

9  
IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH: CUTTACK.

ORIGINAL APPLICATION NO. 610 OF 2004  
Cuttack, this the 30th day of June, 2005.

ANANTA KUMAR MALLICK. .... APPLICANT.

VERSUS

UNION OF INDIA & ORS. .... RESPONDENTS.

FOR INSTRUCTIONS.

1. Whether it be referred to the reporters or not? ✓

2. Whether it be circulated to all the Benches of CAT? ✓

(M.R.MOHANTY)  
MEMBER(JUDICIAL)

(B.N.SOM)  
VICE-CHAIRMAN

30/06/05

10  
CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH:CUTTACK

ORIGINAL APPLICATION NO.610/2004  
Cuttack this the 30<sup>th</sup> day of June, 2005

CORAM:-

THE HON'BLE MR.B.N.SOM, VICE-CHAIRMAN  
AND  
THE HON'BLE MR.M.R.MOHANTY, MEMBER(JUDL.)

Sri Ananta Kumar Mallick,  
aged about 35 years,  
S/o.Dhobei Mallick,  
Resident of Village-Kamalpur,  
PO-Chasikhanda, Via-Anakhia,  
Dist-Jagatsinghpur,  
at present working as Income Tax Inspector,  
O/O Additional Director of Income Tax (Investigation)  
730, Saheed Nagar, Bhubaneswar, Dist-Khurda. .... APPLICANT.

By the Advocates :- M/s.K.C.Kanungo,S.Behera,B. D.Das  
C.Padhi,Advocates.

Versus

1. Union of India represented through its Chairman, Central Board of Direct Taxes,North Block New Delhi-1
2. Chief Commissioner of Income Tax,Orissa, Ayakar Bhawan,Rajaswa Vihar,Vani Vihar, Bhubaneswar, Dist: Khurda.
3. Director of Income Tax(Exmn.)(IT & Audit) 5<sup>th</sup> floor,Mayur Bhawan, Connaught Circus, New Delhi-112301.

By the Respondents: Mr. B. Mohapatra, Addl.S.C.

2

O R D E R

MR. B.N.SOM, VICE-CHAIRMAN:-

Applicant, Ananta Kumar Mallick, being aggrieved by the inaction of the Respondents in declaring the result of Income Tax Officers' (in short I.T.O.) Examination for the years 2000, 2002 and 2003 has filed this Original Application under Section 19 of the Administrative Tribunals Act, 1985, for redressal of his grievance. He has also challenged the order dated 23.5.2001 (Annexure-A/9), by virtue of which he was informed that his application for appearing at the departmental ITO examination for the year 2001 could not be entertained by the Commissioner, Income Tax, Bhubaneswar, on the ground that he was an ad hoc promotee candidate.

2. The case of the applicant in a nut shell is that he is a confirmed post holder of Stenographer, Gr.III and was promoted to Stenographer, Gr.II on ad hoc basis with effect from 30.11.1999. He then qualified for promotion to the grade of Inspector of Income Tax (in short IIT). Thereafter, in terms of the <sup>Rules</sup> ~~Recruitment~~ of Income Tax Officer, he was eligible for appearing in the departmental examination for promotion to the grade of ITO, Group B. In the meantime, he was also promoted as I.I.T. The authorities, although allowed him to appear in the ITO departmental examination for the years 2000, 2002 and 2003, did not declare his result, in

the examination. His case is that recruitment rules of ITO at Annexure-A/7 does not whisper any condition, by which he was ineligible for appearing in the departmental examination for promotion to ITO cadre. He has further pointed out that while he has not been allowed the benefit of ITO examination, officers junior to him in the grade of Stenographer, Gr.II cadre have all been allowed to appear in ITO examination for the years 2000, 2003 and some of them are also enjoying the fruits of promotion.

3. The applicant has challenged the action on the part of the Respondents-Department on two grounds. Firstly, that as per the Recruitment Rules for the departmental examination for promotion to ITO, Group B cadre, he is eligible in terms of the Recruitment Rules of ITO, 1998 as circulated by the Directorate of Income Tax (Income Tax and Audit) dated 20.4.1998 (Annexure-A/19); and, secondly, that although he is the senior most official in the cadre of Stenographer, Gr.II, his promotion to the grade has not yet been declared regular, but the officials, whose name appeared from Sl. Nos. 3 to 8 and were junior to him in the seniority list of Stenographers Gr. II vide Annexure-A/14, were made regular with effect from 28.8.2003 and were declared pass in the ITO examination for the year 2003. He has <sup>thus</sup> been suffered discrimination due to non application of mind by the Respondents.

