CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA No.505/11& OA No.262/12

Tuesday....this the 5th....day of February 2013.

CORAM

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Ms. K.NOORJEHAN, ADMINISTRATIVE MEMBER

OA No.505/2011

Rajeev K., age 37 years
S/o late V.K.Nair,
Inspector of Central Excise (on deputation)
Office of the Commissioner of Central Excise,
Customs & Service Tax
Central Revenue Building,
I.S.Press Road, Kochi-18.
Presently residing at 4th Floor
Providence Plaza, Providence Road
Kochi-18. Applicant

[By Sr. Advocate: Mr.O.V.Radhakrishnan]

Versus

1. Union of India, represented by
Secretary, Department of Personnel & Training
Ministry of Personnel, Public Grievances & Pensions
New Delhi.

2. Under Secretary to Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs
HUDCO Vishala (9th Floor)
Bhikaji Cama Place, R.K.Puram
New Delhi-110066

3. Central Board of Excise and Customs
represented by its Chairman
North Block, New Delhi-110 001.

4. Commissioner of Central Excise,
Customs & Service Tax
Central Revenue Building, I.S.Press Road

Kochi-682 018.

5. Commissioner of Central Excise & Customs
Commissionerate Surat-I, New Central Excise Building
Opposite Gandhi Baug, Chowk Bazar
Surat-395 001.

6. Chief Commissioner of Central Excise,
Customs & Service Tax
Cochin Zone,Central Revenue Building,
I.S.Press Road, Kochi-682 018. Respondents

[By advocate: Mr.Thomas Mathew Nellimoottil, ACGSC]

OA No.262/2012

Shemmy Jose, age 42 years
D/o Sri P.P.Jose
Inspector of Central Excise (on deputation)
Office of the Superintendent of Central Excise,
Service Tax Range, Thrissur.
Residing at 'Bethlahem', Enarc Gardens
Cheroor Post, Thrissur-680 008. Applicant

[By Sr. Advocate: Mr.O.V.Radhakrishnan]

Versus

1. Union of India, represented by
Secretary, Department of Personnel & Training
Ministry of Personnel, Public Grievances & Pensions
New Delhi-110001

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North Block, New Delhi-110 001.

4. Commissioner of Central Excise,
Customs & Service Tax
Central Revenue Building, I.S.Press Road

Kochi-682 018.

5. Commissioner of Central Excise & Customs and Service Tax
Central Revenue Building, Mananchira, Kozhikode

6. Chief Commissioner of Central Excise,
Customs & Service Tax, Vadodara Zone,
2nd Floor, Annex Building
Race Course Circle,
Vadodara-390 007.

7. Chief Commissioner of Central Excise,
Customs & Service Tax, Cochin Zone,
Central Revenue Building,I.S.Press Road,
Cochin-682 018. Respondents

[By advocate: Mr.Thomas Mathew Nellimoottil, ACGSC]

These two applications having been heard together on 31st January 2013, this Tribunal on 5th February 2013 delivered the following:

ORDER

HON'BLE DR.K.B.S.RAJAN, JUDICIAL MEMBER

As the subject matter involved in these two OAs is one and the same, both the OAs are dealt with in this common order. For reference purpose, the details given in OA No.505/11 have been taken into account.

2. Briefly stated, the case relates to interpretation of provisions for inter-commissionerate transfers of the respondent department on 'spouse ground' and 'compassionate ground'. Transfer from one cadre controlling authority to another is called inter commissionerate transfer. Prior to 19th Feb 2004, inter commissionerate transfers were permissible but subject to loss of seniority. As certain administrative difficulties resulting from protracted litigation persisted, it was decided by the Ministry of Finance vide Annexure A-1 order dated 19.02.2004 that no inter commissionerate transfer shall be allowed for any Group-B, C and D employees. Instead, in exceptional circumstances depending upon the merit of each case, such transfer shall be allowed on deputation basis for a period of 3 years subject to approval of the transferrer and transferee cadre controlling authorities. The period of deputation could be extended subject to certain

prescribed conditions. The applicant in OA No.505/11 was the beneficiary of the aforesaid conditions and had been sent on deputation from Surat Commissionerate to Cochin Commissioenrate vide Annexure A-2 order dated 18.09.2006. The period of deputation was extended as could be seen from Annexure A-4 order dated 24.09.2010.

