

**CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH**

Original Application No.70/2012

Dated the 30th day of September, 2021

Reserved on :16.03.2021

Pronounced on :30.09.2021

CORAM:

Hon'ble Sh. Jayesh V. Bhairavia, Member (J)

Hon'ble Dr. A K Dubey, Member(A)

Navin Kumar Sharma,

Aged: 57 years (Date of birth being 13.05.1954)

Son of Shri Prabhu Dayal Sharma

Presently serving as Joint Commissioner, Central Excise, Surat-II,

& Presently residing at 402/B, universal Residency, Pal 10, Surat,

Pin Code – 395 010, Gujarat.

...Applicant

(By Advocate Mr. M. S. Rao)

VS

1. Union of India,
(To be represented through its
Secretary to the Government of India
Department of Revenue, Ministry of Finance,
Government of India, North Block, New Delhi – 110 001)
2. Central Board of Excise & Customs,
(Through its Chairman, CBEC, Department of Revenue,
Ministry of Finance, Government of India,
North Block, New Delhi – 110 001)
3. Central Vigilance Commission
(To be represented through its Director)
Satarkta Bhavan, GPO Complex,
Block-A, I.N.A., New Delhi – 110 023.
4. Union Public Service Commission
(To be represented through its secretary)
Dholpur House, Shahajahan Road,
New Delhi – 110 069.
5. Shri Ahmed Hussain
Commissioner Enquiry

Office of the Commissioner (Inquiry)
Customs & Central Excise,
4th Floor, Utpad Shulk Bhavan, Plot No.C-24, Sector 5
Bandra Kurla Complex, Bandra (East)
Mumbai – 400 051. ...Respondents
(By Advocate Ms. R. R. Patel)

ORDER

Per: Hon'ble Shri Jayesh V. Bhairavia (J)

1. The applicant being aggrieved by the order of minor penalty passed by the disciplinary authority dated 08/11th August, 2011 (Annexure A/5) against him with respect to disciplinary proceedings initiated under charge memorandum dated 18.08.2006 (Annexure A/1), has filed the present OA under section 19 of the Administrative Tribunal Act 1985, seeking following reliefs:-

- (A) *Be pleased to quash and set aside the (i) major penalty charge sheet being Memorandum issued by the respondent no.1 at Annexure A/1 hereto, Inquiry officer's Report submitted by the respondent no. 5 herein at Annexure-A/2 hereto, CVC's second stage advice at Annexure-A/3 hereto, UPSC advice at Annexure-A/4 hereto and also the final order of Penalty issued by the respondent no. 1 herein at Annexure –A/5 hereto, holding and declaring the same to be arbitrary, unreasonable and discriminatory and thus violative of the Articles 14 and 16 of the Constitution of India, apart from being violative of the principles of natural justice.*
- (B) *Issue appropriate directions commanding the respondents herein to forthwith restore the status and also the pay of the applicant herein as it was obtaining before the passing of the impugned order of penalty, with all consequential benefits flowing therefore, including the grant of promotion to the applicant herein right from the date his immediate junior Shri Sukhjinderjit Singh Kahlon was granted on 30.07. 2009 with arrears of salary, seniority, etc.*
- (C) *Grant such other and further relief/s as may be deemed fit and proper in the peculiar facts and circumstances of the present case.*

2. At the outset, it is appropriate to mention that initially the present OA was allowed by this Tribunal vide its order dated 06.05.2016 mainly on the ground of lack of jurisdiction of the disciplinary authority to initiate disciplinary proceedings against the applicant. Aggrieved by the said order, the respondent had filed SCA No. 426/2018 before the Hon'ble High Court of Gujarat. By recording the broad consonance arrived between the Ld. advocates appearing on behalf of the respective parties that the impugned judgments and orders be quashed and set aside and remanded to the Tribunal to decide OAs on its own merits., and the original applicant shall not take the plea that the Disciplinary Authority and / or Authority who pass the order of penalty has no jurisdiction, The Hon'ble High Court vide common order dated 20.02.2018 quashed and set aside the order passed by this Tribunal and remanded the matter with a direction to this Tribunal to decide and disposed of it afresh by restricting the original applicant to raise the issue with respect to the jurisdiction of the authority who initiated the disciplinary proceedings and pass the order of penalty.

Accordingly, after receipt of the writ of aforesaid judgment, the present OA was listed for hearing in the month of August, 2018, thereafter, time to time on the request of the Ld. Counsel for the parties hearing of the case was adjourned. On certain occasion, due to non-availability of the Division Bench of this Tribunal and due to restriction under Covid – 19 pandemic the hearing of the case could not took place. Today, with the consent of counsel for the parties, the OA has been taken up for final hearing.

