

**CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH**

OA/021/00389/2020 & MA 156/2021

HYDERABAD, this the 8th day of March, 2021

Hon'ble Mr. B.V. Sudhakar, Admn. Member



P. Sudhakar Reddy S/o late P.Ramalinga Reddy,
Aged 59 years,
Occ: Deputy Commissioner (Group 'A'),
Customs, GST, Audit-I Commissionerate,
1st Floor, Above Bajaj Electronics,
Ramanthapur, Hyderabad – 500 013,
R/o H.No.2-2-1965/13, Bagh Amberpet,
Street No.1, Near 6 No. Bus Stop,
Hyderabad – 500 013.

...Applicant

(By Advocate: Mr. KRKV Prasad)

Vs.

1. Union of India represented by
The Secretary, Ministry of Finance,
Department of Revenue, North Block,
New Delhi – 110 001.
2. The Chairman, Central Board of Excise and
Customs, New Delhi – 110 001.
3. Principal Chief Controller of Accounts,
Central Board of Indirect Taxes and Customs,
AGCR Building (1st Floor), New Delhi – 110 002.
4. The Commissioner (GST), Audit-I Commissionerate,
Kendriya Shulk Bhavan,
Basheerbagh, Hyderabad-500 004.
5. The Chief Accounts Officer,
O/o The Commissioner of Central Tax (GST),
Audit-I Commissionerate, Hyderabad.
6. The Pay and Accounts Officer,
Central Board of Indirect Taxes and Customs,
4th Floor, Kendriya Shulk Bhavan,
Basheerbagh, Hyderabad-500 004.Respondents

(By Advocate : Mr. K. Rajitha, Sr. CGSC)

ORAL ORDER
(As per Hon'ble Mr. B.V. Sudhakar, Administrative Member)

Through Video Conferencing:



2. The OA is filed challenging the action of the respondents in revising the pay fixation and recovery of excess paid salary vide letter dt. 16.07.2020, relying on the Circulars dt.02.09.2016, 20.06.2016, 18.04.2019 & 15.05.2019.

3. Brief facts of the case are that the applicant joined the respondents organization as Inspector in 1983 in the grade pay of Rs.4600, promoted as Superintendent in 1996 grade pay of Rs.4800 and granted Non Functional Upgradation (NFU) in 2006 with grade pay of Rs.5400 in PB-2, 2nd financial upgradation with grade pay of Rs.5400 in PB-3 in 2007 and finally, 3rd financial upgradation in 2013 with grade pay of Rs.6600. Applicant was promoted as Dy. Commissioner of Customs on 1.1.2019 with Grade Pay of Rs.6600 and he retired on 31.7.2020. Before retirement, when pension papers were submitted, they were returned to refix the pay vide letter dated 16.7.2020 on the grounds that the applicant is not eligible for 3rd MACP with grade pay of Rs.6600 based on the respondents letters dated 2.9.2016, 20.6.2016 and 18.4.2019. Along with the refixation of pay recovery is the consequential action and hence, aggrieved over the same, the OA is filed.

4. The contentions of the applicant are that as per MACP policy, financial upgradation is to the next immediate higher grade pay by ignoring the fact there are two similar grade pays in 2 different pay bands. Therefore, Superintendents, who are in the grade pay of Rs.5400 are to be granted grade pay of Rs.6600 irrespective of the fact that grade pay of Rs.5400 exists in PB -2 and PB -3. CCS (RP) Rules are in favour of the cause of the applicant. As per para 5 of the MACP scheme, promotion earned in the same grade pay are to be ignored. Hence, the grade pay of Rs.5400 on the basis of NFU has to be ignored. The grant of grade pay of Rs.5400 is a part of the pay structure and it is not a financial up-gradation. Even the increment due on 1.7.2020 has not been considered while working out the last pay drawn. The applicant cited the judgments of the Hon'ble Delhi High Court and Madras High Court in support of his contentions. The circulars referred to by the respondents are invalid in the context of the legal principles laid down by the courts. Even in OA 935/2017, it was directed to release terminal benefits without recovery. As per Hon'ble Supreme Court judgment in Rafiq Masih, there can be no recovery from retired employees. The pay fixation was done by the respondents and the applicant did not misrepresent to get the benefit. Re-fixation and recovery would tantamount to imposing a penalty. Further, they adversely affect the pensionary benefits leading to severe monetary loss.

