

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 225 of 2011

Monday, this the 10th day of December, 2012

CORAM:

Hon'ble Mr. Justice P.R. Raman, Judicial Member
Hon'ble Mr. K. George Joseph, Administrative Member

C.J. Babu, S/o. late Sri.Janadanan Pillai,aged 57 years,
 Income Tax Inspector, Income Tax Office,
 Mattanchery, Kochi – 682 002, Residing at 'Sri Ganga' Netaji Nagar 28,
 Ashramam P.O., Kollam. **Applicant**

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

Versus

1. Union of India, represented by the Secretary to Government of India, Ministry of Finance, New Delhi.
2. Chief Commissioner of Income Tax, (CCA), IS Press Road, Kochi – 682 018.
3. Commissioner of Income Tax, Thiruvananthapuram – 695 003.
4. Additional Commissioner of Income Tax, Kollam – 691 001.
5. Smt.B.Ratnavally, ITI, O/o.Dy.CIT, Central Circle, Kollam – 691 001.
6. Shri.E.N.Mohan, ITI, O/o.Addl.CIT, Range – 2, Kochi – 18. **Respondents**

[By Advocate : Mr. Millu Dandapani,ACGSC (R1-4)]

This application having been heard on 07.11.2012, the Tribunal on 10-12-12 delivered the following:

ORDER

By Hon'ble Mr. K. George Joseph, Administrative Member-

As directed in OA No. 784 of 2010 dated 20.9.2010 the Commissioner of Income Tax, Thiruvananthapuram considered the representation of the



applicant, an Income Tax Inspector, against the adverse remarks in his ACR for the year 2006-07. Based on the clarification given by the reporting officer, the Commissioner of Income Tax decided that the entries in the ACR of the applicant would continue as advisory in nature (Annexure A4). The supplementary DPC which met on 22.2.2011 graded the applicant as fit for promotion to the post of Income Tax Officer (ITO) as at Annexure A6. However, the Chief Commissioner of Income Tax, Kochi sought reconsideration of the recommendation of the DPC vide his letter dated 25.2.2011 at Annexure A7. The review supplementary DPC which met on 4th and 7th March, 2011 graded him as unfit for promotion to the post of ITO. The applicant was superseded and his juniors were promoted as ITO. Aggrieved, the applicant has filed this OA for the following reliefs:-

- “1. To quash Annexure A-1, Annexure A-4 and Annexure A-5.
2. To direct the respondents to consider the applicant for promotion in preference to his juniors without considering Annexure A-1 adverse remarks.
3. To direct the respondents to grant the applicant promotion as Income Tax Officer with all consequential benefits including arrears of pay and allowance with interest at the rate of 12% per annum from the date which he became eligible for promotion.
4. To grant such other reliefs as may be prayed for and the Court may deem fit to grant, and
5. Grant the costs of this Original Application.”

2. The applicant contended that retaining the adverse remarks against the applicant in his annual confidential report and superseding him in the matter of promotion are unjust, illegal and arbitrary. The 3rd respondent i.e. Commissioner of Income Tax, Thiruvananthapuram mechanically relied on



the allegation made by the reporting officer behind the back of the applicant. The adverse remarks communicated by Annexure A1 are unsustainable being violative of the instructions regarding adverse remarks in the ACRs. Retaining of the remarks after treating them as advisory in character is illegal. A remark made in violation of the binding instruction governing the field can only be expunged from the records. Even if the remarks are retained as stated in Annexure A4, in so far as the sting of adverse nature is removed from the comments in Annexure A1, they cannot be used to rate the applicant below his juniors. Annexure A4 is issued in violation of principles of natural justice. Material adverse to the applicant was relied on, with no opportunity given to him to contest the same. When the 3rd respondent accepted the stand of the reporting officer that the entries are not adverse but advisory the applicant did not find it necessary to take up the matter and when his juniors were promoted he realized that respondents have relied on the uncommunicated adverse entries against him. The adverse comments in Annexure A1 only are treated as adverse to the applicant. The report of the reporting officer that 40 cases of Government offices assigned to the applicant for conducting spot investigation of the TDS was never brought to the notice of the applicant. It should not have been relied on by the 3rd respondent. The DPC had initially found the applicant fit for promotion as Income Tax Officer. In the review that was held at the instance of the 2nd respondent the DPC relied on un-communicated entries and held Annexure A4 as without locus standi and without any notice to the applicant and gross violation of principles of natural justice. The DPC has no jurisdiction to ignore orders issued on the representations made against adverse entry. No

guidance or advice was given to the applicant before communicating Annexure A1. Except Annexure A1 no adverse entry was ever communicated to the applicant. As such the alleged entries made in ACR for 2008-2009 and 2006-2007 are not those which can be relied on by the DPC. The respondents cannot both approve and reprobate. After having stated that the entries were merely advisory they cannot be treated as adverse when considering the eligibility of the applicant for promotion. The adverse remarks made by the reporting officer in ACR of 2006-2007 are contradictory to the comments made by same reporting officer in column-12 of the ACR.