3. The ban imposed on inter commissionerate transfers vide Annexure A-1 order dated 19.02.2004 was partially lifted in respect of the following categories:-

(a) In cases where the spouse is employed in Central or State Government or any Public Sector Undertaking coming under the administrative control of the Central or State Government (order dated 27.03.2009 refers). This order has further been elucidated that such transfer on spouse ground shall be applicable to all categories of employees, namely Direct Recruitment Quota as well as Promotion Quota employees vide Annexure A-7 order dated 7th August 2009;

(b) Transfer of such persons appointed against 5% compassionate vacancies quota. [Order dated 29th July 2009 -Annexure A-6 refers].

4. In the aforesaid categories, it has also been stated that when such transfer is effected, the same shall be without any loss of seniority gained in the transferrer commissionerate.

5. Original Applications were filed by a number of employees including Cochin Customs Ministerial Organization and All India Customs Inspectors Organization challenging the legal validity of the provisions of the aforesaid orders dated 27.03.2009 (A-5) and 29th July 2009 (A-6) to the extent that such transfers were permissible without loss of seniority [OA Nos.643/09, 650/09 and OA 835/09 refer]. OA No. 400 of 2010 came to be filed by the applicant therein as he was not given the benefit of the inter-commissionerate transfer with due seniority. (This

applicant happened to be respondent in the other O.A No. 835 of 2009) The aforesaid applications were considered and decided and a common order passed vide Annexure A-14 order dated 16th May 2011. After analyzing the rules regulating the grant of seniority in cases of transfers and after taking into account a number of decisions of the Apex Court, the Tribunal has held as under:-

> *"24.From the arguments advanced by the learned for the parties and on perusal of the various judgments of the Apex Court regarding transfers and seniority referred to above, it is abundantly clear that when a transfer is ordered from one cadre to another in public interest, the transferee shall carry with him his original seniority when posted in the new cadre and if the transfer is not in pubic interest but on the request of the employee concerned, he will lose his seniority in the parent cadre and join the new cadre with bottom seniority i.e. below the last employee in the seniority list of that cadre. The transfers on public interest are ordered by the Government in the larger interest of the public and based on the conditions of service such as All India transfer liability etc. The transfers on 'spouse ground' and on 'compassionate ground' are not automatically made by the Government but they are made on the requests of the employee concerned. Now the question is whether any 'public interest' is served by transferring and posting the spouse at the station where the other spouse is posted. It is purely a policy matter which the Government has to take after due consideration of all the relevant facts including the legal rights of others who may be adversely affected. The policy of the Government of India so far in general is that in the case of Inter-cadre transfers made on the request of the employee concerned even on 'spouse ground' or on 'compassionate ground', the transferred employee would lose the seniority position enjoyed by him in his parent cadre. Same was the position maintained so far by the respondents themselves in the matter of Inter-Commissionerate Transfers of their Group-B, C and D officials. The impugned orders granting ICTs to Group-B, C and D employees beyond the Commissionerate having common cadres i.e. from one cadre controlling authority to another, without any loss of seniority stating that such transfers are made in public interest, and, therefore, there is no question of any loss of seniority is a shift in policy. The respondents have issued those orders by interpreting the DoPT's O.M.No.28034/7/86-Estt(A) dated 3.4.1986 as amended from time to time which provide that "a husband and wife are, as far as possible, and within the constraints of administrative convenience, posted at the same station" whether the CBEC is empowered to take such a policy decision or not. The questions those would arise in this regard are (i) whether the CBEC's aforesaid interpretation of the DoPT's order is with the prior approval of the DoPT and if not (ii) whether the CBEC has the competence to make such an interpretation. The records made available by the respondents show that the advice of the DoPT was not obtained by them before they have issued the impugned orders. The CBEC is only a subordinate office under*

