

**IN THE INCOME TAX APPELLATE TRIBUNAL
SPECIAL BENCH, AHMEDABAD**

**BEFORE G.C. GUPTA, VICE PRESIDENT, SHRI MUKUL Kr.
SHRAWAT, JUDICIAL MEMBER AND N.S. SAINI,
ACCOUNTANT MEMBER**

ITA No.2170/Ahd/2005

Shri Nanubhai D. Desai, Surat.	V/s.	The ACIT, Central Circle-Surat
(Appellant)		(Respondent)

Revenue by :	Mrs. Mona Bhatt, Standing Counsel with Mr. D.S. Kalyan, CIT-DR
Assessee(s) by :	Shri Deepak R. Shah, ex-member ITAT, appearing in person.

सुनवाई की तारीख/**Date of Hearing** : **22/04/2014**
घोषणा की तारीख/**Date of Pronouncement**: **23/05/2014**

आदेश/O R D E R

PER SHRI MUKUL KUMAR SHRAWAT, JUDICIAL MEMBER

At the outset, it is necessary to mention that this Special Bench is hearing this case in view of the directions of the Hon'ble Jurisdictional High Court given in an Appeal titled as "Deepak R. Shah (petitioner) vs. Income Tax Appellate Tribunal (respondent) in Special Civil Application No.15308 of 2013 dated 26.12.2013 wherein the observations as also the directions were as under:

"Heard learned advocate for the petitioner and Shri Syed for the respondents. The petitioner himself is also present in the Court and he was also granted audience at his request. The petitioner and Shri Syed informed the Court that the President of the Tribunal had constituted a Special Bench under the order dated 27.5.2011 constituting of three Members for deciding the following question:- Whether Shri Deepak R. Shah, Advocate and Ex-Accountant Member of the Income Tax Appellate Tribunal, is debarred from practicing before the Income Tax Appellate Tribunal in view of the insertion of Rule 13E in the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963? The Special Bench accordingly heard and

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completed the hearing on 20.1.2012, however thereafter the decision is not pronounced. Shri Syed in addition to it, submits that there are intervening circumstances which are also required to be borne-in-mind in form of resolution/amendment of the Bar Council touching upon this aspect. The petitioner-in-person requested the Court that let there be a direction to respondent nos. 1 & 2 to constitute the Bench as now one member who had earlier heard the matter had retired and decide the reference afresh within a stipulated period of three months, to which Shri Syed did not have any objection. Accordingly, without going into merits of the matter, at the request of learned advocate for the petitioner and petitioner himself, this Court is inclined to dispose of the matter with a direction to respondent no.1 & 2 to re-constitute the Special Bench for deciding the Reference aforesaid within a period of three months from the date of receipt of the writ of this order. Meaning thereby the entire exercise of reconstituting Special Bench and hearing of the Reference and disposing of the same shall be completed within three months from the date of receipt of this order. Shri Shah the Petitioner, in view of above directions does not press this petition. Accordingly the petition is disposed of. The Court has not entered into merits of the matter and all the contentions of the parties are kept open. Rule discharged. No costs.”

1.1 This Special Bench has been constituted vide an order u/s 255(1)(3) of the I.T. Act (hereinafter mentioned as the ‘Act’) by the Hon’ble President, I.T.A.T. The question referred to us is reproduced below:

Whether Shri Deepak R. Shah, advocate and ex-Accountant Member of the Income Tax Appellate Tribunal, is debarred from practicing before the Income Tax Appellate Tribunal in view of the insertion of Rule 13 E in the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963?”

2. On the date of hearing, Sri Deepak Shah, Ex-member Income Tax Appellate Tribunal appeared in person. In the beginning of the hearing itself, the Bench has placed a question that whether it is competent for this bench to decide the issue as referred in the light of a judgment passed by *Hon’ble Allahabad High Court/ Lucknow Bench in the case of Dinesh Chandra Agrawal Vs. Union of India (Service Bench No.62 of 2012) dated*

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19.01.12, because the Hon'ble Court has made an observation that prima facie the interpretation of Rule 13E is, quote **“beyond its pale of competence as it has the jurisdiction to decide only the matters relating to tax appeals as contained in the Income Tax Act vide Section 253 and 254 thereof”** unquote.