3. Per contra the respondents submitted that if the applicant was aggrieved by Annexure A4 he could have filed an appeal before the 2nd respondent. Each DPC should decide its own method and procedure for objective assessment of the suitability of the candidates, as per guidelines prescribed by the DOP&T. The review DPC held on 4th and 7th March, 2011 considered the ACRs of the applicant for the years 2006-2007 and 2008-2009 as adverse and graded the applicant as unfit for promotion as ITO. The DPC has considered the suitability of the applicant for promotion as Income Tax Officer strictly following the instructions of the DOP&T. The recommendations of the DPC are advisory in nature and should be duly approved by the appointing authority. If the appointing authority does not agree with the recommendations of the DPC he may record the reasons for disagreement and refer the matter to the DPC for reconsideration. If he does not accept the revised recommendations of the DPC he shall submit the papers to the next higher authority with his own recommendations. On the



basis of the facts pointed out by the appointing authority the DPC reconsidered its earlier recommendation in the case of the applicant and decided to declare that the applicant is unfit for promotion as Income Tax Officer.

4. We have heard the learned counsel for the parties and perused the records.

5. For the sake of convenience Annexure A1 conveying the adverse entries in the ACR of the applicant is reproduced as under:-

"The reporting officer has made the following observations against respective columns mentioned below in your annual confidential report for the financial year 2006-07, which have also been endorsed by the Reviewing Officer.

Column 19 :

Whether the official has flair for any particular type of work e.g. Intelligence, Investigation, Administration, Audit, Judicial, Statistical etc.

"No flair for any particular line of work"

Column 20 :

General observations – Here mention any special ability, trait or performance relevant to the Officer's current/future assignments, Assistance provided during Search and Seizure and in Tax recovery work may also be mentioned.

"No special abilities worth mentioning. Lacks initiative in carrying our assignments to their logical end."

These comments are considered to be of adverse nature. You are hereby given an opportunity to make representations, if any, regarding the remarks within 7 days of receipt of this communication, before the Commissioner of Income Tax, Trivandrum."



Annexure A4 by which the adverse entries were treated as advisory is extracted as under:-

"The Hon'ble Central Administrative Tribunal, Ernakulam Bench in O.A.No.784/2010 dated 20.9.2010 had directed to pass necessary orders on the representation given by the above official. Hence this communication. While doing so I have heard Shri.Binu Vimalan, the reporting officer, who had given the impugned ACR. I have taken into account his submissions dated 19.10.2010 while disposing of the representation of the above official.

In the representation Shri.C.J.Babu had indicated that he had done certain work during the period under review. The reporting officer does not dispute these facts. However, the reporting officer has pointed out the attitude and the manner in which Shri.C.J.Babu had approached the work entrusted to him. Against 40 cases of government offices assigned to Shri.C.J.Babu for conducting spot inspection of TDS he had carried out spot inspection only in 5 of these cases. The reporting officer had further pointed out that in these inspections also no worthwhile work was turned out. This official was satisfied with some oral assurances resulting in some work being redone. In some cases, the reporting officer has mentioned that short/non deduction of tax, or non payment of tax were found out. He has cited the case of Govt. Polytechnic, Punalur.

The reporting officer further pointed out that the feed back on the work assigned to the official was also tardy as a result no progress was achieved till the beginning of January, 2007 whereupon the reporting officer had to take up the responsibility himself in completing the pending work unattended by the official. The reporting officer was fair enough to admit that these lapses were not communicated or made part of record to admonish the official. He also denied personal animosity lead to make such remarks.

On weighing the representation of the official and the report of the reporting officer, I find that the official's claim to attend to the works assigned to him has not been well established. The instances pointed out by him are all of routing nature and not done at his own initiative. In the circumstances, I had to confirm the remarks made by the reporting officer that the instances pointed out by the official do not bring about any materials to prove that the remarks of the reporting officer are not well founded.

The reporting officer finally has clarified that the remarks were intended to purely advisory and not to be construed as adverse remarks against the official.

