

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PATNA BENCH, PATNA.

O.A. No 224 of 2006

Date of order : 02. 08. 2012

C O R A M

Hon'ble Mr. Naresh Gupta, Member [A]
Hon'ble Mrs. Bidisha Banerjee, Member [J]

1. Manoj Kumar, Sr. Tax Assistant, Central Excise, Jamshedpur Commissionerate, Jamshedpur.
2. Sanjay Kumar Choudhary, Sr. Tax Assistant, Central Excise, Central Excise Division, Lahiriasarai.
3. Nitish Kumar, Sr. Tax Assistant, Central Excise, Central Excise, CCO, Ranchi.
4. Prem Kumar, Sr. Tax Assistant, Central Excise, Central Excise, Patna.
5. Sanjay Sharan, Sr. Tax Assistant, Central Excise, Central Excise, Patna.
6. Rajesh Kumar Verma, Sr. Tax Assistant, Central Excise, Central Excise, Dhanbad.
7. Rajan Kumar Ranjan, Sr. Tax Assistant, Customs Headquarters, Patna.
8. Anooj Kumar Raj, Sr. Tax Assistant, Central Excise, Central Excise, Jamshedpur.
9. Deo Kant Singh, Sr. Tax Assistant, Central Excise, Central Excise, Patna.
10. Manish Kumar Sinha, Sr. Tax Assistant, O/o Commissioner of Central Excise, Service Tax & Customs [Appeal] Patna.
11. Sanjay Kumar Sinha, Sr. Tax Assistant, Central Excise, Central Excise, Ranchi.
12. Kanhiya Jee, Sr. Tax Assistant, Central Excise, Jamshedpur.
13. Abdul Mannan, Sr. Tax Assistant, Central Excise, Patna.
14. Rajesh Kumar Pandey, Sr. Tax Assistant, Central Excise, Patna.
15. Pradeep Kumar Pandey, Sr. Tax Assistant, Customs, Motihari.
16. Faroque Rahman, Sr. Tax Assistant, Central Excise, Patna.
17. Raman Prakash, Sr. Tax Assistant, Central Excise Division, Muzaffarpur.
18. Sanjeev Kumar, Sr. Tax Assistant, Central Excise, Patna.
19. Santosh Kumar Lakra, Sr. Tax Assistant, Central Excise Division, Ranchi.
20. Umesh Kumar Lal, Sr. Tax Assistant, Central Excise, Jamshedpur.
21. Umesh Kumar, Sr. Tax Assistant, Central Excise Division, Patna.
22. Ranjeet Kumar, Sr. Tax Assistant, Central Excise, Patna.
23. Deepak Kumar Choudhary, Sr. Tax Assistant, Central Excise Commissionerate, Ranchi.

.....Applicants.

By Advocate : None.

Vs.

1. The Union of India through the Secretary, Ministry of Finance, Department of Revenue, New Delhi.
2. The Chairman, Central Board of Excise and Customs, Department of Revenue, Ministry of Finance & Company Affairs, New Delhi.
3. The Under Secretary, Ministry of Finance, Department of Revenue, New Delhi.
4. The Chief Commissioner, Central Excise & Service Tax Zone, Central Revenue Building, 5 Main Road, Ranchi.
5. The Commissioner, Central Excise, Central Revenue Building [Annexee], 3rd Floor, Bir Chand Patel Path, Patna.
6. The Joint Commissioner, [P&V] Central Excise, Central Revenue Building, 4th Floor, Bir Chand Patel Path, Patna.
7. Md. Athar Noor, S/o Late Md. Noor Hasan, R/o Q. No. B/12, C.R. Colony, Sinha Library Road, Patna.
8. Anil Kumar Singh, S/o Shri Bidya Singh, R/o Q.No. 176/Type -III, C.R. colony, Ashiyana Nagar Road, Patna.

Naresh Gupta

By Advocate : Shri G. Bose for pvt. respondents and Shri S.K. Tiwary for official respondents.

.....Respondents.

