Copy of the Notification having no. 09/2017-Central Tax is annexed herewith and marked as **Annexure -A**, Copy of Notification No. 09/2017-State Tax is annexed hereto and marked as **Annexure-B**, Copy of the extracts of Chapter XVIII of the Central Goods and Services Tax (CGST) Act, 2017 is annexed herewith and marked as **Annexure-C**, Copy of the extracts of Chapter XVIII of the Gujarat Goods and Services Tax (GGST) Act, 2017 is annexed hereto and marked as **Annexure-D**.

2. The Petitioners are a qualified C.A., C.S., B.Com (H) and practice as chartered accountants from last 10 years. Petitioners core areas of expertise are taxation more particularly indirect taxes, corporate laws, etc. The Petitioners regularly delivers lectures and are invited as regular speaker at various seminars/ workshop conducted by institutes like ICAI and various trade organizations. Further, Petitioners is also member of the Indirect tax Committee of the Ahmadabad Branch of WIRC of ICAI. On account of the above, he gets an opportunity to interact with various people from different backgrounds such as businessmen, traders, Chartered Accountants, Lawyers, Students, Company Secretaries etc. The Petitioners undertakes a rigorous analysis of legal developments, policies and institutions.

3. The 1st respondent is the Union of India, represented through the Ministry of Finance, Department of Revenue and is responsible for notifying the Central Goods and Services Tax Act, 2017 and Central Goods and Services Tax Rules, 2017 to be made there under.

3.1 The 2nd respondent is also Union of India represented through the Ministry of Law and Justice. As per various orders of the Supreme Court over the years, all tribunals created pursuant to Central and State legislations ought to function under the 2nd respondent Ministry.

3.2 The 3rd Respondent is The Goods and Service Tax Council (GST Council) is a constitutional body which is constituted as per Article 279A (1) of the amended Constitution to decide all the issues relating to GST.

3.3 The 4th Respondent is the State of Gujarat represented through the Finance Department and is responsible for notifying the Gujarat Goods and Services Tax Act, 2017.

4. That the facts of the case in brief are as follows:-

4.1 The Petitioners have preferred this litigation against tribunalisation of justice,

bureaucratisation of justice and its impact on judicial independence and separation of powers before this Hon'ble Court. Therefore, the Petitioners submit that they have *locus standi* to maintain the present writ petition.

4.2 The 1st and 2nd respondent is the Union of India, represented through the Ministry of Finance, Department of Revenue and Ministry of Law and Justice and is responsible for enactment of the Central Goods and Services Tax Act, 2017, 3rd Respondent is The Goods and Service Tax Council (GST Council) is a constitutional body under Article 279A of the Constitution, Article 279A (4) (c) of the Constitution of India states that the GST Council shall make recommendations to the Union and the States on the model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax etc. and the 4th Respondent is the State of Gujarat through its Finance Department is responsible for enactment of the Gujarat Goods and Services Tax Act, 2017.

4.3 **Genesis:** The idea of moving towards the GST was first mooted by the then Union Finance Minister in his Budget for 2006-07. Initially, it was proposed that GST would be introduced from 1st

April, 2010. The Empowered Committee of State Finance Ministers (EC) which had formulated the design of State VAT was requested to come up with a roadmap and structure for the GST. Joint Working Groups of officials having representatives of the States as well as the Centre were set up to examine various aspects of the GST and draw up reports specifically on exemptions and thresholds, taxation of services and taxation of inter-State supplies. It is submitted that, the fiscal powers between the Centre and the States are clearly demarcated in the Constitution with almost no overlap between the respective domains. In case of inter-State sales, the Centre has the power to levy a tax (the Central Sales Tax) but, the tax is collected and retained entirely by the originating States. As for services, it is the Centre alone that is empowered to levy service tax. Introduction of GST would require amendments in the Constitution so as to concurrently empower the Centre and the States to levy and collect the GST. It is also submitted that, to address all these and other issues, the Constitution (122nd Amendment) Bill was introduced in the 16th Lok Sabha on 19.12.2014. Said Constitution (122nd Amendment)

provides for a levy of GST on supply of all goods or services except for Alcohol for human consumption. The tax shall be levied as Dual GST separately but concurrently by the Union (central tax - CGST) and the States (including Union Territories with legislatures) (State tax - SGST) / Union territories without legislatures (Union territory tax- UTGST). The Parliament would have exclusive power to levy GST (integrated tax - IGST) on inter-State trade or commerce (including imports) in goods or services. Further the bill had been ratified by required number of States and received assent of the President on 8th September, 2016 and has since been enacted as Constitution (101stAmendment) Act, 2016 w.e.f. 16th September, 2016.

