

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

Original Application No.2839/2009, M.A. Nos.2473/2009, 2271/2009 with Original Application No.526/2010

This the 28th day of October, 2010

HON'BLE SHRI JUSTICE V. K. BALI, CHAIRMAN

HON'BLE SHRI L. K. JOSHI, VICE-CHAIRMAN (A)

O.A. NO.2839/2009

Sunil Kumar Yadav S/O G. S. Yadav,
R/O A-201, Harmony Aptt.,
Plot No.6B, Sector-23,
Dwarka, Delhi.

| Applicant

(By Shri Rakesh Khanna, Sr. Advocate and with him Shri A. K. Behera, Mrs. Jasmine Ahmed, Shri S. Nayak & Ms. Seema Rao, Advocates)

Versus

1. Union of India through
Secretary, Ministry of Law & Justice,
Government of India,
Department of Legal Affairs,
A-Wing, Shastri Bhawan,
New Delhi.
2. Secretary,
Ministry of Personnel, Public Grievances
& Pensions, North Block,
New Delhi-110001.
3. President,
Income Tax Appellate Tribunal,
Lok Nayak Bhawan,
Khan Market,
New Delhi.
4. Shri H. L. Karwa
5. Shri O. K. Narayanan
6. Shri N. Bhartvaja Shankar
7. Shri Girish C. Gupta

(Service on respondents 4 to 7 to be effected through Respondent No.3).

(By Shri A. K. Bhardwaj for official Respondents, Ms. Rekha Palli with Shri Hemant Gupta and Ms. Poonam Singh, for Private Respondents, Advocates)

O.A. NO.526/2010

B. R. Mittal S/O R. D. Mittal
R/O C/O Shri Anesh Mittal,
Flat No.87, Swastik Kunj Apartments,
Sector 13, Rohini,
Delhi-110085.

| Applicant

(By Shri Rakesh Khanna, Sr. Advocate and with him shri A. K. Behera, Mrs. Jasmine Ahmed, Shri S. Nayak & Ms. Sema Rao, Advocates)

Versus

1. Union of India through
Secretary, Ministry of Law & Justice,
Government of India,
Department of Legal Affairs,
A-Wing, Shastri Bhawan,
New Delhi.
2. President,
Income Tax Appellate Tribunal,
10th Floor, Lok Nayak Bhawan,
Khan Market, New Delhi.
3. Shri D. K. Tyagi,
Judicial Member,
ITAT, Kolkata Bench.

| Respondents

(By Shri A. K. Bhardwaj for official Respondents, Ms. Rekha Palli with Shri Hemant Gupta and Ms. Poonam Singh, for Private Respondent, Advocates)

O R D E R

Justice V. K. Bali, Chairman:

Sunil Kumar Yadav, Member, Income Tax Appellate Tribunal (hereinafter to be referred as ITAT) has filed two Original Applications bearing OA Nos.2839/2009 and 527/2010. B. R. Mittal, also Member, ITAT, has filed OA No.526/2010. Insofar as OA No.526/2010 filed by B. R. Mittal and OA No.2389/2009 filed by Sunil Kumar Yadav are concerned, the same need to be disposed of by a common order, as has also been suggested by the learned counsel representing the parties. Challenge in both the OAs is to the selection process or selection for appointment to the three posts of Vice-President, ITAT, even though, whereas some grounds may be common, others are different. Surely, while disposing of the two OAs by common order, the points taken by both the applicants in support of the relief claimed shall be separately dealt with. The bare minimum facts that need a necessary mention, have been extracted from both OA Nos.2389/2009 and 526/2009. Insofar as, OA No.527/2010 filed by Sunil Kumar Yadav is concerned, the cause

of action and the relief asked for being different, the same shall have to be disposed of separately. We may mention here that there may be some grounds common in both the Applications in challenging the selection to the post of Vice-President, ITAT, but the main plea raised in both the Applications is different. In that context, we may mention that whereas, Sunil Kumar Yadav claims appointment on the said post as direct recruit, there being an obligation on the part of the Government to provide reservation to OBC, to which category he belongs, B. R. Mittal would primarily state that since after the recommendations of the 6th Central Pay Commission (CPC), pay scale of Members and Vice-President, ITAT is the same, appointment on the post of Vice-President would be only a designation which should go by seniority, and in any case, if it has to be a promotion, the parameters as fixed by the Government in making promotions, whereby an incumbent having requisite benchmark has necessarily to be promoted, have to be followed and he could not be ignored or superseded by his juniors. Sunil Kumar Yadav would press into service same grounds for the requisite relief, but only if his first plea that there has to be reservation for candidates belonging to his category may fail.

2. We may first take in hand OA No.526/2010 filed by B. R. Mittal. The facts as projected in the said OA reveal that the applicant was appointed as Judicial Member in ITAT under the Income Tax Appellate Tribunal Members (Recruitment & Conditions of Service) Rules, 1963 (hereinafter to be referred as the Rules of 1963) in the pay scale of Rs 22400-26000. He joined as Judicial Member w.e.f. 1.1.1998 and is presently posted as such at ITAT, Kolkata Bench. The post of Member under the rules has been classified as General Central Service Group A. When the applicant joined as Judicial Member in ITAT, the post of Vice-President, ITAT was in the pay scale of Rs. 24050-26000 and was, therefore, hierarchically superior than that of Accountant and Judicial Members. However, after the recommendations of the 6th CPC, whereby the expert body not only gave recommendation in respect of the pay scale but also in respect of the cadre hierarchies, the aforesaid position underwent a drastic change. The Government of India after examining the recommendations of the 6th CPC, abolished the difference between the erstwhile pay scales of Rs. 22400-26000 and Rs. 24050-26000, and by merging both the said scales adopted the new pay band/scale of Rs. 75000 + annual increment of 3% - Rs. 80000. Thus, after implementation of recommendations of the 6th CPC, the hierarchical level of Accountant/Judicial Member and Vice-President became the same. After the date aforesaid, it is further the case of the applicant, the designation of Vice-President being a hierarchically superior post ceased to exist, and now, at the most, the said designation could be conferred on Members posted in the outlying Benches for purposes of exercising administrative and financial functions. The necessity for filing the present OA, it is pleaded, arose because of the supply of the minutes of the note on appointment as Vice-Presidents in ITAT in pursuance to an RTI application of another Judicial Member, ITAT, Shri R. P. Tolani. In the said office note, the 1st respondent has confirmed that Shri D. K. Tyagi, Member (the 3rd respondent) has been approved for such appointment by ignoring the claim of the applicant. In the note aforesaid it has been confirmed that five persons have been approved for appointment to the post of Vice-President and the name of the 3rd respondent appears at serial number 5 in the panel. In the cadre of Members, ITAT, the applicant is senior to the 3rd respondent. Whereas the name of the applicant in the seniority list dated 25.4.2005 appears at serial number 25, the name of the 3rd respondent appears at serial number 26. The respondents, it is stated, have already appointed first four persons from the said panel as Vice-Presidents vide order dated 1.12.2009. The applicant would have no grievance against their appointment, as all of them are senior to him in the cadre of Member, ITAT. It is the case of the applicant that the promotion has been granted in the pre-revised scale of pay with effect from a date when such pre-revised scale was not in existence, and that the same has been done only to show on paper that the post of Vice-President is a hierarchically superior post than that of Member. That both the posts are in the same pay scale/grade, which was a material fact, but was not placed before the selection committee. It is pleaded that the applicant would be required to be