ORDER

Naresh Gupta, M[A] - This OA has been filed jointly by Manoj Kumar and 22 others, all of them being Senior Tax Assistants in Central Excise Department posted at Jamshedpur, Latherisarai, Ranchi, Patna, Dhanbad, Motihari or Muzaffarpur, for quashing the Estt. Order No. 1 dated 02.01.2006 whereby 55 UDCs (pre-structured cadre) were promoted in the grade of Tax Assistant (pre-structured cadre) w.e.f. 19.01.2003 (Annexure A/1 of OA), the Estt. Order No. 2 dated 02.01.2006 whereby 13 UDCs (pre-structured cadre) were allowed special pay @ Rs. 140 per month and designated as UDC Spl. Pay (pre-structured cadre) w.e.f. 19.01.2003 (Annexure A/2 of OA) and the Estt. Order No. 4 dated 03.01.2006 whereby 84 persons were appointed as Sales Tax Assistant w.e.f. 20.01.2003 (Annexure A/3 of OA) and seeking a direction to the respondents to make promotion on the basis of the policy decision of 19.07.20001, and to fill up any higher post by way of promotion or otherwise from among the incumbents after restoring their seniority and position as on 26.12.2005. The case of the applicants as presented in the OA and written arguments filed on 28.11.2006 is as follows:

2. The applicants joined service as Data Entry Operators (DEOs, in short) Grade 'A' on various dates during 1994-95. A policy decision was taken at national level to restructure the Customs and Central Excise Department (Department, in short) by abolition of some posts, creation of some posts and merger of several posts in one cadre, etc. Prior to restructuring, there were the following two categories of posts concerning the applicants:

1st Category: Tax Assistant (old), UDC (Spl. Pay), UDC and LDC

2nd category: DEO Gr.(C), DEO Gr.(B) and DEO Gr.(A)

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The promotional avenues of the above two categories were different and guided by different Rules, that is, for Category 1 by 1979 Rules and for Category 2 by 1992 Rules. After the 5th Pay Commission, both the category of incumbents holding the post of DEO Grade (A) and UDCs were given the same pay scale, Rs. 4,000-100-6,000. Prior to the 5th Pay Commission, the Sheshagiri Commission had recommended higher pay scale for incumbents holding the post of DEO Grade (A), but the respondents now were not considering these two categories even as equal and the applicants holding the post of DEO Grade (A) were made junior to the UDCs who joined in the grade of the UDC after the applicants (copy of the recommendation of 5th Pay Commission and Sheshagiri Committee marked as Annexure A/4 of OA). On 16.07.2001, the Union Cabinet approved the restructuring of Customs and Central Excise Department vide Cabinet Secretariat Note dated 16.07.2001 following which in restructuring the then existing posts of Tax Assistant (old), UDC (Spl. pay), DEO (Grade C), and DEO (Grade B) were merged into and redesignated as Senior Tax Assistant. Similarly, the then existing posts in the cadre of UDC, DEO (A) and LDC (except 717 posts) were merged and redesignated as Tax Assistant (New) (copy of notification dated 19.07.2001 marked as Annexure A/5 of OA). In para 2 of this Notification, it has been stated that all posts at different levels stand sanctioned with immediate effect and as per note 4 & 5 of Annexure 1 of the Notification, the merged and redesignated posts of Sr. Tax Assistant and Tax Assistant have come into force and then existing cadres of Tax Assistant (old), UDC (Spl. Pay), DEO Gr.(C), DEO Gr.(B), UDC and DEO Gr.(A) were abolished w.e.f. 19.07.2001. On 05.06.2002, the Government of India (GOI, in short) published the allocation of posts among various Zones/ Commissionerates and for the particular Commissionerate concerning the applicants, a total number of 81 posts were allotted for Senior Tax Assistant and 145 posts were allotted for Tax Assistant (restructured cadre) (Annexure A/6 of OA). On 20.01.2003, the Central Excise and Customs Department Senior Tax Assistant (Group C posts) Recruitment Rules, 2003 came into force whereby under Clause 5(1) of the

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Rules, the earlier service rendered by the incumbents in the earlier posts before commencement of the Rules shall be taken into account as regular service rendered in the post of Senior Tax Assistant for the purpose of promotion etc. (Annexure A/7 of OA). On 05.05.2003, the Central Excise and Customs Department Tax Assistant (Group C posts) Recruitment Rules, 2003 came into force whereby under Clause 4(1) of the Rules, the earlier service rendered by the incumbents in the post of DEO Grade A before commencement of the Rules shall be taken into account as regular service rendered in the post of Tax Assistant for the purpose of promotion etc. (Annexure A/8 of OA). Clause 4(1) of the Rules reads as follows:

4. Initial Constitution- (1) "The person appointed on regular basis and holding the post of Upper Division Clerk and Data Entry Operator Grade A on the commencement of these Rules shall be deemed to have been appointed as Tax Assistant under these rules and the service rendered by such persons in the respective posts before commencement of these rules shall be taken into account as regular service rendered in the post of Tax Assistant for the purpose of promotion etc."

