आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ,चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND SHRI MANJUNATHA.G, ACCOUNTANT MEMBER

आयकर अपीलसं./**ITA No.: 1643/CHNY/2019 & IT(TP)A No.101/CHNY/2018**
निर्धारण वर्ष/Assessment Years: 2014-15 & 2015-16

Daechang Seat Co. Ltd., C/o. M/s. Daechang India Seat Co. Pvt. Ltd., No.491, Mannur Village, Sriperumbudur Village, Kancheepuram – 602 105.	vs.	**The DCIT,** International Taxation -1(1) / International Taxation -1 & 1(2), Chennai – 34.
PAN: AADCD 4448B (अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri G. Baskar, Sree Lakshmi Valli & Shri I. Dinesh, Advocates and Shri S. Sridhar, Advocate & Shri Arjun Raj, CA as Interveners on preliminary issue only

प्रत्यर्थी की ओर से/Respondent by : Dr. S. Palanikumar, CIT & Shri P. Sajit Kumar, JCIT

सुनवाई की तारीख/Date of Hearing : 30.05.2023
घोषणा की तारीख/Date of Pronouncement : 05.07.2023

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

The appeal filed by the assessee in ITA No.1643/CHNY/2019 is directed against the order of the Commissioner of Income Tax

(International Taxation), Chennai in No.CIT/IT/CHE/ 113(263)2018-19 dated 29.03.2019. The assessment was framed by the DCIT, International Taxation -1 & 1(2), Chennai for the assessment year 2014-15 u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 07.12.2016. The appeal in IT(TP)A 101/CHNY/2018 is arising out of the order of the DCIT, International Taxation -1 (1), Chennai for the assessment year 2015-16 u/s.143(3) r.w.s. 144C(13) of the Act vide order dated 25.10.2018 pursuant to the directions of the Dispute Resolution Panel, Bengaluru dated 24.09.2018.

2. When these two appeals were called for hearing, the ld.CIT-DR, Dr. S. Palanikumar along with ld. Senior DR, Shri P. Sajit Kumar raised preliminary objection on ''conflict of interest'' in case these two appeals will be argued by Shri Dinesh Inbavadivu belonging to M/s. V. Ramachandran Advocates. The ld.CIT-DR referred to one letter F.No.CIT-DR/D/ITAT/RTIMatter/2023-24 dated 26.04.2023 whereby they have raised this issue in connection with RTI appeal before Central Information Commissioner(in short 'CIC') [appeal filed by Dr. S. Palanikumar] was fixed for hearing on 19.04.2023 at 1.15 p.m., in the premises of NIC Studio, District

Informatics Officer, Collectorate, 62, Rajaji Salai, Chennai. The contention of the ld.CIT-DR is that since Shri Manoj Kumar Aggarwal, who is Accountant Member and also CPIO, Income Tax Appellate Tribunal (in short 'ITAT') RTI Cell, Chennai engaged one Shri Dinesh Inbavadivu, Advocate and one more Advocate Shri Arjun to represent him in the proceedings before CIC in regard to appeal filed by Dr. S. Palanikumar against the order of CPIO, ITAT, Chennai, there is 'conflict of interest'. Shri Manoj Kumar Aggarwal, Accountant Member is the CPIO, ITAT, Chennai. The letter dated 26.04.2023 has specifically raised three issues. The contents of the letter and the issues raised therein read as under:-

F. No. /CIT-DR/DITAT/RTI Matter/2023 -24 Date : 26-04-2023

To
Asst. Registrar
ITAT
Chennai

Sir,

Sub: Appointment of private counsels in connection with CIC proceedings -'conflict of interest' - submission -reg;
Ref: F No.CIC/ITCHN/A/2022/135678 & 135399 dated 29-03-2023

Kind reference is invited to the above-mentioned subject.

In connection with my two RTI applications and the appeal before CIC, the case was posted for personal hearing on 19-04-2023 at 01.15 PM in the premises of NIC Studio, District Informatics Officer, Collectorate, 62,

Rajaji Salai, Chennai. On 17-04-2023, the undersigned was in receipt of a written submission submitted by the counsel before CIC on behalf of CPIO, ITAT. The counsel name was mentioned as Shri Dinesh Inbavadivu.

On the day of hearing, it was surprised to see Shri Dinesh Inbavadivu belonging to M/s V. Ramachandran Advocates none other than an advocate who regularly appear before ITAT Chennai Bench on behalf of his client's cases. Along with Shri Dinesh Inbavadivu, one more advocate Shri Arjun was also present representing Sri. Manoj Kumar Agarwal, CPIO. He belongs to A S Sriraman Advocates. Both counsels, Shri Dinesh Inbavadivu and Shri Arjun have been presenting the case on behalf of CPIO, ITAT, Chennai.

During the proceedings, it was only these two advocates who have spoken and presented the case on behalf of the Respondent and the Respondent, Sri.Manoj Kumar Agarwal, CPIO chose to remain silent. Since these advocates Shri Dinesh Inbavadivu of M/s V Ramachandran Advocates and Shri Arjun of Sriraman Advocates are regularly appearing before ITAT, Chennai in representing their clients against Revenue, it is my duty to bring the following observations and reservations to your kind perusal;

a). As the said counsels have been appointed by CPIO, ITAT and they have represented CPIO of ITAT, there is direct case of 'conflict of interest' as they being the counsels of the ITAT, Chennai cannot be presenting their clients cases before the members of the ITAT, who are again their clients
b). It is a case of 'conflict of interest' and it will jeopardize the interest of revenue in Income tax appeal proceedings before ITAT, Chennai.
c). To maintain the neutrality and impartiality it is brought on record that the above-mentioned advocates cannot represent their clients before ITAT, Chennai from date of appointment of these counsels by ITAT, Chennai.

Yours sincerely,

Sd/-
(S. Palanikumar)
Commissioner of Income-tax (DR)
D' Bench, ITAT, Chennai

Copy submitted to,

1. Chief Commissioner of Income Tax-1, Chennai for kind information
2. CIT-DR, ITAT-1, 2 and 3, Chennai for kind information
3. Sr. AR, ITAT-1,2,3 and 4, Chennai for kind information

2.1 The ld.CIT-DR before us argued, on the issue of ''conflict of interest'', that in the present case Shri Dinesh Inbavadivu and Shri Arjun are the advocates appearing on behalf of their clients in Income-tax appeals pending in ITAT and they are representing their assessee on day to day basis against Revenue and if ITAT engages these two advocates for representing its case before CIC, naturally, it will become direct case of ''conflict of interest'' for Revenue. It was contended by ld.CIT-DR that RTI appeal filed by him before CIC against dismissal of RTI application by CPIO, ITAT, Chennai and in the proceedings before CIC, New Delhi, representation on behalf of ITAT, Chennai by Shri Dinesh Inbavadivu of M/s. Ramachandran Advocates and Shri Arjun of Sriraman Advocates along with CPIO was narrated before the Bench. The written submissions dated 01.05.2023 filed by Senior AR, Shri P. Sajit Kumar, ITAT, Chennai in connection with appeal in ITA No.195/CHNY/2018 posted for hearing on 01.05.2023 in 'C' Bench was also brought to the notice of Bench. The ld. Senior DR in the letter vide para 6 has raised the

issue that if the Tribunal has given vakalath to these counsels namely Shri Dinesh Inbavadivu and Shri Arjun, then in the interest of upholding the dignity, neutrality and the independence of the Tribunal, the above two mentioned counsels may be excused from presenting the cases of their clients before the existing Members of ITAT. Further, if the vakalath of these counsels have been given in the capacity of the individual Members of the Tribunal, then such Member may recuse himself from hearing the case presented by his own counsel or ex-counsels. The ld.Senior DR also pointed out vide letter para-7 that it was expected on their own motion, conscious of such action and its implications and without anybody having to point or even if no other person is of know of such actions, recuse themselves from hearing a case presented before them by their own client. The ld.CIT-DR filed written submissions consisting of 8 pages dated 16.05.2023 along with 8 annexures, which are as under:-

Sl.No.	Particulars	Annexure
1	Copy of the letter addressed to Assistant Registrar dated 26-04-2023	1
2	Written submission given by Sr.AR of C Bench	2
3	Copy of the email dated 18-04-2023 addressed by Shri Dinesh Inbavadivu	3
4	Written submission dated 17-04-2023 filed by Shri Dinesh Inbavadivu on behalf of respondent, ITAT to CIC	4
5	Copy of the office memorandum of Ministry of Law and Justice dated 16-01-2015	5

6	Acknowledgement of submission made by the appellant to CIC on 19-04-2023 at 03:24 PM	6
7	Appellate tribunal code of ethics for the members issued by the then President ITAT 20-06-2008	7
8	Copy of order of CIC dated 19-04-2023	8

2.2 The ld.CIT-DR argued that it is evident from the email dated 18.04.2023 of Shri I. Dinesh, wherein he claimed that he has been authorized to appear on behalf of CPIO ITAT, RTI Cell, Chennai Benches before CIC. This one document is sufficient, according to him, that he is the counsel for ITAT, Chennai Benches and hence, representation of appeals of his assessees cases will be direct case of 'conflict of interest' for the Revenue. He stated that Shri I.Dinesh also filed a detailed written submission before CIC on behalf of CPIO, ITAT, Chennai Benches. He argued that there is no dispute that Shri I.Dinesh and Shri Arjun appeared before CIC on 19.04.2023 along with the CPIO, ITAT Chennai Benches and only these two advocates have argued the case on behalf of CPIO, ITAT, Chennai. He stated that when the appellant and his other colleague Shri P. Sajit Kumar, Senior AR, entered the court of CIC at Chennai on 19.04.2023 at 1.18 p.m., the hearing already commenced and both Shri I.Dinesh and Shri Arjun were found presenting the case of ITAT. Both the counsel argued before CIC that the ITAT did not record any of the proceedings conducted through virtual hearing by

using Cisco Webex and hence, the information sought under RTI by Dr. S. Palanikumar, cannot be given as it is not being maintained. The ld.CIT-DR argued that being human, a natural moral obligation seeps-in while one's own counsels present their clients cases before ITAT to decide. The concept of 'conflict of interest' is a moral value which is purely conscious-based and to demonstrate the neutrality in taking decision as well as to uphold the dignity of office. Every responsible authority is morally required to recuse oneself from such situation arising. If not avoidable, voluntarily recuse oneself based on conscious or atleast recuse oneself after being pointed out the issue of 'conflict of interest'. 'Conflict of interest' not only applies to the Tribunal but also to the counsels and every authority who are discharging the public function of Government. It is directly applicable to quasi-judicial authorities equally. In this regard, the ld.CIT-DR stated that the Code of Ethics for Members of ITAT issued by the then President ITAT on 20.06.2008 is enclosed as annexure-7. It is self-explanatory and the 'conflict of interest' is explained in the Code of ethics. Restatement of Values of judicial life adopted by Full Court meeting of the Hon'ble Supreme Court of India on 07.05. 1997 is the basis for the aforesaid circular issued by the President of ITAT. Bar Council of India Rules 1975 explained the 'conflict of