2.1 The reply of Mr. Shah is that those words were nothing but an observation of the Hon'ble Allahabad High Court which was neither the order nor a *ratio-decidenti*. He has pleaded that this Bench is competent to decide this issue. He has also pleaded that a judgment of the Hon'ble Allahabad High Court is simply an 'interim order' through which the merits of the case have not been decided, therefore, an observation in the said order had not put any bar to decide the issue, as referred by the Hon'ble President, for the adjudication by this Special Bench.

2.2 Mr. Deepak Shah has referred Section 288 of the Act for the legal proposition that if he is being stopped appearing before the Income Tax Appellate Tribunal then his rights are infringed as laid down u/s.288 of the Act. The Tribunal being a creation of the Income Tax Act has to decide all such issues raised under any of the provisions of the Act, including Sec. 288 of the Act. If any one of the provision of the Income Tax is invoked then the aggrieved party has right to contest before the Tribunal. He has then explained that how he is entitled to appear before the Tribunal. He has explained that u/s.288(2)(iii) and (iv) the definition of

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“Authorized Representative” is incorporated; hence, he is entitled to appear before the Tribunal.

2.3 Next plank of his argument is that a sub-ordinate legislation cannot overrule and override a statutory enactment. He has explained that vide a **notification dated 3rd June, 2009 issued by Ministry of Law & Justice, Department of Legal Affairs, a Rule 13E was introduced** which says, quote **“the President, the Senior Vice President, the Vice President and the Member of the Tribunal shall not practice before the Tribunal after retirement from the service of the Tribunal”** unquote. He has thus pleaded that the same is merely a notification which should not override the main provision of IT Act, i.e., Section 288. Vide this Section it is provide that any legal representative who is entitled to practice in any civil court in India is an ‘Authorized Representative’ to appear before the Income Tax Appellate Tribunal or before any Income Tax Authority. He has commented that in support of this legal proposition there are ample of judgments; need not to be cited right now.

2.4 Mr. Shah has then referred his **letter of appointment as an Accountant Member dated 28th of September, 2001** issued by Government of India, Ministry of Law & Justice, Department of Legal Affairs. He was appointed for the post of an Accounted Member in the Income Tax Appellate Tribunal which belonged to General Central Service “Group-A”. At that time of appointment there was neither such restriction imposed nor informed to him.

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Through this letter of appointment, it was mentioned that, quote “ **I am to request that in case you are willing to accept the offer of appointment as Accountant Member in the Income Tax Appellate Tribunal on the terms and condition mentioned above, your acceptance may be sent to this Ministry immediately and in any case by 10th October, 2001 at the latest. On receipt of your acceptance further instructions in regard to your posting etc. will be issued.**” Unquote. Therefore the argument of Mr. Shah is that had there been a restriction on law-practice after retirement before the Tribunal then he would not have joined the service. Now through this amendment/insertion in Rule 13E the Ministry is trying to change the said offer retrospectively which is *ultra vires*, as well as, against the natural justice.

2.5 His next plank of argument was that the conditions of Rule 13E are applicable to the members who have “**retired**” from the service of Tribunal. But in his case he had tendered his “**resignation**”. He has stated that the fact of resignation is in public domain, and not even disputed by the Government of India. After resigning from the government job as an Accountant Member of the Tribunal, he was deprived of certain benefits. He was communicated by a letter dated 16th of August, 2010 by the Deputy Registrar that he being quitted the service on resignation shall not be entitled to any pension, gratuity or terminal benefits. He has said that it was nothing but a **double jeopardy**. On one hand due to the resignation he has not been allowed certain

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benefits and on the other hand he has also not been allowed to practice before the Tribunal. He has finally pleaded that once a Special Bench in the case of *Concept Creations vs. Adl CIT (2009) 120 ITD 19 (Del.)(SB)* had been established in the past and already taken up an identical reference, that too was pertaining to the applicability of Rule 13E, then in the like manner this Special Bench can also decide the question referred by the Hon'ble President pertaining to applicability of Rule 13E for an Ex-Accountant Member who has resigned from the service. According to him, only a portion of the said order (Concept Creation) was stayed but no other restriction has been imposed by the Hon'ble Allahabad High Court through the afore-cited order dated 19.01.2012, therefore rest of the ratio laid down is now required to be followed.