That being the case the remarks entered in the ACR of the



official would continue as Advisory in nature”

(emphasis supplied)

6. A perusal of the above two documents would show that the adverse remarks in the ACR for financial year 2006-07 communicated to the applicant giving him an opportunity to make representation against them does not contain any remark pertaining to the 40 cases of Government offices assigned to the applicant for conducting the spot investigation of TDS. Therefore, the reliance of the 3rd respondent on the report made by the reporting officer behind the back of the applicant should not have been relied upon and to this extent the consideration done by the 3rd respondent is based on irrelevant material. It is also seen that he relied on the clarification of the reporting officer that the adverse remarks in the said ACR was purely advisory and treated them as advisory in nature. An advisory remark will not have the sting of adverse remark and cannot stand in the way of the applicant for promotion. Therefore, the applicant had no reason to appeal against treating the adverse remarks in the ACR for the year 2006-2007 as advisory. The respondents are estopped from treating those remarks which were treated as advisory as adverse while considering his promotion.

7. The letter of the Chief Commissioner of Income Tax, Kochi dated 25.2.2011 is reproduced as under:-

“I have gone through the recommendation of the supplementary DPC convened under your Chairmanship on 22.2.2011. Thereafter, I have also called for the confidential reports of Shri.C.J.Babu, who has been found fit and recommended for appointment.

2. It appears that it is in view of the petition filed by Shri.C.J.Babu



before the Central Administrative Tribunal and subsequent reconsideration of his rating in the confidential report for F.Y.2006-07 that the DPC recommended his promotion to the grade of ITO. I have called for and reviewed the confidential reports in his case. I find that for the F.Y.2008-09, the Reporting Officer, Kum.Vijayaprabha, ACIT, Circle – 1. Trivandrum had commented that “the official shows reluctance to work, urgent work relating to audit objections, giving effect to appeal orders, etc., was never promptly attended to, he left the office in the morning of 26.3.2009, leaving behind many official urgent works pending, including service of notices u/s.226(3). He was absent from duty from 26.6.2009 to 1.5.2009 without intimating me. The official appears to be more interested in film direction. He should show more interest in his work and learn to do his duties with a sense of responsibility.” Further, against the column promptness in disposal, it is reported “INADEQUATE”, relation with superiors is also considered “INADEQUATE”. General observations regarding special ability, etc., the Reporting Officer had reported ‘NIL’. However, the Reviewing Officer has remarked that the “classification of INADEQUATE in two columns are not correct”. It is further remarked that “I understand that the Reporting Officer was not in good terms with the official. May be such strained relationship prompted the Reporting Officer to make such remarks”. It is stated that the official complained about the Reporting Officer to the CCIT. Accordingly, he rated the official as “VERY GOOD”.

3(a). However, I find that the Reviewing Officer, who made the review on 26.6.2009, had already retired on 31.5.2009. I find that he has not commented on the factual remark regarding unauthorized absence and delay in attending to judicial work, mentioned by the Reporting Officer. He has brought into consideration his earlier experience, when the official had worked under him, which is not relevant for reviewing the performance of a particular year.

3(b). It is seen that disciplinary proceedings were initiated and concluded by CIT, Kochi, against the official on two counts during F.Y.2009-10. He has been issued a warning by the CIT. But since a copy of the warning was not given to the Reporting Officer of the year, the comments of the Reporting Officer are incomplete in respect of Column-10. The fact of warning was also, therefore, not before the DPC. The DPC is required to consider the full facts of the case and rank the category of evaluation. Remark of the then CIT, Trivandrum, in letter dated 8th May, 2009 is as follows :-

“Coming to the specific queries made in the letter dt.22nd April 2009, following is submitted.

(a) Such letter against the senior officer in an open manner is uncalled for and wrong. The said action is against the conduct rule. To be precise, by such action the II'l concerned has exhibited



"Conduct unbecoming of a government servant".

(b) *In so far as the complainant's apprehension of the ACR being spoiled, the same may be due to the official's past experience with his immediate superior having received a adverse remark as also because he was nearing his promotion.*

In this connection, it is further submitted that the ACII, Circle – 1, Kollam is extremely hard working, honest, efficient and well-meaning officer. She has a habit of disciplining her subordinate. The ITI concerned, considering his past history, would not have found it to his liking."

