

OA.No.170/00238/2018/CAT/BANGALORE

CENTRAL ADMINISTRATIVE TRIBUNAL  
BANGALORE BENCH

ORIGINAL APPLICATION NO.170/00238/2018

DATED THIS THE 20<sup>TH</sup> DAY OF MARCH, 2019

**HON'BLE DR.K.B.SURESH, MEMBER (J)**

**HON'BLE SHRI C.V. SANKAR, MEMBER (A)**

Shri Inturi Rama Rao,  
S/o Late Inturi Subba Rao,  
Aged 52 years,  
Occ: Accountant Member,  
Income Tax Appellate Tribunal,  
Second & Third Floor,  
Golden Jubilee Building,  
F.K.C.C.I., Kempegowda Road,  
Bangalore – 560 009  
Residing at:  
Flat No. 604, Block-1,  
Nagarjuna Meadows,  
Phase II, Doddaballapura Main Road,  
Yelahanka, Bengaluru – 560 064  
(By Advocate Shri B.N. Suresh Babu)

..... Applicant

Vs.

1. Government of India,  
Ministry of Law & Justice,  
Department of Legal Affairs,

4<sup>th</sup> Floor, A-Wing, Shastri Bhawan,  
New Delhi, Delhi – 110 001  
Represented by its Secretary.

2. The President,  
Income Tax Appellate Tribunal,  
11<sup>th</sup> Floor, Lok Nayak Bhawan,  
Khan Market, New Delhi – 110 003  
New Delhi

3. The Department of Personnel & Training,  
Government of India,  
North Block, Central Secretariat,  
New Delhi – 110 001.  
Rep. by its Secretary  
(By Shri V.N. Holla, Counsel for the Respondents)

....Respondents

### O R D E R (ORAL)

(HON'BLE DR. K.B. SURESH, MEMBER (J))

Heard. The matter in issue is covered by the decision of the Hon'ble Apex Court when it directed the appointment of the applicant. It is correct that the Hon'ble Apex Court had not clearly stated that the date in 2007 would be the crucial issue. But a fact remains that when the Hon'ble Supreme Court dwell on the selection made pursuant to the efforts of the respondents in 2005 and when two people in the list were found not suitable in respect of vigilance angle and, therefore, the waiting list candidates' names had been proposed. It appears that the ACC had made a decision not to make any further appointments till it decides on amendment to the Recruitment Rule.

2. Now the amendment to Recruitment Rule at any point of time would be within the executive competence provided it is made in respect of the

same methodology adopted in enactment of the said rule. No executive instructions in any way and at whatever level can supersede a law which is made as a delegated legislation after laying in the Houses of Parliament.

3. The question of fact is covered by the decision of this Tribunal sitting in Delhi in OA No. 1024/2008 connected with other cases dated 31.07.2008 which we now quote:

*“: O R D E R :*

*Dr. Ramesh Chandra Panda,*

*As common questions of law and facts are involved in all these cases(OA Nos.1024/2008, 1036/2008 & 1036/2008), we propose to decide all these OAs by a common order.*

*2. The Applicant in OA 1024/2008, is a Chartered Accountant and states that he has been selected by the Selection Board for the appointment to the post of Accountant Member (hereinafter referred as A.M.) in the Income Tax Appellate Tribunal (in short referred as ITAT). He is aggrieved for non-consideration by the Respondents for his appointment as AM in the unreserved (UR) category, though he claims that two vacancies still remain unfilled/vacant. He represented to the Respondents in his letters dated 20.8.2007 and 23.8.2007 which were considered by the Respondents and informed the Applicant in the impugned letter dated 26.9.2007 (Annexure A1) that in compliance of the directions of the Hon'ble Supreme Court's order dated 17.8.2007 offer of appointment have already been issued on 17.9.2007 to the 16 candidates, as per their names in order of their merit (Annexure-1). The impugned letter further states that against all the five unreserved vacancies of Accountant Member, five candidates have been recommended by the Selection Board. Being aggrieved by the impugned letter, the Applicant has prayed this Tribunal (i) to quash and set aside the impugned reply of the Respondents dated 26.9.2007 ; and (ii) to direct the Respondents to consider the name of the Applicant for appointment to the post of 4th/5th vacancy of AM in the UR category in ITAT.*

*3. The Applicant in OA No.1036/2008 is also a Chartered Accountant and has been aggrieved by the inaction on the part of the Respondents in offering the appointment for the post of AM in the UR category in ITAT. He claims that he being at Serial Number 2 of the wait list for the post of AM in the UR category in ITAT and 2 candidates from main list have not joined, the 4th and 5th vacancies exist and for the 5th AM, UR vacancy, the Applicant should have been appointed by the Respondents. The Applicant has, therefore, sought*

*relief (i) to declare the action of the Respondents in not issuing the appointment order in favour of the Applicant as illegal, and (ii) to direct the Respondents to issue appointment order forthwith in favour of the Applicant for the post of AM under UR category in ITAT.*

*4. The Applicant in the OA 1037/2008 is working as an advocate since March 1989 and has been practicing in various Judicial and quasi judicial fora. He was an applicant for the post of Judicial Member (JM) in the ITAT. The Selection Board conducted selection and recommended 8 candidates for appointment as JM in ITAT. The Respondents appointed 6 JMs, leaving aside 2 candidates. The Applicant claims that out of 6 candidates, one has not accepted the offer of appointment and another has sought 6 months time to consider the offer. Therefore, only 4 selected candidates have joined. The Applicants claim is that he being one of the 2 remaining selected candidates, he should be appointed to one of the vacant posts. He, therefore, prayed for the Tribunal's direction to appoint him as JM in ITAT.*

*5. We have heard Shri A.K.Behera, Shri K.R.K.V. RAO and Shri P. Naveen Rao, the Learned Counsels for the Applicants. Shri C.Chandrasekharan, Additional Solicitor General, Shri A.K.Bhardwaj and Jagrati Singh representing the Respondents and with their assistance examined the records of the case.*

*6. The Respondent No.1 issued a Notification in January 2005 which appeared as an Advertisement in Times of India on 22.01.2005 for filling up 22 vacancies of Members in the ITAT in the following categories :-*

*A. Judicial Member:*

	<i>Reserved for SC</i>	<i>Reserved for ST</i>	<i>Reserved for OBC</i>	<i>Unreserved</i>	<i>Total</i>
<i>Current vacancies</i>	<i>Nil</i>	<i>Nil</i>	<i>01</i>	<i>03</i>	<i>04*</i>
<i>Carried forward vacancies</i>	<i>02</i>	<i>01</i>	<i>02</i>	<i>Nil</i>	<i>05</i>
<i>Total</i>	<i>02</i>	<i>01</i>	<i>03</i>	<i>03</i>	<i>09</i>

*\* Out of four current vacancies of Judicial Member, one vacancy is reserved for a person who is Orthopaedically Handicapped. Orthopaedically handicapped persons with the following disabilities will be considered for appointment, subject to production of medical certificate and medical examination by the appropriate Medical Board:*

*One leg affected [(a) impaired reach; (b) weakness of grip and (c) ataxic] Both legs affected but not arms. One arm affected (R) & (L) [(a) impaired reach ;(b) weakness of grip and (c) ataxic]*

**B. Accountant Member:-**

	Reserved for SC	Reserved for ST	Reserved for OBC	Unreserved	Total
Current vacancies	Nil	01	03	05	09
Carried forward vacancies	02	01	01	Nil	04
Total	02	02	04	05	13

2. The number of vacancies indicated above is only approximate and is liable to increase or decrease due to unexpected circumstances that may occur up to 31.12.2005.

7. In the referred Advertisement, it was made clear that the number of vacancies indicated therein was only approximate and was liable to increase/decrease due to unexpected circumstances that may occur up to 31.12.2005. One more vacancy reserved for Scheduled Tribe (ST) in the grade of AM arose later due to the cancellation of offer of appointment made to Shri TBC Rozara CIT who was selected in the previous selections against the ST vacancy which was reported to the Selection Board for inclusion in the recruitment presently under consideration. Thus, the total number of vacancies for which the Selection Board was requested to submit recommendations were 23.

8. The Selection Board was constituted with Smt. Justice Ruma Pal, Judge of Supreme Court of India, as Chairperson, Shri R. L. Meena, Law Secretary, Government of India and Shri Vimal Gandhi, President ITAT as Member. The Selection Board held interviews at 4 places (Chennai, Mumbai, New Delhi and Kolkata) in all for 14 days. Out of 325 candidates called for interview as per the short listing norms evolved for the purpose, 286 candidates appeared before the Selection Board. The Report of the Selection Board for Selection of Judicial/Accountant Members, Income Tax Appellate Tribunal-2005 filed on 22.9.2005 recommended as follows :-

4. Apart from the general attainments and deportment, personality traits, academic achievements and experience of the applicants, their general knowledge, knowledge of judicial concepts and principles, judicial system and administration of justice in India, familiarity with general principles of interpretation of statutes with particular reference to taxation laws and their familiarity with the concept of jurisdiction of courts and tribunals, hearing of appeals on facts and law, reference jurisdiction etc., were tested during the interviews.

5. On consideration of all the circumstances, the Selection Board recommends the applicants who have been found most suitable under different categories as indicated in Appendix-I to this report for

*appointment as Judicial/Accountant Members. The said Appendix also includes a number of wait-listed candidates who can be considered for appointment in case any of the candidates included in the main select list are not available or found unsuitable for appointment after antecedents verification, etc. The inter-se seniority of the candidates recommended for appointment has been fixed on the basis of merit and is indicated in Appendix-II to this report.*

*9. As per the said Report of the Selection Board, there are 2 Appendices. Appendix I is the List of Candidates Recommended for Appointment as Judicial/Accountant Members in the Income Tax Appellate Tribunal under various categories. In the group of Judicial Members the name of Shri Boppudi Krishnamohan, Roll No.821 (Applicant in OA No.1037/2008) appears at Serial No. 2 under the Panel/Wait-List for the Judicial Members in the General category (General Category here means Unreserved Category). Further, in the group of Accountant Members under General Category the names of Shri Pradip Kedia, Roll No.78 (Applicant in OA No.1024/2008) and Shri Inturi Rama Rao, Roll No.5 (Applicant in OA No.1036/2008) appear in the Sl. No.1 and 2 respectively, under caption Panel/Wait List. In the Appendix-II with the caption Combined Merit/Seniority List of the said Report, the names of Shri Pradip Kedia, Shri Inturi Rama Rao and Shri Boppudi Krishna Mohan appear under the heading Panel/Wait List at the seniority ranking of 19, 20 and 22 respectively.*

*10. The Department of Legal Affairs (in short DLA) conducted necessary verification of the character and antecedents of the selected candidates including these 3 Applicants through the Police authorities, CBDT, CBEC and DRI, besides getting the required vigilance clearance of the officers selected. The DLA found all candidates except 2 (3 Applicants in this case do not figure in the said list of 2 candidates) as eligible for seeking the approval of the Competent Authority viz. Appointments Committee of the Cabinet (in short ACC). Therefore, after getting the approval of Minister of Law and Justice on 28.2.2006; the DLA processed the recommendation of the Selection Board for approval of ACC. The DLA sent a proposal dated 1.3.2006 to ACC for appointment of 16 selected candidates (7 for JM and 9 for AM) in the ITAT. ACC approved the list of 16 candidates and directed DLA that all future proposals be processed in line with the notification of 23.12.2005.*

*11. The Notification GSR No.742 (E) dated 23.12.2005 was inserted through an amendment as part of Rule 4A in the Income Tax Appellate Tribunal Members (Recruitment and Condition of Service) Rules, 1963. We take an extract of the same :-*

*{Provided further that where the Selection Borad is of the opinion that it shall not be practicable to call all the candidates for the viva voce, it shall short list the candidates for this purpose by adopting such criteria which shall not be less than the following criteria:-*



*(i) for accountant member*

*a member of the Indian Income-tax Service Group A and has held the post of Commissioner of Income-tax or any equivalent or higher post for at least three years, or*

*a person who has for at least twenty years been in the practice of accountancy as a Chartered Accountant under the Chartered Accountants Act, 1949 (38 of 1949) or partly as such registered accountant and partly as a Chartered Accountant and has net Taxable income of not less than Rs.1,40,000/- (after allowable exemptions or deductions).*

*(ii) for judicial member*

*a member of judicial service who has held a post of District and Sessions Judge or Additional District and Sessions Judge for not less than seven years; or*

*a person who has been practicing as an Advocate for at least twenty years and who has net taxable income of not less than Rs.1,40,000/- (after allowable exemptions or deductions); or*

*a member of the Indian Legal Service who has held a post a Grade-I of that service or any equivalent or higher post for at least three years; or*

*a person who has held judicial office or the office of a member of a Tribunal or any post under the Union or a State requiring special knowledge of law after he became an Advocate or judicial officer, having a combined experience of twenty years;*

*Provided also that in case of candidates belonging to the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes Categories, the Selection Board may adopt such criteria as it may deem fit, but which shall not be less than the eligibility criteria prescribed under Sub-sections (2) and (2A) of Section 252 of the Income-tax Act, 1961 (43 of 1961) and rule 3}*

