

CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH

31

O.A.No.22/98

Hon'ble Shri V.K.Majotra, Member (A)  
Hon'ble Shri Shanker Raju, Member (J)

New Delhi, this the 4<sup>th</sup> day of May, 2001

H.S.Mongia  
R/o F-25, Kalkaji  
New Delhi - 110 019. ... Applicant

(By Advocate: Shri S.K.Gupta)

Vs.

1. Union of India through  
Secretary  
Ministry of Finance  
Department of Revenue  
North Block  
New Delhi.
2. Director General  
Directorate General of Inspection,  
Customs & Central Excise  
New Delhi. .. Respondents

(By Advocate: Shri S.Mohd. Arif)

O R D E R

By Mr. Shanker Raju, Member (J):

The grievance of the applicant in the present OA is fixation of his pay in the grade of Assistant after taking into account the special pay drawn by him as Upper Division Clerk (hereinafter called as 'UDC') as per the Office Memorandum dated 22.5.1989, with all consequential benefits.

2. The applicant has retired from the post of Assistant on superannuation on 30.4.1994. During service, the applicant was promoted as UDC on regular basis in June, 1972 and thereafter he was accorded promotion to the post of Assistant on 14.12.1983. On the basis of OM dated 5.5.1979 on attending the work of more complex and important nature the applicant was accorded special pay of Rs.35/- per month in the year

1982. The pay of the applicant was protected by grant of personal pay equal to difference between pay plus special pay drawn in the lower post while he was promoted to the post of Assistant w.e.f. 14.12.1983. As per the OM dated 5.5.1979 and as decided in the Board of Arbitration the special pay of Rs.35/- is to be reckoned in fixation of pay on the condition that the incumbent should be a substantive holder of the post to which the special pay is attached or the incumbent on the date of appointment on higher post is officiating in the lower post to which the special pay is attached continuously for more than three years as per subsequent OM issued on 1.9.1987. According to the applicant, he fulfilled all the eligibility criteria and his pay may be refixed on notional basis from the date of the promotion by taking into account Rs.35/- and actual benefits may be allowed only after 1.9.1985. The applicant made representation for the grant of fixation of pay in the year 1991 but no decision had been taken on the same. The Directorate of Revenue Intelligence is also one of the subordinate office in Central Board of Excise & Customs and one Mr. B.K.Jain had approached this Tribunal in OA No.2804/92 for grant of fixation of pay and vide order dated 30.8.1993 the pay of the applicant therein was refixed taking into account the special pay. The SLP filed against the decision of the OA 2804/92 was pleased to dismiss the same. It is further contended that one Shri Shiv Dayal who was also working as UDC and promoted as Assistant and junior to the applicant in the cadre of UDC and Assistant was accorded the special pay on filing of an OA, his pay was refixed vide Judgement dated 9.3.1993 in OA No.1066/94. The

applicant raised his grievance regarding discrimination the respondents were considering the case of the applicant which was communicated to him on 7.1.1997 but till now nothing has been done in regard to the implementation of the order passed by the Tribunal in similar cases. The applicant's contention is that he had performing complex of important nature of work and as per the award the special pay was accorded the UDCs and after his promotion as Assistant as he is entitled for fixation of pay as per OM dated 22.5.1989 after taking into the special pay drawn by him as UDC. The applicant further contended that this case is squarely covered with the case of B.K.Jain supra against which SLP had already been rejected.

3. On the other hand, the respondents took exception of the contentions of the applicant and contended that in case of B.K.Jain, treating the case of B.K.Jain as a special case, he was accorded fixation of pay, the aforesaid ratio is not applicable to the case in hand. The respondents had referred to the representation of the applicant decided by the Ministry of Finance on 13.11.1997 where his request has not been acceded to on the ground that the direct line of promotion for UDCs in offices under Central Board of Direct Taxes and CBEC is to the post of Head Clerk/Office Supdt. and not to the post of Tax Asstt. Tax Asstt. is a professional post. The respondents have further contended that the order regarding grant of special pay to the applicant in DGIC and Central Excise has been erroneous and they were not confirming the OM dated 5.5.1979 and was not eligible as they had not been dealing with the complex cases involving deep

study requiring higher competence than those normally expected from UDCs in non-Secretariat Administrative Offices. It is contended that Secretariat Administrative Offices and in such offices where there is an intermediary grade like Assistant, Technical Assistant, etc. between grade of UDC and supervisory level the UDCs are normally not supposed to deal with complex cases involving deep study requiring higher competence. Such cases are dealt with by Assistants as such the special pay was not admissible in Secretariat Administrative Offices and also in non-Secretariat Administrative Offices where there is an intermediary grade between UDC and the supervisory level. Clarification has been shown to this effect which was issued by the Ministry vide OM dated 29.11.1982. According to the applicant, the respondents' Ministry has decided to review of the cases vide order dated 16.1.1998 and in case of retired employees the Department of Revenue is directed to make out a case for waiver of recoveries. As per the respondents, the applicant was neither holding substantive post for the entire period of UDC to which the special pay is attached nor he had completed a continuous service of three years after sanction of special pay. As regards the SLP in B.K.Jain's case supra the same is dismissed on limitation and not on merits. It is contended that the same would not be precedent under Article 141 of the Constitution of India.

