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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

JODHPUR BENCH, JODHPUR

CORAM :

HON'BLE MR. G.R. PATWARDHAN,
ADMINISTRATIVE MEMBER

.....

Original Application No. 290 of 2004

This the 11th day of March, 2005

.....

H.M. Gandhi, Retired Assistant Director of Income Tax (Inv.-II),
Jodhpur R/o 10/36, Chopasni Housing Board, Jodhpur.

.....Applicant.

(By Mr. Sandeep Bhandawat, Advocate, for applicant)

Versus



Union of India through Secretary to
Government of India, Ministry of Finance
(Department of Revenue),
Central Board of Direct Taxes,
North Block, New Delhi.

2. The Chief Commissioner of Income Tax
New C.R. Building, Statue Circle, Jaipur,.

3. Pr. Chief Controller of Accounts
Central Board of Direct Taxes,
9th Floor, Lok Nayak Bhawan,
Khan Market, New Delhi.

4. Sr. Accounts Officer,
Zonal Accounts Office,
Central Board of Direct Taxes
New CR Building, Statue Circle, Jaipur.

5. The Assistant Director of Income Tax (Inv.I),
Aaykar Bhawan, Jodhpur.

.....Respondents

(Mr. Vineet Mathur, Advocate, for respondents)

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ORDER
BY THE COURT

This O.A. has been filed by H.M. Gandhi retired Assistant Director of Income Tax (Inv.-II) Jodhpur against five respondents; Union of India through Revenue Secretary, the Chief Commissioner of Income Tax, Principal Chief Controller of Accounts, Central Board of Direct Taxes (C.B.D.T.); Senior Accounts Officer, C.B.D.T. and the Assistant Director of Income Tax (Inv.I), Jodhpur. An order dated 1.11.2004 passed by respondent No. 4, Senior Accounts Officer of Zonal Accounts Office, Jaipur whereby pay fixed long back has been revised and recovery of overpayment ordered is under challenge. The prayer part in para 6 – inter alia, requests that order dated 1.11.2004 be recalled and respondents directed to release all pensionary benefits like commuted value of pension, leave encashment, gratuity etc.



2. The O.A. has been filed on 22.11.2004 and its reply, under the signature of Assistant Director of Income Tax (Investigation) Jodhpur – respondent No.5 on 21.2.2005.

3. The applicant retired on 31.10.2004 and as nothing was paid to him by way of retirement benefits; on 29.11.2004 he prayed that the department should be asked to release atleast those payments which it considers rightful. The matter was heard and notices issued to respondents to show cause by 3.12.2004. On 9.12.2004, both the parties were heard when it transpired that the applicant has paid approx. Rs. 5 lakhs towards post retiral benefits and the only dispute left is about pay fixation. The Tribunal therefore stayed operation of the order relating to

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recovery of alleged overpayment due to pay fixation.

4. Briefly stated the facts are as follows. The applicant was appointed as Upper Division Clerk (U.D.C.) in the department in 1965 and went to work in Internal Audit Party in 1972 when vide copy of order at Annex. A/2 dated 1.9.1972 – he was allowed to draw Special Pay of Rs. 25/- per month with effect from 15.7.1972 in view of Ministry of Finance (Department of Revenue and Insurance) New Delhi letter No. F.No.6/84/69 – Ad. IX dated 10.12.1970. This order was issued by Commissioner of Income Tax, Jaipur. On 20.7.1979 he was promoted as Inspector and on 14.11.1991 as Income Tax Officer. In 2001, he got promoted as Assistant Commissioner of Income Tax and retired on 31.10.2004. In Internal Audit Party he worked for three years – the special pay of Rs. 25/- was merged for purpose of pay fixation on his promotion – as per rules existing then – which according to the applicant are contained in extract of notification – placed at Annex. A/4. But in 1995, when his service book was sent for verification, the Zonal Accounts Office, Jaipur raised objection on 27.4.1995 vide Annex. A/5 when it observed that the “Special Pay (of Rs. 25/-) was not in lieu of higher scale of pay and therefore this special pay was not admissible in pay fixation at that time” and that “therefore the differential amount of pay and allowances paid to him prior to 1.9.1985 may be recovered under intimation to this office and noted in the service book [App. No. 8 Order No. 29 para (c) FR & SR]”. The applicant has placed a copy of this order at Annex. A/6 and says that this is not applicable to officers working in Income Tax Department and that there is no such clause (c) in it. He therefore submits that the objection raised by Zonal Accounts Officer is not tenable. The applicant further says that this objection was replied to by the then Assistant Commissioner of