4.4 GST law provide for constitution of Appellate Tribunal. The Appellate Tribunal is constituted under section 109 of the CGST Act and GGST Act, is the second level of appeal, where appeals can be filed against the orders-in-appeal passed by the Appellate Authority or order in revision passed by revisional authority, by any person aggrieved by such an Order-in-Appeal/ Order-in-Revision. The law envisages constitution of a

two tier Tribunal i.e. National Bench/Regional Benches and the State Bench/ Area Benches. Jurisdiction of the two constituents of the Appellant Tribunal is also defined. If place of supply is one of the issues in dispute, then the National Bench/ Regional benches of the Tribunal will have jurisdiction to hear the appeal. However, if the dispute relates to issues other than the place of supply, then the State/Area Benches will have the jurisdiction to hear the appeal. An appeal from the decision of the National Bench will lie directly to the Supreme Court and an appeal from the decision of the State Bench will lie to the jurisdictional High Court on substantial questions of law.

4.5 Section 109 of CGST/ GGST Act provides for constitution of Appellate Tribunal and its benches thereof. Section provides that each National Bench/ Regional bench and State Bench/ Area Bench shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State). Section 110 of CGST Act and GGST Act provides for qualification appointment, condition of services, etc for President and members of the Appellate Tribunal.

4.6 Pre-GST regime under separate laws namely Central Excise, Custom and Service tax had also the scheme of second appeal before the Appellate Tribunal known as Custom, Excise & Service Tax Appellate Tribunal ('CESTAT'). Each bench of CESTAT had consisted two members, one Judicial Member and one Technical Members. Statutory provisions regarding second appeal under major indirect taxes earlier were as under :-

Customs: The legal provisions relating to second appeal are contained in Chapter XV of the Customs Act, 1962 under Section 129C and annexed here to and marked as **Annexure E**.

Central Excise: In respect of Central Excise, the provisions relating to second appeal are contained in the Chapter VIA of Central Excise Act, 1944 under Section 35D and annexed here to and marked as **Annexure F**.

Service Tax: In respect of service tax, the statutory provisions with regard to appeal to the Appellate Tribunal in relation to service tax matters are contained in the Chapter I , under Section 86 of the Finance Act, 1994 (32 of 1994) and annexed here to and marked as **Annexure G**.

Composition of the CESTAT (Appellate Tribunal)

under the pre GST regime:-

Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in the present form was earlier formed as Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) in the year 1982. After scrapping of Gold (Control) Act, 1962 and introduction of Service Tax by Finance Act, 1994, a need arose to enhance its jurisdiction to include / entertain appeal of cases relating to Service Tax also hence its name was changed to the present CESTAT. The Tribunal draws its powers and functions from the provisions of section 129C of the Customs Act, 1962 to deal with the matters relating to Customs, section 35D of Central Excise Act, 1944 to deal with the matters relating to Central Excise and section 86 of Finance Act, 1994 to deal with matters relating to Service Tax.

The CESTAT is a quasi-judicial authority. The Constitution of the CESTAT Authority is such that it functions as an independent quasi-judicial body deemed to be a Civil Court for the purpose of Section 195 of the Code of Criminal Procedure, 1973.

CESTAT is the second level appellate authority, the first appellate authority being Commissioner (Appeals). CESTAT, as the name suggests, deals with matters arising from the Customs Act, 1962, Central Excise Act, 1944 and Finance Act 1994 (Service Tax).

Each Bench of CESTAT ordinarily consists of two members, a Judicial Member and a Technical Member. Special or Larger Benches are sometimes constituted (comprising three or five members) when there is difference of opinion between the two members. Small cases (currently of duty amount not exceeding Rs. 10 lakhs) are assigned to single member benches.

