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Central Administrative Tribunal
Principal Bench

OA No. 1623/2002

New Delhi, this the 17th day of January, 2006

Hon'ble Mr. V.K. Majotra, Vice Chairman (A)
Hon'ble Mr. Shanker Raju, Member (J)

1. Mr. Vinay Kumar Saxena,
s/o Sh. Devendra Kumar Saxena,
R/o AB-861, Sarojini Nagar,
New Delhi – 110 023.

2. Mr. Ravi Kant Bajaj,
S/o Mr. J.D. Bajaj,
R/o A-166, Majlis Park,
Adarsh Nagar, Delhi.

3. Mr. Navinendu Shekhar,
S/o Mr. K.C. Shekhar,
R/o 553, Laxmibai Nagar,
New Delhi – 110 023.

4. Mrs. Anita Raheja,
w/o Mr. O.P. Raheja,
R/o 1133, Sector – 8,
R.K. Puram, New Delhi. ...Applicants

(By Advocate: Shri V.S.R. Krishna)

-versus-

Union of India through:

1. Secretary,
Department of Revenue,
Ministry of Finance,
Government of India,
North Block, New Delhi.

2. The Chairman,
Central Board of Direct Taxes,
Ministry of Finance,
Government of India,
North Block, New Delhi.

3. The Director,
Directorate of Organization and
Management Services (DOMS),
Central Board of Direct Taxes,
Department of Revenue,
Ministry of Finance,
Government of India,
Behind Hyatt Regency,
R.K. Puram, New Delhi.

4. The Chief Commissioner of Income Tax,
O/O The Chief Commissioner of Income Tax,
Central Revenue Building,
Indraprastha Estate,
New Delhi. ...Official Respondents

(By Advocate: Shri V.P. Uppal)

5. Mahesh Chandra,
s/o Shri Satyapal,
R/o B-869, Gharoli Dairy Colony,
Mayur Vihar, Phase-III,
Delhi – 96.

6. Surender Kumar Mittal,
s/o Shri Kanwar Lal Mittal,
R/o A-6, Om Vihar, Uttam Nagar,
New Delhi.

7. Mrs. Sushma Madan,
w/o Sh. Parveen Madan,
1/19, Old Rajinder Nagar,
New Delhi.

8. Mrs. Honey Chadha,
w/o Shri Manish Chadha,
R/o B-228, West Patel Nagar,
New Delhi.

9. Mrs. P. Uma Devi
w/o Sh. J. Murthy,
R/o B-5/61C, Sector 34,
Noida, UP.

10. Shri R.K. Chandel,
s/o Sh. Bhagwan Dass,
R/o E-16/594, Tank Road,
Karol Bagh,
New Delhi. ...Private Respondents

(By Advocate: Shri A.K. Behra)

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ORDER

By Mr. Shanker Raju, Member (J):

By virtue of the present Original Application, applicants have challenged an order passed by the respondents on 01.02.2002 whereby, on review DPC held in the cadre of Senior Tax Assistants (hereinafter referred to as `STAs') and despite having been promoted earlier on regular basis, they have been treated as ad hoc STAs till further orders.

2. Brief factual matrix suggests that the applicants had joined the respondents' department as LDCs. The respondents have set up a special unit to impart knowledge of tax upto the level of UDCs in order to upgrade their skill. Thereafter, in order to improve the functional efficiency, Ministry of Finance along with the DoP&T and Department of Expenditure placed certain proposals before the Union Cabinet for restructuring the cadre of the DEO Group `B', which was approved on 31.08.2000.

3. Central Board of Direct Taxes (hereinafter referred to as `CBDT') notified the revised sanctioned strength at different levels with the concurrence of Department of Expenditure on 24.10.2000. Detailed instructions were issued on 4.6.2001 regarding filling up of the vacancies in the cadre of DEO Grade `B', `C' and `D'. Instructions were also issued to hold DPC for promotion to various posts. As regards instructions for the post of STA, pre-structured DEOs i.e. DEO Group `B', who have qualified the ministerial examination, have been treated for determining vacancies in combined strength of STAs. The Recruitment Rules for the years

2000-01 and 2001-02 provided that DEOs Group `B', who could not be promoted, would hold the post as personal to them till they are promoted. In accordance with the instructions on a DPC held, applicants, who had earlier qualified the examination, which is relevant for imparting knowledge of tax to come at par with proper discharge of functions of STAs, were promoted by an order dated 29.06.2001.

