No Departmental Inquiry

CAT/J/12

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

AHMEDABAD BENCH

~~NEW DELHI~~

O.A. No. 549 OF 1989

~~TA NO.~~

DATE OF DECISION 4-10-1991

Shri Jayantilal Dhirajlal Shah, Petitioner

Mr.Anil Raval, for Mr.M.R.Anand Advocate for the Petitioner(s)

Versus

Union of India & Anr. Respondent

Mr.M.R.Bhatt for Mr.R.P.Bhatt Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. P.S.Habeeb Mohammed : Administrative Member

The Hon'ble Mr. R.C.Bhatt : Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? No
3. Whether their Lordships wish to see the fair copy of the Judgement? Yes
4. Whether it needs to be circulated to other Benches of the Tribunal? No

MGIPRRND—12 CAT/86—3-12-86—15,000

Shri Jayantilal Dhirajlal Shah,
Income Tax Officer'B' Grade,
B-4, Subhadra Nagar,
Near Milan Park,
Swastik Char Rasta,
Ahmedabad - 380 009. ...Applicant.

(Advocate : Mr.Anil Raval, for
Mr.M.R.Anand)

Versus

1. Union of India,
(Notice to be served
through the Secretary,
Finance Ministry,
Secretariat,
New Delhi.

2. Commissioner of Income Tax,
Rajkot,
Having office at Amruta Estate,
Race Course Road,
Rajkot. ...Respondents.

(Advocate : Mr.M.R.Bhatt for
Mr.R.P.Bhatt)

O.A. No. 549 OF 1989

CORAM : Hon'ble Mr.P.S.Habeeb Mohammed : Administrative Member

Hon'ble Mr.R.C.Bhatt : Judicial Member

O R A L O R D E R

Date : 4th Oct.1991.

Per : Hon'ble Mr.R.C.Bhatt : Judicial Member

Heard Mr.Anil Raval, for Mr.M.R.Anand, learned advocate for the applicant and Mr.M.R.Bhatt for Mr.R.P.Bhatt, learned advocate for the respondents.

2. This application is filed by the retired Income Tax Officer, Grade-B, to obtain the reliefs prayed for in para-7-A, B and C of the application. Reliefs-7-A, and 7-B, are two distinct reliefs in as much as the relief -B is not consequential to relief -A, Therefore, we asked the learned advocate for the applicant to make the position of the applicant clear regarding the reliefs sought in para-7. The learned advocate for the applicant agreed to this

...3..

position that both the reliefs are distinct in nature and hence he has not pressed relief-7-B, before us and has pressed only relief-7-A, before us. He submitted that the applicant would file separate O.A. if he has any cause of action, regarding the relief -7-B.

3. Thus, the only question which requires to be considered by us is the relief-7-A, sought by the applicant by which he wants us to quash and set aside the impugned Memo at Annexure-A-5, dated 22nd Nov.1988, and the communications/orders at annexure-A-7 collectively, dated 14th December,1988, 13th January, 1989, and Annexure-A-8, dated 17th November, 1989, on the ground that the same are illegal, unconstitutional, without jurisdiction, null and void and of no effect whatsoever.

4. The applicant was an employee of respondent no.1, Union of India, that he was last working as Income Tax Officer, Grade-B, that he has retired ataining the age of superannuation on 31st August, 1989. It is alleged by the applicant that in December,1989, all of a sudden by communication with a covering letter dated 5th December, 1988, the applicant was given a memorandum dated 22nd November, 1988, proposing to hold inquiry against him. The single article of charge according to him refers to two cases, according to which the applicant is alleged to have wrongly allowed D.T.A. Agreement, relief under Section-172,(4), read with Section-154 of the Income Tax Act, to non-resident Shipping Company. It is alleged that the assumptions made in this memo is contrary to the quasi judicial conclusion of the applicant. It is also alleged that there was no misconduct or misbehaviour on the part of the applicant. The applicant submitted preliminary reply by his letter dated 12th Dec. 1988, requesting the authority to drop the enquiry against him.

...4...

(9)

5. The applicant, thereafter, received a communication dated 14th December, 1988, whereby an inquiry officer was appointed to conduct an enquiry against him and by a subsequent order dated 13th January, 1989 the presenting officer was appointed in the inquiry to be conducted against the applicant, the true copies of which are collectively produced as Annexure-A/7. The applicant, thereafter, received a letter dated 1st November, 1989, fixing the date of inquiry on 17th November, 1989, whereby he was informed that the inquiry shall be proceeded with and that he should submit the list of documents etc. by 30th November, 1989. The applicant has produced at Annexure A/8, the minutes dated 17.11.1989 before the inquiry officer.

6. It is alleged by the applicant that the impugned memorandum at Annexures A-5, A-7 and A-8, are clearly without jurisdiction, illegal and bad in law and deserve to be quashed and set aside for the simple reason that the charge levelled against the applicant can never constitute misconduct, or misbehaviour.

7. The respondents have filed reply resisting the application on several grounds as mentioned in various paragraphs of the reply.

8. At the time of hearing of the arguments of the learned advocates for the parties, they jointly submitted before us that an identical matter namely OA/550/88, (Shri Ramesh K.Desai, Vs. Union of India & Another), is decided by the Bench of Ahmedabad on 4th April, 1990. The learned advocate for the applicant has produced the copy of the said judgment in O.A./550/88. He submitted that the points involved in that case, were identical to the points which are raised in this case. He submitted that the Ahmedabad Bench, in its judgment dated 4th April, 90,

(19)

in O.A./550/88, has quashed and set aside the orders which were identical to the impugned memos, Annexures A-5,A-7 and A-8 in this case. He submitted that this Tribunal had considered at length the very points which are also involved in the present case and therefore, the matter is covered by an authority and prayed that in view of the findings given in the said O.A. relief 7-A be granted. Learned advocate for the respondents also agreed to the proposition that the points which are raised before us were almost identical in O.A.550/88 and therefore, covered as per the decision in O.A./550/88. He however, drew our attention to the fact that the respondents have preferred Special Leave Petition against the judgment given in O.A./550/88, and the Special Leave is granted in that case and the hearing is expedited being Special Leave Petition No.14797/90. He submitted that no stay is granted in the Special Leave Petition by the Hon'ble Supreme Court of India. He agreed that at present the ratio in the decision in O.A./550/88, holds the field, so far as the present case is considered. Having heard the learned advocates and considering the submissions that the points involved in the application before us were identical which were in O.A./550/88 and in view of the decision given in that case by which the application was allowed and the inquiry was quashed and set aside, we adopt the same reasoning of O.A.550/88 and hence the same decision is followed and the order is made accordingly.

9. In view of the decision in O.A./550/88 and following the same reasoning in this matter, we allow the

application, So far relief 7-A, is concerned, we quash and set aside, Annexures-A-5, A-7, and A-8, being illegal. The applicant has not pressed the other relief. Hence, the application is allowed to the above extent. Having regard to the facts of the case we pass no order as to costs. The application stands disposed of.

(R.C.Bhatt)
Judicial Member

(P.S.Habeeb Mohammed)
Administrative Member

AIT

All communications should be addressed to the Registrar, Supreme Court, by designation. NOT by name
Telegraphic address :- "SUPREMECO"

S.O(J)
P.P.Rao
Urgently
6/93

No.
D.No.213/93/Sec. IX

12

SUPREME COURT INDIA

Dated New Delhi, the 1st September, 1993 19

Central Administrative Tribunal
Ahmedabad Bench
Inward No. 10191
Date 06.09.93

P.10.91

FROM

Assistant Registrar,
Supreme Court of India.

TO

The Registrar,
Central Administrative Tribunal,
Ahmedabad Bench, Ahmedabad.

PETITION FOR SPECIAL LEAVE TO APPEAL(C) NO.5295 OF 1993

WITH

INTERLOCUTORY APPLICATION NO.2
(Application for ex-parte stay)

Union of India & Anr. .. Petitioners

Versus

~~Dhirajlal~~ Jayantilal Dhirajlal Shah .. Respondent

Sir,

In continuation of this Registry's letter of even number dated 5th May, 1993, I am directed to forward herewith for your information and necessary action a certified copy of the Order of this Court dated 27th August, 1993 passed in the matter above-mentioned.

Please acknowledge receipt.

Yours faithfully,

Assistant Registrar

Encl: As above.

OA/549/89

Sup C. 54 461289

IN THE SUPREME COURT OF INDIA

ORIGINAL JURISDICTION
CIVIL APPELLATE JURISDICTION

Certified to be true copy
Assistant Registrar (Judl.)
2-9-1993
Supreme Court of India

Writ Petition No. of 199

PETITION FOR SPECIAL LEAVE TO APPEAL(CIVIL) NO.5295 OF 1993
(Under Article 136 of the Constitution of India, from the Order dated 4th October, 1991 of the Central Administrative Tribunal, Bench at Ahmedabad in O.A. No.549 of 1989)

WITH

INTERLOCUTORY APPLICATION NO.2
(Application for stay by notice of motion)

1. Union of India,
through its Secretary,
Ministry of Finance,
Govt. of India,
New Delhi.

2. Commissioner of Income-tax,
Rajkot. .. Petitioners

Versus

Jayantilal Dhirajlal Shah,
Income-tax Officer 'B' Grade,
B-4, Subhadara Nagar,
Swastic Char Rasta,
Ahmedabad. .. Respondent

27TH AUGUST, 1993

CORAM:
HON'BLE MR. JUSTICE M.M. PUNCHHI
HON'BLE MR. JUSTICE R.M. SAHAI

For the Petitioners: Mr. D.N. Dwivedi, Additional Solicitor General of India (M/s. T.V. Ratnam and P.Parmeswaran, Advocates with him)

For the ~~sole~~ Respondent: Mr. Swaraj Kaushal, Senior Advocate (Mrs. Hemantika Wahi, Advocate with him)

THE PETITION FOR SPECIAL LEAVE TO APPEAL AND THE APPLICATION FOR STAY above-mentioned being called on for hearing before this Court on the 27th day of August, 1993 UPON hearing Counsel for the parties

....2/-

(14)

herein THIS COURT DOTH ORDER that the Petition for Special Leave to Appeal mentioned above be and is hereby dismissed in view of the decision in "Union of India & Anr. -Vs- R.K. Desai" (1993(2) SCC 49) and consequently this Court's Order dated 30th April,1993 made in Interlocutory Application No.2 above-mentioned granting stay be and is hereby vacated;

AND THIS COURT DOTH FURTHER ORDER THAT THIS ORDER be punctually observed and carried into execution by all concerned;

WITNESS the Hon'ble Shri Manepalli Narayanarao Venkatachaliah, Chief Justice of India, at the Supreme Court, New Delhi, this the 27th day of August, 1993.

(B.S. JAIN)
JOINT REGISTRAR

SUPREME COURT

ORIGINAL JURISDICTION

SPECIAL LEAVE PETITION(CIVIL) NO.5295 OF 1993

WITH

INTERLOCUTORY APPLICATION NO.2

Union of India & Anr. .. Petitioners

Versus

Jayantilal Dhirajlal Shah .. Respondent

ORDER DISMISSING THE SPECIAL LEAVE PETITION & VACATING EX-PARTE STAY.