interest' in relation to advocates duty. This 'conflict of interest' is even well substantiated and explained in the works of Fordham Law Review, by Prof. Dr. Bruce A Green of Columbia University in the international perspective that applies to India and Global nations. The ld.CIT-DR further submitted that the manner in which ITAT conducted proceedings under Cisco Webex, SOP for the Video Conferencing, the contract agreement entered between ITAT and the service provider Godrej and Boyce Mfg Co Ltd etc were revealed to these private counsels engaged by ITAT and it was referred by these advocates in their written submission for not providing the information (video recordings) sought under RTI Act. However, it was not shared when RTI application was filed. It shows the close proximity of these advocates with ITAT Chennai. Neither CPIO nor First Appellate Authority has cited this reason in their proceedings dated 14.3.2022 and 15.12.2022 at the time of rejecting the RTI application and appeal. It was brought to the notice only by Sri. Dinesh Inbavadivu in his written submission filed on 18.04.2023 with CIC just one day prior to the date of hearing. This proves the 'conflict of interest' once again. He further stated that the issue of 'conflict of interest' is a fallout of this RTI proceedings where ITAT authorized the private advocates on behalf of Chennai ITAT benches

who are regularly representing various assessees against Revenue before the same ITAT. As these counsels represented ITAT before CIC, the issue of 'conflict of interest' was brought to the notice of Asst. Registrar, ITAT. The email dated 18.04.2023 addressed by Sri.Dinesh Inbavadivu is evident that he has been authorized to appear on behalf ITAT Chennai benches. The ld.CIT-DR stated that he was afraid that if ITAT, Chennai once again proceeds to decide this issue of 'conflict of interest' raised, this will again violate principles of Nemo judex in cas ua sua. Apart from above arguments, Revenue also filed written submissions vide F.No./CIT-DR/D/ITAT/RTI matter/2022-23/03 dated 30.05.2023 and F.No.CIT-DR/D/ITAT/RTI matter/2022-23/04 dated 31.05.2023.

3. On the other hand, the ld.Advocate Shri G. Baskar submitted that the application No. CIT-DR/D/ITAT/RTI Matter/2022-23 dated 26.04.2023 filed by ld.CIT-DR is obnoxious, contemptuous and just filed to obstruct the judicial proceedings and hence, not at all maintainable. The learned Advocate Shri Baskar stated that when he is appointed as an Advocate/Chartered Accountant, the assessee gives all powers to him and he is substituting the assessee, whereas role of the Departmental Representative is slightly different. The DR

can only appear and argue on behalf of the AO and he can do no more then that. For instance, if courts awards cost, as the assessee's counsel, he can take the cost and pay the cost, whereas the Ld.DR cannot do so, because the costs are awarded to the AO. The functions of the Departmental Representative are enshrined in Office Procedure of the Department. He submitted that he would not have taken this issue only because, the Ld.DR has filed copy of Office Manual of the Tribunal to state that engagement of Shri Dinish Inbavavidu is wrong, he also venture into this aspect. The Ld. advocate drew our attention to para 19 at page 8/40 of the Compilation of Office Manual and stated that in an appeal filed before the Tribunal, the AO is one of the parties and since every officer cannot appear himself, the officers at the rank of Additional/Joint/ Deputy/Assistant Commissioner of Income Tax are appointed as Senior/Junior Departmental Representative respectively to represent the case of revenue before the ITAT. The Senior or Junior DRs are expected to present and argue the case of the Department independently and also to render assistance to CIT DR. The functions of the Departmental Representatives are primarily to represent the Department before the ITAT. The DRs to assist the Tribunal to dispose of the appeal/cross objection/

Miscellaneous Application etc. His function commences the moment appeal is filed in the Registry of the Tribunal either by the Department or by the assessee. The Ld. counsel submitted that unfortunately the Ld.DR blocked disposal of appeal proceedings in this case and also other cases during almost fifteen days wherever Sh I Dinesh is representing. The ld.counsel drew our attention to the procedure of filing Reference Application before the Tribunal and he cited an instance of ITAT Cochin Bench, wherein the Ld.DR has filed an application before the Tribunal. The moot question was whether that Misc. Application, filed by DR, can be entertained or not. The ITAT, Cochin Bench had answered this in the case of DCIT vs. Saraj Trading Corporation,73 TTJ 741 (2001). In that case, according to the AR of the assessee, as per sub-section (2) of section 254 of the Act is to the effect that theITAT may, at any time within four years from the date of the order, with a view to rectify any mistake apparent from the record, amend any order passed by it under sub- section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the AO. Therefore the Representative of the assessee contended that the Misc. Application is to be filed either by the assessee or by the AO as the case may be and since, in this case the Misc.Petition is filed by the Ld. Departmental Representative, the same is not maintainable. After considering the

submissions of both sides and upon perusing section 254(2) of the Act, the Tribunal observed that

> "*we are satisfied that since the Misc. Application is filed by the Ld.DR and not by the Assessing Officer, the same is not maintainable. Hence, we hold that the department is at liberty to file Misc.Application by the competent authority within the time limit prescribed under the Act. In this view of the matter, we are not inclined to consider merit of the application.*"

The ld.counsel stated that, from the above, it is very clear that the Ld.DR is incompetent to file present Misc. Application before the Tribunal. Therefore, in this Interlocutory Application also, the Ld.CIT DR is not competent to file such application before the Tribunal. At best, it should have been filed by the AO. The AO suo motu cannot file application/appeal, but he has to seek permission from the competent authority. Therefore this application has to be backed by approval of the CIT. However, in this case, no such approval has been obtained or filed by the AO.

3.1 Coming to the issue raised by the Ld.CIT-DR of 'conflict of interest' how does it arise, absolutely this petition is not maintainable, because Shri I. Dinesh had promptly appeared before the authorities and made submissions, whereas the Ld.DR has not at all appeared before the CIC. As Shri Dinesh has been authorized

as counsel to represent the CPIO on behalf of ITAT, there being no direct 'conflict of interest'. The counsel submitted that Shri Dinesh appeared before the CIC on behalf of the ITAT on the administrative side of the Tribunal. The functions of the Tribunal are twofold i.e.one is quasi-judicial and the other is administrative side work. The order of the CIC itself says Petitioner is an individual and even in his pleadings before the CIC, the Ld.CIT-DR stated that "*I filed this petition in my individual capacity*". He also stated as to whether the Ld.CIT-DR has taken permission to file this petition before CIC or only to subvert the judicial proceedings before ITAT, the Ld.DR has filed Misc.Application in his individual capacity.

3.2 The second issue raised by the ld.CIT DR-in his letter dated 26.04.2023 is, it is a case of 'Conflict of Interest' and it will jeopardize the interest of revenue in the appeal proceedings before the ITAT, Chennai. The ld.counsel submitted that had Shri I Dinesh appeared for any matter for any Member or Vice-President of the Tribunal as a party in the proceedings as an individual, then possibly there may be bias, because he has represented the Members in their individual capacity, but in this case it is not so. In this case, Shri Dinesh has defended the Tribunal as an institution. There is a

clear distinction between administrative functions and judicial functions of the Tribunal. The ld.counsel further stated that proceedings before the CIC is purely on administrative side and is nothing to do with the quasi-judicial functions. Therefore, since the engagement of Shri I Dinesh before the CIC by the ITAT purely comes under administrative side and nothing to do with quasi-judicial function which Shri I Dinesh has defended. The ld.counsel also drew our attention to the procedures followed by the Hon'ble High Court for instance, as per their cause lists, wherein is mentioned that xxxx Vs. Registrar General of High Court, wherein Senior Advocate Shri Karthik Ranganathan is appearing on behalf of the Registrar General and defending the Registry. In case, if Shri K.Ranganathan appears for the Registrar General for administrative side, can it be possible to say he will be barred from appearing in High Courts in India or for limited purposes before Madras High Court. Similarly, Supreme Court also there are two sides one is judicial side and other is administrative side. Only because an advocate is appearing on administrative side, is it possible to bar him from practising anywhere in India. Further, the department itself appoints standing counsel. Once the case handled by them is over, are they not appearing before the Departmental authorities?

Are you putting any condition/clause that once a particular case is over, you are ceased to become standing council or Departmental Representative. Even in the ITAT, which is more than 80 years old Institution, a good number of Accountant Members were posted from the Revenue Department. For instance, Shri George Cherian, who was initially posted as DR, then promoted as CIT and later assumed charge as Accountant Member and promoted as Vice-President of the Tribunal and discharged his judicial functions. Recently one Standing Council is appointed as Member in the ITAT. He posted a query that, are they not functioning properly? This is only an assumption of Ld. CIT-DR and not borne out from records. Unfortunately, the Ld.CIT-DR has raised such a plea of bias in the Misc. Petition. Therefore, the petition itself is liable to be rejected. Further, Article 323B of the Constitution of India refers to provision for constitution of Tribunals. Apart from ITAT, many Tribunals like GST Tribunal and other Tribunals have been constituted and these Tribunals got inbuilt safeguard/ constitutional protection and that safeguard cannot be thrown away on the mere allegation of bias. The learned counsel drew our attention to the written submissions filed by the Ld.CIT-DR that 'No man can be judge of his own cause'. Ld counsel stated that he is arguing assessee's cause and Ld.CIT-DR

is arguing for department's cause and Hon'ble Member cannot decide his own cause. There could be reasonable thinking of bias, but here it is not so.

3.3 The learned counsel drew our attention to list of CPIOs/Appellate Authorities of the Income Tax Department, wherein at Sr.No.268 for the O/o.CIT DR, the CPIO is ITO (HQrts) in the O/o. CIT DR, ITAT, Chennai-90 and Appellate Authority is CIT (DR)(Admn), Besant Nagar, Chennai-90. So, the CIT-DR is appellate authority. Whether it can be stated that CIT-DR is an income-tax authority and he cannot act an appellate authority? The roles are totally different. Under the RTI Act, information procedure is purely administrative side and nothing to do with the quasi- judicial power. Getting information or not getting information is not going to affect the powers or function or remedies under the Act. Therefore, it is a frivolous petition filed by the Ld CIT-DR.

