

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No.180/00658/2020

Thursday, this the 8th day of April 2021

C O R A M :

**HON'BLE Mr.P.MADHAVAN, JUDICIAL MEMBER
HON'BLE Mr.K.V.EAPEN, ADMINISTRATIVE MEMBER**

P.Sivakumar,
S/o.Parameswaran,
Aged 61 years,
Superintendent of Central Taxes
and Central Excise (Rtd.), Ernakulam.
Residing at Anakha, Pulinchuvadu,
Vaikom, Kottayam – 686 141.

...Applicant

(By Advocate Mrs.V.Vijitha)

v e r s u s

1. Union of India represented by Secretary,
Department of Revenue, Ministry of Finance,
New Delhi – 110 001.
2. The Chairman,
Central Board of Indirect Taxes & Customs,
North Block, New Delhi – 110 001.
3. The Chief Commissioner of Central Tax,
Central Excise & Customs,
Thiruvananthapuram Zone,
Central Revenue Building,
I.S.Press Road, Cochin – 682 018.
4. The Commissioner of Central Tax & Central Excise,
Central Revenue Building, I.S.Press Road,
Cochin – 682 018.
5. The Commissioner,
Audit Commissionerate,
Central Revenue Building,
I.S.Press Road, Cochin – 682 018.

...Respondents

(By Advocate Mr.Brijesh.A.S.)

This application having been heard on 30th March 2021, the Tribunal
on 8th April 2021 delivered the following :

ORDER

Per : Mr.K.V.EAPEN, ADMINISTRATIVE MEMBER

The applicant who is a retired Superintendent of Central Taxes and Central Excise has filed the O.A seeking the following reliefs :

1. *Call for records leading upto Annexure A-10 and to declare that the applicant is entitled for the Grade Pay of Rs.5400/- in PB2 on Non-Functional Basis after 4 years of service in the Grade Pay of Rs.4800/- in PB2, either by way of ACP or MACP.*

2. *To direct the respondents to grant the benefits of Grade Pay of Rs.5400/- in PB2 on Non-Functional Basis after 4 years of service in the Grade Pay of Rs.4800/- in PB2 either by way of ACP or MACP at the earliest with all consequential benefits including penal interest at 12% from the due date.*

3. *To issue appropriate directions or order which this Hon'ble Tribunal deems fit, just and proper in the circumstances of the case.*

And

4. *Award cost of these proceedings to the applicant.*

2. In this connection, the applicant has drawn attention to the CCS (Revised Pay) Rules, 2008 in Part-C, Section II under the heading 'Ministry of Finance, Department of Revenue' at Sl.No.9 wherein it is indicated that Superintendents, Appraisers etc. (Customs & Central Excise) (who are in the pre-revised scale of Rs.7500-12000) shall be granted Grade Pay of Rs.5400/- in PB2 (corresponding to pre-revised scale of Rs.8000-13500) after 4 years of service. Further, in Clause (x) (e) of the Resolution in the same Rules it is indicated that "*Group B Officers of the Department of Posts, Revenue etc. will be granted Grade Pay of Rs.5400/- in PB2 on non-functional basis after 4 years of regular service in the Grade Pay of Rs.4800/- in PB-2.*"

3. The applicant joined the Central Excise & Customs Department as Inspector of Central Excise on 01.06.1994. He received his first ACP upgradation on 01.06.2006 on completion of 12 years of service with Grade Pay of Rs.4800/-. He, therefore, claims that he should have been given non-functional upgradation to the Grade Pay of Rs.5400/- in PB2 with effect from 01.07.2010 on completion of 4 years in the Grade Pay of Rs.4800/-. However, he has been given the Grade Pay Rs.5400/- with effect from 01.07.2014 instead of 01.07.2010 on completion of a total service of 20 years, as per the MACP Scheme which had by then replaced the ACP Scheme. In this connection, he has produced a letter of the Central Board of Excise & Customs (CBEC) dated 21.11.2008 (at Annexure A-1) by which a clarification has been issued regarding date of grant of non-functional upgradation of Group B Officers. In Para 3 of this letter it has been indicated as follows :