under the administrative and financial control of the 3rd respondent and in that situation he may be required to face an embarrassing situation in Bench formation. In any case, the 3rd respondent could not supersede the applicant, is further the case of the applicant. The grievance of the applicant vis-à-vis the selection of the 3rd respondent is two-fold. It is pleaded that firstly, the post of Vice-President, post-implementation of the recommendations of the 6th CPC, is no more a hierarchically superior post for which any selection criteria can be applied, and after implementation of the recommendations of the CPC, DOP&T has issued OM dated 24.3.2009 requesting all Ministries and departments to make consequential changes in the recruitment rules in view of merger of scales, but the 1st respondent did not amend the recruitment rules in this regard and has initiated the process of selection for the post of Vice-President on the basis of old pay scales which are not in existence after the 6th CPC. Secondly, the applicant, it is pleaded, was never communicated any adverse or below benchmark grading in his ACRs at any point of time. On the other hand, the conduct of the 3rd respondent has been openly placed under cloud by the 2nd respondent by filing an affidavit before the Apex Court in the case of Rajiv Ranjan Lalal v Union of India (2006) 6 SCC 613, stating that the said respondent left India without obtaining permission and he had been issued a show cause notice to explain the above act of indiscipline. It was further stated in the said affidavit that the 3rd respondent was made to sit on the Bench with the senior-most Accountant Member to inculcate judicial discipline, decorum and proper behaviour, as the orders passed by him were not only arbitrary but would also display judicial immaturity of the respondent. It is pleaded that the Hon'ble Supreme Court has already taken note of the said affidavit of the 2nd respondent. This factual position, it is pleaded, was not placed before the selection committee, and it is by ignoring these material facts in respect of the 3rd respondent that the applicant has been superseded. It is further pleaded that there were five posts of Vice-President which were sought to be filled up, and for the said posts, 14 eligible Members, ITAT in the order of seniority were included in the zone of consideration. The respondents fixed the said zone of consideration by following the DOP&T instructions on the question of fixing the zone of consideration in the case of promotion from the feeder grade to a higher promotional grade. The respondents at all times had considered the said posts of Vice-President, ITAT as promotional posts and, therefore, the zone of consideration was also fixed under DOP&T instructions applicable to promotion, and the persons within the zone of consideration were assessed on the basis of their ACRs and service records. There was no other material before the selection committee for assessment. It is also pleaded that the post of Vice-President, ITAT, in any case, is classified as General Central Service Group A, and as such all rules as may be applicable for promotion to Group A posts, shall have to be applied in making promotion to the said post. The rules, it is pleaded, involve no supersession, and that promotion is to be governed on the basis of the requisite benchmarks, and any one who may have the requisite benchmark would be promoted as per his seniority. It is thus the case of the applicant that neither on the basis of the instructions nor on the basis of comparative assessment of service vis-à-vis the 3rd respondent, the applicant could have been superseded in the matter of appointment to the post of Vice-President, ITAT.

3. This matter came up for motion hearing before us on 23.2.2010, when while issuing notice, we recorded the following order:

"The applicant is aggrieved of his being overlooked by his juniors for appointment on the post of Vice-President, Income-Tax Appellate Tribunal (ITAT). What is urged during the course of hearing is that the appointment on the post of Vice-President has to be from amongst the Members of ITAT, and that though the method of appointment may be selection, but the same should be by way of promotion, and once, the appointment has to be made by promotion, even though by selection, the DOP&T guidelines which mandate no supersession, and any one having the requisite benchmark has to be promoted, the

applicant could not be overlooked by his juniors. From the provisions contained in rule 7C of the Income-tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963 (hereinafter to be referred as the Rules of 1963), it appears that the President, Senior Vice-President and Vice-Presidents of ITAT have to be selected based on merit by a selection committee consisting of a sitting Supreme Court Judge to be nominated by the Chief Justice of India, President ITAT, and the Secretary, Ministry of Law and Justice (Department of Legal Affairs). We may reproduce rule 7C, which reads as follows:

"7C Selection Committee to select President, etc.:-

The Selection Committee consisting of a sitting Supreme Court Judge, to be nominated by the Chief Justice of India, the President and the Secretary, Ministry of Law and Justice (Department of Legal Affairs), based on merits, shall recommend persons for appointment as President, Senior Vice-President and Vice-Presidents."

Where as, it may be true that the Vice-President is to be appointed from amongst the Members of the Tribunal only, as may be clearly made out from rule 7A of the said Rules, but the method of appointment, from the provisions of rule 7C, appears to be by selection, which would be based upon merits. However, in support of the plea raised by the applicant through Shri A. K. Behera, learned counsel representing him, reliance is placed upon the information received by another Member of the Tribunal under RTI, wherein, no doubt, it is mentioned that all the posts in the Tribunal above the level of Member are filled up by promotion as per provisions contained in Section 252 of the Income Tax Act, 1961 and rules 7, 7A, 7B and 7C of the Rules of 1963. It is also mentioned that as per DOP&T norms, for selection against one vacancy, five incumbents are to be considered, and that the selection committee considered the five senior-most Vice-Presidents for one post of Senior Vice-President, and fourteen Members for five posts of Vice-Presidents, and further that on the basis of available character rolls, knowledge and suitability, the committee made its recommendations. Even though, it may appear prima facie that the method of appointment is by way of selection based on merit, but the information received by the colleague of the applicant, as mentioned above, would need clarification.

2. Issue notice to the respondents, returnable on 5.4.2010."

4. Pursuant to notice issued by this Tribunal, the respondents have entered appearance and by filing their reply, contested the cause of the applicant. The 1st respondent has raised some preliminary submissions. Inasmuch as, the same are by and large reproduction of the relevant observations made by the Hon'ble Supreme Court as regards the limited scope of interference by the courts and tribunals with the selection process, there would be no need to make a mention of the same. There are some preliminary objections as well based upon guidelines to be followed by DPCs in the matter of promotions, reference to which can be made while considering the contentions raised by the learned counsel representing the parties, if the necessity may so arise. In the reply on merits, it is inter alia pleaded that having remained unsuccessful in selection for the post of Vice-President, ITAT, the applicant cannot claim that he should be placed above those who are successful and selected on the higher post on merits. It is urged on the basis of the plea as mentioned above that the applicant should not be permitted to raise the issue as mentioned above having remained unsuccessful in the matter of selection, in which he willingly participated. In controverting the pleas raised by the applicant, reliance has been placed on some judicial

precedents, which we will mention hereinafter if the occasion may so arise. It is pleaded that merely because the pay band for the post of Vice-President and Member, ITAT is same, it cannot be contended that the post of Vice-President is not higher than the post of Member. In terms of recruitment rules, statutory in nature, it is further pleaded, the post of Vice-President is very much in existence and is filled by way of selection on merit, and that merely because the two posts are placed in the same pay band, it cannot be said that the hierarchy between the two has extinguished. Reference is then made to FR 22(III) which envisages promotion within same pay scale. Insofar as, the guidelines issued by DOP&T in the matter of promotion are concerned, it is the case of the respondent that the guidelines issued by DOP&T would not be applicable as selection of Vice-President, ITAT is governed by statutory rules. In terms of rule 7C of the Rules of 1963, the promotion on the post of Vice-President is made on the basis of selection based on merit, i.e., Members who are most meritorious are included in the select list. This issue, it is stated, has since already been examined by the Tribunal in the case of G. E. Veerabhadrappa v Union of India (OA No.463/2009, decided on 20.7.2009).

5. The third respondent has filed his separate reply. Inasmuch as, the defence projected by the official respondents and the third respondent is common, there would be no need to repeat the contents of the reply filed on behalf of the 3rd respondent. We may, however, only mention the pleadings made by the said respondent as regards the challenge to his selection. In that context, it is pleaded that the applicant has grossly abused the process of law to further his vested interest by levying vague allegations against the respondent. The applicant, it is stated, has tried to paint wrong image of the respondent before this Tribunal. As regards the case decided by the Hon'ble Supreme Court referred to by the applicant, it is pleaded that the applicant has deliberately not put forward the correct facts of the case. It is stated that the case aforesaid was a PIL, seeking inter alia enquiry about the fact that as to why the answering respondent who was working as Judicial Member, ITAT at Patna Bench was shunted out of the above Bench by the administration and some other Members of ITAT were sent on tour to Patna to do favours to one politician. The Hon'ble Supreme Court issued notice to President, ITAT to explain the position, who purportedly filed an affidavit explaining reasons for sending the answering respondent on tour. The answering respondent, it is pleaded, was not at all a party in the proceedings before the Hon'ble Supreme Court, and moreover, even otherwise, there was no direct or indirect allegations against the answering respondent in the said petition, rather going by the averments of the petition, in order to favour one politician, the answering respondent was sent out of Patna Bench and some other Members, ITAT were sent on tour. The Supreme Court, it is stated, took no note of the affidavit filed by President, ITAT, and that the applicant is only trying to paint wrong image of the respondent, whereas no observation whatsoever had been made by the Supreme Court with regard to the conduct of the respondent. The PIL was dismissed by the Supreme Court without any observation whatsoever against the respondent. It is then stated that the Hon'ble Judge who also happened to be the chairman of the selection committee, was a member of the Full Bench of the Supreme Court which heard and disposed of the PIL/Petition, and the same President, ITAT who wrote the ACR of the respondent for the relevant period was a member of the selection committee. It is the case of the 3rd respondent that no adverse comments in his ACRs were ever communicated to him. The ACRs recorded by President, ITAT who had filed affidavit before the Supreme Court were duly considered by the selection committee while recommending his name for promotion on the basis of selection as Vice-President, ITAT. The same President who is said to have filed the affidavit before the Supreme Court, as mentioned above, was a member of the high powered committee, which unanimously recommended the name of the respondent for the post of Vice-President, ITAT. Without prejudice to the above, it is further pleaded by the 3rd respondent that the affidavit tendered by President, ITAT before the Supreme Court was filed without any discussion or consultation or without any show cause to the respondent, and that the respondent was not even party to the proceedings in the PIL aforesaid for the simple reason that

there were no allegations whatsoever leveled against him, and even if the allegations are deemed to be correct, even then the same President, ITAT did not pass any adverse remarks in the ACR of the respondent considering the overall merit and improvements in the functioning of the respondent.

