

(RESERVED)

**CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD BENCH
ALLAHABAD**

**HON'BLE MR.A.K. GAUR , MEMBER (J).
HON'BLE MR. D. C. LAKHA, MEMBER (A).**

Original Application Number. 1012 OF 2005.

ALLAHABAD this the 20 day of 11, 2009.

S. K. Singh, S/o late Sri Shyam Sunder Singh, C/20, Income Tax Colony, Meerut Road,, Muzaffar Nagar.

.....Applicant.

VE R S U S

1. Union of India through Secretary, Ministry of Finance, Department of Revenue, New Delhi.
2. Chief Commissioner of Income Tax, Meerut.
3. Commissioner, Income Tax, Muzaffar Nagar.
4. Deputy Commissioner of Income Tax (Administration), Muzaffar Nagar.
5. Assistant Commissioner of Income Tax, (Administration), Muzaffar Nagar.

.....Respondents

Advocate for the applicant: Sri R.C. Srivastava

Sri Shailendra

Advocate for the Respondents : Sri S.C. Mishra

O R D E R

(Delivered by Hon'ble Mr. A.K. Gaur, J.M)

By this Original Application filed under section 19 of Administrative Tribunals Act, 1985, the applicant has prayed for setting aside the orders dated 22.05.2002, 09.05.2005 and 17.05.2005/Annexure-6, 12 and 13 of O.A respectively coupled with prayer for a direction to the respondents not to deduct salary in

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pursuance of the impugned orders and pay him salary what he was getting prior to May 2005 and other consequential benefits.

2. The factual matrix of the case are that the applicant initially was appointed as Stenographer on 11.03.1974. He appeared in the departmental examination of Income Tax Inspector held on 03.07.1992, in which he was declared successful and vide order dated 25.06.1993 passed by the Commissioner of Income Tax, Meerut, he was allowed two advance increment w.e.f. 03.07.1992 and his pay was fixed at Rs. 2480/- . Subsequently vide order dated 26.09.1993 the applicant was promoted on the post of Income Tax Inspector and two advance increments were also given to him w.e.f. 15.07.1993 and his pay was fixed at Rs. 2675/- . According to the applicant, the Assistant Commissioner of Income Tax, Muzaffarnagar vide letter dated 17.02.2004/Annexure-2 of O.A raised an objection regarding grant of two advance increment w.e.f. May 1992, on the ground that the Stenographer Gr-I were not entitled to get advance increments on passing the I.T.I examination in terms of CBDT Letter dated 09.08.1983, dated 09.03.1984 and dated 09.1.2000 and further with regard to two increments w.e.f. 15.07.1993 on the ground that as the time scale of both the posts i.e. Stenographer Gr. I and Income Tax Inspector are identical, his pay was to be fixed under FR 22(a)(ii) now FR 22-I(a)(2) and not under FR 22(c) now FR-I(a)1 on the date of promotion to the post of Income Tax Inspector. The Joint Commissioner of Income Tax, Muzaffar Nagar vide letter dated 18.09.2001/Annexure-4 of O.A also raised an objection regarding entitlement of applicant of Fundamental Rule 22(1) (a)(1) and fixation of his pay. The applicant preferred representation dated 03.10.2004 before Joint Commissioner of Income Tax (Administration), Muzaffar Nagar regarding objections (referred to

above) but the Assistant Commissioner of Income Tax vide order dated 22.05.2002 (Annexure-6 of O.A) withdraw the two increments given to the applicant on 03.07.1992 and further two increments given on 15.07.1993.

3. Aggrieved the applicant preferred representation dated 29.05.2002 before Assistant commissioner of Income Tax (Administration), Muzaffar Nagar followed by representations dated 21.01.2003 and 04.02.2003 (Annexure-8 of O.A). It has also been stated in paragraph 4.17 of O.A that on account of revision of pay scale, vide order dated 30.04.2004, the pay of the applicant was upgraded and fixed at Rs. 9700/- w.e.f. 21.04.2004 in pay scale of Rs. 6500-10500/-. Thereafter the applicant received as Show Cause Notice dated 27.09.2004/Annexure-10 of O.A against which he filed his reply dated 30.09.2004 (Annexure-11 of O.A) before Assistant Commissioner, Income Tax, Muzaffar Nagar. Surprisingly, according to the applicant, the Deputy Commissioner, Income Tax vide order dated 09.05.2005 (Annexure-12 of O.A) reviewed the order dated 30.04.2004 and withdrawal the pay fixation in pay scale of Rs. 6500-10500/- and vide order dated 17.05.2005 (Annexure-13 of O.A) directed to deduct Rs. 5744/- per month from the salary of the applicant w.e.f. May 2005.