5. Respondents, while confirming the career details of the applicant, state that the grant of NFU with grade pay of Rs.5400 has to be reckoned as financial up-gradation. Action has been taken as per letters dated 2.9.2016,

20.6.2016 and 18.4.2019. For waiver of recovery, permission has to be obtained from the Dept of Expenditure as per DOPT memo dated 2.3.2016 and hence, excess amount paid has been withheld. However, in order not to delay the pension disbursement, action was taken to release the pension as per extant rules. The matter is under examination by the cadre controlling authority. Permission is sought from the Dept of Expenditure for waiver of recovery. The inclusion of increment due will be considered after obtaining the approval from the Dept of Expenditure (DOE). Hon'ble Supreme Court has held that the financial up-gradation is to the next immediate higher grade pay and not to the grade pay as per promotional hierarchy. Applicant without representing to the competent authority has filed the OA. Respondents sought 3 months time to obtain permission from DOE and for review by the cadre controlling authority.

Applicant filed rejoinder stating that he filed the OA without representing to the respondents, since the respondents would order recovery from the pension. Court orders have to be followed and not executive instructions. Other contentions as in the OA have more or less, been repeated.

6. Heard both the counsel and perused the pleadings on record.
7. I. The dispute is about re-fixation and recovery of excess amount from the pension of the applicant on the eve of his retirement. The nerve centre of the episode is whether the financial up-gradation by way of grant of grade pay of Rs.5400 consequent to the applicant being given NFU after

rendering 4 years service as Superintendent, is to be considered as financial up-gradation or not. Applicant claims that it should not be, whereas respondents assert that it has to be, by citing respondents letters dated 2.9.2016, 20.6.2016 and 18.4.2019. Further, respondents state that the matter is under active consideration of the cadre controlling authority and the Dept. of Expenditure has been approached for waiver of recovery.



II. In the issue under dispute, there are two aspects, namely recovery and the other is re-fixation of pay/ pension. With regard to recovery from a retired employee, the law is well settled in Rafiq Masih case. The relevant para is extracted here under:

“18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred hereinabove, we may, as a ready reference summarise the following few situations, wherein recoveries by the employees would be impermissible in law:

- i) *Recovery from the employees belonging to Class-III & Class-IV service (or Group-C or Group-D service)*
- ii) *Recovery from the retired employees, or the employees who are due to retire within one year of the order of recovery*
- iii) *Recovery from the employees, when the excess payment has been made for a period in excess of five years before the order of recovery is issued*
- iv) *Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post*
- v) *In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary, to such an extent as would far outweigh the equitable balance of the employer's right to recover.”*

The provisions of the Rafiq Masih case apply squarely to the case of the applicant as per clause (ii) & (iii) cited supra. The 3rd MACP was granted 7

years prior to the retirement of the applicant. The respondents have fixed the pay on their own volition and the applicant did not misrepresent to seek the benefit. Hence, any recovery from the pension of the applicant will not be in order. Therefore, the interim order passed by the Tribunal on 29.07.2020 in respect of recovery, is made absolute.



III. Coming to the aspect of re-fixation of pay, the applicant relied on the judgments of the Hon'ble High Court of Delhi in ***Hari Ram & anr. v Registrar General, Delhi High Court*** in WP (C) No.9357 of 2016 and that of the Hon'ble High Court of Madras in WP No.11535 of 2014 in ***U.O.I. v S. Balakrishnan***. The latter order was even challenged in the Hon'ble Apex Court vide SLP No.15396/2015 but was dismissed on 31.8.2015. Both the decisions held that grant of NFU cannot be treated as a financial up-gradation as submitted by the Ld. Counsel for the applicant. Respondents have not averred anything in regard to the judgments but only requested for time of 3 months since the matter is under consideration of the competent authorities.

IV. Thus, in view of the facts and circumstances stated, the respondents are directed not to make any recovery from the pension of the applicant in view of the well settled law on the subject cited supra. In respect to re-fixation of pay/pension, the respondents are directed to consider taking a decision in the light of the judgments of the Hon'ble High Courts cited above and in accordance with extant rules as well as the latest law, if any, on the subject, within a period of 3 months, as sought by them, from the date of receipt of this order.

V. With the above directions, the OA is disposed of with no order as to costs. MA 156/2021 filed by the applicant accordingly stands disposed. Ld. Counsel for the respondents has submitted that an MA was filed by the respondents, with a prayer to delete R-1, R-2 & R-3 from the array of respondents as they are not necessary parties. However, there is no such MA on record to consider.



**(B.V.SUDHAKAR)
ADMINISTRATIVE MEMBER**

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