3.4 The learned counsel refers to Office Memorandum dated 16.01.2015 issued by Ministry of Law & Justice as stated in the written submissions of Ld.CIT-DR to say that engagement of the counsel Shri I Dinesh itself is wrong. But, Shri I Dinesh went before

CIC and succeeded. The Ld.counsel reiterated last sentence of the said Office Memorandum wherein it is mentioned as "except in exceptional circumstances warranting emergent action in public interest". Therefore, exigency of the situation warranted immediate engagement of Shri I Dinesh as counsel, and ITAT has nominated as counsel on the administrative side in the public interest, because four days in advance only hearing notice of CIC was received, for which it cannot be cited as reason to be barred virtually from practising of Shri I Dinesh before the ITAT. Does it not an infringement of Article 19 under the Constitution of India? The Ld.Counsel also stated that the Ld.CIT-DR wants the matter to be referred to Ministry of Law & Justice. As per sub-section (5) of section 255 of the Act, subject to the provisions of the Act, the ITAT shall have power to regulate its own procedure in all matters arising out of the exercise of its powers or of the discharge of its functions including places at which the Benches shall hold their sittings. The ITAT shall for the purpose of discharging its functions have all powers which are vested in the income tax authorities referred to in section 131 of the Act and any proceeding before the ITAT shall be deemed to be judicial proceeding within the meaning of section 193 & 228 of Indian Penal Code and the ITAT shall be deemed to be a

civil court for all the purposes of section 195 and Chapter XXXV of Code of Criminal Procedure, 1898. By blocking the judicial proceedings, the Ld.CIT-DR is committing contempt of court.

3.5 The learned counsel also drew our attention to Para 18 & 19 of the order of Hon'ble Supreme Court in the case of ITAT Vs. V.K.Agarwal dated 17.11.1998 which reads as under:-

> *"18. In our considered view, this kind of conduct and that too on the part of the Law Secretary who is expected to maintain the independence of the Tribunal and not interfere with its judicial functioning, amounts to gross contempt of Court. It is a deliberate attempt on his part to question the judicial functioning of the Tribunal coming as it does from a person of his rank. It is rightly perceived by the President as well as two concerned Members of the Tribunal as a threat to their independent functioning in the course of deciding appeals coming up before them.*
>
> *19. The first respondent has offered his apology to us. However, looking to all the circumstances of the present case, we cannot accept the apology offered. He has travelled far beyond exercising administrative control over the Tribunal. He has tried to influence or question the decision making process of the Tribunal. An apology in these circumstances cannot be accepted. We, therefore, hold the first respondent guilty of contempt of Court. Looking, however, to the fact that he has since retired as the Law Secretary and is not in a position to inflict further damage , the ends of justice will be met if he is fined a sum of Rs.2,000/- as punishment for contempt. We order accordingly."*

Therefore, the Ld.counsel for the assessee submitted that contempt proceedings can be initiated by this Tribunal against the Ld. CIT-DR both on judicial as well as administrative side, because these proceedings arose on administrative side and in fitness of things,

contempt proceedings may be initiated against the Ld. CIT-DR for filing of such frivolous Misc. Application.

3.6 The learned counsel for the assessee also refers 'Independent functioning of Tribunal' wherein it is stated that to begin with Finance Department of the Government of India (Central Board of Revenue), was initially in-charge of the ITAT. However from 30.05.1942 in deference of public opinion, the ITAT was put in the charge of Legislative Department, the predecessor of Ministry of Law & Justice. As stated by the then Secretary of Ministry of Law, Shri R.S.Gae, the ITAT is functioning as an independent authority without any interference by any Ministry or Department of Govt. of India in discharge of functions entrusted to it. This was affirmed by the Hon'ble Supreme Court in the case of ITAT Vs. V.K.Agarwal wherein it was observed that Tribunal's functioning was under administrative control of executive wing of the Government i.e. Ministry of Law & Justice & Company Affairs was not accepted and it was held that Union Law Secretary has no control over judicial functioning of the Tribunal. On the independence of the Tribunal, Hon'ble Shri Justice Amal Kumar Sarkar, the then Chief Justice of India has stated that as under:-

"There may be people who feel that the Tribunal is not in the full sense a judicial body. I venture to think that none of them is an assessee. I also venture to think that such a notion is superficial and stems from the want of knowledge of the actual working of the Tribunal . The judges who preside over the Tribunal are capable men, men of character and integrity. Anything that is unjudicial is quite foreign to them. The presiding officers of the Tribunal are selected by a body of experienced men presided over for some years now by a judge of the Supreme Court. This should be a guarantee that the right type of men are selected. The Ministry of Finance which is in charge of the collection of taxes has no control over that body or the Tribunal. The Tribunal is under the Ministry of Law for the purposes of administrative control only. That Ministry is not interested in the collection of taxes and does not exercise any control over the Judicial work of the Tribunal. The Members of the Tribunal are divided into two classes, called judicial and Accountant. The Judicial Members are selected from members of the legal profession who have specialised in tax matters, and also from the State civil Judiciary. The present President of the Tribunal, Shri T.P.Mukherjee, before he joined the Tribunal, was an illustrious member of the State Judiciary of Bihar, having last held the office of a District and Sessions Judge in that State. I suppose people selected can be expected to be as independent as anybody else. The Accountant Members of the Tribunal are selected from among the higher officers of the Income Tax Dept, usually Commissioner and Senior Appellate Asst. Commissioners and from the practising Chartered Accountants. So far as the later are concerned, there can be no reason to think that they cannot be independent. The independence of the members recruited to the Tribunal from the officers of the Income Tax Department is secured by so arranging things that they cannot look forward to anything from the Income tax Department or the Ministry of Finance they cannot go back to higher posts in that Department. Their promotion and tenure of office are not controlled by the Ministry of Finance. These are in the hands of the Ministry of Law."

3.7 The learned counsel also drew our attention to the 115th report of Law Commission while examining the necessity and expediency

of setting up National Tax Court vis-à-vis a Tribunal under Article 323B complimented working of the Tribunal in the following words:-

> "There is near unanimity of opinion that Income Tax Appellate Tribunal has immensely justified its existence and largely vindicated the trust reposed in it. It has, therefore, to be retained with its regional jurisdiction. It would be the fact finding authority."

Learned counsel submitted that instead of finding of facts merely on suspicion, Misc. Application has been filed by the ld.CIT-DR without any facts and his arguing on the same point for tenth time. The ld.counsel has concluded his argument by saying that this application is absolutely frivolous and not only needs to be rejected but also exemplary cost has to be awarded, so that this case sets as precedent and a copy of this order has to be forwarded to Chairman of the CBDT, New Delhi.

3.8 He submitted that he is not discharging his duties as CIT-DR as he bunked the Tribunal by taking adjournment on the ground that he is going to attend some other official duty, but even before the CIC he has not appeared which is apparent from record. Therefore, the Misc. Application filed by the CIT-DR is mischievous and lack of bonafide and hence, exemplary cost has to be awarded.The learned counsel also referred to Central Civil Service

(Conduct) Rules, 1964 in regard to the application filed by Senior DR, Shri P.Sajit Kumar, which reads as under:-

> "2. (i)Every Government servant holding a supervisory post shall take all possible steps to ensure the integrity and devotion to duty of all Government servants for the time being under his control and authority;
>
> 2(ii) No Government servant shall, in the performance of his official duties, or in the exercise of powers conferred on him, act otherwise than in his best judgement except when he is acting under the direction of his official superior;
>
> (iii) The direction of the official superior shall ordinarily be in writing. Oral direction to subordinates shall be avoided, as far as possible. Where the issue of oral direction becomes unavoidable, the official superior shall confirm it in writing immediately thereafter;
>
> (iv) A Government servant who has received oral direction from his official superior shall seek confirmation of the same in writing as early as possible, whereupon it shall be the duty of the official superior to confirm the direction in writing."

3.9 The learned counsel also drew our attention to the written submissions filed by the Ld.DR in ITA No.959/Chny/2018 on 01.05.2023 before 'C' Bench, wherein para 4 reads as under:-

> "4 It is for the same reason and spirit. Rule 4(3) of the Central Civil Service (Conduct) Rules was laid out. This rule even prohibits entering into any contract, not only by the Government Servant but also their family members. Even if, entering into such contract is inevitable, then such contracts shall be entered only with the prior permission of the superior authority."

The learned counsel submitted that the above conduct rules are no way concerned and irrelevant with the Misc. Application filed by the

Ld.CIT DR. The CIT-DR has only violated conduct rules by filing this Misc. Application. The ld.counsel also submitted that the CIT-DR has raised the issues of 'conflict of interest', dual representation, adverse interests, personal interests, business relationships, previous involvement and extrajudicial activities only on assumption of bias, which is not so in this application.

4. Another Senior Counsel Shri S Sridhar Advocate also interjected for the reason that ld.CIT-DR, Dr.S. Palanikumar and ld. Senior DR Shri P. Sajit Kumar, is objecting to appearance of Shri Arjun, Advocate. He submitted that his name is N. Arjun Raj, Chartered Accountant and he is not advocate as alleged by revenue. He referred to various correspondence filed by Revenue before the Benches on various dates in different cases. He submitted that the 'conflict of interest' alleged by Dr. S. Palanikumar, CIT-DR Chennai 'D' Bench on Shri N. Arjun Raj, CA appearing on behalf of his clients and further on behalf of the Counsel on Record is completely absurd and not tenable in law. He submitted that Shri N. Arjun Raj assisted Shri Dinesh Inbavadivu, Advocate who was the Counsel on Record for the ITAT under the RTI Act, 2005 and hence the distinction between engagement of a lawyer for making representation on

behalf of a client and assisting a lawyer by a Chartered Accountant in a proceeding is completely overlooked and brushed aside by not bringing the full facts before this Bench while making the objections.