3(c). The comments of the Reviewing Officer, who watered down the Reporting Officer's remarks for F.Y.2008-09 himself has remarked as under in his letter dated 8th May, 2009 :-

"Explanation of Sri.C.J.Babu, ITI, was called for vide this office letter dated 5.5.2009. Copy of the reply submitted by the official is forwarded herewith. I am of the opinion that sending advance copy of the grievance petition to the CCIT cannot be justified. No circumstances which warranted the immediate interference of the CCIT existed. Tendency to send advance copy to the CCIT deserves to be discouraged."

His remarks here do not tally with his remarks on the CR.

4. Therefore, the remarks of the Reviewing Officer may be required to be reconsidered on the basis of the Reporting Officer's specific and factual remarks and the evaluation made independently by the DPC from facts.

5. In respect of the ACR for the year 2006-07, a perusal of the report of the CIT dated 25.10.2010 indicates that the factual correctness of the remarks made by the Reporting Officer is not in dispute. The remarks were treated as "advisory" only on the basis of the advice of the Reporting Officer that it was meant to be advisory and not adverse during the time of reconsideration. However, the CIT's report shows as under :-

"On weighing the representation of the official and the report of the reporting officer, I find that the official's claim to attend to the works assigned to him has not been well established. The instances pointed out by him are all of routing nature and not done at his own initiative. In the circumstances, I had to confirm the remarks made by the reporting officer that the instances pointed out by the official do not bring about any materials to prove that the remarks of the reporting officer are not well founded."



It may be noted here that the Reporting Officer has stated that against 40 cases of government offices assigned to Shri.C.J.Babu for conducting spot inspection, he had carried out spot inspection only in 5 cases. Even in these inspections also, no worthwhile work was carried out. In these circumstances, it is necessary for the DPC to consider the suitability of the official to a post which requires enthusiasm and independent initiative. The Reporting Officer's view that the remarks were only advisory does not appear to be factually correct. If it were advisory, it would have been so mentioned at the first instance itself, or at least at the time of filing of counter affidavit, when the applicant went before the Central Administrative Tribunal. It appears that the remark of the Reporting Officer subsequently is probably an act of charity. The legal tenability of 'advisory' remark is to be evaluated on the basis of CR procedure, as it then existed did not provide for such advisory through CR.

6. Coming to the F.Y.2007-08, it is seen that the official has got an excellent report. However, the report has been given by an officer who had retired in February, 2008 and report itself was written in March, 2008. Therefore, the remarks could be charitable, as the Reporting Officer has no further stake in the Department and could afford to be very charitable. The Reviewing Officer's remark for that year is "the official has shown some improvement in his official work when compared with the year 06-07". This probably means that there is only some improvement and not sufficient improvement, as noted by the Reviewing Officer. This output will have to be examined.

7. Coming to the F.Y.2005-06, the Reporting Officer has given "a very good" report in most columns and in general performance column, the remark is "very efficient in recovery work". However, the Reviewing Officer has remarked as follows :-

"I agree with all the remarks of the reporting officer other than his comment that he is hardworking and efficient. His performance is only mediocre."

For the balance period of the financial year, the performance has been rated by another Reviewing Officer as "GOOD". It is also seen that in F.Ys.2004-05 & 2003-04, the reports are merely "GOOD". For the F.Y.2002-03, the performance is rated by the Reviewing Officer as follows :-

"Official is yet to perform anywhere near his potential."

8. For the F.Y.2000-01, his performance is rated as "GOOD", just as in F.Y.1999-2000.

9. Considering all the above narrated facts and the overall reports, it appears that the DPC needs to re-consider its decision by a detailed

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application of mind and thereafter, reach a conclusion. It may be remembered that Income Tax Officer is an Officer of the cutting edge of the Department and his efficiency and motivation is key to the performance of the Department. It is, therefore, suggested that the DPC may re-examine its decision finding the official fit for promotion.

10. The Committee may consider whether it is in the interests of public servant organizational discipline and image of the department that an official of the attributes that are reflected in the documents mentioned by me to be promoted.

11. Since the DPC held by you was a supplementary DPC and promotion at the lower ranks would depend on promotion to the level of ITO, it is suggested that an early meeting may be convened and decision taken, so that the vacancies consequentially arising can also be taken up for consideration for filling up in the financial year itself."

(emphasis supplied)

8. In his letter dated 25.2.2011 to the Chairman of DPC, the 2nd respondent had relied on the statement of the reporting officer that 40 cases of Government offices assigned to the applicant for conducting spot investigation which remark was not communicated to the applicant. If the CR procedure did not provide for such advisory through CR, the respondents are at fault, not the applicant. The applicant was clearly mislead by the respondents when they treated adverse remarks against him as advisory and later treated them as adverse while considering promotion. There is violation of principles of natural justice and lack of consistency in adopting such a course of action. The comment of the CCT that "The Reporting Officer's view that the remarks were only advisory does not appear to be factually correct" undermines the credibility of the Reporting Officer of the applicant for the year 2006-07.