6. The applicant has filed rejoinder to the written statements filed on behalf of the respondents 1 and 3, but there would be no need to make mention of contents thereof as the same appear to be by and large reiteration of the pleadings made in the OA. Nothing specifically based upon the averments made in the rejoinder has been pointed out to us during the course of arguments.

7. We have heard the learned counsel representing the parties and with their assistance examined the records of the case.

8. Shri Rakesh Khanna, Sr. Advocate, assisted by Shri A. K. Behera, contends that as per recommendations of the 6th CPC, the pay scales of Member and Vice-President, ITAT are to be the same. The pay scale was bracketed in the same pay band, i.e., Rs. 75000-80000 (HAG+). However, the 1st respondent vide note dated 4.8.2009 specifically stated before the chairman and members of the selection committee that the pay scale of Vice-President was Rs 24050-650-26000 (pre-revised). The recommendations of the CPC were to be implemented from 1.1.2006. It is urged that the 1st respondent deliberately concealed the fact that pursuant to recommendations made by the 6th CPC, pay scale of both Member and Vice-President, ITAT has become the same. The 1st respondent instead of referring to the new pay scale, made a mention of the pre-revised pay scale in the note dated 4.8.2009. It is then urged that the respondents concealed from the chairman and members of the selection committee that DOP&T OM dated 24.3.2009 would require all the ministries and departments to amend the service/recruitment rules consequent to the issuance of OM dated 29.8.2008 notifying new pay scales, pay bands and grade pay in place of pre-revised pay scales, especially where some of the pre-revised pay scales have been merged with other and some others are upgraded. On the basis of the facts as stated having not been brought to the notice of the selection committee, it is urged that the selection committee was misled to believe that it would be a case of selection. Put differently, the contention is that if the facts as mentioned above were brought to the notice of the selection committee, appointment on the post of Vice-President would have gone simply by seniority, and thus the pay scale of Members and Vice-President being the same and there being requirement to amend the rules accordingly, would have meant that the recruitment on the post of Vice-President would be by seniority. We find absolutely no merit in the aforesaid contention of the learned counsel. We are of the firm view that mere mention of the pre-revised scale of the post of Vice-President in the note dated 4.8.2009 would be of no meaning and consequence. Even if the selection committee was to be apprised of the new pay scale of Vice-President, ITAT, which may be equivalent or bracketed with that of Member, ITAT, the same would have made no difference. It could not have been considered by the selection committee that since the pay scale of Member and that of Vice-President is to be the same, there would be no need to make selection from amongst those who are eligible and in the zone of consideration, and that only seniority would matter. Even if the selection committee was to note that the pay scales of Members and Vice-President, ITAT have been bracketed and for that purpose necessary amendment in the rules had been carried out, the same also would have made no difference in the matter of selection of those who were under consideration. It would be seen that Accountant Member, Judicial Member, Vice-President and President have been separately defined under rule 2 of the Rules of 1963. The eligibility criteria for appointment on the post of Member \mp Judicial or Accountant, is separately prescribed under rule 3. Any one who is eligible as per the criteria provided under the rules can apply for selection on the post of Member. It is an open competition available to all who may answer the eligibility

criteria. The method of recruitment on the post of Member is provided under rule 4. The selection of Member has to be made by a board consisting of a nominee of the Minister of Law, Secretary to the Government of India in the Ministry of Law (Department of Legal Affairs), the President or the Senior Vice-President of the Tribunal, and such other persons, if any, not exceeding two, as the Minister of Law may appoint. The nominee of the Minister of Law is to be the chairman of the selection board. The selection board is to recommend persons for appointment as Members from amongst the persons on the list of candidates prepared by the Ministry of Law after inviting applications therefor by advertisement or on the recommendations of the appropriate authorities. The Central Government after taking into consideration the recommendations of the selection board is to make a list of persons selected for appointment as Member. As per provisions contained in rule 4A, the selection board is to evolve its own procedure, provided that where the suitability of a candidate is judged from his/her viva voce, each member of the board shall evaluate the performance and award marks out of the maximum marks fixed by the board. A person appointed on the post of Member has to be on probation for a period of two years, and at any time during the period of probation and without any reasons being assigned, such person may be discharged from service as Member. As per provisions contained in rule 7A, the Central Government may appoint from amongst Members one or more persons as Vice-President or, as the case may be, Vice-Presidents, of the Tribunal to assist the President in the discharge of his functions. Senior Vice-President of the Tribunal, as per provisions contained in rule 7B, is to be appointed by the Central Government from amongst Vice-Presidents. President, Senior Vice-President and Vice-President are to be appointed on the basis of selection which is to be made under rule 7C, which reads as follows:

"7C Selection Committee to select President, etc.:-

The Selection Committee consisting of a sitting Supreme Court Judge, to be nominated by the Chief Justice of India, the President and the Secretary, Ministry of Law and Justice (Department of Legal Affairs), based on merits, shall recommend persons for appointment as President, Senior Vice-President and Vice-Presidents."

Seniority amongst members is determined in view of the provisions contained in rule 10. What clearly emerges from the scheme of the Rules of 1963 is that Members, Vice-Presidents, Senior Vice-President and President, ITAT, are different posts. Appointment of Member is by way of direct recruitment open to all who may answer the eligibility criteria. It is from amongst the Members only that appointments have to be made on the post of Vice-President, but by a method of selection. The competition is open only to Members. The mere fact that the pay scale of Member and Vice-President has been bracketed would not make the post of Member equivalent to that of Vice-President, and there would be no question in teeth of the rules as mentioned above for a senior Member to be automatically appointed as Vice-President. Even the senior-most Member has to go through a process of selection as envisaged under rule 7C. It is in consideration of the provisions of the rules that we have said hereinbefore that the mere fact that the selection committee was not informed of the pay scale of Member and that of Vice-President to be the same as per recommendations of the 6th CPC and non-amendment of the rules or non-information of the amendment in the rules in that regard, would be of no meaning and consequence. Further, in view of FR-22(III) promotion in the same pay scale can be made.

9. The main plea raised by the learned counsel representing applicant B. R. Mittal is that if the recruitment on the post of Vice-President is by way of promotion by selection, the rules or instructions issued by the Government from time to time as regards such promotions, i.e., promotion on merits, were to be the governing criteria for making selection by the committee. The selection committee, in other words, it is suggested, could not devise its own procedure to

