

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH,

JAIPUR

Dated of order: 15.10.2003

OA No.63/2003

Hari Kishan Sharma s/o Shri Shiv Dayal Sharma r/c 17,
Dayanand Colony, Opposite Glass Factory, Tonk Road,
Jaipur, last employed as Income Tax Officer (TDS), Range
4, Jaipur.

.. Applicant

Versus

1. Union of India through the Central Board of
Direct Taxes, NCRB, Statue Circle, Jaipur.
2. The Commissioner of Income Tax, Jaipur-I, Central
Revenue Building, Statue Circle, Jaipur.
3. The Income Tax Officer (LDO), Range 4, Central
Revenue Building, Statue Circle, Jaipur.

.. Respondents

Mr. Rajendra Arora, counsel for the applicant.

Mr. N.K. Jain, counsel for the respondents.

CORAM:

HON'BLE MR. M.L. CHAUHAN, MEMBER (JUDICIAL)

HON'BLE MR. A.K. BHANDARI, MEMBER (ADMINISTRATIVE)

O R D E R

PER HON'BLE MR. M.L. CHAUHAN.

The applicant has filed the present application
thereby praying for the following reliefs:-

"(i) That the entire record relating to the case be
called for and after perusing the same, the
respondents may be directed to:-

(a) To set aside the order No.864 dt. 16.9.2002
passed by the respondent No.2 and order dt. 16th
July, 2001 passed by the respondent No.3
resulting thereby:-

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(i) Not to withdraw the benefit of stepping up of pay granted w.e.f. 21.7.1974 vide order

No. ESTT/E-31/PF (HC)/76-77/10002 DT 18.2.77.

(ii) To refund Rs. 89217 recovered from retiral gratuity towards alleged excess payment of salary.

(iii) Re-calculate all retiral benefit and pension on the basis of basic pay/salary which the applicant was drawing prior to passing the order dt. 16.7.2001 or what the applicant would have got but for passing the order dt. 16.7.2002 and/or 16.9.2002.

(b) Payment of interest and compensation on the amount, which is not paid to the applicant on the date when it should have been paid or on the difference amount between retiral benefit paid and payable.

(c) Any other order, direction or relief as may be deemed fit, just and proper under the facts and circumstances of the case, in favour of the applicant may also be passed.

(d) That the cost of this application may be awarded in favour of the applicant."

2. The facts of the case are that the applicant while working as Head Clerk in Income Tax Department made a representation dated 20.11.76 to the Commissioner of Income Tax, Jaipur to the effect that pay in the cadre of Head Clerk should be fixed with reference to the pay of Shri Bhawani Singh, who was junior to the applicant w.e.f. 21.7.74 as the applicant being a senior Head Clerk was drawing pay of Rs. 485/- p.m. on that date. The applicant

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has passed the Income Tax Inspector examination in July, 72 but Shri Bhawani Singh who has passed the said examination in July, 1974 was granted two advance increments of Rs. 15/- each on passing the said examination. The result was that on 21.7.74, the pay of Shri Bhawani Singh was Rs. 515/- per month as against Rs. 485/- per month, which the applicant was drawing. Therefore, there existed an anomaly w.e.f. 21.7.1974.

2.1 On receipt of the said representation the, CIT, Jaipur issued an order under FR 27 on 17.3.77 to step up the pay of the applicant from Rs. 485/- to Rs. 515/- w.e.f. 21.7.74 by relying upon the Govt. of India decision No.7 below FR 22-C which now corresponds the Govt. of India's order 23 dated 4.2.66 below FR 22 (I)(a) (1).

2.2 Subsequently, while finalising the pension papers on retirement on superannuation, the Senior Accounts Officer, ZAO, Jaipur pointed out to the DDO, Range-4, Jaipur vide his letter dated 3.7.01 that pay of Shri Bhawani Singh, the then Head Clerk, has been stepped down and the refixation has also been made in his case vide Dy. Director of Income Tax (Inv.) Jodhpur's order dated 28.11.2000. Thus, on account of fixation of pay of Shri Bhawani Singh, pay of the applicant was required to be refixed. In view of this, the DDO, Jaipur refixed the pay of the applicant vide order dated 16.7.01 and pay drawn in excess was recovered by the DDO from the retirement gratuity payable to the applicant.

2.3 The applicant made representation dated 31.10.2001 to the Chief Commissioner of Income Tax, Jaipur (Ann.A4). After examining the case of the applicant the said representation was rejected vide letter dated 16.9.2002 (Ann.A5) on the ground that - i) the Head Clerks

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are not entitled to grant of advance increments on passing the Inspector's examination, ii) that the order dated 17.3.1977 was issued by the CIT, Jaipur under FR-27 and FR-27 deals with premature increment at initial appointment to a post. Advance increments for passing the departmental examination of ITI does not come under FR-27, iii) The pay of Shri Bhawani Singh was stepped up by giving two advance increments on passing of ITI examination erroneously and iv) the recovery in the instant case was made by the DDO as per para 3 of the letter dated 17.11.2000 of the CBDT, and as such recovery can be effected in view of the provisions contained in rule 71 of the CCS (Pension) Rules, 1972.