Vide Establishment order no 86/03 dated 04.06.2003, the applicants and others (UDCs) were deemed to have been appointed on the post of Tax Assistant in the pay-scale of Rs. 4,000-100-6,000 w.e.f. the date of commencement of the Rules, that is, 05.05.2003 and the services rendered by them before commencement of the rules shall be taken into account for deciding the eligibility for promotion to the next higher grade (Annexure A/9 of OA). On 18.06.2003, the seniority list of Tax Assistants as on 16.06.2003 was published in which the applicants were shown to be senior to the persons who, by the impugned orders were being made senior to the applicants. The applicants and others were, vide Establishment order no 124/03 dated 17.10.2003 (Annexure A/10 of OA) promoted on ad hoc basis to the post of Sr. Tax Assistant in the pay scale of Rs. 5,000-150-8,000 w.e.f. the date on which they assumed charge of the higher post. These promotions were

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confirmed after passing of the respective departmental examinations, vide Establishment order no 26 of 2004 dated 12.02.2004 (Annexure A/11 of OA). On 01.01.2005, the Seniority List of Senior Tax Assistants and Tax Assistants was published in which again the applicants were shown to be senior to the persons who, by the impugned orders, were being made senior to the applicants. The seniority of the applicants lies between Sl. Nos. 35 to 63 in this Seniority List whereas the other persons were figuring from Sl. Nos. 65 to 75 (Annexure A/12 series of OA). The Hon'ble Andhra Pradesh High Court in order dated 02.03.2005 and 07.03.2005 in WP Nos. 7963 of 2004 and 2378 of 2005 respectively held that prior to the date of notification of the respective Recruitment Rules, the vacancies, if any, can be filled up according to the old Rules, that is, the 1979 Rules. The Hon'ble High Court did not say anywhere that a vacancy should be created/ restored and then filled up. In view of para 2 of the Notification dated 19.07.2001, there was no vacancy of the old cadre. On 26.09.2005, the Under Secretary, GOI (respondent No. 3) directed the Chief Commissioner (respondent No. 4) to fill up the vacancy which arose prior to 05.05.2003 of pre-structured cadre in accordance with the old recruitment rules (Annexure A/13 of OA). The applicants submitted on 19.12.2005, 23.12.2005 and 26.12.2005 a representation pointing out that there was no vacancy of Tax Assistant (pre-structured cadre) and, therefore, there was no need to hold any DPC to consider promotion to the pre-structured UDC in view of the policy letter (notification) dated 19.07.2001 (copy of representation dated 23.12.2005 marked as Annexure A/14 of OA). However, the respondents went ahead with the convening of the DPC on 26.12.2005 and based on its recommendation, promoted a total number of 55 UDCs (pre-structured cadre) as Tax Assistant (pre-structured cadre) w.e.f. 19.01.2003 until further orders, vide **Estt. Order No. 1 dated 02.01.2006** (Annexure A/1). This is one of the impugned orders in the series of orders which followed it, as listed below.

Estt. Order No. 2 dated 02.01.2006 (Annexure A/2) - 13 UDCs (pre-structured cadre) were given special pay @ Rs. 140 per month and

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redesignated as UDC Spl. Pay (pre-structured cadre) w.e.f. 19.01.2003 until further orders.

Estt. Order No. 3 dated 02.01.2006 - 55 LDCs (pre-structured cadre) were promoted as UDCs (pre-structured cadre) w.e.f. 04.05.2003 until further orders.

Estt. Order No. 4 dated 03.01.2006 - 84 persons were appointed to the post of Sr. Tax Assistant w.e.f. 20.01.2003, out of which several persons (from Sl. Nos. 31 and onwards) were junior to the applicants according to the Seniority List of Sr. Tax Assistant dated 01.01.2005 and the Establishment Order No. 56 of 2003 was superceded.