*12. When the Select List was not given effect, the Revenue Bar Association of Chennai filed a Writ Petition before the Hon'ble High Court of Madras in the matter and sought the writ of mandamus to direct the Respondents to give effect to the selection list with regard to the posts of JM and AM in ITAT. The Petitioner during pendency of writ petition sought interim direction and in support of the same cited the Judgment of Hon'ble Supreme Court of India in R.S. Mittal Vs Union of India (1995 Supplement (2) SCC 230). Reference was also made by the Petitioner to the 15th Report of the Parliamentary Standing Committee in Department of Personnel and Public Grievances. After hearing the Additional Solicitor General and the Counsels of the Petitioners, Hon'ble High Court passed an interim order in W.P. No.8288 of 2007 directing the Respondents that*

*selection list shall not be treated as lapsed till the disposal of this writ petition. Hon'ble High Court of Madras in the said writ petition finally passed its Judgment dated 24.4.2007.*

*Accordingly, we allow the writ petition and direct the respondents to place the matter before the Appointments Committee of the Cabinet {ACC} with a further direction to give effect to the selection list as approved by the Selection Board in the light of the decisions of the Supreme Court in 1995 Supp {2} S.C.C. 230 and {2000} 1 S.C.C. 600 {cited supra} within a period of eight weeks. However, there will be no order as to costs.*

*13. In the meantime, Rao Vijay Pal, filed an Application before the Principal Bench of the Tribunal (OA 340/2007) with the prayer to call for records pertaining to the selection recommended by the Selection Board in the month of September-October, 2005 against advertisement dated 21.1.2005, to issue orders declaring the act of the respondents for withholding the result of the selection recommended by the Selection Board as unlawful, unjustified, uncalled for, arbitrary, malafide, discriminatory and violative of fundamental rights of the applicant and also to direct the respondents to notify the result with all consequential service benefits. The Division Bench (one of us Hon'ble Mr. Justice V. K. Bali, was part of the Bench) disposed of the OA on 14.5.2007 with the following directions:-*

*For parity of reasons given by the Division Bench of Madras High Court in Revenue Bar Association (supra), we issue the same directions as were issued in the said case.*

*14. Further another case came up before the Hyderabad Bench of this Tribunal between V. Durga Rao Versus Union of India in OA No.219/2007. The Bench followed the decisions of the Hon'ble High Court of Madras (in WP No.8288/2007) and the Principal Bench (in OA No.340/2007) and disposed of the OA with the same directions as given by the Hon'ble Madras High Court and the order would be subject to the appeal said to have been filed by the respondents in the Hon'ble Supreme Court of India against the judgment of the Hon'ble High Court.*

*15. The Respondent Government moved the Hon'ble Supreme Court of India through a SLP [Special Leave Appeal (Civil) No.13681/2007] which was dismissed on 17.08.2007 directing thus :-*

*We find no reason to interfere with the impugned judgment/order. Accordingly, the special leave petition is dismissed. By the impugned judgment/order, a direction has been given to the respondents before it to give effect to the selection list as approved by the Selection Board. The Union of India is given eight weeks' time from today to complete the formalities.*

*16. Consequent to the directions of Hon'ble High Court of Madras*



*confirmed by the Apex Court, the decision of the Division Bench of Hon'ble Court of Madras in WP No.8288 of 2007 reached finality.*

*17. In the present OAs, there are no disputes on certain facts and both Applicants and Respondents admit such facts which are borne from the records. We compile such facts before examining the rival contentions and undertake analysis with considered views on the issues involved in the case.*

*\* Number of vacancies notified in the Advertisement dated 22.01.2005 published in Times of India is 22.*

*\* One vacancy which arose before 31.12.2005 was added and the Selection Board was requested to send the Panel for 23 in different categories.*

*\* It is an admitted fact that Selection Board could not find 5 suitable candidates in different categories (ST JM post-1, ST AM Post-3 ; SC JM Post-1).*

*\* Further Selection Board recommended 22 candidates (Main List 18 +wait list 4) in the combined merit/seniority list (Appendix-II) of the Selection Board Report).*

*\* As per the Combined Merit Seniority List at Appendix-II of the Selection Board Report, 4 candidates in the Panel/wait list included 2 in the UR category of JM (21 and 22) and 2 in the UR category of AM (19 and 20).*

*\* It is also an admitted fact that two from the list of AM (1 from UR category and 1 from other Backward Classes were not considered by DLA for appointment in ITAT for the reasons available with the Department.*

*\* On assumption of charges by 8 selected candidates (JM-5 and AM-3) in October-November 2007, the Respondent No.1 issued a Government Notification dated 4th December 2007. Three more selected candidates (All AMs) have, subsequently joined in February 2005.*

*\* Out of 16 selected candidates and approved by ACC, as on April 2008, 11 have joined in ITAT (AM-6 and JM-5).*

*\* 2 AMs and 2 JMs were granted extension of time. One AM was up to 29.02.2008, another AM up to 23.4.2008; amongst JMs, one was granted extension up to 1.4.2008 and another up to 21.4.2008. There is no information as to whether they have joined or extension of joining time granted by DLA.*

*\* One selected candidate (Shri R. N. Dash) for AM in UR category has declined the offer.*

*18. In an earlier case pertaining to the Panel for the year 2003, where*

one of the selected candidates did not join, the DLA picked up one from the reserved list and submitted the same to ACC in October 2005. ACC did not accept the recommendation of DLA on the ground that the candidate was a wait listed candidate of the selection made during the period from 2003 to February 2004 and in terms of DOPTs instructions such lists lapse on the expiry of a period of one year from the list being drawn up. The aggrieved candidate (Shri Pradeep Mahajan) filed a Writ Petition (WP(C) NO.637 of 2005) in the Hon'ble Supreme Court claiming to be appointed to the post of AM. While dismissing the Petition the Apex Court observed on 24.9.2007 that the grounds of lapsed panel (including) wait list was the basis of ACC decision not to appoint the selected wait listed candidate.

19. In the present case, though one year time prescribed by DOP&T is over, the Hon'ble High Court of Madras in the interim order dated 21.3.2007 in WP No.8288/2007 directed that the selection list shall not be lapsed till the disposal of this Writ Petition. Further the selected candidates were granted extension by DLA and as on April, 2008 some of the selected candidates approved by the ACC, were yet to join. We, therefore, consider that the DLA has been keeping the list alive. However, referring the above cited decision of High Court and Apex Court and after getting the approval of Minister of Law and Justice, DLA sought the views of Shri Gopal Subramaniam, Additional Solicitor General on two issues; (1) whether the limitation of one year can be made applicable to the wait-listed candidates when it was not made, applicable to other selected candidates. (2) In view of the orders of Hon'ble High Court of Madras dated 24.4.2007 and Hon'ble Supreme Court of India dated 17.8.2007, the candidates in the wait list need to be considered for appointment as AM and JM in ITAT?

20. Learned Additional Solicitor General (ASG) has analysed the rules and facts of the case and offered his opinion as follows :-

4. The question which has been raised before me is whether the Government must fill up the balance vacancy by operating the wait list which is available or whether the Government must refrain from making any further appointments out of the said panel on the ground that the panel has outlived its period of validity.

5. In this regard, the general principle is that a panel must be valid for a period of 12 months. This is because a panel is expected to be exhausted within a period of 12 months and if a substantial period lapses since the formation of a panel, the rights of newcomers can be somewhat prejudiced. The instructions issued by the Department of Personnel & Training have also stipulated that a panel would be valid for a period of 12 months from the date it is drawn up and can be extended for a further period of 6 months, i.e., 18 months in all.

6. A question arises as to what happens if the panel is not effectively acted upon. It would not be possible to answer a question in general terms without having regard to the facts and circumstances prevailing

*in each individual situation. While considering the present case, there can be no doubt that the panel could not be acted upon within the stipulated period because the ACC was under an impression that a time-bound appointment could be issued in respect of such Members and the appointment could be for a period of two years. Quite naturally, it was pointed out that the appointment could not be for a limited term in violation of the statutory rule and thus a fresh reference was made to the Appointments Committee of the Cabinet. However, it must be noted that there is a judicial direction by the Madras High Court dated 26th April 2007 wherein the Madras High Court allowed the Writ Petition.*

*7. The said judgment could not be displaced in the appeal before the Supreme Court.*

*8. It is clear from the above that the time to implement the panel was extended by an order of Court. In that view of the matter, the general principle pertaining to validity of a panel as valid for 12 or 18 months loses significance. Once an order is issued by a Court of competent jurisdiction and that too the Supreme Court, in the present case, effect will have to be given to the panel in accordance with law. A further question arises whether the wait listed candidates are at par with the candidates who are on the merit panel or is their right somewhat more tenuous than that of the candidates who are placed in the merit stage. In fact a panel can be either a contiguous panel or a bifurcated panel. The drawing up of such a panel is to enable persons selected in a certain order to be available for appointment subject to the availability of vacancies. There is no vested right on the part of any selectee whether he is in the merit panel or finds a place as a wait listed candidate to claim any vested right of selection. However, if the panel is contiguous or wait listed, it does not make any difference and a wait listed candidate is also entitled to claim a legitimate expectation of being treated fairly in the event the panel is operated. Thus, the panel which consist of merit listed candidates including wait listed candidates must be deemed to form a part of the panel constituted pursuant to the selection held in September 2005 and would have to be treated as a part of the select list. If the wait listed candidates are in fact a part of the select list although they appear to be under the nomenclature wait listed candidates, it does not make any difference and they are entitled to obtain the benefit of the operation of the panel subject to the availability of a vacancy. I, therefore, do not find any impediment in the way of the Central Government from making an appointment to the remaining post of a Member of the ITAT out of the available wait listed candidates. Since the vacancy which survives is that of an Accountant Member, only the wait listed candidates for Accountant Members would have the right to be considered against such a post and wait listed Judicial Members will have no right to be considered against the post of an Accountant Member. Under these circumstances, I am of the opinion that having regard to the peculiar facts and circumstances in the present case including a review*

*reference to the ACC and various Court proceedings and the Supreme Court order dated 17th August 2007, it is fit and proper that the present panel which was drawn up pursuant to the selection held in September 2005 which was rendered valid and operative after the dismissal of the Special Leave Petition on 17th August 2007, should be acted upon and an offer should be made to the first wait listed candidate against the vacant post of Accountant Member.*

*9. I may add that this opinion is not intended to derogate from the general principle governing validity of a panel that the panel is valid for 12 months or at the highest for 18 months. But there may arise cases where on account of judicial orders the panel may have to be operated even well beyond the said period. If in fact appointments were offered to Members out of the select panel pursuant to the judgment of the Members High Court, as affirmed by the Supreme Court, no justification can be offered for not operating the panel in respect of the surviving vacancy of an Accountant Member of the Tribunal. However, care must also be taken to ensure that in future a panel would last for a limited period and indeed all concerned authorities must act in future to ensure that the panel is operated within a period of 12/18 months, failing which the panel cannot be invoked.*

*10. During the course of the conference, a question was posed whether the two Members whose appointments are being withheld on account of certain vigilance enquiries, can be reckoned as surviving vacancies. In my opinion, it is not possible to reckon the post against which the said two Members are entitled to be appointed as surviving vacancies. In the event the vigilance enquiries terminates successfully in favour of the selectee, the said selectee would be entitled to be appointed against those posts and it would be premature at this stage to consider the said two posts are definite vacancies for the operation of the wait listed panel. However, this conclusion proceeds upon the assumption that the said two posts are being made available and continue to remain available for appointment of two incumbents and all that which is being awaited is the clearance from the vigilance authorities. In my view, a clear decision must be taken even in respect of those two vacancies whether the said candidates are fit to be appointed after examining the report of the vigilance authorities.*

*21. On the basis of the ASG's above said opinion, DLA sent on 10.1.2008 a proposal to ACC to operate the wait list for filling up the available vacancies. As on that date one vacancy of AM was requested to be filled up from the wait list and Shri P. Kedia's (one of the Applicants) name was submitted to ACC after the approval of the proposal by Minister of Law and Justice.*

*22. The Learned Counsel for the Applicants argued that the Respondent Government was duty bound to fill up all vacancies advertised and selection process completed. Shri Behera, relied on*



*the orders of the Division Bench of Hon'ble Supreme Court in the Civil Appeals Nos. 4561-62 of 1992 between State of Bihar and another versus Madan Mohan Singh and Others decided on 13.10.1993.*

*.....Whether the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list of 129 candidates prepared in the ratio of 1:4 on the basis of the written test as well as viva voce will hold good only for the purpose of filling up those 32 vacancies and no further because said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said advertisement and selection process.*

*23. Further, Shri Behera cited the judgment of Hon'ble Apex Court in Dir. SCTI for Medical Science and Technology and Another vs. M. Pushkaran in Civil Appeal No.5368 of 2007 decided on 23.11.2007. The facts of the case and decision thereon is stated herein. A question arose for decision in the Appeal as to whether respondent therein had any legal right for being appointed against the post of 3 security guards advertised by the appellant institute. Against 3 vacancies, names of 5 candidates were finalized. The validity for the Panel was one year. Third candidate declined the offer. However, the respondents did not offer any appointment to the 4th candidate in the Panel since the Institute Governing Body decided the services to be hired/contracted out. The selected wait listed candidate filed a writ before the Hon'ble High Court. Though Single Judge dismissed the plea of the petition, but the Division Bench of the Hon'ble High Court reversed the same and directed the Respondents to consider the next person included in the list for regular appointment. However, the Institute appealed against the said order before the Hon'ble Supreme Court. Some of the judicial precedents operating in the field were taken into account by the Apex Court. Those decisions are as follows:-*

*(i) Shankarsan Dash v. Union of India [(1991) 3 SCC 471]*

*(ii) R. S. Mittal v. Union of India [1995 Supp (2) SCC 230]*

*(iii) Asha Kaul (Mrs. And Another v. State of Jammu and Kashmir [(1993) 2 SCC 573]*

*(iv) Food Corpn. Of India and Others v. Bhanu Lodh and Others [(2005) 3 SCC 618].*

*(v) All India SC & ST Employees Association and Another v. A. Arthur Jeen and Others [(2001) 6 SCC 380]*

*The Hon'ble Supreme Court while upholding the decision of the Division Bench of the High Court observed that the application of law would depend upon the fact situation obtaining in each case, decided*



as follows:

18 The judgment of the High Court in view of the aforementioned authoritative pronouncements cannot be said to be perverse. The respondent was to be offered with the appointment at a point of time when no policy decision was taken. There was, thus, no reason not to offer any appointment in his favour. Why the select panel was ignored has not been explained. Even the purported policy decision was not in their contemplation. We, therefore, do not see any reason to interfere with the impugned judgment.