9. It is stated that the applicant was absent from duty from 26.6.2009 to



1.5.2009 without intimation to the reporting officer. The period of absence is not recorded in the normal way of indicating a certain period in forward direction. It indicates lack of due care and attention mainly on the part of the reporting officer. This entry is made against column No. 12 in the ACR for the period from 1.4.2008 to 31.3.2009. The period of absence clearly falls in the financial year 2009-2010. It has no relevance to the ACR of the applicant for the year 2008-09. This entry goes against the instruction that assessment should be confined to the appraisee's performance during the period of report only. Any unauthorized absence on the part of the applicant should invite action as per rules. Performance appraisal through confidential report is to be used as a tool for human resource development and not for fault finding. The reporting officer and the 2nd respondent were casual and careless, in respect of the ACR of the applicant for the year 2008-09 to the extent of relying on irrelevant material. Further the direction of the 2nd respondent to the DPC to reconsider the favourable remarks of the reviewing officer in the ACR for the year 2008-09 on the basis of his opinion about the conduct of the applicant in the succeeding year i.e. 2009-2010 is also irrelevant. The very fact that the reviewing officer who disagreed with the assessment of the reporting officer in respect of the ACR of the applicant for the year 2008-2009 and gave him favourable remarks, had himself opined on 8th May, 2009 that sending advance copy of the grievance of the applicant against the reporting officer to the CCIT cannot be justified and deserves to be discouraged. This would show that the reviewing officer was quite objective in assessing the applicant. He appreciates the good work done by the applicant and deprecates the negative trait in his behaviour.



10. The disciplinary proceedings initiated against the applicant on two counts during the financial year 2009-2010 concluded with a warning by the CIT, Kochi. As warning is no punishment it cannot be taken into consideration by the departmental promotion committee for the purpose of promotion. Hence, the reliance of the 2nd respondent on the warning issued to the applicant is misplaced.

11. Annexure A appended to the minutes of the review meeting of the supplementary DPC held on 4th and 7th March, 2011 is reproduced as under:-

“On the basis of direction No.D.O.F.No.11/Estt./1/CC-CHN/2010-11 dated 25th February 2011 of the appointing authority [the Chief Commissioner of Income Tax (CCA), Kochi] to reconsider the decision finding Shri.C.J.Babu, Inspector of Income Tax fit for promotion to the grade of Income Tax Officer, the Departmental Promotion Committee (DPC) met again on 4.3.2011 and 7.3.2011. The DPC went into the Annual Confidential Reports/Annual Performance Appraisal Reports (hereinafter mentioned as ACRs) of Shri.C.J.Babu in great detail. The DPC also considered other materials, not considered during the meeting held on 22.2.2011. The observations year wise and final decision are as under :-

F.Y.2005-06 :

In the ACR, the overall grading made is “GOOD” by the Reviewing Officer. The remark 'mediocre' given by the Reporting Officer is ignored in view of the overall 'GOOD' grading. The DPC decided to categorize rating as 'GOOD'.

F.Y.2006-07 :

The DPC considered,

- (1) the entry in the ACR “No flair for any particular type of work”.
- (2) the entry in the ACR “No special abilities worth mentioning. Lacks initiative in carrying out assignments to logical end”.
- (3) the following remarks of the CIT, Thiruvananthapuram, who disposed of the appeal filed by Shri.C.J.Babu against the remarks



in the ACR.

- (i) "As against 40 cases of government offices assigned to Shri.C.J.Babu for conducting spot inspection of TDS he has carried out spot inspection only in 5 of these cases."
- (ii) ".....in these inspections also no worthwhile work was turned out."
- (iii) ".....feed back on the work assigned to the official was tardy as a result no progress was achieved"
- (iv) ".....I had to confirm the remarks made by the reporting officer"
- (v) ".....the official do not bring out any materials to prove that the remarks of the reporting officer are not well founded".
- (vi) ".....remarks entered in the ACR of the official would continue as Advisory in nature".

The DPC ignores the point (vi) in view of the observation of Hon'ble Supreme Court in State of Haryana Vs. P.C.Wadhwa, AIR 1997 SC 01. There are no two types of ACR being 'specific' and 'advisory'. Confirmed entry cannot be diluted by remarks of nature 'advisory', when the Hon'ble Supreme Court has stated as under :-

"The whole object of making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, conduct or character, as the case may be. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career."

