Central Administrative Tribunal
Principal Bench

OA No.2662/2015

Order pronounced on : 27.02.2017

Hon'ble Mr. V.N. Gaur, Member (A)

Shri Gunjan Prasad,
S/o Shri Tarkeshwar Prasad,
Working as Commissioner,
Income Tax Settlement Commission,
Lok Nayak Bhawan, Khan Market,
New Delhi.

R/o 2127A, Block-E, Palam Vihar,
Gurgaon, Haryana.

...applicant

(By Advocate : Shri N.S. Dalal)

Versus

Union of India,
Through its Secretary/C.B.D.T.,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

...respondent

(By Advocate : Shri H.K. Gangwani)

ORDER

The present OA has been filed by the applicant, who is Commissioner, Income Tax Settlement Commission, questioning the order of the Reviewing Authority downgrading the APAR for the period 10.09.2012 to 31.03.2013 from '8' to '7'.

2. Notice was issued in this case on 24.07.2015, however, despite a large number of opportunities given to the respondents including imposition of cost, respondents did not file reply till

03.08.2016. In the meantime, the applicant has also filed MA No.1521/2016 on 28.04.2016 stating that the process of preparation for promotion of Commissioners in SAG to the rank of Principal Commissioner in HAG for 1987 batch of IRS officers, to which the applicant belongs, had started and, therefore, the OA be decided early. It was, further submitted that since the respondents had failed to file reply despite ample opportunities, the right of the respondents to file reply may be closed and the matter should be taken up for early hearing. Notice was issued in this MA also on 04.05.2016, but the respondents did not file any reply in the MA till 03.08.2016. When the matter was taken up on 03.08.2016, Shri H.K. Gangwani, learned counsel representing the respondents expressed regret over the delay but was not in a position to say as to when the reply in the OA and MA would be filed. However, he was prepared to argue the case even in the absence of counter reply. Accordingly the matter was heard. After hearing both the sides on MA No.1521/2016, the MA is allowed. The right of the respondents to file written counter reply is closed and the matter is taken up for hearing.

3. The learned counsel for the applicant submitted that the applicant had consistently earned Outstanding APARs including for the period 10.09.2012 to 31.03.3013, wherein the Reporting Authority had graded him as '8'. It was the Reviewing Authority

who illegally downgraded the applicant to '7' which is equivalent to 'Very Good'. It was submitted that the Reviewing Authority had recorded her remarks on a back date i.e. 28.07.2013. From the copies of letters obtained by him under RTI, which are enclosed as Annexure-A/3 and Annexure –A/4 to the OA, it can be seen that Reviewing Authority had recorded her remarks only in October, 2013 and not in July, 2013, because the office of the Reviewing Authority had forwarded the APAR of the applicant along with two other officers on 08.10.2013, which was again forwarded to the concerned Chief Commissioner to convey the same to the applicant by letter dated 28.10.2013. According to the DOP&T OM dated 16.02.2009, a strict time schedule has been laid down for timely preparation of proper maintenance of APARs. In case the APAR is not initiated by the Reporting Authority for any reason beyond 30th June of the year in which the financial year ended, he shall forfeit his right to enter any remarks in the APAR of the officer to be reported upon. Similarly, the Reviewing Authority shall also forfeit his right to enter any remarks in the ACR beyond 31st August of the year in which the financial year ended. In the instant case, the Reviewing Authority having recorded remarks in the month of October, 2013, had clearly violated the aforementioned Government instructions and, therefore, it should be treated as *non est.* He also referred to

various rulings of Hon'ble Supreme Court emphasising that the State is bound by its own guidelines.

4. It was further submitted that the downgrading of APAR by Reviewing Authority in this case was out of malafide which is reflected by the fact that the Reviewing Authority was not familiar with the day-to-day work of the applicant, even then she decided to disagree with the remarks of the Reporting Officer and in each column under review the grading was lowered to '7'. Referring to the remarks given by the Reviewing Authority that the resume was very perfunctory, the learned counsel submitted that the work of the applicant was to assist ITAT in disposal of appeals and, therefore, it was not possible to fix any target as may be possible in some other assignments. The Reviewing Authority without knowing the details of work performed by the applicant and without checking up from the Members or Vice President of ITAT formed a view while appraising his performance. It was pointed out by the learned counsel that the applicant had submitted a representation to the respondents on 24.07.2014, however, the same has not been disposed of as yet.

5. The learned counsel for respondents submitted that there was no truth in the allegation that the adverse remarks were recorded by the Reviewing Authority after the expiry of the time limit. The letter dated 08.10.2013 issued from the office of

Reviewing Authority was in respect of three officers and cannot be taken as a proof that the remarks of the Reviewing Authority had been recorded on or around that date. The learned counsel further submitted that the Department had proceeded in accordance with the rules and the remarks recorded by the Reviewing Authority had been communicated to the applicant and the applicant had submitted his representation also. The representation has not been disposed of by the Competent Authority as yet. He confirmed that the Reviewing Authority who had recorded the impugned remarks had retired on 20.02.2014.

6. Heard the learned counsels for the parties and perused the record. From the copy of APAR annexed to the OA as Annexure-A/2, it is seen that the APAR pertained to the period 01.04.2012 to 31.03.2013. However, it was written for the period 10.09.2012 to 31.03.2013 for the reason that there was no Reporting Authority for more than three months during the period 01.04.2012 to 09.09.2012. In the appraisal column, the applicant had made the remarks which became the subject of adverse comments by the Reviewing Authority subsequently. The remarks of the applicant are as under:

> "I have joined as CIT(DR) in ITAT on 10.09.2012.
>
> The main and only job is to represent the case(s) of the Department before the second appellate forum. It involves not only making pre-hearing research, preparation at the basic level but also articulating the position of the Department before the Tribunal,

> consisting of Members under the Ministry of Law. The post hearing stage also involves the filing of written submissions and filing counter to the submissions filed by the opposite party. Decisions are eventually rendered by Members in ITAT.
>
> During the period of my stay in ITAT I have assisted the Tribunal in disposing off more than 200 appeals from 10.09.2012 to 31.03.2012. This also includes such old appeals as Mohan Mekins Ltd. and Ors. which consisted of 31 appeals from both sides. The arguments lasted 4 working days.
>
> Besides, disposing off appeals before the E-Bench, where I am posted, I have also handled cases of other Benches, when the designated CIT was unavailable. Substantial disposals took place.
>
> No targets are fixed for the job. The only focus is on quick disposal of appeals. Here I may acknowledge that there was no interference from CCIT-III in the disposal of the appeals for which I am thankful. My articulation has also been appreciated by Members, including the Vice President of the ITAT."

7. Reporting Authority had graded the applicant as '8', however, interestingly, in Column 8A 'Pen Picture' under Section III(B) of the APAR, the Reporting Authority has written "He has never met me." The applicant had filled up the form along with the self appraisal on 15.07.2013, which was beyond the date prescribed by the DOPT OM dated 16.02.2009 (Annexure A-8). However, he has argued in his representation that any delay in submission of APAR cannot be considered adversely as according to the DOP&T OM dated 23.09.1985, the Reporting Authority was free to initiate APAR without his self appraisal. The main contention of the applicant is that the Reviewing Authority had recorded the remarks in the APAR after the prescribed cut off date of 31.08.2013 and, therefore, the same had become *non est*. In

the copy of the APAR that has been placed on record by the applicant as Annexure A-2 the date of receipt of the APAR by the Reviewing Authority has been shown as 24.07.2013. However, according to the applicant, the fact that the APAR had been forwarded by the office of the Reviewing Authority by the letter dated 08.10.2013 proves that the APAR was written by the Reviewing Authority after 31.08.2013. The argument is that since the office of Reviewing Authority had forwarded the APAR on 08.10.2013, it is presumed that the remarks were recorded beyond the permissible date of 31.08.2013. It is very difficult to appreciate this logic. The letter dated 08.10.2013 was a consolidated forwarding letter in respect of three officers and there is nothing on record to show that the APARs forwarded through this letter were recorded after 31.08.2013. In para 5 (i) and 5(ii) of the OA the applicant himself stated that "Reviewing Officer forfeited her right to make entries in the APAR as the same seems to have been done by her on 08.10.2013...." and "just to cover up her wrong, the Reviewing Officer has antedated her remarks in the APAR to 27th July 2013, while the letter dated 08.10.2013 shows that it has been done only in October and if this is so then certainly it is serious matter." It is obvious that the applicant himself is not sure whether the remarks of the Reviewing Authority were recorded after 31.08.2013 or not, and has made allegation without any convincing evidence. This

Tribunal cannot make up its mind on the basis of conjunctures and surmises.

8. The applicant has also alleged malafide and personal bias against the Reviewing Authority in the OA but there is nothing in the pleadings that could throw some light on the reasons for malafide and personal bias. It is trite that any allegation of malafide has to be proved with incontrovertible evidence and the allegations cannot be bandied about in a casual manner.

9. The third ground taken by the learned counsel for applicant is that the Reporting Authority was fully conversant with the work done by the applicant and, therefore, he was in the best position to appraise his performance. Since he had given a score of '8', the Reviewing Authority who was not familiar with the work of the applicant was not justified in downgrading the APAR from '8' to '7'. This contention of the applicant cannot be accepted as a general preposition because by that logic no Reviewing Authority will be qualified to comment on the work of an officer after the same has been reported upon by the Reporting Authority who is supposed to be best placed to judge the performance of the subordinate. The logic breaks down further, particularly, in the case of the applicant because in OA No.1233/2014, which is one of the judgments relied upon by the learned counsel for applicant,

it was Reporting Officer who had given him overall grading of 5.87 in the APAR for the period 22.07.2011 to 17.02.2012, which was upheld by the Reviewing Authority. The applicant had challenged that grading in the OA 1233/2014. It is obvious that the applicant himself would not accept the assessment of Reporting Authority as the last word. The comment of the Reporting Authority in column 8 of the APAR that "he (applicant) has never met me" is quite significant. It raises doubt about the familiarity of even Reporting Authority with his next junior in day-to-day functioning when he had no occasion to even meet him during the span of 7 months for which he was reporting.

10. The learned counsel for the applicant has also questioned the remarks made by the Reviewing Authority in column 4 under Section IV(A)-Review, which reads as follows :-

> "The Resume given by the officer is very perfunctory. He mentions about helping in disposing of more than 200 appeals, means he is not sure about the exact figure. Beyond this, he has not elaborated the quality of his arguments, the result in cases where The Tribunal decided in favour of the Deptt. Mere saying that Members and Vice-President of ITAT praised his articulation without any supportive document/any comment from the Reporting Officer or positive remarks from his side, cannot be taken/accepted on face value. I have, therefore, downgraded his appraisal from 8 in all columns and then overall 8 to '7' in all columns with overall 7. Regarding comments on Column 5 about his integrity too, I am not in agreement with the Reporting Officer. It is within my knowledge that he has been served with a 'major chargesheet' on 12.12.12."

11. The learned counsel particularly focussed on the remark of the Reviewing Authority that the resume of the officer was very perfunctory, and that there was major charge-sheet served on the officer on 12.12.2012.