3. The facts of the case in brief are as under:-

3.1 In the year 2006, while the applicant was serving as Joint Director in the office of the Additional Director General of Inspection, Customs and Central Excise, South Regional Unit, Chennai, was served upon a major penalty charge memorandum no. 49 of 2006 dated 18.08.2006 under the provision of Rule 14 CCS (CCA) Rules, 1965 for following article of charges :-

“That Shri N. K. Sharma (applicant herein), while functioning as Deputy Commissioner (assessment Group-I) Customs House, kandla. During the period of 30/08/2003 to 04/07/2005, and while assessing Seven Bills of Entry filed during March and April, 2004 by M/s Shah Alloys Ltd., Santej, Taluka : Kalol, District : Gandhinagar, in respect

of Furnace oil imported by them purportedly against five licensees under EPCG scheme permitted the benefit of the concessional rate of duty under the Notification No. 55/2003-Cus dated 01.04.2003, knowing it that the said Notification covered only capital goods and spare and not the fuel and that the benefit under the said Notification was not admissible to Furnace Oil. This action of said Shri Sharma (applicant herein) resulted in the loss of Duty of Rs. 2,11,47,945/- to Exchequer, it was further alleged that the applicant also dealt with the said Bills of Entry in Group – I of the Custom House whereas the said B/Es if file with the claim of seeking concessional rate under the aforesaid Notification should have been dealt with in Group-V. The said B/Es should have been referred to Group –V for registration of the Licence and to examine the coverage under the said EPCG Scheme. By assessing the said seven Bills of Entry the applicant has acted beyond his allocated jurisdiction.

For the said act of commission and omission the applicant had exhibited lack of absolute integrity and devotion to duty and acted in manner unbecoming of a government servant and thus contravened the provision of Rule 3 (1) (i), (ii) & (iii) of CCS (Conduct) Rules, 1964”.

Upon receipt of the said charge memorandum, the applicant had denied the said allegations levelled against him vide his written statement of defence dated 08.09.2006. The disciplinary authority (herein after referred to as the DA) decided to conduct departmental inquiry and vide order dated 06.03.2008 appointed an Inquiry Authority as well as a Presenting Officer to conduct departmental inquiry.

- 3.2 The applicant participated in the said inquiry and submitted his defence brief on 25.08.2008. After the departmental inquiry concluded, the Inquiry Officer had submitted his Inquiry Report on 17.09.2008 (Annexure A/3) wherein he recorded his finding that the charges ‘lack of devotion to his duty’ and acting in a manner unbecoming of a government servant levelled against the applicant have been proved. However, since, the department could not adduce any evidence with regard ulterior motive on the part of the CO, the charge of lack of absolute integrity was not proved.
- 3.3 On receipt of the said report of IO, the DA vide its communication dated 08.10.2009 had referred the case to the CVC for its second stage advice. In response to it the CVC after considering the report of the inquiry officer tendered its second stage advice to the effect that the imposition of “minor penalty higher than censure” would be

appropriate to meet the ends of justice vide its office memorandum dated 22.10.2009 (Annexure A/2).

- 3.4** The DA vide memorandum dated 23.11.2009, supplied the copy of the Inquiry Officer's report together with a copy of the CVC's second stage advice and called upon the applicant to submit his reply or representation. In response to it, the CO, i.e., applicant herein submitted his representation dated 31.12.2009 (Annexure A/7) to the DA along with copies of certain documents. In the mean time, he was transferred from Chennai and posted as Joint Commissioner of Central Excise Surat-II, on 17.05.2010.
- 3.5** Thereafter, the applicant herein came to be served with copy of advice of the UPSC dated 20.07.2011 (Annexure A/4) along with an order of penalty being Order no. 34 of 2011 dated 8/11.08.2011 (Annexure A/5) whereby agreeing with the penalty suggested by the UPSC in their advice, the Disciplinary Authority vide order at Annexure A/5 has imposed a penalty of ***“reduction of pay by one stage for a period of two years without cumulative effect and not adversely affecting the applicant's pensions”***.
- 3.6** The applicant, reeling under a wrong notion that an appeal lies to the Hon'ble President of India against the order of penalty passed by the DA, had preferred an appeal vide letter dated 07.09.2011. However, vide communication dated 19.09.2011, he was informed that in terms of the Rule 22(i) of the CCS (CCA) Rules, 1965, (herein after referred as CCS Rules) no appeal shall lie against the order made by the President. Hence, the present OA.
- 4.** Learned counsel for the applicant Mr. M. S. Rao mainly submits as under:-
- 4.1** The learned counsel vehemently submitted that following serious discrepancies have crept in the entire departmental disciplinary proceedings which have caused serious prejudice to the interest of applicant herein.
- 4.2** It is submitted that the impugned charge sheet Annexure A/1 does not disclose any misconduct on the part of the applicant herein. The charges levelled against the applicant therein are merely based on conjectures and surmises. Therefore, the impugned charge sheet and also the consequent order flowing there-from deserves to be quashed

and set aside. It is also contended that there is gross delay in initiation of the major penalty proceedings against the applicant which in turn has resulted in serious prejudice to him. The said charge sheet requires to be quashed on the sole ground of inordinate delay.

- 4.3** It is contended that the Inquiry Officer did not bother to deal with the various documents which the applicant had placed on record of the Enquiry in support of his case. The Inquiry Officer in his impugned report erroneously held that the charge in Article I has been established against the applicant. The Inquiry Officer erroneously arrived at finding that the applicant herein by assessing the seven bills of entry in question in Group I, acted beyond his allocated jurisdiction, and these findings have been recorded without considering all the documents placed on record by the delinquent, i.e. the applicant herein.
- 4.4** The Inquiry Officer had conveniently ignored the fact that the assessment of all the said seven bills of entry were made only provisionally by the applicant. There was a total non application of mind on the part of Inquiry Officer to the fact that the applicant was a quasi judicial authority in the discharge of his functions at the relevant point of time and that he was guided by the pronouncements of various higher judicial fora like CESTAT, High Court and the Hon'ble Supreme Court of India.
- 4.5** The Inquiry Officer failed to distinguish between a DGFT circular and a notification issued by the Ministry of Commerce. Further the Inquiry Officer failed to appreciate that no allegation can be levelled against an Officer when the existence of a provisional assessment is proved. The assessment in question was a provisional one.
- 4.6** The Inquiry Officer failed to appreciate the fact that the importer i.e. M/s. Shah Alloys Ltd is a status holder holding "Export House" status and that being so it was exempted from furnishing bank guarantee. The Inquiry Officer remained silent on the submission of applicant that the current audit and CERA audit had also certified the correctness of the disputed bills of entry.
- 4.7** The Inquiry Officer as well as the Disciplinary Authority overlooked the fact that when DGFT had issued a specific licence for import of furnace oil under Customs Notification No.55/2003-Cus, the applicant