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Income Tax, Bikaner clarifying the position on 27.7.1995 vide Annex. A/7 that the Special Pay was sanctioned by C.I.T., Jaipur by referring to Ministry of Finance letter 6/84/69-Ad IX dated 10.12.1970 and that the objection raised by Zonal Accounts Office are not clear and that action for recovery could be initiated after ascertaining correct facts. However, the applicant says, suddenly on 23.7.2001, Senior Accounts Officer, Zonal Accounts Office, Jaipur was informed by Accounts Officer, C.B.D.T. that



“At the first instance we would like to state that neither your office letters dated 27/03/2000 & 31.05.2000 nor Service Book of Sh. Gandhi was received in this office. About two and half month back one official from your office had visited HQ and he was advised to locate the letter dated 27.03.2000 from R&I Section of HQ, but it could not be located. Again another official from your office visited this office in connection with the case under reference. He was also advised to checkup with R&I with R&I Section. As on verification paper under reference could not be located, issue was discussed with AAO of this Section, wherein you were advised to intimate number of registered letters/Speed Post letters telephonically under which letter dated 27.03.2000 ibid was sent to this office so that Service Book could be traced if received in this office. But no intimation either written or telephonically was sent to us. Under such circumstances it is just improper for your office to remind this office for the requisite clarification and returning of Service Book of Shri Gandhi. You are therefore advised to send us the registered letter No. or Speed Post No. under which your office letter dated 27.03.2000 was sent to this office, so as to enable us to locate Service Book under reference, if possible at a such belated time. You are also advised to take up the issue with Deptt. Of Posts.

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Further in regard to point of clarification as per your office letter dated 27.03.2000 we would like to intimate that since special pay was given to Sh. Gandhi for working in the Internal Audit Party, that does not allow to special pay in lieu of higher scale, it will not be treated as part of pay for fixing up pay at the time of promotion. This is as per O.M. Dated 25.02.65 incorporated as G.O.I. Order No. 27 in Appendix VIII of FR SR, Part-I."

5. Applicant thereafter has referred to Government of India Order No. 27 – in Appendix VIII of FR&SR Part - I by Annexing it as Annex. A/9 and says that a bare perusal of it, will disclose that even the letter of 23.7.2001 (Annex. A/8) was not applicable in his case and the Zonal Accounts Officer was not right. However, the Zonal Accounts Officer, took a U-turn on 31.10.2002, by issuing a letter and maintaining that special pay to U.D.Cs in Internal Audit Party is granted for arduousness of work and, not in lieu of higher scale of pay. This was addressed to Senior Accounts Officer, Zonal Accounts Office, Jaipur and referred to their letter of 31.7.2002.

6. A representation followed to the department - duly forwarded by the Director General of Income Tax (Inv.) Jaipur to Dy. Chief Controller of Accounts, New Delhi vide Annex. A/11. As he was retiring in October 2004, he put forward his pension papers in July 2004 and came to know that some recovery was being ordered on the alleged ground of wrong pay fixation. The Assistant Director of Income Tax (Inv.I) Mr. Rahul Dhawan, took up the case of the applicant with Principal Controller of Accounts in C.B.D.T. on 20.9.2004 vide Annex. A/14 with request that the objection may be withdrawn and pensionary benefits allowed. This

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letter analysed the rule position in detail. It was followed by a letter of Director General, Income Tax, Jaipur on 7.10.2004 vide Annex. A/15. But nothing happened and so this O.A. was filed after sending a representation to the Zonal Accounts Office on 1.11.2004 by the applicant. However, that very day i.e. 1.11.2004, an order was issued vide Annex. A/1 – for recovery.