Estt. Order No. 5 dated 03.01.2006 (Annexure A/15 of OA) - Establishment Order No. 86/2003 by which the applicants and others were deemed to be appointed as Tax Assistant was superceded

3. The applicants have contended that the effect of the aforesaid impugned orders is that persons junior to the applicants according to the seniority list (Annexure A/12 series of OA) became senior and the senior persons became junior which was evident from the chart showing the previous and present position of seniority (Annexure A/16 of OA). The posts to which the private respondents were being given promotions were not in existence at the relevant point of time and had been abolished w.e.f. 19.07.2001 and therefore the question of giving promotions to non-existent posts did not arise. If any vacancy had arisen due to restructuring, the same could not be filled up by pre-structured cadre. The posts of Superintendents were filled up by after giving promotion to the Inspectors, the resultant vacancies of Inspectors filled up by giving promotion to Senior Tax Assistants and again the resultant vacancies of Senior Tax Assistants filled up by giving promotion to Tax Assistants. Thus the resultant vacancy of Tax Assistant can be taken as the vacancy arising out of restructuring which cannot be filled by pre-structured cadre, as in terms of para 2 of the notification dated 19.07.2001, reduction in number of posts at any level will be effective after

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the existing incumbents are promoted to the higher level or in posts falling vacant on account of retirement etc. In the old Rules, there was no post of Senior Tax Assistant. In Chandigarh Commissionerate of Central Excise & Customs, where also the vacancies of the old cadres were sought to be filled up after 19.07.2001, and according a DPC was held on 08.11.2005, persons similarly situated as the applicants in the instant OA moved the Tribunal Bench at Chandigarh in OA No. 1040 of 2005 wherein by order dated 21.11.2005 (Annexure A/17 of OA), the respondents were restrained from finalising the minutes of the proceedings of the DPC. The applicants have filed **MA No. 337 of 2006** seeking a direction to the respondents not to fill up the vacancies of Inspectors by promotion during the pendency of the OA or in the alternative to fill up only 33.3% vacancies of the new sanctioned strength (511) by promotion. A revised chart of sanctioned strength has been marked as annexure A/18 of MA. Earlier the sanctioned strength of Inspectors was 645 in Bihar and Jharkhand but after 19.07.2001, it had been reduced to 511, which was evident from letter dated 10.07.2002 (Annexure A/19 of MA). Out of 606 posts (working strength of Inspectors), 163 Inspectors were promoted as Superintendent after 19.07.2001 and therefore the remaining working strength of Inspectors was reduced to 443 (i.e., 606-163) and consequently the remaining vacancies in the grade of Inspectors becoming 68 (i.e., 511-443). The Department promoted 62 officials in the grade of Inspectors vide Establishment Order No. 180 of 2002 dated 20.12.2002 (Annexure A/20 of MA) and another 10 officials vide Establishment Order No. 118 of 2005 dated 16.12.2005 (Annexure A/21 of MA) and, therefore, 100% vacancies can be taken to have been filled up. The Hon'ble Andhra Pradesh High Court by order dated 02.03.2005 in WP No. 7963 of 2004 and other analogous cases observed that the posts which were available prior to the date of new Recruitment Rules (RRs) 2002 should be filled up under the old RRs, i.e., of 1979. Vide letter dated 17.05.2006 (Annexure A/22 of MA), the Ministry of Finance directed that the vacancies of Inspectors which arose prior to 07.12.2002 be filled up by promotion on the

pre-structured strength of 645 which was contrary to the notification dated 19.07.2001 (Annexure A/5 of OA) and notification dated 05.06.2002 (Annexure A/18 of OA) whereby the new sanctioned strength (of 511) had come into force with immediate effect. Thereafter the Joint Commissioner (P & V), Central Excise, Patna (respondent No. 6) vide letter dated 02.06.2006 (Annexure A/24 of MA) invited 73 persons for Physical Standard Test (in June 2006) to fill up 100% of posts of Inspectors of pre-structured cadre (645) by promotion, which was impermissible under old Rules, 1979 as amended by the Central Excise Group C posts Recruitment (Amendment) Rules, 1999 (Annexure A/25 of MA), which provide that only 33.3% vacancies should be filled up by promotion and the balance by direct recruitment. The applicants have filed another **MA bearing No. 39 of 2009** seeking an amendment in the prayer in the OA to add in the reliefs already sought in the OA for quashing the Estt. Order No. 57/2006 dated 22.06.2006 (Annexure A/26 of MA) and the Estt. Order Nos. 78 to 82 of 2006 dated 22.06.2006 (Annexure A/27 series of MA) whereby a number of applicants juniors have been promoted to the next higher post of Inspectors. A copy of the notification dated 05.06.2002 with a revised chart of sanctioned strength has been marked as Annexure A/18 of this MA. The applicants have filed yet another **MA bearing No. 466 of 2007** indicating that the applicants had been reverted from their seniority and meanwhile the respondents had promoted juniors.