as assessing officer could not have denied the release of goods on provisional assessment for an importer having status of “Star Trading House”. The furnace oil was cleared under notification no.55/2003 after execution of bond by the importer with Group-I in terms of said notification.

- 4.8** The Disciplinary Authority overlooked the fact that the applicant herein had to assess the Bill of Entries (in short BOEs) due to appraising Group-I refusing to take the BOEs on the ground of goods falling under chapter 27 not being dealt with by any other Group. The applicant herein had never exceeded his allocated jurisdiction. The work relating to EPCG was not allotted to any of the seven groups functioning under the Kandla Custom House at the relevant point of time. In this regard he placed reliance on Estt. Order No.6/2003 dated 30.08.2003. However, the item imported, i.e., Furnace Oil, the said fell under Chapter 27 and the Group – I was authorize to assess the commodity that fell under Chapter 27. Therefore, the applicant had discharged his duty with due devotion and as per the work allocation to him.
- 4.9** Once the bond has been executed by the importer, all assessment of import under EPCG are provisional only and not final. Therefore, there is no question of loss of revenue to Government at all. In this regard applicant referred to CBEC circular No.52/95 dated 25.05.1995.
- 4.10** The Disciplinary Authority failed to considered the fact that the Deputy Director General of Foreign Trade (DGFT) had given detailed explanation to the DGCEI that in view of public notice No.42 dated 28.01.2004 which extended the scope of imports to consumables also, the live EPCG licences issued to the importer for import of furnace oil were in order. Therefore, the Inquiry Officer could not have made the applicant alone accountable for the whole episode and held the charges against the applicant proved. In this regard, counsel for the applicant seeks to refer and rely on the order passed in the case of Commissioner of Customs v/s Shah Alloys Ltd reported in 2011(269) E.L.T. 323 (Guj.). The said order was upheld by the Hon’ble Supreme court and the same was reported in 2011 (270) E.L.T. A38 (S.C.).

- 4.11** The Inquiry Officer failed to consider the fact that the importer has executed the bond for EPCG benefit in terms of notification no.55/2003-Cus. with Group I.
- 4.12** It is contended that the very charge that EPCG-Cus being assessed by Group-V as per prevailing practice, is not borne out by any “office order” or instruction. Not only that while auditing the 7 BOEs by the Kandla Custom House, in their process of audit no such “established practice” or “prevailing practice” was found. Further it is submitted that with regard to said charges, the Inquiry Officer in his report has recorded its finding that there is no specific allotment of EPCG work to any group.

However, the Inquiry Officer for the reasons best known to him failed to take into account the allotment of work of Chapter 27 to Group – I and the Bills of Entry with respect to commodity import falling under Chapter 27 were assessed in Group-I.

The Inquiry Officer, in his report noted that the applicant did not follow the “prevalent practice” and based on that observation came to the conclusion that the applicant has erroneously assessed the bill. In this regard it is submitted that the so called “prevalent practice” cannot take the place of administrative order and the same also cannot have the force of law. The SW-2 and SW-3 has never stated before the Inquiry Officer that EPCG bills have been handled by Group “V”. However, it is erroneous to record that witnesses deposed that such prevailing practice was existing. Therefore, the finding of Inquiry Officer has no base and same is erroneously recorded in his report.

Therefore, the entire charge sheet based on the allegation of the applicant exceeding his allocation of work or jurisdiction is only based on oral statements which cannot be relied upon to inflict punishments involving serious consequences and social stigma.

- 4.13** It is submitted that in the disciplinary proceedings initiated for the similar allegations levelled against co-employee, i.e., Shri P Ambazhagan, Assistant Commissioner, the very same disciplinary authority had taken a stand that the proven charge in the case “only involves a procedural lapse and no ulterior motive has been established and therefore the proven lapse did not constitute a grave misconduct to

warrant action under Rule 9 of CCS (Pension) rules, 1972.” Accordingly, the disciplinary authority vide its order dated 06.07.2011 had decided to close the departmental proceedings instituted against the said Shri P Ambazhagan (Annexure A/9). However, in the case of applicant though the alleged charges and material were same as referred and relied in the case of said Shri P Ambazhagan, the DA acted differently and in a discriminative manner. Therefore, the impugned decision of the DA is required to quashed and set aside.

- 4.14** It is submitted that though the IO recorded in his report that with respect to show cause notice issued to the importer including the Assessing Officer, i.e., applicant herein and other Officer, the Commissioner Central Excise, in its original order absolved the CO (as Co-Noticee) of any collusion or offence under Custom Act and no penalty has been imposed upon the applicant. But, without any evidence the IO in his report held that charge of not maintaining devotion to the duty was believed to be proved and the DA without assigning any reason to the objection of the applicant in this regard passed the impugned orders. Therefore, the said impugned orders suffer from legal infirmities and the same are required to be quashed and set aside.