4. However on 19.07.2001, a different set of instructions regarding filling up the posts has been promulgated by the Department, which has done away with the pre-requisite requirement of passing of ministerial staff examination, which has resulted in review DPC whereby the applicants had been made ad hoc. The said action of the respondents led to filing the present O.A.

5. This O.A. was earlier disposed of on 1.1.2003 by quashing the impugned order dated 1.2.2002 and declaring that the applicants are regularly promoted STAs. In the course of recording this finding, it was held that review DPC was unwarranted. The said order was challenged by non-parties in the OA being affected before the High Court of Delhi in CWP No. 6977/2003 and the High Court with a consent order on 9.2.2005 remanded back the matter to the Tribunal for a decision afresh. In pursuance to the High Court's order, private parties, represented through the learned counsel Shri A.K. Behra, have filed their reply.

6. Learned counsel of the applicants Shri VSR Krishna contended that the decision through which the earlier instructions have undergone change by Memo dated 19.07.2001 is an amendment

which cannot be applied retrospectively to do away with the regular promotion of the applicants.

7. Learned counsel would contend that there is no merger of posts of DEO Group ` B' and TA as according to the Notification of Department of Finance dated 23.12.1999, DEO Group `B' is a temporary post which cannot be clubbed with the permanent post of Group `A'.

8. Learned counsel would also contend that despite doing away with the ministerial staff examination, the fact that in the rules there is a provision as to non-promotion of DEO Group `B', the same would continue to hold the DEO Group `B' cadre till they are promoted and the same clearly shows that the composition of cadre was defined as merger only for STAs & DEO Group `C' and rest of it is a selection by DPC. As such, DEOs Group `B' have to be placed before the DPC and then promoted as STAs as the requirement was to pass the ministerial examination. Those who could not qualify as DEO Group `B' would not be considered and continued to retain the status till they pass their examination and then promoted.

9. Learned counsel would further contend that even newly promulgated rules i.e. Income Tax Department (Group `C' Recruitment Rules), 2003 also provide passing of the said examination for promotion as STAs. As such, any amendment in the rules, which has now been promulgated by the President vide Notification issued in 2002, would not have retrospective application and promotion earned by the applicants cannot be disturbed.

10. Learned counsel would also contend that before doing away with the promotion, a civil consequence has ensued upon the applicants in non-grant of an opportunity to show cause, which is in violation of principles of natural justice. It is stated lastly that merger of DEO Group `B' and TA was only for the purpose of posts but the promotion procedure would not change.

11. On the other hand, learned counsel of the private respondents Shri Behra, by placing reliance on a decision of the Apex Court in ***S.S. Grewal vs. State of Punjab & Others,*** 1993 (25) ATC 579, stated that the applicants have not annexed the entire text of the rules as there had been a merger of DEO Group `B' and TA. For the recruitment year 2001-02, there is no requirement of passing of ministerial staff examination as the same had been inadvertently figured in the instructions promulgated on 4.6.2001. Corrigendum dated 19.07.2001, which is approved by the Cabinet has notified the instructions and in that event this modification has to be treated as part of the original instructions promulgated on 4.6.2001 and as there has been no requirement for passing of ministerial staff examination by DEO Group `B', applicants' ad hoc officiation converted by the review DPC is perfectly legal. Shri Behra stated that validity of instructions dated 19.07.2001 has not been assailed.

12. Shri Behra further stated that anomalous instructions dated 4.6.2001 were rectified on 19.7.2001. There had been a merger to the grade of DEO Group `B' with STA. As such, DEO Group `B' on merger after the recruitment year 2002-03, is non-existent and, therefore, they have no liability to pass the ministerial staff examination as an eligibility.

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13. Official respondents have also reiterated what the learned counsel of the applicants has stated.

14. In rejoinder, contentions raised are represented.

15. Apart from ***S.S. Grewal vs. State of Punjab & Others*** (Supra), it is held that no explanatory or clarificatory rule is to be held as part of the main rules and would operate retrospectively. The aforesaid issue was also cropped up before the Apex Court in ***Zile Singh vs. State of Haryana & Ors.,*** 2004 (8) SCC 1, whereby the following observations have been made:

> "13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only '*nova constitutio futuris formam imponere debet non praeteritis*' – a new law ought to regulate what is to follow, not the past. (See : Principles of Statutory Interpretation by Justice G.P. singh, Ninth Edition, 2004 at p. 438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.
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> 14. The presumption against retrospective operation is not applicable to declaratory statutes. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. An amending Act

may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect.

