A THE INCOME TAX APPELLATE TRIBUNAL, HYDERABAD SPECIAL BENCH, HYDERABAD

v.

THE DEPUTY COMMISSIONER OF INCOME-TAX (ASSTTS.) III, HYDERABAD, ANDHRA PRADESH AND ORS.

B JANUARY 17, 1996

[B.P. JEEVAN REDDY AND S. B. MAJMUDAR, JJ.]

Income Tax Act, 1961 :

C *S.255 and Regulation 98-A of Regulations framed under s.255(5)—Income Tax Appellate Tribunal—President—Power to constitute Special Bench Held, Power of President to constitute Special Bench under sub-sec(1) read with sub-section (3) of s.255 is an administrative power which can be exercised even suo motu in appropriate cases—This power is independent of* D *reference by Judicial order of a Bench of Tribunal under Regulation 98-A.*

Constitution of India

Article 226—Held, in writ jurisdiction High Court cannot sit in appeal over administrative decision of the President of the Income Tax Appellate E *Tribunal to constitute a Special Bench except in extraordinary cases wherein the order is shown to be a mala fide one.*

Practice and Procedure :

Income Tax Appellate Tribunal—Grant of adjournments to parties and F *accepting their written submissions—Properiety of—Explained.*

The assessee-companies, respondents no. 2 is each of the instant appeals, filed three tax appeals before the Hyderabad Bench of the Income Tax Appellate Tribunal. A common issue of interpretation of s. 115-J of the Income Tax Act, 1961 was involved in the said appeals which were G **placed for hearing before a Special Bench of the Tribunal. The Special Bench decided the appeals in favour of the assessees. The Revenue challenged the said judgment by filing three writ petitions before the High Court. The High Court, while allowing the writ petitions of the Revenue, held that in the absence of a reference by a judicial order by the Bench of** H **the Tribunal, the President of the Tribunal was not justified in constituting**

the Special Bench for deciding the appeals of the respondent-assessees; and that the Tribunal was not justified in refusing adjournment as was prayed for by the Revenue. The Tribunal filed the present appeals against the decision of the High Court on the aforesaid two points whereas the assessees also filed separate appeals against the decision of the High Court on construction of s. 115-J of the Act. The appeals filed by the assessees were delinked and were directed to be dealt with separately from the present appeals filed by the Tribunal.

In the present appeals, the Tribunal as also the Revenue filed affidavits indicating the manner in which the three appeals of the respondents-assessees came to be listed before the Special Bench of the Tribunal. It was stated that the Tax Bar Association of Andhra Pradesh addressed a letter dated 25.7.1992 to the President of the Income Tax Appellate Tribunal requesting him to refer to a Special Bench the question of correct interpretation of s.115-J of the Income-Tax Act. Thereafter two Senior Members of the Tribunal, by a D.O. Letter dated 25.9.1992, requested President of the Tribunal to constitute a Special Bench to decide the four matters enumerated in the said letter involving the common issue of interpretation of s.115-J of the Act. The President agreed with the Members of the Tribunal and constituted a Special Bench, before which nine matters, including the four matters enumerated in the D.O. letter dated 25.9.1992 and the tax appeals of the three respondents-assessees giving rise to the instant appeals, were placed for hearing. When the arguments were concluded and judgment was reserved, the counsel for the four matters enumerated in D.O. letter dated 25.9.1992 prayed for releasing those cases, on the ground that the same involved some additional issues which were not specifially covered by the reference. The Special Bench released those four matters observing that it was not necessary for the Bench to go into other points and once the main questions referred to in the matters were decided the said judgment would abide the other cases also, and delivered the judgment in the tax appeals of the respondents-assessees.

Disposing of the appeals preferred by the Income Tax Appellate Tribunal, this Court

HELD 1.1. The High Court erred in holding that a Special Bench can be constituted by the President of the Income Tax Appellate Tribunal only pursuant to a judicial order and not in exercise of his administrative

A power. [646-G-H]

1.2. The President's power under sub-section (1) read with sub-section (3) of Section 255 to constitute Benches or for that matter Special Benches is an administrative power. It is obvious that the President in this connection may even act suo motu if it is brought to his notice that any B important point is pending for decision in a matter which requires to be decided by a larger Bench. If the President acting on such information and in bona fide exercise of his powers constitutes a larger Bench or a Special Bench for deciding a matter it cannot be said that he acts ultra vires his powers or functions entrusted to him by the legislature under Section C 255(1) read with Section 255(3) of the Income Tax Act. [646-E-G]

1.3. The President's power under sub-section (1) read with sub- section (3) of s.255 of the Act is independent of the provisions of Regulation 98-A of the Regulations framed under S.255(5) of the Act conferring jurisdiction on a Bench of the Tribunal in an appropriate pending matter to pass D a judicial order and make a reference to the President of the Tribunal to constitute a Special Bench. But such a situation had never arisen on the facts of the present case. The two Members had recommended to the President to constitute a Special Bench for resolving the controversy centering round the construction of Section 115-J of the Income Tax Act by their E communication dated 25th September 1992. Though styled as a reference under Section 255(3) of the Act, it was merely a recommendation for invoking the administrative powers of the President under Section 255(3) for constituting a Special Bench. It was certainly not a reference under Section 255(3) read with Regulation 98-A. [647-H; 648-A; 647-A-C]