4. Aggrieved the applicant has filed the present O.A on the main grounds that the principle of natural justice and fair play has been violated by the respondents as before passing impugned orders no opportunity of hearing was provided to him; under the provisions of Fundamental Rules 27(12), it is settled that an employee who had been in receipt of higher pay on account of erroneous fixation by the authority

should not be asked to repay the excess pay drawn; despite repeated representation, the respondents did not place the same before Internal Audit Party; the copy of objection raised by the Audit was never supplied to the applicant, the Deputy Commissioner of Income Tax has no power to review and withdraw the order dated 30.04.2009 as the fixation of salary was made on the recommendations made by the 5th Pay Commission. When the matter was taken up on 20.12.2005, respondents were directed not to effect any recovery on the basis of impugned order till the disposal of O.A.

5. Learned Counsel for the applicant invited our attention to Annexure SA-1 and SA-2 of Suppl. Affidavit and submitted that similar benefit of two increments was given to similarly situated employees after passing the departmental examination and after promotion on the post of Income Tax Inspector. Learned counsel for applicant would further contend that in case of wrong fixation made by the authorities concerned, as per the Provisions of Fundamental Rules 27(12)/Annexure SA-4 of Suppl. Affidavit, it cannot be taken back. Learned counsel for the applicant also placed reliance on **judgment dated 26.04.1996 passed in Civil Misc. Writ Petition No. 7271/1986 reported in 1996 (3) UPLBEC 1840 - Harish Chandra Srivastava Vs. State of Uttar Pradesh and others** and submitted that the applicant cannot be held responsible for the fault of department and order without giving opportunity cannot be sustained.

6. On notice, the respondents filed Counter Affidavit stating therein that after passing the departmental examination for Income Tax Inspector, the benefit of two increments w.e.f. 03.07.1992 was inadvertently allowed to the applicant vide order dated 25.06.1993 passed by the Commissioner of Income Tax, Meerut, and his pay was

wrongly fixed at Rs. 2480/- . It has further been contended by the learned counsel for the respondents that on promotion of the applicant to the post of Income Tax Inspector, two advance increments were again allowed to him and his pay was wrongly fixed at Rs. 2675/- . Learned counsel for the respondents further submitted that As per Govt. of India, Ministry of Finance, Department of Revenue, C.B.D.T letter No. 26017/7/67/80-Ad IX dated 09.08.1983 and clarificatory letter dated 09.03.1984 and 09.11.2000, Head Clerks, Stenographers Gr. II & I are not entitled to get advance increment on passing the I.T.I Examination. Learned counsel for the respondents would further contend that the applicant passed the Departmental Examination of I.T.I on 03.07.1992 while he was working on the post of Stenographer Gr. I in pay scale of Rs. 550-900 and granted two advance increments w.e.f. 03.07.1992 in contravention of Govt. orders dated 09.08.1983 and clarificatory letter dated 09.03.1984 and 09.11.2000 because the Stenographers Gr. I were not entitled to advance increments on passing the I.T.I examination in terms of CBDT Letter dated 09.08.1983, dated 09.03.1984 and dated 09.1.2000.

7. Learned counsel for the respondents further submitted that while the applicant was working on the post of Stenographer Gr. I in pay scale of Rs. 1640-2900 was promoted to the post of I.T.I in same pay scale of Rs. 1640-2900 w.e.f. 15.07.1993 and his pay was again wrongly fixed under FR 22(c) now F-22-I(a)(1) because the minimum maximum and the rate of increment of the time scale of Stenographer Gr-I and I.T.I i.e. Rs. 1640-2900 are the same, therefore, the post of I.T.I cannot be treated as the post of 'Higher Responsibility' unless the same is declared the post of 'Higher Responsibility' by the C.B.D.T. It has further been contended by

the learned counsel for the respondents as the time scale of both the posts i.e. Stenographer Gr. I and Income Tax Inspector are identical, the pay of the applicant was to be fixed under FR 22(a)(ii) now FR 22-I (a) (2) and not under FR 22(c) now FR-I (a)1 on the date of promotion to the post of Income Tax Inspector. In support of his contention, learned counsel for the respondents referred to the Letter No. A26017/19/85-Ad-Ad IX Dated 03.05.1985 and submitted that the pay of Stenographer Gr. I in pay scale of Rs. 550-900 (pre-revised) - 1640-2900 (revised) on promotion as Inspector has to be fixed under FR-22 (a) (ii) now FR-22-I(a)(2) and not under FR-22 (c) (a) (1).