As per the Constitution of the Tribunal, the President, Vice President, Registrar and members of the Bench carry on the day to day functions of CESTAT. Appointment and qualifications for the recruitment of President, Vice President and members is governed by rule 3,6,10,12 of **CESTAT Members (Recruitment and Conditions of Service) Rules, 1987**. Copy of CESTAT Member rules is annexed hereto and marked as **Annexure-H**

The qualifications for recruitment are that mainly he/she has held a judicial office in the territory of India at least for 10 years or he/she has been a member of Indian Legal Service and has held a post in grade 1st of that service or any equivalent or higher post for at least three years. On the other way he/she has been an advocate for at least 10 years. For the appointment as a Technical member the person should be a member of the Indian Customs & Central Excise Service group 'A' and has held the post of Commissioner of Customs & Central Excise or any equivalent or higher post at least for three years. However minimum age for appointment as member is 45 years.

The appointment of the president, vice president and members of the CESTAT is approved a selection committee consisting of the following members of committee

(i) a judge of the Supreme Court of India as nominated by the Chief Justice of India.

(ii) The Secretary to the Government of India in the Ministry of Finance;

(iii) The Secretary to the Government of India in the Ministry of Law (Department of Legal Affairs);

(iv) The President;

(v) Such other persons not more than two as nominated by the Central Government, is designated the powers to make appointment as member. In this selection committee judge of the Supreme Court of India acts as chairman of the committee and recommends persons as members only those who are on the list of candidates which is prepared by the Ministry of Finance after inviting applications.

4.7 Post GST Regime: Section 109 of CGST/ GGST Act provides for constitution of Appellate Tribunal and its benches thereof. Section provides that each National Bench/ Regional bench and State Bench/ Area Bench shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).

4.8 That the National Appellate Tribunal has been contemplated as a substitute and not as supplemental to the High Court and that to provide the Tribunal as an additional forum from where the parties could go to the High Court would have been a retrograde step, therefore, the Tribunal should be a real substitute for the High Court, not only in form and de jure, but in

content and de facto. The principle of paramount importance that the substitute institution must be a worthy successor of the High Court in all respects. It is submitted that, a Bench of National Appellate Tribunal should consist of one Judicial Member and one Technical Member or the Judicial Member should be equal or in majority in compare to the Technical Member and in no circumstances the number of Technical Member should not be in majority in compare of Judicial Member. The Technical member is for technical expertise support and should not assume Judicial powers and cannot be allowed to hear a case solely in absence of a Judicial Member.

4.9 That the coram of the Appellate Tribunal consists of One Judicial Member and two Technical Member where by the constitution of Appellate Tribunal is a *corm non judice*. Hence, *the coram of the Appellate Tribunal is subject to judicial review by this Hon'ble Court as judicial review is a basic and essential feature of the Constitution and that though the basic and essential feature of judicial review cannot be dispensed with, it would be within the competence of Parliament to amend the Constitution and to provide alternative*

institutional mechanism, provided it is not less efficacious than the High Court. That the Appellate Tribunal created an institutional alternative mechanism and that it must be effective and efficacious to exercise the power of judicial review. Hence, the personnel appointed in the Appellate Tribunal are called upon to discharge judicial or quasi-judicial powers and that therefore they must have a judicial approach, knowledge and expertise in that particular branch of Constitutional and Tax Laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficiency and effectiveness of the judicial adjudication. It is necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training, as on many an occasion, different and complex questions of law, which baffle the minds of even the trained judges would arise for discussion and decision. Therefore, the bench of the Appellate Tribunal, the number of Technical Members could not be more than the number of Judicial Members.

