

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 212 of 2008

Monday, this the 25th day of May, 2009

CORAM:

Hon'ble Dr. K.B.S. Rajan, Judicial Member

K.G. Luke, S/o. Late Sri George Lukose,
 aged 42 years, Inspector of Central Excise,
 Central Excise Divisional Office, Trivandrum,
 residing at Flat No. 23, AJ Residency, Bakery
 Junction, Trivandrum.

Applicant

(By Advocate - Mr. M.R. Hariraj)

V e r s u s

1. Union of India, represented by the Secretary to Government of India, Department of Revenue, Ministry of Finance, New Delhi.
2. Superintendent of Central Excise, Kundara Range I, Kundara, Kollam District, Kerala.
3. Deputy Commissioner, Central Excise, Customs and Service Tax, Kollam Division, Kollam.
4. Joint Commissioner (P&V), Office of the Commissioner of Central Excise and Customs, ICE Bhavan, Press Club Road, Thiruvananthapuram.
5. Commissioner of Central Excise and Customs, CR Buildings, IS Press Road, Kochi 682 018.
6. Prabhakaran K., Retired Suptt. of Central Excise, Anitha Bhavan, Nellikode, Vadasserikonam P.O., Varkkala, Trivandrum.

Respondents

(By Advocate – Mr. TPM Ibrahim Khan, SCGSC)

This application having been heard on 20.04.2009, the Tribunal on 25.05.09 delivered the following:

ORDER

This application has been filed by the applicant seeking inter alia the following relief:

- "i. Quash Annexure A1, A2, A3, A4, A22 and A29,
- ii. to direct the respondents to expunge the adverse remarks in the annual confidential reports of the applicant for the year 2005-06,
- iii. to direct the respondents to consider the applicant for any promotion for which he was superseded till the date of disposal of the original application as if the adverse remarks against him communicated by Annexure A1 is not in existence by the constitution of Review DPC's and to grant him all consequential benefits."

2. The impugned Annexure A-1 order dated 29.6.2006 is the order, communicating to the applicant of adverse remarks. Annexure A-2 order dated 16.10.2006 is the rejection of the representation made by the applicant against the adverse remarks. The Annexure A-3 is again further response to the representation made by the applicant. Annexure A-4 order dated 6.6.2007 is a summary rejection of appeal on the ground that no provision for appeal lies. Annexure A-22 is the order of rejection passed by the Commissioner on the appeal preferred by the applicant and passed in pursuance of an order of this Tribunal in OA 414 of 2007. Annexure A-29 is again rejection of appeal.

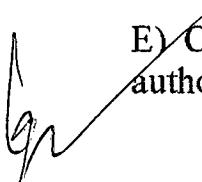
3. Briefly stated the applicant who has been serving as Inspector in Central Excise, Divisional Office, Trivandrum was communicated with the adverse remarks vide order dated 29.6.2006 against which the representation was filed which came to be rejected by order dated 6.11.2006. The appeal preferred before the Commissioner of Central Excise having been rejected without going into the merits on technical ground, the applicant moved this Tribunal in OA 414 of 2007 which came to be decided

on 29th October, 2007 directing the appellate authority to dispose of the appeal. Accordingly, the authorities have considered the appeal but rejected the same vide Annexure A-22 and A-29.

4 The applicant's contention is that recording of adverse remark is fully with malafides as the applicant has leveled strong allegations against respondent No. 6 vide Annexure A-5, A-6, A-7, A-8, A-9, A-10, A-11, A-12 and A-13. All the above communications related to the period of early 2006. The applicant preferred a brief resume of the work done during 1.4.2005 to 31.3.2006 vide Annexure A-14. However, the reporting officer, did not agree with the self appraisal preferred by the applicant and recorded adverse entries as given in Annexure A-1. The reviewing officer has agreed upon with the adverse remarks and other remarks recorded by the reporting officer and in addition he has added "there is no co-relation between the officer's words and deeds. He should be kept away from sensitive post as well as posts with public contact."

5. As stated earlier the representation of the applicant was considered but rejected. Grounds of attack of the adverse remarks as given in paragraph 5 of the OA are as under:

- A) The impugned orders are arbitrary, unjust and violative of Articles 14 and 16 of the Constitution of India.
- B) The adverse entries are vitiated by malafides.
- C) There is no factual basis for the adverse remarks. No warnings or reprimands have been registered and recording of the adverse remarks is not in conformity with the procedure laid down in the nodal Ministries administrative orders.
- D) Rules of natural justice have been given complete go bye.
- E) Communication of adverse remarks should be by the reviewing authority but it is by an authority above the reviewing authority.

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F) The representation made by the applicant has been rejected without application of mind.

G) The 4th respondent has no authority or jurisdiction to consider the appeal after the administrative instructions dated 30.1.1978.

H) The rejection by the 5th respondent to consider the matter on merits is against the directions of the Tribunal as also rules and instructions governing the appeal.

I) Adverse remarks are very vague and unwarranted phraseologies have been used (eg. he is not normal in character).

J) No instructions were given to the applicant whereas the adverse remarks contained "in spite of repeated instructions".

K) Entries have been made without any factual basis

6. The respondents have contested the OA. According to them the adverse remarks recorded against the applicant are legally valid. Occasions were many when the applicant had disobeyed and did not pay attention to the office work. All the false allegations made against the respondents are fabricated, baseless and ill-motivated. The reporting officer and reviewing officer were the competent authority to record the adverse remarks. Annexure A-22 was recorded in pursuance of the order of this Tribunal. Annexure R-2 would go to show that the act of the applicant referred to therein is one of unbecoming of a government servant. Similarly Annexure R-1 would go to show that the applicant's conduct was found to be most indecent and unwarranted. Explanation has been called for from the applicant in regard to certain alleged misconduct vide Annexure R-3. Annexure R-4 series would reflect the conduct of the applicant. Annexure A-22 contains the reasons for rejection of the appeal viz. there is no provision in regard to the same.