4. The **private respondent Nos. 7 and 8** who were initially not parties in the OA had filed MA bearing No. 338 of 2006 praying for addition as intervenor applicants which was allowed by order dated 15.06.2006. They have in their WS and the written arguments filed on 06.07.2012 submitted that the applicants cannot question the policy decision of the Government in the matter of promotion. The applicants belonged to the cadre of Data Entry Operators, whereas the private respondents were UDCs and Tax Assistants. The Data Entry Operators are technical posts and known initially as Key Punch Operators for which the minimum educational qualification was

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Matriculation, they should know typing and feeding the computer, their engagement was through Employment Exchange and there was no written or viva-voce examination but only typing test, whereas the LDCs and UDCs were recruited through Staff Selection Commission after holding regular selection and the minimum qualification for which was graduation. According to Notification dated 19.07.2001 (Annexure A/5 of OA), it was apparent from para 2 that where was a reduction in number of posts it would be effective after the existing incumbents were promoted to the higher level or the vacancies arising out of retirement and para 3 provided that no direct recruitment should be made to the various grades for the year 2001-02 without approval of the Ministry/ Department, since the Cabinet had approved as a one-time relaxation, the filling up of vacancies by promotion in all cadres. This ban on direct recruitment was extended up to 31.12.2002. This implied that all the vacancies were to be filled up only by promotion. It was incorrect to say that the old existing posts/ cadres stand abolished. These were to be reduced and not abolished only after adjusting the existing employees being promoted to the higher level or the vacancies arising out of retirement. The Hon'ble Andhra Pradesh High Court had held in WP No. 7963 of 2004 that persons eligible for promotion before restructuring should be guided by the old rules. The Ministry of Finance, Department of Revenue vide letter dated 17.05.2006 (Annexure A/22 of MA No. 337 of 2006), while making a reference to the judgments of the Hon'ble Andhra Pradesh High Court dated 02.03.2005 and 07.03.2005 as well as similar orders passed by Principal Bench of CAT in OA No. 1571 of 2003 (Kapil Dev and Others), Ernakulam Bench of CAT in OA No. 72 of 2003 (Smt. P. Narayani) and Allahabad Bench of CAT in OA No. 649 of 2004 (Smt. Negma Khatoon), conveyed to the Commissionerates as to how Senior Tax Assistants and Tax Assistants were to be promoted under the amended Recruitment Rules for Inspectors. [In para 3 it was stated that the amended RRs of Inspectors, Sr. Tax Assistants and Tax Assistants were published in the GOI Gazette on 07.12.2002, 20.01.2003 and 05.05.2003 respectively and thus the cadre

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restructuring in respect of these grades was made effective from the respective dates on which the amended RRs were notified. Accordingly, the Commissionerates were to work out the vacancies in the cadre of Inspectors prior to 07.12.2002 and in the cadre of Tax Assistants and UDCs prior to 05.05.2003 for filling up the vacancies from amongst the officers eligible for promotion as per the RRs at that time. In view of the order of the Hon'ble Andhra Pradesh High Court dated 02.03.2005 in WP No. 7963 of 2004 being challenged in the Hon'ble Supreme Court by filing of SLPs by D. Raghu and Ors. on the ground that implementation of the order would adversely affect the chances of promotion of Data Entry Operators to the grade of Inspectors, it was specified that promotion to the cadre of Inspectors effected in pursuance of the order of Hon'ble Andhra Pradesh High Court dated 02.03.2005 would be subject to the outcome of the SLPs.] The learned counsel for the private respondents has cited the order dated 06.07.2011 in OA No. 712 of 1997 (Amresh Chandra Sinha vs. Union of India), where issues were more or less the same, in support of his case.