4.10 It is submitted that, the daily practice in the courts not only gives training to Advocates to intersect the rules but also adopt the conventions of courts. In built experience would play vital role in the administration of justice and strengthen and develop the qualities, of intellect and character, forbearance and patience, temper and resilience which are very important in the practice of law. Practising Advocates from the Bar generally do endow with those qualities to discharge judicial functions. Specialised nature of work gives them added advantage and gives benefit to broaden the perspectives. "Judges " by David Pannick (1987 Edition), at page 50, stated that, "we would not allow a man to perform a surgical operation without a thorough training and certification of fitness. Why not require as much of a trial judge who daily operates on the lives and fortunes of others". This could be secured with the initial training given at the Bar and later experience in judicial adjudication. No-one should expect expertise in such a vast range of subjects, but familiarity with the basic terminology and concept coupled with knowledge of trends is essential. A premature approach would hinder the effective performance of

judicial functions. Law is a serious matter to be left exclusively to the judges, because judges necessarily have an important role to play in making and applying the law. There is every reason for ensuring that their selection, training and working practice facilitate them to render their ability to decide the cases wisely on behalf of the community. If judges acts in injudicious manner, it would often lead to miscarriage of justice and a brooding sense of injustice rankles in an aggrieved person.". Therefore, the strength of number of Technical Member cannot supersede the Judicial Member to constitute a Bench.

4.11 Further, attention is also invited to Section 110 of the CGST / GGST Act which provides for qualification appointment, condition of services, etc for President and members of the Appellate Tribunal.

4.12 It is submitted that, there is no search cum selection committee for the purpose of appointment of President and Judicial Members under the Act and the appointment of President and Judicial Member of the National Bench should be made and nominated by the Chief Justice Hon'ble Supreme Court and the appointment of

President and Judicial Member of the State Bench should be made and nominated by the Chief Justice of Hon'ble High Court. It is submitted that, in the recent order dated 09.02.18 by the Hon'ble Supreme Court in the case of Kudrat Sandhu versus Union of India wherein the Hon'ble Supreme Court has formed the search cum selection committee for the chairman/judicial members in respect of all tribunal and their service conditions.

4.13 It is submitted that, the Hon'ble Supreme Court in *R. Gandhi case vs Union of India & Ors* (2010) 11 SCC 1) had laid down the following directions and mandated that the Government of India follow the directions as guidelines while constituting the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT):

a. Only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunal. Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member;

- b. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade-1) cannot be considered for appointment as judicial members. The expertise in Company Law service or Indian Legal service will at best enable them to be considered for appointment as technical members;
- c. As the NCLT takes over the functions of High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members.
- d. A 'Technical Member' presupposes an experience in the field to which the Tribunal relates.
- e. Instead of a five-member Selection Committee with Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the

Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members, the Selection Committee should broadly be on the following lines:

- i. Chief Justice of India or his nominee - Chairperson (with a casting vote);
 - ii. A senior Judge of the Supreme Court or Chief Justice of High Court - Member;
 - iii. Secretary in the Ministry of Finance and Company Affairs - Member; and
 - iv. Secretary in the Ministry of Law and Justice - Member
- f. The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the concerned field. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as

post- retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

g.Any person appointed as members should be prepared to totally disassociate himself from the Executive.

h.To maintain independence and security in service, suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.

i.The Technical support for all Tribunals should be from the Ministry of Law & Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.

j.Two-Member Benches of the Tribunal should always have a judicial member. Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members.

4.14 The above guidelines were given by the Hon'ble Supreme Court based on the following principles as enumerated in para 44 of the said judgment:-

- i) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

- ii) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.

- iii) Whenever there is need for 'Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of

jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

iv) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly, while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any

encroachment, intentional or unintentional, by either the legislature or by the executive.”

4.15 It is submitted that even though the Hon'ble Supreme Court has prescribed the various guidelines in the decision of *R. Gandhi* (supra) with regard to the constitution of the NCLT and NCLAT, the same stands applicable to all the tribunals in India.

4.16 It is submitted that, Hon'ble Supreme Court in *Kesavananda Bharati vs State of Kerala* [(1973) 4 SCC 225] held that separation of power creates a system of checks and balances, by reasons of which, powers are so distributed, that none of the three organs transgresses into the domain of the other. The concept ensures the dignity of the individual. The power of –judicial review ensures, that executive functioning confines itself within the framework of law enacted by the legislature. Accordingly, the demarcation of powers between the legislature, the executive and the judiciary, is regarded as the basic element of the constitutional scheme. When the judicial process is prevented by law, from determining whether the action taken, was or was not, within the framework of the legislation enacted, it would amount to the