2.6 An another plank of argument of Mr. Deepak Shah before us is that as per the said notification vide Rule 14 of "Interpretation" it is provided that, "if any question arises relating to the notification of these rules the decision of the Central Government thereon shall be final". He has, therefore, pleaded that in the recent past the Central Government had appointed the Attorney General who has opined in the following manner (referred a letter of the Hon'ble President dated 13th of July, 2012):-

"The following clarifications by the Attorney General for India are relevant:-

13. I note that in the Statement of Case, it is stated as follows:

"In the light of above discussion it appears that findings / observations of the Supreme Court in the judgment of N K

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Bajpai would not affect the decision of Spl. Bench ITAT in the case of Concept Creations so far as it relates to right of practice before ITAT of those Members who have resigned and not retired in terms of Rule 13E"

I agree with this.

14. *In the light of the aforesaid, I shall, answer the questions raised as under:*

Q.(i) Whether in the light of Rule 13E of the ITAT Members (Recruitment and Conditions of Service) Rules, 1963, the decision taken in the case of Concept Creations by the ITAT can withstand the judicial scrutiny in the light of law laid down by the Supreme Court in the case of N K Bajpai?

Ans. Yes. The decision of the ITAT in Concept Creations case dealt with Rule 13E. The judgment of the Supreme Court in N K Bajpai's case deals with Section 129(6) of the Customs Act. This does not displace the earlier decision of the ITAT

Q-(ii) Whether a person who resigned as Member of ITAT can practice before various Benches of the ITAT in view of the provisions contained in Rule 13E of ITAT Rules?

Ans. Yes".

2.7 Mr. Shah has also referred the final direction given in the said letter by the Respected President of the Tribunal to the Tribunal Benches, reads as under :

"In the light of the above opinion obtained by the Ministry, now it is time for us to put an end to all the disputes relating to the right of ex-Members of the ITAT to appear before the Tribunal. The sum and substance of this opinion is that the decision of the Supreme Court in the judgment of N K Bajpai has not overturned the decision of the Special Bench in the case of Concept Creations vs. Addl. CIT (2009) 120 ITD 19 (Del) (SB). Therefore, we may strictly follow the guidelines laid down in Concept Creations in the matter of deciding this issue. Consequently, the communication received from the Ministry of Law & Justice in F.No. A-60011/60/2012-Admn. III(LA) dated 19th April 2012 is to be treated as final in the matter and should be considered as having been issued by the Ministry under Rule 14

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and Rule 15 of the Income Tax Tribunal Members (Recruitment and Conditions of Service) Rules, 1963. The matter should rest there.

This is brought to your notice so that you may appraise the Members in your Zone, to take a uniform view in the light of the Special Bench decision in the case of Concept Creations, as clarified by the Ministry.”

2.8 He has thus vehemently argued that in a situation when the Ministry of Law has appointed Attorney General and on the advice of the said Attorney General the President of the Tribunal has given direction to allow the appearance then such direction should be treated as the decision of the Central Government in respect of interpretation of Rule 13E of the said impugned notification. He has thus contested that the bar imposed upon him is unjustifiable. He must be allowed to appear before the Tribunal, strongly advocated.

3. From the side of the Revenue, learned Standing Counsel, Mrs. Mona Bhatt, assisted by Ld. DR Mr. D.S.Kalyan CIT have appeared. From their side, a gist of submissions along with certain case laws, etc. have been placed in the form of a compilation. She has raised a preliminary objection that this Tribunal does not have jurisdiction to entertain the issue referred by the Hon'ble President. She has pleaded that the question of service condition, appointment, retirement, resignation, etc., comes within the purview of ITAT Recruitment and Conditions of Service (Rule, 1963). The correct forum for any redress is the respected Central Administrative Tribunal. She has quoted Section 3(P) r.w.s. 28 of the Central Administrative Tribunals Act, 1985, which is providing

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a cure of such type of grievance. The services of ITAT Members are classified under Rule-8 of General Central Civil Services Class-I (Group-A); hence, an appeal lies with Central Administrative Tribunal.

She has further pleaded that as per Section 253(1) and (2), an appeal is to be filed before the Tribunal against an order of the Lower Tax Authorities. The issue, presently under process of hearing, does not arise from any of the order of Income Tax Authority.