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, Seventh Edition), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may b called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the Statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute: (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right.

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to 'explain' a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as they are explanatory and declaratory in nature. The classic illustration is the case of **Att. Gen. V. Pougett**. By a Customs Act of 1873 (53 Geo.3,c.33) a duty was imposed upon hides of 9s. 4d., but the Act omitted to state that it was to be 9s. 4d. per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c.105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s. 4d. per cwt., but Thomson C.B., in giving judgment for the Attorney-General, said: "The duty in this instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act."

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17. Maxwell states in his work on interpretation of Statutes, (Twelfth Edition) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it." If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary secundum materiam" Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act.

18. In a recent decision of this Court in **National Agricultural Cooperative Marketing Federation of India Ltd. And Another v. Union of India and Others,** it has been held that there is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to be subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as : (i) the words used must expressly provide or clearly imply retrospective operation; (ii) the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional; (iii) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.

19. The constitution bench in **Shyam Sunder & Ors. v. Ram Kumar & Anr.**, has held – "Ordinarily when an enactment declares the previous law, it requires to be given retrospective effect. The function of a declaratory statute is to supply an omission or explain previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare

what was the previous law and when such a declaratory Act is passed invariably it has been held to be retrospective. Mere absence of use of word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory it has to be construed as retrospective."

20. In **The Bengal Immunity Company Ltd. v. The State of Bihar & Ors., Heydon's** case was cited with approval. Their Lordships have said – "It is a sound rule of construction of a statute firmly established in England as far back as 1584 when **Heydon's** case was decided that – "for the sure and true interpretation of all statutes in general (be they penal or beneficial), restrictive or enlarging of the common law) four things are to be discerned and considered:-

Ist. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament had resolved and appointed to cure the disease of the Commonwealth, and

4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico."*

21. In **Allied Motors (P) Ltd. v. Commissioner of Income-tax, Delhi,** certain unintended consequences flew from a provision enacted by the Parliament. There was an obvious omission. In order to cure the defect, proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rules of reasonable interpretation should apply. "A proviso which is inserted to remedy unintended consequences and to make the provisions workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation

so that a reasonable interpretation can be given to the section as a whole."

16. In the above view of the matter, it is no more res integra that in the matter of clarification or correction of inadvertent error, the said modification is to be treated as part of the rules and there is no infirmity as it is one of the legal modes of interpreting the statute and this clarification would have retrospective application. However, the President has granted ex-post facto sanction under Article 309 of the Constitution of India to the relaxation of the recruitment rules promulgated on 19.07.2001.

17. On careful consideration of the rival contentions of the parties, though rules promulgated on 4.6.2001 talk of pre-structured DEO Group `B', who have qualified ministerial examination and a stipulation in the remarks column of the post of STA as to if any of the DEO Group `B' could not be promoted for any reason they will hold the post as personal to them till they are promoted. However on going through the entire text of the rules, we find that for the recruitment year 2001-02, the cadre of DEO Group `B' has been merged into the cadre of STA and as on merger when it is not pre-requisite for cadre of TA to qualify the ministerial examination which has been done away with vide clarification issued on 19.7.2001, stipulation as to non-promotion of DEO Group `B' would not have construed in such a manner as to non-promotion of DEO Group `B'. Non-passing of the ministerial staff examination would keep the status of those non-promoted DEO Group `B' and the post as personal to them till they are promoted. On merger of the grade of DEO Group `B' with TA, there is no requirement of passing of

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ministerial staff examination as inadvertently this requirement had figured while promulgating the instructions dated 4.6.2001, which, by way of clarification, has been done away with in the instructions issued on 19.7.2001 by according ex-post facto sanction of the President on promulgation of these rules under Article 309 of the Constitution of India. Any clarification shall relate back to the original promulgation of the rules and would have to be treated as part of it having retrospective operation.

18. Applying the aforesaid to the present case, the requirement of passing of ministerial staff examination, on merger of DEO Group `B' with the cadre of Tax Assistant, has been done away with. As such, review DPC was legal as illegality has cropped up in the original DPC and on reconsideration, respondents' action to make the applicants ad hoc, does not suffer from any infirmity in law.

19. In the result, for the foregoing reasons, finding no merit in the O.A., the same is accordingly dismissed but without any order as to costs.

S. Raju

(Shanker Raju)
Member (J)

V.K.Majotra

(V.K.Majotra)
Vice Chairman (A)

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