find out as to who was better amongst those who were eligible, and that the instructions of the Government being that there would be no supersession and a senior person would have to be appointed if he may have the requisite benchmark, had to be the governing criteria for selection. In the alternative, it is urged that even if by virtue of statutory rules governing recruitment on the post of Vice-President, ITAT, it was a case of selection there being no criteria having been adopted by the selection committee, the one envisaged under the Government instructions had to be followed. We will deal with the alternative submission raised by the learned counsel later. Insofar as, the first contention of the learned counsel as noted above is concerned, we may mention that this precise controversy came to be debated before us in OA No.463/2009 which was decided on 20.7.2009 in the matter of G. E. Veerabhadrapa (supra). The applicant in the said case was initially appointed as Member, ITAT, and at the time when he filed the OA, was holding the post of Vice-President. He came to be selected as Vice-President along with others on the same date. In the panel prepared by the selection committee held on 15.9.2004, he was recommended for appointment on the post of Vice-President at serial number 2. It was his case that he being the seniormost Member, ought to have been placed at serial number 1 in the order of merit by the selection committee. The case of the applicant was that OMs dated 8.2.2002 and 18.2.2008 which are instructions issued by the Government as regards promotion merit, had to be applied, and if so done, the applicant answering the requisite benchmark and being senior, ought to have been recommended at serial number 1. The plea raised by the applicant was that as per rule 8 of the Rules of 1963, a Member, ITAT is a member of the General Central Service, Class-I Gazetted. As per rule 7A, the Government has the power to appoint from amongst the Members of ITAT one or more persons as Vice-President to assist the President in the discharge of his functions. In the said Rules no specific procedure for promotion to the post of Vice-President has been provided. However, under rule 13, the conditions of service of Member, ITAT in respect of matters for which no provision is made in the Rules would be the same as may be for the time being applicable to other employees of the Government of India of a corresponding status. The post of Vice-President, ITAT is a post above the level of Joint Secretary to the Government of India, and in fact is equivalent to Additional Secretary, while the post of Senior Vice-President is equivalent to the post of Special Secretary to the Government of India. Promotion to the post of Joint Secretary and above under the Government of India is governed by DOP&T OM dated 18.2.2008 read with OM dated 8.2.2002. According to the OM dated 8.2.2002 officers from the feeder grade are to be judged fit and unfit for promotion with reference to the prescribed benchmark of "very good". There would, however, be no supersession in the matter of promotion. Prior to issuance of OM dated 18.2.2008, the Central Government was following the uniform policy of promoting officers from the feeder grade who would have four "very good" gradings in five ACRs which are taken into consideration for such promotion. It was further the case of the applicant that insofar as, Shri R. V. Eswar, the 3rd respondent arrayed in the OA was concerned, he was initially appointed as Member, ITAT from the 1990 panel w.e.f. 11.11.1991. He completed his period of probation w.e.f. 10.11.1993 and was thus substantively appointed as Member, ITAT w.e.f. 11.11.1993. Thus as Member, ITAT, the 3rd respondent remained junior to the applicant from the very beginning of his career as Member, ITAT. On 7.1.2005 the Central Government appointed the applicant as well as the 3rd respondent as Vice-President, ITAT under Section 252(4) of the Income Tax Act, 1961. In the said order the name of the applicant was shown at serial number 2, while the name of the 3rd respondent was shown at number 1. It was mentioned in the order that the appointment to the post of Vice-President had been made in the order of merit as indicated therein. The 3rd respondent, thus became senior in the grade of Vice-President. It was urged on behalf of the applicant that as per rules and instructions for promotion at the level of Joint Secretary and above of the Central Government, which are mutates mutandis applicable to the ITAT, the 3rd respondent could not have stolen a march over the applicant, when both of them were found fit for promotion in the same selection and when the respondent had all along been junior to the applicant. The plea raised by the respondents, on the other hand,

was that in terms of the Rules of 1963, which are statutory in nature, the selection committee consisting of members as mentioned above, has to recommend persons for appointment as President, Senior Vice-President and Vice-Presidents, ITAT, and that the selection being governed by statutory rules, merit alone would prevail and seniority could not be the sole criteria for appointment on the post of Vice-President and others. After reproducing the provisions of rule 7C, we observed as follows:

"The method of selection of President, Senior Vice President and Vice Presidents is thus governed by statutory rules, and by virtue of provisions contained in rule 7C, it is a case of pure and simple selection, where seniority of a Member cannot be the sole determining criteria"

We find no reason to take a different view than the one taken by us in Veerabhadrapa (supra), even though we find that there may be requirement to elaborate on the issue, in the context of the contentions that have been raised by the learned counsel representing the parties. It may be recalled that the counsel representing the applicant in Veerabhadrapa's case (supra) when confronted with the rule position, sought relief on other grounds mention whereof has been made in the judgment, and it is for that reason that there would be need to elaborate.

10. Shri Rakesh Khanna, learned Senior Advocate representing the applicant, contends that insofar as selection on the post of Member is concerned, as per rule 4A the selection board can evolve its own procedure, but in case, suitability of a candidate is to be judged from his or her viva voce, each member of the board shall evaluate the performance and award marks out of the maximum marks fixed by the board. Insofar as, appointment on the posts of President, Senior Vice-President and Vice-President is concerned, it is nowhere mentioned that the selection committee can evolve its own procedure. There is nothing provided in the rule where suitability of a candidate may be decided on the basis of viva voce either. In absence of any procedure to be followed by the selection committee, it is urged that the procedure for selection by promotion as envisaged under DOP&T OMs dated 8.2.2002 and 18.2.2008 has to be followed. By way of an illustration, the learned counsel argues that the selection committee followed the instructions or guidelines issued by the Government as regards zone of consideration, and that if the instructions as regards zone of consideration were followed in absence of such guidelines in the rules, the procedure for promotion on merit as envisaged in the two OMs referred to above should have also been followed. It is also urged that it is specifically provided in rule 13 that the conditions of service of a Member in respect of matters for which no provision is made in the Rules shall be the same as may be for the time being applicable to other employees of the Government of India of a corresponding status, and inasmuch as, there is no provision in the Rules of 1963 as to how promotion or selection is to be made, as per provisions contained in rule 13, the memos dated 8.2.2002 and 18.2.2008 would govern the field, further contends the learned counsel.

11. We may deal with the later argument of the learned counsel, as noted above, first. Rule 13 reads as follows:

"13. Other Conditions of Service:-

The conditions of service of a member in respect of matters for which no provision is made in these rules shall be the same as may be for the time being applicable to other employees of the Govt. of India of a corresponding status."

We are of the considered view that conditions of service cannot possibly include the procedure or method of appointment/selection. The conditions of service can be such as the method of

calculating pension, various perks or facilities that a Member may be entitled to, but the conditions of service as mentioned above, cannot include the mode, method and procedure of recruitment/selection. We find the first argument of the learned counsel, as noted above, to be also equally devoid of merit. It may not have been specifically said in rule 7C, as has been said in rule 4A, that the selection board shall evolve its own procedure, but that would not mean that the procedure to be adopted by the selection committee would be as envisaged under OMs dated 8.2.2002 and 18.2.2008. Once, the method of recruitment on the post of Vice-President is by way of selection, the selection committee would be well within its power and jurisdiction to evolve its own procedure, whether so said in the rules or not. It may be recalled that prior to issuance OMs dated 8.2.2002 and 18.2.2008, wherein the element of supersession in case an employee may have the requisite benchmark was not involved, the instructions issued by the Government as regards the method of appointment or promotion by selection clearly stipulated that concerned DPC would have a right to evolve their own procedure of making selection. Once, the field is governed by rule 7C, the instructions contained in OMs dated 8.2.2002 and 18.2.2008 would have no role to play. In the process of selection, supersession is possible, as the concerned committees or DPCs have to find out the best person suited for the job irrespective of his seniority. Seniority, at the most, would give right to a person to be considered if he may come within the zone of consideration, but not an automatic right of selection or promotion, as the case may be. Instructions, when a particular situation may be specifically covered under the rules, cannot be made applicable. The rule would have precedence over the instructions. The Hon'ble Supreme Court in *N. Suresh Nathan & Others v Union of India* [AIR 2010 SC 2171] held that where rules do not mention criteria of promotion as seniority-cum-merit, same is selection, and the question of seniority is not relevant in selection. It has also been held that most meritorious person is the most suitable person to be promoted for selection post. In *General Manager, Uttaranchal Jal Sansthan v Laxmi Devi & Others* [AISLJ 2010 (1) 43 SC] the Hon'ble Supreme Court held that when the rules were framed by the State in terms of the proviso to Article 309 of the Constitution, the same would prevail over circulars/letters which have no force of law. We may also make a mention of the judgment of this Tribunal at Chennai Bench on identical facts seeking identical relief in the matter of *Uttam Bir Singh Bedi v Union of India* [OA No.1001/2009 decided on 12.3.2010], wherein it has been held that "The provisions therein clearly show that the committee which is headed by sitting judge of the Supreme Court has to recommend persons for appointment as President, Senior Vice President and Vice President based on merits. Such being the case, we are unable to agree with the submissions made by learned counsel for the applicant that seniority should be the criteria for selection". Reliance placed by the learned counsel on the observations of the Hon'ble Supreme Court in *Comptroller and Auditor General of India v Mohan Lal Mehrotra* [AIR 1991 SC 2288] that even though, administrative orders cannot be issued in contravention of the statutory rules, but they could be issued to supplement the statutory rules, is of no relevance in the facts of the present case, as the statutory rules for making selection are in position and the instructions dated 8.2.2002 and 18.2.2008 cannot be said to be supplementing the statutory rules. The learned counsel also places reliance upon the judgments of Hon'ble Supreme Court in *H. C. Puttaswamy v Hon'ble Chief Justice of Karnataka High Court* [1991 Supp (2) SCC 421], and *UPSC v K. Rosiaia* [JT 2005 (11) SC 1], to contend that procedural fairness is the main requirement in the administrative action and that fairness or fair procedure in the administrative action ought to have been observed, but these judgments would be of no meaning and consequence unless it is further elaborated as to what unfairness has been committed in the procedure of making selection on the post of Vice-President, ITAT, but for stating that the instructions governing the field as contained in OMs dated 8.2.2002 and 18.2.2008 should have guided the selection committee to make selection, nothing else is urged.