3.1 Ld. Standing Counsel has strongly challenged the maintainability of the above issue before this Special Bench and pleaded that the reference being not within the provisions of I.T.Act hence this Bench has no jurisdiction to decide it. She has also mentioned that the Tribunal being a creation of I.T.Act consequently has to operate and function in accordance to the provisions of the Act. This Bench can not decide an unconnected matter. This Bench has no power to decide an issue which is related to the vires of a Rule, pertaining to the service condition, framed by the Ministry of Law. Therefore, on the above stated grounds, this Hon'ble Tribunal, with utmost respect, has no jurisdiction to decide the present issue, she has pleaded. Ld counsel has also mentioned that on the similar issue, the Hon'ble Special Bench has considered this issue and therefore, the decision in the case of Concept Creation (supra) is squarely applicable. The issue to be decided is whether Shri Shah, who is an Ex-Accountant Member, who has resigned after 03.06.2009 is eligible to appear

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before the ITAT. The facts are not disputed, as Mr. Shah was appointed under order dated **28.09.2001**, confirmed on **29.11.2003** and voluntarily resigned on **01.04.2010**. According to her the amendment in Rule 13E is prospective, and therefore, it will be applicable to those who have retired or resigned after 3.6.2009.

The general Rule of statutory interpretation states that Rule 13E which came into force with effect from 03.06.2009, being the service condition is applicable to those who are in service as on 03.06.2009. As Mr.Shah was in service on 03.06.2009, Rule 13E is applicable to him. Further, even for applicability of the Rule, the object, intent and purpose of the insertion are to be seen. A purposive interpretation is to be given to the Rule. Apparently, the object is to disallow ex-member to practice otherwise following events / eventuality may happen for eg.

(1) Bias against their own peers. ;

(2) Resignation versus retirement will create absurd proposition, resulting into that one class of person is allowed to appear and not the other.

(3) The proposition canvassed will induce members to resign before few days of their retirement.

For giving purposive interpretation in the present case, retirement and resignation has same meaning. The Department relies upon the case reported as CIT vs D.P. Malhotra 229 ITR 394 (**Bombay**).

3.2 With regard to the submission of Mr. Shah about applicability of Section 288 of the Income Tax Act, it is submitted

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that the said Section of the Income Tax Act is not required to be read in isolation. It is to be read along with Rule 13E of the ITAT Members Rules, 1963, because Section 288 of the Income Tax Act prescribes qualification or disqualification to practice, whereas Rules which are framed under Article 309 of the Constitution of India decide the conditions of service for the class of officers. Here, Mr. Shah has been classified as Group-'A' Central Government Officer. Therefore, there cannot be said to be any conflict. Therefore, the general provision will not prevail over the specific Rules which are framed under Article 309 of the Constitution of India. Therefore the contention of Mr. Shah that under Art. 19(1)(g), he has right to practice, is to be read with the reasonable restriction imposed under Art 19(6) of the Constitution of India.

3.3 During his rejoinder Mr. Shah was asked a question by the Bench that whether it is within our jurisdiction to decide the legality as also the vires of a Service Rules and in his fairness he has given the answer in negative.

4. We have heard both the sides at length. From the records of the case, we have noted that learned Sri Deepak R. Shah was appointed as Accountant Member of the Income Tax Appellate Tribunal on 29th of November, 2001. He was confirmed on 29.11.2003. Later on, he has resigned as a Member of the Tribunal on 01.04.2010. At this juncture, it is worth to mention that Rule 13-E in (Recruitment and Conditions of Services) Rules, 1963 was

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inserted vide a notification dated 3rd of June, 2009, already reproduced supra.

5. At the outset, it is worth to mention that whether this Special Bench is entitled to decide the applicability of the provisions of Rule 13E of Members (Recruitment and Conditions of Service) Rules, 1963. There is a cardinal Rule that *nemo debet esse judex in propria causa* (**no one should be a judge in his own cause**).

