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**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR**

ORIGINAL APPLICATION No. 203/2008

Date of Order : 24.05.2012

(Reserved on 15.02.2012)

**HON'BLE MR. SUDHIR KUMAR, MEMBER (A)
HON'BLE MR. V. AJAY Kumar, MEMBER (J)**

P.D Sharma
S/o Late Shri Jaggannath Sharma,
R/o Badada Bagh, Gali No.1,
Bhilwara Official Address Retired Income
Tax Inspector in the office of Income Tax
Officer, Bhilwara.

...Applicant

(By Advocate: Mr.Kamal Dave)

Versus

1. Union of India,
Through the Secretary,
Ministry of Finance, Deptt. Of Revenue,
Government of India, New Delhi.
2. Chief Commissioner of Income Tax,
Rajasthan Central Revenue Building,
Near Statute Circle, Jaipur.
3. Secretary, Central Board of Direct Taxes,
New Delhi.
4. Commissioner of Income Tax, Udaipur (Raj.)

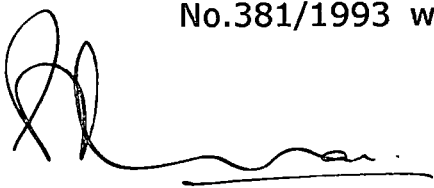
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(By Advocate: Mr. Varun Gupta)

ORDER

PER MR. SUDHIR KUMAR, MEMBER (A):

The applicant retired as Income Tax Inspector, and is
before us in this third round of litigation. His first OA
No.381/1993 was decided on 02.12.1994, and the second OA



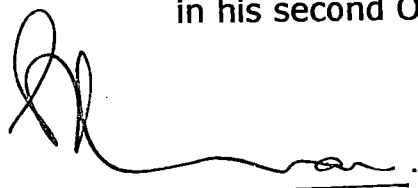
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No.76/2004 had been decided by this Tribunal on 09.08.2007.

Thereafter, in compliance of the order of this Tribunal in the said second OA, the respondents passed a speaking order dated 09.08.2007. But since the applicant's grievance is still not satisfied, he has come before us in the present Application, with the following prayers:-

- a) That by quashing order impugned dated 09.08.2007 and also the reasoning given for rejection of applicants claim the respondents may be directed to allow the benefit of financial up gradation in favour of the applicant as per his entitlement with all consequential benefit and also to piously implement the judgment of Hon'ble Central Administrative Tribunal.
- b) Since the CCIT is scuttling the issue by one pretext or the other by denying the benefit extended by the Hon'ble CAT, it is respectfully submitted that a clear order may kindly be passed specifying the financial up-gradation in the scale of Office Superintendent and Administrative Officer since 9.8.1999 and further to extend all the consequential benefit including the revised pensionary benefit the CCIT may have no further chance to deny the benefit intended to be given to the applicant by the CAT in its order dated 29.11.2006.
- c) Any other appropriate order or direction, which may be considered just and proper in the light of above, may kindly be issued in favour of the applicant.
- d) Costs of the application may kindly be awarded in favour of the applicant.

2. For describing the case of the applicant, we may borrow the summary of the case from the judgment dated 29.11.2006 in his second OA No.76/2004 as follows:-



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"2.Skipping up superfluities, the material facts leading to filing of this case are that the applicant was initially appointed as Vaidya and was drawing pay in the pay scale of Rs.425-640 (revised Rs.1400-2300/5000-8000), at the time when he was declared surplus from 1.3.1974. He was re-deployed in the office of Inspecting Assistant Commissioner, Income Tax, New Delhi, where he joined his duties on 16.8.1974, as UDC. The pay scale of post of UDC was lower than that of Vaidya, but his pay was protected on account of the fact that he was in the higher pay scale prior to the declaration as surplus. He was further promoted to the post of Tax Assistant in the year 1982. However, his pay in the scale of Rs.425-640, was protected since the pay scale for the post of Tax Assistant was also in lower grade then the one he was already drawing. His pay reached to the maximum of the pay scale of Rs.1400-2300 on 1.6.1991 and he faced stagnation. He filed an Original Application No.381 of 1993 wherein this Bench of the Tribunal was pleased to direct the respondents to find out some avenues of promotion in respect of the applicant. He made numerous representations and the response was that the same were forwarded to the CBDT.