F 2.1. The High Court in exercise of its power under Section 226 of the Constitution cannot sit in appeal over the administrative decision of the President who might have felt that the case was of all India importance and was required to be decided by a larger Bench of three Members. Such an administrative order is not open to scrutiny under Article 226 of the G Constitution of India except in extra ordinary cases wherein the order is shown to be *mala fide* one. [647-C-D]

2.2. In the instant case, the Revenue did not make any allegation against the President of the Tribunal. It may be that the President of the Tax Bar Association might have initially moved in the matter or it may be H that the two Members of the Tribunal might have suggested to the Presi-

dent of the Tribunal to place the four matters before a Special Bench. Admittedly, there was a conflict of opinion between the decision of a Single Member of the Madras Bench and that of a Division Bench of the Hyderabad Bench of the Tribunal. Being so apprised of the situation, if the President felt that the tax appeals moved by the respondent-assessees involved the same points and were required to be thrashed out by a Special Bench, there was no reason for holding that constitution of the Special Bench by the President for deciding the present three matters was an illegal or unjudicious exercise or an exercise based on whims and fancies of the President. In making such observation the High Court appears to have been uncharitable to the President of the Tribunal. [647-D-G]

3.1. Since the decision of the High Court on the merits of the controversy centering round the construction of Section 115-J of the Income Tax Act is already pending scrutiny of this Court in the delinked appeals filed by the assessees, it would not be fit to go further into the question of failure of principles of natural justice at the stage of hearing before the Special Bench of the Tribunal. [638-F-G]

3.2. However, prima facie, the view of the High Court that the Tribunal on the peculiar facts of the case was not justified in insisting on hearing the matter and even not taking the written submissions on record as tried to be furnished on behalf of the Revenue and thus had adopted an unjustified stand, appears to be well sustained. It is no doubt true that the matter was adjourned on 11 occasions earlier. It is also true that when a senior counsel is not available to argue an adjourned matter for which a Special Bench is constituted at Hyderabad where the President had to come from Delhi and another member had to come from Bombay, the Revenue should have taken all care to see that some alternative arrangement was made so that the matter may not get unduly prolonged and indefinitely adjourned and that in such situations the Special Bench of the Tribunal could have legitimately required the Revenue to make alternative arrangement for getting the matter argued. But for that purpose a short adjournment of a day or two could have been granted when the departmental representative who was incharge of the matter was admitted to a nursing home. In any case written submissions could have been taken on record and considered by the Tribunal instead of totally brushing them aside. [638-G-H, 639-A-C]

A **4. In the facts and circumstances of the case, there is no doubt that the President of the Tribunal in *bona fide* exercise of his administrative power constituted the Special Bench for deciding the tax appeals relating to the present proceedings. Consequently the observation of the High Court that the Special Bench was constituted act the whims and fancies of the President for deciding the said appeals is unjustified and unsustainable; and therefore, the judgment and order of the High Court as regards the two points agitated before this Court on behalf of the income Tax Appellate Tribunal are quashed and set aside. So far as the question of true construction of s.115-J of the Act is concerned, the same is kept open in the delinked appeals of the assessees. [650-C-F]**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2039-41 of 1996.

From the Judgment and Order dated 31.2.93 of the Andhra Prasesh High Court in W.P. Nos. 5408, 6102-41 of 1993.

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A. Subba Rao and A.D.N. Rao for the Appellant.

B.B. Ahuja, S.N. Terdol, B.Sathish, P. Parmeswaran and B.S. Ahuja for the Respondents.

E The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. Leave granted in all these petitions.

By consent of learned advocates of parties the appeals are heard finally and are being disposed of by this common judgment. These appeals

F are taken out by Income Tax Appellate Tribunal (referred to as 'the Appellate Tribunal') which is up in arms against the Income Tax Department. In a way these are unusual cases wherein the Tribunal has to voice a grievance against the Income Tax Department in connection with its functioning as such. A few relevant background facts are required to be

G noted at the outset to highlight the grievance of the appellant-Appellate Tribunal.

Background Facts

M/s. Surana Steels Pvt. Ltd., M/s. Binjusaria Metal Box Co. Pvt. Ltd.

H and M/s. Agroha Extraction Ltd., who are respondents nos.2 in each of

these appeals are the concerned assessees. They were appellants in three income tax appeals before the Income Tax Appellate Tribunal, Hyderabad. The Special Bench thereof disposed of all the three appeals by common order dated 4th February 1993 as they involved consideration of common question of law relating to the construction of Section 115-J of the Income Tax Act, 1961 (hereinafter referred to as 'Income Tax Act').