Mr Rao, the Learned counsel for the applicant, further submits that the decision in original adjudication by the Commissioner Central Excise confirming the demand of duty was challenged by the affected parties, i.e., M/s Shah Alloys before the Appellate Authority, and the said appeal was allowed by the Custom, Excise and Service Tax Appellate Tribunal (“the Tribunal”) vide order dated 19.09.2008 and the order of demand of duty was quashed. Aggrieved by the said order of the Tribunal, the Department (Custom and Excise and Service Tax) had filed Tax Appeal No. 271/2009 before the Hon’ble High Court of Gujarat. The said Tax Appeal came to be dismissed vide judgment dated 31.03.2010 by confirming the decision of Appellate Tribunal. It was further held that the licence issued by the DGFT Authorities indicate that the import of fuel was for production of electric power for making stainless steel products and the licence had been issued under the EPCG Scheme and the Notification No. 55/2003, without any

governing of import was also mentioned therein. Thus, nothing can be suppressed from the DGFT Authorities, who after having the benefit of perusing the said certificate had issued the EPCG Licence. Therefore, it is contended by the counsel for the applicant that the said licence issued under the EPCG Scheme was declared valid and as such based on the said certificate the applicant herein assess the commodity falling under Chapter 27 while working in Group – I. The said act of the applicant cannot be construed as any kind of misconduct committed by him. In this regard the counsel for the applicant had placed reliance on various judgments.

- 4.15** Learned counsel Mr. Rao vehemently submits that the disciplinary proceedings vitiated as the DA failed to follow the Statutory Provision of Rule 15 of the CCS (CCA) Rules while imposing penalty upon the applicant solely based on advice of UPSC. It is paramount grievance of the applicant that though the DA considered and relied upon the UPSC advice, it failed to supply the copy of the said advice in advance to the applicant before the penalty was imposed upon him. Therefore the DA has deprived the applicant of the opportunity to submit his representation on the advice of UPSC. The said action of the DA cause serious prejudice to the applicant as the applicant has been deprived to submit the flow in the said advice and the defence of his innocence before the final order passed by the DA. Learned counsel for the applicant submits that except the present disciplinary proceedings the applicant's service record has been impeccable and punctilious ever since his entry in to the government service. The said disciplinary proceedings and the impugned order would cause serious prejudice to the service/ carrier of applicant and also cause social stigma.

In support of aforesaid submissions, learned counsel placed reliance on the judgment passed by Hon'ble Supreme Court in the case of UOI & Others Vs S.K.Kappor reported in 2011 (4) SCC 589 wherein the Apex Court placing reliance on its earlier ruling rendered in the case of S.N.Narula Vs UOI & Others, held that if the UPSC advice is relied upon by the DA then a copy of the same must be supplied in advance to the concerned employee, otherwise, there will be violation of the principles of natural justice. It is submitted that this

Tribunal by relying upon the said judgment quashed and set aside the order of penalty in the case of D.K.Rao Vs UOI & Others. Therefore, the impugned decision dated 08/11.08.2011 passed in violation of Statutory Rules and contrary to the law laid down by the Hon'ble Apex Court in the case of S. K. Kapoor (Supra), the said impugned decision was required to be quashed and set aside.

5. Per Contra, the respondent have filed their counter reply and denied the contention of applicant. The standing counsel Ms. R. R. Patel for the respondent mainly submits as under:-

5.1 It is stated that departmental inquiry was conducted in accordance with provision of Rule 14 of CCA (CCS) Rules. The CO, i.e., applicant herein had participated in the said departmental inquiry. He was offered enough opportunity to submit his defence. After conclusion of the inquiry, the Inquiry Officer by dealing with every contention raised by the CO in its defence brief, had recorded his finding in his report dated 17.09.2008 that the charge, i.e., of lack of devotion to the duty and that the CO acted in a manner unbecoming of government servant as levelled against the applicant were proved. The learned counsel for the respondent placed reliance on the following observation in para 20 of the Inquiry Report that :-

“Further contention of the CO that as the assessment was provisional, the competent authority could have reviewed the same under section 129 of the Customs Act, 1982, is also not valid, since it was the responsibility of the Co to the capacity of quasi-judicial officer and a revenue officer to examining the issue put forth before him by the sub-ordinate in its proper prospective and merits periodically in the context of the said notification, which apparently the CO has failed to take care of. It is also observed in the present case that the importer of had paid duty under protest, since importer had paid duty under protest it is obvious that they must have filed an appeal before the appellate authority. However, the CO has not furnished any information as to whether the importer succeeded in the appeal filed to support the legal stand taken by the CO or otherwise. In the circumstances, it can be presumed that the importer had not succeeded in the appeal filed and thus this fact supports the legal interpretation of the notification no.55/2003 and the stand taken by the department”.

Further the IO has recorded its findings that:-

“Any assessment in deviation of the practice prevailing over the years should have been done under the approval of higher officer

or under a report to the superior giving the circumstances leading for such change in practice”.

Further observed as under:-

“There appears to be nothing on an effort to cover the lapse by referring to the circular to other Ministry instead of interpreting and implementing the contents of notification issued by Ministry of Finance/CBEC in its proper prospective letter and if he had really felt strongly that the notification levelled by the Ministry of Finance was not in conscience with that of other Ministry, he could have put up the matter to spare and have sought necessary direction in this regard, instead of deciding to assess furnace oil at a concession rate of duty by extending the benefit of the notification.