3. In that second OA of his, the applicant had come before this Tribunal with the same grievance that he had not been provided financial upgradation under the ACP scheme, even though he had remained in the grade of Rs.5000-8000/- ever since the date of his appointment in the respondent Department, and was even promoted to the post of Head Clerk in the same pay scale. Only later he was promoted to the post of Inspector in the pay scale of Rs.5500-9000, w.e.f. 26.09.2011. The respondents had denied the eligibility of the applicant for grant of ACP benefits, since he had already been given multiple promotions, and, therefore, the question of applicability of ACP scheme to his case did not arise, which is a scheme only for the



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employees who remain stagnated in a pay scale without any promotions.

4. Without going into the details of his eligibility for such ACP benefit or not, in view of the higher pay scale already enjoyed by the applicant, the Bench on 29.11.2006 had relied upon its earlier judgment in the case of **Jasveer Singh & Ors Versus Union of India & Others**, in OA No.129/2005 decided on 15.11.2006, in which it was held that if the higher grade post, to which a person when posted on promotion carries an identical pay scale, the individual will not be considered as having got the promotion. In the result, the applicant's second OA No.76/2004 was allowed, and the respondents had been directed to consider the case of the applicant for grant of ACP benefits on completion of 12/24 years of service, with effect from 09.08.1999, the date of introduction of the ACP scheme, allowing necessary adjustment to be made in respect of the subsequent promotion given to the applicant.

5. Thereafter, the applicant has filed the present third OA, since the respondents have once again denied the grant of financial upgradation under the ACP Scheme on the premises stated in the impugned order as follows:-

"On being declared surplus by your parent Deptt., joined the Income Tax Department as UDC on 26.8.74. After joining as UDC you were granted two regular promotion, the first promotion from UDC to TA in the year 1989 and second promotion as Head Clerk in the year 1998. Subsequently, promotion to the



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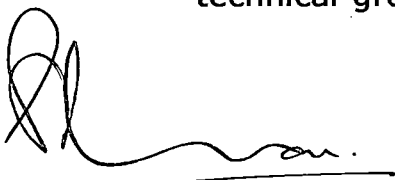
cadre of Inspector was granted in 2001. Since you had not qualified the Deptt. Exam for ITO the question of promotion to the cadre of ITO did not arise.

It is clear from the above facts that you had already availed a regular promotion in the grade of TA in 1989 and second promotion as Head Clerk in 1998 and third promotion as Inspector in the year 2001 where you were fixed in the higher pay scale of Rs.5500-9000 (Revised pay Rs.6500-10500) and therefore the terms and provisions of ACP Scheme regarding allowing of financial up-gradation are not applicable in your case.

Even, otherwise, in terms of clarification of the DOP&T vide OM dated 10.02.2002, "all promotion norms have to be fulfilled for up-gradation under the scheme. As such, no up-gradation shall be allowed if an employees fails to qualify departmental/skill test prescribed for the purpose of regular promotion ", accordingly you were not eligible for further progression beyond the pay scale of Income Tax Inspector as you have not qualified the departmental examination for the next higher post i.e. of Income Tax Officer.

In view of the aforesaid facts and circumstances of your case, a decision has been taken by the Appropriate Authority that no financial benefit under the ACP Scheme can be granted to you."