2.4 The applicant has challenged the aforesaid order mainly on two grounds that huge amount to the tune of Rs. 89217/- has been recovered from the amount of retiral gratuity without following the normal procedure of law and such recovery could not have been effected after a long time without show-cause notices even if it is held that benefit of advance increment was wrongly given. The second ground taken is that the order dated 17th March, 1977 of granting two advance increments was passed by the Commissioner of Income Tax which has been withdrawn vide order dated 16th July, 2001 by the ITO (DDO) who is junior than the sanctioning authority that too without providing any opportunity of hearing and after more than 24 years within a fortnight before the date of his retirement on superannuation against all cannons of law, justice and service jurisprudence. It is further stated that on account of passing of the said impugned order dated 16th July, 2001 the applicant has been paid all terminational benefits at the reduced pay, which needs to be

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recalculated correctly and arrears thereof should be paid to him apart from enhancing the pension.

3. The respondents have filed reply. In the reply, the facts as stated above are not disputed. It is further stated that the pay of Shri Bhawani Singh was stepped down and refixation of his pay was made by the Dy. Director, Income Tax, Jodhpur vide order dated 18.11.2000, therefore, the pay of the applicant was also stepped down at the time of scrutinising the papers of pension vide order dated 16.7.2001. In the reply, the respondents have quoted Rule 73 of the CCS (Pension) Rules in order to justify that recovery of dues other than dues pertaining to occupation of Government accommodation can be adjusted against the amount of retirement gratuity becoming payable to the Government servant on his retirement. It is further stated that the recovery was effected on the basis of the objection raised by the Senior Accounts Office, ZAO, Jaipur.

4. We have heard the learned counsel for the parties and have gone through the material placed on record.

4.1 The learned counsel for the applicant brought to our notice the decision rendered by this Bench in the case of Panna Lal Tailor vs. Union of India passed on 17.7.2003 in OA No.274/2002 wherein the similar points were involved. In that case also the applicant while working as Head Clerk, has also qualified the examination for the post of Inspector and was granted two advance increments. Subsequently, his pay was also reduced after a lapse of 17 years and recovery of huge amount of Rs. 95,145 was made from the gratuity of the applicant in the similar manner

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without show-cause notice. The defence taken by the respondents in that OA was also almost similar. This Tribunal while disposing of the OA in para 6 held as under:-

"6.I have heard the learned counsel for the parties and gone through the material placed on record.

6.1 Without going into the merits of the case, the matter can be disposed of dly on the short point that before reducing the pay of the applicant after a lapse of almost 16 years and ordering recovery of sum of Rs. 95,145/- from the gratuity amount of the applicant, no show cause notice was issued to the applicant. Such action on the part of the respondents is not legally sustainable and is in violation of the principles of natural justice. The aim of the rule of natural justice is to secure or to put it negatively to prevent miscarriage of justice. In a sence, it is mean to assure that the party concerned has an opportunity of being heard on the principle of audi-alteram-partem. The violation of rule of natural justice results in abritrariness which is the same as discrimination. Where the discrimination is a result of State action, it is violation of Article 14. Therefore, a violation of principle of natural justice by a State action is a violation of Article 14. It is further judicially settled that an order by a State to the prejudice of a person in derogation of the vested right may be made only in accodance with the basic rule of

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justice and fairplay. Since the recovery of huge amount of Rs. 95,145/- from the gratuity amount of the applicant and also reducing his pay by two increments w.e.f. 1.7.83 after a lapse of about 17 years certainly effects the rights of the applicant and as such, such an order could not have been passed without affording opportunity to the applicant to show-cause against the said action. Thus, the action of the respondents in passing the impugned order Ann.A2 dated 26.3.02 thereby reducing the pay of the applicant by two increments w.e.f. 1.7.93 till 1.1.02 and withdrawing the earlier order dated 9.5.85 (Ann.A3) is arbitrary and as such not legally sustainable and the same deserves to be quashed and set-aside.

6.2 The instant case is also squarely covered by the decision of the Apex Court in the case of Bhagwan Shukla vs. Union of India and ors., 1994 (4) SLR 614 wherein the pay of the appellant there was reduced with retrospective effect without affording any opportunity of being heard on the ground that it was wrongly fixed initially and that position continued due to administrative lapses for about 20 years. The Hon'ble Apex Court in Para 3 observed as under:-

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3. We have heard the learned counsel for the parties. That the petitioner's basic pay had been fixed since 1970 at Rs. 190/- p.m. is not disputed. There is also no dispute that the basic pay of the appellant was reduced to Rs. 181 p.m.