19. Furthermore, the respondent is an ex-serviceman. He in ordinary case should have been offered appointment particularly when three posts were vacant. The decision to abolish posts was not taken at a point of time when he had filed the writ petition. It was expected that on 16.06.2005 when the third candidate refused to join the post, he should have been offered the same.

20. The policy decision to abolish the posts as also contracting out the security services was taken by the appellant much thereafter, viz., on or about 29.12.005. We are, therefore, of the opinion that it is not a fit case where we should interfere with the impugned judgment.

24. The Applicant's counsel also quoted the judgment of Hon'ble Supreme Court in *Y. V. Rangaiah and others vs. J. Sreenivasa Rao and others*, and *State of Andhra Pradesh and another vs. J. Srenivasa Rao and others*, [AIR 1983 SC 852] in support of his claim that vacancies which occurred prior to amended rules would be governed by old rules and not by new rules. His averment was that the amendment of Rules, if any, would be prospective.

25. Shri Behera, further cited the decision of the Apex Court in *P. Mahendran and others vs. State of Karnataka and others*, AIR 1990 SC 405. He quoted the following relevant portion:-

*It is true that a candidate does not get any right to the post by merely making an application for the same, but a right is created in his favour for being considered for the post in accordance with the terms and conditions of the advertisement and the existing recruitment rules. If a candidate applies for a post in response to advertisement issued by Public Service Commission in accordance with recruitment Rules he acquires right to be considered for selection in accordance with the then existing Rules. This right cannot be affected by amendment of any Rule unless the amending Rule is retrospective in nature.*

26. Shri C. Chandrasekharan, the Learned Additional Solicitor General strongly opposed the contentions of the Applicant while highlighting the facts of the case he stated that the Government did not consider any candidate from the wait list recommended by the Selection Board. It is a settled law that a person included in the wait

*list can have no right to seek appointment to a post. He submitted that the names of the Applicants featured only in the wait listed candidates. In support of his contention, he cited the judgment of Hon'ble Supreme Court in Union of India vs. S. S. Uppal and ors. [1996 (1) SCSJ page 225 ; 1996 (1) JT Page 258] where it was ruled that mere inclusion of a person's name in the panel does not confer him any right to automatic appointment. In case of Dr. K. Ramulu and another vs. Dr. S. Surya Prakash Rao and others [(1997) 3 SCC 59], the Apex Court held in the matter of operating a wait list that the respondents did not acquire any vested right for being considered for promotion.*

*27. Learned Additional Solicitor General relied on the Judgment of Hon'ble Supreme Court of India in SLP (C) No.6175 of 1997 in Sanjay Bhattacharjee vs. Union of India and Others [(1997) 4 SCC 283] in support of his claim that inclusion of candidates in the waiting list have no right to appointment. In view of the present case, we feel it appropriate to cite the judgments of the Hon'ble Supreme Court, to appreciate whether the Apex Court decision is applicable in the present case.*

*Merely because the petitioner has been put in the waiting list, he does not get any vested right to appointment. It is not his case that anyone below his ranking in the waiting list has been appointed which could give him cause for grievance. Thus he cannot seek any direction for his appointment. (Para 3)*

*For subsequent vacancies, everyone in the open market is entitled to apply for consideration of his/her claim on merit in accordance with law and it would be consistent with Articles 14 and 16 (1) of the Constitution. The direction sought for, not to fill up the vacancies having arisen subsequently until the candidates in waiting list are exhausted, cannot be granted.*

*28. In this case Petitioner was in the position of 779 while the notified vacancies were 480 and his contention was that the fresh recruitment could not be resorted to unless he and other wait listed persons were appointed. In the present case, the Applicant's claim is to fill up the advertised/notified vacancies from the panel/wait list. The facts of both the cases and grounds for filling up the vacancies from the wait list being significantly different, we are of the opinion that the ratio of Hon'ble Supreme Court in Sanjay Bhattacharjee's case (supra) is not applicable to the present case.*

*29. On behalf of the Respondents, Learned ASG also highlighted that in case of a similar Petition filed by 2 wait listed candidates (Mr. P. K. Mahajan and Mrs. Neera Gupta) before Hon'ble Supreme Court in WP (C) No.637 of 2005 and WP (C) No.22/2006 praying for their appointment as JM in ITAT, the Respondent Government submitted therein that the ACC did not approve the proposal for the appointment of said 2 candidates as per DOP&T instructions that such lists lapse*

*on the expiry of a period of one year from the date the lists get drawn up. Both writ petitions were dismissed by the Apex Court vide its order dated 24.9.2007.*

*30. Another point was raised by the Learned ASG to the effect that the Government had already taken a decision to amend the Recruitment Rules for bonafide reasons. Further, he states that the Respondent is well within its rights to take an appropriate decision in public interest and is not under any obligation to operate the wait list.*

*31. The Judgment of Hon'ble High Court of Madras in the Revenue Bar Association case (supra), holds the grounds since the attempt of the Respondents to displace the same before the Apex Court failed. We recapitulate the decision of the High Court of Madras.*

*Accordingly, we allow the writ petition and direct the respondents to place the matter before the Appointments Committee of the Cabinet [ACC] with a further direction to give effect to the selection list as approved by the Selection Board in the light of the decisions of the Supreme Court in 1995 Supp [2] SCC 230 and [2000] 1 SCC 600 [cited supra] within a period of eight weeks. However, there will be no order as to costs.*

*The decision cites the Apex Court Judgment in 1995 Supp (2) SCC 230 and (2000) 1 SCC 600 (cited supra). For better judicial understanding of the present case, we produce extract of two judgments:-*

*R. S. Mittal vs. Union of India [1995 Supp (2) SCC 230]*

*It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government, No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law. The appointment should have been offered to Mr. Murgad within a reasonable time of availability of the vacancy and thereafter to then next candidate. The Central Governments approach in this case was wholly unjustified.*

*A. P. Aggarwal v. Govt. of NCT of Delhi [[2000] 1 SCC 600]*

*A reading of section 13 (4) of the Delhi Sales Tax Act and the office memorandum together shows that the letter was issued with a view to fill up the vacancy as soon as practicable. The statutory provision is expressed in mandatory language and in order to give effect to the*

*same, executive instructions were issued in the office memorandum. The first paragraph of the office memorandum shows that the position prevailing prior to 14.5.1987 lead to some difficulties and the memorandum in question was being issued in order to get over such difficulties and achieve the objective of early fulfillment of the vacancy contemplated in the Act. If the office memorandum is read in the light of the provisions in Section 13 (4), there is no doubt whatever that a public duty is case on the authorities concerned to fill up the vacancy within as short time as possible provided the conditions set out in the memorandum are present. There is no dispute in this case that the vacancy was created by resigning of the post by M.L. Sahni within a period of six months of the date of joining the same. The list recommended by the Select Committee and accepted by the Government contained a panel of two names and the post is such it is not possible to make local arrangements to fill up the vacancy. Nor is it desirable to keep it vacant for a long time or till the competition of fresh recruitment.*

*In our opinion this a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and, therefore, it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. Even if it is to be said that the instructions contained in the office memorandum dated 14.5.1987 are discretionary and not mandatory, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also satisfy the mandatory requirement of the statute. It is not, therefore, open to the Government to ignore the panel which was already approved and accepted by it and resort to a fresh selection process without giving any proper reason for resorting to the same. It is not the case of the Government at any stage that the appellant is not fit to occupy the post. No attempt was made before the Tribunal or before this Court to place any valid reason for ignoring the appellant and launching a fresh process of Selection.*

*It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us [vide Shrilekha Vidyarthi vs. State of U.P. , [1991] 1 SCC 212.*

*32. Having gone through the rival contentions and the directions of Hon'ble High court of Madras, having analysed the facts of the case and considered the judicial precedents and having carefully perused the records of the Respondent No.1, we find that the vacancies exist and the wait listed candidates selected through a due process by a Selection Board headed by the then Hon'ble Judge of Supreme Court, are available with the Respondents. We also observe that the Respondent No.1 (DLA) considered and accepted the views of the*



then ASG, Shri Gopal Subramanian in the issues and submitted name of one wait listed candidate to ACC for approval.

33. We consider here the issue of validity of the panel since 12/18 months have passed, we must indicate that the Selection Board drew up the panel and submitted its Report on 22.9.2005. As per DOP&T, the same should have been operated and all activities completed in a period of one year i.e. on or before 21.9.2006. Even a period of 6 months extension (as admissible) is taken into consideration, all actions would have to complete on or before 21.3.2007. But as on April, 2008, 11 out of 16 AMs and JMs have joined, one has declined to join and some have been given extension of time. This, in our view, is not the completion of panel operationalisation. Legally, we find that the Combined Panel is still alive and hence valid. For reasons stated by Shri Gopal Subramanian learned ASG, are in tune with the settled Law. We are of the firm opinion that within a time limit the actions in all respect of the Panel including the wait list shall be completed and all surviving vacancies filled up.

34. Having concluded that the Panel is valid and can be operated, we come to the issue of filling up the vacancies presently available from the advertised number of vacant posts, from the wait listed selected candidates. It is a settled legal position that there is no vested right on the part of any selected candidate whether he is in the main list or wait list. But, once the Panel gets operated, the process of appointment from the combined list (main + wait list) as per the rank/seniority must continue and reach natural and legal conclusion. Respondents have not completed the process fully. We also observe that the Selection Board has given a combined list. For this case such a combined list is contiguous and not separate. The Selection Board has categorically stated The said Appendix also includes a number of wait listed candidates who can be considered for appointment in case any of the candidates included in the main select list are not available or found unsuitable for appointment after antecedent verification etc..Further, we could not get satisfactory reasons from the Respondents on the question of why the selected wait list candidates are to be ignored. The idea/thought of ignoring such a Panel with no justifiable reasons, will become arbitrary.

35. In our opinion to operate the Panel, including wait list, is a case of exercise of power together with discretion, which means that it casts a duty on the Government to promote the object for which the power is vested while ensuring that there is no iota of arbitrariness. To say that the Rules will be amended and, therefore, the wait list will not be operated, seems to reflect the arbitrariness and violation of the directions issued by Hon'ble High Court of Madras. In our opinion, it is not open to the Respondents to ignore the panel which includes the wait list to fill up the vacancies advertised. It has not been the case of the Respondents at any stage to say that the Applicants are not fit to be appointed as AM/JM in ITAT. The basic principle under Article 14 of



*the Constitution is that every state action, in order to survive the judicial scrutiny, must not be susceptible to the arbitrariness.*

*36. In view of our above discussions and observations, the Respondents are directed to consider the selected wait listed candidates for filling up the advertised vacancies presently existing in AM/JM UR categories in 8 weeks time. With the above directions, these OAs (OA No.1024/2008, OA No.1036/2008 & OA NO.1037/2008) are allowed. There would be however no order as to costs.”*

4. Therefore, the question of fact is now available for our consideration.

Apparently the Tribunal allowed that application and held that the respondents to be compelled to consider the selected wait listed candidates for filling up of advertised vacancies presently existing in 8 weeks' time.

5. The matter was taken up under judicial review on challenge in Writ Petition (Civil) No. 7521 of 2008 dated 20.03.2009 which we quote:

**“MADAN B. LOKUR, J.**

*The Petitioner (Union of India) is aggrieved by an order dated 31st July, 2008 passed by the Central Administrative Tribunal, Principal Bench in OA No.1024/2008, OA No.1036/2008 and OA No.1037/2008.*

*2. The Respondents are an advocate (Shri B. Krishna Mohan) and two Chartered Accountants (Shri Inturi Rama Rao and Shri Pradip Kumar Kedia). They all belong to the general or unreserved category and have been held entitled to appointment as a Judicial Member and Administrative Members respectively in the Income Tax Appellate Tribunal (for short the ITAT).*

*3. On 22nd January, 2005 the Union of India issued an advertisement for filling up 22 vacancies of members in the ITAT. Of these vacancies, three were for Judicial Member (JM) in the unreserved category (UR) and five were for Accountant Members (AM) also in the unreserved category (UR). The advertisement specifically stated that the number of vacancies is approximate and is liable to increase or decrease due to unexpected circumstances that might occur upto 31st December, 2005.*

*4. For filling up the above 22 vacancies, a Selection Board was chaired by Hon'ble Ms. Justice Ruma Pal (then a Judge of the Supreme Court of India) and two members Shri R.L. Meena, Law Secretary, Government of India and Shri Vimal Gandhi, President of the ITAT. The magnitude of the task facing the Selection Board can be*

gauged from the fact that it interviewed as many as 286 candidates over a period of 14 days in four different cities of the country.