5.1 This question was raised in the case of Concept Creations 120 ITD 19 (SB) (Del) and a view was taken that the Special Bench so constituted was competent to go into the said question raised before the Bench. But at present that position has been altered. At this juncture, it is also worth to mention that at present the legal position is that the **Hon'ble High Court Of Judicature at Allahbad, Lucknow Bench**, in the case of *Dinesh Chandra Agarwal Vs. Union of India (Service Bench No.62 of 2012) vide an order dated 19th of January, 2012* has held that the judgment rendered in the case of Concept Creations (supra) was **beyond its pale of tax appeals** as contained in the Income Tax Act, vide Sections 253 and 254 thereof. The relevant portion is extracted below:

“As per Rule 13E of the Rules notified on June 3, 2009 whereby the Income Tax Appellate Tribunal Members (Recruitment and Conditions' of Service) Rules, 1963 has been amended, a ban has been imposed on practice by the retired members before the Income Tax Appellate Tribunal Rule 13E as aforesaid on reproduction reads as :

"13E. The President, the Senior Vice-President, the Vice-President and the Members of the Tribunal shall not practice

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before the tribunal after retirement from the service of the Tribunal."

*Though, prima facie, the Rule appears to be a correct notification supposedly issued in public interest in line with the rules and practice clamping ban on the legal practice by the retired judges of High Court in the courts where they remain posted as permanent judge and the Tribunals and Courts subordinate to High Court, however, it appears to be offensive in two respects; namely, that the retired members have been completely barred from practice before the Tribunal, and secondly, that the aforesaid rule 13E has been interpreted to apply retrospectively in the judgment rendered in the case of **Concept Creations Vs. Additional Commissioner of Income Tax, Range, Panipat reported in (2009) 120 ITD 19 (Delhi) (Special Bench)** by the Income Tax Appellate Tribunal, Delhi, beyond its pale of tax appeal as contained in the Income Tax Act vide Sections 253 and 254 thereof."*

5.2 Hence the view taken by the Special Bench in the Concept Creation (supra) about the competence of the Tribunal benches to hear service related issues, including Special Bench, now stood reversed. Moreover, as on date, there is no other decision of any other Hon'ble High Court before us. The Tribunal Benches as also the Special Bench are subordinate to the High Courts. In the hierarchical judicial system an accepted rule to follow a precedent is that, quote "the better wisdom of the Court below has to yield to higher wisdom of the Court above. Once an authority higher than the Tribunal has expressed an opinion on some issue, then the Tribunal is no longer at liberty to rely upon its earlier decision, may be a decision of the Special Bench" unquote. This is a settled rule hence even a non-jurisdictional High Court order do not alter the position and therefore to be followed, if not dissented.

Hence, the Tribunal being a subordinate Court, is expected to follow in letter and spirit an order of the Hon'ble High Court, unless and until either reversed by the Hon'ble Apex Court or by

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an order of the Jurisdictional High Court taking a contradictory view. Hence, the decision of the Special Bench pronounced in the case of Concept Creation (supra) is no more a good law on this issue being reversed by the Hon'ble Allahabad High Court. **So the present legal position is that the Tribunal has no inherent jurisdiction to decide the question as to whether an Ex-Member of the Tribunal can appear and practice before the Income Tax Tribunal Benches.** Since, we have followed the decision of the Hon'ble Allahabad High Court; therefore, certain allied question about the applicability of the provisions of Section 288 of IT Act need not to be addressed by us in this order. Likewise, the question of an appealable order before the Tribunal as prescribed u/s.253 is not required to be adjudicated upon by us in the present appeal. We are also not entertaining one of the arguments of learned Mr Shah that in terms of Section 254 of IT Act the Appellate Tribunal is entitled to "*pass such orders thereon as it thinks fit*".

5.3 Resultantly our conscientious decision is that in the light of the decision of the High Court it is beyond our jurisdiction to decide the issue on merits and that part of the Concept Creation (supra) now stood overruled by the Hon'ble Allahbad High Court. The vires of Rule 13E, whether it is *ultra-vires* or *intra-vires*, is a subject not falling within our jurisdiction.

5.4 Before us learned Standing Counsel, Mrs. Bhatt has referred **Article 309 of the Constitution of India** which prescribes the

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Recruitment and Conditions of Service of persons serving the Union or State. She has said that a particular legislature may regulate the Recruitment and Conditions of Service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. She has also pointed out that as per one of the proviso, it is prescribed that it shall be competent for the Hon'ble President of India, or such person as may be directed, in the case of Services and Posts to make rules regulating the Recruitment and Conditions of Service of persons appointed and any rule so made shall have effect subject to the provisions of any such Act. She has clarified that the purpose of citing Article 309 of the Constitution of India is that if Mr. Shah is aggrieved by the insertion of Rule 13E then he should have approached the competent authority to decide the *vires* of Rule 13E. The Income Tax Tribunal is not the correct forum for redressal of such grievance. She has further clarified that the recruitment as a Member of the Tribunal is classified under Rule 8 General Central Civil Services Class-I (Group-A Member), hence Central Administrative Tribunal may be the proper forum to decide the applicability of the provisions of Rule 13E of the notification. We find force in this arguments of learned Standing Counsel; hence, put this controversy at rest that the grievance being not emerging from an order of Tax Authorities as prescribed under Section 253 of IT Act (order appealable before the Appellate Tribunal), therefore this Tribunal is not competent to decide this issue which is related to the service conditions of the Members.