transgression of the adjudicatory/determinatory process by the legislature. Therefore, the exclusion of the power of judicial review, would strike at the basic structure of the Constitution. Further, in the *In Minerva Mills Ltd & Ors. Vs Union of India & Ors.* [(1980) 2 SCC 591] Hon'ble Supreme Court confirmed the view *Kesavananda Bharati* case (supra) and held that the amending power of the Parliament, was not absolute. The Parliament, it was maintained, did not have the power to amend the basic structure of the Constitution. A legislative assertion, that the enacted law had been made, for giving effect to a policy to secure the provisions made in Part IV of the Constitution, had the effect of excluding the adjudicatory process. In the case on hand, Hon'ble Supreme Court arrived at the conclusion, that Section 4 of the Constitution (Forty-second Amendment) Act was beyond the amending power of the Parliament, and the same was void, because it had the effect of damaging the basic and essential features of the Constitution and destroying its basic structure, by totally excluding any challenge to any law, even on the ground, whether it was inconsistent with or it had abridged, any of

the rights conferred by Articles 14 and 19 of the Constitution. Hon'ble Supreme Court further held that the power of judicial review was an integral part of India's constitutional system, and without it, the -rule of law would become a teasing illusion, and a promise of unreality. Premised on the aforesaid inferences, this Court finally concluded, that if there was one feature of the Indian Constitution, which more than any others, was its -basic structure fundamental to the maintenance of democracy and the rule of law, it was the power of judicial review. While recording the aforementioned conclusion, Hon'ble Supreme Court also recorded a clarificatory note, that it should not be taken, that an effective alternative institutional mechanism or arrangement for -judicial review could not be made by Parliament. It was, however, clearly emphasized that judicial review was a vital principle of the Indian Constitution, and it could not be abrogated, without affecting the basic structure of the Constitution. It is therefore, that it came to be held, that a constitutional amendment, which had the effect of taking away the power of -judicial review, by providing, that it would not be liable to be questioned,

on any ground, was held to be beyond the amending power of the Parliament. For, that would make the Parliament the sole judge, of the constitutional validity, of what it had done, and thereby, allow it to determine the legality of its own actions.

4.17 The Petitioners is concerned about the independence of judicial tribunals and seeks to protect the same and hence, is filing the present writ petition under Article 226 of the Constitution of India.

4.18 The Petitioners has directly filed a petition under Article 226 of the Constitution as the Section 109 and Section 110 of the CGST and GGST Act are arbitrary and violative of Article 14 and 50 of the Constitution. It is further submitted that Article 50 of the Constitution demonstrates the intent of the framers of the Constitution, namely, that they wished to ensure the exclusivity and the separation of the judiciary, from the executive. Further, Section 109 and Section 110 of the CGST and GGST Act are also violative of Article 21 right to life which includes the right to justice by an independent judiciary and by a Tribunal which is free from executive or political

influence. The Petitioners is vitally concerned with the administration of justice and maintenance of rule of law which has been held to be part of the basic structure of the Constitution.

4.19 The glaring infirmities and consequences to the independent judicial administration of the various tribunals and appellate tribunals has compelled the present Petitioners to file the present writ petition under Article 226 of the Constitution of India.

5. The glaring infirmities and consequences to the independent judicial administration of the various tribunals and appellate tribunals have compelled the present Petitioners to file the present writ petition under Article 226 of the Constitution of India on the following amongst other grounds mentioned hereinafter.

G R O U N D S

a) It is submitted that, this Writ Petition furnishes a typical instance of a widespread malady which has infected the legislative system in India, the tendency of the legislature of not exercising legislative restraint and crossing their limits by encroaching into the judicial domain, contrary to

the broad separation of powers envisaged under our Constitution.

b) It is submitted that, the constitution of National Bench / Regional Bench and State Bench / Area Bench of the Appellate Tribunal under Section 109 CGST Act and GGST Act are an excessive delegation of legislative functions without placing any guidelines and is violative of Articles 14 and 50 of the Constitution of India.

c) It is submitted that under the Pre GST regime Appellate Tribunal name called CESTAT consist of two member one of whom shall be Judicial Member. However, in case of special bench number of Judicial member shall be more than Technical Member. The Constitution of the CESTAT is such that it functions as an independent quasi-judicial body deemed to be a Civil Court for the purpose of Section 195 of the Code of Criminal Procedure, 1973.