Thus every entry in ACR is at once 'advisory' and adverse entries continue to be adverse, even without any specific comment by appellate authority. Hence, point (vi) has no locus standi. Most importantly, the adverse remarks do not contain any advice. They are very specific. A specific confirmed entry cannot be toned down as advice when the appellate authority confirms the original entries in toto.

The DPC further noted that the remarks are serious in nature as the official, who if promoted as ITO, has to exhibit high degree of initiative to perform. His lack of flair and initiative and other contents of decision of CIT disposing his appeal are before the DPC. Such traits and poor performance make him unfit for promotion to the rank of Income Tax Officer, where responsibility is very heavy. This



decision of the DPC is by way of overruling the earlier decision, minutely examining the elements of the ACR for F.Y.2006-07 and the proceedings of the CIT, Thiruvananthapuram, connected with the ACR for F.Y.2006-07.

The DPC categorizes, after examining all records, that the ACR for F.Y.2006-07 as 'inadequate'.

Year 2007-08 :

The DPC after going through the ACR decides to grade the ACR as GOOD, despite the observation that "The official has shown some improvement in his official work when compared with the year 06-07".

Year 2008-09 :

The DPC noted that the Reporting Officer has made the following observations :-

- (i) The official shows reluctance to work; urgent appeal orders was never promptly attended to; he left the office in the morning of 03-09, leaving behind many urgent official work pending including service of notice u/s.226(3). He was absent from duty from 26.6.2009 to 1.5.2009 without intimating me. The official appears to be more interested in film direction. He should show more interest in his work and learn to do his duties with a sense of responsibility.
- (ii) Promptness in disposal : inadequate
- (iii) Relation with superiors : inadequate

The Reviewing Officer using his knowledge based on previous work experience with Shri.C.J.Babu overrules the reporting officer, without marshalling the facts correctly. The previous experience is not material when current year's performance is evaluated. He has given only one justification. "May be such strained relationship prompted the reporting officer to make remarks in 15(iii) and 17(i) as well as those recorded in 12". He also stated that "The official has complained about the reporting officer to the CCIT". The former, the DPC notes, as not emphatic and adequate justification not provided. In respect of the latter, on examining records, it is seen that official has used words like "super ego personality", "mean minded", "selfish" etc. in a complaint against the reporting official. For this conduct of smearing superior officer, proceedings were initiated against Shri.C.J.Babu under CCS (CCA) Rules and a warning was issued. Against this warning issued on the basis of finding of the



disciplinary authority that ".....the action on the part of the official amounts to a lapse which calls for a serious consideration" no further appeal was filed by Shri.C.J.Babu. The CIT, the disciplinary authority has issued a warning. No appeal was filed against the order. Thus, post facto most observations of Reviewing Officer have fallen apart. This is on account of the fact that Shri.C.J.Babu has a proven instance of using intemperate language against superior officer, justifying remark 'inadequate' in respect of entry 'Relation with Superiors' in the ACR. The reviewing officers observation stands on weaker footing since (i) he used personal knowledge and not facts and (ii) usage of bad language in writing (the letter was written in year 09-10), showing clearly that relation with superior is inadequate. Further he has not controverted the factual finding of the Reporting Officer regarding leaving the office on 03.09, leaving urgent official work pending etc., all these shows lack of responsibility. Thus, the adverse view subsists.

In this connection the DPC also observed contents of paragraph 1 of the report dated 8.5.2009 of the very same reporting officer addressed to CIT, Thiruvananthapuram wherein he had observed adversely the manner of sending report by Shri.C.J.Babu against the reporting officer. This finding is not compatible with the entry made in the ACR by the reviewing officer.

The DPC grades the ACR for year 2008-09 as inadequate using its powers to make its own assessment based particularly on the above facts, without being guided by the grading as recorded in the confidential report.

Year 2009-10 :

The DPC noted that the Reporting Officer, as confirmed by the Superior Officer, has found the relationship with the superior as 'good'. It was in this year the official has written a letter smearing superior officials and the CIT after initiating disciplinary proceedings issued a warning. However, the contents of the proceeding of CIT, Kochi where in warning was issued were not available to the Reporting Officer or Reviewing Officer (copy of proceedings was not marked to the two officials). If these were available, a different view is possible. Hence, the grading 'good' ordinarily needs to be toned down.