4.1 Moreover, CPIO, ITAT is an authority created under the said statute and hence there cannot be any presumption of 'conflict of interest' with an institution/statutory body when Shri N. Arjun Raj is appearing in the captioned case namely M/s Kerry Indev Logistics P Ltd as an authorised representative. Further, the objections raised by ld.CIT-DR, Dr.S Palanikumar is presumably in his individual capacity and not backed by any approval obtained from his administrative head/CBDT at New Delhi inasmuch as his role before the ITAT is to represent the cases assigned to him and to defend the stand of the Jurisdictional AO. Therefore, he has no locus standi to raise this objection and blocking the judicial function. The 'conflict of interest', if at all should be considered in the context of the personal capacity of CPIO, ITAT and whereas there cannot be any personal capacity for CPIO, ITAT in the scheme of things as he is discharging his dual statutory function one as Accountant Member under the Act and the other as CPIO, ITAT under the RTI Act, 2005. Further, there cannot be any individual identity for the CPIO, ITAT/Accountant

Member and in this regard, the objections for Shri N. Arjun Raj appearing before the ITAT on the given set of facts is misleading and completely motivated thereby demonstrating the intentions in blocking the judicial proceedings. Under the Chartered Accountants, Act 1949 any member holding Certificate of Practice is entitled to appear in the capacity of CA in any quasi-judicial forum under the Act in view of Section 288 of the said Act and it is a classic case of obstruction by Dr.S Palanikumar in pursuing his professional work before this Bench thereby clearly violating the fundamental rights guaranteed more specifically Article 19(1)(g) under the Constitution of India, 1950.

4.2 He further stated that the objections for making appearance by N. Arjun Raj C.A. by Dr. S. Palanikumar is a serious issue to be noticed by this Bench by providing appropriate solution/decision and the obstruction of the judicial proceedings and discharging the professional function by N. Arjun Raj as an officer of this Court to defend his client is a criminal offence punishable in terms of Sections 186, 166, 228, 499 and other related provisions of The Indian Penal Code 1860.The Chartered Accountants Act, 1949 is an act of Parliament and Shri N. Arjun Raj is holding the Certificate of

Practise under the said Central Act. Therefore, he has every right to appear before this Bench as he is entitled to legally and the objections are accordingly baseless, absurd, mis-directed, motivated and not sustainable both on facts and in law. Moreover, Shri N. Arjun Raj, even on the presumption, is one of the Counsels represented CPIO, ITAT before the CIC under the RTI Act, the said professional function undertaken by him is only limited to the said matter and therefore, the presumption of 'conflict of interest' based on the wrong further presumption of Shri N. Arjun Raj, CA holding General POA (Retainer) on behalf of the ITAT is factually mis-leading and not correct on the factual matrix of the case. In one of the cases Dr.S Palanikumar in the capacity of CIT-DR of D' Bench sought for an adjournment in a stay granted matter represented by the undersigned which was posted for hearing on 19.04.2023 by stating that he was in another official assignment connected with Tribunal before another authority, which according to the undersigned is a misleading/false statement inasmuch as the information sought for under the RTI Act is basically for protecting his personal interest and hence the consistency in his approach for blocking the judicial proceedings is explicit. The 'conflict of interest' alleged by Dr S Palanikumar is baseless, incorrect, erroneous,

wrong, completely absurd and Dr.SPalanikumar has miserably failed to understand that this Bench is part of a statutory body inasmuch as his objection should also presumed to be extended to all other Benches of ITAT which is completely mis-directed as well as not to be entertained in rejecting his objection outright. The objections of Dr.S Palanikumar is possibly as well as indirectly against the Benches at Chennai and hence the motivated objections deserves to be rejected.

4.3 He further argued that reference to the Latin Maxim 'nemo judex in casua sua' is completely out of context and the said Maxim literally means 'no one is judge in his own cause' inasmuch as Dr. S Palanikumar has completely missed the point that this Bench is not judging his own cause and whereas they are deciding the cases listed before them including the captioned case in discharge of their functions statutorily prescribed in Section 254 of the Act.The prayer sought for in his objections for making a reference to the Law Ministry is wholly unjustified and Dr.S Palanikumar has no locus standi to make the said pleading especially in the judicial proceedings conducted by this Bench who have the trappings of a civil court.The obstruction of the judicial proceedings may be dealt

with appropriately by imposing cost on him recoverable personally from him in invoking the provisions of Section 254(2B) of the Act as Dr.S Palanikumar in the captioned case is representing the AO. It is prayed for imposing cost on Dr.S Palanikumar in blocking the judicial proceedings in the interest of justice and further it is prayed for placing the order to be passed on this preliminary untenable objection before the CBDT for information and appropriate action.

5. In reply, the learned CIT-DR, Dr.S. Palani Kumar argued on the point of possibility of bias submitted that it is a simple letter, he has handed over to the Asst. Registrar, ITAT to bring the issue to the notice of the Bench. He submitted that he has received one mail from Shri I Dinesh saying that he received hearing notice of CIC dated 29.03.2023 and the CIC has posted the case for hearing by mentioning appellant's name and CPIO's name. On 29.03.2023 when he has received the notice(stated by DR S Palanikumar but not fact. Fact is that the notice is dated 29.03.2023 but received on 10.04.2023), it required to file some written submissions in support of that case and accordingly he has filed and a copy was served on the CPIO on 15.04.2023 in connection with RTI matter. On 18.04.2023 there was e-mail received from Shri I Dinesh at 11.39

saying that written submissions filed along with reference and the above appeal was posted for hearing before CIC on 19.04.2023 and Shri I Dinesh has been authorized to appear on behalf of ITAT, Chennai and written submissions were attached thereto. The Ld.DR submitted that he do not know who is Shri I Dinesh, when he went to CIC, he found both Shri I Dinesh and Shri Arjun, Advocates were representing the case along with written submissions. The Bench clarified that Shri I Dinesh, appeared in the case before CIC,at Chennai through VC on behalf of ITAT Chennai.

5.1 The ld.CIT-DR further stated that the learned counsel for the assessee made false allegation that the he is blocking judicial proceedings in this appeal by way of filing Misc. Application, but he is not at all blocking the proceedings of appeal. Further, referring to the argument made by the counsel in regard to order of the ITAT, Cochin Bench reported in 73 TTJ 741, the ld.CIT-DR submitted that the same is not at all relevant to this issue and present facts and circumstances of the case. The Ld CIT-DR also submitted that in this regard, the Bench of this Tribunal has recorded everything in the order sheet dated 15.05.2023 and accordingly, he has filed written submissions also as directed by the Bench on the issue of 'conflict of

interest' which is the moot point as per his letter dated 26.04.2023 filed before the Assistant Registrar(AR), ITAT., Chennai. The Bench posed a query to the Ld.CIT DR as to whether he claims that letter dated 26.04.2023 filed before the AR is on administrative side, and whether it needs to be closed as the Ld. CIT-DR is satisfied that the issue is dealt with? But in reply, the CIT-DR asked that who has authorized Shri I Dinesh to appear before CIC for CPIO, ITAT Chennai is not forthcoming from records. On the one hand Tribunal says Shri I Dinesh is authorized to appear before CIC but without authorization. Shri Arjun, an Advocate also appeared before CIC without any authorization, so the issue of 'conflict of interest' comes therein. The learned CIT-DR submitted that 'conflict of interest' was raised in connection with two persons namely Shri I Dinesh & Shri Arjun, Advocates appeared along with CPIO, ITAT, Chennai before CIC and represented the matter of CPIO & FAA and this may lead to 'conflict of interest'. Out of these two, one Shri Arjun, Advocate is not authorized to appear and both have filed written submissions on 18.05.2023 and that is the back ground of this letter dated 26.04.2023. However, the ld.CIT-DR stated that it is purely an administrative issue and he has nothing to do with this appeal.

6. The Bench intervened and observed that 'if this is an administrative issue why the Ld.CIT-DR has raised it before the Bench. In case it is raised, bench is duty bound to decide this issue.

7. At this juncture, the learned counsel brought to the notice of the Bench stating that one application made by the other DR, in other Bench, that in a case before CIC filed by a colleague officer against ITAT with respect to an application submitted under RTI Act,the officer on 19.04.2023 accompanied the colleague officer to the venue fixed for hearing through video conferencing just to have an experience as to how the proceedings before CIC are conducted. When a colleague officer can go along with DR, then why not Shri Arjun could go along with Shri I Dinesh. But, the ld.CIT-DR stated that the crux of the issue was "in two of the appeals, arguments of the DR was not recorded" and therefore, video recording footage was sought for. In that case, first CPIO had taken one decision and therefore, we went to CIC because the CPIO has given a reply that entire judicial proceedings were not recorded. For this purpose, the ITAT has engaged two counsels and was given SOP and contract agreement entered into vendor. The Ld.CIT-DR asked who has

engaged Shri I Dinesh as counsel, for which they don't have any data so far.

8. Now, on coming to the issue of assumed bias, the ld.CIT DR stated if the same counsel appeared before the CIC on behalf of the ITAT and the same counsel is appearing before the same bench of ITAT, this may lead to 'conflict of interest'. In regard to Office Memorandum dated 16.01.2015, as per Annexure-5, in regard to para no.3, the CIT-DR submitted that no exceptional circumstances warranted for engagement of Shri I Dinesh to appear before CIC, and there was no emergency arose because notice was issued on 29.03.2023 by the CIC and case was posted for hearing on 19.04.2023. The CIT-DR submitted that for this reason only, the CIT DR has given letter dated 26.04.2023 which may lead to 'conflict of interest' and may jeopardize the interest of the revenue, if the same counsel appeared before the CIC, appears in the Misc.Petition filed by the Revenue.

9. Shri P.Sajit Kumar, Ld.DR, who filed written submissions in ITA No.959/Chny/2018 in the case of Fichtner Consulting on 1st May, 2023 before ITAT., 'C" Bench, sought permission to clarify his

stand. He argued that he has never blocked any counsel from appearing. He admitted that he took the issue privately as there will be ''conflict of interest''. So the Members have to take a call as per their consciousness and it is not for the counsel to take a call. He also argued that it is purely an administrative issue to be decided by the Bench. He also drew our attention to para 7 of his written submissions which reads as under:-

> "7. The exact facts and circumstances under which the vakalath has been given is privy only to the Honourable Members of the Tribunal. It was expected on their own motion. conscious of such action and its implications and without anybody having to point out or even if no other person is on the know of such actions recuse themselves from hearing a case presented before them by their own client in the true spirit of upholding of the dignity and neutrality of the esteemed constitutional body of the Government of India."

10. The Bench clarified that bench do not engage any advocate and Shri I Dinesh, as an Advocate presented the case of ITAT Chennai, RTI Cell before the CIC and ITAT engaged him in administrative/institutional capacity. The Ld.DR stated that they are not computers but are human beings. The Bench observed that if the CIT-DR don't want the appearance of Shri I Dinesh, as an Advocate before ITAT, it is better they can approach the Bar Council of India. In reply, the Ld.DR submitted that he is requesting the bench to take a call. If the CPIO has given vakalath to Shri I Dinesh,

then the CPIO has to recuse himself. If CPIO has authorized Shri I Dinesh, then the CPIO should recuse himself from hearing wherever Shri I Dinesh is appearing before ITAT. He argued that because of vakalath has been given by the CPIO, ITAT to Shri Dinesh, some sort of relationship has happened, so, the concerned Member has to recuse himself from hearing Shri I Dinesh in the ITAT and it is purely conscious issue. He also argued that since the administrative issue is pending, not to continue with hearing of Shri I Dinesh in order to prevent any further damage.