4. The Respondents have opposed the prayer of the applicant on the ground that the applicant was provisionally promoted to the post of Stenographer, Gr.II and also to the post of IIT on ad hoc basis and, therefore, he is not eligible to take the departmental examination for ITO. Referring to the departmental examination as revised vide letter dated 21.2.1991 (Annexure-A/7 to the O.A.), they have pointed out that the rules provide that only Head Clerks/Supervisors and Stenographers, Gr.II who have passed the Inspector Examination regardless of whether they have been promoted as Inspector or not are eligible to appear in that examination, provided such persons have passed the Inspector Examination three years prior to the ITO examination. Admittedly, the applicant having passed the Inspector Examination only in the year 1999, he did not by that time had three years service after passing that examination to be eligible for appearing in the departmental examination for ITO. They have also submitted that the applicant is not only ad-hoc in the grade of Inspector, he is also ad-hoc in the grade of Stenographer, Gr.II. In the circumstances, they have submitted that, as per the clarification dated 26.5.2000 of the Directorate of Income Tax (Examination) New Delhi which was issued in consultation with the Department of Personnel & Trg. "the ad hoc promotees are not eligible to appear at the departmental examination meant for regular grade in which

such candidates have been promoted on ad hoc basis" (Annexures-R/1 and R/2).

5. We have heard the learned counsel for the rival parties and have also perused the records placed before us.

6.1. The controversy involved in this O.A. centers round the rules for Departmental Examination for ITO, Group-B cadre. In this respect, the Respondents in their counter have drawn our notice to the rules available at Annexure-A/7 of the O.A. We have perused AnnexureA-7, which is a letter dated 21.2.1994 issued in supersession of Board's letter dated 17.11.1993 and D.I.T.(IT) letter dated 18.11.1993, circulating Departmental Examination rules for Income Tax Officers and Income Tax Inspectors. Under Rule 3 of the said rule for departmental examination for Income Tax Officers, 1994, under the heading "eligibility", it is stated as follows :

"(2) ... Heard clerks, Supervisors Grade II and Stenographer Grade-II, Stenographer Grade I who have passed the Inspectors Examination, regardless f whether they have been promoted as Inspectors or not.

However, all such persons should have passed the Inspector's Examination three years prior to the ITO's Examination."

6.2. Further, relying on the letter dated 26<sup>th</sup> May, 2001 (Annexure-R/1) and letter dated 8.5.2000 ( Annexure-R/2 ) issued by the Director of Income Tax ( I. T & Auditor), Ministry of Finance,

15/4  
Department of Revenue stated that "an employee promoted on ad hoc basis will not be eligible to sit for the examination appropriate to his grade". The applicant on the other hand, has filed a copy of the revised rules for departmental examination for Income Tax Officers/Income Tax Inspectors issued by the Director of Income Tax (IT & Auditor) dated 20.04.1999 (Annexure-A/19), by swearing an affidavit. These rules were notified to be made applicable to the departmental examination to be held in 1998 onwards in supersession of the rules for the departmental examination for the ITOs issued under that Directorate's letter dated 18/26.11.1993, as referred to earlier vide letter No. EG(20)(8)/93/DIT/6603 dated 18.11.1993 as amended from time to time. Rule-III with regard to the eligibility for the examination, the amended rules provide as under :

"The following persons will be eligible to appear in the Departmental Examination for Income-tax Officers:

- (1) Income-tax Inspectors who have passed the Departmental Examination for Inspectors.
- (2) Head Clerks, Supervisors Grade/II, Tax Assistants, Stenographer Grade I & II who have passed the Inspector's Departmental Examination, regardless of whether they have been promoted as Inspector or not."

6.3. From the above it is clear, as pointed out by the learned counsel for the applicant that the earlier condition in the rule that an official, who is

9/

not an IIT, but has passed the Inspectors Departmental Examination will be eligible to appear in the departmental examination for ITO only after three years of passing Inspectors Examination was deleted. Thus, as the condition of three years' waiting after passing ITO examination was deleted from the statute book in the year 1998 and the applicant in this case had appeared for ITO examination in the year 2000 (as also for the year 2001, 2002 and 2003), his results could not have been withheld by the Respondents.

