

CASE NO.:
Transfer Case (civil) 5 of 1997

PETITIONER:
Ajay Gandhi and Anr.

RESPONDENT:
B. Singh and Ors.

DATE OF JUDGMENT: 05/01/2004

BENCH:
CJI & S.B. Sinha

JUDGMENT:
JUDGMENT

W I T H

T.C. NO. 6 OF 1997

V.N.KHARE, CJI.

The Income Tax Act was first introduced in the country in the year 1922. The said Act was repealed and replaced with the 1961 Act (hereinafter called and referred to for the sake of brevity the said Act). Section 5A of the 1922 Act was in pari materia with sub-sections (1) to (3) of Section 252 as it originally stood. The provision of appeals to the Appellate Tribunal as contained in Chapter XX thereof came into being in the year 1941. Section 252 of the Act mandates the Central Government to constitute an Appellate Tribunal consisting of as many judicial and accountant members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal. The said provision lays down the qualification of a judicial member and an accountant member. The President of the Tribunal is to be appointed ordinarily from the judicial member of the Tribunal. The Central Government is also authorised to appoint one or more members of the Appellate Tribunal as Vice-President and in the event there are more than one Vice-Presidents, it may appoint a Senior Vice-President. The Senior Vice-President or a Vice-President may be delegated by the President such functions of the President as may be delegated to him by a general or special order in writing.

Several notifications have been issued whereby and whereunder the President, Income Tax Appellate Tribunal delegated the powers to Vice-presidents.

Sub-section (1) of Section 255 provides that powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President of the Appellate Tribunal from amongst the members thereof. Sub-section (5) of Section 255 reads thus :

"Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings."

The Tribunal is functioning since 21.5.1941. From its very inception, the President of the Tribunal has been exercising the power of transfer of the judicial members and the accountant members to the places where different Benches are functioning. The second respondent herein, however, in purported exercise of its power under Rule 10 of the Delegation of Financial Powers Rules, 1958 read with the Ministry of Finance O.M. No.F.10(13) B-Coord/79 dated 10.4.1975 and 8.3.1976 and in partial modification of the Department letter No. F.3(18)/75 Admn. III(LA) dated 26.6.1978 directed the President of India had been pleased to decide that President, I.T.A.T. shall thenceforth submit all proposals for postings and transfers of members including Senior Vice-President and Vice-Presidents of the Income Tax Appellate Tribunal to the Ministry for prior approval. It was further stated :

"The President, ITAT shall issue orders regarding posting and transfer of the members after approval of the Ministry indicating therein that they have been issued after approval of the competent authority. A copy of all such orders shall invariably be endorsed to the Ministry.

The President of India is further pleased to decide that the Ministry may also issue orders of posting and transfers of Members when considered necessary."

Questioning the validity of the said order, the Appellant herein has filed this writ petition claiming, inter alia, for the following reliefs :

"In this circumstances, the petitioners pray this Hon'ble Court may be pleased to issue an appropriate writ, direction or order declaring that the impugned order contained in letter No.F.No.A.60011(54)/96-Admn.III(LA) dated 15.11.96, copy whereof is Ex. 'A' to the petition and the impugned order passed by the Hon'ble President of India referred to therein is without jurisdiction and is liable to be treated as non-est for all purposes and pass such other order(s) as may be deemed fit and proper."

The records of the proceedings shows that the efforts were made to the effect that the parties to arrive at a consensus as regard the extent of the power as also the guidelines therefor so as to enable the President to discharge the said functions. The Union of India in an affidavit filed on 16.2.2001, suggested the following guidelines :

"1. Upon appointment of a Member, his initial posting will be done by the Government in consultation with the President, ITAT having regard to the following :-

(i) A Member shall not be given initial posting at a place where he was earlier practicing as an Advocate or Chartered Accountant in taxation matters as the case may be;

(ii) A Member shall not be posted at a place where his spouse, son, daughter, grandson or granddaughter is practicing either as an Advocate or Chartered Accountant in taxation matters.

2. The transfers shall be made by the Government on the advice of the President, ITAT ordinarily having regard to the following guidelines :

(i) A Member shall not be posted at a place for a period exceeding five years;

(ii) A Member shall not be posted at a place where his spouse, son, daughter, grandson or granddaughter is practicing as an Advocate or Chartered Accountant in taxation matters;

(iii) A Member shall not be posted at a place where he has earlier served as a Member unless he has cooled off for a period of two years.

3. Advice of the President, ITAT shall have primacy unless it is against any of the guidelines or results in any hardship."

The writ petitioners, however, did not agree thereto and their suggestions, in terms are in the following terms :

"I. Initial posting of a member shall be done by the Government in consultation with the President ITAT.

II. Postings to different benches shall be by the President having regard ordinarily to the following :

(i) A member may not be given initial posting at a place where he was earlier practicing as an Advocate or a Chartered Accountant as the case may be.