7. The grounds raised in challenging issue of revised pay fixation and counting of special pay are as follows :-



(i) That Special Pay was granted in accordance with the Circular of 7.12.1970 and so, Special Pay being merged with the higher pay scale on his completion of continuous three years of drawing such pay scale is absolutely legal, justified and in accordance with rules existing at that time.

(ii) That the department had clearly erred in law in not appreciating the fact that none of the circulars referred in the various objections raised from time to time is applicable to him and further the merger of Special Pay is in accordance with law and circular.

(iii) That the department has clearly erred in law in not appreciating the fact that according to CCS (Pension) Rules, once the verification has been made on completion of 25 years or before five years of retirement, it can not be reopened.

(iv) That the department has further erred in law in not appreciating the fact that general rule of law as established and approved by the various Courts of the country clearly states that no circular/order would have

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retrospective operation until and unless specified in that order itself.

(v) That the general clauses act also says that the rights once given to a person cannot be taken away by a corrigendum or amendment.

8. Learned counsel of applicant and respondents have been heard and pleadings perused. Mr. Vineet Mathur, learned counsel for respondents has pleaded mainly as follows :-



(i) Merger of special pay for the purposes of fixation of pay on promotion is not correct as neither the condition regarding the merger of special pay for the purpose of fixation is mentioned in the sanctioned order dated 1.4.1972 issued by the Commissioner of Income Tax, Rajasthan, Jaipur nor in the letter dated 10.12.1970 issued by the Ministry of Finance, Department of Revenue and Insurance, New Delhi. When the special pay granted was not in lieu of a separate higher scale from the very beginning, the question of special pay taking into account for fixation of pay in the higher post does not arise.

(ii) On review of the service book at the time of service verification, the objection raised vide letter dated 27.4.1995 issued by the ZAO, CBDT, was correct. In that letter it was never denied that the special pay was not granted in lieu of higher pay scale and hence, it cannot

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be taken into account at the time of fixation of pay on promotion to the post of Head Clerk on 9.10.1975.

(iii) As per letter dated 31.3.1979 issued by the Ministry of Finance, Department of Revenue, the special pay cannot be taken into account for purposes of fixation of pay on promotion.

9. The issues for consideration are :

- a) Was the pay fixation done on promotion as Head Clerk by taking into account the Special Pay – based on any rule /instruction then prevailing ?
- b) When should the Service Book be verified of a Government servant ?
- c) When did the department first come to know about wrong pay fixation ? and
- d) Is it proper to revise the pay fixation in 1995 after nearly 23 years ?

10. Though neither party has enclosed or referred to the order of pay fixation or even its date – it is to be presumed that this was done on the basis of a letter of Ministry of Finance (Revenue and Plan) of 6.12.1972 where it was provided that the special pay for the post of U.D.C. in Internal Audit parties should be treated as having been sanctioned in lieu of higher scale of pay. This attracted provisions of Government of India, Ministry of Finance O.M. No. 6(1) E III / B / 65 of 25.2.1965 where it was provided that :-

“(13) Treatment of special pay for purpose of pay on promotion :

(a) When the special pay is in lieu of a separate higher scale – In cases

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where a Government servant is in receipt of a special pay in a post, his pay on promotion to a higher post may be fixed after taking into account the special pay drawn in the lower post subject to the conditions mentioned below :



- (i) The special pay in the lower post should have been granted in lieu of a separate higher scale.
- (ii) If the special pay has been drawn in the lower post continuously for a minimum period of three years on the date of promotion, the pay in the higher post will be fixed, under the normal rules, treating the special pay as part of basic pay.