The legal status on Warning in relation to DPC is as under :-

"Warning – Not to be considered by Departmental Promotion Committee – A warning is no punishment. So far as it has been laid down that a warning cannot be taken into



consideration by the Departmental Promotion Committee. Thus a warning is of no consequence, for the purpose of promotion. - Madhavan V. C.I.T., (1983) II LLJ 356 (Ker.).

Notwithstanding incorrect grading, the DPC decided not to take adverse view of the same giving precedence to the judicial position cited above. The overall rating is confirmed.

DECISION

The DPC finds that ACR for years 2006-07 and 2008-09 are adverse. Since these falls within 5 years for which ACR is considered, the DPC grades him 'UNFIT' for promotion to the grade of Income Tax Officer.

(Sd/-)
A.MOHAN
MEMBER

(Sd/-)
R.VISHNUDAS
MEMBER

(Sd/-)
T.P.KRISHNAKUMAR
CHAIRMAN"

(emphasis supplied)

12. The DPC which met on 22.2.2011 had graded the applicant as fit for promotion to the post of ITO based on his ACRs for the years 2005-06, 2006-07, 2007-08, 2008-09 and 2009-2010. The very same DPC in its review meeting on 4th & 7th March, 2011 at the instance of the CCIT, Kochi after going into the very same ACRs of the applicant in great detail, the remarks of CIT, Trivandrum who disposed of the appeal filed by the applicant against the adverse remarks in his ACR for 2006-07 and the letter of CCIT, Kochi dated 25.2.2011 graded the ACRs of the applicant as inadequate in respect of 2006-07 and 2008-09. The DPC found that the ACRs of the applicant for the years 2006-07 and 2008-09 were adverse as they fell within five years for which ACRs were considered and graded him unfit for promotion as ITO.

13. The DPC has stated in Annexure A appended to the minutes of the



review meeting held on 4th & 7th March, 2011 that it has minutely examined the elements of the ACR for the year 2006-07, the proceedings of the CIT, Trivandrum and overruled its earlier decision and categorized the said ACR of the applicant as inadequate. The DPC failed to note the contradiction in the comments of the reporting officer in column 12 of ACR for 2006-07 that the applicant "has done good work in conducting TDS surveys on his own" and the adverse comments in column Nos. 19 & 20 to the effect that he has no flair for any particular line of work and that he has no special abilities worth mentioning, and that he lacks initiative in carrying out assignments to their logical end. The DPC relied heavily on the five remarks of the CIT, Trivandrum and held that the 6th remark has no locus standi. The DPC failed to note that the five remarks of the CIT were based on the 40 cases of Government offices assigned to the applicant for conducting spot investigation of TDS. He had carried out spot investigation only in five of these cases. The five remarks of the CIT were based on the reported statement in Annexure A4. "Against 40 cases of Government offices assigned to Shri C.J.Babu he had carried out spot inspection only in 5 of these cases". This adverse remark was not communicated to the applicant as per Annexure A1. In fact, there was no such remark made by the reporting officer in the ACR of the applicant for the year 2006-07.

14. The discretion of the DPCs to devise their own methods and procedures for objective assessment of the suitability of the candidates who are to be considered by them is governed by the guidelines, in order to ensure greater selectivity in matters of promotion and for taking uniform procedures

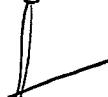


for assessment. The DPC should assesses the suitability of the employees for promotion on the basis of their service records and particularly with reference to the CRs of the five preceding years. In the instant case the DPC considered only the two adverse entries in the ACR of the applicant for the year 2006-07 which were communicated to the applicant and certain remarks of the CIT, Trivandrum in the order disposing of the representation of the applicant against those remarks. There is nothing on record to show that the DPC, for assessment of the applicant, considered the aspects of technical ability, quality and reliability of work and other qualities in the said ACR assessed by the reporting officer as very good (8 times) and good (5 times) and his integrity as outstanding and the remarks that he had done good work in conducting surveys on his own. The DPC also failed to note that the remark of the reporting officer against column 12 in the said ACR contradicts the adverse remarks in columns 19 & 20. The assessment of the suitability of the applicant for promotion was not with particular reference to his ACR for the year 2006-07 but with particular reference to the order of the CIT, Trivandrum on the representation of the applicant against the two adverse entries in it. In considering the order of the CIT also the DPC relied on his observation based on the 40 cases assigned to the applicant which as already pointed out was not mentioned in the ACR of the applicant for the year 2006-07. Further observation of the CIT, Trivandrum in his order that the reporting officer had admitted that "these lapses were not communicated or made a part of record to admonish the official" is ignored by the DPC. Likewise the clarification of the reporting officer that the "remarks were intended to be purely advisory and not to be construed as adverse remarks" is