This decision of the Special Bench resulted in three writ petitions moved by the Deputy Commissioner of Income Tax, Hyderabad before the High Court of Andhra Pradesh. The assessee-respondents nos. 2 in each of these appeals had succeeded before the Special Bench of the Appellate Tribunal on the construction of Section 115-J of the Income Tax Act. However, Income Tax Reference No. 126 of 1992 which was pending in the High Court also pertained to the very same question centering round the construction of Section 115-J and was, therefore, clubbed with the aforesaid three writ petitions moved by the Deputy Commissioner of Income Tax against the common order of the Special Bench dated 4th February 1993. All these matters were heard by a Division Bench of the High Court consisting of V. Sivaraman Nair and S.V. Maruthi, JJ. The Division Bench of the High Court by its common order dated 31st December 1993 allowed the three writ petitions moved by the Deputy Commissioner of Income Tax and answered the Reference in favour of the Revenue and against the assessees. The Appellate Tribunal being aggrieved by the findings reached by the High Court in the writ petitions has filed the aforesaid appeals before this Court on obtaining leave under Article 136 of the Constitution of India. The dissatisfied assessees have filed separate Special Leave Petitions Nos. 12446 and 12835 of 1994. By an order dated 8th August 1994 in the special leave petitions moved by the Appellate Tribunal a bench of this Court consisting of one of us, Jeevan Reddy, J. and Sen J., issued notice and directed that pending further orders, the judgment, in so far as it holds that constitution of a Special Bench consisting of three or more members by the President of Income Tax Appellate Tribunal can be done only and by virtue of a judicial order, is suspended, while notice was also issued and interim relief was granted on condition in the assessee's Special Leave Petition No. 12446 of 1994 arising from the very same common judgment of the High Court.

By a later order dated 3rd April 1995, however, Special Leave Petitions Nos. 12054-56 of 1994 moved by the Income Tax Appellate

A Tribunal were delinked from other matters. That is how the assessees' Special Leave Petitions are now no longer a part of the present group and we are concerned, in the present proceedings, with the three appeals arising out of Special Leave Petition Nos. 12054-56 of 1994 moved by the Income Tax Appellate Tribunal against the common order of the Division B Bench of the High Court in the aforesaid three writ petitions. Consequently, we will not be concerned, in these proceedings, with the question of construction of Section 115-J of the Income Tax Act and the merits of the decision of the High Court on this point. We will, therefore, only consider, in these proceedings, the grievances voiced on behalf of the Appellate Tribunal by its learned counsel Shri Subba Rao.

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Rival Contentions

Shri Subba Rao, learned counsel appearing for the appellant-Tribunal contended that the High Court had patently erred in law in taking D the view that the President of the Income Tax Appellant Tribunal had no jurisdiction to constitute a Special Bench for hearing the appeals of the respondent-assessees. He submitted that the Division Bench of the High Court had misconstrued and misinterpreted the relevant statutory provisions of the Income Tax Act as well as the regulations in this connection. According to Shri Subba Rao the High Court had wrongly assumed E that Special Bench can be constituted by the President only on the basis of a judicial order and not in exercise of his powers under sub-section (3) of Section 255 of the Income Tax Act. According to the learned counsel the High Court had equally erred in taking the view that on the facts of the present case the Special Bench was constituted on the whims and fancies of the President and there was no reason for constituting such a F Bench. He also further contended that the High Court was equally in error when it held that the Tribunal had committed a breach of the principles of natural justice in not granting adjournment as asked for by learned counsel for the Revenue. That on the facts of the present case enough latitude was shown by the Tribunal in adjourning the matters at the G instance of the learned counsel for the Revenue on 11 past occasions and, therefore, there was no violation of principles of natural justice when further adjournment was refused and the matter was heard by the Special Bench.

Shri Ahuja, learned senior counsel appearing for the respondent-H Deputy Commissioner of Income Tax on the other hand submitted that on

the facts of the present case the High Court rightly took the view that Special Bench was constituted by the President of Tribunal without any rhyme or reason and in any case the Tribunal had committed breach of basic principles of natural justice in refusing adjournment in the appeals posted for hearing before the Special Bench when the departmental representative who was incharge of the matter had taken ill and had to be hospitalised and that the previous adjournments which were granted before the constitution of the Special Bench were only 8 in number and that had nothing to do with the situation in which the department found itself under circumstances beyond its control when the learned counsel for the Revenue was busy in the High Court in tax matters before the Tax Bench and the departmental representative had suddenly taken ill and had to be hospitalised. That these were circumstances which called for a judicious and a liberal approach on the part of the Tribunal. That even the written submissions which were tendered on behalf of the Revenue were not permitted to be taken on record and, therefore, the High Court was right in taking the view that the Tribunal in deciding the Special Bench matter had committed breach of basic principles of natural justice.

In view of the aforesaid rival contentions, the following points, arise for our determination.

Point No. 1

Whether the Special Bench of the Income Tax Appellate Tribunal had committed breach of principles of natural justice and had denied reasonable opportunity to the Income Tax Department to put forward its case in the appeals taken up for decision by the Special Bench.