8. Learned counsel for the respondents further submitted that the Joint Commissioner of Income Tax, Muzaffar Nagar vide letter dated 18.09.2001/Annexure-4 of O.A also raised an objection regarding entitlement of applicant of Fundamental Rule 22(1) (a)(1) and fixation of his pay. Learned counsel for the respondent also denied the contention of the applicant that no opportunity was given to the applicant and submitted that the Joint Commissioner of Income Tax (Administration) vide order dated 18.09.2001 asked him to deposit the excess amount paid to him. Learned counsel for the respondents further submitted that the objection raised by the Audit was also conveyed to the applicant , copy of which has already been enclosed by the applicant as Annexure-4 of O.A. Learned counsel for the respondents contended that in such cases where the fixation of pay was done inadvertently and excess salary was drawn, no opportunity is required to be given. The withdrawal of increments was an administrative action to correct the mistake which was crept subsequently, therefore, no opportunity is required to be given to the applicant. However, according to the learned counsel for the

respondents, the applicant was given opportunity vide letter dated 18.09.2001 issued by the Joint Commissioner of Income Tax (Admn.), Muzaffarnagar and dated 24.01.2003 issued by the Assistant Commissioner of Income Tax (Admin.), Muzaffarnagar. It has further been contended by the learned counsel for the respondents that the provisions of FR-17-A are not at all applicable in the present case as it relates to the procedure to be followed while taking penal action on account of unauthorized absence from duty. Learned counsel for the respondents would contend that the respondents are duty bound to rectify the inadvertent mistake which was detected at a later stage. Learned counsel for the respondents also submitted that consequent to order dated 09.05.2005, the order dated 17.05.2005 was passed by the competent authority.

9. Respondents have also filed Supplementary Counter Affidavit to the Supplementary Affidavit. In para 5 of the Suppl. C.A it has been contended that the applicant at the time of passing departmental examination for Income Tax Inspector was Stenographer Selection Grade, whereas Sri Ram Dulare was Senior Tax Assistant. Learned counsel for the respondents further submitted that after receiving order dated 08.09.2003, the applicant has not been denied the benefit of fixation and his pay was fixed under FR 22(I)(a)(1) vide order dated 07.11.2005 giving benefit of fixation of pay from the date of promotion as Income Tax Inspector.

10. Learned counsel for the applicant filed Rejoinder Affidavit and invited our attention to extracts of Sub Rule 9 of FR 27/Annexure -1 of R.A and submitted that payment of advance increment are also

applicable to Stenographer Selection Grade treating them equivalent to Stenographer (Ordinary Grade). It has further been contended by the applicant that benefit of two advance increment was provided to the applicant after he passed the departmental examination and subsequently two increments were allowed after his promotion to the post of Income Tax Inspector. Learned counsel for the applicant further invited our attention to FR-12 and submitted that once fixation has been done as per FR-12, it cannot be withdrawn.

11. Respondents have also filed Supplementary Counter Affidavit in which nothing new has been added except what has been stated in Counter Affidavit.

12. We have heard learned counsel for either sides and perused the pleadings as well as the Written Arguments filed by the applicant.

13. The sole controversy involved in the instant case is that the applicant was allowed two advance increments on passing Department Examination and thereafter two advance increments on promotion to the post of Income Tax Inspector inadvertently, which was noticed at a later stage whether the pay of the applicant can be reduced and the excess amount paid on that account can be recovered from the applicant. In this context, we may refer to FR-12, which is being reproduced hereinunder: -

"(12). Wrong Fixation under F.R.27- Initial pay fixed not be reduced- Once fixation was done by competent authority in exercise of the discretion vested in it under F.R 27 that authority was not competent under the law to reduce initial pay originally fixed even when such

pay was based on some data which subsequently turned to be incorrect."

14. In the instant case, no doubt even if the plea taken by the respondents that the applicant had wrongly been awarded the pay scale to which he was not entitled and when this mistake was detected, the orders were passed for recovery of excess amount and also with regard to cancellation of order granting two advance increments on passing Departmental Examination and thereafter two advance increments on promotion to the post of Income Tax Inspector , It is no where stated by the respondents that the applicant had ever misled or committed fraud with the authorities. On the other hand the record shows that the authorities concerned had allowed advance increments to the applicant of their own accord. Therefore, even if, subsequently it was noticed or discovered that by mistake the applicant had been granted excess monetary benefits, a short question arises as to whether the applicant is liable to refund the excess amount already received by him bona fide?