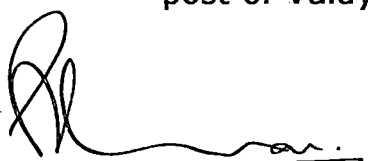
6. This is the third round of litigation filed by the applicant. When he had first come before this Tribunal in OA No.381/1993, in the order pronounced on 02.12.1994, the Bench had declined to disturb the then impugned order dated 03.08.1983, holding it to be technically correct, but had given directions to the respondents to find out some other avenue of payments or any other suitable relief, which can be granted to the applicant, so that his case may not remain a hard case, rejected only on technical grounds throughout the career of the applicant. Since



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we are faced with these two different and exactly opposite orders passed by the Tribunal earlier, one rejecting and the other upholding the claim of the applicant, we do not feel bound by the findings of either of the two earlier judgments in his case, which have arrived at findings obviously contrary to each other. While in the case of the orders of the Apex Court, it is customary to give greater weightage to the latest order, if the earlier contrary order has not been declared per-incuriam, and holds the field with an opposite finding, there is no such requirement of judicial discipline in the case of the orders of this Tribunal, that on similar facts, in the context of the case of the same applicant, the later order would hold the field and the arena in which it operates, and the earlier order of another concurrent Bench, which had appreciated the facts of the case of the same applicant differently, can be given a go by altogether. This Bench therefore considers freed of the dilemma of following the judicial discipline by necessarily following only one of those two earlier orders.

7. The trouble and the problem of the applicant has emerged from the fact that his initial appointment was on the post of a Vaidya, in another department, the Ayurvedic Department, where he was an employee of the Subordinate Service or technical staff, and did not at all belong to the formal structure of groupings of the employees as a Group 'C' or 'D'. When that post of Vaidya in the Ayurvedic Department, which the applicant



was holding initially upon his appointment, was abolished due to a down-sizing of the Ayurvedic Department, he was declared surplus on 01.03.1974, and his services were placed with the Surplus Cell of the Union of India. During the period of his being with the Surplus Cell, his pay as last drawn was protected, without any work being extracted from him, and he also did not hold any lien against any post in any department. After a gap of more than five months, on 26.8.1974, the applicant was re-deployed as an employee in the office of the Inspecting Assistant Commissioner, Income-tax Department, New Delhi, on the post of a UDC, and came to acquire a fresh lien in the Income-tax Department. But while he was earlier drawing pay in the pay scale of Rs.1400-2300 as Vaidya, prior to his having been declared surplus, which pay was being protected, his new post of UDC was in the lower pay scale of Rs.1200-2040. The case of the applicant was considered favourably by the respondents, and his last pay drawn was protected at the level of the pay he was drawing earlier in the higher pay scale, as Vaidya of the Ayurvedic Department, even when he moved from the Surplus Cell in the lower pay scale of UDC of Income-Tax Department.

8. The applicant thereafter appeared in the Limited Departmental Competitive Examination for promotion to the post of Assistant, and was selected for the same in the year 1992. Accordingly, he came to occupy a lien in the post of Tax Assistant, the pay-scale of which was also only Rs.1350-2200,



and even though he was notionally given two advance increments in the Tax Assistant's grade, his actual pay continued to be protected by the respondents, in his earlier pay scale of Rs.1400-2300, in which he was before being declared surplus. On 01.06.1991 he reached the maximum of the pay scale Rs.1400-2300, which was held personal to him, and, thereafter, no increments could have been granted to him in that pay scale of Rs.1400-2300.

9. When on 13.09.1991 the Government introduced the Career Advancement Scheme for Group 'C' and 'D' employees, applicable to the employees who had not been promoted on regular basis even after one year after having reached the maximum scale of their said post, the applicant herein still did not fulfill any of the three conditions prescribed in Para 2 of the Career Advancement Scheme Memorandum dated 13.09.1991. He was directly recruited to a Group 'C' post; his pay on appointment to such a post was not fixed at the minimum of the pay scale of the said post; and he had not stagnated for one year on reaching the maximum of the scale attached to such post.