5. The Selection Board gave its recommendations on 22 nd September, 2005 and the applicants found most suitable for appointment were mentioned in Appendix I (both for JM as well as for AM). The Appendix also included a number of wait-listed candidates including the Respondents, who could be considered for appointment in case any of the candidates included in the select list were not available or found unsuitable for appointment after verification of their antecedents etc.

6. We are concerned only with the vacancies for JM/UR and for AM/UR.

For the three vacancies of JM/UR, the candidates recommended and appointed were Smt. Asha Vijayraghavan, Shri George George K. and Shri George Mathan. Therefore, all the three vacancies of JM/UR were filled up.

As far as the AM/UR vacancies are concerned, of the five advertised vacancies, three of them were filled up by Shri B. Ramakotaiah, Shri Abraham P. George and Shri Amarnath Pahuja. Shri R.N. Dash was selected but did not join, while the name of Shri Satya Prakash was not sent to the Appointments Committee of the Cabinet (ACC) because his vigilance clearance was not available and we were told that even today it is not available. In any case, he has not been appointed as a member of the ITAT. There are, therefore, two clear vacancies in the category of AM/UR.

7. In so far as the post of JM/UR is concerned, it has come on record that Shri Vishnu Chander Gupta (selected against a JM/UR vacancy advertised in 2003) declined the offer on 21st March, 2005 and consequently the offer given to him was cancelled and withdrawn by the Department of Legal Affairs by its letter dated 6th April, 2005. It has also come on record that Shri Sanjeev Sharma (selected against a JM/UR vacancy advertised in 2003) joined duties on 9th March, 2005 but subsequently resigned and his resignation was accepted with effect from 10th May, 2005 vide Notification dated 9 th May, 2005 issued by the Government of India, Ministry of Law and Justice.

8. Against the above two vacancies of JM/UR arising from the selection made in 2003, the Union of India recommended the name of Shri Pradeep Kumar Mahajan and Ms. Neera Gupta, who were in the waiting list of 2003 but by a letter dated 3rd October, 2005 the ACC did not approve their appointment. Shri Mahajan and Ms. Gupta challenged the failure of the Union of India to appoint them by filing writ petitions in the Supreme Court being WP (C) No. 637/2005 ([Pradeep Kumar Mahajan vs. Union of India](#)) and WP (C) No. 22/2006 ([Neera Gupta vs. Union of India](#)). Both the writ petitions were dismissed on 24<sup>th</sup> September, 2007.

9. On these broad facts, the case of Shri B. Krishna Mohan

*JM/UR is simply this: as per the advertisement issued on 22nd January, 2005 it was clearly stated that the number of vacancies is liable to increase due to unexpected circumstances that may occur upto 31 st December, 2005. Unexpectedly, two vacancies did arise with Shri Vishnu Chander Gupta (JM/UR) declining to join the ITAT and the offer given to him having been withdrawn on 6 th April, 2005 and Shri Sanjeev Sharma (JM/UR) tendering his resignation which was accepted on 9th May, 2005. Consequently, two unexpected vacancies arose in 2005 (though from the 2003 selection) against which Shri B. Krishna Mohan could be appointed. It was submitted that the failure of the Union of India to appoint him is completely arbitrary and contrary not only to the advertisement issued but also the recommendation of the Selection Board.*

*10. As far as the two AM/UR vacancies are concerned, the submission of Shri Pradip Kumar Kedia and Shri Inturi Rama Rao is that there were admittedly two clear vacancies because, of the five AM/UR vacancies, only three were filled up (with Shri R.N. Dash refusing to join and Shri Satya Prakash not having been granted vigilance clearance). Therefore, Shri Pradip Kumar Kedia and Shri Inturi Rama Rao who were the first two in the wait list ought to have been offered appointment as AM/UR. The failure of the Union of India to do so is completely illegal and arbitrary.*

*11. As can be seen from the fact situation mentioned above, the issues raised are not at all complicated. Undoubtedly, there are vacancies available both in the category of JM/UR as well as in the category of AM/UR. In the category of JM/UR two unexpected vacancies arose before 31st December, 2005 which were not considered by the Union of India against which Shri B. Krishna Mohan could be appointed. In so far as AM/UR vacancies are concerned, there is no dispute that there are two clear vacancies against which Shri Pradip Kumar Kedia and Shri Inturi Rama Rao could be appointed.*

*12. Before the Tribunal, one of the questions that had arisen was whether the 2005 select panel was still valid or not. The Tribunal was of the view that the 2005 select panel was very much alive. The learned Additional Solicitor General did not agitate or contest this issue before us at all. We are, therefore, proceeding on the basis that the select panel recommended by the Selection Board on 22 nd September, 2005 is still valid. The learned Additional Solicitor General also did not contest before us that the two unexpected vacancies of 2003 could not be carried forward till 2005. We are, therefore, proceeding on the basis that the two unexpected vacancies of JM/UR were available for being filled up through the 2005 selection process.*

*13. The learned Additional Solicitor General urged two issues before us - one on facts and the other on law. The factual issue urged was that no vacancy existed as regards JM/UR for accommodating Shri B. Krishna Mohan. This submission is factually incorrect as we*

have noted above. No submission was made before us of the non-availability of any vacancy to adjust Shri Pradip Kumar Kedia and Shri Inturi Rama Rao against the posts of AM/UR. Again, as we have already noted above, two vacancies did exist to accommodate them.

14. The controversy in law raised by the learned Additional Solicitor General is that waitlisted candidates have no right to be appointed and it is for this reason and this reason alone that the order passed by the Central Administrative Tribunal is sought to be faulted.

15. The learned Additional Solicitor General placed reliance on [Sanjoy Bhattacharjee v. Union of India and others](#), (1997) 4 SCC 283 wherein it has been held by the Supreme Court that merely because a candidate has been put in the waiting list he does not get any vested right to an appointment.

16. This proposition of law is not only well settled but extends beyond what is submitted by the learned Additional Solicitor General. [In Shankarsan Dash v. Union of India](#), (1991) 3 SCC 47, it has been held that even a candidate on the merit list does not have any indefeasible right to an appointment, even if a vacancy exists. A similar view has been taken in several other cases such as in [Asha Kaul and another v. State of Jammu and Kashmir and others](#), (1993) 2 SCC 573 and [Food Corporation of India and others v. Bhanu Lodh and others](#), (2005) 3 SCC 618.

17. However, what is of importance is what the Supreme Court recently said in [State of Madhya Pradesh and others v. Sanjay Kumar Pathak and others](#), (2008) 1 SCC 456 that if a vacancy exists and it is not filled up, there must be some reasonable explanation for not doing so. In coming to this conclusion, the Supreme Court relied upon [K. Jayamohan v. State of Kerala](#), (1997) 5 SCC 170 and [Munna Roy v. Union of India](#), (2000) 9 SCC 283. Indeed, this view has been consistently expressed by the Supreme Court in several other decisions such as [R.S. Mittal v. Union of India](#), 1995 Supp (2) SCC 230 and [A.P. Aggarwal v. Government of NCT of Delhi and another](#), (2000) 1 SCC 600.

18. The law, therefore, seems to be quite well settled to the effect that no one has indefeasible or vested right to an appointment, whether he is on the waiting list or on the merit list, but at the same time there must be some reasonable basis for not filling up an existing vacancy or not offering an appointment to a meritorious candidate. If a reasonable or rational explanation does not exist, it would clearly fall foul of [Article 14](#) of the Constitution.

19. In so far as the present case is concerned, the only explanation proffered by the learned Additional Solicitor General for not filling up the vacancies was that the Recruitment Rules were likely to be amended. In fact during the course of oral submissions, it was brought to our notice that an amendment to the Recruitment Rules was contemplated sometime in November, 2004. It was further brought to our notice that a Notification bearing GSR No. 742(E)



*dated 23 rd December, 2005 was inserted through an amendment in Rule 4A in the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963. Nothing in this amendment disqualifies any of the Respondents from being appointed as members of the ITAT, nor was any such argument advanced by the learned Additional Solicitor General. We are, therefore, unable to see the relevance of the amendment to the Rules, which is sought to be made the basis of denying appointment to the Respondents to the post of member of the ITAT.*

*20. Contrast this with the fact that the selection was conducted by a high-powered Selection Board presided over by a sitting Judge of the Supreme Court. No one can doubt that the recommendations of such a Selection Board deserve to be given due respect, weightage and consideration. There is also no doubt that there is a huge backlog of cases pending in the ITAT and it does not serve anybody's interest if the backlog remains or increases. The only way of reducing the backlog is by filling up all vacancies at the earliest and by not doing so, the Union of India is merely prolonging the agony of a large number of assesseees, apart from depriving itself of its legitimate dues, depending on the verdict of the ITAT in the appeals pending before it. Therefore, far from being a reasonable or rational explanation for not filling up the vacancies, the explanation given is detrimental to the public interest and the interest of the Revenue.*

*21. We have also seen from a perusal of the impugned order passed by the Tribunal that there is no explanation whatsoever given by the Union of India for not filling up the vacancies except some proposed amendment to the Rules. Before us also there is no other explanation forthcoming. Consequently, we have no option but to dismiss the writ petitions and approve the view taken by the Tribunal. The Union of India is, therefore, directed to process the case for the appointment of the Respondents against the respective vacancies to which they may be entitled and thereafter place the matter before the Appointments Committee of the Cabinet for further directions. The needful should be done by the Union of India within a period of 8 weeks from today.*

*22. The writ petitions are dismissed but there will be no order as to costs."*

6. The Hon'ble High Court of Delhi held that the respondents are **"eligible against the respective vacancies"** and granted a further 8 weeks of time to do the needful.

7. This matter was taken under challenge in Civil Appeal Nos. 6567-6569/2010 and vide order dated 17.11.2011 the Hon'ble Supreme Court held



that the amendment in Rule 4 (a) had been in effect from 26.04.2004 and, therefore, this amendment could not be the amendment which was in the mind of the Appointments Committee of the Cabinet when it took a decision on 26.04.2006 and 31.08.2007 to make further appointments only after the rules are amended. The Hon'ble Apex Court further held that, following the decision of the Madras High Court, the Supreme Court had taken up the matter in SLP in a similar matter relating to appointment of 16 persons. That may not be necessarily followed in this particular case as the Hon'ble Apex Court held in respect of the wait listed candidates that, as there is a proposal for amendment of the Recruitment Rules, therefore, the Original Applications filed by the applicants were dismissed.

8. But then, contrary to the proposals made above to amend the Recruitment Rules, the government decided not to do it and further selections were made on the same parameters. Therefore, the applicant again approached the Hon'ble Apex Court vide Writ Petition (Civil) No. 202/2013 and vide order dated 23.09.2014 the Hon'ble Apex Court held that applicant should be considered for recruitment on the basis of **“his position in the Waiting List against one of the two vacancies that had arisen on account of two of the candidates in the merit list not having been granted the vigilance clearance.”** We quote from the said judgment of the Hon'ble Apex Court:

**“ORDER**

*This writ petition under Article 32 of the Constitution of India has been filed seeking the following reliefs:*

*“(a) Writ of Mandamus directing the Respondent No.1 as (sic) the Accountant Member of ITAT in lieu of the selections already*

*made and/or issue appropriate writ of order for the enforcement of its order dated 17-09-2009 in SLP(C) No.13681 of 2007; and (b) Direct the respondent to (sic) petitioner as AM of ITAT in pursuance of the selection list of 2005;"*

*The case has a long chequered history and for an effective adjudication of the entitlement of the petitioner - Inturi Rama Rao to the reliefs prayed for a brief recital of the relevant facts will be necessary*

*By an advertisement dated 21<sup>st</sup> January, 2005 13 posts of Accountant Members and 9 posts of Judicial Members in the Income Tax Appellate Tribunals of the country were advertised.*

*A Select List of 18 persons, 13 for the post of Accountant Member and 5 for the post of Judicial Member was finalized. There was a waiting list also prepared by the Selection Committee and insofar as the present proceedings are concerned, the petitioner was placed at Serial No.2 of the said Waiting List for appointment as Accountant Member.*

*A Public Interest Litigation was instituted in the Madras High Court to give effect to the selections made by way of appointment of the selected candidates. The writ petition was answered in the affirmative and the said order of the High Court was affirmed by dismissal of the Special Leave Petition (Civil) No.13681 of 2001 filed by the Union of India. Thereafter, it appears that the Select List was approved by the Appointment Committee of the Cabinet (ACC) and 11 vacancies of Accountant Members were filled up whereas 5 vacancies of Judicial Members were also filled up. Two vacancies of Accountant Members remained vacant as the two candidates who were selected were not cleared by the Vigilance. The petitioner who was placed at Serial No. 2 in the Waiting List, therefore, perceived a right to be appointed against one of the vacant posts of Accountant Member.*