Point No. 2

Whether the President of the Tribunal was legally competent to constitute a Special Bench for hearing the three appeals moved by respondent No. 2 assessees in these three cases and whether the Special Bench was validly constituted.

We shall deal with the aforesaid points one by one.

Point No. 1

So far as this point is concerned the High Court in the impugned

A judgment at page 31 has noted that it was true that the matter was adjourned at the instance of the departmental representative from time to time on 11 occasions from 28.10.1992 upto 4.1.1993. However, on 4.1.1993 when the matter was posted for hearing before the Special Bench Shri H. Srinivasulu who was appointed as designated officer to argue the matter before the Special Bench fell sick. It was also not disputed that he was B shifted to Hyderabad Nursing Home and the doctors had advised him rest for four weeks. It was also true that Shri Mani, another Deputy Commissioner, who was appointed to assist Shri Srinivasulu was ready to argue the matter and in fact he argued the matter to the best of his ability. However, in view of the complicated nature of the case and the heavy revenue C involved in the matters and also keeping in view the fact that any decision rendered by the Special Bench of the Tribunal will have an all India effect, to supplement the arguments of Shri Mani, the department sought permission of the Tribunal to file written submissions and it is not disputed that the Tribunal did not permit the departmental representative to file those written submissions. On these facts the High Court took the view that the D Tribunal was not justified in not adjourning the matter and in insisting to hear the matter. Now we may state at this stage that even though on merits the Revenue lost before the Special Bench of the Income Tax Appellate Tribunal the High Court in writ petitions heard the department fully on the merits of the question, namely, the construction of Section 115-J of the Income Tax Act and held in favour of the Revenue and against the E assessee. Thus the Revenue had not only full opportunity to put forward its case before the High Court in the writ petitions but had succeeded therein. Under the circumstances the question of violation of principles of natural justice by the Tribunal pales into insignificance and, therefore, we do not deem it fit to pronounce upon that question finally. We have already F noted that the decision of the Division Bench of the High Court on the merits of the controversy centering round the construction of Section 115-J of the Income Tax Act is already pending scrutiny of this Court in the delinked special leave petitions moved by the assessees and this Court is going to decide that question on merits. Under these circumstances we do not think it fit to delve deep into the question of failure of principles of G natural justice at the stage of hearing before the Special Bench of the Tribunal. However, in passing we may observe that prima facie, the view of the High Court that the Tribunal on the peculiar facts of the case was not justified in insisting on hearing the matter and even not taking the written submission on record as tried to be furnished on behalf of the Revenue and thus had adopted an unjustified stand, appears to be well

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sustained. It is no doubt true that the matter was adjourned on 11 occasions earlier. It is also true that when a senior counsel is not available to argue an adjourned matter for which a Special Bench is constituted at Hyderabad where the President had to come from Delhi and the another members had to come from Bombay, the Revenue should have taken all care to see that some alternative arrangement was made so that the matter may not get unduly prolonged and indefinitely adjourned and that in such situations the Special Bench of the Tribunal could have legitimately required the Revenue to make alternative arrangement for getting the matter argued. But for that purpose a short adjournment of a day or two could have been granted when the departmental representative who was incharge of the matter was admitted to a nursing home. In any case written submissions could have been taken on record and considered by the Tribunal instead of totally brushing them aside. However, as noted earlier as ultimately the Revenue has not suffered till date and its viewpoint has been accepted by the High Court on the construction of Section 115-J of the Income Tax Act we do not dilate on this question any further. That disposes of the first point.

Point No. 2

So far as this point is concerned it is necessary to have a look at the relevant facts as emerging on the record of the case which resulted in the constitution of the Special Bench by the President of the Appellate Tribunal. In the counter filed by Shri Kalu Ram Meena, Deputy Commissioner of Income Tax, Hyderabad in the present proceedings the background facts leading to the formation of the Special Bench by the President have been stated. It is averred that the Tax Bar Association of Andhra Pradesh addressed a letter to the President on 25th July 1992 requesting him to refer the matter of correct interpretation of Section 115- J to a Special Bench to have uniformity of the decisions on the point. The request in the letter was as follows :

> "In the wake of the divergent opinions expressed by different Benches of the Tribunal and also in view of language in which Sec. 115-J is couched, the members of A.P. Tax Bar Association have felt the need to request your goodself to refer the matter to a Special Bench to have uniformity in the decisions on this point. The Governing Body has received various representations to this effect from our members. May we, therefore, request your goodself

A to consider the request of constituting a Special Bench to decide the issue relating to the interpretation of the word u/s 115-J and oblige.