10.1 The Bench posed a query to the Ld.DR as to whether CPIO has given vakalath in his personal case in individual capacity or as CPIO in dual capacity? The Govt. of India has appointed him CPIO of ITAT under RTI Act and he is also discharging duties as Accountant Member of the ITAT, Chennai, for which the Ld.DR replied that they are not computers and he has already addressed the issue.

11. We have heard ld.CIT-DR Dr. S.Palanikumar and ld. Senior DR Shri P. Sajit Kumar on the preliminary issue of 'conflict of interest' regarding objection for appearance of advocate Shri I. Dinesh of Shri V. Ramachandran, Advocates in appeals filed by him and Shri

N Arjun Raj, Chartered Accountant before ITAT. First of all, we have to clarify the background of the case. Shri Manoj Kumar Aggarwal is appointed as CPIO, ITAT, Chennai Benches by President ITAT to decide the RTI applications filed before ITAT Chennai RTI Cell vide order dated 15.12.2021. He is also performing judicial functions as an Accountant member of ITAT. He has dual capacity on administrative side as well as judicial side of ITAT. Dr.S.Palanikumar filed RTI application vide F.No.CIT(DR)/(Admin)/ITAT/'D' Bench/2021-22/01 dated 14.03.2022 seeking the video recording of the virtual hearing in the case of Lakshmi Machine Works Ltd. vs. ACIT in ITA No.697/CHNY/2014 and in M/s. Pon Mahal Income vs. ACIT in ITA No.1235/CHNY/2017 which was rejected by the CPIO vide letter dated 11.04.2022. Dr S. Palanikumar filed appeals before CIC seeking video recording of the Virtual hearings of the above two cases. The CIC posted the cases for personal hearing on 19.04.2023 in RTI Appeal File No.CIC/ITCH/A/2022/135678 & CIC/ITCH/A/2022/135399 both dated 29.03.2023 at 1.15 PM & 1.20 PM before the Information Commissioner, Delhi at Chennai through VC, the notice for the same was received by the Tribunal on 10.04.2023. Hence, Shri I. Dinesh, Advocate was engaged by APIO to represent the RTI cell of ITAT, Chennai Benches before CIC on

19.04.2023. The CIC passed the order in the case of Dr. S. Palani Kumar vs. CPIO, ITAT,Chennai Benches RTI cell vide File No.CIC/ITCHN/A/2022 135399 + CIC/ITCHN/A/2022/135678 dated 19.04.2023, wherein for appellant, none was present i.e., for Dr.S. Palanikumar whereas for respondent i.e., CPIO/APIO, ITAT Chennai, RTI Cell, Shri Dinesh Inbavadivu, Advocate & representative of CPIO present through video conference. Admittedly, Shri I. Dinesh, Advocate represented CPIO/APIO, ITAT, Chennai, RTI Cell before CIC in the RTI proceedings initiated by Dr S. Palanikumar. It is totally denied by APIO/CPIO of ITAT that Shri N Arjun Raj [who is not an advocate by profession but he is Chartered Accountant by profession appearing before ITAT regularly for his assessees] was engaged by ITAT to argue on behalf of CPIO, ITAT Chennai. This is totally false and contumacious argument and beyond facts on record. Hence as far as the objection of Dr S Palanikumar is concerned the same is rejected as totally false and without any basis and beyond facts on record.

11.1 Now the question arises, whether application dated 26.04.2023 objecting appearance, before Tribunal, of Shri I. Dinesh belonging to Sri Ramachandran Advocates and others of his group

and Shri N Arjun Raj(Chartered Accountant not an Advocate) of Sriram Advocates is a direct case of 'conflict of interest' as they appear before ITAT in their clients cases. The allegation of Dr. S. Palanikumar, CIT-DR is that as the said counsels have been appointed by CPIO, ITAT and they have represented CPIO, ITAT before CIC, there is a direct case of 'conflict of interest' as they being counsel of the ITAT, Chennai cannot present their clients case before the Members of ITAT, who were again their clients. According to him, it is direct case of 'conflict of interest' and it will jeopardize the interest of Revenue in income-tax proceedings before ITAT, Chennai.

11.2 For this we have to go to the Principles of Administrative Law, where the issue of 'conflict of interest' is discussed. The 'conflict of interest' in the context of lawyer refers to a situation where the lawyers personal or financial interest conflicts with their professional obligation to their clients. The lawyers have a duty to provide competent and zealous representation to their clients while maintaining their independence and loyalty. Any litigation or disputes over profession, lawyers conduct most frequently involves 'conflict of interest', a subject to be addressed by disciplinary rules.

These disciplinary rules are made by Bar Counsel of India in India to govern the legal profession. For a lawyer there is situation in which there is a risk that lawyer will not adequately carry out the obligations to a present or former client because of competing obligations to another present or former client or because of the lawyers own competing interests. Although various purposes have be prescribed to them, the 'conflict rules' are best understood as rules of risk avoidance. Before accepting or denying the representation in such situation, lawyer must obtain the individual consent of the client whose interests are to be at risk, where the risk is unreasonably high, the lawyer must refrain from accepting or denying the representation. Hence, like other rules of professional conduct, the conflicting rule are designed to be enforced primarily by disciplinary agencies to the extent they are not self-enforced.

11.3 Considering the argument of both the sides, we are of the view a 'conflict of interest' in the context of lawyers refers to a situation where lawyer's personal or financial interest conflicts with their professional obligations to their clients. The 'conflict of interest' comes in a situation where there is dual representation, adverse interests, personal interests and business interests. The 'conflict of

interest' can be addressed as legal ethic rules requires a lawyer to identify and avoid conflicts wherever possible. This includes obtaining informed consent from clients after fully disclosing the nature and implications of the conflict. Hence the lawyers are bound by Bar Council of India rules i.e., rule 49 to 52 and also TamilNadu Civil Rules of practice. Apart from this, there can be 'conflict of interest' viz-a-viz judges. A 'conflict of interest' occurs when an individual, as a judge, is in a position where their personal, financial, previous involvement and extra judicial activities could potentially influence their judgment or decision making abilities in an unfair or biased manner but in the present case before us none of the situation is prevalent either from lawyers representing their cases or the Members of Tribunal conducting the Benches. In the instant case, Shri I. Dinesh as authorized representative of APIO, ITAT Chennai represented ITAT before CIC and he also represents his clients before ITAT Benches. It is not the case of the Ld.CIT-DR that there is any financial interest, personal interest between the client or any of the Member constituting the Bench neither it is the case of the Ld.CIT-DR that any of the Member of ITAT constituting the Bench has represented the client during their professional services. This is a simple case of lawyer Shri I. Dinesh has been

appointed by President, ITAT to represent CPIO by virtue of power vested in him u/s.255(5) and 255(6) of the Act, who happens to be a Member of ITAT. Ld.Counsel before us filed few of instances by filing a judgment of Hon'ble Madras High Court in W.P No.7215 of 2020 and W.M.P. Nos.8626 & 20587 of 2020 in the case of Shri N.R.S. Ganesan vs. 1. Union of India, 2. Income Tax Appellate Tribunal & others wherein for ITAT, Shri R. Sankara Narayanan, Additional Solicitor General of India assisted by Mr.K.Srinivasamurthy, Senior Panel Counsel for Central Government appeared before Hon'ble High Court and the same Additional Solicitor General of India is appearing for Income-tax Department to argue their appeals before the Benches of ITAT particularly one example is of Cognizant Tecnology Solutions India Private Limited V ACIT LTU-1 Chennai in ITA 269/Chennai/2022, appeared on 28.03.2023.

11.4 In view of the above, we have to discuss the concept of institution or a body engaging counsels or having panel of advocates is a practice in vogue. The High Court Registry and Supreme Court Registry have panel of Advocate who appear on behalf of the Registry and who also represent as advocates before the same Court. There is no restrain placed on the counsel to represent its clients merely because they

are empanelled as registries panel advocates. This tribunal has seen members from Indian Revenue Services who have all along been with the Revenue becoming members of this Tribunal and have unblemished record of dispensing justice without fear or favour. This Tribunal has also seen emergence of some of the finest members who have been representing the department in their professional careers later to become Members of the Tribunal and judges of the High Court and Supreme Court If these are to be considered as instance of Conflict of interest than no departmental representative and no member from Indian Revenue Services would be eligible to become members of tribunal.

11.5 Now, this issue raised by ld.CIT-DR, Dr.S. Palanikumar before us is totally out of context, without any basis, totally different and distinguished on facts. According to us, there is no 'conflict of interest' in this matter. Hence, this should be rejected at the threshold.

11.6 The other facet is that the Tribunal is not the appropriate judicial forum to raise this issue. The reason for this is that the Tribunal is not to disqualify the lawyer or the law firm as a regulatory measure and it would not be a disciplinary body but there are appropriate forums for punishing professional mis-counduct, if

any committed by lawyer. Hence, ld.CIT-DR raising this issue has himself tried to obstruct Shri I.Dinesh and his firm M/s. V.Ramachandran Advocates from appearing before ITAT. Here the simple litigation was before CIC where the order of CPIO is to be defended by the CPIO/APIO of ITAT, Chennai Benches, RTI Cell and for this purpose, ITAT have engaged advocate Shri I. Dinesh of Shri V. Ramachandran Advocates and which was successfully defended by him. APIO after taking due permissions from the Competent Authority i.e., President of ITAT has appointed Shri I. Dinesh as counsel to argue before CIC in RTI appeal filed by one Dr S. Palanikumar.

11.6.1 **The personal Capacity of Ld. CIT-DR Dr. S. Palanikumar and not official.** It is not known whether Dr. S. Palanikumar has filed this appeal before CIC in his individual capacity or as CIT-DR. It is neither explained nor replied by Dr. S. Palanikumar, whether any prior approval from competent authorityis obtained or not ? Whether the AO has consented in filing of this RTI or not ? This has not been answered by Dr. S. Palanikumar despite queries raised from Bench. In case, the appeal before CIC is filed by Dr.S. Palanikumar in personal capacity, he has no business to raise this objection before Tribunal on the issue of 'conflict of

interest'. In case, he is raising as CIT-DR in official capacity whether any permission is obtained from competent authority of the income tax department, nothing is on record. Even it seems that the AO has not been authorized to file this petition.