12. Insofar as, the alternative argument of the learned counsel as noted above is concerned, all that has been urged by him is that when there is no criteria prescribed and/or adopted by the

selection committee, the one envisaged under the Government instructions has to be followed, as surely, as regards the matters which may not be covered under the rules, the instructions can be followed. We do not find any merit in this contention of the learned counsel as well. Once, the criteria for appointment on the post of Vice-President, ITAT as envisaged under rule 7C of the rules of 1963 is selection, the concerned committee, as mentioned above, is free to evolve its own procedure. The committee is free to adopt the procedure as it may deem appropriate. If the selection committee in view of the fact that the appointment was to be made on a fairly high post, was of the view that the best person, of course, who may be under the zone of consideration, had to be chosen irrespective of his seniority, the instructions issued by the Government for making merit-based promotions would be of no meaning and consequence. Merit-based promotions would inherently involve the element of supersession, and, therefore, the instructions issued by the Government would be wholly inapplicable.

13. It is then urged by the learned counsel that there was nothing before the selection committee but for the ACRs of Members under consideration for appointment on the post of Vice-President, and that the selection has been done only on the basis of ACRs, and if the applicant may have been ignored because of some of his ACRs which may be below benchmark, then unless communicated, such ACRs could not be taken into consideration. For the contention as mentioned above, the learned counsel places reliance upon the judgments of the Hon^{ble} Supreme Court in *Dev Dutt v Union of India* [(2008) 8 SCC 725] and *Abhijit Ghosh Dastidar v Union of India* [SLP (Civil) No.26556/2004 decided on 22.10.2008]. It is urged that it was incumbent upon the respondents to bring to the notice of the selection committee the judgments recorded by the Hon^{ble} Supreme Court. We do not find any merit in this contention of the learned counsel at all. Present is not a case where selection may have been made only on the basis of ACRs, even though the ACRs were before the selection committee. It may be recalled that the selection on the post of Vice-President is to be only from amongst those who are already Members, ITAT. The selection committee, amongst others, consisted of the President, ITAT as a member. The head of the institution can well be said to be definitely aware of the efficiency, performance, capacity to work, quality of judgments and all other attributes of the Members in the zone of consideration for selection. All such inputs, as mentioned above, are relevant when it is a case of selection. ACR dossiers of the concerned Members and vigilance records may be before the selection committee and would be naturally considered for appointment on the post of Vice-President, but that was not to be the sole criteria. There is no allegation of bias against any member of the selection committee which is a high powered committee, consisting of one of the seniormost Judges of the Hon^{ble} Supreme Court of India. All that is being urged is that if the selection was made only on the basis of ACRs which alone were before the selection committee, and those who have been selected had better gradings in their ACRs, those who may have lesser gradings ought to have been intimated of the same. We do not find any merit in the contention as noted above in the context of the facts and circumstances of the case, and in particular the provisions contained in rule 7C of the Rules of 1963, adverted to above.

14. Insofar as, the contention of the learned counsel by way of illustration of the selection committee following the procedure contained in the instructions as regards zone of consideration is concerned, we may only mention that in case of selection, there ought to be more than one person against one post, as otherwise it would be a pure and simple case of appointment by seniority. The selection committee had necessarily to make a choice from amongst others who may be the seniormost, and if the zone of consideration as decided by the selection committee was to be the same as may be provided under the Government instructions, it would not automatically follow that the procedure for promotion on merits emanating from instructions ought to have been followed.

15. The last contention of the learned counsel is that it is an admitted position that the selection committee had not prepared any chart or sheet of comparison regarding performance of the Members considered for appointment on the five posts of Vice-President, which would clearly show that there was no other material available before the selection committee, but for the ACRs. We have already dealt with this issue and may only add that the mere fact that the selection committee did not prepare any chart or sheet of comparison regarding performance of Members would not mean that comparative merit was not considered by the selection committee. It is absolutely inherent in the method of selection that the respective merit of all the Members would have been considered. There was no requirement at all to make a mention of the respective merits of the Members under consideration for appointment on the post of Vice-President. Mention of comparative merit may not have been made, and it appears to us, was rightly not made, as that would be rather counter productive. To illustrate, if a particular Member was not found meritorious enough to be appointed as Vice-President because of some of his attributes which may be adverse, an argument would surface that unless such an attribute was to be put to the concerned Member, the same could not be taken into consideration. Making mention of such attributes would also result into bitterness. We are of the firm view that when selection is made by a high powered committee and there are not even allegations of any bias or favouritism, least there being any material for the same, the selection made by such committee would need no interference by the courts or tribunals. A citizen must have faith in the system rather than crying foul when he has not been able to make it on merits.

16. Having observed as above, we may make a mention of some judicial precedents which would be relevant for adjudicating the controversy in issue. The Hon'ble Supreme Court in *National Institute of Medical Health & Neuro Sciences v Dr. K. Kalyana Raman & Others* [AIR 1992 SC 1806] has held that "the function of the Selection Committee is neither judicial nor adjudicatory. It is purely administrative. The High Court seems to be in error in stating that the Selection Committee ought to have given some reasons for preferring Dr. Gauri Devi as against the other candidate. The selection has been made by the assessment of relative merits of rival candidates determined in the course of the interview of candidates possessing the required eligibility. There is no rule or regulation brought to our notice requiring the Selection Committee to record reasons. In the absence of any such legal requirement the selection made without recording reasons cannot be found fault with". ... Administrative authority is under no legal obligation to record reasons in support of its decision. Indeed, even the principles of natural justice do not require an administrative authority or a Selection Committee or an examiner to record reasons for the selection or non-selection of a person in the absence of statutory requirement". The Supreme Court in *Inderjeet Khurana v State of Haryana & Others* [(2007) 3 SCC 102] has held that "In the absence of the Rules prescribing any method of recruitment, the appointing authority was at liberty to follow any reasonable and appropriate procedure for selection. In this case, the selection was made purely on the basis of merit. The procedure adopted for assessing the inter se merit on the basis of five years' ACRs and interview (set out in para 6 above) is reasonable and does not suffer from any infirmity, as rightly held by the High Court".

17. Insofar as, challenge to the selection of the 3rd respondent on the basis of adverse material against him is concerned, it would be seen that the Hon'ble Supreme Court in *Rajiv Rajjan Singh Lalan v Union of India* [(2006) 6 SCC 613] dealt with writ petitions that were filed in public interest litigation by the petitioners who were Members of Parliament. Insofar as, the 3rd respondent may be concerned, the allegation as made in the petitions was only to the effect that he had been transferred and other Members inducted in his place to show favouritism to the concerned parties. There was no allegation made against the 3rd respondent. In fact, the strain of the pleadings was that the 3rd respondent was the person who would have shown no favours, and