“3. The Department of Expenditure have now clarified that the 4 year period is to be counted with effect from the date on which an officer is placed in the pay scale of Rs.7500-12000 (pre-revised). Thus, if an officer has completed 4 years on 01.01.2006 or earlier, he will be given the non-functional upgradation with effect from 01.01.2006. If the officer completes 4 years on a date after 01.01.2006 he will be given non-functional upgradation from such date on which he completes 4 years in the pay scale of Rs.7500-12000 (pre-revised).”

4. The applicant's contention is that various judicial pronouncements have upheld the validity and scope of the Annexure A-1 letter supra and thus he is entitled to be given the Grade Pay Rs.5400/- with effect from 01.07.2010 instead of 01.07.2014.

5. There have been court pronouncements and judgments in this matter. Soon after the letter at Annexure A-1 dated 21.11.2008 was issued, the very same organization, namely, Central Board of Excise and Customs issued another clarification dated 11.02.2009 wherein they backtracked on the issue. It was, inter-alia, indicated as follows in the letter :

*“Thus, it is clear that the officers who got the pre-revised pay scale of Rs.7500-12000 (corresponding to Grade Pay of Rs.4800/-) by virtue of financial upgradation under ACP will **not** be entitled to the benefit of further non-functional upgradation to the pre-revised pay scale of Rs.8000-13500 (corresponding to Grade Pay of Rs.5400/-) on completion of 4 years in the pre-revised pay scale of Rs.7500-12000.”*

6. This was reiterated by the Central Board of Excise and Customs by its letter dated 16.09.2009 produced at Annexure R-3 by the respondents. However, there were challenges to the Annexure A-2 letter from various quarters. The applicant submits that the dictum has been laid down by the Hon'ble High Court of Judicature at Madras, in the case of **M.Subramaniam v. Union of India & Ors. in W.P.(C) No.13225/2010** on 06.09.2010 produced at Annexure A-3. The Hon'ble High Court of Madras upheld the Annexure A-1 letter. It was held that if an officer has completed 4 years on 01.01.2006 or earlier he would be given the non-functional upgradation with effect from 01.01.2006 and if the officer completes 4 year on a date after 01.01.2006 he would be given non-functional upgradation from such date on which he completes 4 year in the pay scale of Rs.7500-12000 (pre-revised). The Hon'ble High Court, while discussing the clarification given by the Central Board of Excise & Customs vide Annexure A-2, stated as follows in para 8 of the order :

“8. Thus, if an officer has completed 4 years on 01.01.2006 or earlier, he will be given the non-functional upgradation with effect from 01.01.2006 and if the officer completes 4 year on a date after 01.01.2006, he will be given non-functional upgradation from such date on which he completes 4 years in the pay scale of Rs.7500-12000 (pre-revised), since the petitioner admittedly completed 4 year period in the pay scale of Rs.7500-12000 as on 01.01.2008, he is entitled to Grade Pay of Rs.5400/-.....Therefore, denial of the same benefit to the petitioner based on the clarification issued by the Under Secretary to the Government was contrary to the above said clarification and without amending the rules of the revised pay scale, such decision cannot be taken.”

7. Learned counsel for the applicant also submits that an identical issue was considered by the Hon’ble High Court of Kerala, when a Superintendent of Central Excise, Shri.S.Ashoka Narayanan, challenged Annexure A-2 when he suffered a reduction in salary on the basis of Annexure A-2 letter. In that matter, the Hon’ble High Court stated as follows in para 9 of the order in O.P.(CAT) No.276/2010 delivered on 08.12.2016, produced at Annexure A-4 :

“9. We find that the view expressed by the Madras High Court is similar to the view expressed by us in the preceding paragraphs. There is no case for the respondents that they have challenged Exhibit P6 verdict passed by the High Court of Madras in W.P.(C) No.13225/2010, by way of appropriate proceedings before the Apex Court and hence, it has to be reasonably presumed that the said verdict has become final. We find that the course pursued by the Department in having reduced the Grade Pay of the petitioner (fixed as per Annexure A-7 based on Annexure A-5 as Rs.5400/-) to Rs.4800/- by placing reliance on Annexure A-2; at the same time without making a reference to the earlier clarification issued by the very same Ministry as per Annexure A-6 is not correct or sustainable.”