- 5.2** It is submitted that on receipt of report of Inquiry Officer the DA has sought second stage advice from the CVC in turn the CVC, had advised that a minor penalty higher than censure be imposed on the charge officer. Thereafter, the copy of Inquiry Report along with advice of the CVC was supplied to the applicant and opportunity of representation was given to him by the DA.

The applicant had submitted his representation before the DA. On receipt of it, the DA thought it fit to seek advice from the UPSC. After receipt of advice of UPSC dated 20.07.2011 by considering and agreeing with the penalty suggested by the UPSC in the said advice as also the advice of CVC along with findings of the Inquiry Officer, the DA came to the conclusion that charges levelled against the applicant stood proved and decided to impose penalty of reduction of pay by one stage for a period of two years without cumulative effect and not adversely affecting its pension.

- 5.3** The respondent in their reply contended that DA had followed the procedure laid down in Rule 14 of CCS (CCA) Rules. It is further stated in their reply that there was no provision under the rules to provide copy of recommendatory advice of the UPSC. Even otherwise the advice of the Commission is not binding on the Disciplinary Authority. It is submitted that the judgement relied upon by the counsel for the applicant i.e. Union of India Vs S K Kapoor, was a case wherein departmental inquiry was initiated after seeking the opinion of Public Service Commission. Therefore, the opinion of

the Public Service Commission was a material relied upon to initiate inquiry i.e. at the enquiry stage and a copy of the same was ordered to be supplied. Whereas in the present case, the departmental inquiry was not initiated based on the UPSC advice and the advice was sought after receipt of inquiry report is used to ensure that a case is assessed on the basis of judicious and independent consideration of all the relevant facts and circumstances of the case. Therefore, the said judgement as relied upon by the applicant is not applicable in the present case.

- 5.4** Learned counsel for the respondent submits that in the case of UOI and others Vs. T B Patel reported in 2007 (4) SCC 785 the Hon'ble Apex Court has held that it is not necessary for Disciplinary Authority to make available advise tendered by UPSC to the delinquent officer. Further in the case of Shadilal Gupta Vs State of Punjab and Haryana reported in 2008 (9) SCC 31, the Apex Court has held that when the punishment is minor non-supply of copy of report or notice cannot prejudice the delinquent and there is no breach of principle of natural justice. In the facts of the present case the Disciplinary Authority has only imposed minor penalty though the original charge sheet proposed major penalty.
- 5.5** Further, it is submitted by the respondent that the applicant herein re-agitated the defence before this Tribunal about the evidence recorded against the applicant by the inquiry officer and confirmed by the Disciplinary Authority; the said plea is not permissible as the same will amount to re-appreciation of evidence. The assessment of the applicant with respect to seven bills of entry resulted in heavy loss of duty to exchequer. The said bills of entry seeking concessional rate under the notification was required to be dealt with in group-V of the Custom House. However, beyond the allocated jurisdiction the applicant had dealt with the said bill of entries while working in group-I. Therefore, the DA agreed with the findings of the IO that the misconduct exhibited by the applicant for lack of integrity and devotion to duty and he acted in the manner unbecoming of Government servant. It is submitted that SW – 3, i.e., one Shri. P Anbazhagan deposed in the proceeding that at the material time he

was holding the charge of Group-V alongwith other official charges and the bills of entry relating to import under EPCG scheme irrespective of clarification were handled by Group-V and they were maintaining centralised register for monitoring EPCG license for Group-V. The IO had given due weightage in his conclusion that the CO should have sought clarification if he had any doubts rather than given the benefit of the doubt to the firm importing furnace oil. Therefore, the applicant cannot seek the re-appreciation of evidence.

5.6 It is submitted that the notification dated 01/04/2003 relied upon by the applicant relates to capital goods, its components and spare parts. It does not cover furnace oil. It is re-emphasised that irrespective of classification of group-I or group-V bills of entry relating to import under EPCG Scheme were being handled by said Mr. P Anbazhagan and his office was maintaining record of it. The defence put forth by the applicant in shape of evidence of one Shri. V Anna Raman i.e. the representative of the importer to the effect that he approached officer of Group-V for the assessment of the bills but same was not entertained, was not accepted by the IO and the DA. He further, submitted that the penalty was not shocking or disproportionate and this Tribunal may not substitute its own punishment or penalty imposed by the authority.

5.7 Learned Counsel for the respondent placed reliance on judgement passed by Hon'ble Apex Court in the case of B C Chaturvedi Vs UOI reported in 1995 (6) SCC 749 and submitted that judicial review is not an appeal from a decision but a review of the manner in which the decision is made. The court/Tribunal has its power of judicial review but it does not act as appellate authority to re-appreciate the evidence in its arrival at its own dependent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in the manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry particularly where the conclusion or finding reached by the Disciplinary Authority is based on no evidence. In the present case the departmental inquiry was concluded as per the provision of Rule-14 there is no question of any violation of natural justice. Due

opportunity was granted and same was filed by the applicant while participating in the said departmental inquiry as such in the present case.