*As appointment was not forthcoming, the petitioner moved the Central Administrative Tribunal, Hyderabad Bench by filing O.A. No.1036 of 2008 along with O.A. No.1024 of 2008 and O.A. No.1037 of 2008 which were transferred to Principal Bench of Central Administrative Tribunal at New Delhi. Appropriate relief was granted by the learned Tribunal. The order of the Central Administrative Tribunal was affirmed by the Delhi High Court in the Writ Petitions filed by the Union of India.*

*As against the order of the Delhi High Court, the Union of India filed Special Leave Petition (Civil) Nos. 13606-13608 of 2009 which were converted into Civil Appeal Nos. 6567-6569 of 2010. The said appeals were allowed by order dated 17<sup>th</sup> November, 2011. Review Petitions as also the Curative Petition filed by the present petitioner (Respondent in Civil Appeal Nos. 6567-6569 of 2010) have also been dismissed. It is in the aforesaid circumstances that the present writ petition under Article 32 of the Constitution of India has*

*been filed seeking the reliefs earlier noticed.*

*A reading of the judgment dated 17th November, 2011 passed by this Court in Civil Appeal Nos. 6567-6569 of 2010 arising out of Special Leave Petition (Civil) Nos. 13606-13608 of 2009 would go to show that this Court had perceived a difference between the main list of selected candidates and the wait-listed candidates. As appointments of the candidates in the main list (16 in number) had already been made, this Court thought it proper not to affirm the directions for appointment of the wait-listed candidates as made by the Central Administrative Tribunal and the High Court in the orders under challenge before it and, instead, accepted the contentions made by the Union of India that it would be making further appointments only after amendment of the Rules, which contemplated amendment, we are told at the Bar, pertained mainly to the eligibility of the candidates. It is an admitted fact that amendment to the Rules as contemplated and stated before this Court in Civil Appeal Nos. 6567-6569 of 2010 has not been effected till date. Rather it is not in dispute that a fresh selection process has been initiated in the year 2013 on the basis of the unamended Rules and the selection process has been completed and the appointments are awaited.*

*As the judgment dated 17<sup>th</sup> November, 2011 passed by this Court in Civil Appeal Nos. 6567-6569 of 2010 has been reiterated by this Court by dismissal of the Review Petitions and the Curative Petition has also been dismissed and even otherwise we do not consider it necessary to express a view different from those recorded in the order dated 17th November, 2011 in the aforementioned Civil Appeals i.e. Civil Appeal Nos. 6567-6569 of 2010. However, taking the aforesaid order as it is, what we find is that notwithstanding the statement made on behalf of the Union of India before this Court that vacancies in the future will be made only after the amendments in the Rules are carried out, the Union of India has initiated a process to make further appointments without amending the Rules. If persons eligible under the then existing Rules which are in force even today are to be considered for appointment, surely, the petitioner, who is a wait-listed candidate, will also have to be considered for appointment by consideration of his entitlement for appointment as in the year 2007 when the appointments on the main-list were made and the two vacancies arose giving rise to the issue of operation of the waiting list. What follows from the above is that even accepting the order dated 17<sup>th</sup> November, 2011 passed by this Court in Civil Appeal Nos. 6567-6569 of 2010, in view of the subsequent facts and events that have occurred, namely, action of the Union of India in resorting to a fresh process of selection and appointment without amendment of the Rules, the right of the petitioner to be considered for appointment on the basis of his position in the Waiting List has once again come to fore which needs to be resolved by an appropriate order.*

*We, therefore, allow this writ petition and direct consideration of the case of the petitioner for appointment on the basis of his position in the Waiting List against one of the two vacancies that had arisen on account of two of the candidates in the merit list not having been granted the vigilance clearance. This will be done by the concerned Authority within 30 days from the date of receipt of a copy of this order.*

*The writ petition shall stand disposed of in the above terms.”*

9. The Hon'ble Apex Court held that it is not in dispute that a fresh selection process has been initiated in the year 2013 on the basis of the unamended rules and the selection process had been completed and appointments are also awaited at that point of time. It noted that the curative petition filed by the present applicant was also dismissed as against the order in Civil Appeal Nos. 6567-6569/2010. But then it also held that **“the petitioner who was placed at Serial No. 2 in the Waiting List, therefore, perceived a right to be appointed against one of the vacant posts of Accountant Member.”**

10. The Hon'ble Apex Court also noted that a Public Interest Litigation was instituted in the Madras High Court to give effect to the selections made by way of appointment to the selected candidates. This Writ Petition was answered in the affirmative by the Hon'ble High Court of Madras. It was also taken by the respondents in challenge in Special Leave Petition (Civil) No. 13681/2001, and the Hon'ble Apex Court having dismissed this SLP, the select list was approved by the Appointment Committee of the Cabinet.

11. The respondents had filed a detailed reply and also an argument note. They would say that the second prayer of the applicant is contrary to the Hon'ble Supreme Court order dated 23.09.2014 and, if granted, would

literally amount to retrospective promotion which is not permissible in the facts and circumstances of the case. They do not offer any other worthwhile challenge to the prayer other than saying that the matter had been examined at high levels and in fact appointment had been granted to the applicant based on the Hon'ble Apex Court order. They would note that the Income Tax Appellate Tribunal (ITAT) vide letter dated 11.05.2015 had forwarded a representation dated 16.04.2015 of the applicant regarding fixation of his seniority as per the select list dated 22.09.2005. But then it was examined at the department in the light of the Rule 10 of the Income Tax Appellate Tribunal Members (Recruitment and Condition of Service) Rules and decision of the competent authority was conveyed to the ITAT.

12. Rule 10 says **“Seniority of a member shall be determined in accordance with the date of the list of persons selected for appointment as members made under sub-rule (4) of Rule 4.”** The Hon'ble Apex Court has already held in the earlier Civil Appeal that this rule was amended much before the selection of the candidates and, therefore, would hold sway. It indicates that the seniority of the persons concerned in the same list shall be contiguous to each other. That means that the seniority will follow a broad pattern of 1, 2, 3 and thereafter. In other words, as per their position in the merit list of the selection, they would be placed in the order of seniority. The respondents also rely on Rule 4 (4) of the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules which states that “the Central Government shall after taking into consideration the recommendations of the Selection Board, make a list of



persons selected for appointment as member.” In other words, the recommendation shall emanate from the Selection Board's prerogative in selection. No other body can interfere in the selection unless a very significant issue had not been taken into consideration by the Selection Board or on very insignificant issue which lead to a selection had been taken by Selection Board contrary to the norms of propriety and has, therefore, caused prejudice to some other. This is the only ground upon which this can be reviewed at all. No other grounds exist under law to review this positioning of the Selection Committee. In other words, if the selection has been lawfully made, then the precedence in the selection has to be observed by everyone concerned unless very specific and compelling significant reasons exist to undo it. It is not the case of anybody that any such compelling reasons exist and particularly so in view of the Hon'ble Apex Court ruling and the subsequent acceptance of the ACC of this and appointment of the applicant.

13. Applicant had filed a rejoinder and he says that the Hon'ble Supreme Court in Gujarat State Dy. Executive Engineers Association Vs. State of Gujarat reported in 1994 Supp (2) SCC 591 held that:

*“.....the first question is what is a waiting list? can it be treated as a source of recruitment from which candidates may be drawn as and when necessary? And lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. **A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate**”.....*

*..... Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to*

*arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. **Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join.***

The Hon'ble Supreme Court in WP (C) No. 202/2013 dated 23.09.2014 in the case of Inturi Rama Rao Vs. Union of India & Anr held as under:-

*“..... If persons eligible under the then existing Rules which are in force even today are to be considered for appointment, surely, the petitioner, who is a wait listed candidate, **will also have to be considered for appointment by consideration of his entitlement for appointment as in the year 2007 when the appointments on the main list were made and the two vacancies arose giving rise to the issue of operation of the waiting list.....**”*

*We, therefore, allow this writ petition and **direct consideration of the case of the petitioner for appointment on the basis of his position in the waiting list against one of the two vacancies that had arisen on account of two of the candidates in the merit list not having been granted the vigilance clearance.** This will be done by the concerned Authority within 30 days from the date of receipt of a copy of this order.*

The Hon'ble Supreme Court in Virender S. Hooda Vs. State of Haryana reported in 1999 (3) SCC 696 held as under:-

*“Therefore, we have no hesitation in directing the respondents to consider the cases of the appellants for appointment to posts of Haryana Public Service (Executive Branch). However, it is made clear that the appellants shall be fitted to the post ranking below to those who had been selected **along with the appellants** at the time of recruitment made pursuant to result declared on 19.06.1992. **The appellants will be fitted in appropriate posts and they will be accorded appropriate scale of pay by giving them the benefit of increments, if any, but they will not be entitled to any monetary benefits for the period for which they have been kept out of employment.** Let such action be taken by the Government expeditiously but not later than a period of three months.”*

The Hon'ble Supreme Court in State of J&K & Ors. Vs. Sat Pal

reported in AIR 2013 SC 1258 held as under:-

*“.....The aforesaid offer of appointment will relate back to the permissible date contemplated under the rules laying down conditions of service of the cadre to which the respondent Sat Pal will be appointed. **Naturally, the respondent will be entitled to seniority immediately below those who were appointed from the same process of selection.** Since Sat Pal has not discharged his duties, he would be entitled to wages only with effect from the date of the instant order.”*

The Hon'ble Supreme Court in Manoj Manu & Anr., Vs. Union of India & Ors., reported in 2013 (12) SCC 171 held as under:-

*“We are, therefore, of the opinion in the facts of the present case, the decision of UPSC in forwarding three names against requisition of DoP&T for six vacancies was inappropriate. We, accordingly, allow the present appeal, set aside the order of the High Court as well as Tribunal and issue a mandamus to UPSC to forward the names of the next three candidates to the DoPT for appointment to the post of Section Officer's grade. **They shall get the seniority from the date when Rajesh Kumar Yadav was appointed to the said post.** Their pay shall notionally be fixed, without any arrears of the pay and other allowances. No costs”*

14. Applicant would say that since the law indicates that his selection emanates from the notification dated 10.12.2007, this cannot be construed as retrospective as applicant obtained a valuable right pursuant to his selection which cannot be set aside without compelling and significant reasons.

15. Therefore, we had gone carefully through the argument notes put up by the parties.

16. The applicant submits that the matter is covered by government circulars itself. He refers to Office Memorandum No. 22011/7/86-Estt. (D) dated 03.07.1986. We quote from it:

“No.22011/7/86-Estt.(D)  
Government of India  
Ministry of Personnel, Public Grievances & Pensions  
(Department of Personnel & Training)

...

dated 3-7-86

**OFFICE MEMORANDUM**

*Subject: SENIORITY – Consolidated orders on.*

....

*The undersigned is directed to say that instructions have been issued by this Department from time to time laying down the principles for determining seniority of persons appointed to services and posts under the Central Government. For facility of reference, the important orders on the subject have been consolidated in this Office Memorandum. The number and date of the original communication has been quoted in the margin so that the users may refer to it to understand fully the context in which the order in question was issued.*

**SENIORITY OF DIRECT RECRUITS AND PROMOTEEES**

*(MHA O.M.No.9/11/55-RPS dated 22.12.59).*

*2.1 The relative seniority of all direct recruits is determined by the order of merit in which they are selected for such appointment on the recommendations of the U.P.S.C or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of a subsequent selection.*

***2.2 Where promotions are made on the basis of selection by a D.P.C., the seniority of such promotees shall be in the order in which they are recommended for such promotion by the Committee. Where promotions are made on the basis of seniority, subject to the rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the relative seniority in the lower grade from which they are promoted. Where, however, a person is considered as unfit for promotion and is superseded by a junior such persons shall not, if he is subsequently found suitable and promoted, take seniority in the higher grade over the junior persons who had superseded him.***

*2.3 Where persons recruited or promoted initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit.*

*2.4.1 The relative seniority of direct recruits and of promotee shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively*

*in the Recruitment Rules.*

*2.4.2 If adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. [DPT OM No.35014/2/80-Estt.(D) dt.7.2.86].*

*In other words, to the extent direct recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional, direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year.*

ILLUSTRATION: *Where the Recruitment Rules provide 50% of the vacancies of a grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the year 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:*

	<u>1986</u>		<u>1987</u>
1.	P1	9.	P1
2.	D1	10.	D1
3.	P2	11.	P2
4.	D2	12.	D2
5.	P3	13.	P3
6.	D3	14.	D3
7.	P4	15.	P4
8.	P5	16.	D4
		17.	P5
		18.	D5
		19.	D6
		20.	D7



2.4.3 In order to help the appointing authorities in determining the number of vacancies to be filled during a year under each of the methods of recruitment prescribed, a Vacancy Register giving a running account of the vacancies arising and being filled from year to year may be maintained in the proforma enclosed.

2.4.4 With a view to curbing any tendency of under-reporting/suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad-hoc promotees.

### **SENIORITY OF TRANSFEREES**

**(MHA OM No.9/11/55-RPS dated 22.12.1959)**

3.1 The relative seniority of persons appointed by transfer to a Central service from the subordinate offices of the Central Government or other department of the Central or a State Government shall be determined in accordance with the order of their selection for such transfer.