d) It is submitted that, as mentioned hereinabove earlier before the pre GST regime the Appellate Tribunal consist of equal number of Judicial Member and Technical Member, however in any case number of Judicial Member can-not be less than Technical Members. Subsequently after the enactment of the

biggest tax reform GST, the Respondents have increased the number of Technical Numbers which is clearly in violation of the Article 14 and 50 of the Constitution of India. It is further submitted that, in terms of section 109(8) of the CGST and GGST Act, the Parliament / State Legislature has abdicated its authority by empowering the Central Government and State Government to frame Rules. This amounts to delegation of essential judicial functions that is unconstitutional. This also amounts to the granting of an uncanalised power to the executive to control vital bodies that perform, in essence, judicial functions.

e) It is submitted that a Constitution Bench in *S. P. Sampath Kumar v. Union of India*, (1987)1 SCC 124 at para 7, speaking through Bhagwati, CJ, has held that

"It can no longer be disputed that total insulation of the judiciary from all forms of interference from the co-ordinate branches of the Government is a basic essential feature of the Constitution, the same independence from possibility of Executive pressure or influence must also be ensured to the Chairman, vice Chairman and Members of the Technical Tribunals. The Constitution makers have made anxious provision to secure total independence

of the judiciary from executive pressure or influence."

That the constitutional guarantee of an independent judicial branch and the constitutional scheme of separation of powers can be easily and seriously undermined, if the legislatures were to entrust the Tribunals with Members not being Members of the 'Judicial service' of the State, as they are not entitled to protection similar to the constitutional protection afforded to the Courts.

f) It is further submitted that if the constitutional Scheme and intent are to be preserved, it must be held that the 'total insulation of the judiciary' referred to in the case of *S. P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124 is not just for the 'judiciary' comprising of Judges appointed to the regular Courts. The 'judiciary' in this context must be understood as taking within its fold, all courts and Tribunals and other adjudicatory bodies, whatever be the label assigned to them. The independence and impartiality which are essential for the proper exercise of the judicial power, are to be secured not only for the Courts but also for Tribunals and their members, who, though they do not belong to the 'Judicial Service' are entrusted with judicial powers. Any other view would

effectively eviscerate the constitutional guarantee of an independent Judicial Branch.

g) It is submitted that the safeguards which ensure independence and impartiality are not for promoting personal prestige of the functionary but for preserving and protecting the rights of the citizens and others who are subject to the jurisdiction of the Tribunal, and for ensuring that such Tribunals will be able to command the confidence of the public.

h) It is further submitted that several safeguards to protect the independence of the judiciary mentioned in *R. Gandhi* (supra) are not following in National Bench / State Bench of Appellate Tribunal. Reference may be drawn to Section 109(3) for National Bench / Section 109(9) for State Bench read with Section 109(11) the CGST Act/ SGST Act, wherein primacy has been given to the executive by including more Technical Members from the Central Government as compared to the Judicial Members from Judiciary.

i) It is submitted that, the present CGST Act, 2017 and GGST Act and rules there under insofar as it amends the structure of Appellate Tribunal which is a quasi judicial body and such structure is an

unconstitutional and violative of the basic structure of the Constitution. Presence of more Technical Members as compare to Judicial Members in a bench is led to mockery of principles enunciated in the basic structure of constitution. The said impugned provisions of the CSGT Act and GGST Act violate the principles of separation of powers which is not only part of basic structure but also an elementary component of the rule of law. That in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 and in *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, larger benches of this Hon'ble Supreme Court have held, *inter alia*, that an independent judiciary and it's power of judicial review are among the basic features of the Constitution.

j) It is submitted that, Article 50 of the Constitution is part of the basic structure of the Constitution, and is one example of a specific constitutional provision embodying the basic features of separation of powers and rule of law. Provisions of Section 109 and 110 of the CGST Act and GGST Act, directly encroach into these basic features and derogate from the same by vesting unbridled powers in the executive and the same is in complete breach of Article 50 which emphasizes that the State shall take steps to separate the

judiciary from the executive in the public services of the State.