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6. It is worth mentioning that both the sides, Ld. Mr. Shah as also Ms. Bhatt have expressed with full sense of responsibility that the question referred to this Special Bench being bonded with the legality of the Service Condition Rules hence out of the jurisdiction of the Tribunal, therefore by giving due weight to their acceptance of this legal position we hereby hold that the issue in hand do not fall within our competence of jurisdiction. Needless to repeat again, this view is fortified by the binding decision of Hon'ble Allahabad High Court.

7. An another argument has also been raised that the Respected Attorney General has given an opinion which can be treated as an order of the Central Government; therefore, Mr. Shah should be allowed to appear before the Tribunal. However, this argument is also not in line with the judgment of the Hon'ble Allahabad High Court; hence, deserves to be rejected. Moreover, the Central Government has not given any decision in respect of Rule in question; hence, we are not convinced to hold that an opinion can be treated as a decision of the Central Government.

8. Before we part with the issue, it is worth to mention that the Hon'ble Allahabad High Court has fixed the date of hearing to decide the *vires* of Rule 13E and for that purpose issued notice to the learned Attorney General of India; hence, at present it is not legally justifiable to take up the merits of the issue. We hereby hold that the question referred to us is beyond our jurisdiction.

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9. The question referred to us is *alieni juris* hence forbidden to adjudicate.

(N.S. SAINI)
ACCOUNTANT MEMBER
Ahmedabad; Dated 23/05/2014

Sd/-
(G.C. GUPTA)
VICE PRESIDENT

Sd/-
(MUKUL Kr. SHRAWAT)
JUDICIAL MEMBER

Prabhat Kr. Kesarwani, Sr. P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-III, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

Separate order

Sd/-
(N.S. Saini)
23.5.2014

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad

PER SHRI N.S. SAINI, ACCOUNTANT MEMBER:

I have gone through the order prepared by my Ld. brothers on behalf of Special Bench. In respect of the question referred to Special Bench which was constituted by the Hon'ble President of the Tribunal in pursuance of the directions of the Hon'ble Gujarat High Court, I find that the question referred in my view is not answered in the proposed order. I discussed my view on the issue with the Ld. brothers who proposed the order. Having failed to convince the Ld. brothers with my view and having failed to convince myself with the proposed order, I propose to write my separate order which is as under:

2.1 The facts leading to the constitution of this Special Bench are as follows:

2.1.1 In the case of Shri Nanubhai D. Desai, Surat Vs. ACIT, Central Circle, Surat in ITA No. 2170/Ahd/2005, Shri Deepak R. Shah appeared before a Division Bench of the Tribunal to represent the assessee when the matter was called for hearing before the Tribunal and filed his letter of authority to represent the assessee before the Bench. The DR at that time objected to his representing before the Tribunal on the ground that he cannot be said to be an Authorized Representative within the meaning of section 288 of Income Tax Act, 1961 because the Delhi Special Bench of the Tribunal in the case of Concept Creations Vs. ACIT, Range Panipat (2009) reported in 120 ITD 19 (Del.)(SB) has held

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that those Members who retire after 03.06.2009 are not eligible to represent before the Tribunal.