just for that reason he was replaced by others by transferring him. In regard to the said allegation, it appears that the President, ITAT was required to file an affidavit, wherein, of course, reasons for transferring the 3rd respondent had been mentioned. It was stated that the 3rd respondent had left the country without obtaining permission for which he had been issued a show cause notice to explain his conduct, and further that the respondent was made to sit on the Bench with the senior-most Accountant Member to inculcate judicial discipline, decorum and proper behaviour, as the orders passed by him were not only arbitrary but would also display judicial immaturity of the respondent. It is an admitted position that no comments as regards the contents of the affidavit filed by President, ITAT before the Supreme Court have been made in the judgment. The 3rd respondent was indeed issued a show cause, but after he responded to the same, no action at all was taken against him. In none of the ACRs of the 3rd respondent any remarks as regards judicial indiscipline, decorum and proper behaviour ever came to be made by the President, ITAT. The very fact that no action was taken against the respondent in view of the show cause notice issued to him after he submitted his reply, would clearly manifest that the impression formed by the President, ITAT with regard to leaving the country without permission may not be correct, or that the explanation furnished by the respondent was accepted. Insofar as, other attributes as mentioned in the affidavit are concerned, suffice it to say that it is possible that the 3rd respondent after he was made to sit with the seniormost Accountant Member on the Bench, may have improved and improved tremendously. We are saying so for the reason that the same very President who filed the affidavit aforesaid was a member of the selection committee, and had there been even an inkling in his mind as regards the adverse comments made by him in the affidavit, there would have been no question that the respondent would be selected. One of the Hon'ble Judges deciding the PIL in which the affidavit aforesaid came to be filed, was heading the selection committee. There was no question that if the Hon'ble Judge may have drawn an inference against the 3rd respondent as per the contents of the said affidavit, the respondent would have been selected. Assuming that as per the very nature of his job, a Judge has to decide number of cases, and it may not be possible for him to remember each and every case, but there is no question for the President, ITAT to have forgotten the affidavit he had filed before the Apex Court. We are absolutely convinced that the contents of the affidavit may be a prima facie opinion of the President, ITAT, or in any case, the adverse comments made in the affidavit against the 3rd respondent would have outlived their effect, if the 3rd respondent may have made tremendous improvement in his work and conduct. Cases are not lacking where a person who is told about his deficiencies may become serious to bring about a complete change in his attitude and while doing so, may even become better than others. In the case of the respondent, it can be legitimately presumed so, as surely, if he had not made any improvement in his work and conduct, there was no question that the President, ITAT, who, as mentioned above, was a member of the selection committee and was the same person who had given the affidavit, would have not pointed out about the deficiencies of the 3rd respondent as mentioned in his affidavit before the Apex Court, and thus there was no question that the respondent would have been selected. No other arguments have been raised in support of the Original Application filed by B. R. Mittal.

18. Applicant Sunil Kumar Yadav belongs to OBC category. He was in practice as an advocate since 1980. On 21.3.1996, he, on his selection as Member of the Tribunal, was appointed as such initially on two years' probation, which was completed by him on 20.3.1998. In terms of rule 10, in the seniority list of Members as on 4.2.2009, the name of the applicant is shown at serial number 17 in the list of Members. The Members at serial numbers 2 and 3 have already retired. The Member at serial number 4 has since resigned. The Member at serial number 5 has been selected for appointment as Senior Vice-President. The Members at serial numbers 6, 7, 8 and 9 have been appointed as Vice-Presidents. The Member at serial number 10 has since retired on 14.3.2009 and the Member at serial numbers 11 and 15 have been appointed as Vice-Presidents. In the manner aforesaid, against the available sanctioned strength of nine

posts of Vice-Presidents, as on date including the name of Shri R. V. Eshwar, there are seven Vice-Presidents, leaving two clear vacancies in the cadre. Shri P. Mohanranjan was to retire on 6.11.2009, and in the manner aforesaid, there would be clear four vacancies in the cadre of Vice-President after his retirement, and notification of the name of Shri Eshwar as Senior Vice-President. The applicant, it is pleaded, in the circumstances as mentioned above, would be fifth in the seniority of Members eligible for appointment as Vice-President. The applicant, who is an OBC category candidate, claims reservation on the post of Vice-President, ITAT. On the basis of a judgment rendered by this Tribunal in OA No.463/2009 decided on 20.7.2009 in the matter of G. E. veerabhadrapa v Union of India, it is pleaded that appointment on the post of Vice-President is by direct recruitment, and is neither classified as 'scientific' or 'technical', nor is a post for conducting research or for organizing, guiding and directing research, and thus, in any case, the post being a civil post and not being 'scientific' or 'technical' post, reservation for OBC shall also be applicable to the post to the extent of 27%. It is the case of the applicant that even though the respondents have applied reservation policy in the matter of appointment of Member, however, the said benefit has not been made available in the matter of appointment to the post of Vice-Presidents to the Members belonging to OBC. It is pleaded that prior to pronouncement of judgment of this Tribunal in G. E. Veerabhadrapa (supra) ostensibly all had misconstrued appointment to the post of Vice-President of the Tribunal as by way of promotion than direct recruitment, however, in view of the said judgment, which, it is stated, has since attained finality in the absence of any challenge thereto, appointment to the post of Vice-President being by way of direct recruitment, the respondents would have to apply reservation to the OBC categories. It is further pleaded that the official respondents have initiated the process for filling up of three vacancies in the cadre of Vice-President from amongst Members without reserving any post in favour of the Members belonging to OBC categories. However, in the absence of benefit of reservation extended to Members belonging to OBC to the extent of two posts, appointment in the cadre of Vice-President to that extent from amongst Members belonging to categories other than those belonging to OBC, would be illegal. De hors the position of law in this behalf, the respondents, it is stated, are proceeding ahead to fill up the three posts in the cadre of Vice-President from amongst Members without adhering to the reservation to the extent of 27% in favour of the Members belonging to OBC. The reservation to the extent of 27% in favour of OBC is not to be adhered to, as per the information received by the applicant. In wake of circumstances as mentioned above and in view of the right of the applicant as an OBC category candidate for reservation, the applicant pleads that the selection process for appointment to the three posts of Vice-President would be illegal and the same would need to be quashed and in consequence thereof, a direction needs to be given to the respondents to fill up two posts in the cadre of Vice-President from amongst eligible Members belonging to OBC category, giving the benefit of 27% reservation.

19. Pursuant to notice issued by this Tribunal, the respondents have entered appearance and by filing their respective counter replies, hotly contested the cause of the applicants. Before we may refer to the averments made in the written statement, we may mention that while issuing notice in the case, on 9.10.2009, ad interim, we directed that appointment on two posts of Vice-President of ITAT in the general category would be subject to decision of the present OA. It appears that during the pendency of the OA, selections have been made and the applicant has, therefore, challenged the selection of respondents 4 to 7. In the counter reply fled on behalf of the respondents it has inter alia been pleaded that posts in grades above the lowest grade in Group 'A' are exempted from the purview of reservation orders. The reservation policy is stated to have been introduced by the Government for advancement of weaker sections of the society, but the same is sought to be made applicable in the matter of alleviation to the post of Vice-President, ITAT. In terms of general instructions issued by the DOP&T vide OM dated 13.8.1990 as modified by OM dated 8.9.1993 and dated 13.1.1995, 27% of the vacancies in civil posts and

under the Government of India to be filled through direct recruitment, are to be reserved for the OBC, but in the same very instructions it is, however, provided that the reservation shall not apply to persons/sections mentioned in column 3 of the Schedule appended thereto. Further, vide OM dated 13.5.1994 scientific and technical posts in Group 'A' were exempted from the purview of reservation orders for OBCs. The said OM reads as follows:

"Subject: Exemption of Scientific and Technical posts from the purview of reservation orders for OBCs.

The undersigned is directed to refer to this Department's O.M. No.9/2/73-Estt.(SCT) dated 23.6.1975, (see Order No.16 under Section 2) wherein such of the technical posts as satisfying all the following conditions are exempted from the purview of reservation orders.

The post should be in grade above the lowest grade in Group 'A' of the Service Concerned.

They should be classified as 'Scientific' or 'Technical' (in terms of Cabinet Secretariat, Department of Cabinet Affairs) O.M. No.85/11/CF-6(1) dated 28.12.1961 and

These should be posts for conducting research or for organizing guiding and directing research

Orders of the Minister concerned are required to be obtained before exempting any post satisfying the above conditions from the purview of the scheme of reservations.

2. With the introduction of the Scheme of reservation for Other Backward Classes, doubts have been expressed by certain Ministries/ Departments as to whether the above-said provision of OM, dated 23.6.1975, would be applicable to the reservations for OBCs also. As the reasons for the grant of exemption from the purview of reservation orders in respect of SC/ST is equally applicable for the grant of such exemption in the case of OBC, it is clarified that the provisions of OM, dated 23.6.1975, for the grant of exemption from the purview of reservation orders would be equally applicable to reservation for OBCs."