the Department of Revenue which in turn is under the Ministry of Finance, Government of India. Clause (3) of Article 77 of the Constitution of India has provided for the Allocation of Business of India among the Ministries. In terms of the aforesaid provision of the Constitution, the President has promulgated "the Government of India (Allocation of Business) Rules, 1961". "Recruitment, Promotion and Morale of the Services" is one of the businesses allocated to the Department of Personnel and Training under the Ministry of Personnel, Public Grievances & Pensions and the "general question relating to recruitment, promotion and seniority pertaining to Central Services except Railway services and under the control of Department of Atomic Energy, the services under the Department of Defence Research and Development, the erstwhile Department of Electronics, the Department of Space and Scientific and Technical services under the Department of defence Research and Development" come under the same Head. It is, therefore, seen that the policy decision regarding the seniority pertaining to the Central Services is within the exclusive jurisdiction of the DoPT. Individual Ministries/Departments/offices cannot be allowed take its own separate decisions regarding the seniority of their employees without the concurrence of the DoPT. Otherwise, there will be chaos in the matter of personnel administration in the various Ministries/Departments/Subordinate Offices of the Government of India. The applicants in these O.As have not made the DoPT a respondent. However, this Tribunal has directed Mr Millu Dandapani, the learned ACGSC for respondents in O.A.835/2009 to ascertain from the DoPT whether they have to say anything in the matter. However, in spite of his best efforts, they did not give any assistance in the matter.

25. In the above facts and circumstances of the case, we consider that it is premature for this Tribunal to adjudicate upon the question whether the ICT on 'spouse ground' and on 'compassionate ground' is in public interest or not. We, therefore, allow O.As 643/2009, 650/2009 and 835/2009 and dismiss O.A.400/2010. Consequently, we also quash and set aside the impugned orders F.No.A.22015/19/2006-Ad.III.A dated 27.3.2009, letter F.No.A.22015/11/2008-Ad.III.A dated 29.7.2009 and letter F.No.A.22015/18/2009.Ad.III.A dated 7.8.2009 to the extent that the ICTs of Group-B, C and D officers on 'spouse ground' as well as on 'compassionate ground appointments' have been allowed without loss of seniority. However, the respondent-CBEC is at liberty to take up the matter with the DoPT, Government of India to take appropriate decision in the matter.

26. There shall be no order as to costs."

6. The consequence of the above order is that in so far as Annexures A-5 & A-6 are concerned, transfer on inter commissionerate basis of a person on spouse ground or on compassionate ground could be effected but the concession given therein, viz., carry forward of the same

seniority, has been taken out of the said orders of the respondents. Thus, from the date of issue of the aforesaid order of the Tribunal, A-5 & A-6 orders have been curtailed of the provision that such transfer would not result in loss of seniority. It is stated that the above order of the Tribunal has been under challenge before the High Court and is pending consideration.

7. The applicants in the present OAs are not parties to the aforesaid decision and they have contended that when no specific finding has been rendered with reference to public interest element in the transfers on spouse ground or in cases of compassionate appointments, the orders vide A-5 & A-6 cannot be quashed or set aside, to the extent that the transfer could be with loss of seniority. The applicants have , therefore, sought for the following reliefs:-

> *(i) to issue appropriate direction or order directing the respondents 4 to 6 to grant inter commissionerate transfer to the applicant to Cochin Commissionerate on spouse ground without loss of seniority as ordered in Annexures A-5 to A-7 forthwith and at any rate within a time frame that may be fixed by this Hon'ble Tribunal;*
>
> *(ii) to grant such other reliefs which this Hon'ble Tribunal deems fit, just and proper in the circumstances of the case; and*
>
> *(iii) to allow the above OA with costs."*