5. **In their WS the official respondents have submitted that prior to cadre restructuring, the promotional avenue was for the 1st category: LDC - UDC - Tax Assistant (old) - Inspector and that for the 2nd category: DEO Grade A - DEO Grade B - DEO Grade C. There was no promotion channel in the executive line for DEOs. The recruitment rules of the two categories were different. The recruitment rules of the 1st category were published in 1979 while the recruitment rules of the 2nd category in 1992. The candidates of the 1st category were promoted as per the recruitment rules of 1979 in the channel indicated above while that of the 2nd category as per the recruitment rules of 1992 in the channel DEO Grade A - DEO Grade B - DEO Grade C. In the cadre restructuring, the Government of India abolished the post of UDC and DEO Grade A and redesignated it as Tax Assistant. Prior to the 5th CPC, the pay-scale of UDC was Rs. 1,200-30-2040 and that DEO Grade A Rs. 1150-25-1500 (as**

per the 4th CPC). The pay-scale of DEO Grade A was thus less than that of UDC before the 5th CPC. The Central Board of Excise and Customs vide letter dated 19.07.2001 communicated the approval of the Ministry on restructuring whereby some posts were abolished, some merged and some created. This was given effect to in the relevant Recruitment Rules. The revised RRs for Inspector, Sr. Tax Assistant and Tax Assistant came into effect from 07.12.2002, 20.01.2003 and 05.05.2003 respectively, that is from the date of publication in the Gazette of India and the Board vide letter dated 17th June 2003 and 21st April 2003 clarified that the post of Senior Tax Assistant came into existence w.e.f. 20.01.2003 and the post of Tax Assistant w.e.f. 05.05.2003, that is, date of publication of the RRs in the Gazette, and accordingly the Department implemented the guidelines and issued promotion orders in the grade of Senior Tax Assistants and Tax Assistants.

In the earlier seniority list as on 16.06.2003, the applicants were senior but on the direction of the Board to implement the orders of the Hon'ble Andhra Pradesh High Court dated 02.03.2005 and 07.03.2005 as well as similar orders passed by Principal Bench of CAT in OA No. 1571 of 2003 (Kapil Dev and Others), Ernakulam Bench of CAT in OA No. 72 of 2003 (Smt. P. Narayani) and Allahabad Bench of CAT in OA No. 649 of 2004 (Smt. Negma Khatoon), Estt. Orders No. 1, 2 and 3 dated 02.01.2006, Estt. Orders No. 4 and 5 dated 03.01.2006 were issued. The Hon'ble Andhra Pradesh High Court had ordered: *Promotion to the post of UDC Cadre and Tax Assistant of pre-structured cadre shall be made in accordance with the old recruitment rules in respect of vacancies which arose prior to 05.05.2003.* Similar orders had been passed by the Hon'ble Andhra Pradesh High Court in WP No. 7963/2004 in WP No. 7963 of 2004: "For the reasons stated above, we hold that the Order of the Tribunal is not sustainable and accordingly it is set aside. The department is directed to fill up the vacancies in the cadre of Inspector of Excise in respect of the vacancies which arose prior to 7.12.2002 in accordance with the 1979 Rules. If any promotions are held up or kept in abeyance, they shall be given effect forthwith." The Department was bound

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by the above orders and accordingly vacancies were calculated in the grade of old Tax Assistant and UDC prior to 20.01.2003 and 05.05.2003 and promotion orders issued. Also the seniority list had to be revised as the earlier list as on 16.06.2003 and 01.01.2005 was before the orders of the Hon'ble Andhra Pradesh High Court. Inasmuch as according to the order of the Hon'ble Andhra Pradesh High Court that **the amended Rules in respect of the S.T.A. and Tax Assistant shall be deemed to have come into force only from the date of publication of the Rules in the Gazette, namely with effect from 20.1.2003 and 05.05.2003, the post of old Tax Assistant and UDC will be treated as abolished w.e.f. 20.01.2003 and 05.05.2003 and not from 19.07.2001.** Before 20.01.2003 and 05.05.2003, the applicants were not in the channel of category 1 (para 5 above).

6. When the case came up for hearing on 06.07.2012, there was no one present for the applicant. However, the learned counsel for the applicant had earlier filed written arguments. As the OA has been pending for a long time, it was not possible to give any further adjournment and it was considered that the case be decided on merit as provided for in Rule 15(1) of the CAT (Procedure) Rules, 1987. Perused the entire record.