2.1.2 Thereafter, a Division Bench of the Tribunal referred the matter to the Hon'ble President of the Tribunal for constitution of a larger Bench and suggested the following questions to be referred to the Special Bench:

- (1) *Whether the Members of the Tribunal are competent to decide an issue in whose outcome they would be directly or indirectly interested?*
- (2) *Whether the Tribunal under section 253 and 254 can interpret a rule which is not framed under section 295 or ITAT Rules, 1963?*
- (3) *Whether any condition of eligibility or ineligibility of Authorized Representative other than those prescribed under section 288 can operate to allow or disallow a person to represent before the ITAT?*
- (4) *What is the status of ITAT Members (Recruitment & Conditions of Service) Rules, 1963 and amendment made, therein vis-à-vis Income-tax Act. Whether subordinate legislation in the form of rule 13E of Recruitment & Conditions of Service Rules supersede the provisions of the Act and wherever provisions of the I.T. Act (sec.288) is in conflict with R.C.S. Rules, which will prevail..*

Without prejudice to the above, if the Tribunal is competent to decide this issue then following questions are required to be addressed:-

- (1) *Whether Amendment by way of Rule 13 E takes away a vested right of livelihood after retirement in the members appointed prior to appointment If yes, whether such amendment would only be applicable to the members recruited after 3.6.2009.*
- (2) *Whether those Members who resigned without taking the benefit of service can be treated at par with those who retire with all the benefits of service and, therefore, rule 13E would be applicable with same rigours who ceased to hold office after 3.6.2009?*

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- (3) *Whether the said notification inserted in rule 13E is amendment in conditions of service, and if yes, whether alteration in service conditions can be made against the detriment of existing Members who are employed with different service conditions?"*

2.1.3 Thus, it clearly transpires that after considering the above referred propositions, the Hon'ble President of the Tribunal constituted a Special Bench consisting of 3 Members on 27.05.2011 and referred the following question for its adjudication based on it.

"Whether Shri Deepak R. Shah, advocate and ex-Accountant Member of the Income Tax Appellate Tribunal, is debarred from practising before the Income Tax Appellate Tribunal in view of the insertion of Rule 13E in the Income Tax Appellate Tribunal (Recruitment and Conditions of Service) Rules, 1963?"

2.1.4 The Special Bench though heard the appeal on 20.01.2012 but could not pronounce its decision and in the meanwhile, a Member of the Special Bench retired. Thereafter, a writ was filed before the Hon'ble Gujarat High Court by Shri Deepak R. Shah and the Hon'ble Gujarat High Court in Special Civil Application No. 15308 of 2013 vide its order dated 11.02.2014 observed and directed as under:

"Heard learned advocate for the petitioner and Shri Syed for the respondents. The petitioner himself is also present in the Court and he was also granted audience at his request. The petitioner and Shri Syed informed the Court that the President of the Tribunal had constituted a Special Bench under the order dated 27.5.2011 constituting of three Members for deciding

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the following question:- Whether Shri Deepak R. Shah, Advocate and Ex-Accountant Member of the Income Tax Appellate Tribunal, is debarred from practicing before the Income Tax Appellate Tribunal in view of the insertion of Rule 13E in the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963? The Special Bench accordingly heard and completed the hearing on 20.1.2012, however thereafter the decision is not pronounced. Shri Syed in addition to it, submits that there are intervening circumstances which are also required to be borne-in-mind in form of resolution/amendment of the Bar Council touching upon this aspect. The petitioner in person requested the Court that let there be a direction to respondent nos. 1 & 2 to constitute the Bench as now one member who had earlier heard the matter had retired and decide the reference afresh within a stipulated period of three months, to which Shri Syed did not have any objection. Accordingly, without going into merits of the matter, at the request of learned advocate for the petitioner and petitioner himself, this Court is inclined to dispose of the matter with a direction to respondent no 1 & 2 to reconstitute the Special Bench for deciding the Reference aforesaid within a period of three months from the date of receipt of the writ of this order. Meaning thereby the entire exercise of reconstituting Special Bench and hearing of the Reference and disposing of the same shall be completed within three months from the date of receipt of this order. Shri Shah the Petitioner, in view of above directions does not press this petition. Accordingly the petition is disposed of. The Court has not entered into merits of the matter and all the contentions of the parties are kept open. Rule discharged. No costs."

2.1.5 In pursuance to this direction of the Hon'ble Gujarat High Court to reconstitute the Special Bench for deciding the question referred to the Special Bench earlier, the Hon'ble President of the Tribunal reconstituted the Special Bench with the direction to decide the following question:

"Whether Shri Deepak R. Shah, advocate and ex-Accountant Member of the Income Tax Appellate Tribunal, is debarred from practising before the

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Income Tax Appellate Tribunal in view of the insertion of Rule 13E in the Income Tax Appellate Tribunal (Recruitment and Conditions of Service) Rules, 1963?"