DATED THIS THE 27TH DAY OF AUGUST, 1993.

cs

Engrossed by

Examined by

Compared with

No. of folios

P. Parmeswaran,

SHRI

the Petitioners.

Advocate on Record for

xxx Smt. Hemantika Wahi,

SHRI

the sole Reependent.

Advocate on Record for

SEALED IN MY PRESENCE

27/8/93

All communications should be addressed to the Registrar, Supreme Court, by designation, NOT by name.
Telegraphic address :-
"SUPREMECO"

No.
D.No.213/93/Sec.IX

SUPREME COURT INDIA

Dated New Delhi, the 5th May, 1993 19

Central Administrative Tribunal
Ahmedabad Bench
Inward No. 2112
Date 12.05.93

FROM

Assistant Registrar,
Supreme Court of India.

TO

The Registrar,
Central Administrative Tribunal,
Ahmedabad Bench, Ahmedabad.

PETITION FOR SPECIAL LEAVE TO APPEAL(CIVIL) NO.5295 OF 1993
WITH
INTERLOCUTORY APPLICATION NO.2
(Application for ex-parte stay)

Union of India & Anr. .. Petitioners

Versus

Jayantilal Dhirajlal Shah .. Respondent

Sir,

I am directed to forward herewith for your information and necessary action a certified copy of the Order of this Court dated 30th April, 1993 passed in the matter above-mentioned.

Please acknowledge receipt.

Yours faithfully,

Assistant Registrar

Sup. C. 52

IN THE SUPREME COURT OF INDIA

CRIMINAL/CIVIL APPELLATE JURISDICTION

Mxx xxx 19xx

PETITION FOR SPECIAL LEAVE TO APPEAL(CIVIL) NO.5295 OF 1993
(Under Article 136 of the Constitution of India, from the Order dated 4th October, 1991 of the Central Administrative Tribunal, Bench at Ahmedabad in O.A. No.549 of 1989)

WITH

440745

INTERLOCUTORY APPLICATION NO.2
(Application for stay by notice of motion with a prayer for an ex-parte order)

1. Union of India,
   through its Secretary,
   Ministry of Finance,
   Govt. of India,
   New Delhi.

2. Commissioner of Income-tax,
   Rajkot. .. Petitioners

Versus

Jayantilal Dhirajlal Shah,
Income-tax Officer 'B' Grade,
B-4, Subhadara Nagar,
Swastic Char Rasta,
Ahmedabad. .. Respondent

30th April, 1993

CORAM:
HON'BLE MR. JUSTICE M.M. PUNCHHI
HON'BLE MR. JUSTICE B.P. JEEVAN REDDY

For the Petitioners: M/s. T.V. Ratnam and P. Parmeshwaran, Advocates.

THE PETITION FOR SPECIAL LEAVE TO APPEAL AND THE APPLICATION FOR STAY above-mentioned being called on for hearing before this Court on the 30th day of April, 1993 UPON hearing Counsel for the Petitioners

....2/-

herein THIS COURT while directing issue of notice to the Respondent herein to show cause why Special Leave be not granted to the Petitioners herein to appeal to this Court against the Order of the Central Administrative Tribunal above-mentioned, DOTH ORDER that pending the hearing and final disposal by this Court of the application mentioned above for stay after notice, the operation of the Order dated 4th October, 1991 of the Central Administrative Tribunal, Ahmedabad Bench in O.A. No.549 of 1989 be and is hereby stayed;

AND THIS COURT DOTH FURTHER ORDER THAT THIS ORDER be punctually observed and carried into execution by all concerned;

WITNESS the Hon'ble Shri Manepalli Narayanarao Venkatachaliah, Chief Justice of India, at the Supreme Court, New Delhi, this the 30th day of April, 1993.

(B.S. JAIN)
JOINT REGISTRAR

SUPREME COURT

xCRIMINAL/CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION(CIVIL) NO.5295 OF 1993

WITH

xxNo. xxxxx

INTERLOCUTORY APPLICATION NO.2

(Application for ex-parte stay)

Union of India & Anr. .. Petitioners

xxxxxxx Appellant

Versus

xxPetitioner

Jayantilal Dhirajlal Shah .. Respondent

xVersus

ORDER DIRECTING ISSUE OF SHOW CAUSE NOTICE AND GRANTING AD-INTERIM/EX-PARTE STAY.

DATED THIS THE 30TH DAY OF APRIL, 1993.

xxxxxxxx Respondent

Dated the

[redacted]

Engrossed by SHRI P. Parmeshwaran.

Examined by *Advocate on Record for* the Petitioners.

Compared with SHRI

No. of folios *Advocate on Record for*

SEALED IN MY PRESENCE

5/5/93

Central Administrative Tribunal Ahmedabad Bench.

Application No. GA/549/88 of 199

Transfer Application No. _____ Old Writ Pet.No. _____.

CERTIFICATE

Certified that no further action is required to be taken and the case is fit for consignment to the Record Room (Decided).

Dated: 2/1/92

Countersigned:

Section Officer/Court Officer.

Signature of the
Dealing Assistant.

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AT AHMEDABAD BENCH

INDEX SHEET

CAUSE TITLE OA/549/89. OF 198.

NAMES OF THE PARTIES Shri. J.D. Shah.

VERSUS

U.O.I. & another.

PART A B & C

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2	Documents filed.	25-46
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4	Orders dt. 21/3/90, 26/4/90, 31/8/90, 9/8/91, 11/9/91, 26/9/91.	
5	Judgment dt. 4/10/91.	

SlCA 581/89
13/12/89

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ADDITIONAL BENCH AT AHMEDABAD
O.A. NO: 549 OF 1989

Jayantilal D. Shah ... Applicant

vs.

Union of India & anr. ... Respondents

Copy served to Mr. R.P. Bhatt Advocate ... 13/12/89

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(M. R. Anand)
Applicant's Advocate.

IN THE CENTRAL ADMINISTRATIVE TRUBUNAL

ADDITIONAL BENCH AT AHMEDABAD

O. A. NO: 549 OF 1989

Between

Jayantilal Dhirajlal Shah ... Applicant

And

1. Union of India
2. Commissioner of Income-Tax
   Rajkot. ... Respondents

DETAILS OF THE APPLICATION

1. Particulars of the Applicant :

(i)	Name of the Applicant :	Jayantilal Dhirajlal Shah
(ii)	Name of the Father :	Dhirjlal Shah
(iii)	Designation & office in which employed :	Income Tax Officer 'B' Grade (Retd) Office of the C.I.T., Rajkot
(iv)	Office address :	Office of the C.I.T. Amruta Estate Race Course Road RAJKOT.
(v)	Address for service of all notices :	B-4 Subhadra Nagar Near Milan Park Swastik Char Rasta Ahmedabad - 380 009.

2. Particulars of the Respondents :

(i) Name and/or disgnation of the respondents : 1. Union of India
(Notice to be served through the Secretary
Finance Ministry
Secretariat
New Delhi.

2. Commissioner of Income Tax, Rajkot
having office at
Amruta Estate
Race Course Road
RAJKOT.

(ii) Office address of the respondents : As in item no.(i) above.

(iii) Address for service of notices : As in item no.(i) above.

3. Particulars of the order against which application is made :

The application is against the following orders :

(i) Order No.
(ii) Date
(iii) Passed by

1. No.CIT.R-HQ/Vig./DR/GO/88-89 dated 22nd November, 1988.

2. No.CIT R/HQ/Vig/DR-1/ 88-89 dated 14th December, 1988

No.CIT.R/HQ/Vig/DP-1/88-89 dated 13 January, 1989.

3. No.09/VLS/208 dated 17th Novem er 1989.

(iv) Subject in brief : Challenge to the institution of Departmental Inquiry for exercising quasi judicial powers, without there being any sort of misconduct or misbehaviour.

4. Jurisdiction of the Tribunal :

The applicant xxxxx declares that the subject matter of the orders against which the applicant wants redressal is within the jurisdiction of the Hon'ble Tribunal.

5. Limitation

The applicant further declares that the application is within the limitation prescribed in Section 21 of the Administrative Tribunals Act, 1985.

6. Facts of the case :

Judgement delivered by Hon'ble Shri P.H. Trivedi, VC and Hon'ble Shri A.V. Haridasan on 4.4.90

This petition raises identical issues in the parallel factual premises as are raised in O.A. No. 550 of 1988, which is admitted by this Hon'ble Tribunal and the ad interim reliefx as prayed for has already been granted. That matter is pending for final hearing.

The brief facts of the present case are given below :

6.1. The applicant is a citizen of India. He was an employee of respondent no.1 Union of India. He was last working as Income Tax Officer Grade 'B'. He retired on attaining the age of superannuation on 31st August, 1989. The applicant started service in the year 1955 as Upper Division xx Clerk. He xx was promoted to the next higher post of Income Tax Inspector in the year 1968 and finally he was promoted to the post of I.T.O. Grade 'B' in the year 1978. All through his servicex the applicant maintained clean and meritorious record of service. In fact, his work was appreciated by his superiors and he never received a single adverse C.R.

nor was he ever ~~s~~subjected to any departmental inquiry, till he retired. All his promotions were given as and when due on the basis of his merit and seniority.

6.2. In the year 1978 the applicant was posted at Jamnagar, a port city. This was one of the heavist charges and many a times the applicant had to pass as many as more than five thousand assessment orders in a year. In addition to circle assessment work the applicant also exercised the jurisdiction over Non-resident shipping cases, this being a port city. Prior to January, 1976, the shipping liners visiting a gi en port were paying 100% of the taxes due on the taxable income earned by them. So there were complaints bythe shipping companies that inspite of Double Taxation Agreements (for short 'DT As'), between Indian and the foreign countries wherefrom the ships were hailing, the Income Tax Officers were not allowing reliefs due to such companies under the DTAs. The Central Board of Direct Taxes (for short 'the Board'), therefore, by its Instruction No.915 dated 30th January, 1976, directed all the Commissioners of Income-tax and the Income tax Officers working under them that the relief under DTAs should be allowed in case of all the regular shipping liners belonging to the countries with which India has DTA agreements. This relief was

not to be allowed to occasional shipping or tramp steamers, under Sec. 172(4) of the I.T. Act though it had to be allowed to tramp steamers under Sec. 172(7) of the I.T. Act. Thus, in every case of return by the Non-resident Shipping Company, an I.T.O. was required to exercise his judicial discretion and come to a conclusion as to whether this was a regular shipping liner or an occasional shipping. This had to be done on the basis of the material placed before him and the representation - personal or written - of the assessee. A true copy of the instruction No.915 dated 30.1.1976, is annexed hereto and marked Annexure A-1.

Ann.A-1

6.3. As stated earlier the applicant took over as I.T.O. at Jamnagar only in the year 1978. In the year ~~1981-82~~ 1980-81 he was to be in the charge where he had the jurisdiction over the returns of Non-resident Shipping companies at Jamnagar. When the applicant took over this particular charge he had no information or knowledge about the instructions No.915 at Annexure A-1 for the simple reason that nobody had brought to his notice that such an instruction was issued in January 1976. As far as the memory of the applicant is concerned, he was, therefore, collecting 100% tax dues from all the Non-resident Shipping Companies. Some times in the year 1982, it was brought to the notice of the applicant that other ITOs were giving DTA relief under instruction no.915. The applicant made some enquiries and found that this was the practice followed by all the ITOs all over India and then he also started following this practice of collecting half the tax and giving DTA relief for the other half. This was done in bonafide exercise of quasi judicial power while passing the assessment

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orders in the sincere conviction that the practice of the department in this behalf i.e. implementation of section 172 of the I.T. Act should be uniform.

6.4. The applicant submits that it is obvious that the provisions of Sec. 172 of the I.T. Act are applicable in cases of non-resident shipping business. So the I.T.Os. who happened to be posted at Ports, and particularly those posted to the Wards having this kind of returns would come to know about the procedure under Sec. 72 of the I.T. Act. Thus generally speaking the I.T.Os. are not familiar with this statutory function as a part of their day to day duty. Furthermore, the instruction at Annexure A-1 does not explain in any way the distinction between regular shipping and occ sional shipping or tramp steamers. Not only that, but nothing under the I.T. Act or the Rules made thereunder defines or explains this term. The applicant therefore, had to follow the practice that was followed by his senior colleauges in all the Port towns after the issuance of the Instruction at Annexure A-1, to implement the mandate of Sec. 172 of the I.T. Act, a copy of which is annexed herewith and marked Annexure A-2. Ann.A-2.

6.5. The applicant did the work of assessing the returns of Non-resident Shpping Companies till May, 1983 when he was transferred from Jamnagar to Rajkot. In the year 1986, the I.T.Os. received a

Circular drawing their attention to the "Common Mistakes" found while checking the cases by the Internal Audit Parties". Item No.12 of the communication refers to the fact that 50% tax is wrongly allowed while passing provisional orders under Sec.172(4) of the Act, and that such relief has to be granted while passing the final assessment order under Sec.172(7) only. (Surprisingly, while pointing out the mistakes of the I.T.Os., it may be noted the very correction pointed out to the I.T.Os. itself is not only defective being directly in conflict with the Board's direction ~~by~~ that the benefit has to be given to the regular shipping companies and not to occasional shipping or tramp steamers, but the direction of 1986 makes no such distinction.). A copy of the Circular dated 25.6.1986 listing the common mistakes in income tax assessment, is annexed herewith and marked Annexure A-3.

Ann.A-3

6.6. All these common mistakes are discribed as such for the obvious reason that they are committed by the Officers everywhere. They are rectified in due course either in the appellate proceedings or in the rectification procedure available under the Act itself. These common mistakes are not confined to Sec. 172(4) of the Act, but are taking place under the various statutory provisions by large number of Officers anywhere. The applicant alongwith his colleagues took note of these common mistakes. At the same time, it must be mentioned that neither the original instruction dated 30.1.1976 at Annexure A-1, nor the list of common mistakes suggested by the Department at Annexure A-3 is beyond doubt, as far as interpretation of Sec. 72 of the I.T. Act is concerned. As a matter of

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fact, the shipping companies have raised the plea that they are entitled to the full benefit of DTAs at the time the order under Sec.172 (4) is passed, and the orders to the contrary were challenged by writ petitions in various High Courts. To the information of the applicant, one such petition is pending in the Gujarat High Court also. This is SCA No.1330 of 1986, which is admitted by the Hon'ble High Court, and is pending for final hearing. This petition actually contends that S.172(7) of the Act is otiose , and no more applicable to the Non-resident Shipping Companies hailing from the countries with which India has DTA agreements. The applicant craves the leave of this Hon'ble Ttirunal, to refer to and rely upon the said petition at the time of hearing of this application, as and when necessary.

6.7. Six to seven years after the above mentioned assessments under section 172(4) of the Act were made by the petitioner in the year 1982-83 and after more than 2½ years of issuance of the Circular at Annexure A-3, the applicant received a charge-sheet subjecting him to departmental inquiry for taking a particular view of Section 172(4) in two particular cases and not taking the other views. The things began with a confidential memo dated 21st May, 1986 seeking the applicant's explanation and asking him why departmental inquiry should not be instituted against

him. The applicant replied by his letter dated 20th June, 1986 pointing out that he had done the work as per the uniform practice of the department everywhere and this was bonafide exercise of quasi judicial power as an I.T.O. He also pointed out that the refunds were granted to authorised agents and after proper verifications ~~xx~~ of the documents and evidence on record. The applicant also pointed out that he had completed thousands of assessment every year during these years and to point out this kind of mistakes, this or that one assessment order was hardly just and fair. The applicant also pointed out that at the relevant time he was never informed that this was not correct practice. The applicant also referred to the assurance given by the Chairman of the C.B.D.T. by his D.O. letter No.P.No.C.13011/133/85/AD-XI (A) dated 11th January, 1965 which stated that "action will be taken only if there is concreate evidence to show that over a period of time an officer has been either lacking in integrity or has been extremely inefficient. There need not be any apprehension in the mind of the officers that they will be proceeded against for taking bonafide decisions. After all, if an officer takes 10 decisions, one or two may be wrong. Nobody will be punished for bonafide mistake on the basis of stray instances." The applicant pointed out that this very assurance was now being breached in an arbitrary manner. The applicant crave leave to refer to and rely upon the confidential memo dated 21st May, 1986 asking for his explanation and the applicant's reply dated 20th June, 1986 at the time of hearing as and when necessary. The applicant received a reply dated 24th February, 1987

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whereby the applicant was told that his explanation is not satisfactory and that the quality of the applicant's work is considered as poor. According to the departmental practice, this would amount to a warning that would go into the confidential record of the applicant, but otherwise this was the end of the matter. A true copy of the said letter dated 24th February, 1987 is annexed hereto and marked Annexure A-4 . Ann.A-4

6.8. The applicant was due to retire in August, 1989. In December, 1988 all of a sudden by a communication ~~dated~~ with a covering letter dated 5th December, 1988, the applicant was given a memorandum dated 22nd November, 1988 proposing to hold an inquiry against the applicant. The single article of charge refers to two cases according to which the applicant wrongly allowed DTA relief under section 172(4) read with section 154 of the I.T. Act to Non-resident Shipping companies. This was alleged on the ground that the shipping lines were operating on occasional basis and therefore, this was not entitled to DTA relief. The assumption is contrary to the quasi judicial conclusion of the applicant that they were regular shipping companies and thus were entitled to the DTA relief. A true copy of the memorandum dated 22nd November, 1988 along with the annexures is annexed hereto and marked Annexure A-5. Ann.A-5

6.9. The applicant submitted the preliminary reply by his letter dated 12th December, 1988 requesting that the inquiry instituted against him may be dropped.

The applicant once again pointed that he had bonafide exercised the quasi judicial powers and that he should not be punished for that after so many years, particularly when he has maintained a clean service record for more than 34 years. The applicant submitted that even if this was a mistake, it was a bonafide one and likely one in the very nature of things and one could not be punished for such genuine errors if any. The applicant also pointed out that he was already warned pursuant to the order Annexure A-4 and that he should not be punished twice for the same alleged misconduct. The applicant, thus pointed out that this was also in violation of principle of natural justice and the principle of res-judicata as well as in violation of the public policy and the requirement of fair plan. The applicant also pointed out that Board's instructions were capable of different interpretations and he should not be punished for taking one view against the other as this would amount to punishing him for doing his duty properly and in accordance with his true understanding. The applicant also pointed out that he definitely had the jurisdiction over the Non-resident Shipping Companies. The only question was which sub-section of Section 172 would apply either Sub-section 4 or sub-section 7 and that he concluded that the assessees were entitled to DTA relief under section 172(4) of the I.T. Act. The applicant also pointed out that there was absolutely no loss of revenue in this connection. The applicant also pointed out that once he had come to a conclusion that the assessees were entitled to DTA relief, his earlier order in which he had not given this relief had to be

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rectified, otherwise he would be acting inconsistently. Thus the resort to section 164 was also fully fair in exercise of his quasi judicial power. The applicant also submitted that issuance of refund orders was as per the existing practice and he was never told that it was his duty to give the refund orders by registered AD post only. In any case the said practice could not be followed where the order could be given in person to the authorised agents. Besides this was the practice uniformly followed at the relevant time. The payment was in fact made by crossed account payee cheque in favour of the principal only and not in favour of the agents. The applicant also pointed out that legal undertaking was taken from the agents for all the liabilities that may accrue against the applicant. This was again the practice followed by all the ITOs and was not something specially done by the applicant. The applicant again referred to the above mentioned assurance of the Chairman given by letter 11.1.85 and requested that the inquiry against him may be dropped as it amounted to double punishment and also punishment for bonafide mistake in exercise of the quasi judicial power. A true copy of the reply is annexed hereto and marked Annexure A-6. Ann.A-6

6.10. Inspite of the above mentioned reply at Annexure A-6, the applicant received a communication dated 14th December 1988 (received on 2nd January, 1989) whereby an inquiry officer was appointed to conduct an inquiry against him. By a subsequent order dated

13th January, 1989 the presenting officer was appointed in the inquiry to be conducted against the applicant. True copies of these two orders are annexed hereto and marked Annexure A-7 collectively. The applicant thereafter received a letter dated 1st November, 1989 fixing the date of inquiry on 17th November, 1989. The applicant by his letter dated 8th November, 1989 pointed out that in identical cases, other ITO has approached this Hon'ble Tribunal and that the inquiry was stayed. The applicant also requested and wondered whether the inquiry could go on. The applicant received a reply dated 17th November, 1989 on 22nd November, 1989, whereby he was informed that the inquiry shall proceed with and that he should submit the list of documents etc. which he wants by 30th November, 1989 and that the inquiry would commence after January 1990. A true copy of the reply dated 17th November, 1989 is annexed hereto and marked Annexure A-8. (The applicant has already requested for relev nt documents by his letter dated 27th November, 1989.)

Ann.A-7 Col.

Ann.A-8

6.11. The applicant has sadly come to a point where though he was already warned for the alleged mistake, he is again sought to be subjected to departmental inquiry for the so called misconduct after he is retired and for the events that ~~x~~ ~~x~~ had taken place 6-7 years back. The applicant apprehends that this so called inquiry will continue for years to come and will result in denial of retirement dues to the applicant for the entire duration.

6.12. Aggrieved and dissatisfied by the impugned action

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of instituting the inquiry by memorandum at Annexure A-5 and the subsequent communication at Annexure A-7 collectively and Annexure A-8 confirming the institution of inquiry and having no other ~~x~~ adequate alternate remedy the applicant approaches this Hon'ble Tribunal on the following grounds amongst the other :-

6.13. The applicant submits that the impugned memorandum at Annexure A-5 and the communications at Annexures A-7 and A-8 are clearly without jurisdiction, illegal and bad in law. They are actuated by extraneous considerations and malafides, and deserves to be quashed and set aside for the simple reason that the charge ~~xx~~ levelled against the applicant can never constitute misconduct, ~~xxxxxxxxxxxxxxxxxx~~ or misbehaviour. If it can constitute misconduct, no authority or officer, discharging quasi judicial function can ever be safe, Such an approach, as shown by the Department in this case, is clearly perverse, arbitrary and shows the clear cut design to victimize the applicant.

6.14. The applicant submits that perusal of Instruction No.515 at Annexure A-1 leaves no room for doubt that any I.T.O. in charge of the Non_Resident Shipping Company's returns, if any return is filed by regular shipping line, the benefit of the DTA agreement had to be allowed under Sec. 172(4) of the I.T. Act. The applicant bonafide exercising his quasi

judicial powers, concluded that the ships in question were the regular shipping lines as per his understanding of the term as explained in ~~t~~ his reply to the Memorandum and hereinabove. The applicant could not be punished for exercising his quasi judicial powers in a particular manner. If the applicant had erred, the mistake could be corrrcted in the appellate forum. There is a procedure for rectification, as well, available under Sec. 154 of the I.T. Act, or under Sec.263 of the I.T. Act, by the Commissioner of Income tax. But the exercise of quasi judicial powers in a particular fashion could never be the subject matter of the departmental inquiry by a superior executive or administrative authority. The applicant submits that as stated earlier, thi very issue is pending before the Hon'ble Hich Court of Gujarat, where the Hon'ble High Court has found a prima facie case that the DTA relief has to be given under Sec.172(4) of the I.T. Act only and not under Sec.172(7) of the Act and therefore, admitted the petition (In the petition before the Hon'ble High Court, DTA relief u/s.172 (4) was given as was given by the applicant. But it was subsequently sought to be withdrawn by the order under Sec.154 of I.T. Act which is challenged before the High Court in the said petition which is pending).

6.15. The applicant submits that assuming without admitting that the applicant has committed some error in construing or interpreting the Instruction at Annexure A-1, or the provisions of Sec.172(4) read with Sec.172(7) of the Act, this could only be seen as an error of judgment which

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could take place in exercise of the quasi judicial power by any judicial authority. Such a bonafide error of judgment which has taken place in exercise of the quasi judicial powers could never constitute a misbehaviour or misconduct. Every day it happens that the High Court orders are reversed by the Hon'ble Supreme Court and the Hon'ble Supreme Court itself reverses its own earlier pronouncements. The meaning of the departmental inquiry in the present case could only be this that an I.T.O. exercising his quasi judicial power is inviting trouble, if he passes an order in favour of the assessee, even if it is in accordance with the law. The course of action adopted by the Department is clearly violative of the mandate of Sec.119 of the I.T. Act.

6.16. The applicant submits that the course of action adopted by him was followed by all the officers known to the applicant who were in charge of such cases in Port cities. Some might have taken a different view also. This ~~also~~ would also show that there was a legitimate room for difference of opinion. This is also clear from the Department's own circular dated 25.6.1986, at Annexure A-3, pointing out common mistakes. All these officers all over India have not been subjected to the treatment meted out to the applicant. The applicant has been ~~+~~ singled out for this discriminatory treatment in violation of his

fundamental rights under Arts. 14 and 16 of the Constitution of India. This submission is borne out from the fact that the confidential Circular at Annexure A-3 refers to the exercise of power under Sec. 172(4) in a particular manner as a 'common mistake'. Certainly this could not be the mistake of the applicant only, and certainly the mistake is not a misconduct.

6.17. The applicant submits that at the worst, this could be said to be a legitimate mistake is clear from the fact that the language of S.172(4) read with Sec.172(7) gives one version. The second version is given by the instruction No.915 at Annexure A-1, and the third version of the course to be adopted is given by the Circular at Annexure A-3. In fact the communication at Annexure A-3 is issued by the Commissioner of Income tax and shows the clear misunderstanding of the Bo rd's instructions. According to the Commissioner's instruction, in case of the Non-resident Ship owners, DTA relief could not be given under Sec.172(4) of the I.T. Act notwithstanding the fact that they were regular shipping lines or tramp steamers, whereas under the Board's instructions DTA relief can certainly be given to regular shipping lines under Sec. 172(4) of the Act, Furthermore, none of these two versions is expressly embodied in the language of Sec.172. Under these circumstances to say that an I.T.O. who was merely following the practice generally followed by the other I.T.O.s everywhere in India, is guilty of some kind of misconduct and that too after 6 - 7 years, is clearly illegal, improper and bad in law. (The applicant is only

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referring to the three versions available with the Department, and is not referring to the version available to the shipping lines, imputed in the petition pending before the Hon'ble High Court of Gujarat, to the effect that Sec.172(7) is otiose and that full and final relief has to be given under Sec.172(4)).
(It could very well be visualised that if the Hon'ble High Court of Gujarat takes the view as contended by the petitioner therein, then, will the Department say that the I.T.Os. who took the view contrary to the applicant's view are guilty of misconduct ? This absurdity is the only conclusion of the department's approach in issuing the charge-sheet to the applicant).

6.18. The applicant submits that the Charge-sheet is given to him in the year 1988 simply because in the year 1986 it was realised by the Department that the procedure followed by the I.T.Os. was not correct. But between 1981 and 1986, nobody raised a single question. To say after more than 6 - 7 ye rs that a particular course of action adopted by an Income Tax Officer in exercise of his quasi judicial power, to the full knowledge of his superiors has suddenly become a misconduct, is clearly arbitrary and violative of Articles 14 and 16 of the Constitution of India. This would show that prior to 1985-86 nobody thought that this was an incorrect course of action, and suddenly, because the Department has changed its policy as to exercise of power under

Section 172 (4), the exercise of powers 6-7 years back has become a misconduct. This is absolutely inconceivable and fantastic, particularly because there is no charge against the applicant of any corrupt practice or any collussion with the assessee, or anything which could be seen as improper or illegak, either in law or in equity.

6.19. The applicant submit that the impugned orders are vitiated by malafides because by order at Annexure A-4 the applicant was already given warning for the same alleged misconduct and now he cannot be punished again and thus subjected to double jeopardy in violation of his constitutional rights. The impugned action also shows utter non-application of mind to these very relevant considerations. The non-application of mind is further clear from the fact that Annexure I to the Memorandum at Annexure A-5 also accused the applicant of having wrongly exercised power under section 154 of the I.T. Act. Section 154 provides for rectification of the erroneous orders. Once the applicant had come to a conclusion that his earlier order passed under section 172(4) was erroneous, how could he, while exercising quasi judicial powers refuse to rectify the same. Thus the applicant is sought to be penalised for acting honestly and sincerely. If the applicant had not rectified his earlier erroneous order under section 154 he would have been accused of acting arbitrarily and illegally. Thus the petitioner was trapped either way. All these because years after the orders were passed by him some audit party listed common mistakes committed by the officers

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all over India.

6.20. The applicant also submit that it is one of the components of the principles of natural justice that the inquiry should be held within a reasonable time. The Hon'ble Supreme Court of India, and the Hon'ble High Court of Gujarat and various other High Courts have held that belated and stale inquiry violates the principles of natural justice. In the present case, the inquiry is sought to be held for the assessments made in the year 1981, after more than 6-7 years, without telling the applicant in the intervening period of 6 - 7 years that his explanation was not accepted. The whole conduct of the department smacks of malafides. It may also be noted that the applicant is ~~xxxfxrxxprxxxxxxxxxxxxxxxx~~ retired from service. In addition to the legal contentions raised hereinabove, the applicant submits that it is difficult for an employee to remember all the facts after a long time. It also makes impossible for an officer to make an effective defence, and such an inquiry is therefore, in violation of the principles of natural justice and fair play.

6.21. The malafides of the Respondent-authorities are further clear from the fact that the refund orders where given to the authorisied agents in the year 1982-83. The official circular to the effect that the refund orders should not be given personally and must be sent by registered post was given to

the applicant in the year 1983. Therefore, it is too much to believe that the applicant is accused of violating in 1982 the instruction which was issued in 1983. This shows the grossest non_application of mind and recklessness in trapping the applicant by any means. The recklessness is also clear from the fact that the applicant is accused of lack of integrity and loss to the revenue, whereas there is no loss of a single pie to the revenue in any manner whatsoever. (The board's Instruction No.1530 dated 16.10.83 itself refers to some 1979 circular which according to the instruction was not followed by the I.T.Os. and which was not given by the applicant in any case). The refunds in question had to be given either under Se. 172(4) or under Sec.172(7) of the Act. As stated earlier, if the Department is of the different opinion, the rectification procedure under Sec.154 or under Sec.263 of the Act could always be taken. Even after these rectification procedures or appellate procedures, the refund will have to be given, and it is not as if the applicant has done something xx unauthorisedly or improperly. Thus all these facts can show the malafides. This submission is further reinforced from the fact that the successors of the applicant and a number of other I.T.O.s had also exercised the powers in identical manner as was done by the applicant, but they were subsequently warned whereas now the applicant is subjected to full-fledged departmental inquiry and threatened with a major penalty. This not only shows the discriminative treatment given to the applicant, but the extraneous and ulterior considerations actuating the impugned action against the applicant.

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7. Reliefs Sought :

In view of the facts mentioned in para 6 above, the applicant prays that the Hon'ble Tribunal be pleased to grant the following reliefs :

(A) To quash and set aside the impugned Memo at Annexure A-5, and the communications/ orders at Annexures A-7 collectively and A-8 as illegal, unconstitutional, without jurisdiction, null void and of no effect whatsoever.

14-12-88

(B) To pay the applicant the amount due to him on account of leave encashment, gratuity, pension etc. with 18 per cent interest on the outstanding amount from the date it is due i.e. from 1st Sepetember, 1989.

(C) To grant any other appropriate relief/remedy deem just and proper by the Hon'ble Tribunal in the facts and circumstances of the case, including the costs of this application.

8. Interim order, if prayed for :

Pending admission, final hearing and disposal of this application, the Hon'ble Tribunal may be pleased to grant interim relief by staying the operation of the impugned Memorandum/Orders at Annexures A-5, A-7 col. and A-8 and directing the

respondent authorities to consider for payment of the amount due to him on account of leave encashment, gratuity, pension etc.

9. Details of the remedies exhausted :

The applicant declares that he has availed of all the remedies available to him under the relevant service rules by making representations as spelled out in para 6 of the application.

10. Matter not pending with any other Court, etc.

The applicant further declares that the matter regarding which this application has been made is not pending before any court of law or any other authority or any other Bench of the Tribunal.

11. Particulars of Bank Draft/Postal Order in respect of the Application fee.

1. No. of Indian Postal Orders : DD 194288
2. Name of the Issuing Post Office : High court P.O
3. Date of issue of Postal Orders : 13-12-1989
4. Post Office at which payable : High court P.O.

12. Details of Index

An Index in duplicate containing the details of the documents to be relied upon is enclosed.

13. List of Enclosures :

1. Annexures A-1 to A-8 as mentioned in the Indix.
2. Vakalatnama
3. Postal Orders in respect of application fee.

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In Verification

I, Jayantilal D. Shah, son of Dhirajlal Shah aged adult, ~~xxxx~~ Income Tax Officer (Retd.) resident of Ahmedabad, do hereby verify that the contents from paras 1 to 13 are true to my personal knowledge and belief, and I have not suppressed any material facts.

Place : Ahmedabad

Date : 13-12-89

Filed by Mr... M.R Anand
Learned Advocate for Petitioners
with second set & ... 2 ... spares
copies copy served/not served to
other side

Dt 13/12/89 By Registrar C.A.T.(J)
A'bad Bench

(Signature of the Applicant)

M R Anand

M.R. Anand
Applicant's Advocate.

TO:

The Registrar
C.A.T.
Ahmedabad Bench.

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Annexure A-1

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INSTRUCTION NO. 915

F. NO. 480/2/75-FTD

GOVERNMENT OF INDIA
CENTRAL BOARD OF DIRECT TAXES
NEW DELHI, dated the 30th January, 1976.

To,

All Commissioners of Income-tax

Sub :- Shipping business of non-residents -
Section 172 of the Income-tax Act, 1961 -
Relief under DTA Agreements -

--x--

Sir,

It has been represented to the Board that after the amendments made by the Finance Act, 1975, to the provisions relating to computation of profits in the case of non-resident shipping companies, Income-tax Officers are not allowing relief due to such companies under the relevant D.T.A. Agreements existing between India and other countries.

2. Our D.T.A. Agreements with Federal Republic of Germany, Finland, France, Greece and Japan provide that the tax to be charged in India on the profits derived by operating ships in international traffic (as distinct from coastal traffic) by an enterprise or a resident of these countries shall be reduced, on the basis of reciprocity, by an amount equal to 50% (55% in the case of Japan) of the tax so charged. However there is a specific provisions in these Agreements that this reduction of the specified percentage of tax shall not affect the provisions of section 172(1) to section 172(6) of the Income-tax Act, 1961, (or the corresponding sections 44A to 44B of the Income-tax Act, 1922) in relation to the ad-hoc assessment of profits from occasional shipping or tramp steamers but will be allowed when an adjustment is to be made under section 172(7) of the Income-tax Act, 1961 (or section 44C of the 1922 Act). In our D.T.A. Agreements with Denmark, Norway, Romania and Sweden, there is no such restriction even in the case of occasional shipping or tramp steamers.

3. Thus, it will be observed that in the case of the regular shipping lines belonging to the countries with which we have D.T.A. Agreements covering shipping profits, the reduction in tax by the specified percentage would be available even at the stage of ad-hoc assessment under section 172(4) of the Act before the departure of ships belonging to these countries from the Indiam ports because the restriction in the D.T.A. Agreements relates only to occasional shipping or tramp steamers.

4. The above clarification may please be brought immediately to the notice of the Income-tax Officers in your charge.

Yours faithfully,
Sd/-
(A.C. MATHUR)
Secretary
Central Board of Direct Taxes.

// c o p y //

True copy
A.K. Mathur
Adv

(*b*) "partial partition" means a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family, or both.

H.—Profits of non-residents from occasional shipping business

Shipping business of non-residents.

172. (1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India [21][* * *].

(2) Where such a ship carries passengers, livestock, mail or goods shipped at a port in India, [22][seven and a half] per cent of the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India, shall be deemed to be income accruing in India to the owner or charterer on account of such carriage.

(3) Before the departure from any port in India of any such ship, the master of the ship shall prepare and furnish to the Income-tax Officer a return of the full amount paid or payable to the owner or charterer or any person on his behalf, on account of the carriage of all passengers, livestock, mail or goods shipped at that port since the last arrival of the ship thereat :

Provided that where the Income-tax Officer is satisfied that it is not possible for the master of the ship to furnish the return required by this sub-section before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Income-tax Officer may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with this sub-section.

(4) On receipt of the return, the Income-tax Officer shall assess the income referred to in sub-section (2) and determine the sum payable as tax thereon at the rate or rates [23][in force] applicable to the total income of a company which has not made the arrangements referred to in section 194 and such sum shall be payable by the master of the ship.

(5) For the purpose of determining the tax payable under sub-section (4), the Income-tax Officer may call for such accounts or documents as he may require.

(6) A port clearance shall not be granted to the ship until the Collector of Customs, or other officer duly authorised to grant the same, is satisfied that the tax assessable under this section has been duly paid or that satisfactory arrangements have been made for the payment thereof.

(7) Nothing in this section shall be deemed to prevent the owner or charterer of a ship from claiming before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port

21. "... Income-tax Officer is satisfied that there is reason to believe that the non-resident has ... whom the tax will be recoverable under the other provisions of this Act" omitted by the Finance Act, 1975, w.e.f. 1-6-1975.

22. Substituted for "one-sixth", *ibid.*

23. Substituted for "for the time being" by the Finance (No. 2) Act, 1967, w.e.f. 1-4-1967.

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falls, that an assessment be made of his total income of the previous year and the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any payment made under this section in respect of the passengers, livestock, mail or goods shipped at Indian ports during that previous year shall be treated as a payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the case may be.

I. – Recovery of tax in respect of non-residents

Recovery of tax in respect of non-resident from his assets.

173. Without prejudice to the provisions of sub-section (1) of section 161 or of section 167, where the person eatitled to the income referred to in clause (*i*) of sub-section (1) of section 9 is a non-resident, the tax chargeable thereon, whether in his name or in the name of his agent who is liable as a representative assessee, may be recovered by deduction under any of the provisions of Chapter XVII-B and any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident which are, or may at any time come, within India.

J.—Persons leaving India

Assessment of persons leaving India.

174. (1) Notwithstanding anything contained in section 4, when it appears to the Income-tax Officer that any individual may leave India during the current assessment year or shortly after its expiry and that he has no present intention of returning to India, the total income of such individual for the period from the expiry of the previous year for that assessment year up to the probable date of his departure from India shall be chargeable to tax in that assessment year.

(2) The total income of each completed previous year or part of any previous year included in such period shall be chargeable to tax at the rate or rates in force in that assessment year, and separate assessments shall be made in respect of each such completed previous year or part of any previous year.

(3) The Income-tax Officer may estimate the income of such individual for such period or any part thereof, where it cannot be readily determined in the manner provided in this Act.

(4) For the purpose of making an assessment under sub-section (1), the Income-tax Officer may serve a notice upon such individual requiring him to furnish, within such time, not being less than seven days, as may be specified in the notice, a return in the same form and verified in the same manner as a return under sub-section (2) of section 139, setting forth his total income for each completed previous year comprised in the period referred to in sub-section (1) and his estimated total income for any part of the previous year comprised in that period ; and the provisons of this Act shall, so far as may be, and subject to the provisions of this section, apply as if the notice were a notice issued under sub-section (2) of section 139.

(5) The tax chargeable under this section shall be in addition to the tax, if any, chargeable under any other provision of this Act.

(6) Where the provisions of sub-section (1) are applicable, any notice issued by the Income-tax Officer under sub-section (2) of section 139 or sub-section (1) of section 148 in respect of any tax chargeable under any other provision of this

True copy

Annexure A-3

27

GOVERNMENT OF INDIA
OFFICE OF THE CHIEF COMMISSIONER OF INCOME TAX(Adm.)&
COMMISSIONER OF INCOMETAX GUJARAT-1
AAYAKAR BHAVAN, NAVRANGPURA, AHMEDABAD.9

.A.I-63/86-87 Dated 25th June 1986
4th Asadha 1908.

hief Commissioner (Adm) &
ommissioner of Income-tax
ujarat-I, Ahmedabad.

he Commissioner of Income-tax,
ujarat II, III, IV, Recovery, Central,
hmedabad., CIT, Baroda/Surat/Rajkot.

Sirs,

Sub:- Common mistakes in Incometax assessments detected by the Internal Audit Parties.

The I.A.C.(Audit) Ahmedabad, has tabulated some very common mistakes having a large tax effect detected by the parties working under him. I enclose a list for your ready reference. It will be desirable to brief the ITOs and the IACs working under you to be specially alert in avoiding such mistakes. It may also be necessary to include such mistakes while appraising the performance of any officer.

2. In appropriate case, it may be examined whether remedial action can be suggested by the ITO or the IAC without waiting for Internal Audit or Revenue Audit to examine the case.

Yours faithfully,
sd/-
(G.R.PATWARDHAN)
Chief Commissioner (Adm) &
Commissioner of Incometax, Gujarat.I

No.BRD/JUD/IAP/MISC/86 Office of the C.I.T. Baroda.
Dt. 11th July, 1986.

Copy forwarded to :-

(1) All IACs of Baroda Charge,

(2) All ITOs of Baroda Charge - The enclosed common mistakes found while checking the cases by the IAP may be noted carefully. They should be alert to avoid such mistakes.

(S.M.H.KANUGA) ITO(JUD),
for Commissioner of Income-tax,
Baroda.

True copy
M R Mahadevan
Adv

COMMON MISTAKES FOUND WHILE CHECKING THE CASES BY THE INTERNAL AUDIT PARTIES.

		Section to which mistake pertains
1.	Depreciation and Investment Allowance allowed without obtaining the prescribed particulars stipulated by Rule 5AA of the IT Rules	32
2.	Incorrect allowance of bonus exceeding 20% of the salaries.	36(2)
3.	Non-charging of interest on the debit balance of partners.	37
4.	Allowance of full depreciation on motor car (personal use) when the current expenses are disallowed in part.	37
5.	The provisions of Sales-tax/Central Sales-tax, Excise Duty etc. are not disallowed by the ITO as per the provisions of Sec.43B of the Act which has come into force w.e.f. 1-4-84	43-B
6.	Business loss were carried forward and set off against current year's salary income or capital gain or income from other sources, was given.	72
7.	The deduction under Chapter VIA for exceeded the gross total income	80A(2)
8.	Dividend income was included by the ITO in a particular asst.year and credit for TDS and deduction u/s 80H allowed by him. The assessee declared the same dividend income in another asstt.year. The appellate authorities confirmed the action of the ITO. Accordingly, the dividend income was reduced from the total income of the asstt.year in which it was offered by the assessee. But the ITO failed to withdraw the credit for the TDS and deduction u/s 80M	80M
9.	Non-charging of interest u/s 139(8), 215/217 of the Act.	139(8), 215/217
10.	The ITO has not passed order u/s 157 stating in detail, the asstt.years to which the loss pertains and intimating the lossess to the assessee.	157
11.	Order u/s 155 seldom found to be passed.	155
12.	In the case of non-resident ship owners, DIT relief at the rate of 50% wrongly given at the time of passing provisional order u/s 172(4) of the Act. Such relief is to be granted at the time of passing final order u/s 172(7) of the Act	172(4)
13.	Separate orders levying interest u/s 216 were not passed.	216
14.	Interest u/s 220(2) was not levied even though Tribunal confirmed the additions made by the ITO	220(2)

....2

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15. The Appellate Orders were not given effect to promptly resulting in unnecessary grant of interest u/s 244. In one case effect was not given to order u/s 263 passed by the C.I.T. 244

16. Interest u/s 244(1A) was allowed on advance tax payments. 144(

17. The figures of contract receipts declared as per the books of accounts/P&L account do not tally with the figures shown in TDS vouchers of Contractors. No reconciliation statement is found or given by the assessee. --

18. Totalling errors were still being committed. --

19. The disallowance discussed in the body of the assessment order failed to find a place in the final computation of total income --

20. Tax calculation errors were not detected by the Supervisory staff. ---

True copy
for K Ahmad
Ad

A-4

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CONFIDENTIAL.
No.CIT-R/Jud/DTA/172(4)/8/86-87
(Vig.)

Office of the
Commissioner of Income-tax,
"Amruta Estate", 5th Floor,
M.G. Road, Rajkot-360 001.

Dated the 24th February,1987.

Shri J.D. Shah,
Income-tax Officer,
Circle-II, Ward-I,
RAJKOT.

Sub:- Irregularity in allowing the DTA relief in the cases of Occasional Shipping business of non-residents.

:-x-:

Please refer to your explanation submitted vide your No.II/C/Misc./85-86 dated 20-6-1986.

2. The explanation offered is not considered as satisfactory and the quality of your work is considered poor.

(J.P. SHARMA)
COMMISSIONER OF INCOME-TAX,
RAJKOT.

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No.CIT.R/Hq(Vig)/DP-I/88-89.

OFFICE OF THE
Commissioner of Income-tax,
Amruta Estate, 5th Floor,
Rajkot, dated 22nd Nov., 1988.

-: MEMORANDUM :-

The undersigned proposes to hold an inquiry against Shri J.D.Shah, Income-tax Officer, Group 'B', under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. The substance of imputations of misconduct or misbehaviour in respect of which the inquiry is proposed to be held is set out in the enclosed statement of articles of charge (Annexure-I). A statement of the imputations of misconduct or misbehaviour in support of each article of charge is enclosed (Annexure-II). A list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained are also enclosed. (Annexures III and IV).

2. Shri J.D.Shah, Income-tax Officer, Group 'B', is directed to submit within 10 days of the receipt of this Memorandum a written statement of his defence and also to state whether he desires to be heard in person.

3. He is informed that an inquiry will be held in respect of those articles of charge as are not admitted. He should, therefore, specifically admit or deny each article of charge.

4. Shri J.D.Shah, Income-tax Officer, Group 'B', is further informed that if he does not submit his written statement of defence on or before the date specified in para 2 above, or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of Rule 14 of the C.C.S.(C.C.A.)Rules, 1965 or the orders/ directions issued in pursuance of the said rule, the inquiring authority may hold the inquiry against him ex parte.

5. Attention of Shri J.D.Shah, Income-tax Officer, Group 'B' is invited to Rule 20 of the Central Civil Services (Conduct) Rules, 1964, under which no Government servant shall bring or attempt to

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bring any political or outside influence to bear upon any superior authority to further his interest in respect of matters pertaining to his service under the Government. If any representation is received on his behalf from another person in respect of any matter dealt with in these proceedings, it will be presumed that Shri J.D.Shah, Income-tax Officer, Group 'B', is aware of such a representation and that it has been made at his instance and action will be taken against him for violation of Rule 20 of the C.C.S. (Conduct) Rules, 1964.

6. The receipt of the Memorandum may be acknowledged.

(R.R.Bajoria)
Commissioner of Income-tax,
Rajkot.

To

Shri J.D.Shah,
Income-tax Officer,
Ward 2(3), Rajkot.

true copy
M R Anand
Adv

Annexure-1.

Statement of Article of Charge framed against Shri J.D.Shah, Income-tax Officer, Group 'B', Rajkot./Gujarat.

Shri J.D.Shah, Income-tax Officer, Group 'B' while functioning as Income-tax Officer, H-Ward, Jamnagar, Gujarat, during the period from 19th May, 1982 to 11th May, 1983, wrongly allowed Double Taxation Agreement relief u/s.172(4) and 154 of the I.T.Act, 1961 to non-resident shipping companies operating on occasional basis and also issued refund orders to the persons who were not authorised to receive such refunds. Thereby Shri Shah failed to maintain absolute integrity and devotion to duty and exhibited a conduct un-becoming of a Government Servant. Thereby Shri Shah violated the provisions of Rule 3(1)(i), 3(1)(ii) and 3(1)(iii) of the CCS (Conduct) Rules, 1964.

R.R.Bajoria

(R.R.Bajoria)
Commissioner of Income-tax,
Rajkot.

Rajkot,
22-11-1988.

True copy
M.R.Anand
Adv

Annexure-II.

Statement of imputations of misconduct or misbehaviour in respect of Article of Charge framed against Shri J.D.Shah, Income-tax Officer,Group 'B'Gujarat.

Shri J.D.Shah was working as Income-tax Officer, H-Ward, Jamnagar, Gujarat during the period from 19th May, 1982 to 11th May, 1984 and was having jurisdiction over non-resident shipping companies. As per the Board's instruction No.915(F.No.480/2/75-FTD) dated 30th January, 1976, Double Taxation Agreement (DTA) relief was to be allowed in respect of ships operated by regular shipping liners belonging to the countries with which the Govt.of India had DTA agreements, even at the stage of ad-hoc assessment under section 172(4). But in the case of occasional shipping or tramp steamers, such DTA relief was not to be allowed in the course of ad-hoc assessments under Section 172(4).

2. In complete disregard of the Board's instructions referred to above, Shri J.D.Shah allowed DTA relief in the following case of non-resident shipping companies which were operating ships on occasional basis:-

Name of the assessee.	Date of ad-hoc assessment order U/s.172(4).	Amount of DTA relief allowed.	Amount of Refund issued.
MV AEGIS	7-5-1983	Rs.16,950/-	Rs.16,950/-

3. Apart from the case mentioned above, Shri Shah also rectified u/s.154 the assessment in the following case and allowed DTA relief which has not earlier been allowed by him in the course of ad-hoc assessment U/s. 172(4):

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Name of the assessee.	Date of order u/s.172(4).	Date of order u/s.154.	DTA Relief.	R.O. issued.
MV Goods Transporter.	15-3-1982	26-7-82.	Rs.46,895/-	Rs.46895/-

4. In respect of the case mentioned in para 3 above, the original ad-hoc assessment order under sec. 172(4) of the Income-tax Act, 1961, denying the DTA relief to the Non-Resident Shipping Company, was passed by Shri J.D.Shah himself. Later on Shri Shah himself passed an order of rectification under Sec.154 of the Income-tax Act, 1961 in the case of this assessee, rectifying the original ad-hoc assessment order and granted DTA relief. Section 154 provides for rectification of a mistake of fact or law which is apparent from the record. Whether or not the ship in respect of which relief was denied earlier during assessment under section 172(4) was part of any regular shipping line, the provision of Section 154 could not be invoked for granting relief to the assessee which was denied earlier. Whether relief was rightly or wrongly denied as to it earlier during the original ad_hoc assessment could be determined only by a process of reasoning and consideration of facts of the case and, therefore, provision of section 154 could, in any case, not apply. Hence, invoking the provision of Sec.154 to grant relief to the assessee by Shri Shah was totally uncalled for.

5. There is no evidence on record to indicate that the ships mentioned above in respect of which relief was allowed by Shri Shah, either at the time of original ad-hoc assessment u/s.172(4) or by rectifying the original assessment u/s.154 were part of any regular shipping lines. Thus, Shri Shah irregularly allowed DTA relief

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to the above-named non-resident shipping companies operating on occasional basis and in the process also caused substantial loss of revenue.

6. Shri J.D.Shah also issued refunds amounting to Rs.63,845/- in the cases referred to above to the Indian Agents of the Masters of the ships. In fact, these agents were not authorised to receive the refund orders, nor were there any request from the non-resident owners of the ships to issue refunds to their agents. The refunds were, therefore, granted to unauthorised persons. Moreover, refunds in these cases were personally delivered to the agents in disregard of Board's instructions that refunds should be issued by registered post.

7. By his above acts Shri Shah failed to maintain absolute integrity and devotion to duty and exhibited a conduct un-becoming of a Government Servant, thereby violated provisions of Rule 3(1)(i), 3(1)(ii) and 3(1)(iii) of the CCS(Conduct) Rules, 1964.

Rajkot,
22-11-1988.

(R.R.Bajoria)
Commissioner of Income-tax,
Rajkot.

True copy
M R Anand
Adv

Annexure-III.

List of documents by which the Article of charge framed against Shri J.D.Shah, Income-tax Officer Group 'B', Gujarat, are sought to be proved.

1. Income-tax Assessment Records of all the assessees mentioned in the statement of imputation.
2. Board's instruction No.945(F.No.480/2/75-FTD) dated 30th January, 1976.
3. Board's letter F.No.12/753/79-ITA-II dated 7th October, 1979, instructing service of refunds by RPAD.
4. Board's instructions No.1530 dated 16th October, 1983, instructing service of refunds by RPAD.

(R.R.Bajoria)
Commissioner of Income-tax,
Rajkot.

Rajkot,
-11-1988.

Annexure-IV.

List of witnesses by whom the Article of charge framed against Shri J.D.Shah, Income-tax Officer, Group 'B' are proposed to be sustained.

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(R.R.Bajoria)
Commissioner of Incometax,
Rajkot.

Rajkot.
-11-1988.

free copy
M R Anand
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J.D.Shah,
Income-tax Officer,

Ward-2(3), Rajkot.
Dated: 12th Dec.,1988.

To

The Commissioner of Income-tax,
Rajkot.

Sub:- Disciplinary proceedings-
Reply to the memorandum
dated 22nd November,1988

Respected Sir,

Kindly refer to your memorandum No.CIT.RJHQ/YYC/LP-1(CO) dated 22-11-1988.

2. At the outset, I may be permitted to say that I deny the charge that I "failed to maintain absolute integrity and devotion to duty, and exhibited a conduct unbecoming of a Govt.servant." I further deny the charge that I have violated the provisions of Rules 3(1)(i), 3(1)(ii) and 3(1)(iii) of the C.C.S.(Conduct) Rules 1964.

3. In this connection, I wish to bring to your kind notice that I was posted as Income-tax Officer, Ward-E, Jamnagar on promotion, and was holding the charge of Ward-H, Jamnagar during the relevant period. The said charge was one of the heaviest charges of Jamnagar Circle, having mainly small income cases. During my stay in the said ward, apart from other misc.work attended to, my disposal was 3394, 5101 and 3762 assessments respectively for F.Ys.1980-81, 1981-82 and 1982-83. I wish to place before your honour that I have discharged my duties to the best of my ability, and has never, I repeat, never consciously committed any mistake with the ulterior motive, which may have resulted in loss of revenue. I may further mention that I am to retire from service on 31-5-1989, after 34 years' service in this Department and the charge of 'lack of devotion to duty, and failure to maintain absolute integrity', towards the end of my career, has pained me immensely. No doubt, the mistake referred to in the statement of imputations, has taken place, but it was not the result of a scheming mind, or with any ulterior motive to defraud the revenue, and if any, has been committed not consciously, but due to the prevalent practice, and the ambiguity in the instructions of the Board on the point, as existing at that time.

4. In this connection, I am to submit that during my last 11 years' Gazetted service, there has never arisen an occasion to adversely comment on my performance, devotion to duty and integrity. I feel proud to submit that in the past, not even a memo was issued to me for any such serious lapses. I may also submit that during this period, my inspections were carried out by the I.A.Cs several times, and the inspection notes bear testimony to my above submissions.

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Also, my annual C.Rs, I have reasons to believe, are without any blemish for all these years, supporting my contention that I had a spotless career throughout. In view of my above submissions, I am to request that the proceedings initiated under your above office memorandum may kindly be dropped.