7. Having regard to the apparent contradiction in the averments made by the Respondents in the counter and the provisions in the departmental rules as amended/revised from 1998, we had called upon the Respondents to reconcile their position or to come out clearly refuting the documents filed by the applicant. We are constrained to remark that no effort was made by the Respondent-Department to file any reply reconciling their submission or refuting the position taken by the applicant. Further, by our order dated 15.4.2005, we had called upon the Respondents to clarify as to why the applicant who is the senior- most Stenographer in Gr.II cadre was left out as ad hoc whereas his juniors were made regular in that grade, six of them during the year 2003. We did not get any worthwhile response either formal or informal. One of the arguments of the Respondents against the applicant's candidature for ITO examination is that he being an ad hoc

Stenographer, Gr.II he could not be treated as eligible for appearing in that examination. The learned counsel for the Applicant, on the other hand, has argued that had the applicant been declared regular with effect from the date his junior was made regular, he could not have been denied the benefit of the eligibility rule either in terms of 1994 Rules or in terms of 1998 Rules. We are constrained to say that the Respondents preferred to remain silent on this point also. The way the Respondents have given their reply and have exhibited their inability in refuting that the rules were revised in 1998 gives us enough clue to conclude that denial of opportunity to the applicant in competing for a place in the ITO Group B cadre is nothing but an act of total non application of mind bordering on discrimination. More appalling is the fact that they have adduced in additional reply dated 29.4.2005 that because the applicant was officiating in the grade of IIT, "there was no scope for regularizing him in the previous grade of Stenographer, Gr.II". We could not have come across a more absurd and inane argument than this. From this reply, we are persuaded to believe that there is serious malady in the administrative set up of the Respondent-Department, which calls for action to be taken by the Respondent No.2 to revamp the administration. Needless to point out that whenever the DPC meets to consider the officials/officers in a cadre for promotion/regularization, if any official in the zone of

consideration is found to be outside the cadre or on ex-cadre appointment, his interest is to be protected by considering his case for regularization/promotion and if he is found fit, he is to be granted proforma benefit to protect his interest. These are the basic principles of personnel administration and this could not have been unknown to the Respondent-Department, which is not a set up built up the other day. We, therefore, feel that overlooking the need for protecting the interest of the applicant in the cadre of Stenographer, Grade-II was also an inexcusable omission on the part of the Respondents for which they should seek remedial action and also fix responsibility to ensure that such mistakes do not recur.

8. Having regard to the above facts and circumstances of the case, we direct that the results of the ITO examination with respect to the applicant for the years 2000, 2002 and 2003 be declared at once and in any case within 30 days of the receipt of this order and if he is found successful, he should be given the benefit of promotion under the Next Below Rule (in short N.B.R.) as enshrined under F.R. 22. We quote the exact scope of the next below rule, as under:-

**"The Next Blow Rule and its exact scope -**  
Doubts have frequently been expressed regarding the exact scope of the various rulings issued in connection with the operation of the 'Next Below Rule'. For avoidance of doubt, the extant decisions on this subject have been summarized below -

19

2. The working rule subjoined to this paragraph may be taken to express the convention which is commonly known as the 'Next Below Rule' as originally approved, and its provisos, the modifications made from time to time. The intention underlying the "rule" is that, an officer outside his regular line should not suffer by forfeiting the officiating promotion which he would otherwise have received had he remained in the original line. The so-called "rule" is not a rule of any independent application. It sets out only the guiding principles for applications in any case in which it is proposed to regulate officiating pay by special orders under the second proviso to FR 30(1). The conditions precedent to the application of the 'Next Below Rule' must, therefore, be fulfilled in each individual case before action may be taken under this proviso. It also follows that the benefit of officiating promotion is to be given only in respect of the period or periods during which the conditions of the 'next below rule' are satisfied.

"Rule – When an officer in a post (Whether within the cadre of his service or not) is for any reason prevented from officiating in his turn in a post on higher scale or grade borne on the cadre of the service to which he belongs, he may be authorized by special order of the appropriate authority pro forma officiating promotion into such scale or grade and thereupon be granted the pay of that scale or grade, if that be more advantageous to him, on each occasion on which the officer immediately junior to him in the cadre of his service (or if that officer has been passed over by reason of inefficiency or unsuitability or because he is on leave or serving outside the ordinary line or forgoes officiating promotion of his own volition to that scale or grade, then the officer next

junior to him not so passed over)draws officiating pay in that scale or grade":

✓

The intention underlying the "rule" is that an officer outside his regular line should not suffer by forfeiting the officiating promotion which he would otherwise have received had he remained in the original line.

9. In the result, the O.A. succeeds as above. No costs.

*Yours  
30/06/08*  
(M.R.MOHANTY)  
MEMBER(JUDICIAL)

*B.N.SOM*  
(B.N.SOM)  
VICE-CHAIRMAN