2.1.6 As per the view expressed by my Ld. brothers that the Tribunal has no inherent jurisdiction to decide the question as to whether an ex-Member of the Tribunal can appear and practice before the Income Tax Appellate Tribunal Benches. In my considered view, this special Bench has jurisdiction to decide the question referred to it inasmuch as the same was referred on the directions of the Hon'ble Jurisdictional High Court and therefore, we are duty bound to follow the directions given by the Hon'ble Hon'ble Jurisdictional High Court and decide the question referred to it.

2.1.7 I like to observe that as the Hon'ble President has reconstituted this Special Bench and referred the above question to be decided by this Special Bench on the direction of the Hon'ble Jurisdictional High Court dated 11.02.2014 which has been passed after interim order dated 19.01.2012 of the Hon'ble Allahabad High Court, in my considered view, this Special Bench of the Tribunal is duty bound to decide the referred question as no material was brought before us that the aforesaid direction of the Jurisdictional High Court was varied subsequently by the Hon'ble Gujarat High Court or Hon'ble Supreme Court.

2.1.8 I would also like to place on record the submission of Shri Deepak R. Shah which was to the effect

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that a rule which is in the nature of subordinate legislature cannot override an Act of Parliament unless the Act of Parliament specifically provides so. In the instant case, section 288 of the Income Tax Act, 1961 which was passed by the Parliament nowhere provides that the provisions of that section shall be subject to any rule made by any authority. Therefore, in my considered view, Rule 13E of "Income Tax Appellate Tribunal (Recruitment and Conditions of Service) Rules, 1963" cannot override the provisions of section 288 of the Act. If a person violates a rule which has been made under "Income Tax Appellate Tribunal (Recruitment and Conditions of Service) Rules, 1963", consequences of such violation prescribed by the law shall follow but the same cannot be held as overriding the provisions of an Act passed by the Parliament.

2.1.9 Further, it may be appropriate to also observe that though the power of the Tribunal u/s. 253 is to adjudicate the issues arising out of orders passed by the lower authorities as prescribed in the section and pass such orders thereon as it deems fit, but at the same time, the Tribunal has inherent and incidental power to regulate the proceedings which are conducted before it. For example, Rule 17A of the Income Tax Appellate Tribunal Rules, 1963 prescribes for the dress code of the representatives of the parties before it. Therefore, if a representative appearing before it is in proper dress as per the said rule or not is to be decided by the Bench of the Tribunal before which he or she

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is appearing. To say that the Bench of the Tribunal has no jurisdiction to decide this incidental matter as because this issue is not arising out of the orders of the lower authorities, in my view is preposterous.

2.1.10 Further, in other words, when the Tribunal cannot adjudicate whether an ex-Member of the Tribunal can appear before it as an Authorized Representative or not, the natural consequence of the view is that the Tribunal cannot debar an ex-Member of the Tribunal from appearing as an Authorized Representative.

2.1.11 In this view of the matter, the answer to the question referred to this Special Bench on the direction of the Hon'ble Gujarat High Court, ought to be, in my opinion, that Shri Deepak R. Shah, advocate and ex-Member of the Income Tax Appellate Tribunal, cannot be debarred by the Tribunal from practising before the Tribunal Benches. I therefore, hold so. My above view is fortified by the view expressed by the Hon'ble Allahabad High Court in its interim order dated 19.01.2012 in the case of Dinesh Chandra Agarwal Vs. UOI through Secretary, Ministry of Law & Justice, New Delhi in Service Bench No. 62 of 2012, whereby the Hon'ble High Court stayed the operation of the decision of the Special Bench of the Tribunal in the case of Concept Creations Vs. ACIT, Range Panipat (supra).

2.1.12 In view of the above, I answer the referred question to the Special Bench that the Tribunal cannot debar Shri Deepak R. Shah, advocate and ex-Member of the Income

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Tax Appellate Tribunal who is an Authorized Representative u/s. 288 of the Income Tax Act, 1961 to appear and practice before the Tribunal Benches.

Order pronounced in the Court on Friday the 23rd of May, 2014 at Ahmedabad.

Sd/-
(N.S. Saini)
Accountant Member

Ahmedabad; Dated /05/2014
Ghanshyam Maurya, Sr. P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-III, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad