

CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH,

Original Application No. 599 of 2003

Jabalpur, this the 2nd day of September, 2004

**Hon'ble Shri M.P. Singh, Vice Chairman
Hon'ble Shri Madan Mohan, Member (J)**

V.S. Shah s/o late S.R. Shah
R/o Bilaspur,
working as Commissioner of Income Tax,
Bilaspur.Applicant

(Applicant in person)

-Versus-

1. Union of India through
Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.
2. Central Board of Direct Taxes,
Through its Chairman,
New Delhi.,
3. S.J.S.Pall,
Chief Commissioner of Income Tax,
Allahabad.
4. P.Bandopadhyay,
Chief Commissioner of Income Tax,
Kolkata.Respondents

(By Advocate: Shri B.da.Silva)

O R D E R

By M.P. Singh, Vice Chairman:

The applicant is a Member of Indian Revenue Service of 1969 batch.

Private respondents nos. 3 and 4 are also Members of Indian Revenue Service but belong to 1970 batch. The applicant was working as



Commissioner of Income Tax at Bilaspur at the time of filing of this application but at present, he is working as Commissioner of Income Tax at Ahmedabad. He is due to retire on superannuation on 31.10.2004. During the financial year 1999-2000, he was posted as Commissioner of Income Tax (Appeals) at Patna. The applicant was communicated certain adverse remarks in the ACR for the year 1999-2000 vide letter dated 25.9.2000. He made point-wise representation against the said adverse remarks in the ACR on 06/15-11-2000 (Annexure A-6). According to the applicant he ought to have been considered for promotion to the post of Chief Commissioner of Income Tax in the year 2002 but respondent no. 1 has ignored him and considered and promoted respondents no. 3 and 4 to the post of Chief Commissioner of Income Tax. Since he has not been promoted to the post of Chief Commissioner of Income Tax, he has filed this O.A. claiming the following main reliefs:

- i) call for the entire records/proceedings of the case including the ACRs of the applicant and the respondents for all the relevant years;
- ii) direct the respondents to hold DPC and consider promotion of the applicant to the post of Chief Commissioner of Income Tax from the date the respondent no. 2 and 3 were promoted;
- iii) Direct that the applicant be treated as senior to respondents no. 2 and 3 after his promotion in the post/cadre of Chief Commissioner of Income Tax;
- iv) Direct that the applicant be paid all that salary and allowances as he is entitled to from the date his juniors have been promoted.

2. Heard the applicant, who is present in person, and the learned counsel for the respondents.

3. The applicant has submitted that he has been superseded by his juniors for the promotion to the post of Chief Commissioner of



Income Tax. During the course of his arguments, the applicant has taken several grounds for his supersession but the main grounds taken by him are as follows:

- i) He was communicated certain adverse remarks in his A.C.R. for the year 1999-2000 vide letter dated 25.09.2000. According to him, the officer who initiated the ACR with adverse entries was not competent to initiate it.
- ii) A decision to the effect that the officer who recorded adverse remarks in the ACR was not competent was communicated to the applicant on 24.6.2002. A Departmental Promotion Committee also met on the same day i.e. 24.6.2002 to consider the promotion of respondents nos. 3 and 4 for promotion to the post of Chief Commissioner of Income Tax. The applicant apprehends that the contents of the letter dated 24.6.2002 which was addressed to the applicant might not have been brought to the notice of the Departmental Promotion Committee.
- iii) He has a fundamental right to be considered for promotion based on merit criteria fairly and objectively along with his juniors. He has also submitted that he has been discriminated in the process of his consideration by the DPC inasmuch as either full facts leading up to the communication of the department vide its letter dated 24.6.2002 completely nullifying and erasing the deleterious effect of the so-called adverse remarks were not placed before the DPC and DPC was allowed to consider the said adverse remarks or the DPC considered incomplete record/ACR of the applicant in so much as for the relevant period, no ACR was written and available.