3.2 Where such transfers are effected against specific quotas prescribed in the Recruitment Rules, the relative seniority of such transferees vis-à-vis direct recruits or promotees shall be determined according to the rotation of vacancies which shall be based on the quotas reserved for transfer, direct recruitment and promotion respectively in the Recruitment Rules. Where the vacancies in any quota or quotas are carried forward, the principles stated in para 2.4.2 will apply, mutatis mutandis in determining inter-se seniority of the appointees.

3.3 Where a person is appointed by transfer in accordance with the provisions in the Recruitment Rules providing for such transfer in the event of non-availability of suitable candidate by direct recruitment or promotion, such transferee shall be grouped with direct recruits or promotees, as the case may be. He shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion.

3.4.1 In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "Transfer on deputation/Transfer"), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in

*fixing his seniority, subject to the condition that he will be given seniority from –*

*- the date he has been holding the post on deputation,*

*or*

*- the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department;*

*whichever is later.*

*3.4.2 The fixation of seniority of a transferee in accordance with the above principle will not, however, affect any regular promotions to the next higher grade made prior to the date of such absorption. In other words, it will be operative only in filling up of vacancies in higher grade taking place after such absorption.*

*3.5 In cases in which transfers are not strictly in public interest, the transferred officers will be placed below all officers appointed regularly to the grade on the date of absorption.*

***[DOP&T O.M.No.20020/7/80-Estt.(D) dated 29.5.1986]***

#### **SENIORITY IN SPECIAL TYPE OF CASES**

***[MHA O.M.No.37/1/52-DGS dated 10.7.54, O.M.No.13/4/56-RPS dated 29.9.1956 & No.13/4/57-RPS dated 14.7.58, MHA O.M.No.9/13/82-Estt.(D) dated 10/10/62 & O.M.No.9/30/63-Estt.(D) dt.7.2.64].***

*4.1 In the case of such ex-T.B. or ex-Pleurisy ex-Leprosy patients, as have been declared non-infective and medically fit for Government service, on re-employment in the same posts from which they were discharged the actual previous service rendered by them should be counted for seniority. The seniority of such persons reemployed in other posts will be fixed in consultation with the Department of Personnel & Training.*

*4.2.1 An order imposing the penalty of reduction to a lower service, grade or post or to a lower time-scale should invariably specify:-*

*(i) the period of reduction, unless the clear intension is that the reduction should be permanent or for an indefinite period;*

*(ii) Whether on such re-promotion, the Govt. servant will regain his original seniority in the higher service, grade or post or higher timescale which had been assigned to him prior to the imposition of the penalty.*

*4.2.2 In cases where the reduction is for a specified period and is not to operate to postpone future increments, the seniority of the Govt. servant may, unless the terms of the order of punishment provide*

*otherwise, be fixed in the higher service, grade or post or the higher time scale at what it would have been but for his reduction.*

*4.2.3 Where the reduction is for a specified period and is to operate to postpone future increments, the seniority of the Govt. servant on re-promotion may, unless the terms of the order of punishment provide otherwise, be fixed by giving credit for the period of service rendered by him in the higher service, grade or post or higher time-scale.*

*4.3.1. The surplus employees are not entitled for benefit of the past service rendered in the previous organization for the purpose of their seniority in the new organization. Such employees are to be treated as fresh entrants in the matter of their seniority, promotions etc. [MHA O.M.No.8/27/65-CS.II dated 25.2.66 & O.M.No.9/22/68-Estt.(D) dated 6.2.69].*

*4.3.2 When two or more surplus employees of a particular grade in an office are selected on different dates for absorption in a grade in another office, their inter-se seniority in the latter office will be same as in their previous office provided that –*

*(i) no direct recruit has been selected for appointment to that grade in between these dates; and*

*(ii) if there are no fixed quotas for direct recruitment and promotion to the grade in question in the new office no promotee has been approved for appointment to that grade in between these dates.*

*4.3.3 When two or more surplus employees of a particular grade in an office are simultaneously selected for re-deployment in another office in a grade, their inter-se seniority in the particular grade, on redeployment in the latter office, would be the same as it was in their previous office.*

*4.3.4 The above orders would not be applicable in respect of personnel who are appointed on the recommendations of the U.P.S.C. to posts/services recruitment to which is made through the Commission. Seniority of surplus officers appointed on the recommendations of the Commission will be decided on merits in consultation with the Commission.*

*5. It is requested that these instructions may be brought to the notice of all administrative authorities for information, guidance and compliance.*

*(Hindi version will follow soon)*

*Sd/-  
( K.S.R. Krishna Rao )  
Deputy Secretary to the Govt. of India  
Tel: 3011225”*

17. He also quotes from MHA OM No. 9/11/55-RPS dated 22.12.1959 and other connected OM's which we quote:

**“SENIORITY OF DIRECT RECRUITS AND PROMOTEES**

**(MHA O.M. NO.9/11/55-RPS Dated 22.12.59, O.M. No. 35014/2/80-Estt.(D) Dated 7.2.1986, O.M. No. 22011/7/86-Estt.(D) Dated 03.07.1986, O.M. No. 20011/5/90-Estt (D) Dated 4.11.1992 and O.M. No. 20011/1/2006-Estt.(D) Dated 03.03.2008.**

1. These principles shall apply to the determination of seniority in Central Civil Services and Civil Posts except such Services and Posts for which separate principles have already been issued or may be issued by the Government.

**2.1. SENIORITY OF DIRECT RECRUITS**

***The relative seniority of all direct recruits is determined by the order of merit in which they are selected for such appointment on the recommendations of the U.P.S.C. or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of subsequent selection. The relative seniority that used to be determined earlier according to the date of confirmation and not the original order of merit, (in case where confirmation was in an order different from the order of merit indicated at the time of their appointment), in accordance with the general principles of seniority, has been discontinued w.e.f. 4.11.1992 (O.M. No. 20011/5/90-Estt (D) Dated 4.11.1992). The general principles of seniority therefore stands modified to that extent.***

**2.1.1 Clarification:** Appointment from the Reserve panel at a later date:

***The interse seniority of candidates nominated from reserve panel will be fixed as per consolidated merit given by UPSC/SSC/Recruiting agency. However instructions circulated vide this Department's O.M. No. 41019/18/97-Estt.(B) Dated 13th June 2000 should be strictly followed in operating or requesting for nominations from the reserve panel.***

**2.1.2 Clarification** In case if more than one-selection panels received from UPSC/SSC through letter of the same date.

***It has been encountered on a number of occasions that UPSC etc. in response to two separate requisitions from the Department on different point of time, sends two panels of direct recruits on the same date. Since the general principles on seniority envisages that the candidates appointed through an earlier selection stand senior to***

those appointed through a subsequent selection, it becomes difficult to fix the inter-se seniority of the candidates in such cases drawn from two different panels of the same date. Accordingly, it has been decided that, effort would be made by the UPSC and other selecting authorities to avoid recommending the panels on the same date and strive to send the panel for earlier requisition first. However, in case of such an eventuality (i.e. different panels on the same date) following procedures may be followed for fixation of the inter se seniority of the candidates from the two panels:

- i. Chronology of recommendation letter;
- ii. Where the date of recommendation letter is same, chronology of interview board reports and
- iii. Where both (i) and (ii) are also same, then the chronology of requisition made by the respective Ministries/Departments.

It is also mentioned here than in case of recruitment through examination, the date of publication/announcement of the results shall remain the criteria as has been envisaged in the guidelines of seniority issued by **DoP&T vide O.M. No. 22011/5/76-Estt.(D) Dated 24.06.1978.**

## **2.2. SENIORITY OF PROMOTEES**

Where promotions are made on the basis of recommendations of a DPC, either by 'selection' or 'non-selection' method as per due procedure, the seniority of an officer assessed as 'fit', in the promoted grade shall be same as in the feeder grade from which they are promoted. Where, however, a person is considered as unfit for promotion and is superseded by a junior, such persons shall not, if he/she is subsequently found suitable and promoted, take seniority in the higher grade over the junior persons who had superseded him/her. Persons appointed as a result of an earlier selection shall be senior to those appointed as a result of subsequent selection. The relative seniority of promotees which earlier used to be determined according to the date of confirmation in the promotion grade and not the original order of merit, (in case where confirmation was in an order different from the order of merit indicated at the time of their appointment), has been discontinued w.e.f. 4.11.1992. **(O.M. No. 20011/5/90-Estt (D) Dated 4.11.1992)**

2.2.1 Where promotions to a grade are made from more than one grade and quotas have been laid down for each feeder grade, the eligible persons shall be arranged in separate lists in the order of their relative seniority in their respective grades. The officers in each grade, assessed as fit by the Departmental Promotion Committee shall be interpolated in the ratio prescribed for each grade in the recruitment rules for the post.



**When eligibility list is to be resorted to?**

2.2.2. Where promotions to a grade/post are made from more than one grade and no quota has been fixed for various feeder grades owing to a small number of posts in the promotion grade the aforesaid principle would not be viable. In such cases it would be required to prepare a combine eligibility list of the candidates from various feeder grades with due regard to the inter-se seniority of the candidates of various feeder grades. Separate instructions have been issued in this connection with regard to framing of recruitment rules in such a situation. Whereas specific criteria need to be issued/incorporated in the Recruitment Rules by the cadre controlling authorities for preparation of combined eligibility list of the candidates from various feeder grades/ broad parameters as under may be kept in view while preparing such list.

- i. Date of completion of the qualifying service prescribed in the relevant recruitment rules, in the feeder grade for promotion.
- ii. If the aforesaid date is same than date of completion of the qualifying service in the feeder-to-feeder grade.
- iii. Inter se seniority of the officers from each feeder grade will be maintained.

**2.3 Seniority of SC/ST Government servants on their promotion by virtue of rule of reservation roster****O.M. No.20011/1/2001-Estt. (D) Dated 21st January 2002**

SC/ST Government servants on their promotion by virtue of rule of reservation roster will be entitled to consequential seniority also. In other words, the candidates belonging to general/OBC category promoted through a later DPC will be placed junior to the SC/ST Government servants promoted through earlier DPC, even though by virtue of the rule of reservation.

**Clarification on reservation roster vis-a-vis seniority:**

In case of promotion, vacancies meant and reserved for SC/ST are determined through the roster points in the reservation roster. It is clarified that the said reservation roster/points are meant only for identifying the vacancy that goes to a particular category of officer and in no way acts as a determinant for fixation of seniority of the officer in a panel recommended by the DPC. According to this Department's **O.M. No. 35014/7/97-Estt.(D) Dated 8th February 2002**, the DPC is to grade an officer as 'fit' or 'unfit and the feeder grade seniority of the officers assessed as fit would be maintained in the promoted grade.

**RELATIVE SENIORITY OF DIRECT RECRUITS AND PROMOTEEES****O.M. No. 35014/2/90-Estt(D) Dated.07.02.1986****O.M. No. 22011/7/86-Estt.(D) Dated 03.07.1986,**

2.4 The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between available direct recruits and promotees which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

2.4.1 If adequate number of direct recruits does not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. In other words, to the extent direct recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number of vacancies for direct recruits and promotees as determined according to the quota for that year. The additional, direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year.

**Clarification of the term “availability”**

**O.M. No.20011/1/2006-Estt.(D) Dated 03.03.2008**

2.4.2. Some references have been received seeking clarifications regarding the term 'available' used the O.M. dated 7.2.86 and 3.7.1986. It is clarified that while the inter-se seniority of direct recruits and promotees is to be fixed on the basis of the rotation of quotas of vacancies, the year of availability, both in the case of direct recruits as well as the promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/selection and completion of pre-appointment formalities as prescribed. It is further clarified that when appointments against unfilled vacancies are made in subsequent year or years either by direct recruitment or promotion, the persons so appointed shall not get seniority of any earlier year (viz. year of vacancy/panel or year in which recruitment process is initiated) but get the seniority of the year in which they are appointed on substantive basis. The year of availability will be the vacancy year in which a candidate of the particular batch of selected direct recruits or an officer of the particular batch of promotees joins the post/service.

Cases of seniority already decided (prior to issue of this O.M. dated 3.3.2008), with reference to any other interpretation of the term 'available' as contained in O.M. dated 3.7.1986 need not be reopened.

**Note** The seniority of direct recruits and promotees is delinked from the vacancy/year of vacancy. The seniority / inter se seniority of direct recruits and promotees in a particular year is fixed with reference to the availability of the candidates /officers after completion of all pre-appointment formalities and rotation of quota is applicable only among the available direct recruits and promotees. **(O.M. No. 22011/7/86-Esst.D Dated 03.07.1986)** If no direct recruit is available in a particular year, all the promotees are bunched together in accordance with their position in the DPC recommendation. Similarly if no promotee is available in a particular year, available direct recruits are bunched together. In other words, complete rotation of quota is feasible **only** in an ideal situation where adequate/proportionate number of direct recruits and promotees become available in a year for rotation as per the quota prescribed in the recruitment rules.