- 5.8** It is submitted that the IO and the DA had considered the representation of the CO and by speaking order the DA passed impugned order whereby charges levelled against the applicant were believed to be partly proved and only minor penalty has been awarded. It is submitted that since, there is no procedural lapse in conducting the departmental inquiry and concluding the disciplinary proceedings against the applicant no interference is called for and OA of the applicant deserved to be dismissed
- 6.** Heard the counsel for the parties at length and perused the material on record.
- 7.** In the present case departmental proceeding was initiated against the applicant under Rule 14 of CCS (CCA) Rules 1965 for the charges that:

“...by assessing the seven Bills of Entry the applicant while working as assistant commissioner has acted beyond his allocated jurisdiction. For the said act of commission and omission the applicant had exhibited lack of absolute integrity and devotion to duty and acted in manner unbecoming of a government servant and thus contravened the provision of Rule 3 (1) (i), (ii) & (iii) of CCS (Conduct) Rules, 1964”

It is noticed that the CO i.e. applicant herein participated in the departmental enquiry and had availed the opportunity of cross examining the witnesses. He submitted his statement of defense. On conclusion of said inquiry the Inquiry Officer recorded his findings in his report dated 17.09.2008 that there was no ulterior motive in the action of the CO. However, the IO arrived to the conclusion that the charge of *lack of devotion to his duty and act in a manner unbecoming government servant* levelled against the applicant is proved.

- 8** It is noticed that on receipt of said inquiry report, the DA had sought second stage advice from the CVC. In turn vide its letter/office memorandum dated 22.10.2009 the CVC, advised for imposing minor penalty higher than ‘censure’ on the CO. Thereafter a copy of the IO’s report and the copy of 2nd

stage advice of CVC were sent to the CO for his comments and in turn the CO has submitted his representation/defense brief dated 31.12.2009 (Annexure A/7) before the DA wherein he explain his defense in detail to the effect that assessments made by him in the seven bills of entry as a quasi judicial authority, were correct, proper and legal. He had never exceeded his allocated jurisdiction, and therefore, he requested the DA that there was no justification for imposing evens a minor penalty on him under the circumstances as explained by him in written submission dated 31.12.2009.

9. At this stage it is apt to mention that after receipt of the said written submission of the applicant, the Disciplinary Authority had taken a tentative view to impose a suitable penalty upon the CO and had referred the matter to UPSC for their advice.
- 10 The UPSC tendered its advice dated 27.07.2011 wherein, by agreeing with finding of the IO, recommended that end of justice would be met if a penalty of “reduction of pay by one stage for a period of two years without cumulative effect and not adversely affecting his pension” is imposed upon Shri N K Sharma, the CO.

After obtaining the aforesaid advice from the UPSC, the disciplinary authority accepted the same and passed order no. 34/2011 of punishment dated 08/11th August 2011 (Annexure A/5) against the applicant and communicated the same along with the advice of UPSC. The said order No. 34/2011 reads as under:

ORDER NO 34/2011

Whereas, Shri N K Sharma, the then Dy. Commissioner, Kandla was issued a Charge Memo dated 21.08.2006 under Rule 14 of CCS (CCA) Rules, 1965 for initiating major disciplinary proceeding against him.

And Whereas, the allegation against Shri N K Sharma in the said Memo, is that he allowed the benefit of concessional rate of duty (5%) under EPCG Scheme in respect of 7 Bill of Entry filed by M/s Shah Alloys Ltd., Gandhinagar during March and April, 2004 relating to import of furnace oil though the notification no.55/2003-Custom dated 01.04.2003 covered only capital goods and spares. This action of Shri Sharma resulted in the loss of duty of Rs.2,11,47,945/- to the exchequer. It was further alleged that he also dealt with the Bill Entries to Group-V which dealt with import of license to examine the coverage under the same EPCG scheme. Thus, he acted beyond his allocated jurisdiction.

And Whereas, on denial of charges, an inquiry was held. The IO in his Report dated 17.09.2008 arrived at the conclusion that the charge is partly proved. IO has also held that there was no ulterior motive in the action of the CO. CVC in its second stage advice has advised for imposing minor penalty higher than ‘censure’ on the Charged Officer. A copy of the

Io report and second stage advice of CVC was sent to CO for representation, if any. The representation of Shri N K Sharma was further examined.

And Whereas, his submissions were not found acceptable and a tentative view was taken at the level of disciplinary Authority Viz. President to impose a suitable major penalty upon Shri Sharma and to refer the matter to UPSC for their statutory advice.

“And Whereas, UPSC in their advice letter dated 20.07.2011 have observed that “in his defence, the CO submitted that M/s Shah alloys Ltd. Were legally holding requisite and valid licence issued by Joint Director of Foreign Trade for import of furnace oil and he has placed reliance on the letter dated 18.04.2005 from the Ministry of Commerce, Joint Director Foreign Trade, Ahmedabad and contended that consumables and catalysts were for the first time allowed to be imported under EPCG scheme. This has been rebutted by IO in his report on the ground that notification dated 01.04.2003 issued by the Ministry of Finance specifically speaks about Export Promotion Capital Goods (EPCG) at sr. No.5 of the table to the said notification covers “spares for the existing plant and machinery of the licence holder.” UPSC has also observed that IO has concluded that CO should have got clarification if he had any doubt on the issue rather than giving the benefit of doubt to the firm importing furnace oil. Further, it is on record that M/s Shah Alloys Ltd. the company under reference subsequently paid the difference of duty 2.11 crore which clearly establishes that the importer was convinced that they had availed inadmissible concessional rate of duty. Regarding charge that EPCG was allotted to Group V and not to Group I and that the CO should have referred this case to Group V, the IO has held that though Estt. Order 30.8.2003 is silent on the work of the EPCG allotted to any particular Group in practice, Group V was looking after EPCG matters and any deviation of the practice prevailing over the years should have been under the approval of the higher officer.