15. Learned counsel for the applicant further argued that while passing the impugned order, no opportunity of hearing was provided to the applicant and the principle of natural justice was violated by the respondents resulting into civil consequences.

16. On the other hand learned counsel for the respondents submitted that in such cases where the fixation of pay was done inadvertently and excess salary was drawn, no opportunity is required to be given.

17. We are not convinced with this argument of learned counsel for the respondents, in view of the decision rendered by Hon'ble Supreme Court reported in **1986 SCC (L&S) 745 – Smt. Rajinder Kaur Vs. State of Punjab and another and 2000 (2) E.S.C 932(S.C) – V.P. Ahuja Vs. State of Punjab and others.** Hon'ble Supreme Court in the case of Smt. Rajinder Kaur (Supra) has held as under: -

“13. On a conspectus of all these decision mentioned hereinafter, the irresistible conclusion follows that the impugned order of discharge though couched in innocuous terms, is merely a camouflage for an order of dismissal from service on the ground of misconduct. This order has been made without serving the appellant any charge-sheet, without asking for any explanation from her and without giving any opportunity to show cause the purported order of dismissal from service and without giving any opportunity to cross-examine the witness examined, that is, in other words the order has been made in total contravention of the provision of Article 311(2) of the constitution. The Impugned order is, therefore, liable to be quashed and set aside. A writ of certiorari be issued on the respondent to quash and set-aside the impugned order dated September 9, 1980 of her dismissal from service. A writ in the nature of mandamus and appropriate direction be issued to allow the appellant to be reinstated in the post from which she has been discharged. The appeal is thus allowed with cost.....”

18. In the case of V. P. Ahuja (Supra) Hon'ble Supreme Court has further held as under:-

“6. Learned Counsel for the respondents has contended that the appellant, after appointment, was placed on probation and though the period of probation was two years, his services could be terminated at any time during the period of probation without any notice, as set out in the appointment letter. It is

contended that the appellant can not claim any right on the post on which he was appointed and being on probation, his work and conduct was all along under scrutiny and since his work was not satisfactory, his services were terminated in terms of conditions set out in the appointment order. This plea can not be accepted.

7. A probationer, like a temporary servant, is also entitled to certain protection and his services can not be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principle of natural justice.

8. The affidavits filed by the parties before the high court as also in this court indicates the background in which the order, terminating the services of the appellant came to be passed. Such an order which, on the face of it, is stigmatic, could not have been passed without holding a regular enquiry and giving an opportunity of hearing to the appellant."

19. In the instant case admittedly the applicant has not been afforded any opportunity of hearing before passing the impugned orders, which is totally in violation of principles of natural justice and in any view of the matter can not be sustained in the eyes of law. The rule of principle of natural justice mandates that the decision makers should afford to the person concerned a reasonable opportunity of being heard. This view finds support from the decision rendered by the Hon'ble Supreme Court reported in **AIR 1990 SC 1402 (Km. Neelima Misra Vs. Dr. Harinder Kaur and others.** Besides this, in the decision rendered in **Shyam Babu Verma and others Vs. U.O.I & Ors reported in 1994 (2) SCC 621,** Hon'ble Supreme court has held that since the petitioner received the higher pay scale due to none of his fault, it shall not be just and proper to recover the salary already paid to him.

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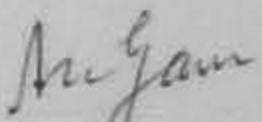
20. In view of the observations made above, the orders impugned in the present O.A are liable to be quashed and set aside not only for want of providing reasonable opportunity of hearing to the applicant but also on the ground that the applicant cannot be held responsible for securing higher scale of pay , therefore, payment of salary already paid to the applicant cannot be recovered , as held in the case of Shyam Babu Verma's case (Supra).

21. Accordingly the Original Application is allowed. The impugned orders dated 22.05.2002, 09.05.2005 and 17.05.2005/Annexure-6, 12 and 13 of O.A respectively are hereby quashed and set aside. The respondents are directed not to deduct any amount from the salary of the applicant except in accordance with law and any amount already recovered from his salary in pursuance of the impugned orders, the entire amount shall be refunded to the applicant within a period of three months from the date of receipt of certified copy of the order. However, if any action is required to be taken in pursuance of the order dated 17.02.204/Annexure-2 of O.A or in pursuance of the impugned orders; the respondents are directed to give reasonable opportunity of being heard to the applicant in accordance with rules and the decisions (referred to above) and then pass appropriate orders in this regard.

22. Parties are directed to bear their own costs.



MEMBER- A.



MEMBER- J.

/Anand/