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from Rs. 190/- p.m. in 1991 retrospectively w.e.f. 18.12.1970. The appellant has obviously been visited with civil consequences but he had been granted no opportunity to show cause against the reduction by the department and the order came to be made behind his back without following any procedure known to law. There has, thus, been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee, suffering civil consequences should be passed without putting the concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25.7.1991, which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant. The order of the Tribunal deserves to be set aside. We, accordingly, accept this appeal and set aside the order of the Central Administrative Tribunal dated 17.9.93 as well as the order (memorandum) impugned before the Tribunal dated 25.7.1991 reducing the basic pay of the appellant from 190 to Rs. 181 w.e.f. 18.12.1970."

6.3 That apart, the present application deserves to be succeeded yet on another ground. It has been judicially determined and settled by the Apex Court that where a Govt. servant is allowed to draw higher pay due to no fault of the Govt.

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servant concerned and the pay has been reduced subsequently after a lapse of considerable period, no step should be taken to recover or to adjust any excess payment paid to the employee. In the instant case, the advance increments have been paid due to the fault of the respondents and the applicant in no way can be held responsible for the same. In this behalf reference may be made to the decision of the Apex Court in the case of Shyam Babu Verma vs. Union of India and ors. (1994) 27 ATC 121, Gabriel Saver Fernandes and Ors. vs. The State of Karnataka and Ors., 1994 (5) SLR 625 and P.H.Reddy and ors. vs. National Institute of Rural Development and Ors., 2002 (2) ATJ 208. Thus, the recovery of Rs. 95,145 is not justified in view of the law laid down by the Apex court even if it is held that the applicant was not entitled to two increments on account of passing of departmental examination. The learned counsel for the applicant has also relied upon the decision of CAT-Jodhpur Bench rendered in the case of Arjun Singh vs. UOI in OA No.130/95 whereby it has been held that recovery from the retiral benefits of over payment made during the past 13 years solely due to administrative error, is not in conformity with the rules/instructions and as such withheld amount be refunded alongwith interest from the date of its due. Applying the ratio as laid down by the Apex Court, the recovery of Rs. 95,145/- could not have been effected from the applicant after a lapse of 16 years that too from the

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retiral benefits, even if it is assumed that the applicant was not entitled to two increments. Thus, the application must succeed on this ground also.

6.4 Now let us make passing references to the circular dated 24.7.55, 8.12.60 and 9.8.83 according to which the applicant was held not entitled to grant of two increments on passing the departmental examination. So far as circular dated 24.7.55 is concerned, it specifically states that the President is pleased to decide that subject to fulfilment of under noticed condition, the Lower Division Clerk, Upper Division Clerks and Inspectors of Income Tax Department should be given two advance increments in the grade in which they were working from the date they qualified in the departmental examination prescribed for the next higher grade. This circular was followed by another circular dated 8.12.60 according to which the benefits of earlier circular dated 24.7.55 was extended to certain categories including the Head Clerk to which category the applicant belongs and was given benefit of two increments on passing the departmental examination for Inspectors. It will be useful to quote para 1 of this circular which will have bearing in this case.

"The President is pleased to extend the benefit of the orders contained in the Ministry of Finance (Revenue Division) letter No. 2(29) Ad.VII/53, dated the 24th July, 55 and subject to the conditions prescribed therein to Steno-

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Typists, Stenographers, Head Clerks and Supervisors in the Income Tax Department who have qualified or qualify in future, the next higher departmental examination i.e., a Steno-Typist on passing the Departmental Examination for Ministerial Staff, Stenographer on passing the Departmental examination for Inspectors, and Head Clerks and Supervisors on passing, the departmental examination for Income Tax Officers will be granted two advance increments.

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Another circular which will have bearing in this case is dated 9.8.83 which reads thus:-

" I am directed to invite reference to this department's letter of even number dated 6.4.1983 on the above subject and to clarify that the two advance increments may be granted to all persons, who have qualified in the Departmental Examination for promotion to the next higher grade, irrespective of the year or date of passing, but restricting the drawl of the increased pay and allowances (Arrears) from 6.4.83 the date of issue of the letter under reference."