It is the case of the respondents based upon the instructions reproduced above that the posts in the grades above the lowest grade of Group 'A' are exempted from the purview of reservation orders. It is further their case that there cannot be any reservation for OBC category in appointment/promotion to the post of Vice-President, ITAT. Insofar as, the decision in the matter of Veerabhadrapa (supra) relied upon by the applicant is concerned, it is the case of the respondents that vide order dated 4.2.2010 this Tribunal made it clear that the ratio of the said judgment is that the post under contention was to be filled by way of selection and not by promotion. The judgment dated 20.7.2009 in the said case has been clarified vide order dated 4.2.2010 in a misc. application filed on behalf of the respondents that the findings recorded therein as regards the post under contention being a direct recruitment post, would be obiter. It is the case of the respondents that the post of Vice-President, ITAT has to be filled by way of selection based on merit from amongst those who are Members, ITAT and, therefore, it would be a case of promotion by way of selection, and once, it is not a case of direct recruitment, the applicant cannot claim reservation on the post of Vice-President. The method of direct recruitment and the selection method for the post of Member is provided in rules 4 and 4A of the Rules of 1963. In terms of the said rules, a selection board, as prescribed therein, has to adjudge

a candidate for his appointment as a Member, on the basis of viva voce, while in terms of rule 7C, it is not a board but a committee, which considers a Member for his appointment as Vice-President on the basis of selection based on merit. The reservation, it is pleaded, would not apply in the matter of promotion, and that when an incumbent of a post is eligible for appointment to a higher post, may be on the basis of selection based on merit, it cannot be called a direct recruitment. Insofar as, the facts of the case are concerned, the same are not much in dispute. The identifiable issues are pure and simple legal. The applicant, in short, states that the post of Vice-President, ITAT, is to be filled by way of direct recruitment, and if that be so, there has to be reservation of 27%, and inasmuch as, if reservation was to be provided, two posts of Vice-President would have gone to the share of OBC category candidates, and the applicant being an OBC category candidate, would have been appointed as Vice-President, ITAT.

20. The applicant has filed rejoinder. A counter reply has also been filed by the 7th respondent, but inasmuch as, the pleas raised in contesting the cause of the applicant are similar as taken by the official respondents, there would be no need to mention the pleadings made in reply filed by the said respondent. Insofar as, OA No.2389/2009 filed by Sunil Kumar Yadav is concerned, even though in the pleadings the points raised by B. R. Mittal in his OA No.526/2010 have not been taken, but during the course of arguments the said points have been urged in support of both the OAs.

21. Before we may proceed any further in this case, we may mention that it is the common case of the parties that if the post of Vice-President, ITAT is to be filled by way of promotion, there would be no reservation available to the applicant. It is conceded position that if at all 27% reservation is to be made for candidates belonging to OBC category, it would be applicable only as regards direct recruitment and not promotion. There is contest as regards reservation of 27% for OBC category candidates across the board, i.e., relating to all the civil posts. Whereas, counsel for the applicant would contend that 27% reservation for OBC candidates has to be provided whatever be the civil post, the counsel representing the respondents would contend that as per the very instructions relied upon by the applicant, there is no reservation in direct recruitment, insofar as it may pertain to posts in the grade above the lowest grade in Group 'A' of the service concerned. It is also urged that reservation is not a right, and that the provisions in that regard contained in the Constitution, rules, regulations, office memoranda or instructions are enabling, and whereas, it may be permissible for the Government to provide reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes, no one can claim it as a matter of right; in other words, no writ would be competent to direct the respondents to necessarily provide reservation in every post. We may go into this issue only if our finding is to be that recruitment to the post of Vice-President, ITAT is by way of direct recruitment only. We repeat and reiterate that the learned counsel for parties are ad idem that there would be no reservation for any category if the appointment on the post of Vice-President is to be made by way of promotion. For the contention that the post of Vice-President should be filled by method of direct recruitment, exclusive reliance of the applicant is on the provisions of the Rules of 1963 and the judgment of this Tribunal recorded in the matter of Veerabhadrapa (supra). We may mention that it is the case of the applicant himself that before the said judgment, the provisions of the statute were being construed by all concerned as if the post of Vice-President was to be filled by way of promotion, and it is only by way of the judgment, which, according to him, has attained finality, that the post of Vice-President has to be filled by way of direct recruitment. The exclusive reliance of the applicant being on our own judgment, it would be appropriate at this stage itself to see the controversy as was subject matter of debate and decision by us. The facts of the case, the rival contentions of learned counsel representing the parties and the decision given by us have since already been referred hereinbefore. We may reiterate that the only controversy raised by the applicant was that he being the seniormost Member, ITAT, ought to have been

placed at serial number 1 in the order of merit by the selection committee. While referring to rule 7C of the Rules of 1973, which was inserted vide notification dated 26.4.2004, we observed that the method of selection of President, Senior Vice-President and Vice-President is thus governed by statutory rules, and by virtue of provisions contained in rule 7C, it is a case of pure and simple selection, where seniority of Member cannot be said to be the sole determining criteria. The counsel representing the applicant, confronted with the position aforesaid, advanced other arguments which may not be relevant for the purpose of deciding the controversy in issue. Suffice it may, however, to say that the contest insofar as the parties were concerned, was that insofar as the applicant wanted promotional criteria as emanating from the OMs referred to above to be applied, the respondents endeavoured to show that the criteria for promotion would be as envisaged under the statutory rules. The plea raised by the applicant as regards appointment on the post of Vice-President as per promotion criteria provided in the OMs referred to above, was repelled. The observations/findings that came to be recorded in that regard, read as follows:

"However, we may mention that insofar as OM dated 8.2.2002 and 18.2.2008 are concerned, on which alone the case of the applicant is sought to rest, the same are wholly inapplicable to the facts of the present case. Appointment, be it of Members, Senior Vice President, Vice President or President, is governed by a set of rules and the vacancies shall have to be filled as per procedure prescribed therein"

It was not even the case of the respondents that appointment on the post of Vice-President would be by way of direct recruitment. We, however, observed that the title of the Rules of 1963 would clearly indicate that the only method of appointment on various posts enumerated therein would be by recruitment and not by promotion. We further observed as follows:

"There are only three modes of appointment known in service jurisprudence, the same being by (1) direct recruitment, (2) promotion, and (3) deputation. The Rules too prescribe the method of appointment. Even as per rules 7, 7A, 7B and 7C reproduced above, when the Government was to appointment Senior Vice President or Vice President, the method had to be by direct recruitment. No element of promotion is envisaged in the said Rules. As per Rules of 1963, Accountant Member, Judicial Member, President and Vice President have been separately defined under rule 2, but the recruitment on different posts would be only by way of selection. Once, the words 'promotion' and 'deputation' are missing from the language employed in the Rules referred to above, and it is a case of recruitment, the only method, as mentioned above, would be by way of selection. OM dated 8.2.2002 and 18.2.2008, which deal with promotion even though, by way of selection on the basis of benchmarks, we reiterate, would be wholly inapplicable to the facts of the present case."

Observations as made above were the additional reason on the dint of which the plea raised by the applicant based upon OMs referred to above was repelled. This was not the matter in controversy. We repeat, whereas the applicant urged that it was a case of promotion but the criteria to be adopted for promotion was to be the one as envisaged in the OMs referred to above, the respondents too would state that it was a case of promotion but the method of promotion would be by way of selection. Our judgment has not been challenged in a higher judicial forum. However, the respondents moved a misc. application under rule 24 of the CAT (Procedure) Rules, 1987 seeking clarification/modification of the order dated 20.7.2009 passed in OA No.463/2009 in the matter of Veerabhadrappa (supra), wherein it was inter alia pleaded that the observations made by the Tribunal as regards there being only three modes of appointment, i.e., (1) direct recruitment, (2) promotion, and (3) deputation known in service jurisprudence, and that as per rules 7, 7A, 7B and 7C the method of appointment would be direct recruitment, would not

be ratio deci dendi. The ratio deci dendi, it was pleaded would rather be that the criteria for appointment/selection to the post of Vice-President would be selection on merit and not fitness as envisaged in OMs dated 8.2.2002 and 18.2.2008. The prayer made in the misc. application as mentioned above was to modify/clarify our order dated 20.7.2009 only as regards the observations adverted to above. The said application was disposed of vide order dated 4.2.2010 by observing as follows:

"We find considerable merit in Miscellaneous Application No.22/2010. The ratio of the judgment dated 20.07.2009 passed in OA No.463/2009, is that the post under contention was to be filled by way of selection and not by way of promotion. That was the main issue involved in the case. Any observations in the order that it is a case of direct recruitment, if at all, are obiter.