4. As regards the Shiv Dayal's case in pursuance of the order dated 13.11.1997 recovery proceedings have been initiated by the Department as

he was not eligible for grant of the same. Respondents while referring the order passed on representation dated 16.1.1998, contended that the case of the applicant was reconsidered and he was not found eligible as such the same has not been accorded to him. The applicant in his rejoinder reiterated his pleas taken in the OA and further contended that no recovery has been effected against him and he is covered by the decision of the B.K.Jain's case.

5. We have carefully considered the rival contentions of the parties and perused the material on record. As per OM dated 5.5.1979 and subsequent clarification issued on 1.9.1987, in pursuance of the award of Board of Arbitration, the special pay of rs.35/- per month was being paid to the UDC as special pay and has bound to be taken into account for fixation of promotion subject to the conditions that the incumbent is substantive holder of the post to which the special pay attached and also on the date of his appointment to the higher post as officiating in the lower post to which the special pay is attached continuously for a period of not less than three years. The applicant contends that he was substantively appointed as UDC on regular basis in June, 1972 and had been promoted as Assistant w.e.f. 14.12.1983, i.e., prior to 1.9.1985 as such fulfilled the conditions laid down in OM dated 1.9.1987. We find from the reply of the respondents that the applicant was neither holding substantive post for the entire period of UDC nor he completed continuously the service after sanction of the special pay. The applicant was accorded special pay on 23.10.1982 and

was promoted as Assistant w.e.f. 14.12.1983 as such we find that as per the OM dated 1.9.1987 in order to qualify for fixation of pay on promotion taking into account the special pay drawn in the post of UDC it is pre-requisite that the incumbent should be holder of substantive post and also should have continued to officiate in the lower post continuously for a period of not less than three years when he was accorded the special pay. In the instant case, the applicant allowed special pay on 23.10.1982 and was promoted as Assistant on 14.12.1983 as such the applicant has not completed a continuous officiation in the lower post to which the special pay is attached, i.e., he has not rendered service as UDC for three years the day when he was accorded special pay and as such he is not fulfilling the pre-requisite for including Rs.35/- special pay towards fixation of pay on promotion. The contention of the applicant that one of the conditions is to be fulfilled in OM dated 5.5.1979 where the word 'Or' is written between the two conditions. However, it is not correct as in the subsequent clarification issued on 1.9.1987 the two conditions are to be fulfilled simultaneously for getting the relief of pay on promotion. The contention of the applicant that in the case of B.K.Jain supra decided by the Tribunal the applicant therein had been accorded the benefit of special pay for fixation of pay on promotion post as Assistant. The applicant being similarly situated, he is also entitled for according the same and Shri Shiv Dayal also similar fixation by filing an OA. In this regard, the respondents' plea that dismissal of SLP in B.K.Jain's case would not be a binding precedent under Article 141 of the Constitution of India is correct as

matter has not been dismissed on merit. Apart from it, B.K.Jain's case the benefit was allowed as special case to the applicant therein but in view of the fact that the applicant is not confirming to the conditions laid down in OM dated 1.9.1987 and his case has been thoroughly considered by the Department, he cannot claim any benefit of the ratio laid down in B.K.Jain's case. Apart from it in Shiv Dayal's case the respondents have already instituted recovery proceedings as the same had been accorded erroneously.

6. As regards the contention that the applicant has not been performing the complex nature of work involving higher responsibility is concerned, the matter has been considered by the respondents and the request of the applicant was rejected on 13.11.1997 and on clarification issued on 29.11.1982 it is clearly observed that the orders are applicable to UDCs in Subordinate Offices not participating in the Secretariat Scheme and where there is no intermediary level between Supervisory grades and UDCs including Technical Assistant, Investigator, etc. The request of the applicant was also considered vide order dated 16.1.1998.

7. The contention of the respondents that the OM dated 5.5.1979 was allowed to those UDCs who deals with the complex nature of work involving deep study than the UDCs in non-Secretariat Administrative Offices where there is intermediary grade like Assistant, Technical Assistant, etc, the UDCs are not suppose to deal with such cases and these cases are holding by the Assistants, as applicant had not been

found performing the complex nature of work, which is pre-condition for accord of fixation of pay and grant of special pay the respondents have erroneously accorded the benefits to the applicant who has retired, the proceedings are held for waiver of the recoveries. But it has been ordered against the persons who are still in service is will founded as per the OM ibid.

8. In view of the discussion made above, we are of the considered view that the applicant is not entitled for grant of benefit of pay fixation on the basis of his <sup>having</sup> drawn special pay of Rs.35/- as UDC. However, as decided by the respondents vide order dated 16.1.1998 the applicant, who had retired on superannuation on 30.4.1994 the recoveries of the amount already drawn by him should not be effected against him.

9. The OA is being devoid of merit, the same is accordingly dismissed.

S. Raju  
(SHANKER RAJU)  
MEMBER(J)

/RAO/

V.K. Majotra  
(V.K. MAJOTRA)  
MEMBER(A)