As can be seen from the order dated 9.5.85 (Ann.A3) the benefit of two advance increments was given to the applicant w.e.f. 25.6.81 in view of the circular dated 24.7.55 and 9.8.83 but the arrears were confined w.e.f. 6.4.83 in view of the circular dated 9.8.83. From the portion as

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quoted above, it is quite evident that benefit of two advance increments was also extended to the Head Clerks, besides Steno-Typist, Stenographer and Supervisors on passing the departmental examination for promotion to next higher grade. The specific case as pleaded by the respondents in their reply and more particularly in para 4(2) is that advance increments for passing the Income Tax Examination Inspector was effective vide letter dated 24.7.55 to LDCs and UDCs. This concession was further extended to Stenographer Grade-III vide letter dated 8.12.60 and this concession of advance increment was not extended to any other fresh category of staff. This submission made by the respondents in the reply affidavit is not factually correct if seen in the light of the circular dated 8.12.60 relevant part of which has been extracted above. The benefit was not only extended to Stenographers but the same was also extended to Steno-Typist, Head Clerks and Supervisors. It is not the case of the respondents in the reply that there are two separate departmental examination i.e. for Income Tax Inspector and ITO and the applicant qualified the examination for Income Tax Inspector. Be that as it may, the benefit of earlier circular dated 24.7.55 was not only extended to Stenographers but it was also extended to 3 categories namely Steno-Typist, Head Clerk and Supervisors and as such the contention of the respondents that the benefit of this circular was only available to the Stenographers cannot be accepted. That part,

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the basis of effecting recovery and reducing pay of the applicant at the fag end of retirement is on the basis of the clarification issued on 20.10.94 and 17.11.2000 (Ann.R1 and R2). If the letter dated 20.10.94 is perused, this letter makes it clear that the said letter is prospective and the grant of advance increments to Head Clerks or Stenographers for passing the Inspector's Departmental Examination was not to be granted at this stage and no fresh category of staff be added to this scheme and further it has been decided that the benefit according to the existing scheme of advance increments be continued to the categories which have been granted such advance increments but no fresh category of staff be added to this scheme. The letter dated 20.10.94 is reproduced in extenso which thus reads:-

".....The concession of advance increment was not extended to any other fresh category of staff, except those to whom this concession had earlier been sanctioned, as indicated above. The question of grant of advance increment to Head Clerk or stenographer Gr.II for passing the Inspectors Department examinations does not arise at this stage. Moreover, passing of the examination itself is an incentive to employee to become eligible for appointment to a higher post on passing of such an examinaiton. On these considerations, the existing scheme of advance increment needs to be abolished. However, considering that in the Income Tax Department the

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benefit of two advance increments is already admissible to some category of employees, ^{it} would be difficult to withdraw this incentive at this stage. It has, therefore, been decided that while the existing scheme of grant of advance increments for income tax side may be continued on historical grounds (no fresh category of staff can be added to this scheme".

Thus from perusal of the letter dated 20.10.94 it is quite evident that the benefit of grant of advance increment was dispensed with, with regard to fresh category of staff and the staff who were allowed to continue to draw advance increments. Similarly, the respondents also cannot draw any assistance from the letter dated 17.11.2000 which say that the Head Clerks and Stenographers are not entitled to grant of advance increments on passing the Inspectors Examination. However, para 3 of the said letter states as under:-

" As regards recovery of excess payment, the matter has been considered in consultation with the Finance Division of this department. It has now been decided that recoveries may be made from all concerned officials except those who have got a judgment from CAT in their favour".

This letter is also discriminatory in nature inasmuch as the recovery of excess payment has been ordered from all concerned officials except those who got the judgment from the CAT in their favour. Once the department has accepted the decision of the CAT as final and not decided to

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challenge the same, it does not behove the department to make recoveries from persons who have not approached the Tribunal for redressal of their grievances and to waive the recovery in respect of persons who have obtained favourable order from the CAT."

4.2 From the observations as quoted above, the matter is squarely covered by the ratio laid down in the aforesaid case of Panna Lal Tailor (supra). Resultantly, the impugned order dated 16.7.2001 (Ann.A2) is hereby quashed and set-aside. The respondents are directed to refund the amount of Rs. 89,217/- which was adjusted from the retirement gratuity payable to the applicant. The respondents are further directed to revise the pension of the applicant taking into consideration two advance increments sanctioned to the applicant vide order dated 18.3.77 (Ann.A1) and on such re-fixation the applicant shall be entitled to the revised pension. The arrears on account of revised pension as well as recovery of Rs. 89,127/- recovered from the gratuity of the applicant shall be paid to the applicant within a period of 3 months from the date of receipt of a copy of this order. It is made clear that in case the arrears on account of enhanced pension and amount of Rs. 89,127/- recovered from the gratuity of the applicant is not paid within 3 months from the date of receipt of this order, the amount which may become payable to the applicant after the expiry of said period shall carry interest at the rate of 12% p.a. from the date of filing of this application i.e. 7.2.2003 till the amount is actually paid.

5. The OA is disposed of accordingly with no order

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as to costs.

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(A.K.BHANDARI)

Member (A)

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(M.L.CHAUHAN)

Member (J)