8. The Hon’ble High Court also indicated in the same order that the scope of the relevant clause was clarified by the Ministry as per Annexure A-6 dated 21.11.2008 (produced as Annexure A-1 in this case). The Hon'ble High Court observed that having issued the said clarification, what made the Ministry to take a ‘U-turn’ or say something contrary to the terms

of Annexure A-6, by way of Annexure A-2 (also produced as Annexure A-2 in this case), remains to be a matter of mystery. The Hon'ble High Court also indicated that no reference was made anywhere in Annexure A-2 to Annexure A-6. Whether existence of Annexure A-6 clarification issued by the very same Ministry was brought to its notice, when Annexure A-2 was issued, is not known. Apparently, the Hon'ble Court observed in paragraph 7 of the order, the letter of 21.11.2008 (Annexure A-6 there/Annexure A-1 here) virtually stands contrary to the letter dated 11.02.2009 (Annexure A-2 in both cases), in so far as, the interpretation or clarification sought to be given as to the scope of the relevant clause in Annexure A-5, is concerned. In so far the clarificatory letter dated 11.02.2009 (Annexure A-2) is not issued in supersession of the letter dated 21.11.2008 (Annexure A-6 there/Annexure A-1 here) and to the extent the letter dated 21.11.2008 survives (having not been recalled or cancelled or modified), the Hon'ble Court was of the view that the adverse result pointed out by the petitioner ought not to have been resulted under any circumstance. The Hon'ble High Court observed as follows :

“7.Non issuance of notice to the petitioner gathers momentum in the said context. Had the petitioner been given a notice at appropriate time, before implementing the reduction and ordering recovery, the correct factual position could have been brought to the notice of the authorities concerned then and there, which unfortunately has not happened in the instant case. Nothing is stated in the reply statement as to how Annexure A-6 clarification issued by the Ministry on 21.11.2008 came to be varied by the said Ministry by issuing Annexure A-2.....”

Considering all these issues the Court set aside the letter dated 11.02.2009 to the extent the petitioner was concerned and held that the petitioner would be governed by the earlier letter dated 21.11.2008.

9. The judgment of the Hon'ble High Court of Madras and that of the Hon'ble High Court of Kerala were taken to Civil Appeal in Hon'ble Supreme Court of India in SLP (Civil) No.17576/2017 and C.A.No.8883/2011 respectively. The Hon'ble Supreme Court vide common order dated 10.10.2017 in the matter did not see any ground to interfere with the impugned orders. The appeal and the SLP filed by the Union of India were dismissed (order produced at Annexure A-5). Thus, the applicant submits the issue has attained finality. He also brought to notice an order passed by this Tribunal in O.A.No.862/2018 dated 26.02.2019 (produced at Annexure A-6) where it has been ordered as follows :

“8. In view of the judgment passed by Principal Bench in O.A.No.1707 of 2016 dated 11th April 2018 allowing the O.A relying upon the judgment rendered by Hon'ble High Court of Madras in M.Subramaniam vs. Union of India and others, we find that present case is identical to the above mentioned case and is also covered by the judgment of the Hon'ble High Court of Kerala in S.Ashoka Narayanan vs. Union of India and others

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9. We are of the considered view that the aforesaid decision is applicable to the present case. Accordingly the O.A is allowed. Respondents are directed to grant Grade Pay of Rs.5400/- to the applicants after 4 years of service in the Grade Pay of Rs.4800/- with all consequential benefits....”