After the receipt of the above letter, the President forwarded the same to the Senior Member of the Income-tax Appellate Tribunal, B Hyderabad Bench, Hyderabad directing him to contact the members of the Bar and suggest to him how far he feels the need of constituting a Special Bench. On that the Senior Member alongwith the Accountant Member after due consultation with the Bar suggested constitution of the Special Bench and the reason C for the constitution of the Special Bench is stated in reference dated 25.9.1992 forwarded to the President, which reads thus :

'After noting conflicting decisions on the interpretation of Section 115-J and also after going through the several articles published in 50 Taxman 659 (Magazine Section) 47 Taxman 133 (Magazine D Section) 48 Taxman 347 (Magazine Section) and 49 Taxman 49 and 133 (Magazine Section) and having noticed diametrically opposite views expressed in two decisions of the Tribunal-one reported in 39 I.T.D. 432 Butwelded Tools (P) Ltd. v. Asstt. Commissioner of Income-tax and the opposite decision rendered E by the Hyderabad Bench in *V.V. Trans Investment (P) Ltd.* v. *Income-tax Officer,* (42 ITD 242) we are of the opinion in order to secure uniformity in judicial decisions and prevent judicial Chaos and in order to avoid uncertainties on such a vital point of public importance, constitution of a Full Bench is very essential to resolve the following questions :

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(1) Whether depreciation and loss should necessarily be present for purpose of adjustment while computing book profit u/s 115-J of the I.T. Act read with 205(1) proviso (b) of the Companies Act?

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(2) For purpose of computing book profits under sec. 115J of the I.T. Act read with Section 205(1) proviso (d) of the Companies Act whether depreciation include loss?

(3) If an assessee had not incurred losses in previous years but H only had unabsorbed depreciation claim, the claim for deduc-

tion under Section 115-J(1)(iv) would not be available to such an assessee? A

(4) In a case where there is profit in a year but after adjustment of depreciation it results in a loss, can no adjustment in book profit under sec. 115-J of the IT Act be allowed.' B

This reference was made on 25.9.1992 in the prescribed form and it was sent alongwith covering letter dated 25.9.92 to the President of the I.T.A.T. at Delhi. Thereupon the President ITAT had accepted the reference and constituted a Special Bench vide letter No. F.16-LG (ANTZ-Sectt) 92 dated 1.10.1992. C

The aforesaid stand taken in the counter shows that the President appeared to have acted in the light of the reference dated 25th September 1992 made by two senior members of the Tribunal. It is also true that the President was requested by the Tax Bar Association of Andhra Pradesh to constitute a Special Bench for resolving the question in controversy. However, when we turn to the reference letter dated 25.9.1992 which has been brought on record of these proceedings as an annexure to the Special Leave Petition as Annexure 'A', we find that the reference purports to be under Section 255(3) of the Income Tax Act by two members Shri T.V. Rajagopala Rao and Shri Chander Singh and they have suggested that the Special Bench of the Tribunal may be constitution for deciding the following four matters : D E

1.	I.T.A. No. 1045/Hyd/91 (Asstt. Year : 1989-90)	Hagglunds Lenision Ltd. Dy. Commissioner of Income Tax (Assts), Spl. Range- 4, Hyderabad.
2.	I.T.A. No. 138/Hyd/92	*Novopan India Ltd., Hyderabad* v. *Dy. Commissioner of Income Tax (Assts), Spl. Range-4 Hyderabad.*
3.	I.T.A. Nos. 797 & 798/Hyd./92 (Assts. Years : 1988-89 & 1989-90)	*Andhra Printers Ltd. Vijayawada* v. *Dy. Commissioner of Income Tax, Spl. Range, Vijayawada.*
4.	I.T.A. No. 812/Hyd/92 (Asst Year: 1989-90)	*Sri Raja Rajeswari Paper Mills Ltd.* v. *Dy. Commissioner of Income Tax, Spl. Range, Vijayawada.*

F G H

A It is also interesting to note that it is this D.O. letter of the Accountant Member and the Judicial Member dated 25th September 1992 to which the President agreed and by his order in the light of the said D.O. the President constituted a Special Bench. That is clearly indicated by communication dated 1st October 1992 addressed by Assistant Registrar of the Income tax Appellate Tribunal, New Delhi to Shri T.V. Rajagopala Rao, Member, B Income Tax Appellate Tribunal, Hyderabad. The said communication is at Annexure 'B' to the S.L.P. at page 135 of the Paper Book. It is also brought on the record of this case that one of the members of the Tribunal, namely Shri Chander Singh who was a signatory to the reference dated 25.9.1992 had earlier taken the view by his order dated 30th July 1992 that this C question was not required to be referred for decision to the Special Bench. But even that apart even though he might have subsequently changed his view and recommended constitution of a Special Bench for resolving the questions involved centering round construction of Section 115-J of the Income Tax Act in company of Shri T.V. Rajagopala Rao, Judicial Member D only four listed matters were suggested to be placed before Special Bench for decision. However, the Special Bench was constituted by the President not for deciding these four matters but for deciding the three tax appeals being I.T.A. Nos. 1845/Hyd/90, 811/Hyd/92 and 822/Hyd/92 which were moved by the present three assessee-respondents in these proceedings and it is that decision of the Special Bench in these appeals that has resulted E in the present proceedings. We wanted, therefore, to know from the learned counsel for the appellant as to how the aforesaid three income tax appeals of the present three respondent-assessees were placed before the Special Bench by the President when the President had agreed to the suggestion of the members of the Income Tax Appellate Tribunal for F placing four other appeals which were listed in the reference of 25th September 1992 for being placed before the Special Bench. In this connection by our order dated 1st December 1995 the required details were asked for from the appellant-Tribunal. We shall deal with the material supplied by the Tribunal pursuant to our aforesaid order a little later.