12. This Tribunal does not see any ground for interfering in the remarks recorded by the Reviewing Authority which are nothing but factual. It cannot be denied that the applicant in his resume has not mentioned the exact number of cases he has handled during the period under review, which is easily available from the record. He has made a general statement that his work involved "not only making pre-hearing research, preparation at the basic level but also articulating the position of the Department before the Tribunal…". In my view it is for the concerned department to take a view with regard to the manner in which the officers are to report the work done by them in the resume. Knowing the nature of the work done by its officers the department only can decide whether an officer has filled his resume of work done in a truthful, precise and objective manner. This Tribunal cannot substitute its own views in this matter. Suffice would it be to say, the applicant has failed to show as to why these remark is contrary to the fact. The same applies to the observation that a major charge sheet had been served on the applicant. It is settled position that vigilance clearance can be withheld in respect of a

Government servant once the charge sheet has been served. In this case, despite serving of charge sheet on 12.12.2012, the Reporting Authority certified his integrity in the relevant column on 23.07.2013 as "beyond doubt". It would have been contrary to facts, as well as conveyed a wrong picture, had this incorrect remark not been corrected by the Reviewing Authority.

13. The learned counsel for applicant has relied on the following judgments in support of his contentions :-

(i) ***Gunjan Prasad Vs. Govt. of India*** (OA No.1233/2014)

(ii) ***Union of India Vs. Rohit Kumar Parmar*** (WP(C) No.5533/2011)

(iii) ***Rohit Kumar Parmar Vs. Union of India & Ors.*** (OA No.3410/2010)

(iv) ***Sukhdev Singh Vs. Union of India & Ors.*** (C.A. No.5892/2006.

(v) ***Devendra Swaroop Saksena Vs. Union of India*** (OA No.4258/2013 in MA No.1575/2014)

(vi) ***R.L. Butah Vs. Union of India & Ors.*** (C.A. Nos.1614 to 1616 of 1968)

14. I have perused these judgments and find that in OA No.1233/2014, as noted earlier, the issue was quite different. It was not a case where the grading given by the Reporting Officer

was downgraded by the Reviewing Authority. It was a case where both authorities had given the same gradings but the applicant had challenged it in a different set of facts. The only ground that is common is that the remarks were recorded much after the due date prescribed both by the Reporting as well as Reviewing Authority, which apparently was an admitted position in that case. This is not so in the present OA.

15. In ***Rohit K. Parmar*** (supra), the issue before the Hon'ble High Court of Delhi was the order given by this Tribunal in OA No.3410/2010 to ignore the APARs for the period 2003-04 and 2006-06 (sic) following the judgment of Hon'ble Supreme Court in ***Abhijit Ghosh Dastidar Vs. Union of India*** (C.A. No.6227/2008). Obviously, this is not the grievance of the applicant in this case that the adverse remarks of the APAR were not communicated to him. In ***Sukhdev Singh*** (supra) also the main issue before the Hon'ble Supreme Court was regarding the communication of entry in ACRs of Public Servant – Poor, fair, average, good or very good, within a reasonable time so that the Government servant could make representation to the concerned authorities. In ***Devendra Swaroop Saksena*** (supra), the representations of the applicant against grading awarded in his ACRs/APARs were rejected by the competent authority without providing valid reasons for the same. The Hon'ble Supreme Court

held that approach of respondents was far from being quasi judicial.

16. A perusal of above mentioned judgments shows that these judgments are not of any help to the applicant in the present OA as the issues discussed and decided in those cases are quite different.

17. In ***R.L. Butah*** (supra), the Hon'ble Supreme Court has held that adverse remarks in confidential report need not contain specific instances on which such remark was based. The affected employee does not have right to hearing unless as a result of specific incidence, warning or censure is issued to such employee.

18. The ratio of this judgment is squarely applicable to the remarks of the Reviewing Authority in the APAR of the applicant under reference as the Reviewing Authority had mentioned certain factual positions according to her perception for which it was not necessary to consult the Members and Vice President of ITAT as contended by the applicant.

19. It is noted that the appeal filed by the applicant has not yet been decided by the Competent Authority, however, it is an admitted fact that the officer who was Reviewing Authority at that time has already superannuated. Therefore, the remanding of the matter back to the respondents to decide the appeal when, the

then Reviewing Authority is no more in service, will be a futile exercise. The OA has, therefore, been examined on merits and in view of the foregoing discussion and reasons, I do not find any merit in the OA. The OA is, accordingly, dismissed as such.

(V.N. Gaur)
Member (A)

27th February, 2017

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