- iv) It is a well settled position that adverse entry cannot be operative if any representation is filed within the prescribed time and is pending. Pendency of any memorial or appeal would mean that the adverse remarks are not final and cannot be acted upon. According to him, the competent authority had acted upon the adverse remarks in the confidential rolls when a representation submitted within the prescribed time was pending for consideration before it.
- v) There is no provision in the extant rules for the competent authority to decide that a 'No Report Certificate' be given in place of confidential reports bearing adverse entries as it amounts to keeping the ACR of the applicant for the period 1999–2000 blank which is not permissible under the rules (Rule 174(13) of P & T Manual Vol.III. He has also submitted that when the competent authority comes to the conclusion that the adverse entries are inspired by malice or were entirely incorrect or unfounded or made by a person who is not competent to make them, they ought to have been expunged and order to that effect should be passed.
- vi) His ACR has been written by the reporting officer which was not reviewed by the reviewing officer concerned but by someone else who did not have the requisite experience of the work and conduct of the officer reported upon.
- vii) The DPC is required to assess the suitability of the applicant for promotion on the basis of service record and with particular reference to the ACRs for five preceding years. But in this case it could not do so correctly as the competent authority came to

the conclusion that the remarks were made by an authority, having no competence after the DPC was met.

viii) The applicant has not been given an opportunity in the case of down gradation of his CRs as required in view of the judgement of the Hon'ble Supreme Court in the case of **U.P. Jal Nigam**.

4. On the other hand, learned counsel for the respondents has taken the preliminary objection stating that the applicant has not been found fit for promotion to the post of Chief Commissioner of Income Tax by the Union Public Service Commission (for short, UPSC) and the U.P.S.C. has not been impleaded as a party. Therefore, the present OA is not maintainable as a non-joinder of party. He has stated that in case of promotion to the higher grade in Central Civil Services as well as in All India Services, it is the UPSC which makes the selection. Learned counsel further stated that the Hon'ble Supreme Court has held in the case of selection of All India Services that unless UPSC is impleaded as a party no relief could be claimed against UPSC. As regards the contention of the applicant that 'No Report Certificate' for the year 1999-2000 could not have been given, the learned counsel for the respondents has submitted that the matter has been examined in the light of the instructions issued by the DOP&T on writing and maintenance of ACRs. It was found that the applicant while working as Member (AA), Ahmedabad was transferred to Patna vide Board's order dated 13.5.1999. He after taking leave, joining time and performing election duty joined at Patna on 23.8.1999. During the period from 23.8.1999 to 31.3.2000, Shri J.S. Ahluwalia (23.8.99 to 28.12.99) and Sh. A.Mukhopadhyay (29.12.1999 to 31.3.2000), the then CGIT, Patna supervised the working of the applicant. During this

period, Smt. Asha Mehra, the then Member, C.B.D.T. was the Reviewing Officer. According to the instructions issued by the DOP&T, both Reporting and Reviewing Officer are required to have at least three months experience of supervising the working and conduct of the government servant reported upon before writing their assessment on the performance of the government servant.

5. Keeping in view these instructions, the ACR of the applicant for the year 1999-2000 was examined and it was observed by the competent authority that there should have been two reports on him i.e. for the period from 23.8.1999 to 28.12.1999 commented/reported upon by Shri J.S. Ahluwalia, the then CCIT, Patna and then reviewed by Smt. Asha Mehra, the then Member, CBDT & Zonal Member for Bihar and the second report should have been for the period from 29.12.1999 to 31.3.2000 reported by Shri A.Mukhopadhyay, the then CCIT, Patna and reviewed by Smt. Asha Mehra, the then Member, CBDT. However, Shri J.S. Ahluwalia who was transferred as CCIT, Chandigarh did not initiate the ACR of the applicant for the period from 23.8.1999 to 28.12.1999 due to which the Reviewing Officer did not get an opportunity to review the report. The ACR for the calendar year 1999-2000 during which the applicant was working as CIT (A), Patna was written by Shri A.Mukhopadhyay who succeeded Shri Ahluwalia w.e.f. 29.12.1999.
6. During the period between 29.12.1999 to 31.3.2000 when Shri Mukhopadhyay was Reporting Officer, the applicant was on earned leave during months of December, 1999 and January, 2000. As such out of three months period during the calendar year 1999-2000 Shri Mukhopadhyay did supervise the working of the applicant for only

two months which is less than 90 days required under the instructions of DOP&T. In view of this, the competent authority i.e. Chairman, CBDT decided that Shri Mukhopadhyay was not competent to report upon the working of the applicant for the year 1999-2000.

7. Keeping in view the above, the competent authority decided not to take any cognizance of the adverse remarks given by Shri Mukhopadhyay on the working and conduct of the applicant for the year 1999-2000. Since the other Reporting Officer Shri Ahluwalia who had supervised the working of the applicant for more than three months had retired from the government service on superannuation and also the Reviewing Officer during that period i.e. Smt. Asha Mehra was no longer in service, the competent authority while considering the representation of the applicant in 2002 decided to give 'NRC' for the year 1999-2000 in the case of the applicant. A decision to this effect was communicated to the applicant vide letter dated 29.6.2002.
8. As regards the impugned order dated 14.07.2003, the learned counsel for the respondents submitted that it was clarified that the applicant was considered by the DPC held on 24.6.2002 to recommend a panel for promotion to the grade of CCIT for the vacancies for the year 2002-03. The fact that the competent authority has decided to give No Report Certificate for the year 1999-2000 in the ACR of the applicant was duly communicated to the UPSC and was considered by the DPC which met on 24.6.2002 to recommend a panel for promotion to the grade of CCIT. The DPC while recommending officers in the panel did not recommend the applicant for promotion though two officers junior to him were recommended for promotion. The

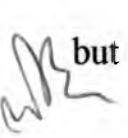
recommendations of the DPC were accepted by the competent authority i.e. Appointment Committee of Cabinet and as a result, the applicant did not find his name in the list of promotees issued vide order dated 14.7.2003. The DPC held in UPSC was constituted in the light of Indian Revenue Service Rules, 1988 (as amended from time to time). It is for the DPC to fix its own criteria and benchmark for recommending officers in the panel for the grade of Commissioner of Income Tax/Chief Commissioner of Income Tax.

9. We have given careful consideration to the rival contentions of the parties and we find that the applicant has been considered for promotion to the post of Chief Commissioner of Income Tax by the Departmental Promotion Committee held on 24.6.2002 to prepare a panel for the vacancies for the year 2000-2003. The applicant has earlier been communicated adverse remarks recorded by one Mr. Mukhopadhyay for the period from 29.12.1999 to 31.3.2000. He has made a representation and the competent authority has found that the applicant has not worked for a period of 90 days under Shri Mukhopadhyay as he was on leave during the month of December, 1999 and January, 2000. Keeping in view the instructions pertaining to writing and maintenance of ACR, the Board decided that Shri Mukhopadhyay was not the competent authority to report upon the applicant's working for the year 1999-2000. On the other hand, Shri Ahluwalia under whom the applicant had worked for the period from 23.8.1999 to 28.12.1999 did not initiate any CR for that period and he has since retired. The reviewing officer Mrs. Asha Mehra, who was the Member of the CBDT had also retired. Keeping in view these facts, the competent authority while considering the representation of

the applicant had decided to record a 'No Report Certificate' for the year 1999-2000. The said fact was brought to the notice of the Departmental Promotion Committee by the department on 5.6.2002 i.e. well before the date of the meeting of the DPC held on 24.6.2002, to prepare the panel for the post of Chief Commissioner of Income Tax (Para 4(ix) and 4(x) of parawise comments of the reply). The DPC has, therefore, taken into consideration this fact and has not considered the adverse remarks reported upon by Shri Mukhopadhyay for the period of 1999-2000.

10. As regards the contention of the applicant (para 43 of the written submission filed on 12.4.2004) that his CR for the subsequent period i.e. 2001-2002 and 2002-2003 are available and out of it better five ACRs should be selected for consideration of his case for promotion, cannot be accepted and the same is rejected as it is not permissible under the rules pertaining to the DPC.
11. As regards the contention of the learned counsel for the respondents that the applicant has not made the U.P.S.C. as a party, which has convened the meeting, and as per the settled legal position in case of All India Services this OA is not maintainable for non-joinder of parties, is not correct and is accordingly rejected for the following reasons.

The applicant is not claiming any relief against the UPSC. There is a difference for making selection for promotion of the officers of the Central Revenue Service through departmental promotion committee and in the case of officers inducted into All India Services. In the case of the All India Service, there is no DPC

 but the selection is made by a Selection Committee which consists of

Officers of the State Governments, Central Government and presided over by a Member of the UPSC. Moreover, in that case the recommendations of the Selection Committee selecting the officers for induction into All India Services are again considered by the UPSC after obtaining observations of the State Governments and the Central Government and then the decision of the UPSC is final. However, in case of the recommendations of the DPC, these are merely recommendations and are subject to acceptance by the competent authority in the Government. Therefore, the contention of the learned counsel for the respondents that the applicant is challenging the action taken by the UPSC is not correct. Hence, the above contention of the respondents is incorrect and is accordingly rejected.