G In the background of the aforesaid facts the High Court took the view that on the facts and circumstances of the case the President of the Tribunal was not justified in constituting the Special Bench for deciding the appeals of the aforesaid three respondents. The High Court has taken the view that the President had to exercise his discretion judiciously and H judicially and it may not be exercised at whims and fancies of the President.

The High Court has further observed that in the present case there was no conflict at all between 39 ITD 432 (Butwelded Tools (P) Ltd. v. Asst. Commissioner of Income Tax) and 42 ITD 242 (V.V. Trans-Investment (P) Ltd. v. Income Tax Officer) and that there was no reason for the President to constitution Special Bench. The High Court has also made the following observations in this connection at page 41 of its judgment :

> "....As already stated, the power to constitute a Special Bench under Section 255(3) of the Act shall be exercised judiciously and judicially and the discretion cannot be exercised arbitrarily at the whims and fancies of the authority vested with such power.
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> We see considerable force in the submission of counsel for the petitioner that unless reference is made in a judicial order by Bench of the Tribunal pointing out the reasons for constitution of a Special Bench, the President of the Income Tax Tribunal, was not competent to constitute a special Bench. In the present case, admittedly, none of the Benches of the Tribunal had made any reference by a judicial order when the question came up for consideration and the conflict of decisions of the coordinate Benches was adverted to. The procedure adopted in this case seems to us to be curious. On receipt of a representation by the Tax Bar Association, the President of the Tribunal invited comments from the senior member for a Hyderabad Bench of the Tribunal. It is more curious that the very same member who had rendered judgment which was reported in (42) ITD 242 replied to the President suggesting the constitution of the Special Bench. Counsel for the petitioner submits that in the facts and circumstances of the case that was but a command performance at the instance of the President. He submits further that since there was no judicial order requesting for a reference of any question to a Special Bench, the constitution of the same was not justified. We see considerable force in the submission, since a Court or a judicial tribunal is expected to discharge their judicial functions by passing judicial orders and not by intra-departmental Communications. We also see force in the submission of counsel that had the matter been posted for hearing on the Judicial side, the Department would have had an opportunity to project its views before the Hyderabad Bench deliberated upon the alleged conflict of

A authorities, rather than depending on views expressed in articles and journals as reason for constitution of a Special Bench."

In our view the aforesaid decision of the High Court to the effect that the President of the Income Tax Appellate Tribunal cannot constitute a Special Bench save and except under a judicial order cannot be sus-
B tained on the scheme of the Act and the relevant regulations. The reasons are obvious.

Section 255 of the Income Tax Act deals with the procedure of Appellate Tribunal. The said Section along with relevant sub-sections
C thereof reads as under :

"255. 1. The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President of the Appellate Tribunal from among the members thereof.

D 2. Subject to the provisions contained in sub-section (3), a Bench shall consist of one judicial member and one accountant member.

3. The President or any other member of the Appellate Tribunal authorised in this behalf by the Central Government may,
E sitting singly, dispose of any case which has been allotted to the Bench of which he is a member and which pertains to an assessee whose total income as computed by the Assessing Officer in the case does not exceed one lakh rupees and the President may, for the disposal of any particular case, constitute a Special Bench
F consisting of three or more members, one of whom shall necessarily be a judicial member and one an accountant member.

4. If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they
G shall state the point or points on which they differ, and the case shall be referred by the President of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members
H of the Appellate Tribunal who have heard the case, including those

who first heard it. A

5. 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." B

Now a mere look at sub-section (1) shows that it is the administrative function of the President to constitute benches from amongst the members of the Tribunal for exercising the powers and functions of the Appellate Tribunal. Similarly sub-section (3) empowers the President for disposal of any particular case to constitute a Special Bench consisting of three or more members one of whom shall necessarily be a judicial member and one an accountant member. The functions entrusted under sub-sections (1) and (3) of Section 255 to the President of the Appellate Tribunal are obviously administrative functions. They have nothing to do with exercise of any judicial power. It is of course true that as per sub-section (5) the Appellate Tribunal can regulate its own procedure and the procedure of benches and for that purpose can frame appropriate regulations. In exercise of that power the Income Tax Appellate Tribunal has framed regulations. The relevant regulation for the present purpose is Regulation 98(A). It reads as under : C D E

"*Regulation 98(A)*

With a view to bring about uniformity in the procedure for reference of cases to President I.T.A.T. for constitution of Special Benches consisting of three or more members instructions have been issued from time to time. For making such reference the concerned bench should pass the order similar to order of Tribunal "the reference shall be made by the bench as far as possible" in the proforma as appended in XIX(B). F

APPENDIX XIX (B) G

INCOME TAX APPELLATE TRIBUNAL

PROFORMA FOR MAKING REFERENCE BY A BENCH TO THE PRESIDENT, ITAT FOR CONSTITUTION OF SPECIAL BENCH. H

A 'We the members of ..... Bench(es) at ..... (Station) are of the opinion that the appeal(s) No. (s) ..... in the matter of ..... which were posted for hearing before us on ..... is/are fit and proper appeal(s) which should be heard by a Special Bench consisting of three/or ..... members of the Tribunal. We accordingly forward B the records of the appeal(s) mentioned above to the President of the Tribunal and request him to constitute a Special Bench for the reasons given below :

Reasons in brief :

C Signature : 1.