(ii) A member may not be posted at a place where any of his parents, spouse, son, daughter or other close relation is practicing as an Advocate or a Chartered Accountant in taxation matters.

(iii) A member may not be posted at a place for a period exceeding 5 years.

(iv) A member may not be posted at a place where he was earlier posted unless a period of two years has elapsed.

(III) The Government shall have the liberty to bring to the notice of the President, ITAT relevant facts requiring the transfer of a member from a particular bench in public interest."

The learned counsel for the parties have addressed us at length as ultimately no consensus could be arrived at. The submissions of the learned counsel appearing on behalf of the petitioners are : (1) Having regard to the fact that there are 48 Benches of the Tribunal and having regard to the provisions contained in sub-section (1) of Section 255 read with sub-section (5) thereof, the President is to constitute Benches, by necessary implications, it must be held that he alone had the power to transfer the members thereof; (2) As the President of Tribunal had been exercising the said power since the inception of the Tribunal, no interference therewith at the hands of respondent was called for.

The Appellate Tribunal constituted under the Act is not an income-tax authority. It is the ultimate fact finding authority under the Act and only a reference to the High Court or this Court on a question of law from its orders can be made. (See *Udhavdas Kewalram Vs. Commissioner of Income-Tax, Bombay City I.* [1967] 66 ITR 462) The President in the matter of constitution of benches exercises his both judicial and administrative powers. While the President exercises administrative jurisdiction even no writ petition would be maintainable thereagainst. (See *Income-Tax Appellate Tribunal Vs. Deputy Commissioner of Income-Tax (Assessments) and Others* [1996] 218 ITR 275). The position of the appellate tribunal is the same as of Court of Appeal under the Civil Procedure Code and its powers are identical with the powers enjoyed by the appellate court thereunder. (See *New India Life Assurance Co. Ltd. Vs. Commissioner of Income-Tax, Excess Profits Tax, Bombay City*, [1957] 31 ITR 844)). In any event, the Central Government cannot usurp the power of the President in purported exercise of its functions under the delegation of the financial rules which were issued only for certain purposes.

The submission of the respondent on the other hand are : (1) The Central Government has the necessary administrative control over the Tribunal having regard to the power to constitute the same; (2) The power of appointment of a member of the Tribunal would include a power of his transfer and posting; (3) Such a power of the Central Government is implicit from the scheme of the Act.

There are a large number of instances where such a power of the President has been misused and having regard thereto, the impugned decisions had been taken.

The Income Tax Appellate Tribunal exercises judicial functions and has trapping of Court.

It may be true that the Tribunal functions under the Ministry of Law and Justice and the Law Secretary is the member of the Selection Board. The Ministry of Law and Justice, Department of Legal Affairs, it is accepted, exercises a disciplinary power over the members of the Tribunal. The Allocation of Business Rules of

the Government of India in respect of the Tribunal is placed under the Department of Legal Affairs, Ministry of Law and Justice. Does it mean that the Ministry of Law and Justice exercises a supervisory jurisdiction over the Tribunal? Supervisory control under the Rules of Allocation of Business relates to the administrative matters and not the judicial ones. The functions of the Tribunal being judicial in nature, the public have a major stake in its functioning, for effective and orderly administration of justice. A Tribunal should, as far as possible, have a judicial autonomy. The provisions of Sections 252, 254 and 255, as noticed hereinbefore, confer a statutory power upon the President to constitute Benches. The Appellate Tribunal is a National Tribunal. The President subject to delegation of powers to Senior Vice-President or the Vice-President, exercises the administrative control over the members thereof. The Benches are to be constituted only by the President. No other authority is empowered to do so.

The primal question, therefore, which arises for consideration is as to whether the Central Government can be said to have any power of transfer and posting of the members of the Tribunal. It is true that ordinarily the power of transfer vests in the employer. Such power, however, would be subject to the statutory provisions operating in the field.

For the aforementioned purpose, the scheme of the Act plays an important role. In the instant case, having regard to the provisions contained in sub-sections (1) and (5) of Section 255 of the Act, we are of the opinion that the President has the requisite power of transfer and posting of its members. For construction of a statute, it is trite, the actual practice may be taken into consideration.

In CORPUS juris secundum, Volume 82, PP. 761, it is stated that the controlling effect of this aid which is known as 'executive construction' would depend upon various factors such as the length of time for which it is followed, the nature of rights and property affected by it, the injustice resulting from its departure and the approval that it has received in judicial decisions or in legislation.

In Francis Bennion Statutory Interpretation, Fourth edition, the law is stated in the following terms at page 596:

"Section 231. The basic rule: In the period immediately following its enactment, the history of how an enactment is understood forms part of the contemporanea expositio, and may be held to throw light on the legislative intention. The later history may, under the doctrine that an ongoing Act is always speaking, indicate how the enactment is regarded in the light of developments from time to time.

