

Central Administrative Tribunal
Principal Bench: New Delhi

OA No. 4472/2015

Reserved on: 05.05.2016
Pronounced on: 31.05.2016

Hon'ble Mr. V. Ajay Kumar, Member (J)
Hon'ble Dr. B. K. Sinha, Member (A)

Yogendra Mittal
Joint Director of Income Tax (TCB & Policy)
s/o Sh. Mahesh Chand Mittal,
R/o 302, Ratnagiri Apartments,
Kaushambi,
Ghaziabad (UP)-201 010. ...Applicant.

(By Advocate: Mr. Sachin Chauhan)

Versus

1. Union of India through
Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi-110 001.
2. The Chairman,
Central Board of Direct Taxes,
Ministry of Finance, Department of Revenue,
North Block, New Delhi.
3. The Member (P&V),
Central Board of Direct Tax,
North Block, Delhi.
4. The DGIT (Vig.),
Dayal Singh Public Library,
Deen Dayal Upadhyay Marg,
Delhi. ...Respondents

(By Advocate: Ms. Harvinder Oberoi)

O R D E R

By Hon'ble Dr. B.K. Sinha, Member (A):

The applicant in the instant OA, is aggrieved with the action of the respondents in continuing him in the Agreed List of officers against the provisions of rules and denying

him vigilance clearance. The applicant has, therefore, prayed for a direction to the respondents to remove his name from the Agreed List with all consequential benefits.

2. An episodic of narration of facts, posited from the records, is that the applicant is admittedly an Income Tax Officer appointed in the year 2006 as Assistant Commissioner of Income. He was subsequently promoted to the rank of Deputy Commissioner of Income Tax and then Joint Commissioner of Income Tax (TCB & Policy) vide order dated 13.08.2015. In January 2013, FIR was registered by the CBI under Sections 7, 12 and 13(2) r/w 13(1) (d) of Prevention of Corruption Act but till date no chargesheet has been filed under Section 173 of Cr.P.C. and the case continued under investigation. However, vide order dated 24.05.2013 the applicant was transferred from Delhi (CCA) to Chennai (CCA TN). Aggrieved, the applicant filed OA No.1868/2013 which was allowed by this Tribunal vide order dated 13.01.2014 and affirmed by the Hon'ble High Court of Delhi in WP(C) No.6726/2015 decided on 25.08.2015. The fact that the applicant had been placed in Agreed List came to the notice of the applicant for the first time from the counter affidavit filed on behalf of the respondent in the said OA. Hence, the applicant has filed

the instant OA for deletion of his name from the Agreed List on the following grounds:-

- (i) In the first instance, the applicant submits that he was put on the Agreed List in 2013 jointly drawn up by the Department, CVC and CBI. The Agreed List does not permit retention of any officer beyond a period of three years, hence, his name should have been removed from the said list;
- (ii) In the second place, normally an officer is placed in the Agreed List for a period of one year and in exceptional cases, the retention in the Agreed List is extended for second and may be for third year on the basis of recommendation of the Department, CVC and CBI and affirmed at the level of CBDT, but there is no provision of extension in the said list beyond the period of three years;
- (iii) In the third place, it is submitted that he was promoted to the rank of Joint Commissioner of Income Tax vide order dated 13.08.2015. It is the case of the applicant that when he was good enough to shoulder higher duties and responsibilities on the basis of vigilance clearance, then how could vigilance clearance be refused to him for training abroad;

- (iv) In the fourth place, neither departmental proceeding has been initiated against him nor has any charge sheet been filed in the criminal case pending against him. Therefore, there are no grounds for the respondents to continue him in the Agreed List beyond three years;
- (v) In the fifth place, the applicant submits that the 'integrity column' of APAR has been well reported and there is no question mark on his integrity. In this regard, the applicant has relied upon the order of the Mumbai Bench of this Tribunal in OA No.154/2012 decided on 12.06.2012 whereby the Tribunal quashed the action of the respondents in keeping the applicant therein in the Agreed List.