5. Without prejudice to the above, and coming to the merits of the charges, I am to submit that the I.A.E.,Jamnagar had raised objections in the cases of occasional shipping companies on the basis of Board's instructions No.945 (F.No.480/2/75-FTD dt. 30-1-1976.) These objections were accepted by the Department, and necessary remedial actions by way of rectification orders were passed. The fact that same type of mistakes were committed by several assessing officers, support my sincere and firm belief that the Board's instructions were ambiguous, and were capable of different interpretations, resulting in the mistakes in several cases. I may further submit that the Chief C.I.T.(Adm.),Ahmedabad had called for explanations of all the concerned officers, including me, why disciplinary proceedings under Rule 3 of C.C.S. (Conduct) Rules, 1964 should not be initiated. I had submitted my explanations on 4-4-1986 and 20-6-1986, after considering which, the C.I.T., Rajkot, did not consider it fit and necessary to initiate proceedings under Rule 3 of C.C.S.(Conduct) Rules, 1964, and instead issued to me a warning conveying his dissatisfaction about the quality of my work in regard to the said assessments. I am constrained to believe that the Department is resorting to sort of witch-hunting, by reopening a closed issue, for which a punishment in the form of a warning was awarded to me. I may further submit that the present proceedings are in violation of the principles of natural justice, as a man cannot be punished for the same offence twice, which is unheard of in the annals of legal history and jurisprudence. It is, I submit, Sir, an attempt at violation of natural justice, particularly, the law of res judicata, and tantamounts to double jeoparady. The principles of res judicata is not arbitrary one, but based on sound policy that one should not be vexed with the same matter more than once. This is not merely a Rule, but is a doctrine, which is founded upon reason, and the soundest principles of public policy. Thus, if action is contemplated and initiated for same default repeatedly, then there would not be an end to any dispute and consequent litigation. I would further wish to draw your kind attention to sec.11 of Criminal Procedure Code of 1859, as amended by Act 104 of 1976, and the principles of res judicata. The present proceedings are thus against the principles laid down under C.P.C., and the law of Tort, and are liable to be quashed. It is, therefore, respectfully requested that the present proceedings may be dropped.

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6. Without prejudice, and coming to the merits of the issue, I may state that I have not committed any grave mistake, or consciously disregarded the existing instructions. As submitted earlier, the Board's instructions were capable of different interpretations, as can be seen from the fact that several officers had committed the same mistake. At any rate, the imputation of ulterior motive, lack of devotion to duty, and failure to maintain absolute integrity, is not warranted, as even the Internal Audit Party, which raised the objection had never in the past, raised such objections. It may also be stated that the then I.A.Cs, while checking refunds exceeding Rs.1 lakhs, used to approve such assessments/orders. For instance, the I.A.C., Jamnagar had approved the issue of a refund of Rs.3 lakhs in the case of MV MADSON, yet no cognizance appears to have been taken in the said case, tacitly giving the seal of approval thereto. One may, in the above circumstances, feel that Officers of different level in the Department, are meted out different treatment, and an attempt is being made to find out a scape-goat in the shape of one in the lowest rung of the ladder, a group 'B' Officer, who had a spotless career all these years. The mistake, I submit has crept in, as I too, followed the prevalent practice, believing that it is the correct legal position.

7. Without prejudice to the above, I may state that it is undisputed fact that I had jurisdiction over non-resident shipping companies. The jurisdiction is for the cases to be dealt with in accordance with the provisions of Sec.172. It did not restrict me to pass orders only under sec.172(4). If occasional shipping comes once during the year, its provisional assessment would be meant as final assessment only, and all adjustments should be carried out finally. The income is chargeable at uniform rate of 7.5%. As such, the assessment should have been considered as passed under sec.172(7) and not under sec.172(4) of the Act. There is nothing in the jurisdiction order which prevents me from passing an order u/s.172(7). The second defect noticed by the authorities that the provisions of sec.154 were wrongly applied, is also not correct. If D.T.A.agreement provides 50% relief, one has to rectify the mistake. Apart from this, I may state that if my act was erroneous, in so far as it relates to the passing of rectification order u/s.154, how could the Department justify the invoking of the provisions of sec.154 for withdrawal of the relief, which the Department has resorted in numerous cases. Thus, the Department is preaching one thing, and practising another, with the tacit approval and blessing of the higher authorities. Thus, I believe that my action is correct to the best of my knowledge and belief and even if any error is considered, should be viewed as a bonafide mistake. Besides, it has been alleged that there wwas substantial loss of revenue. I feel that the assessee was entitled for the refund, and that there is, therefore, no loss of revenue.

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8. As regards the resort to section 154, I may submit that so many such assessments were rectified in the past, where refunds were granted. I may further submit that for the purpose of D.I.T. relief already granted, the Department, on the Audit's pointing out the mistake, has resorted to sec.154, for withdrawing the relief so granted. I say this was done with the Departmental approval and blessing. I sincerely feel and believe that if resort to sec.154 could be made to withdraw the DIT relief, conversely, resort to sec.154 could be taken for rectifying the mistake, and for granting refunds, and was not that irregular. In any case, this could also be attributed to the confusion in the minds of the officers viz a viz the Board's instructions on the point, as also the widely prevalent practice, prior to the audit objections.

9. As regards the point of issue of refund orders by means other than the approved method, I may submit that once the R.O.is signed and sent to the office, the Officers are not further pursuing it, believing that it will be despatched according to the proceedure laid down. Moreover, the directions to issue R.Os by Regd.Post only, was, it appears, not very strictly followed at that time, necessitating the Board to issue further instructions in the matter. Accepting that the ultimate responsibility was that of the I.T.O., I may submit that it was perhaps not humanly possible to have control on each and every thing that takes place in the office in the normal course of day to day working, and some degree of trust has to be placed in the subordinates that they would act in accordance with the instructions.

10. I may further state that here also the past practice was followed since the agents are filing undertakings for shouldering all the responsibilities relating to income-tax matters and are also filing authority letters of the Master of the Ships. In the instant case also, the Agents had filed undertaking as well as letter of authority of the Master of the ship, which specifically authorised the Agents for receiving the refunds. It can be seen that on the basis of undertaking by one of such agents, viz. Chowgule Bors., an agent of MV GOODS TRANSPORTER had paid Rs.46,895/- on 14-9-1986 due to withdrawal of DTA relief. These facts show that the Agents are responsible for each and every acts relating to Income-tax irrespective of its being payments or refunds. As such, according to me, the above line of action adopted by me,was in order, and there was nothing irregular.

10. Without prejudice, I may be permitted to draw your kind attention to the assurance giventy our Chairman, C.B.D.T., New Delhi in his D.O.Letter No.F.No.C.13011/133735-A&-XI( ) dt. 11-11-1985 reproduced below:-

> "Action will be taken only if there is concrete evidence to show that over a period of time an officer has been

either lacking in integrity or has been extremely inefficient. There need not be any apprehension after all, an officer takes ten decisions, one or two may be wrong. Nobody will be punished for bonafide mistakes on the basis of instances."

From the above, it is obvious that certain mistakes are bound to happen, as to errew is human. In my case, the mistakes pointed out should not be treated as indicating lack of devotion to duty, considering the general nature of the mistake and my submissions given above. I, therefore, earnestly believe that such mistakes would not attract initiation of action under Rule 3 of C.C.S. (Conduct) Rules.

11. To sum up, it is earnestly prayed that-

1. double punishment could not, and should not be awarded for the same allegedmistake; and
2. that in view of my above detailed explanation, the mistake be treated as a bonafide mistake, and the proposed disciplinary proceedings be kindly dropped.

Thanking you,

Yours faithfully,

(J. L. Shah)

True copy
M R Anand
Adv

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CONFIDENTIAL.

No.CIT.R/HQ/Vig/DP-1/GO/88-89.

OFFICE OF THE
Commissioner of Income-tax,
Amruta Estate, 5th Floor,
Rajkot: Dated 14th Dec.,88.

Order relating to the appointment of Inquiry Officer.

(Rule 14(2) of C.C.S.(C.C.A.) Rules, 1965.

WHEREAS an inquiry under Rule 14 of the Central Civil Services (Classification, Control and Appeal)Rules, 1965 is being held against Shri J.D.Shah, Income-tax Officer, Rajkot.

AND WHEREAS the undersigned considers that an Inquiring Authority should be appointed to inquire into the charges framed against the said Shri J.D.Shah

NOW, THEREFORE, the undersigned, in exercise of the powers conferred by sub-rule (2) of the said rule, hereby appoints Miss Vijay Lakshmi Sharma, CDI, C.V.C.,New Delhi, as the Inquiring Authority to inquire into the charges framed against the said Shri J.D.Shah.

(R.R.Bajoria)
Commissioner of Income-tax,
Rajkot.

Copy to:-

1. Shri J.D.Shah, Income-tax Officer, Rajkot.
2. Miss Vijay Lakshmi Sharma, CDI,CVC, New Delhi.
3. The D.I.(Vigilance), New Delhi.
4. The Chief C.I.T.(Adm.)., Ahmedabad.

True copy
M R Anand
Adl

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No.CIT.R/HQ/VIG/DP-1/88-89.

OFFICE OF THE
Commissioner of Income-tax,
Amruta Estate, 5th Floor,
Rajkot, dated 13th Jan.,89.

Order relating to appointment of Presenting Officer (Rule 14(5)(c) of C.C.S(CCA)Rules,1965.

WHEREAS an inquiry under Rule 14 of the Central Civil Services(C.C.A.), Rules, 1965 is being held against Shri J.D.Shah, Income-tax Officer, Rajkot.

AND WHEREAS the undersigned consiers that a Presenting Officer should be appointed to present on behalf of the undersigned the case in support of the articles of the charge.

NOW THEREFORE, the undersigned in exercise of the powers conferred by sub-Rule (5)(c) of Rule 14 of the said Rules, hereby appoints Shri Rajendra, ADI Bhavnagar, as the Presenting Officer.

(H.C.Parekh)
Commissioner of Income-tax,
Rajkot.

Copy to:-

1. Shri Rajendra, ADI(I), Bhavnagar.
2. Shri J.D.Shah, Income-tax Officer, Rajkot.
3. Miss Vijaylaxmi Sharma, Inquiry Officer.
4. The Chief C.I.T.(Adm.).,Ahmedabad.
5. The D.I.(Vigilance), New Delhi.

Free copy
M R Shah
Adv

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New Delhi
17.11.89

Present : Shri Rajendra PO

PH in this case was taken up today. Only the PO has presented himself . The CO has sent a letter dated 8.11.89, received by me only today in which he has contended that since the similar proceedings are being conducted against other officers of Gujarat wherein the charges involved are almost the same and that since the other officers have obtained Stay Order in ther cases against disciplinary proceedings, he is not sure whether the desciplinary proceedings against him would also be stayed or continued. The CO is hereby informed that in his case there is no Stay Order from CAT and as such there is no restrain in proceeding with the departmental enquiry in his case. As regards the decision in the case of Shri V.V.Ghatalia decided by CIT Rajkot, it is not known to the undersigned as to whether the charge for which the CO is now being proceeded against has alread been enquired into and decided upon by the Desciplinary Authority at an early stage. In the present case since the charge has been issued to him and the CO has denied the charge vide his letter dt. 12.12.88, the proceedings in this case would continued on the premise that the CO has denied the charge. Accordingly the following time schedule for inspection of additional documents etc. is laid down.