**2.4.3 Starting point in the recruitment roster for the purpose of inter se seniority of officers through Direct Recruitment, Promotion, Absorption etc.**

**DOP&T's OM No. 28011/6/76-Estt, Dated 24th June, 1978**

The starting point in the roster should be that mode of recruitment prescribed in the Recruitment Rules for which the selection process had been completed first. For this purpose, the date of the completion of the selection process will be determined as follows: -

<b><u>Direct Recruitment</u></b>	<b><u>Date of completion of selection process</u></b>
(a) Through examination conducted by UPSC or any other authorities.	Date of publication/announcement of results.
(b) Through interviews conducted by UPSC or any other authorities	Date of Commission's letters containing their recommendation.
<b><u>Promotion</u></b>	
(a) Where UPSC is associated	Date of UPSC's letter containing their recommendations ratifying the promotion
(b) Where UPSC is not associated or its concurrence is not required.	Last date of DPC meeting
(c) Limited Departmental Examination.	Date of announcement of results.

2.4.4. A new roster will have to be started in the following cases:

- (i) From the date the recruitment rules are notified in the gazette.
- (ii) When there is an amendment to the Recruitment Rules which changes the percentage allotted for the various modes of recruitment.

### **3. SENIORITY OF ABSORBEES**

**MHA O.M.No.9/11/55-RPS Dated 22.12.1959**

**O.M. No. 20020/7/80-Estt(D) Dated 29.05.1986**

**O.M. No. 20011/1/2000-Estt(D) Dated 27.03.2001**

**NOTE:** The method of recruitment 'Transfer' has been re-named as 'Absorption' and Transfer on Deputation' as 'Deputation' vide DOP&T's O.M.No.AB.14017/2/97-Estt. (RR) Dated 25.5.1998.

3.1 The relative seniority of persons appointed by absorption to a Central service from the Subordinate Offices of the Central Government or other departments of the Central or a State Government shall be determined in accordance with the order of their selection for such absorption.

3.2. Where such absorptions are effected against specific quotas prescribed in the Recruitment Rules, the relative seniority of such absorbees vis-à-vis direct recruits or promotees, subject of the provision of para 3.4 below, shall be determined by rotation of vacancies amongst the available direct recruits, promotees and absorbees which shall be based on the quotas reserved for direct recruitment, promotion and absorption respectively in the Recruitment Rules. Where the vacancies in any quota or quotas are carried forward, the principles stated in Para 2.4.1 will apply, mutatis mutandis in determining inter-se seniority of the appointees.

3.3 The principle laid down in para 3.1 above will not present any difficulty where recruitment by absorption is made singly and at intervals but it will be found wanting in cases where two or more persons are selected from different sources on the same occasion and the selection is spread over a number of days. It will, therefore, be necessary for the authorities responsible for approving appointments by absorption to indicate the interse order of merit of the selected persons in such cases.

#### **3.4 - Seniority of persons absorbed after being on deputation**

**O.M. No. 20020/7/80-Estt.(D) Dated 29.5.1986**

**O.M. No. 20011/1/2000-Estt.(D) Dated 27th March, 2001]**

3.4.1 In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for

“Deputation/Absorption), his seniority in the grade in which he/she is absorbed will normally be counted from the date of absorption. If he/she has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his/her parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he/she will be given seniority from –

- the date he/she has been holding the post on deputation,

(or)

- the date from which he/she has been appointed on a regular basis to the same or equivalent grade in his parent department.,

Whichever is earlier.

These instructions **(No. 20011/1/2000-Estt. (D) Dated 27th March, 2001)** shall take effect from the December 14, 1999.

3.4.2 The fixation of seniority of an absorbee in accordance with the above principle will not, however, affect any regular promotions to the next higher grade made prior to the date of such absorption. In other words, it will be operative only in filling up of vacancies in higher grade taking place after such absorption.

3.4.3 In the original O.M. (1959) there is a provision that, in cases, in which transfers(now absorption) are not strictly in public interest, the transferred(now absorbed) officers will be placed below all officers appointed regularly to the grade on the date of absorption. This provision has been reviewed and now stands deleted since no such situation where absorption is not in public interest, could be envisaged.

3.4.4 It is also clarified that for the purpose of determining the equivalent grade in the parent department mentioned in the Office Memorandum dated May 29, 1986, the criteria contained in this Department Office Memorandum **No.14017/27/75-Estt.(D) Dated March 7, 1984**, which lays down the criteria for determining analogous posts, may be followed.

### **3.5 Seniority of persons who are transferred and absorbed directly without being on deputation.**

Some cases has been received in this department seeking clarification whether the **(DOP&T) O.M.No.20020/7/80-Estt. (D) Dated 29.5.1986 and No.20011/1/2000-Estt.(D) Dated 27th March, 2001]** in the case of a person who is initially taken on deputation and absorbed later, would be applicable also for persons who are transferred and absorbed directly without being on deputation i.e.



where the recruitment rules provide for recruitment through absorption. The matter has been considered and it has been decided that, in such cases also the provision as contained in the afore-said O.Ms would be applicable i.e. the date he has been holding the post on deputation or the date from which he has been appointed on the regular basis to the same or equivalent grade in his parent department, whichever is earlier.

#### **4. SENIORITY IN SPECIAL TYPES OF CASES**

##### **O.M. No. 22011/7/86-Estt.(D) Dated 03.07.1986**

**4.1. In the case of such ex-T.B. or ex-Pleurisy ex-Leprosy patients,** as have been declared non-infective and medically fit for Government service, on reemployment in the same posts from which they were discharged the actual previous service rendered by them should be counted for seniority. The seniority of such persons re-employed in other posts will be fixed in consultation with the Department of Pers. & Trg.

##### **4.2.1 Seniority of an officer under suspension and of officers against whom enquiries are pending.**

##### **O.M. No. 22011/4/91-Estt. (A) Dated 14.09.1992**

An officer under suspension who on conclusion of the departmental proceeding against him/her, is completely exonerated, the suspension being held to be wholly unjustified, should be promoted in the first vacancy that could be made available for the purpose and his/her seniority in the next higher grade fixed as if he/she had been promoted in accordance with his/her position in the select list. In such a case, the period during which any officer junior to the suspended officer concerned was promoted to the higher grade should be reckoned towards the minimum period of service prescribed for purpose of eligibility for promotion to the higher grade.

##### **4.2.2 Seniority of officers who have been recommended for promotion by a DPC during the currency of a penalty.**

##### **O.M. No. 20011/2/92-Estt.(D) Dated 03.11.1995**

An officer who has been recommended for promotion by a DPC despite imposition of a minor penalty on him/her, will be promoted on the basis of the recommendation of the said DPC, only after expiry of the penalty and his/her seniority would be fixed according to his/her position in that panel.

##### **4.2.3 Fixation of seniority of a Government servant reverted to a lower post/grade/service as a measure of penalty and subsequently promoted to a higher post. (O.M. No.22011/7/86-Estt.(D) Dated 03.07.1986)**

**4.2.4 An order imposing the penalty of reduction to a lower service,**

grade or post or to a lower time-scale should invariably specify:-

(i) the period of reduction, unless the clear intention is that the reduction should be permanent or for an indefinite period;

(ii) whether on such re-promotion, the Govt. servant will regain his original seniority in the higher service, grade or post or higher time-scale which had been assigned to him prior to the imposition of the penalty.

4.2.5 In cases where the reduction is for a specified period and is not to operate to postpone future increments, the seniority of the Govt. servant may, unless the terms of the order of punishment provide otherwise, be fixed in the higher service, grade or post or the higher time scale at what it would have been but for his/her reduction.

4.2.6 Where the reduction is for a specified period and is to operate postpone future increments, the seniority of the Govt. servant on re-promotion may, unless the terms of the order of punishment provide otherwise, be fixed by giving credit for the period of service rendered by him/her in the higher service, grade or post or higher time-scale.

**4.3.1 Fixation of inter se seniority of the staff rendered surplus and redeployed on different occasions but in the same office.**

**O.M.No.9/22/68-Estt.(D) Dated 6.2.69.**

The surplus employees are not entitled for benefit of the past service rendered in the previous organisation for the purpose of their seniority in the new organisation. Such employees are to be treated as fresh entrants in the matter of their seniority, promotions etc.

4.3.2 When two or more surplus employees of a particular grade in an office are selected on different dates for absorption in a grade in another office, their inter-se seniority in the latter office will be same as in their previous office provided that –

(i) no direct recruit has been selected for appointment to that grade in between these dates; and

(ii) if there are no fixed quotas for direct recruitment and promotion to the grade in question in the new office no promotee has been approved for appointment to that grade in between these dates.

4.3.3 When two or more surplus employees of a particular grade in an office are simultaneously selected for re-deployment in another office in a grade, their interse seniority in the particular grade, on redeployment in the latter office, would be the same as it was in their previous office.

4.3.4 The above orders would not be applicable in respect of personnel who are appointed on the recommendations of the UPSC

to posts/services recruitment to which is made through the Commission. Seniority of surplus officers appointed on the recommendations of the Commission will be decided on merits in consultation with the Commission.

#### **4.4 Seniority in cases of delay in reporting for duty after selection**

**O.M. No. 9/23/71-Estt.(D) Dated 6.6.1978**

**O.M. No. 35015/2/93-Estt.(D) Dated 9.8.1995.**

(i) An offer of appointment issued by different Ministries/Departments should clearly specify the period (which shall not normally exceed one or two months) after which the offer would lapse automatically if the candidate did not join within the specified period.

(ii) If, however, within the specified period, a request is received from the candidate for extension of time, it may be considered by the Ministries/Departments but extension beyond three months should not be granted and it may be granted only as an exception where facts and circumstances so warrant and in any case only up to a maximum of six months from the date of issue of the original offer of appointment. An offer on appointment would lapse automatically after the expiry of six months from the date of issue of the original offer of appointment. The candidates who join within the above period of six months will have their seniority fixed under the seniority rules applicable to the service/post concerned to which they are appointed, without any depression of seniority.

(iii) If, even after the extension(s), if any, granted by the Ministries/Departments, a candidate does not join within the stipulated time (which shall not exceed a period of six months), the offer of appointment should lapse.

(iv) An order of appointment which has lapsed, should not ordinarily be revived later, except in exceptional circumstances and on grounds of public interest. The Commission (UPSC) should in all cases be consulted before such offers are revived.

(v) In a case where after the lapsing of the offer, the offer is revived in consultation with the commission as mentioned in sub-para. (iv) above, the seniority of the candidates concerned would be fixed below those who have already joined the posts concerned within the prescribed period of six months; and if the candidate joins before the candidates of the next selection examination join, he/she should be placed below all others of his batch. If however, the candidate joins after some or all the candidates of the next selection examination have joined he/she should be—

*(a) In case of selection through interview, placed at the bottom of all the candidates of the next batch;*

*(b) In the case of examination, allotted to the next year's batch and placed at the bottom.*

#### **4.5 Determination of seniority of re-employed officers for promotion/confirmation**

##### **MHA O.M No. 20011/3/80-Estt.(D) Dated 16.6.1980**

*1. The question of determination of seniority of re-employed officers should arise only in cases where the officers are re-employed before they attain the age of normal superannuation.*

*2. (1) Officers re-employed after they had retired/discharged, whether from Defence or Civil employment prior to the attainment of the age of superannuation under the civil rules, will, if appointed to civil posts under the provisions of the Recruitments applicable to direct recruits, be treated as direct recruits and their seniority in the grade fixed accordingly.*

*(2) However, where such officers are appointed to civil posts and the Recruitment Rules applicable thereto prescribed re-employment as a distinct mode of recruitment, their seniority will be determined as under—*

*(a) The inter se-seniority of persons so re-employed shall be determined in accordance with the order of their selection.*

*(b) The relative seniority of persons so re-employed in relation to direct recruits and promotes shall be determined—*

*(i) Where the Recruitments Rules prescribed specific quotas for each of the categories, on the basis of rotation of vacancies based on the said quota;*

*(ii) In other cases, on the basis of the chronology of selection.*

*3. In the case of officers referred to in previous para., their confirmation and promotion to Higher posts would take place with reference to the seniority so fixed.*

*4. These instructions would apply subject to any special provisions that may be applicable to particular services/posts in terms of the Recruitment Rules applicable to those services/posts.*

#### **4.6 Fixation of seniority of a person who has been transferred to a lower post under FR-15A**

*When the Government employee is transferred to a lower post on his own request under FR 15(a)(2), it neither, identifies itself as a case of penal action on the employee nor as a case of transfer to a*

lower post in public interest. As the person already stood promoted to the next higher grade, in case of his/her reoccupying the lower post at the top of the seniority (original position), would affect adversely not only the existing officers in the grade, but would apparently nullify the very purpose of his /her transfer to the lower post. As such an officer seeking transfer to a lower post under FR-15, at his own request, would be placed below all officers appointed regularly to the lower grade on the date of transfer.

#### **4.7 Seniority of meritorious sportsmen appointed in relaxation of recruitment rules**

**O.M. No. 14015/1/76-Est. (D) Dated 4.8.1980.**

Where sportsmen are recruited through the Employment Exchange or by direct advertisement and are considered along with other general category candidates, they may be assigned seniority in the order in which they are placed in the panel for selection. Where recruitment to a post is through a selection made by the Staff Selection Commission, whether by a competitive examination or otherwise, the sportsmen recruited by the department themselves should be placed en bloc junior to those who have already been recommended by the Staff Selection Commission. The inter se-seniority of sportsmen will be in the order of selection.