7. Applicant has filed his rejoinder wherein he has contended that there is absolutely no proved allegations against the applicant.

8. Additional reply had been filed by the respondents meeting the contentions made in the rejoinder. Annexure R-8 is an order which states that where the reviewing officer is not sufficiently familiar with the work of the Government servant reported upon, so as to be able to arrive at a proper and independent judgment of his own, it should be his responsibility to verify the correctness of the remarks of the Reporting Officer after making such inquiries as he may consider necessary. Where necessary, he should also give a hearing to the Government servant reported upon before recording his remarks.

9. Counsel for the applicant argued that a glimpse of the report by the Reporting officer would show that personal feuds have fouled the air. Remarks like the applicant is not normal in character etc. are not expected to be recorded as the reporting officer has no authority to record so. He has further contended that the ACRs of the applicant both prior to and posterior to the relevant year 2005-2006 will indicate that the applicant has been viewed comfortably by other officers and it is only in respect of respondent No. 6 the applicant has been reported upon throughly adversely.

10. Counsel for the respondents submitted that as there is no authority by the appellate authority to pass any order, Annexure A-22 has to be issued. As regards the adverse remarks against the applicant it is accordingly submitted that the same being by the immediate superior who had supervised the work of the applicant, the said adverse remarks cannot be faulted with.

11. Arguments were heard and documents perused.

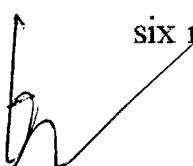
12. Vide Annexure A-22 order dated 8.1.2008 passed by the Commissioner which was stated to be in compliance with the decision of

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this Tribunal, the Commissioner has stated as under:-

“However, with due reverence and respect to the Honourable CAT Bench, I observe that as per the Ministry of Personnel, DOP & T's instruction O.M. No.21011/1/77 Estt. Dated 30.01.1978 only one representation is to be allowed against the adverse remarks. The same point has been again reiterated by the Ministry vide F.No.A.28018/5/94 dated 4.10.1995 which explains that the question regarding the representation against the adverse remarks in the Annual Confidential Report of Group 'C' and 'D' officials was recently examined in consultation with the Department of Personnel & Training, New Delhi, that Department have opined that existing instruction contained in their O M No.21011/1/77-Estt(A) dated 30.1.1978 make it explicit that only one representation is to be allowed against adverse remarks. This representation is to be disposed of by such competent authority as has been prescribed in their O.M. No.51/5/72-Estt(A) dated 20.5.1972 (both copies enclosed). There is no provision for the Government servant concerned to make further representations to any Superior Authority, including the Board, against the decision of the Competent Authority. The only administrative remedy left to an employee is to make representation to the Honourable President of India for expunction of adverse remarks. Under the circumstances explained above, I am left with no option except to reject the representation dated 24.4.2007 without going into the merits of the same.”

13 The above remarks of the Commissioner would amount to mean that the Commissioner is sitting on appeal on a judicial order passed by the Tribunal. The Commissioner has failed to note that in the earlier order dated 29.10.2007, the challenge by the applicant was that the rejection of his appeal, on the ground that as per the existing instructions contained in DOPT OM dated 30.1.1978, only one representation is to be allowed against adverse remarks, is erroneous. The ground of challenge included that the bar as per order dated 30.1.1978 is related to representation beyond six months of rejection and not earlier and the appeal was preferred within

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six months after rejection. The Tribunal considered the above and stated that the bar would apply only where the appeal against the rejection is beyond six months. The term "no memorial or appeal against rejection of representation" has been considered by this Tribunal and it is only thereafter a ruling has been given that an appeal against the rejection of representation would lie, if preferred within six months. Though specifically not mentioned in the aforesaid order of this Tribunal, the term "memorial" on the one hand and "appeal" on the other, would mean two different situations namely, memorial, if addressed to the President and appeal if addressed to other authorities. If the department has felt that the above finding or interpretation of this Tribunal is erroneous, the only course available to them is to challenge the same before competent forum and not to sit on appeal and come to the conclusion that no further appeal lies against the rejection of representation, as done by the Commissioner. Consultation with DOPT, does not in any way give the Commissioner any authority to override the direction of this Tribunal. At best, it may form part of ground of appeal, if the decision of this Tribunal is to be challenged before the High Court.

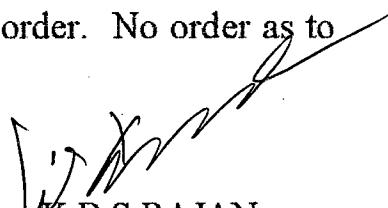
14 In view of the above, the case has to be necessarily remanded back to the Commissioner to consider the appeal preferred by the applicant on merit and come to a judicious conclusion. While so considering, yet another aspect as given in the succeeding paragraph is to be kept in view by the Commissioner.

15 While considering the case, the ACR dossiers were called for and the Confidential Reports made available for perusal, which goes to show that during the year anterior to as well as posterior to the year in question, the applicant's report shows a comfortable position and there is a steep decline in the report for the year 2005-2006. Such a decline in the instant case appears to be unnatural. This is the *prima facie* view of this Tribunal.

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However, comparing the other reports available with the department, the authorities may come to a different conclusion which is left to the competent authority namely the Commissioner.

16 In view of the above, the OA is disposed of with a direction to the 5th respondent to consider the case on merit and arrive at a judicious decision on the appeal preferred by the applicant against rejection of his representation with regard to the adverse remarks. This may be done within eight weeks from the date of communication of this order. No order as to costs.



K B S RAJAN
JUDICIAL MEMBER

sa/abp