And Whereas, in view of this detailed analysis, the UPSC have advised that end of justice would be met if a penalty of “reduction of pay by one stage for a period of two years without cumulative effect and not adversely affecting his pension” is imposed upon Shri N K Sharma, the CO.

And Whereas, taking into consideration I.O. report, submissions of CO, and all other relevant factors of the case, the President considers that the advice of UPSC seems to be fair and appropriate and he has decided to accept the same.

Now, therefore, the President after careful examination of all relevant facts of the case and the advice of UPSC, has decided to impose a penalty of “reduction of pay by one stage for a period of two years without cumulative effect and not adversely affecting his pension” upon Shri N K Sharma, the CO.

(By order and in the name of President)

*Sd/-
Under Secretary to GoI*

Encl: UPSC advice dated 20.07.2011.

- 11 It can be seen that, undisputedly the Disciplinary Authority by relying upon the advice of UPSC dated 20.07.2011 as also the penalty suggested therein, came to the conclusion vide its impugned decision dated 08/11.08.2011 that the charges levelled against the applicant stood proved and awarded the penalty upon the applicant. Further, it is noticed that before issuance of the said impugned order, the Disciplinary Authority had not supplied the copy of UPSC advice **in advance** to the applicant. Admittedly, the copy of said advice of UPSC was supplied to the applicant only **alongwith** the impugned order of penalty dated 08.08.2011.
- 12 At this stage, it is appropriate to refer the procedure stipulated in Rule 15 of the CCS(CCA) Rules 1965 (reproduced below) that needs to be followed by the DA on receipt of the IO report as also the advice of UPSC.

‘15. ACTION ON INQUIRY REPORT:

- (1) The disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of Rule 14, as far as may be.
- (2) The disciplinary authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the disciplinary authority or where the disciplinary authority is not the inquiring authority, a copy of the report of the inquiring authority together with its own tentative reasons for disagreement, if any, with the findings of inquiring authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the disciplinary authority within fifteen days, irrespective of whether the report is favourable or not to the Government servant.
- (3) (a) **In every case where it is necessary to consult the commission, the Disciplinary Authority shall forward or cause to be forwarded to the Commission for its advice:**
 - (i) a copy of the report of the Inquiring Authority together with its own tentative reasons for disagreement, if any, with the findings of Inquiring Authority on any article of charge; and
 - (ii) comments of Disciplinary Authority on the representation of the Government servant on the Inquiry report and disagreement note, if any and all the case records of the inquiry proceedings.
- (b) **The Disciplinary Authority shall forward or cause to be forwarded a copy of the advice of the Commission received under clause (a) to the Government servant, who shall be required to submit, if he so desires, his written representation or submission to the Disciplinary Authority within fifteen days, on the advice of the Commission.**
- (4) **The Disciplinary Authority shall consider the representation under sub-rule (2) and/or clause (b) of sub-rule (3), if any, submitted by the Government servant and record its findings**

before proceeding further in the matter as specified in sub-rules (5) and (6).

(5) If the Disciplinary Authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in clauses (i) to (iv) of rule 11 should be imposed on the Government servant, it shall, notwithstanding anything contained in rule 16, make an order imposing such penalty.

(6) If the Disciplinary Authority having regard to its findings on all or any of the articles of charge and on the basis of the evidence adduced during the inquiry is of the opinion that any of the penalties specified in clauses (v) to (ix) of rule 11 should be imposed on the Government servant, it shall make an order imposing such penalty and it shall not be necessary to give the Government servant any opportunity of making representation on the penalty proposed to be imposed.

13 It can be seen that the Sub-Rule 3 (b) of Rule 15 of CCS (CCA) Rules 1965 stipulates the statutory obligation of the DA to forward or cause to be forwarded a copy of the advice of the Commission received under Clause (a) to the Government servant, who shall be required to submit, if he so desires, his written representation or submission to the DA within 15 days on the advice of the Commission. Thereafter, as per Sub Rule 4 the DA shall consider the representation of the Government servant/delinquent and record its findings before proceeding further in the matter as specified in Sub Rules (5) and (6) of the CCS (CCA) Rules.

14. It is also settled principle of law that if the Disciplinary Authority relied upon the advice of UPSC, then a copy of the same must be supplied in advance to the concern CO; otherwise, there will be violation of principle of natural justice. In this context, it would be appropriate for us to place our reliance on the law set by the Hon'ble Supreme Court in the in the matters whether the delinquent official should be supplied with copy of the UPSC advice/report prior to the passing of the penalty order or along with the penalty order. The Hon'ble Apex Court after referring the law laid down in the case S N Narula v/s Union of India reported in (2011) 1 SCC (L&S) in the case of **UoI v/s Shri S K Kapoor** reported in (2011) 1 SCC (L&S) 725 : (2011) 4 SCC 589, 727 held that:

“when the Disciplinary Authority relied upon the advice of the UPSC, then the copy of the same be supplied in advance to the employee concerned, otherwise, there would be violation of principles of natural justice”.

The Hon'ble Apex Court in the said judgment further held that:

“the decision in S L Narula case was prior to the decision in UoI v/s T V Patel case. Since, the decision in S N Narula case was not noticed in T V Patel case, the later decision is a judgment per incuriam”.