10. The applicant submits that various representations in this regard have been made by him to the respondents and, inspite of the fact that All India Association of Central Excise Gazetted Executive Officers Kerala Unit had approached the Tribunal in O.A.No.862/2018 and had got the above quoted orders, the respondents have chosen a method of providing the non-functional upgradation only to those officers who approach judicial forums and get favourable orders. While in service he had been diligently

making representations for the non-functional upgradation and consequential benefits; however, there was no appropriate action from the respondents and he finally retired from service on 31.03.2019 without the said upgradation.

11. The applicant has produced a copy of the letter received by him in response to a public grievance petition made by him in this regard. The respondents have accepted in the letter that the subject matter for extending the benefit to non petitioners is being taken up and is under examination of Department of Expenditure. (A copy of the same is produced at Annexure A-10 [1] and A-10 [2]). He, therefore, submits that he is substantially prejudiced by the stand taken by the respondents in refusing to grant the benefits due to him in the light of Government of India Orders and Court directions and that the stand taken by the respondents is irresponsible, improper and illegal.

12. Per contra, the respondents have filed a reply statement in which they have largely reproduced the same orders on the basis of which the applicant had made his case. They submit that the CBEC had taken a decision that the officers who got the pre-revised pay scale of Rs.7500-12000 (corresponding to Grade Pay of Rs.4800/-) by virtue of financial upgradation under ACP will not be entitled to the benefit of further non-functional upgradation to the pre-revised pay scale of Rs.8000-13500 (corresponding to the Grade Pay of Rs.5400/-) on completion of 4 years in the pre-revised pay scale of Rs.7500-12000. While the Hon'ble High Court of Madras had allowed the appeal in favour of Shri.M.Subramaniam in W.P.(C) No.13225/2010 and

also the C.A.No.8883/2011 filed by the department against the judgment of the Hon'ble High Court of Madras was dismissed by the Hon'ble Supreme Court vide its order dated 10.10.2017, it was still decided to implement the order dated 06.09.2010 of the Hon'ble High Court of Madras in the case of petitioners therein only. Even though there have been a large number of CAT/Court Cases/Contempt Cases which have been filed by similarly placed officials, the matter of extending the benefit of order dated 06.09.2010 of the Hon'ble High Court of Madras to all similarly placed officers has not been agreed to by the Board in consultation with the Department of Expenditure, Government of India.

13. We have heard Smt.V.Vijitha, learned counsel for the applicant and Shri.Brijesh.A.S., learned counsel for the respondents in the matter and have also gone through the orders/judgments and records provided. It appears quite clearly to us that the directions of the Hon'ble High Court of Madras in M.Subramaniam (supra) and the directions of the Hon'ble High Court of Kerala in O.P(CAT) No.276/2010 further confirmed by the Hon'ble Supreme Court in SLP (Civil) No.17576/2017 and C.A.No.8883/2011 as also the order of this Tribunal in O.A.No.862/2018, all put together, have established that there is hardly any further scope for additional adjudication in this regard. In fact, it is argued by the applicant the action of the respondents in denying the benefits of Annexure A-1 inspite of these judgments, is in violation of the National Litigation Policy, the aim of which itself is to transform Government into an efficient and responsible litigant. The respondents, by refusing to fully acknowledge the impact of the decision in the Annexure A-4 judgment confirmed by the Apex Court by the

Annexure A-5 judgment seem to be paving the way for multiplicity of litigation which by itself is not a desirable state of affairs particularly when the premier departments are involved. The applicant has also brought to notice the dictum laid down by the Hon'ble Supreme Court in (SLP No.77457/2017) in the case of **Government of NCT & Anr. vs. Somvir Rana & Ors.**, wherein it was observed that "*once the question, in principle, has been settled, it is only appropriate on the part of the Government of India to issue a Circular so that it will save the time of the court and the Administrative Departments, apart from avoiding unnecessary and avoidable expenditure*". Further, the judgments of the Hon'ble Apex Court in **Bhoop v. Matadin Bhardwaj, (1991) 2 SCC 128** and **Nirmal Chandra Bhattacharjee v. Union of India, (1991) Supp. (2) SCC 363** have held that the mistake or delay on the part of the department should not be permitted to recoil on the party. In this matter, we would also agree that the issue has attained its finality. The respondents could consider whether they could issue a general circular in this regard instead of just providing the non-functional upgradation only to those officers who approach judicial forums. By now this could be considered a '*judgment in rem*' rather than a '*judgment in persona*'. We urge the department concerned to consider the matter in its entirety and examine whether a clarification can be issued in this regard allowing the benefit of Grade Pay of Rs.5400/- in PB2 on non-functional basis to all those who have completed 4 years in PB2 with Grade Pay of Rs.4800/- irrespective of how they have reached the Grade Pay of Rs.4800/-.