#### **4.8 Seniority of persons appointed on compassionate ground**

DOP&T's **O.M. No.14014/6/94-Estt.(D) dated the 9th October, 1998** provides for the Scheme for Compassionate Appointment in Central Government. Para 15 of the said Scheme provide that:

- (a) The inter-se seniority of persons appointed on compassionate grounds may be fixed with reference to their date of appointment. Their interpolation with the direct recruits/promotees may also be made with reference to their date of appointment without disturbing the inter-se seniority of direct recruits/promotees.
- (b) Date of joining by a person appointed on compassionate grounds shall be treated as the date of his/her regular appointment.

A number of references were received in this Department seeking clarification as to the fixation of seniority of a person appointed on compassionate ground vis-à-vis direct recruits and promotees in a particular cadre. It is observed that while the afore-said principle has been working fine, there has been difficulty in fixation of seniority when two or more candidates come from direct recruitment/promotion joined the service on different dates. The matter has been reviewed and it has now been decided that the person appointed on compassionate ground in a particular year may be placed at the bottom of all the candidates recruited/appointed



through direct recruitment, promotion etc. in that year, irrespective of the date of joining of the candidate on compassionate ground.

**4.9 Determination of seniority of persons selected for appointment to different posts in the same grade requiring different qualifications.**

**O.M. No.22011/7/86-Estt.(D) Dated 03.07.1986**

According to the Annexure to M.H.A., O.M. No. 9/11/55- RPS, dated the 22nd December, 1959 [ Item-I ], the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment on the recommendation of the UPSC or other selecting authority; persons appointed as a result of an earlier selecting being senior to those, appointed as a result of a subsequent selection.

In cases where persons are selected either by the UPSC for appointment to different posts in the same grade with different qualification (e.g., posts of Assistant Lecturer in History, Economics, Physics & Chemistry, etc.), the UPSC should be requested to recommend candidates for such posts in a consolidated order of merit. Similarly, other selecting authorities should also be requested to indicate such an order of merit while making selections for recruitment such posts.

The seniority of persons appointed to posts indicated above will be determined in the order in which their names appear in the consolidated list.

**4.10 Fixation of seniority of Civil Government servants who are permitted to take up military service during emergency and of Civil Government servants who are members of Defence Reserves/Territorial Army/Auxiliary Air Force and are called up for military service during emergency.**

**O.M. No.22011/7/86-Estt.(D) Dated 03.07.1986**

In the case of all such Civil Government servants, the period spent in military service/training will be counted towards seniority in their Civil posts. If such a Government servants is promoted to a higher post in his parent Department/office during his absence on military service, his military service, from the date of such promotion will count for seniority in the higher post.

**4.11 Fixation of seniority of Released Emergency Commissioned officer and Short-Service Commissioned officers of the Armed forces of the Union appointed against vacancies reserved for them in Central Civil Services and posts, Group 'A' and Group 'B' (other than Engineering and Medical Services and posts).**

**O.M. No.22011/7/86-Estt.(D) Dated 03.07.1986**

Seniority of such officers shall be determined on the assumption that they entered the Service or the post, as the case may be, as the first opportunity they had after joining the training prior to their Commission where there was only post Commission training that is-

(a) In the case of services or posts recruitments to which is made on the results of a competitive examination conducted by the Commission, the released Emergency Commissioned Officer or Short Services Commissioned Officers who complete successfully at the first or second available opportunity would be deemed to have passed the examination at the first or second occasion he could have appeared at the relevant examination had he not joined military service and shall be assigned the year of allotment correspondingly; and

(b) In the case of services or posts recruitment to which is made otherwise than through a competitive examination conducted by the Commission, seniority shall be fixed on the assumption that the Emergency Commissioned Officers would have been appointed on the date arrived at after giving credit for the approved military services as Emergency Commissioned Officers or Short Service Commissioned Officers, as the case may be, including the period of training, if any and shall be deemed to have been allotted the corresponding year for the purpose of fixation of seniority.

2. Seniority inter-se of candidates who are appointed against the vacancies reserved under sub-rule (1) of Rule 4 of the Released Emergency Commissioned Officers or Short Service Commissioned Officers (Reservation of vacancies) Rules, 1971, and allotted to a particular year shall be determined according to the merit list prepared by the Commission on the basis of the results of their performance at the examination or test or interview.

3. All candidates who have been appointed against the vacancies reserved under sub-rule (1) of Rule 4 of the rules referred to at 2 above shall rank below the candidates who were appointed against unreserved vacancies in the services or posts through the competitive examination or test or interview conducted by the Commission corresponding to the year to which the former candidates are allotted.

**4.12 Seniority of released Emergency Commissioned and Short Service Commissioned Officers of the Armed Forces of the Union who are appointed against reserved vacancies in the Engineering and Medical Services and posts of the Government of India Group 'A' and Group 'B'.**

**O.M. No.22011/7/86-Estt.(D) Dated 03.07.1986**

Seniority of these Officers shall be fixed on the assumption that

*he would have been appointed to the service or post, as the case may be, on the date arrived at after giving credit for his approved military service as Emergency Commissioned Officers or Short Service Commissioned Officer, as the case may be, including the period of training, if any:*

*Provided that in the case of an officer who competes for the reserved vacancies under proviso to sub-clause (1) of Clause (a) of sub-rule (2) of Rule 5 of the released Emergency Commissioned Officers or Short Service Commissioned Officers (Engineering and Medical Services) Reservation of Vacancies (No. II) Rules, 1971, seniority would be fixed as if he has been directly recruit to the service or post through open completion corresponding to the date and year in which he actually joined.*

*2. Seniority inter-se of released Emergency Commissioned Officers or Short Service Commissioned Officers who are appointed against technical vacancies reserved for them allotted to a particular year shall be determined according to the merit list prepared by the Commission on the basis of the results of their performance at the viva voce test or interview.*

*3. All candidates who are appointed against the reserved vacancies will rank below the successful candidates from open competition of the year to which they are allotted.*

*4. In case where the released Emergency Commissioned Officers or Short Service Commissioned Officers recruited initially on a temporary basis and given the same year of allotment are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit.”*

18. In paragraph 2.1.1. as a clarification on ‘Appointment from the Reserve panel at a later date,’ it is mentioned that the interse seniority of candidates nominated from reserve panel will be fixed as per consolidated list given by recruiting agency. Now the consolidated merit list has been already given by the recruiting agency. The only difference is that the list has not been set aside for any cogent reason **but only held back as an amendment to the Recruitment Rules was in consideration.** But then, as later on this proposed amendment was dropped, the earlier position was

reinstated back. No other factual positions are assailed by the learned counsels.

19. The Hon'ble Apex Court in the case of State of Bihar Vs. Bal Mukund Sah reported in AIR 2000 SC 1296 stipulates that **“Article 309 is expressly made subject to other provisions of the Constitution and subject to that, an appropriate legislature or governor can regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State.”** In other words, the Fundamental Right of equity and equality will guide the powers of the government in making appointments. In other words once again, it shall be done only in accordance with the rules then in vogue. The proximity of a consideration on an amendment to the Recruitment Rule shall not weigh with the executive in passing orders under Article 309 according to the Hon'ble Apex Court. The Hon'ble Apex Court in Baikuntha Vs. C.D.M.O. reported in (1992) 2 SCC 299 held that **“if rules are applicable to all classes of government servants, it cannot be challenged as discriminatory unless it is malafide, arbitrary or perverse.”** In this case, Rule 10 and Rule 4 (4) are very clear. The seniority should follow the placement in the original merit list of selection. The Hon'ble Apex Court in State of Haryana Vs. Piara reported in (1992) 4 SCC 118 held that **“the State should not exploit its employees nor should it take advantage of the helplessness of either the employees or the unemployed persons.”** In other words, when selection was denied on the ground of proximity of an intended change in the rules position, clearly applicant was in a helpless

position. But then later on when it transpired that no such amendment is in process and fresh selections are also being made, the right of the applicant would then reign supreme and pre-eminent above all others and, as held by the Hon'ble Apex Court in several cases, as it is a matter relating to law alone, others would not be heard in the matter as they cannot have any juncture in the matter as they are of a subsequent selection only.

20. The Hon'ble Apex Court in *Amrit Banaspati Co. Ltd Vs. State of Punjab* reported in (1992) 2 SCC 411 held that **“a change of policy is also controlled by the doctrines of promissory estoppel.”** So, therefore, what is the promise made by the government to an applicant for selection. At the time of any selection, several elements are made clear by the selector to the selectees:

- 1) The selection would be fair and just,
- 2) There will not be any discrimination,
- 3) The selection will be guided by the policy of equity and equality.

That being so, a promissory estoppel arises in favour of the applicant for selection made unless the executive finds that selection had been vitiated by any malafide purpose. Mere attempt to change the law in the interregnum could not have changed the issue at all but since the Hon'ble Apex Court have decided on this matter, we do not want to venture on this aspect of the rule but the fact remains that promissory estoppel arises against the government at least at the point when it decided that there need not be any amendment. At least at that point of time the applicant's right with retrospective effect would come into fore.

21. The Hon'ble Apex Court in Om Prakash Shrivastava vs. State of Madhya Pradesh reported in AIR 2005 SC 2453 held that **“Fixation of seniority of the employees by placing them higher in seniority list by fixing their notional duty of confirmation on day of expiry of original period of probation is not contrary to law.”** The contention taken by the respondents seems to be that if the applicant is notionally held to be eligible for the appointment following the selection made in 2007, it will be a retrospective promotion. The Hon'ble Apex Court says that as the notion of selection is paramount for all purposes at all times, once it is made, it cannot be denied by the respondents and, therefore, having decided that Rule 10 will have a proximate value, that should be applied in all cases without exception. The Hon'ble Apex Court in Nirmal Vs. Union of India reported in (1991) Supp 2 SCC 363 held that **“a subsequent restructuring of the service or delay in holding the selection for which the employee was not responsible cannot take away his seniority for promotion.”** This rule held applicable for promotion will be applicable for appointment as well. Once the applicant had been selected and was about to be appointed, even if a restructuring is already made, the Hon'ble Apex Court held that it cannot affect the right which has been concretized in favour of the applicant. Needless to say that when that intended reformation of the rule did not take place at all and following which further selections are also made, this will apply with more strength than mentioned earlier.

22. The Hon'ble Apex Court in Dharam Vs. Administrator reported in AIR



1991 SC 1924 held that **“where a person has been denied seniority by a wrong application of the rules or without any reasonable ground, the court may direct competent authority to place him in the higher grade with effect from the date when his junior was placed therein, with consequential monetary benefits.”** But then there is a slight distinction in this case. Applicant seeks a placement in accordance with next senior and not the junior in the select list and we also have a little bit of doubt whether having not performed duty by legitimate purposes, would he be eligible for monetary consequences even though held so by the Hon'ble Apex Court.

23. Since the respondents have stated that at a higher level decision has been taken probably what they mean is that the doctrine of pleasure. This doctrine has been washed away in the efflux of constitutional flood. The Hon'ble Apex Court in *Moti Ram Deka Vs. Union of India* reported in AIR 1964 SC 600 held that **“the right of a civil servant to be protected against political interference or any other illegitimate interference, Article 311 introduces certain safeguards.”** The Hon'ble Apex Court in *State of Orissa Vs. Dhirendranath* reported in AIR 1961 SC 1715 held that **“exceptions to the doctrine are found in the Constitution as illustrated by Articles 124, 148, 217, 218 and 324. It is also subject to Fundamental Rights.”** Without any doubt, Article 14 and 16 are the Fundamental Rights in issue here. A selection follows a life with dignity and livelihood which cannot be denied to a person without adequate safeguards provided to him. Apparently the challenge is that such safeguards were not provided to him and it is not disputed with facts. Therefore, we hold that applicant is eligible

to be kept in the seniority list following the notification of 2005 and the select list of 2007 and he will be placed in the select position available to him in the next position after the last person appointed in that. But then he had not claimed for anything else other than the notional seniority provided under the seniority list. This we now grant him.

24. The OA is allowed. No order as to costs.

(C.V. SANKAR)

MEMBER (A)

(DR.K.B.SURESH)

MEMBER (J)

/ksk/

**Annexures referred to by the applicant in OA No. 170/00238/2018**

Annexure-A1: Copy of the notification dated 22.01.2005 issued by the 1<sup>st</sup> respondent

Annexure-A2: Copy of the Income Tax Appellate Tribunal members (Recruitment and Conditions of Service) Rules, 1963

Annexure-A3: Copy of the judgment of the Hon'ble Apex Court in Civil Appeal Nos. 6567-6569/2010 dated 17.11.2011

Annexure-A4: Copy of the order in WP No. 202/2013 dated 23.09.2014

Annexure-A5: Copy of the notification dated 04.07.2008

Annexure-A6: Copy of the notification dated 21.02.2012

Annexure-A7: Copy of the appointment order dated 13.03.2015 of the applicant

Annexure-A8: Copy of the posting order dated 09.04.2015 of the applicant

Annexure-A9: Copy of the circular dated 10.12.2007

Annexure-A10: Copy of the representation given by the applicant dated 15.04.2015

Annexure-A11: Copy of the representation given by the applicant dated 16.04.2015

Annexure-A12: Copy of the representation given by the applicant dated 03.01.2018

Annexure-A13: Copy of the latest seniority list of Income Tax Appellate Tribunal

**Annexures with reply statement:**

Annexure I: Copy of the Ministry of Law and Justice letter dated 21.06.2017

Annexure II: Copy of fixing of seniority of Shri Inturi Rama Rao, Accountant Member, ITAT – Bangalore – reg.

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