14.1 At this stage, it is apt to mention that Hon’ble Apex Court after considering the judgments passed in the case of *S N Narula (supra)*, *T V Patel case (supra)*, *S.K.Kapoor (supra)* including the judgment passed by Apex Court in the case of *ECIL v/s B Karunakar (1993) 4 SCC 727* as also other judgments in the case of *UoI v/s R. P. Singh reported in (2014) 2 SCC (L&S) 494* wherein the Apex Court, held that:-

“the decision in S N Narula case is an authority for the proposition that the advice of UPSC, if sought and accepted the same, regard being had to the principle of natural justice, is to be communicated before imposition of punishment”.

- 15** It is also required to mention that after the decision in **S K Kapoor case** (supra), the Government of India, Ministry of Personnel PG & Pensions, Department of Personnel & Training vide Office Memorandum dated 06.01.2014 directed that a copy of the advice of UPSC, in all cases where the commission is consulted, be provided to the CO before a final decision is taken by the Disciplinary Authority. Thereafter, by way of amendment the GoI in their decision dated 19.11.2014 reiterated the necessity to supply the copy of advice of UPSC to the CO in advance by the DA before it takes a final decision.
- 16** It is settled principle of law that the scope of judicial review in the disciplinary proceeding is very limited and if the decision making process is vitiated by not following the statutory provision in conducting the proceeding against the charged officer, as also in case of violation of principles of natural justice or the conclusion of disciplinary authority based on no evidence, interference of the Courts/Tribunals is called for.
- 17.** In the present case undisputedly, the DA had consulted the UPSC, had received the advice from UPSC and relying upon the said advice, the penalty was imposed upon the applicant by the DA that too without supplying the copy of said **UPSC advice in advance** i.e. before taking final decision against the CO. We are of considered opinion that the DA in the present

case, failed to follow the statutory procedure laid down in Rule 15 (3) (b) before issuance of impugned order of punishment. Thus, the said impugned decision of the DA suffers from infirmities by dint of deviation from the statutory obligation under the CCS (CCA) Rules 1965.

18. The respondents in their counter reply (written statement) attempted to justify their action for not supplying the copy of UPSC advice in advance by contending that the said advice of the Commission is not binding on the Disciplinary Authority and the DA has independently passed the impugned order. The respondents in their additional reply also contended that, the applicant herein in his OA had not stated in which manner he has been prejudiced for non supply of copy of UPSC advice in advance. In our considered view the said averment of the respondents is not tenable for the reason that the same is contrary to the statutory provisions of Rule 15 (3)(b) of CCS(CCA) Rules 1965 and law laid down by the Hon'ble Apex Court as stated herein above.
19. In the present case it is also noticed that admittedly the CO was not given any opportunity to submit his representation on the advice of UPSC before imposition of penalty of reduction of pay by one stage for a period of 2 years. The Disciplinary Proceeding was initiated against the applicant vide memorandum dated 18.08.2006 which was concluded vide impugned decision dated 08/11th August 2011 that too without affording him the due opportunity stipulated in statutory Rules, the carrier progression during such time also affected. The question of prejudice cause to the applicant is writ large.
20. Considering the totality and facts of the case, we are of the consider opinion that impugned penalty order suffers from the legal infirmity on the count i.e.(a) the impugned penalty order dtd.08/11th August 2011 has been passed without supply the copy of UPSC advice **in advance** to the CO. (b) the applicant has been deprived to meeting with UPSC advice (c) The DA failed to follow provision of statutory Rules 15 3(b) of Rules 1965. (d) The Disciplinary Authority also failed to follow the GoI instructions in respect of supply of UPSC advice in advance before taking final decision against the CO. Further, we are also of the opinion that the impugned decision is passed in violation of principle of natural justice in light of dictum laid down by Supreme Court in the matter of S K Kapoor (Supra). The Disciplinary

Authority also failed to follow the GoI instructions in respect of supply of UPSC advice in advance. The Disciplinary Authority is a quasi judicial authority in respect to Departmental Proceedings initiated under Rule-14 of the CCS Rules 1965, the DA cannot give a go-by to the statutory requirement before taking final decision against the CO. Resultantly, we are of considered opinion that in the present case the legal infirmity has crept in from the stage of non-adherence to the statutory provision of rule 15(3)(b) of CCS(CCA) Rules 1965.

- 21** In view of the aforesaid discussions and in light of the law laid down by Hon'ble Apex Court as referred herein above, leaving other grounds open, we quash and set aside the impugned order dated 08/11.08.2011 (Annexure A/5) passed by the Disciplinary Authority. Consequently, the matter is remitted back to the respondents by granting liberty to the DA to continue with the disciplinary proceeding against the applicant from the stage where the legal infirmity has crept in as held herein above and the DA shall pass fresh order after taking into consideration the objections to be filed by the applicant against the report/advice submitted by the UPSC, copy of which has already been made available to the applicant along with the impugned order dated 08.08.2011. The applicant is at liberty to file objections to the report of the UPSC, if he so desires within a period of one month from the date of receipt of this order. In case, such objections are filed by the applicant within the aforesaid period, the Disciplinary Authority shall consider the same and pass reasoned and speaking order within a period of two months thereafter with due intimation to the applicant.
- 22.** The OA is partly allowed to the above extent. MA if any, pending stands disposed of. No costs.

(Dr A K Dubey)
Member (A)

(Jayesh V Bhairavia)
Member(J)

Abp/PA