2.

Note : 1. This form should be sent to the President of the D Tribunal in duplicate, alongwith the observations of the Vice President of the concerned Zone.

Note : 2. Document/materials in support of the reasons for constitution of a Special Bench should be enclosed.'"

E The aforesaid regulation shows that the concerned Bench which is seized of the matter may in exercise of its judicial function in appropriate case make a reference to the President to constitute a Special Bench. The exercise of that function by the Bench of the Tribunal hearing the matter is of course a judicial function but so far as the President's power under Sub-section (1) read with sub-section (3) of Section 255 to constitute F Benches or for that matter Special Benches is concerned the said power is an administrative power. It is obvious that the President in this connection may even act suo motu if it is brought to his notice that any important point is pending for decision in a matter which requires to be decided by a larger bench. If the President acting on such information and in bona fide exercise G of his powers constitutes a larger bench or a Special Bench for deciding a matter it cannot be said that he acts *ultra vires* his powers or functions entrusted to him by the legislature under Section 255(1) read with Section 255(3) of the Income Tax Act. Consequently, the Division Bench of the High Court with respect was in error when it took the view that a Special Bench can be constituted by the President only pursuant to a judicial order H and not in exercise of his administrative powers. It is of course true that in

any pending matter before a bench of two learned members, if it is felt by the learned members that a Special Bench is required to be constituted, they can pass a judicial order in the light of the procedure laid down by Regulation 98(A). But such a situation had never arisen on the facts of the present case. We have already seen above that the two learned members had recommended to the President to constitute a Special Bench for resolving the controversy centering round the construction of Section 115-J of the Income Tax Act by their communication dated 25th September 1992. That was styled as a reference under Section 255(3) of the Income Tax Act. It was merely a recommendation for invoking the administrative powers of the President under Section 255(3) for constituting Special Bench. It was certainly not a reference under Section 255(3) read with Regulation 98(A). We fail to appreciate how the High Court in exercise of its power under Section 226 of the Constitution could sit in appeal or judgment over the administrative decision of the President who might have felt that the case was of all India importance and was required to be decided by a larger Bench of three members. Such an administrative order is not open to scrutiny under Article 226 of the Constitution of India except in extraordinary cases wherein the order is shown to be a malafaide one. No such allegation was made by the Department against the President of the Tribunal on the facts of the present case. It may be that the President of the Tax Bar Association might have initially moved in the matter or it may be that the two learned members of the Tribunal might have suggested to the President to place listed four matter before a Special Bench. But being so apprised of the situation if the President felt that the present three matters moved by the concerned three respondents in these proceedings involved the same points and which were required to be thrashed out by a Special Bench we do not see any reason for holding that the constitution of a Special bench by the President for deciding present three matters was an illegal or unjudicious exercise or an exercise based on whims and fancies of the President. The Division Bench of the High Court on the facts of this case appears to have been uncharitable to the President of the Tribunal when it observed as aforesaid. It is also difficult for us to appreciate how the High Court could persuade itself to hold that when none of the Benches of the Tribunal had made any reference by judicial order the President of the Income Tax Tribunal was not competent to constitute a Special Bench. As we have already noted above Special Benches can be constituted by the President both in exercise of his administrative powers under Section 255(1) read with Section 255(3) as also on the basis of a judicial order passed by any bench of the Tribunal making a reference to

A the President in that connection under Regulation 98(A). But it is not as if that such a reference by the members under Regulation 98(A) by passing a judicial order is the only mode and manner in which the President can be moved to constitute a Special Bench. Even independent of such a reference on the judicial side the President can in an appropriate case even suo motu may move in the matter and can constitute a Special Bench of B course on appropriate and germane grounds. It is, however, true that the President in exercise of its administrative powers under Section 255(3) cannot just constitute a Special Bench without any rhyme or reason. Such an administrative exercise can be demonstrated to be unreasonable, capricious or malafide on a given set of facts. But in our view present case was C not of that type. There was a conflict of opinion between two Benches of the Tribunal, namely, Madras and Hyderabad Bench. It is, however, true that Madras Bench decision was by a single member while the Hyderabad Bench decision was by a Division Bench. Still it could not be said that there was no conflict of decisions between two benches of the Tribunal. That itself constituted a rational and valid ground for the President to act in D exercise of his administrative powers to constitute a Special Bench if he thought it fit to do so. Such an exercise on the facts of the present case cannot be styled as an arbitrary or whimsical or fanciful one as wrongly and uncharitably assumed by the Division Bench of the High Court.