The CO is given time till 30.11.89 to inspect the original listed documents in the office of CIT Rajkot after fixing up mutually convenient date and time with the PO. In case he is engaged a Defence Assistant, the name of the Defence Assistant and full address must be endorsed to the PO and to the undersigned. The inspection of documents must be completed by 30.11.89 and thereafter the CO is required to give certificate that he has completed the inspection ~~of~~ and ~~xxx~~ is satisfied with the authenticity/genuiness thereof. Thereafter the time is given to the CO till 18.12.89 to submit his list of additional documents and witnesses. The list of additonal documents must clearly mention the subject matter, file number-if any, ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ custodian and relevancy of each document vis-a-vis charges under enquiry. The list of witnesses must include the full name with designation - if any, latest postal address and the relevancy to the charges under enquiry. Copy of these lists must be endorsed to the PO. The undersigned would decide upon the relevancy of documents and witnesses under intimation to both PO & CO and thereafter the PO is given time till 21.1.90 to collect the documents and afford inspection thereof, at the Chief CIT

(Admn), Ahmedabad, Office to the CO and his Defence Assistant if any. The PO is to note that that in case any of the documents allowed has since been weeded out, destroyed not available, a non-availability certificate must be obtained from the Competent Authority to be placed on record during RH.

Once the inspection of additional documents is confirmed to me both by the PO & CO, dates for RH would be fixed.

Copy of this Order Sheet is handed over to the PO. Copies of this Order Sheet are also being sent to the CO and Desciplinary Authority for information and strict compliance.

C.D.I.

PO _____

No.09/VLS/208 RECD
Government of India
Central Vigilance Commission

Copy for information & strict compliance to :

1. Sh. J.D.Shah, I.T.O.(Retd), B/4, Subhadranagar Flats, Near Milan Park, Navrangpura, Ahmedabad- 380 009.

2. The Commissioner of Income-tax, Office of the Commissioner of Income-tax, Amruta Estate, 5th Floor, Rajkot , for information

(Vijai Lakshmi Sharma)
Commissioner for Departmental Inquiries

True copy
M R Bhatt
Adv

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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

D.C.

O.A. No. 549 of 1989.

Shri Jayantilal D. Shah. .....Applicant.

V/s.

Union of India and
others. .....Respondents.

Copy saved to Mr. Mehta on 30/11/91
30/11/91

WRITTEN REPLY

I, Jaidev, Commissioner of Income-tax, Rajkot do hereby solemnly state as follows:-

1. I have gone through the application filed by/Shri Jayantilal D. Shah and I am conversant with the facts of the case and am able to depose to the facts stated herein.

2. At the outset I submit that the application is not maintainable since the applicant has approached this Hon'ble Tribunal at an inquiry stage and that the applicant has alternative efficacious remedies available to him by facing the inquiry, where he will get adequate opportunity to place his case. On this ground alone the application requires to be - rejected.

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3. Without prejudice to the aforesaid I shall now deal with the application parawise as under :-

(A) Regarding paras 1 to 6 of the application, it is not necessary to state any details and no comments.

(B) Regarding paragraph 6.1 of the application, it is submitted that the contention that applicant had meritorious record of service is not at all relevant so far as the points at issue in the present case are concerned. No comments on the other averments.

(C) Regarding paragraph 6.2 of the application, it is not necessary to state any details and no comments.

(D) The contents of para 6.3 are denied. The applicant did not grant the D.T.A. Relief in bonafide exercise of his quasi-judicial powers because the Board's Instruction No. 915 issued on 30-6-76 laid down that the D.T.A. Relief was not to be allowed in respect of the non-resident shipping companies operating on occasional basis. The Shipping Companies

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to which the D.T.A. Relief has been allowed by the applicant were occasional shipping lines and hence did not qualify for the grant of D.T.A. Relief U/s. 172(4) of the Income-tax Act. Not only this, the applicant went to the extent of rectifying the earlier orders passed by this predecessor denying such relief and allowed D.T.A. Relief to these companies, treating the earlier non-allowance as mistake apparent from record, which action was in violation of the provisions of Section 154 of the Income-tax Act which permits rectification of the mistake apparent from the record. Section 154 of the Act does not empower an Income-tax authority to reverse the decision taken earlier.

(E) The Contents of para 6.4 are denied. The distinction between regular shipping lines and occasional shipping lines is too obvious to be spelt out anywhere. Further, the applicant cannot absolve himself of the charge of irregular and improper application of the Board's Instruction, which is in a clear and unambiguous language, resulting in allowance of D.T.A. Relief where not due. Incidentally, action under the prescribed procedure has also been initiated against-

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other officers for irregularities on this ground.

(F) With regard to para 6.5 of the application, it is true that a Circular was issued drawing attention of the Income-tax Officers to the common mistakes pointed out by audit. However, it is urged that the Circular which was in a very condensed from, did not state that the D.T.A. Relief was to be allowed at the stage of ad-hoc assessment even to Non-resident Shipping Lines operating on occasional basis.

(G) The Contents of para 6.6 are denied. In fact, the Instruction No.915 dated 30-1-76 issued by the Central Board of Direct Taxes is quite clear and unambiguous in the sence that it clearly prohibits the allowance of D.T.A. Relief to occasional shipping lines. The pendency of a petition before the Honourable Gujarat High Court, challenging the validity of Section 172(7) is no ground to obsolve the applicant of the charges of misconduct levelled against him.

(H) As regards the contention raised in paragraph 6.7, irregularity in allowing D.T.A. Relief in the case of occasional shipping liners of

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non-resident shipping companies came to light as a result of audit objections in the month of May, 1986 and thereafter memorandum dated 21st May, 1986 was issued to the applicant whereby the applicant's explanation was sought. The applicant, no doubt, submitted his reply on 20th June, 1986 to the Commissioner of Income-tax, Rajkot. After a further detailed examination of the matter and after processing it in accordance with the prescribed procedure, a charge sheet was issued to the applicant by the Disciplinary Authority on 22nd November, 1988. The chronology of dates given above shows that no undue delay occured in processing the case once the misconduct came to light. The letter issued by the CIT, Rajkot to the applicant on 24-2-87 merely apprises the views of the Commissioner that the quality of the applicant's work is considered as poor. This does not operate either as a warning or a penalty.

(I) Regarding para 6.8 of the application, No comments other than that the averment of the applicant that the assumption is contrary to the quasi-judicial conclusion of the applicant that

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they were regular shipping Cos. and entitled to the D.T.A. Relief, is denied, as the Board's instruction No.915 clearly laid down that the I.T.A. Relief was not to be allowed in respect of non-residential companies operating on occasional basis.

(J) The contents of paragraph 6.9 of the application are denied. There is no evidence on recording to establish that the non-resident shipping companies were regular shipping liners. Moreover, Section 154 of the Income-tax Act provides for rectification of mistakes apparent from the records. A mistake which can be determined by a detailed process of reasoning or about which there can be two opinions is not a mistake apparent from the record under the provisions of law. So, the assessment completed earlier, without granting relief, could under no circumstances be considered as involving a mistake apparent from the records and was, thus beyond the purview of Sec.154 of the Income-tax Act. Still, however, the applicant passed orders u/s. 154 rectifying the earlier orders denying such relief to the assessee. The other averments are repetitions.

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(K) Regarding para 6.10 of the application, it is not necessary to state any details and no comments.

(L) The averments in para 6.11 of the application are denied. It is reiterated that the letter dated 24-2-87 of CIT, Rajkot issued to the applicant does not constitute a penalty and cannot preclude the disciplinary authority from initiating disciplinary proceedings. So far as the averments of retirement dues are concerned, the issue can only be decided on conclusion of disciplinary proceedings. The applicant is, however, in receipt of provisional pension which is equivalent to the normal pension he would have otherwise received.

(M) Regarding paragraph 6.12 the applicant will have full opportunities to defend himself before the Inquiring Officer who is an officer nominated by the Central Vigilance Commission to conduct the inquiry. The applicant has thus an efficacious alternative remedy.

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(N) Contents of paragraph 6.13 of the application are denied. The initiation of disciplinary proceedings against the marerial on record. When the orders passed are perverse and seem to be actuated by an ulterior motive, the applicant cannot get away by simply saying that the orders were passed by him in his capacity as quasi-judicial authority.

(O) Contents of paragraph 6.14 of the application are repetitions of paragraph 6.13; hence no comments.

(P) Contents of paragraph 6.15 of the application are denied. The assessment orders and rectification orders passed by the applicant were conscious acts and not bonafide errors of judgement.

(Q) Contents of paragraph 6.16 of the application are denied. No discriminatory treatment has been meted out to the applicant. Action has been initiated against other officers also for similar misconduct.

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(R) Contents of paragraph 6.17 are repetitions and denied.

(S) With reference to para 6.18 of the application, it is denied that the department has initiated action against the applicant when the policy was changed. As stated earlier, the irregularities were noticed in the year 1986 and soon thereafter proceedings were initiated against the concerned officers. It is denied that the action of the department is in violation of Articles 14 and 16 of the Constitution of India.

(T) Contents of para 6.19 of the application are repetitions, hence no comments.

(U) The contents of paragraph 6.20 of the application are denied. The comments given hereinbefore are reiterated.

(V) With reference to para 6.21 of the application it is submitted that the applicant was supposed to issue refund orders to authorised persons, whereas he issued refund orders to agents who were not authorised to receive the same. The contention that the applicant was justified in rectifying the orders passed earlier is denied.

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(W) Contents of paragraph 7 of the application relate to relief sought by the applicant. Since the application is premature, this Honourable Tribunal may be pleased to direct the applicant to submit himself to the departmental enquiry and also to exhaust the alternative remedies available to him.

(X) Contents of paragraph 8 of the application relate to interim reliefs sought by the applicant. The applicant has already been allowed to draw provisional pension and has also been paid on 11-10-90 leave encashment due to him. No other interim relief as sought by the applicant is admissible with regard to the facts and circumstances stated above.

(Y) Regarding paragraphs 9,10,11,12 and 13 of the petition need no comments.

4. In view of the above facts, the applicant is not entitled to any reliefs as claimed, and the petition decerves to be rejected.

Dated this 10th day of January, 1991.

A. G. Bhatt

(R.P. BHATT).
Advocate for the respondents.

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: VERIFICATION :

I, Jaidev

age...47..... working as..Commissioner of Income Tax, Rajkot

in the office of Income Tax, resident of..Rajkot.....

do hereby verify that the contents of paras 1 to

....4... believed to be true on legal advice and

that I have not supressed any material fact.

Dt: 10th Jan., 1991.

(जयदेव)
आयकर आयुक्त
Commisioner of Income-Tax
राजकोट/Rajkot

Reply/Rejoinder/written submissions
filed by Mr. R. P. Bhatt
learned advocate for
Respondent with second
Copy served/not served

Dt. 30/1/91 Dy. Registrar C.A.T.
A'bad Bench