8. Respondents have contested the OAs. They have stated that in pursuance of the order of the Tribunal vide Annexure A-14, references were made by the Cochin commissionerate to their Headquarters, which in turn referred the matter to the Ministry of Personnel and the Ministry of Personnel had given certain clarifications, on the basis of which Annexure R-1 O.M. Dated 2.8.2011 came to be issued. The said letter reads as under:-

"By Speed Post
F.No.A.22015/23/2011-Ad.IIIA
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs

Room No.502, Hudco Vishala Building,

Bhikaji Cama Place, R.K.Puram, New Delhi-110 066

Dated the 27th Oct. 2011.

To

All the Chief Commissioners/Directors General under CBEC
All the Commissioners in-charge of Directorates under CBEC

Subject: Lifting of ban on Inter Commissionerate Transfer in respect of willing officers in Group 'B', 'C' & 'D' posts under the CBEC – regarding.

Sir/Madam,

I am directed to refer to the Board's letter F No.A 22015/3/2004-Ad.III.A dated 19.2.2004, vide which the Inter Commissionerate Transfer (ICT) in respect of groups 'B', 'C' and 'D' employees were banned. Subsequently the ban was relaxed in phases on spouse ground, compassionate appointment ground and physically handicapped employees vide Board's letters F.No.A22015/19/2006-Ad.III.A. Dated 27.03.2009, F.No.A 22015/11/2008-Ad.III.A dated 29.07.2009 and F.No.A 22015/15/2010-Ad.III.A dated 09.02.2011 respectively. Such relaxation was allowed without loss of seniority and subject to specific conditions mentioned in the above instructions. This was done to facilitate posting of husband and wife at the same station and permitting in respect of employees appointed on compassionate ground basis and for physically handicapped employees without loss of seniority.

2. On consideration of all aspects in the matter of ICT, it has been decided by the Board now to lift the ban on ICT with immediate effect. Accordingly, any willing Group 'B', 'C' employee and the erstwhile Group 'D' employee may apply for transfer from the jurisdiction of one Cadre Controlling Authority (CCA) to another CCA subject to availability of vacancy and on the following terms & conditions:

(i) The concerned two Cadre Controlling Authorities should agree to the transfer.
(ii) The transferee will be placed below all officers appointed regularly to that post/grade on the date of his/her appointment on transfer basis in terms of Para 3.5 of DoP&T's O.M. Dated 03.07.1986. In other words, such a transferee will be junior to those regularly appointed officers prior to his/her transfer. However, such transferred officer will retain his/her eligibility of the parent Commissionerate for his/her promotion to the next higher grade, etc.
(iii) On transfer he/she will not be considered for promotion in the old Commissionerate.
(iv) He/she will not be entitled to any joining time and transfer traveling allowance;
(v) Under no circumstances, request for ICT should be entertained till the officer appointed in a particular Commissionerate/post completes the prescribed probation period.
(vi) The seniority of the officers who were allowed ICT earlier by the various Cadre Controlling Authorities on the basis of Board's letters F.No.A 22015/19/2006-Ad.III.A dated 27.03.2009, F.No.A.22015/11/2008-Ad.III.A dated 29.07.2009 and F.No.A.22015/15/2010-Ad.III.A dated 09.02.2011 shall be fixed as per the present instructions.
(vii) Officers who are presently working on deputation basis from their parent Commissionerate to any other Commissionerate/Directorate and are willing to avail of the ICT in future will have to revert back to their parent Commissionerates first and apply afresh for ICT. The officers who have been continuously on deputation and have been absorb ed on ICT during the interim period from 19.02.2004 (i.e. The date from which the ban became effective) till date, their seniority will be fixed from the date of their joining on deputation in the transferred Zone/Commissionerate.

(viii) A written undertaking (in the enclosed format) to abide by the requisite terms and conditions will be obtained form the officers before the transfers are actually effected.
(ix) All pending Court cases where seniority protection/ICT has been challenged may be handled appropriately in terms of these instructions and necessary compliance furnished to the Board in due course.