10. The applicant herein has throughout been drawing his pay at a level much higher than the pay scale applicable to the post which he held, but yet he pleaded that since his promotion to the post of Tax Assistant has not resulted in any monetary benefits to him, as he had already been enjoying higher scale of pay, and

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had even reached the maximum of the much higher pay scale which was personal to him, and therefore he was entitled for the benefits of Career Advancement Scheme. But the Bench, while deciding the applicant's case, made a distinction in the case of the applicant between "promotion simpliciter", and "promotion technical", and had held that since the applicant had continued to be in the higher pay scale, which was personal to him, he could be considered to have been only "technically promoted", in an advancement in part towards his original grade and the pay scale which he was already drawing as personal to him. In view of this, the Bench had held that the applicant's case is a hard case, in as much as while he did receive "technical promotion", he could not get financial benefits out of such promotion, because he had already been enjoying much higher salary as personal to him. The Bench had therefore directed the respondents to find out some avenues of providing to the applicant promotion, or any other suitable relief, which could be granted under the Rules to the applicant.

11. When no such relief was granted in terms of the Career Advancement Scheme after a lapse of more than 10 years, the applicant had come before this Tribunal in his second OA No.76/2004. But it is seen that the Bench while passing the order dated 09.11.2006 on this second O.A., did not determine as to whether the benefit of ACP scheme has to be granted to the applicant on completion of 12/24 years, the date of his



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eligibility for the grant of ACP Scheme financial upgradation to the applicant, and as to which pay scale should be accorded to the applicant, as he was already enjoying a pay scale higher than that he would have been holding in the substantive post which he held on that date. The impugned orders passed by the respondents on 09.08.2007 have therefore to be examined in the light of the above situation.

12. In their reply written statement, the respondents clearly stated that the applicant had been promoted from the post of UDC to the post of Tax Assistant in the month of June, 1989, and therefore on the basis of the orders under the 1991 Scheme for Career Advancement of Group 'C' employees, he could not now plead that no promotion was granted to him, just because he was already drawing a higher salary as personal to him even prior to such promotion. It was submitted that the relief claimed by the applicant is misconceived, and his request for the grant of financial upgradation is untenable, as the benefits of such financial upgradation are applicable only in such cases where no substantial promotion has ever been granted to an employee. They stated that there is no provision for the provision of financial upgradation under ACP scheme which would take the employee's pay scale much beyond his entitlement in relation to the substantive post held by him. It was, therefore, prayed that the OA is liable to be rejected with costs. The respondents had also produced a photocopy of almost the entire service book of

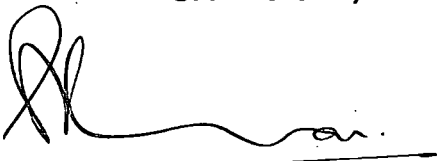


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the applicant as proof of the various promotions accorded to him.

13. Heard. Learned counsel for the applicant vehemently argued on the point that this was a case in which an employee was left to be stagnating in a pay scale from 26.08.1974, the date of his absorption in the respondent department, till his promotion to the cadre of Income-tax Inspector in the year 2001, and in the meanwhile the ACP benefits had been denied to him only on the ground that he had not qualified the Departmental Examination for the next higher post of Income-tax Inspector, because of which he could not be considered to be eligible for the grant of financial upgradation to a pay scale beyond the pay scale of the post of Income tax Inspector, which was Rs.5500-9000, subsequently revised to Rs.6500-10500. The case of the applicant is that in as much as it is true that he has enjoyed for many long years a salary higher than that commensurate with the substantive posts assigned to him, first as UDC, and then as Head Clerk, and later as Income-tax Inspector, and yet he has had to come before us claiming that he was facing stagnation, because he had reached the maximum of the higher pay scale which was personal to him from the date of his de-employment in the Income-tax Department on 26.08.1974.

14. The Coordinate Bench which had earlier decided his first OA No.381/1993 on 02.12.1994, has already gone into the



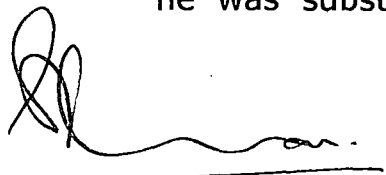
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question of "Promotion Simplicitor" Versus "Promotion Technical". However, the ACP scheme, which was notified on 09.08.1999, did not make any such distinction between "Promotion Simplicitor" and "Promotion Technical".