k) It is submitted that more members of the Technical Members of the government will lead to executive taking power of judiciary and executive who enjoys the office to the pleasure of government. There has been significant number of decisions against the tax department constituting Technical and Judicial Member under pre GST regime, it will now be apprehensive to pass orders against the relevant ministry. Ironically, it vitiates the very power of judiciary by making one judge in his own cause "Nemo judex in causa sua".

l) That under the provisions of Section 109 and 110 of the CGST Act and GGST Act, the Technical assistance and support to tribunals is to be provided by the parent ministry. This is directly contrary to the guidelines prescribed by the Hon'ble Supreme Court in the case of R. Gandhi (supra), wherein Hon'ble Supreme Court had categorically held that the Technical support has to come from the Department of Law & Justice.

m) It is submitted that, considering the Doctrine of Legitimate Expectations is of prime importance for fiscal Taxing Statutes wherein certainty in Tax

assessment and compliance foster confidence in the Statutes. It is also to be considered that, the Doctrine of Legitimate expectation is the expectation of benefits, relief/remedy that accrues from a promise or established practices, and give rise to locus standi to a person to seek judicial review of any action, of State or its subsidiaries, which are arbitrary, discriminatory, unfair, malicious in law, devoid of Rule of law and violative of the principles of Natural Justice.

6. The Petitioners craves leave of this Hon'ble Court to raise additional grounds at the time of hearing.
7. The Petitioners have not filed any other appeal or application either before this Court or the Hon'ble Supreme Court of India or before any other Courts on the same subject matter of this Petition. The Petitioners has no other alternative efficacious remedy but to approach this Hon'ble Court by way of this Petition.
8. That the Petitioners prays that this Hon'ble Court may be pleased to:-
 - (a) Your Lordships may be pleased to issue any Writ, order or direction more particularly in the nature of a Writ of declaration to declare

Section 109 the CGST Act and GGST Act relating to constitution of Appellate Tribunal as *ultra vires* of Article 14 and 50 of the Constitution of India and being violative of the doctrine of separation of powers and independence of judiciary which are parts of the basic structure of the Constitution and further contrary to the principles laid down by the Hon'ble Supreme Court in *Union of India v R. Gandhi*, (2010) 11 SCC 1 and pass such further or other orders as this Hon'ble Court may deem fit and necessary in the facts and circumstances of the case and thus render justice;

- (b) Your Lordships may be pleased to issue any Writ, order or direction more particularly in the nature of a Writ of declaration to declare Section 110 of the CGST Act and GGST Act relating to constitution of Appellate Tribunal and qualification, appointment and condition of services of its members, as *ultra vires* of Article 14 and 50 of the Constitution of India and being violative of the doctrine of separation of powers and independence of judiciary which are parts of the basic structure of the Constitution and further contrary to the principles laid down by the Hon'ble Supreme Court in *Union of India v R. Gandhi*, (2010) 11 SCC 1 and pass such further

or other orders as this Hon'ble Court may deem fit and necessary in the facts and circumstances of the case and thus render justice.

- (c) Pending admission, hearing and till final disposal of this Petition, Your Lordships may be pleased to pass an order of stay of the operation of the Chapter XVII of the Central Goods and Services Tax (CGST) Act, 2017 and Gujarat State Goods and Services Tax, Act 2017 (GGST) more particularly Section 109 which relate to 'Constitution of Appellate Authority' and Section 110 which relate to 'President and Members of Appellate Tribunal their qualification, appointment, conditions of service etc';
- (d) Pending admission, hearing and final disposal of this Petition Your Lordships may be pleased to stay the operation, execution and implementation of the Notification No. 09/2017 - Central Tax and Notification No. 09/2017- State Tax notifying provisions of Section 109 and 110 of the CGST and GGST;
- (e) Your Lordships may be pleased to grant any other relief or reliefs in the facts and circumstances of the present case as may be deem fit by this Hon'ble Court;

AND FOR THIS ACT OF KINDNESS, THE PETITIONERS
SHALL, AS IN DUTY BOUND, EVER PRAY.

Ahmedabad
Date:

[VISHAL J. DAVE & NIPUN SINGHVI]
ADVOCATE FOR THE PETITIONERS