7. It is seen that in Writ Petition Nos. 7963 of 2004, 11090 of 2004, 18501 of 2004, 20108 of 2004, 20890 of 2004 and W.P.NO. 4444 of 2005, the Hon'ble Andhra Pradesh High Court held on 2 March, 2005 that the Rules in respect of the Senior Tax Assistants and Inspectors shall be deemed to have come into force only from the date of publication of the Rules in the Gazette namely with effect from 20.1.2003 and 7.12.2002 respectively and that it has to be necessarily held that the vacancies which arose prior to revised Recruitment Rules came into force have to be filled up by the then existing rules and not the amended rules. The Department was directed to fill up the vacancies in the cadre of Inspector of Excise in respect of the vacancies which arose prior to 7.12.2002 in accordance with the 1979 Rules

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and if any promotions were held up or kept in abeyance, they had to be given effect forthwith. Thus there is no ambiguity on this score and there is no doubt in regard to the proposition of law that any vacancy prior to the new Rules would be governed by old Rules and not by the new Rules. While considering a similar issue in J.Selvaraj vs Union Of India, the Hon'ble Madras High Court has in order dated 30 April, 2009 referred to the stand of the respondents that when the Government took a conscious decision not to fill the vacancy under old Rules keeping in view the massive restructuring of the Department, the old Rules cannot be relied on in those circumstances according to the decisions of the Hon'ble Apex Court reported in 2007 (10) SCC 402 and 1997 (3) SCC 59. However, in view of the decision of the Hon'ble Andhra Pradesh High Court cited which concerns the case of the instant applicants and respondents, the authorities had acted correctly in filling up the vacancies with reference to the old RRs. **Therefore the issues to be considered now are whether the vacancies of Inspectors which arose prior to 07.12.2002 could be filled up on the pre-structured strength by promotion** in regard to which the case of the applicants is that this would be contrary to the notification dated 19.07.2001 (Annexure A/5 of OA) and notification dated 05.06.2002 (Annexure A/18 of OA) whereby the new sanctioned strength had come into force with immediate effect, and **whether 100% of posts of Inspectors of pre-structured cadre could be filled up by promotion**, which was impermissible under old Rules, 1979 as amended by the Central Excise Group C posts Recruitment (Amendment) Rules, 1999 (Annexure A/25 of MA), which provide that only 33 1/3 % vacancies should be filled up by promotion and the balance by direct recruitment, according to the applicants. Restructuring entailed abolition, creation and merger of certain posts and the recruitment to the posts after restructuring was to be governed by the revised/ amended Rules notified in the Government of India Gazette on the dates indicated above. Any action taken in pursuance of the above policy of restructuring would have to be with reference to the position as on the date from which effect has been given to

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it and this includes counting the number of vacancies also. The number of vacancies for the purpose of promotion cannot be frozen to the level when the decision was taken or order was issued in regard to restructuring but instead it has to be reckoned as on the date of effect of the order on restructuring, that is the date of publication in the Gazette. The argument of the applicants in this regard is repelled.

8. In regard to the contention of the applicants in MA No. 337 of 2006 that not more than 33 1/3 % of posts of Inspectors of pre-structured cadre could be filled up by promotion with reference to the old Rules of 1979 (said to have been amended in 1999), there is no submission by the respondents, although it has been provided in para 3 of the Notification of the Ministry of Finance dated 19.07.2001 (Annexure A/5 of OA) that no direct recruitment might be made to the various grades for the year 2001-02 without approval of the Ministry/ Department as the Cabinet had approved as a one-time relaxation, the filling up of vacancies by promotion in all cadres. This ban on direct recruitment was extended up to 31.12.2002. This implied that all the vacancies were to be filled up only by promotion. This is a policy decision which should not ordinarily be interfered with. However, the respondents are directed to ensure that all vacancies prior to the date of effect of restructuring are filled up in accordance with the Rules prevailing then and those after restructuring with reference to the amended (revised) Rules of 2003, except for the period for which a ban was imposed by GOI on direct recruitment. It should be ensured that no partiality is shown to any category of staff in effecting the promotions.

9. With the above direction and observations, the OA with MA Nos. 337 of 06, 466 of 07, 39 of 2009 stands disposed of. No order as to costs.

Naresh Gupta

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[Bidisha Banerjee] M [J]

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Naresh Gupta
[Naresh Gupta] M [A]