3. The above instructions may be brought to the notice of all concerned authorities for compliance.

Yours faithfully
Sd/-
(S.K.DEB)
Deputy Secretary to the Govt. of India
Tele-Fax: 011-26162693

Encl: As above"

9. In view of the above, the respondents have stated that the application deserved to be dismissed.

10. The applicants have filed rejoinders stating that Annexure R-1 has no application in this case as it relates to cases involving persons who do not fall under spouse category or compassionate appointment category. They have also annexed details of persons who have been transferred on inter commissionerate transfer basis in Bangalore Zone (Annexure A-21).

11. Senior Counsel for the applicants submitted that since the applicants in these OAs were not parties before this Tribunal in OA Nos.643/09 & 650/09, there is no scope for them to challenge the aforesaid order which set aside a portion of order dated 27.03.2009. The only remedy available is to file a separate OA as held in the case of Gopabandhu Biswal Vs. Krishna Chandra Mohanty 1998 4 SCC 447; Our attention was invited to para 11 of the said judgment, according to which the only remedy available for a person who wants to challenge the judgment is to file a separate application before the Tribunal and persuade the Tribunal either to refer the question to a larger Bench or if the Tribunal prefers to follow the earlier decision, to file appeal from the Tribunal's judgment and the Tribunal judgment be set aside in appeal. A review is not an available remedy. The senior counsel further argued that

vide para 25 of the order in OA No.643/09 etc. it has been clearly spelt out that it is premature for the Tribunal to adjudicate upon the question whether inter commissionerate transfer on spouse ground and on compassionate ground is in public interest or not. Once such an observation has been made, the question that arises for consideration is whether the Tribunal could have been right in quashing A-5 & A-6 orders. According to the senior counsel, loss of seniority is a condition precedent for any transfer where transfer is not in public interest. A person on such inter commissionerate transfer can retain his seniority in the transferee commissionerate only when his transfer is in public interest. In other words, whether in inter commissionerate transfer either on spouse grounds or in respect of compassionate appointments, the benefit of seniority could be extended, has to be decided on the touch stone of whether transfer of such individual has any public purpose served. When that issue has not been decided by the Tribunal the question of quashing or setting aside A-5 & A-6 orders to the extent it provides for no loss of seniority for the inter commissionerate transfer under spouse or compassionate ground does not arise.

13. The senior counsel further argued that in so far as Annexure R-1 is concerned, its scope and extent is confined to cases of inter commissionerate transfers which do not come under the A-5 or A-6 orders. It is in respect of other willing persons but not in respect of persons on spouse ground or compassionate appointment ground. As regards the contention of the respondents that the DOPT had been consulted, vide para 10 of the counter, the senior counsel has stated that the order at Annexure R-1 not having expressly indicated such a consultation, the same cannot be improved by way of an affidavit as has been held in the Apex Court in many a case.

14. Counsel for the respondents argued that Annexure R-1 has been passed after the matter has been referred to by the respondents to the DoPT as per the advice of the Tribunal vide para 25 of the said order. As per this, Annexure R-1 order dated 27th Oct. 2011, which has been passed

in the wake of consultation with DoPT, transferee will be placed below all the officials appointed regularly to that post/grade on the date of appointment on transfer basis in terms of point No.3.5 or order dated 3.7.1986 (the said para 3.5 of the order dated 03-07-1986 states that in cases in which transfers are not strictly in public interest, transferred person will be placed below all officials appointed regularly to the grade on the date of absorption). Thus the order of 27th Oct 2011, though not referring to the decision of the Tribunal, is in tandem with the aforesaid decision in that the question of keeping seniority intact does not arise in such inter commissionerate transfers.

15. The senior counsel in his oral rejoinder reiterated that the order at Annexure R-1 has no bearing in so far as the cases falling under spouse ground or compassionate appointments are concerned.