E It is now time for us to deal with one apparent inconsistency underlying the order of the President of the Tribunal, constituting the Special Bench, which was highlighted by learned counsel for respondent-Revenue. As noted earlier the President of the Tribunal does not seem to have acted suo motu simply relying upon the recommendations of the Income Tax Bar Association, Hyderabad for constituting a Special Bench for deciding the F controversy in issue. He seems to have obtained opinion of senior members of the Tribunal and in the light of their recommendations contained in the communication dated 25.9.1992 the Special Bench was constituted for hearing the appeals of the present three respondents. It is also true that the members had recommended placing before the Special Bench four G listed matters, which did not include the appeals of these present three respondents. Thus the order constituting Special Bench appeared to be inconsistent with the recommendations of the members of the Tribunal. In this connection further details as noted earlier were sought for from the Appellate Tribunal by our order dated 1st December 1995. It is in the light H of what the Tribunal has stated in response to our order dated 1st Decem-

ber 1995 that we now proceed to deal with this aspect of the matter. A

Pursuant to our order dated 1.12.1995, an affidavit has been filed by Shri Kishan Rao, Asstt. Registrar, who worked as Asstt. Registrar, Income Tax Appellate Tribunal Bench at Hyderabad at the relevant time. In the said affidavit, he has clarified that on receipt of letter dated 28.7.1992 B addressed by the President of Income Tax Tribunal to Shri T.V. Rajagopala Rao, Member, Tribunal, Bench at Hyderabad, the learned Member Shri Rajagopala Rao, by his letter dated 25.9.1992 addressed to then President of the Tribunal Shri G. Krishnamurthy, stated that after verifying the files, he felt the justness of the demand made by the Bar and that he discussed the matter with the learned brother Member Shri G. C Krishnamurthy and formulated the questions referable to the Full Bench, that it was true that in the said letter of reference four matters were mentioned but it is further pointed out that on receipt of the said letter a circular was issued by the Tribunal to all other 18 Benches of the Tribunal intimating that the Special Bench of Income Tax Appellate Tribunal. D Hyderabad Bench-A was being constituted to consider the questions which were mentioned in the circular. A copy of the circular is annexed to the affidavit as Annexure-V. This circular shows that all the four matters which were sought to be referred to the Special Bench by reference letter of 25.9.1992 by two Members of the Tribunal were sought to be placed before the Special Bench. In addition thereto is found at serial no. 6 Income Tax E Appeal No. 1845/Hyd/90 which is one of the matters in the present proceedings which was disposed of by the Special Bench. It is thereafter that nine cases in which common question of construction of Section 115-J read with Section 143(1)(a) of the Income Tax Act was involved were placed before the Special Bench. The cause list of cases posted for hearing F before the Special Bench at Hyderabad is annexed as Annexure-VI to the affidavit. It shows that the matters pertaining to the present proceedings were placed for hearing before the Special Bench along with four matters which have been mentioned in the reference letter dated 25.9.1992 of the two Members of the Tribunal, namely, Shri T.V. Rajagopala Rao and Shri G Chander Singh. It is further clarified in the affidavit that arguments were concluded in all these appeals on 5.1. 1993 and judgment was reserved in four cases to which reference was made. However, at the conclusion of the arguments, the learned counsel in those four cases submitted that there were some additional issues which were not specifically covered by the questions which came up for decision before the Special Bench and hence H

A they requested that those appeals be released from Special Bench, and as the Full Bench felt that it was not necessary for them to go into other points and once the main questions referred to in the matters were decided, the said judgment will abide the other case also, the said four cases were released by the Special Bench to be heard by the Division Bench after Judgment in Surana Steels case and others.

B

In view of the aforesaid affidavit based on the relevant events which transpired prior to the constitution of the Special Bench, and in the light of the relevant documentary evidence produced in support of the affidavit, we have no doubt that the learned President in *bona fide* exercise of his C administrative power constituted the Special Bench for deciding the Income Tax Appeals with which the present proceedings are concerned. Consequently, the observation of the High Court that the Special Bench was constituted at the whims and fancies of the President for deciding these appeals must be held to be unjustified and unsustainable.

D In the light of the aforesaid discussion, therefore, point No. 2 must be decided in the affirmative.

In view of our conclusion on point no. 2 and as we have held that point no. 1 does not survive for our decision as aforesaid, the judgment and order rendered by the Division Bench of the High Court in the three E writ petitions moved by the Deputy Commissioner of Income Tax on the aforesaid two points are quashed and set aside. So far as the question about true construction of Section 115-J is concerned, we keep it open for decision in the delinked S.L.Ps. of the assessees. All the three appeals are allowed accordingly. The writ petitions before the High Court will stand F dismissed to the aforesaid extent. On the facts and circumstances of the case there will be no order as to costs all throughout.

R.P. Appeals disposed of.