11.7 We noted that there is a procedure for filing petitions before ITAT and for that there are functions of the DR as enshrined in office procedure of the Department. The Department has filed copy of Manual of Office Procedure Volume-I Administrative, issued on February, 2003, where functions of Departmental Representative are enshrined as under:-

> "19 Functions of Departmental Representatives (Senior / Junior), Income Tax Appellate Tribunal.
>
> 19.1 In an appeal filed before the Tribunal, the Assessing Officer is one of the parties and since every officer cannot appear himself, the officers of the rank of Additional/Joint Commissioner of Income Tax and Deputy/Assistant Commissioner of Income Tax are appointed as Senior Departmental Representatives and Junior Departmental Representatives respectively to represent the case before the Income Tax Appellate Tribunal. The Senior or Junior Departmental Representative is excepted to prevent and argue the case of the department independently and to render necessary assistance to the CIT(DR).
>
> 8. Functions of the Departmental Representative
> 8.1 The function of the Departmental Representative is primarily to represent the Department before the Tribunal. The Departmental Representative assists the Tribunal in the disposal of appeals, cross objections and miscellaneous applications. He takes submissions on behalf of the Department. His functions commence the moment an appeal is filed

> in the Registry of the Tribunal, either by the Department or by the assessee."

It means that this petition dated 26.04.2023 is filed by Ld CIT-DR in his personal capacity and no approval is obtained from competent authority. From the above functions of Departmental Representative, it is very clear that the role of the Departmental Representative is to represent the case and does not have any authority to append his signature in his official capacity to file additional grounds of appeal or miscellaneous application. The AO is authorized to file appeal, additional ground, any application or miscellaneous application and for that he has to seek permission from the competent authority. Hence in our view, the ld.CIT-DR has no locus standi to file this impugned application and further argue the same. It seems that ld.CIT-DR is acting in his individual or personal capacity as an aggrieved party for the reasons known to him. Hence, for this reason also this petition is dismissed as not-maintainable.

11.8 One more fact is noted here, that on 19.04.2023 Dr.S. Palanikumar, Ld.CIT-DR filed adjournment petitions enblock in Bench 'D', which is his assigned Bench by the Department, for the reasons stated that he is assigned another official duty and hence,

all the appeals fixed on 19.04.2023 before 'D' bench and assigned to him be adjourned. But it is noted that and fact brought before the Bench that Dr. S. Palanikumar was to attend the hearing before CIC, Delhi through VC at Chennai at 1.15 p.m. but, he did not attend that hearing also as is evident from the order of CIC. It means that Ld.CIT-DR in the capacity of DR of 'D' Bench sought for an adjournment of 'D' Bench listed cases including stay granted matters, which were posted for hearing on 19.04.2023 by stating that he was on another official assignment connected with Tribunal before another authority. Going by the order of CIC, it seems that the adjournment petitions filed for 19.04.2023 is misleading and false statement made in adjournment petitions by CIT-DR, Dr. S. Palanikumar. This fact is ascertained from records and CBDT can take cognisance of the same.

11.9 Another objection raised by ld.CIT-DR, Dr.S. Palanikumar that the matter may be referred to Ministry of Law and Justice, we want to clarify that ITAT is a quasi judicial authority and it is an independent Tribunal that hears appeals against the orders of income-tax authorities and makes decision on matters related to income-tax. The ITAT has the power to examine evidences,

interpret tax laws and pass orders on appeals filed before it. Regarding supervision of ITAT, the parent ministry is Ministry of Law & Justice for administrative and financial decisions. As far as judicial supervision is concerned, it is overseen by the respective High Court within whose jurisdiction it falls. Even Hon'ble Supreme Court in the case of ITAT vs. V.K. Aggarwal, 235 ITR 175 (SC) has conferred the judicial independence of ITAT without any interference by any Ministry or Department of the Government of India in the discharge of the functions entrusted to it by Income-tax Act. In this case, Hon'ble Supreme Court laid down the proposition that the administrative control of the Tribunal functioning was under the executive wing of the Government i.e., Ministry of Law & Justice but it was held that it has no control over the judicial functioning of the Tribunal. To decide the present petition filed by ld.CIT-DR dated 19.04.2023 before Assistant Registrar is not the administrative function of the Tribunal but it is the judicial function of the Tribunal whereas it has to be decided whether the issues raised before Bench are to be decided judicially and not administratively because ld.CIT-DR, Dr. S. Palanikumar and one Senior DR, Shri P. Sajit Kumar tried for almost 15 to 20 days to block the judicial proceedings by blocking Shri I.Dinesh, Advocate of V. Ramachandran Advocates

and Shri N.Arjun Raj, Chartered Accountant of Sriram Associates. They took up this issue on judicial side of the functioning of the Tribunal by raising this issue before the benches. Hence, we decided to take up the matter on judicial side of the functioning of the Tribunal. Hence, this plea of ld.CIT-DR also rejected.

11.10 The present application dated 19.04.2023 by ld.CIT-DR is pitted as preliminary objection to cases to be represented by the Shri I.Dinesh and others and is a quintessential example of obstruction of justice. While it is a undisputed fact that Shri I.Dinesh has been appointed to represent ITAT, duly authorised by the President of the Tribunal through the registry, in discharging his administrative function, the present application is preferred to obstruct the judicial function of the Bench in disposing off the appeals. By this application the functioning of the bench has been disrupted and obstructed. We are of the view that it is imperative and it is compelling that functioning of the bench should not be put to mockery by means of such frivolous, mischievous, illegal and baseless applications which has successfully stalled a judicial proceeding without any substance. If application of such nature is entertained and if such application could stand as an impediment to

the tribunal functioning than it would result in untold misery to the tax payers and therefore it is just and expedient to hear the present application as a preliminary issue to the appeal intended for hearing and obstructed by the ld.CIT-DR. In our view, in case, ld.CIT-DR, Dr. S. Palanikumar seems to be aggrieved personally either from the counsels or from the Bench, he should have sat with the Bar and Bench and could have resolved the issue and should not have put the functioning of Bench on hold. This application is on account of narrow, parochial and sedentary approach to a sensitive matter involving bar and bench. The application only exposes the lack of knowledge on the part of the person who files it. It is unfortunate that we have to deal with this issue where the Departmental Representative as well as the Bar members both are officers of the Court and due respect is being given to both the sides.

Having said so, let us examine, in the given facts and circumstances, the conduct of Dr.S.Palani Kumar, ld.CIT-DR. Dr.S.Palani Kumar is an Indian Revenue Service Officer holding a position of Commissioner of Income Tax and posted as Departmental Representative before the Tribunal to represent the appeals filed by the Revenue. Therefore, as a Counsel for the

Revenue, it is expected from the Ld.DR, a minimum understanding of the functioning of the Tribunal. Admittedly, ITAT is a quasi-judicial Appellate Forum established under the Income Tax Act, 1961, and for the purpose of discharging its functions, it is vested with the powers of Civil Courts. Counsels represent the assessee and the Revenue, are Officers of the Court and they are expected to behave in a manner which is in accordance with the formulated Court crafts. In the instant case, the Ld.DR, Dr.S. Palani Kumar, he is behaving in such a manner to obstruct the Court proceedings by filing frivolous application in many of the cases, which is in our considered view is a clear case of obstructing the judicial functioning of the Tribunal. As we are all aware, the ITAT is regulated by its own rules and procedures, and conducts open court hearing and affords opportunities to the Counsels of both sides to represent their cases. The Tribunal before delivering its order/judgment, considers the facts on record and arguments advanced by both the Counsels and pass the orders accordingly. Although in some cases, there can be a mistake apparent from records and for that a remedy is provided in the Act itself. But in any case, the DRs cannot file letters or petition in personal capacity which will hinder the justice delivery system. Since, DR S Palanikumar LD CIT DR is representing the AO,

we expect him to be conversant with open Court crafts and procedures, which should not hindering the justice delivery system. We, therefore, deprecate this kind of behaviour of Dr.S.Palani Kumar and advise the Revenue to give proper training to him before he is posted in any judicial forum. Since, he has obstructed judicial functioning of the Tribunal by filing frivolous application and letters, we are of the considered view that it is a fit case for imposing a cost, but we are refraining ourselves from imposing any cost as income tax department will take everything into consideration. We further direct the Registry to send a copy of this order to the Chairman, Central Board of Direct Taxes, New Delhi, and also to the Principal Chief Commissioner of Income Tax of Tamil Nadu & Puducherry, for necessary information. Accordingly, the preliminary objection raised by ld.CIT-DR, Dr.S. Palanikumar is rejected.

IT(TP)A No.101/CHNY/2018

12. The only issue in this appeal of assessee is as regards to the order of Assessing Officer passed on the directions of the Dispute Resolution Panel concluding that the guarantee fee received by the assessee to the extent of Rs.5,22,88,362/- is liable to tax in India. For this, assessee has raised following Ground Nos. 3 to 8 :-

3. The Assessing Officer/ Dispute Resolution Panel erred in concluding that guarantee fee received by the Appellant to the extent of Rs.5,22,88,362/- was liable to tax in India.

4. The Assessing Officer/ Dispute Resolution Panel erred in holding that guarantee fee was liable to tax u/s.9 of the Income Tax Act, 1961.

5. The Assessing Officer/ Dispute Resolution Panel erred in concluding that guarantee fee was taxable in India under Article 22 of the Double Taxation Avoidance Agreement (DTAA) between Republic of India and Korea.

6. The Appellant submits that the levy of Tax at the rate of 40% on the guarantee fee along with the surcharge at the rate of 59% and education cess at the rate of 3% is erroneous.

7. The Assessing Officer/ Dispute Resolution Panel failed to appreciate the decision of the Hon'ble Mumbai Tribunal in the case of M/s. Capgemini SA V DCIT (International Taxation) for the Assessment Year 2009-10 in ITA No. 7198/Mum/2012, wherein it was held that, "Furthermore, as per Article 23.3, income can be taxed in India, only if it arises in India. In the instant case, the income clearly arises in France because the guarantee has been given by the assessee, a French company to BNP Paribas, a French Bank, in France and, therefore, Article 23.3 has no applicability as income does not arise in India."

8. Without prejudice to the above, the Assessing Officer/ Dispute Resolution Panel failed to appreciate that as per Article 22 of the Double Taxation Avoidance Agreement (DTAA) between Republic of India and Korea, the other income shall be taxable only in that contracting state i.e.Korea.