MA stands disposed of accordingly."

Once, the parties were not at variance as regards the method of appointment on the post of Vice-President, ITAT by way of promotion, surely, any observations made with regard to controversy which was not in issue, would be obiter. It is too well settled a proposition of law that any finding or observation recorded in any judgment or order, even that of the Apex Court, which may come about without there being an issue and debate on the said issue, would even otherwise be not binding. Such findings as mentioned above even if made by the Hon'ble Supreme Court, would be termed as sub silentio and not the law laid down under Article 141 of the Constitution. The debate as regards the appointment of Vice-President to be by the method of promotion or direct recruitment is the direct question involved in the present case, and we shall proceed to determine it. Insofar as, reliance by the applicant on our judgment is concerned, we have already held that any observations made therein as regards the method of appointment on the post of Vice-President being by way of direct recruitment, are only obiter and, therefore, no reliance can be placed upon the same. We are conscious that if the findings recorded by us in OA No.463/2009 were not stated by us to be obiter, there would have been need to constitute a larger Bench, if we were to take a different view. However, as mentioned above, the said findings did not come on an issue involved, debated and decided. That being so, all that is required to be seen is as to whether under the provisions of the Rules of 1963 the appointment on the post of Vice-President can be termed as appointment by way of direct recruitment or by promotion. Before we may part with this aspect of the case, we may mention that there appears to be a mistake in the order dated 4.2.2010. We mentioned that the ratio of the judgment dated 20.7.2010 passed in OA No.463/2010 would be that the post under contention was to be filled by way of selection and not by way of promotion. The controversy, as mentioned above, was pure and simple as to while making promotion on the post of Vice-President, ITAT whether the criteria as envisaged in the OMs dated 8.2.2002 and 18.2.2008 would govern the field, or that rule 7C of the Rules of 1963 clearly stipulating that appointment would be by way of selection based on merit, shall hold the field. The ratio of the judgment dated 20.7.2009 is thus that the post under contention was to be filled by promotion by way of selection and not by way of promotion by adopting the criteria for promotion as envisaged under the instructions referred to above. Irrespective of the mistake as mentioned above, what is, however, crucial is that in the order dated 4.2.2010 we have clearly mentioned that any observations in the order that it is a case of direct recruitment, if at all, would be obiter.

22. Accountant Member, Judicial Member, Vice-President and President have been separately defined under rule 2 of the Rules of 1963. 'Judicial Member' means a Judicial Member of the Tribunal, whereas 'Accountant Member' means an Accountant Member of the Tribunal. 'President' means President and 'Vice-President' means Vice-President of the Tribunal. What can

be gathered from the definition of those who constitute the Tribunal is that they are different posts, be it of Member, Vice-President or President. Rule 3 deals with qualifications for recruitment to the posts of Judicial Member and Accountant Member. A person shall not be qualified for appointment as Judicial Member unless he has for at least ten years held a judicial office in the territory of India, or has been a member of the Indian Legal Service and has held a post in grade-II of the Service or any equivalent or higher post for at least three years, or has been an advocate for at least ten years. Any one in the country whether holding any post as mentioned above or a lawyer and may have the eligibility criteria, is competent to apply to be a Judicial Member of the Tribunal. A person shall not be qualified for appointment as an Accountant Member unless he has for at least ten years been in the practice of accountancy as a chartered accountant under the Chartered Accountants Act, 1949 or as a registered accountant under any law formerly in force, or partly as such registered accountant and partly as a chartered accountant, or has been a member of the Indian Income Tax Service Group 'A' and has held the post of Additional Commissioner of Income Tax or any equivalent or higher post for at least three years. The appointment on the post of Accountant Member is thus also open to all, whether a person is in service or not. The method of recruitment as per provisions contained in rule 4 of the Rules of 1963 is that there shall be a selection board consisting of a nominee of the Minister of Law, Secretary to the Government of India in the Ministry of Law (Department of Legal Affairs), President or Senior Vice-President of the Tribunal, and such other person, if any, not exceeding two, as the Minister of Law may appoint. The nominee of the Minister of Law and Justice shall be the Chairman of the selection board. The board is to recommend persons for appointment as Members from amongst persons on the list of candidates prepared by the Ministry of Law after inviting applications therefor by advertisement or on the recommendations of the appropriate authorities, and the Central Government shall after taking into consideration recommendations of the selection board make a list of persons selected for appointment as Members. The selection board is to evolve its own procedure, provided that where the suitability of the candidate is judged from his or her viva voce, each member shall evaluate the performance and award marks out of the maximum marks fixed by the board. Selected persons are to undergo a medical fitness test. Every person appointed as Member shall be on probation for a period of two years, which may be reduced as well. During the period of probation, without assigning any reasons, a Member can be removed from service. Appointment of Member is thus through open advertisement and all those who answer the eligibility criteria provided in the rules have a right of consideration on merits, to be assessed by the selection board. Insofar as, the appointment of the President, Senior Vice-President and Vice-President of the Tribunal is concerned, the same is governed by rules 7, 7A and 7B. The said rules read as follows:

"7. The President:-

(1) The Central Government shall appoint the Senior Vice-President or one of the Vice-Presidents of the appellate Tribunal to be the President thereof.

(2) The appointment of the President may be in an officiating or substantive capacity.

7A. The Central Government may appoint from among the Members one or more persons as Vice-President or, as the case may be Vice-Presidents of the Tribunal to assist the President in the discharge of his functions.

7B. The Senior Vice-President: The Central Govt. may appoint one of the Vice-Presidents of the Appellate Tribunal appointed under rule 7A, to be the Senior Vice-President thereof."

Selection of President, Senior Vice-President and Vice-President is to be made by a selection committee as per provisions contained in rule 7C, which has since already been reproduced hereinabove. Classification and pay scales of Members, President, Senior Vice-President and Vice-President are governed by rules 8 and 9 respectively. In view of the provisions contained in rule 13, the conditions of service of a Member in respect of matters for which no provision is made in the Rules shall be the same as may, for the time being, be applicable to other employees of the Government of India of a corresponding status. Saving clause is incorporated in rule 16, which reads as follows:

"16. Saving:-

Nothing in these rules shall affect reservations, relaxation of age limit and other concessions required to be provided for the Scheduled Castes, the Scheduled Tribes, Ex-Servicemen and other special categories of persons, in accordance with the orders issued by the Central Govt. from time to time in this regard."

From the reading of the relevant rules referred to above, what clearly emerges is that whereas every one having the requisite qualifications as mentioned in rule 4 is entitled and has a right to be considered for appointment as Member, the selection of President, Senior Vice-President and Vice-President of the Tribunal is to be only from amongst those who are already Members. Once, President, Senior Vice-President and Vice-President are to be appointed by way of selection by the selection committee so constituted under rule 7C from only amongst those who are already Members, it cannot be a case of direct recruitment. It would indeed be a case of promotion by way of selection. We have already mentioned that insofar as, our observations in Veerabhadrapa (supra) as reproduced above are concerned, the same are obiter, so specifically stated on a clarificatory application moved on that behalf by the Government. If the said observations are not to be taken into consideration, the applicant may have nothing to state in support of the proposition that appointment of President, Senior Vice-President and Vice-President would be by way of direct recruitment. The provisions of the rules would leave no one in any manner of doubt that the appointments being made by the Central Government of President, Senior Vice-President and Vice-President are by way of promotion where method of selection is merit to be considered by the selection committee headed by a sitting Judge of the Supreme Court to be nominated by the Chief Justice of India.

23. The Hon'ble Supreme Court in *K. A. Nagamani v Indian Airlines & Others* [2010 (1) AISLJ 11 SC] held that if the list of candidates called for selection was only of serving employees and no claim of any outsider was considered, the same is not a direct recruitment but selection and appointment on the basis of promotion. The plea raised by the applicant, Sunil Kumar Yadav, that under the rules appointment on the post of Vice-President is by way of direct recruitment does not appear to be correct. As mentioned above, it is admitted position that if appointment on the post may not be by way of direct recruitment, no reservation would be applicable.

24. For the reasons mentioned above, both the Original Applications being devoid of merit are dismissed. In view of the nature of controversy raised in the Applications, however, the costs of the litigation are made easy.

(L. K. Joshi)
Vice-Chairman (A)

(V. K. Bali)
Chairman