16. Arguments were heard and documents perused. It is to be noted here that in the common order dated 16th May 2011, three of the four OAs assailed the provisions of A-5 & A-6 orders herein in so far as these state that on inter commissionerate transfers on spouse grounds and on compassionate ground, seniority was to be kept intact, while the fourth one i.e. OA No.400/10 came to be filed as the applicant in that case is the beneficiary of the said provision of retention of seniority. The applicant in this OA also happened to be respondents in certain other OAs, dealt with in the common order. OA No.400/10 was, however, dismissed.

17. The senior counsel for the applicants argued that without rendering a definite finding whether inter-commissioneerate transfers on spouse ground or compassionate ground, public interest is involved or not , the order at Annexure at Annexure A-5 and A-6 could not have been interfered with. According to him, it is for the Tribunal to decide the issue whereas, on the one hand holding that without such a finding the case is premature, on the other hand Annexures A-5 and A-6 have been interfered with, in so far they related to the retention of seniority.

One of the members of this Bench (the Administrative Member) is party to the aforesaid order. We have carefully considered the said order. It is the admitted fact that where no statutory rule has been framed in respect of seniority of persons functioning in the respondents' organization, it is the common administrative order issued from time to time by the Nodal Ministry/Department, i.e. the DOPT that should hold the fort. Seen from this angle, vide para 3.5 of the order dated 03-07-1986, in respect of all inter-seniority unit transfers, the benefit of past seniority was not to be granted. That order applies to all the Ministries and departments including the respondents herein. That part of the said order dated 03-07-1986 has not undergone any change when the order at Annexure A-5 and A-6 had been issued. This means that the decision to retain seniority in such cases has been taken by the respondents themselves (of course, with the approval of the Chairman CBEC) without the concurrence of the Nodal Ministry. It is for the DOPT to consider and take a decision whether such inter-commissionerate transfers involved public interest. If the Tribunal has to render a finding, then DOPT should have been inducted as a party to the O.As. In the O.As before us earlier, the DOPT was not a party and thus, the Tribunal cannot render a finding in this regard. . It was therefore, decided to maintain statusquo ante by deleting the concession granted in Annexure A-5 and A-6 orders but at the same time giving liberty to the respondents to move the matter before the DOPT. Discussion in extenso in the said order was only to facilitate the authorities in arriving at a conclusion about the public interest aspect, by keeping in mind various decisions of the superior courts relating to the term 'public interest'. That was the only possible judicious decision. We find no illegality in the Annexure A-14 order so passed by the other Bench.

18. Though the counsel for the respondents submitted that the order dated 27th Oct. 2011 has been passed in the wake of a consultation with the DoPT and the said order applies to all the inter commissionerate transfers, there has been absolutely no reference in the said order either to

the decision of the Tribunal or the matter having been referred to DoPT. The tenor of the order dated 27.10.2011 is such that there was a complete ban on inter commissionerate transfer earlier and that only deputation was permitted. Later on the ban was relaxed in respect of two categories of personnel, namely on spouse grounds and on compassionate ground by A-5 & A-6 orders, in which cases such transferred officials would not loss their seniority. Thereafter, vide Annexure R-1 order, the ban in respect of other cases had also been lifted and the willing individuals were permitted to seek inter commissionerate transfer but subject to losing their seniority. It cannot be implied that Annexure R-1 order was passed in pursuance of the advice given by the Tribunal vide last sentence of penultimate paragraph of the order passed by this Tribunal. If the issue of order at Annexure R-1 was after consulting the DOPT, the same be incorporated in the said order by issue of a due corrigendum to the said order.

19. In any event, the said order being under challenge, the Hon'ble High Court is seized of the issue and the decision of the High Court would be applicable uniformly to all.

20. In view of the aforesaid discussions, the two O.As are dismissed. No costs.

K.NOORJEHAN
ADMINISTRATIVE MEMBER

Dr K.B.S.RAJAN
JUDICIAL MEMBER

aa.