13. Briefly stated facts are that the assessee company received a sum of Rs.5,22,88,362/- as guarantee fee from Daechang India Seat Pvt. Ltd., (DISPL) and KM Seat India Pvt. Ltd., (KMSIPL) during the relevant assessment year 2015-16. The assessee

company entered into a corporate guarantee agreement with certain banks for providing guarantee for loans granted by bank to its group companies across various countries. In term of the corporate guarantee agreement, the assessee received this guarantee fee from the above stated two group companies. The AO noted that the foreign banks extended loan facility to these two subsidiaries which are resident companies of India and in term of that received loans from foreign banks and the loan was availed in India. According to AO, since the loans were availed in India, the income accrued from the guarantee fee has arisen in India only. According to AO, the guarantee fee is not in the nature of business income, since the assessee company was predominantly engaged in the manufacturing business and not in the business of providing corporate / bank guarantee to earn income on regular basis. The AO noted that the guarantee agreement is entered into for the limited purpose of enabling its subsidiaries to secure loans and the guarantee income is incidental in nature, since the assessee was not in the business of providing corporate/bank guarantee to earn income. The AO noted that the guarantee fee cannot be treated as business income, which in the absence of permanent establishment (PE) in India is not taxable in India under Article 7 of the India-

Republic of Korea Tax Treaty. The AO noted that guarantee fee received by assessee of Rs.5,22,88,362/- from Indian subsidiaries namely DISPL and KMSIPL is accrued and arised in India. Hence, he proposed to make assessment of the above said guarantee fee and for this a proposal was issued. The assessee moved to DRP u/s.144C(2) of the Act and the DRP vide F.No.162/DRP-2/Bang/2017-18 dated 24.09.2018 directed the AO to tax the guarantee fee as income from other sources as normal income of the foreign company to be taxed at 40% plus surcharge and education cess. For this, the DRP observed in para 6.6, 6.7 & 6.8 as under:-

> 6.6 On the aspect of the rate to be applied, being 10% as made out by the assessee or 40% as undertaken by the Assessing Officer, it is found that the rate of tax enforced by the Assessing Officer is indeed in order. The assessee tries to categorize the Guarantee Fee to be in the nature of interest so as to get the benefit of concessional taxation provided under the treaty and the Income Tax Act. Whereas the Assessing Officer by virtue of its accrual or arising of a such income in India applied the rate of tax as the normal income of a foreign company.
>
> 6.7 The treatment given by the assessee in respect of this income as interest is incorrect. Under the Income Tax Law, the term interest is defined as any payment pursuant to a loan transaction, if it is made in the context of the loan and in relation to the contract between the 3%AParties, even in the absence of debtor / creditor relationship. However, as in the case under consideration, a payment made to a person not a party to a loan transaction or contract cannot be treated as an interest payment even though the payments are incidental to the loan. If the definition of interest under the Act or the Treaty were expanded, it would also cover other payments

incidental to the actual loan agreement, which would not reflect the true intention of the legislature or the Treaty policy.

6.8 Since the assessee is not a party to the loan transactions and the guarantee contract is different from the loan contract, the guarantee fee does not fall within the definition of the interest either under the provisions of the Act or the Treaty. Therefore, the position taken by the Assessing Officer to tax the income from other sources of Rs.5,22,88,362 as normal income of the foreign company and tax it @40% + SC @5% and EC@2% is upheld. The objection of the assessee on this aspect of taxation is rejected.

In term of the above directions of DRP, the AO framed assessment order and brought the above mentioned guarantee fee of Rs.5,22,88,362/- to tax. Aggrieved assessee preferred appeal before the Tribunal.

14. Before us, the ld.counsel for the assessee drew our attention to the additional ground raised before DRP stating that guarantee fee received by assessee is not taxable in India inasmuch as the Indo-Korean DTAA under Article 23, "Other Income" clearly clarifies the position that the same is taxable in the contracting state i.e., Korea only. The ld.counsel for the assessee, during the course of hearing drew our attention to pages 68 to 98 of assessee's paper-book and particularly at page 93, wherein Article 23 defines where 'other income' is taxable. The Article 23 reads as under:-

> "Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention, shall be taxable only in that State."

In view of the above Article, the ld.counsel for the assessee stated that the DRP failed to adjudicate the additional ground raised in respect of taxation of guarantee fee as per Indo-Korea DTAA. The ld.counsel argued that the AO as well as the DRP having accepted the fact that the guarantee fee income falls under 'income from other sources' and the AO having himself relied on Article 23 of the Indo-Korean DTAA, failed to comply the same because DTAA clearly stipulates that the taxation of other incomes can be charged only in contracting state i.e., Korea. The ld.counsel for the assessee also drew our attention to the order of the AO and that of the DRP and both having denied the fact that the income received is neither the business income nor interest income and having not disputed that the same is an international transaction, both ought to have gone by the DTAA of Indo-Korea.

15. On the other hand, the ld. CIT-DR argued that it was the act of subsidiary, borrowing the funds for the purpose of their business carried out in India and in this connection, the subsidiaries paid guarantee fee to its holding company i.e., the assessee. He argued

that from the AYs 2014-15 to 2017-18, the assessee company duly admitted this income/guarantee fee received from the subsidiaries in return of income. This can be referred from the paper book of the assessee filed for the AY 2015-16 at page no.2. The assessee company admitted this income accrued from India and filed return of income by claiming the corresponding TDS credit deducted by the subsidiaries. He further submitted that details of assessment year-wise return of income filed, total income admitted, relevant head/schedule, total TDS credit for the relevant AY, TDS carry forward, TDS brought forward from the earlier AY claimed in subsequent AY etc, are presented in a separate tabular format. From that it is evident that this particular income is spread over for various AYs and continuously accrued to the assessee company in all those AYs. It is for these reasons, the assessee filed the return of income and duly admitted the income that accrued to them in India. The dispute in AY 2014-15 and 2015-16 was the rate of which tax to be deducted. The AO charged higher rate of tax. From the AYs 2014-15 to 2018-19, the assessee duly admitted the royalty income. From the AYs 2014-15 to 2017-18, the assessee apart from admitting royalty income, income accrued on account of guarantee fee was admitted in its return of income. He further submitted that

the assessee consistently admitted the guarantee fee accrued and received as income accrued received in India in all the returns filed upto AY 2017-18. The return of income filed for AY 2016-17 & 2017-18 was not selected for scrutiny whereas, it was duly processed u/s 143(1) of the IT Act by accepting the returned income. In AY 2018-19, the assessee did not admit this guarantee fee income accrued to them in its return of income filed on 28.03.2019. However, TDS credit of Rs. 1,28,71,498/- was claimed by the assessee. In the AY 2018-19, the assessee admitted only the royalty income received. In the AYs 2014-15 and 2015-16, the assessee raised a common ground that by virtue of Article-22 of Indo-Korea DTAA, the other income shall be taxable only in the contracting state, ie. Korea. However, this ground is devoid of any merit that the assessee themselves filed the return of income and admitted the guarantee fee accrued in India that was subsequently paid by the subsidiaries, carrying out business in India as per section 5(2) and section 9 of the IT Act, 1961. The ld.DR stated that the assessee relied upon the decision of ITAT, Mumbai in the case Capgemini SA v. ADIT in ITA No. 7198/Mum/2012 in support of its contention but the facts and circumstances of this case is not at all relevant to the facts of the assessee. In the assessee's case,

the assessee themselves duly admitted the income accrued in India in the return of income filed for AYs 2014-15 to 2017-18 (4 Assessment years) consecutively. Only in AY 2018-19, this was not admitted. The assessee also relied upon the decision of Hon'ble ITAT, Delhi in the case of Johnson Matthey Public Ltd [2017] 88 taxmann 127. This is the decision rendered in favour of Revenue. Hon'ble tribunal examined the changeability of guarantee fee in the light of section 9, section 2(28A) of the Act as well as the DTAA. From the paragraph 17 this issue was analysed in depth. The finding given by the Tribunal in paragraph 20 is as under:

> "Having examined the issue of corporate/bank guarantee recharge with reference to Article 12(5) of the Indo U.K. Treaty and section 2(28A) of the Act, we are of the considered opinion that the authorities below are perfectly justified in concluding that this payment does not fall within the expression of interest and in view of Clause 3 of Article 23 of the Treaty, in the absence of any specific provision dealing with corporate/bank guarantee recharge, the same has to be taxed in India as per the provisions of the IT Act, 1961. We do not find any illegality or irregularity in the reasoning given or conclusions reached by the authorities below. We, therefore, dismiss Ground Nos. 2 to 4 & 10."

16. In reply, the ld.counsel for the assessee stated that the ld.CIT-DR relied on the financials of the assessee to demonstrate that TDS has been deducted which clearly establishes the fact that the assessee had admitted the guarantee fee received as income. According to ld.counsel, the ld.CIT-DR has exceed his briefing and it

is no ones case either of the Assessing Officer nor the DRP that the guarantee fee received is business receipts and that once that is the case, the ld.CIT-DR has no business to exceed his briefing and now come to Tribunal and say that the income is business receipt. He also argued that the reliance placed by ld.CIT-DR in the case of Johnson Matthey Public Ltd., *supra,* to say that guarantee fee is taxable under DTAA of India-UK, he argued that the case law relied on by the ld.CIT-DR relates to India-UK Treaties and the subject appeal or subject issue before us is Indo-Korea DTAA and the same cannot be relied on by the Revenue now. The ld.counsel for the assessee relied on the decision of Co-ordinate Bench in the case of M/s. Draegerwerk & Co. KGAA vs. ACIT in ITA No.547/MUM/2022 dated 09.11.2022, wherein the Tribunal has clearly distinguished the decision of Johnson Mathey Public Ltd., *supra.* In term of the above, the ld.counsel for the assessee again made emphasis on Article 23 of Indo-Korea DTAA which specifically provides that taxability of 'other income' is only in Korea i.e., contracting state and not in India. Hence, he requested the Bench to set aside the orders of Assessing Officer and that of the DRP and allow this additional ground raised before DRP.