COMMENT

On a superficial view, it may be thought that nothing that happens after an Act is passed can affect the legislative intention at the time it was passed. This overlooks the two factors stated in this section.

Contemporanea expositio The concept of legislative intention is a difficult one.

Contemporary exposition helps to show what people thought the Act meant in the period immediately after it was passed. Official statements on its meaning are particularly important here, since every Act is supervised, and most were originally promoted, by a government department which may be assumed to know what the legislative intention was."

In *R. vs. Wandsworth London Borough Council, Ex parte, Beckwith* [(1996) 1 All E.R. 129], the House of Lords has held that a departmental circular is entitled to respect. It can only be ignored when it is patently wrong. The said principle has also been followed in *Indian Metals and Ferro Alloys Ltd. vs. Collector of Central Excise* [AIR 1991 SC 1028, p. 1034]; *Keshavji Ravji and co. vs. Commissioner of Income Tax* [AIR 1991 SC 1806, p. 1817], *Raymond Synthetics Ltd. vs. Union of India* [AIR 1992 SC 847, p. 859] *Kasilingam vs. P.S.G. College of Technology* [1995 (2) SCALE 387, p. 397] and *Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries* [(2002) 2 SCC 127].

The Central Government admittedly never exercised its purported power of transfer and posting in its capacity as an employer or otherwise. From the impugned order, furthermore, it would appear that even therein the source of power had not been traced from the provisions of the Income Tax Act but to the Delegation of Financial Powers which have no nexus therewith. By reason of amendment to certain circular letters also, the Central Government cannot confer upon it such statutory power of transfer and posting of the members of the Appellate Tribunal.

Having regard to the fact that the Central Government had acted sub silentio and even allowed the President to delegate his power to constitute benches to various Senior Vice-Presidents over a number of years is itself a pointer to the fact that the Central Government was also of the opinion that the power of transfer and posting is a part of the administrative function of the President as an ancillary power of constitution of benches.

Keeping in view the fact that the independence of the Tribunal is essential; for maintaining its independence any power which may be conferred upon the executive authority must be proved to be in the interest of imparting justice. We are of the view that this long standing practice should be allowed to prevail over the stand of the respondents herein. However, we are of the opinion that by reason thereof, the President cannot be said to have an unguided, unfettered and unlimited jurisdiction as the same may be flawed with great consequences. We are, therefore, of the opinion that the following guidelines could serve the said purpose:

- (i) Initial posting of a member shall be done by the Government in consultation with the President of ITAT.
- (ii) Postings to different benches shall be done by the President having regard ordinarily to the following:
 - (a) A member save and except for sufficient and cogent reasons shall not be posted at a place where he had earlier been practising as an advocate or a Chartered Accountant, as the case may be.
 - (b) A member may not be posted at a place where any of his parents, spouse or other close relation is practising as an Advocate or a Chartered

Accountant in taxation matters.

(c) Save and except for sufficient and cogent reasons, the Member shall not posted at a place of a period exceeding five years. Ordinarily, a Member may not be posted at a place where he was earlier posted unless a period of two years has elapsed.

(iii) The President shall keep the Government informed about the orders of posting. The Government, if it so thinks fit, shall have the liberty to bring to the notice of the President, ITAT relevant facts including that transfer and posting of a member is not in conformity with the aforementioned guidelines. It shall also be at liberty to bring to the notice of the President any case of extreme hardship which may be faced by a member by reason of such an order of transfer and posting.

(iv) The Government shall have further liberty to request the President to transfer a member from a particular bench when it is in public interest or in an exceptional circumstances. The President, ITAT, it goes without saying, shall consider the same in proper perspective. If the President refuses to comply with the request of the Central Government, although the transfer is in public interest in such a cases it would be open to the Central Government to pass order of transfer.

Although, it is not necessary that the President should consult the Senior Vice-President, we are of the opinion that he in all fairness should consult them keeping in view the fact that a large number of members are functioning at different places and, thus, it may sometimes becomes impossible for the President to know about the intellect or otherwise of the member for the purpose of his posting, including his efficiency, disposal and other relevant factors.

During the course of discussions, it was suggested that in exercise of the aforementioned powers, the President must consult the two senior Vice-presidents by forming a collegium therefor. Although we are of the opinion that such a course of action may not be necessary but we hasten to add that the President, in all fairness, should consult two Senior Vice-Presidents before passing such orders of transfer and posting. Such a measure may be necessary having regard to the fact that the President may not be aware of the efficacy or otherwise in relation thereto. In view of the fact that the large number of members are functioning at different places and, thus, the advice of the senior Vice-Presidents as regard the functioning of a particular member including his efficiency, disposal and other relevant factors may be considered by the President in ultimately passing such orders of transfer and posting.

This Writ Petition is allowed on the aforementioned terms. In the facts and circumstances of this case, there shall be no order as to costs.

JUDIS