14. We, therefore, hold in this matter that the applicant is entitled to Grade Pay of Rs.5400/- in PB2 on non-functional basis on completion of 4 years of service in the Grade Pay of Rs.4800/- in PB2. This will be with effect from 01.07.2010, the date by which he becomes due after the completion of 4 years in the Grade Pay of Rs.4800/-. In this matter, we further note that he was given the Grade Pay of Rs.5400/- with effect from 01.07.2014 ie., 4 years later than the date he should have normally got the Grade Pay. Thus, he is entitled to the arrears for the 4 year period between 01.07.2010 to 01.07.2014 along with any consequential benefits, if any, of refixing his pay from the earlier date, including for pension. However, in such cases we are also guided by the judgment of the Hon'ble Supreme Court in **Union of India & Anr. v. Tarsem Singh in Civil Appeal No.5151-5152 of 2008** which have restricted the relief relating to arrears to only three years before the date of petition. We adopt the same principle in this case also. The penal interest at 12% which he prays for as relief is, however, not granted.

15. The O.A is allowed to the extent as indicated above. We direct the respondents to complete the payment of arrears and consequential benefits as above within a period of three months from the date of receipt of a copy of this order. No order as to costs.

(Dated this the 8th day of April 2021)

K.V.EAPEN
ADMINISTRATIVE MEMBER

P.MADHAVAN
JUDICIAL MEMBER

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List of Annexures in O.A.No.180/00658/2020

- 1. Annexure A-1** – A copy of the Letter F.No.A26017/98/2008-Ad.II.A dated 21.11.2008.
 - 2. Annexure A-2** – A copy of the Letter F.No.A.26017/98/2008-Ad.II.A dated 11.02.2009.
 - 3. Annexure A-3** – A copy of the Order dated 06.09.2010 in WPC No.13225/2010 of the Hon'ble High Court of Judicature Madras.
 - 4. Annexure A-4** – A copy of the Judgment dated 08.12.2016 in O.P(CAT) No.276/2010 of the Hon'ble High Court of Kerala.
 - 5. Annexure A-5** – A copy of the Common Order dated 10.10.2017 of the Hon'ble Supreme Court in SLP (Civil) No.17576/2017 and C.A.No.8883/2011.
 - 6. Annexure A-6** – A copy of the Order dated 26.02.2019 in O.A.No.862/2018 of the Hon'ble Central Administrative Tribunal, Ernakulam.
 - 7. Annexure A-7** – A copy of the representation dated 28.08.2019 of the applicant.
 - 8. Annexure A-8** – A copy of the Letter dated 27.09.2019 from the office of the 3rd respondent.
 - 9. Annexure A-9** – A copy of the Letter dated 20.11.2019 to the 2nd respondent.
 - 10. Annexure A-10** – A copy of the Letter dated 28.01.2020 of the 1st respondent.
 - 11. Annexure R-1** – A copy of the Department's Letter F.No.A-26017/98/2008-Ad.II A dated 21.11.2008.
 - 12. Annexure R-2** – A copy of the CBEC Letter F.No.A-26017/98/2008-Ad.IIA dated 11.02.2009.
 - 13. Annexure R-3** – A copy of the Board's Letter F.No.A-26017/98/2008-Ad.IIA dated 16th September 2009.
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