ignored. The decision of the CIT, Trivandrum the competent authority to treat the adverse remarks as advisory was dismissed as having no locus standi as if the DPC were sitting in appeal over the decision of the competent authority. In reality it is the remark on the CIT, Trivandrum that has no locus standi as not being based on the ACR for the year 2006-07. Thus the assessment of the applicant by the DPC in respect of his ACR for the year 2006-07 was unfair and unjust and discriminatory and on irrelevant consideration. Further the categorization of ACR for the year 2006-07 as 'inadequate' is not as per the guidelines for the DPCs. The DPCs are required to grade the officers, not their ACRs, as outstanding, very good, good, average or unfit, or as fit or unfit with reference to bench mark as the case may be.

15. As regards the ACR of the applicant for the year 2008-09 the DPC graded it as inadequate heavily relying on the report dated 8.5.2009. The said report is not made by the reporting officer as stated in the minutes of the DPC but by the reviewing officer. It has already been pointed out that this letter was not relevant for the ACR of 2008-09 and that the reviewing officer, by all accounts, was objective in his approach. The DPC has not considered the guideline that if the reviewing authority has overruled the remarks of the reporting officer, the remarks of the reviewing authority should be taken as final for the purpose of assessment provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. The DPC sat in appeal over the remarks of the reviewing officer and gave a finding based on the irrelevant



letter of 8.5.2009 that the adverse observations in the said letter is not compatible with the entry made in the ACR by the reviewing officer. It is irrational to evaluate the favourable remarks made by the reviewing officer about the applicant, based on his comments in a letter about an incident which happened in the year subsequent to the year of ACR. It is not on the ACR of the applicant for the year 2008-09 that the DPC focusses its attention but on extraneous matter which makes assessment of the applicant neither objective nor fair. Again it is the ACR which the DPC graded, not the officer, that too not as per guidelines, even if the grading of the ACR is interpreted to be the grading of the applicant. The DPC failed to note that no adverse remarks in the ACR for 2008-09 was communicated to the applicant.

16. The DPC should have kept in mind that adverse entry not communicated to the applicant should not be considered for assessment for promotion. The Hon'ble Supreme Court in Dev Dutt Vs. Union of India & Ors. - 2008 (8) SCC 725 held as under:-

“17. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India (supra) that arbitrariness violates Article 14 of the Constitution.

18. Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must



be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

19. Learned counsel for the respondent has relied on the decision of this Court in U. P. Jal Nigam vs. Prabhat Chandra Jain AIR 1996 SC 1661. We have perused the said decision, which is cryptic and does not go into details. Moreover it has not noticed the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India (supra) which has held that all State action must be non-arbitrary, otherwise Article 14 of the Constitution will be violated. In our opinion the decision in U.P. Jal Nigam (supra) cannot be said to have laid down any legal principle that entries need not be communicated. As observed in Bharat Petroleum Corporation Ltd. vs. N.R. Vairamani AIR 2004 SC 4778 (vide para 9):

"Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute, and that too, taken out of their context.

.....

.....

22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

23. In the present case, the action of the respondents in not communicating the 'good' entry for the year 1993-94 to the appellant is in our opinion arbitrary and violative of natural justice, because in substance the 'good' entry operates as an adverse entry (for the reason given above). What is natural justice? The rules of natural justice are not codified nor are they unvarying in all situations, rather they are flexible. They may, however, be summarized in one word : fairness. In other words, what they require is fairness by the authority concerned. Of course, what is fair would depend on the situation and the context."

The settled legal position is that it is illegal, arbitrary and against the principles of natural justice not to communicate the adverse remarks in the



ACR, to the employee concerned. Therefore, the assessment of the applicant based on the un-communicated adverse remarks in his ACR for the year 2008-09 by the DPC cannot be sustained legally.

17. In the light of the above, the grading of the applicant as unfit for promotion to the grade of Income Tax Officer overruling its earlier decision grading him as fit for promotion is erroneous, arbitrary and illegal. Hence, the OA succeeds. Annexure A5 to the extent it excludes the applicant is set aside and the minutes of the DPC meeting on 4th & 7th of March, 2011 at Annexure A8 to the extent it is adverse to the applicant is also set aside. In the result, Annexure A6 recommending the applicant as fit for promotion as ITO survives. The respondents are directed to take consequential action as per law within a period of 60 days from the date of receipt of a copy of this order.

18. The OA is allowed as above. No costs.



(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER



(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER

"SA"