12. On our requests, the respondents have produced a copy of the DPC proceedings as well as ACR dossier of the applicant. We have carefully gone through the ACRs of the applicant for the period from 1.4.1993 to 31.3.1994 onwards. In the year 1993-94 he was graded as 'good'; in 1994-95 he was again graded as 'good'; in 1995-96 'no report certificate' was given as the reporting officer ~~was~~ passed away; in 1996-97 he was again graded as 'good'; in 1997-98 he was graded as 'competent officer' by the reviewing officer whereas the reporting officer has not given over all assessment; in 1998-99 he was graded as 'good'; in 1999-2000 a 'no report certificate' has been given stating that both the reporting and reviewing officer have since retired on superannuation; and in the year 2000-2001 he has been graded as 'very good'. Thus, during the period from 1993-94 to 2000-2001 he has received only one 'very good' report and one as a 'competent officer'.

13. The applicant has been considered for the post of Chief Commissioner of Income-tax which is in the pay scale of Rs.22400-24500. As per the minutes of the DPC held on 24.6.2002 there were 32 vacancies which pertain to the year 2002-2003. For these vacancies, 43 officers were considered for promotion. The name of the applicant did not figure in this list of 43



officers. However, the Committee has also considered another 22 officers i.e. from serial nos. 44 to 65 for extended panel. The name of the applicant appeared at serial no.47 and the applicant was assessed as 'unfit' by the DPC.

14. As per the Office Memorandum F.No.35034/7/97-Estt.(D) dated the 8th February,2002(referred to in para 6.3.1 of Chapter 54 relating to 'Promotions' of Swamy's complete Manual on Establishment and Administration- Ninth Edition-2003) "in the case of 'selection' (merit) promotion, the hitherto existing distinction in the nomenclature ('selection by merit' and 'selection-cum-seniority') is dispensed with and the mode of promotion in all such cases is rechristened as 'selection' only. The element of selectivity (higher or lower) shall be determined with reference to the relevant bench-mark ("Very Good" or "Good") prescribed for promotion". It has been further provided in the said OM that "the DPC shall determine the merit of those being assessed for promotion with reference to the prescribed benchmark and accordingly grade the officers as 'fit' or 'unfit' only. Only those who are graded 'fit' (i.e. who meet the prescribed benchmark) by the DPC shall be included and arranged in the select panel in order to their inter se seniority in the feeder grade. Those officers who are graded 'unfit' (in terms of the prescribed benchmark) by the DPC shall not be included in the select panel.". It has also been provided for by the said memo dated 8.2.2002 that Promotion to the revised pay scale (grade) of Rs.12,000-16,500 and above, the mode of promotion, as indicated above, shall be 'selection', and the benchmark for promotion shall continue to be 'very good'.

15. In the present case, the DPC has been held on 24.6.2002 to make the selection for the post of Chief Commissioner of Income-tax in the scale of Rs.22400-24500 for the vacancies of the year 2002-2003. Therefore, the above instructions issued on 8.2.2002 shall be very much applicable for the said DPC and the benchmark for selection to the post of CCIT will be 'very good'. We have found from the ACR dossier of the applicant

[Signature]

that the assessment recorded in respect of the applicant for his performance from the year 1994-95 onwards as Commissioner of Income-tax has consistently been 'good' except for the year 1997-1998 when he was graded as 'competent officer' and 2000-2001 when he was graded as 'very good'. Therefore, there is no down-gradation of the reports in terms of the judgment of the Hon'ble Supreme Court in the case of U.P.Jal Nigam(supra) we also find that the grading given to the applicant on the basis of his confidential report does not meet the benchmark i.e. 'very good' and, therefore, the DPC held on 24.6.2002 has rightly graded the applicant as 'unfit' for the post of Chief Commissioner of Income-tax. We, therefor, do not find any illegality in the action taken by the respondent-department on the basis of the recommendations of the DPC held in the office of UPSC on 24.6.2002.

16. In the result, for the reasons recorded above, we do not find any merit in this Original Application and the same is accordingly dismissed, however, without any order as to costs.

(Madan Mohan)
Judicial Member

(M.P.Singh)
Vice Chairman.

rkv.

प्रांतकान सं. और/वा. जलालपुर, दिल्ली
प्रतिलिपि वा विवर:—
(1) सचिव, उत्तर व्यापार व वित्त विभाग, जलालपुर
(2) आवेदक श्री/श्रीमति, डॉ. जलालपुर
(3) फलाली श्री/श्रीमति, डॉ. जलालपुर
(4) विवाहित, डॉ. जलालपुर
सद्विवाह एवं आवेदक वार्तालाई देते
उप रजिस्ट्रार

Shri Kishore Shrivastava JI
Shri B.P. Silva. HC 150

Issued
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