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The applicant, a U.D.C., was appointed in the Internal Audit Party on 15.7.1972 and was promoted as Head Clerk on 9.10.1975 as revealed by para 4.3 of O.A, order refixing pay dated 30.11.2004 of Assistant Director of Income Tax (Inv.1) and reply paras 4.3 to 4.6. Thus, he had put in more than three years with special pay in the Audit Wing and it has to be presumed – in the absence of rebuttal that the pay on promotion was fixed under the above mentioned instructions. This underwent change in 1979 (after nearly four years of pay fixation) when a letter was issued to all Commissioners of Income Tax on 31.12.1979 by the Under Secretary in the Department of Revenue (Annex. R/6) that "in their letter of 1972 creating additional posts for Audit Organisation, it was inadvertently stated that special pay for the post of U.D.C. in Internal Audit Parties should be treated as having been sanctioned in lieu of higher scale of pay. The special pay to U.D.C. in Internal Audit Parties is in fact, granted for arduousness of work and not in lieu of higher scale of pay."

Therefore, without any hesitation, it has to be held that the pay was fixed

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as per instructions of the Ministry of Finance. The first issue, therefore, has to be answered in affirmative.

11 Under well established instructions of office procedure, service books of all non-gazetted employees are to be verified periodically. Rule 81 of GFR provides that :



“Annual Verification of service.-

At a fixed time early in the year, the Service Books shall be taken up for verification by the Head of Office who after satisfying himself that the services of the Government servants concerned are correctly recorded in each of the Service Books shall record in each case a certificate in the following form over his signature :-

“Services verified up to (date) from (the record from which the verification is made).”

The annual verification of service is intended to ensure that the Head of the Office has satisfied himself that the Government servant's entire service as recorded in the Service Book, is completely borne out by actual facts. No certificate of verification need be recorded by the Head of the Office in respect of periods of foreign service, if any. The entries made in the Service Book by the Accounts Officer under the provisions of SR 203 will be sufficient for this purpose.”

In the instant case, the verification does not seem to have been done as per the procedure and therefore the revised instructions of 1979 were not implemented in time, leading to avoidable complications. The second issue therefore, resolves in this manner.

12. The respondents seem to have stumbled upon the discrepancy only in 1995 when the Zonal Accounts Officer realised that the services of applicant from 1.11.1970 to 9.11.1976 had not been verified and that the pay fixation on his promotion on 9.10.1975 was defective. A period of nearly twenty years thus

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separated the event and its detection. No reasons or explanation is offered and none can be presumed.



13. All that is being said by way of reply to the ground of delay is that a person is not entitled for any payment in violation of the rules and if some wrong payment has been made to any government servant de hors the rules then the government / respondents are well within their rights to recover the same and therefore re-fixation in the present case is just, proper and correct.

So, we have to see, if there was a violation of rules in the instant case and if so, the applicant was responsible ? The pay fixation done in 1975 – as has been revealed, was strictly as per the instructions then existing and was not done by the applicant. The drawal of pay thereafter was definitely under authority and continued for nearly 23 years. It was only then detected to be unauthorized. We are pretty sure that the applicant was not his own drawing and disbursing officer and that this drawal was being allowed by some one who should have been aware of revised instructions. It hardly needs recollecting that financial liability cannot be fastened retrospectively. Moreover, the revised instructions of December 1979 do not even attempt to give it retrospectivity – and attempt cannot be made to mean it otherwise.

14. Having so traversed the factual and legal aspects of the case, it is difficult to sustain the impugned order or the logic behind it contained in Annex. A/1 dated 1.11.2004 issued by respondent No. 4. The same is therefore set aside. The respondents are directed to calculate all retiral dues accordingly and arrange

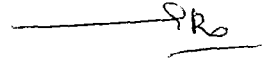
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payment within 90 days enclosing therewith the calculation chart.

15. Before parting with the case, it appears necessary to make two observations relating to procedure. The O.A. in para 4-J alleges positive discrimination but it has not been responded to. Secondly Mr. Rahul Dhawan, Assistant Director, Income Tax, who championed the cause of the applicant with the Principal Controller of Accounts in C.B.D.T. in September 2004; with equal alacrity opposed this O.A. by swearing reply in February 2005. Compulsions of situation apart, at least for the sake of propriety, he should have thought a second time.

16. O.A. accordingly disposed of. No costs.



(G.R. Patwardhan)
Administrative Member

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