15. The meaning of the word "promotion" was considered by the Hon'ble Apex Court in the case of **Director General, Rice Research Institute, Cuttack & anr v Khetra Mohan Das,** 1994 (5) SLR 728, and it was held as follows:-

"A promotion is different from fitment by way of rationalisation and initial adjustment. Promotion, as is generally understood, means; the appointment of a person of any category or grade of a service or a class of service to a higher category or Grade of such service or class. In C.C. Padmanabhan v. Director of Public Instructions, 1980 (Supp) SCC 668: (AIR 1981 SC 64) this Court observed that "Promotion" as understood in ordinary parlance and also as a term frequently used in cases involving service laws means that a person already holding a position would have a promotion if he is appointed to another post which satisfies either of the two conditions namely that the new post is in a higher category of the same service or that the new post carries higher grade in the same service or class".

16. In the instant case, while the promotion of the applicant herein first to the post of Tax Assistant and later as Head Clerk, had satisfied the conditions of his being appointed to a new post, on a higher category of the same service, and the new post also carried an attached higher grade/pay scale, both times the benefit of that higher grade/pay scale could not be accorded to the applicant, because he was already enjoying a pay scale, and grade much higher than that attached to the two posts to which he was substantively promoted. Therefore, in terms of the



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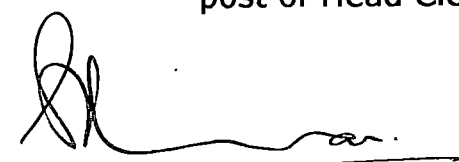
meaning of the word "promotion" as laid down by the Hon'ble Apex Court in the above case, and taking into account the fact that the applicant was substantively promoted when he moved first from the post of UDC to the post of Tax Assistant, and then from the post of Tax Assistant to the post of Head Clerk, and thereafter as Income-tax Inspector, it cannot be said that the applicant was never promoted.

17. In case of **State of Rajasthan v. Fatehchand Soni**, (1996) 1 SCC 562, the Hon'ble Apex Court held their promotion can either be to a higher pay scale, or to a higher post. In the case of the present applicant, since he had already been enjoying a pay scale much higher than all the posts which he came to substantively occupy, his "promotion" to the higher posts is evident, to a higher post of Tax Assistant from that of the UDC, and then to the higher post of Head Clerk, which qualified both times to be advancement, or conferment of higher honour, dignity, rank, or associated substantive grade.

18. In the result, since as per the law laid down by the Hon'ble Supreme Court through the above cited case, it can ~~not~~ be held that the applicant did get promotions to the higher posts even though he could not get higher emoluments on such promotions, because he was already enjoying much higher emoluments as personal to him, ^{and} obviously it cannot be said that he was stagnating in either the post of UDC, or had stagnated in the post of Head Clerk. The ACP scheme is only a safety-net scheme,

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and a protection against stagnation in a particular post or pay scale for long without any promotions. Therefore, the claim of the applicant for the grant of any further higher pay scales/grades of pay, appears to be untenable. Under the principle of "quantum meruit", he was entitled only to the lower pay scales associated with the posts which he held on substantive basis. But he had continued to enjoy much higher pay scale than the principle of "quantum meruit" would have entitled him to otherwise legally demand from the respondent department on the basis of the substantive posts held by him.

19. In the instant case, the applicant has got repeated promotions technically, while continuing to enjoy in his personal capacity a pay scale much higher than that of the concerned posts. Therefore, in terms of the stipulation of requirement of stagnation for a period of 12/24 years of service for the consideration of his case for the grant of first and second financial upgradation under the ACP scheme respectively, it cannot be held that the applicant had ever stagnated, without any promotion whatsoever. The OA is, therefore, rejected, but there shall be no order as to costs.

V. 2- anur
(V. Ajay Kumar)
Member (J)


(Sudhir Kumar)
Member (A)

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