17. We have heard rival contentions and gone through facts and circumstances of the case. We noted that the assessee is a foreign company incorporated in Korea which is engaged in the manufacture of automobile and auto parts. During financial year 2014-15 relevant to assessment year 2015-16, the assessee entered into guarantee agreement with its subsidiaries DISPL and KMSIPL to provide guarantees to foreign banks namely Standard Chartered Bank to provide loan to above subsidiary companies. Pursuant to guarantee agreements, the assessee received a sum of Rs.5,22,88,362/- from its subsidiaries after deducting TDS @ 10%. We noted that the Assessing Officer in his draft assessment order passed on 29.12.2017 treated the guarantee fee as 'other income' by observing as under:-

> "The Guarantee agreement is entered into for the limited purpose of enabling its subsidiaries to secure loans and the guarantee income is incidental in nature, since the assessee was not in the business of providing corporate / bank guarantee to earn income on a regular basis. Accordingly, the guarantee fee cannot be treated as business income which, in the absence of a permanent establishment in India is not taxable in India under Article 7 of the Treaty.
>
> As a result, the guarantee fee falls under Article 22 "Other Income" of India and Republic of Korea Treaty and fully taxable in India. Therefore the Guarantee fee received Rs.5,22,88,362/- is added back to total income for the relevant AY 2015-16"

Similarly, when the matter was carried by assessee before DRP, the DRP also confirmed the position taken by the Assessing Officer and noted that the position taken by the Assessing Officer to tax the income from other sources as normal income of the foreign company is upheld and to be taxed accordingly. It means that the DRP treated the guarantee fee as income from other sources. This direction of the DRP was complied by the Assessing Officer and further noted that the guarantee fee is not in the nature of business income since the assessee company was predominantly engaged in the manufacturing business and not in the business of providing corporate / bank guarantee to earn income on regular basis. Hence, according to Assessing Officer the guarantee agreement is entered into for limited purpose for enabling its subsidiaries to secure loans and the guarantee income is incidental in nature, since the assessee was not in the business of providing corporate / bank guarantee to earn income on regular basis. Hence, the Assessing Officer held that the guarantee fee received from Indian Subsidiaries namely DISPL and KMSIPL has accrued and arised in India as income from other sources. We noted that this is a clear cut case of applicability of DTAA of Indo-Korea, whereby by virtue of Article 23, the other income has to be taxed in the contracting state

i.e., Korea and not India. We also noted that reliance placed by ld.CIT-DR on the decision of Johnson Matthey Public Ltd., *supra* relates to Indo-UK Treaties and this has been distinguished by Co-ordinate Bench of ITAT, Mumbai in the case of M/s. Draegerwerk AG & Co. KGAA, wherein while dealing with Indo-German Treaty it has clearly distinguished the decision cited by ld.CIT-DR. We noted that this issue has been considered by Co-ordinate Bench of Mumbai in the case of Capgemini SA vs. DCIT (International Taxation) in ITA No.6323/Mum/2016, dated 09.01.2017, wherein the Tribunal considering another decision of the same assessee for AY 2012-13, in ITA No.888/MUM/2016, order dated 13.07.2016 and further following AY 2009-10 in ITA No.7198/MUM/2012, order dated 28.03.2016 held that the guarantee commission received by French Company in that case neither accrued in India nor deemed to be accrued in India and therefore, not taxable in India under the Act. For this, the Tribunal observed in para 2.4 as under:-

> "2.4 If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld.representative counsels, if kept in juxtaposition and analyzed, broadly, the ld.DRP has followed its own order, in the case of assessee, for Assessment Year 2012-13 on the resons that the Tribunal has not still overrules the order of the ld.DRP and further the guarantee is normally sought at the instance of the guarantee seeker and not at the instance of guarantor. However, under the facts available before us, we find that for Assessment Year 2012-13, the Tribunal vide its order dated 13/07/2016 (ITA No.888/Mum/2016), by following the

order of the Tribunal, in the case of assessee itself, for Assessment Year 2009-10 (ITA No.7198/Mum/2012) dated 28/03/2016, decided the issue in favour of the assessee. The relevant portion from the order of the Tribunal is reproduced hereunder for ready reference:-

> 3. Insofar as Ground of appeal nos. 1 to 4 are concerned, they relate to a single issue arising from the action of income-tax authorities in holding that guarantee commission earned by the assessee amounting to Rs.33,40,347/- was liable to tax in India.
>
> 4. In this context, the relevant facts are that the appellant is a foreign company incorporated in France and is a tax resident of France. It is engaged in the business of providing various support, sustenance and developmental service to Capgemini Group companies across the world. During the year under consideration, assessee-company had earned royalty from two of its associate concerns in India, viz., Capgemini India Pvt. Ltd and Capgemini Business Services India Pvt. Ltd. In the return of income filed by the assessee for the assessment year under consideration it declared an income of Rs.9,52,52,240/- on account of such royalty income. In the course of assessment proceedings, the Assessing Officer noticed that assessee had received guarantee commission of Rs.33,40,347/- from the two associate Indian concerns in return for assessee having extended corporate guarantee to BNP Paribas, France for the credit facilities extended by BNP Paribas, France to the associate concerns in India. Before the Assessing Officer the plea of the assessee was that such guarantee commission was not chargeable to tax in India either under the domestic law or even in terms of Double Taxation Avoidance Agreement (DTAA) between India and France. The pertinent point made out by the assessee was that no service was rendered by the assessee, much less a professional/ Technical service, and in any case, no service can be said to have been rendered in India. The plea of the assessee did not find favour even with the DRP and accordingly, the Assessing Officer held the guarantee commission of Rs. 33,40,347/- as taxable.
>
> 5. At the time of hearing, the learned representative for the assessee pointed out that an identical controversy was considered by the Mumbai Bench of the Tribunal in the assessee's own case for Assessment Year 2009-10 vide ITA No. 7198/Mum/2012 dated 28.3.2016. The relevant discussion in the order of the Tribunal dated 28.3.2016 (supra) reads as under :-

"3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a resident of France and does not have a permanent establishment in India. During the year assessee has given a corporate guarantee BNP Paribas, a French Bank in France, on behalf of its various subsidiaries worldwide. During the year under consideration, in India, two subsidiaries of the assessee M/s.Capgemini India Pvt. Ltd. and Capgemini Business Services (India) Ltd. were sanctioned credit facilities by the Indian Branches of BNP Paribas, which credit facilities to the extent of USD 15 million4and 2 million respectively, were secured by the said corporate guarantee given by the assessee. The assessee has charged guarantee commission @ 0.5% per annum for the corporate guarantees given on behalf of its subsidiaries in India. The AO has taxed the same by holding it to be "Other Income" under Article 23 of the DTAA between India and France.

4. The assessee is before us against the said addition.

5. We have considered rival contentions and found that the AO taxed the guarantee commission on the plea that guarantee has been provided for the purpose of raising finance by an India company. As per the AO finance was raised in India. The AO further observed that finance requirement is met by a Indian branch of the bank, the benefits of guarantee are shared by the Indian entity with the assessee by making a compensatory payment. Accordingly the AO held that fees for guarantee arise in India. From the record we found that guarantee commission received by France company did not accrue in India nor it can be deemed to be accrued in India, therefore, not taxable in India under Income Tax Act. Furthermore, as per Article 23.3, income can be taxed in India, only if it arises in India. In the instant case, the income clearly arises in France because the guarantee has been given by the assessee, a French company to BNP Paribas, a French Bank, in France and, therefore, Article 23.3 has no applicability as income does not arise in India."

6. Before us, it was a common point between the parties that the facts and circumstances of the dispute in the instant year are similar to those considered by the Tribunal in Assessment Year 2009-10 (supra). It was also a common point between the parties that decision of the Tribunal dated 28.3.2016 (supra) continues to hold the field and, therefore, following the aforesaid precedent, in the instant year also the guarantee commission of Rs. 33,40,347/-

> earned by the assessee from the two associate Indian concerns cannot be held to be taxable in India. As a consequence, on this aspect, the assessee succeeds.
>
> In the light of the foregoing order, the one of the reason that the order for Assessment Year 2012-13 of Ld.DRP has not been reversed by Tribunal, no more survives. The Tribunal in order dated 28/03/2016 for Assessment Year 2009-10 (ITA No.7198/Mum/2012) found that guarantee commission, received by France Company neither accrued in India nor deemed to be accrued in India, therefore, not taxable in India under the Income Tax Act. Furthermore, as per Article-23.3, income can be taxed in India only if arises in India and since, in the instant case, the income arose in France, as the guarantee was given by the assessee, a French company to BNP Paribas, a French Bank, in France, therefore, Article-23.3 has no applicability as income arose out of India. Respectfully, following the decisions of the Tribunal, these grounds of the assessee are allowed."

17.1 In view of the above and following Article 23 of Indo-Korea DTAA which specifically provides that taxability of 'other income' is only in the contracting state and in the present case, the contracting state is Korea and not India, hence taxability under the Income Tax Act is not at all desirable. Hence, we delete the addition and allow this appeal of assessee on this very issue. The appeal of the assessee is allowed.

ITA No.1643/CHNY/2019 in AY 2014-15

18. We noted that the issue in assessment year 2014-15 in the present appeal is as regards to the order of CIT, International Taxation invoking the provisions of section 263 of the Act and

setting aside the assessment framed u/s.143(3) of the Act and concluding that the guarantee fee received by assessee accrues and arises in India and same would be covered under the ambit of provisions of section 5(2) and section 9(1) of the Act. The ld.counsel for the assessee drew our attention to para 4 of the order of CIT, International Taxation passed in No.CIT/IT/CHE/113 (263)/2018-19 dated 29.03.2019 u/s.263 of the Act setting aside the assessment order by holding that the guarantee fee is taxable in India, as in assessment year 2015-16, identical issue by Assessing Officer in his assessment order held that for the payments received on account of guarantee fee as taxable under the Income-tax Act. He observed in para 4 as under:-

> "4. The matter is considered. In view of the fact that DRP, Bengaluru has issued a categorical direction upholding the contention of the Assessing Officer that the impugned Guarantee fee is taxable in India and that the same is chargeable to tax at the rate of 40%, I hold that the assessment for A.Y.2014-15 on identical issue charging the amount at the rate of 10% is prejudicial to the interest of revenue. Accordingly, I deem it appropriate to set aside the assessment by virtue of powers vested in me vide section 263 of the Act with the direction to the Assessing Officer to revise the assessment in the light of the directions of the DRP, Bengaluru.

As, we have already adjudicated the issue in assessment year 2015-16 in IT(TP)101/CHNY/2018 in preceding paras and finding is given that the guarantee fee is not taxable in India in view of Article 23 of

Indo-Korea DTAA, we quash the revision order passed by PCIT u/s.263 of the Act. The appeal of the assessee is allowed.

19. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on 5th July, 2023 at Chennai.

Sd/-	Sd/-
(मंजुनाथ. जी)	(महावीर सिंह)
(MANJUNATHA.G)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 5th July, 2023

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकरआयुक्त /CIT
4. विभागीय प्रतिनिधि/DR	5. गार्ड फाईल/GF.	6. अध्यक्ष/President, ITAT

7. Chairman, CBDT, New Delhi
8. Pr.CCIT, TN & Pondicherry