3. The respondents have filed their counter affidavit in which they submit that one complaint file bearing No.NZ/CBI/01/13 is pending against the applicant in which CBI report dated 23.07.2015 recommending prosecution against him has been examined. The case was further referred to the CVC for its first stage advice on 10.09.2015 which has sought certain clarifications. The CBI has submitted its reply to these queries vide letter dated 17.12.2015. The respondents further submit that the name of the applicant has been placed on the Agreed List

after the joint meeting between the CVO of the CBDT and the CBI in pursuance to the instructions issued by DoP&T from time to time. The applicant had sought placement in Senior Professional Course in NIFM, which is not a mandatory training/course to be attended by the applicant, vigilance clearance was accordingly withheld. It is the case of the respondents that a search had been conducted in January, 2013 and the CBI recommended launching of prosecution against the applicant. The respondents have, therefore, stoutly pleaded for dismissal of the OA.

4. The applicant has filed a rejoinder application in which he has drawn the attention of the Tribunal to the reply of the respondents of paras 5.5 and 5.6 of the OA regarding retaining the name of the applicant beyond one year on the same ground of registration of FIR and continued him on the Agreed List beyond three years without there being any prior consent of the competent authority. It is the case of the applicant that no specific reply to the above paras has been submitted by the respondents in their counter affidavit.

5. We have carefully gone through the pleadings of the rival parties and have patiently heard their oral

submissions made during the course of arguments by their respective learned counsels. The twin issues for our consideration are –

- (i) Whether the instructions relating to retention and removal of names in the Agreed List have been followed in the case of the applicant?*
- (ii) Whether pendency of criminal case in respect of the applicant would ipso facto lead to retention of his name continued to be in the Agreed List irrespective of the other instructions on the subject?*

6. We start with the fact that the inclusion, retention and exclusion of names on the Agreed List are guided by the instructions contained in OM dated 05.05.1966 of MHA. It is apparent from the above instructions that the Agreed List is a list of officers in respect of whom a certain watch and ward activities have to be looked into. It is prepared in respect of those gazetted officers against whom complaints have been received in respect of their integrity and honesty or doubts, if any, exist regarding their conduct, following consultation between the officers of the Department concerned and of CBI (now CVC). The officers placed on the Agreed List are subject to closer scrutiny,

quite checking about their reputation, unobtrusive watch of their contracts style of living and secret enquiry by the CBI regarding their assets and financial resources and collection of information by CBI on the basis of bribery and corruption. The relevant portions of the instructions dated 05.05.1966 are reproduced hereunder:-

“7. The following action will be taken in respect of officers on these agreed lists by the Departments or the Undertakings and by the C.B.I.:-

- (I) Closer and more frequent scrutiny and inspection of their work and performance by the Departments concerned, particular in spheres there is scope for discretion or for showing favours.*
- (II) Quite check about their reputation both by the Department and the C.B.I.*
- (III) Unobtrusive watch of their contracts style of living etc. by the CBI.*
- (IV) Secret enquiry by the C.B.I. about their assets and financial resources. The Departments will make available their property returns and other relevant records to the CBI.*
- (V) Collection of information by the CBI of specific instances of bribery and corruption practices.*

8. If these secrets checks and enquires reveal positive material, open enquiries will be started by the C.B.I. and further action taken in the light of the results of that enquiry. It may be emphasized that no adverse or punitive action is contemplated against any officer on these lists unless these checks, verifications or enquiries bring for the adequate material to reasonable conclude that he is lacking in integrity. These agreed lists will remain in force for one year from the date of preparation. At the end of this period, the list will be reviewed and the name of those officers against whom there is not sufficient evidence to proceed against will be deleted from the list.”

However, subsequently there were complaints relating to including, retention and exclusion of officers from the Agreed List as a consequence of which the Department issued the OM dated 13.02.1991 on the subject.

7. The question of inclusion does not concern us as admittedly the applicant stands included in the Agreed List. To the contrary, his grievance relates to not being excluded from the Agreed List. The period for which an officer, once included, will continue on the Agreed List has also been provided in para 3(iv)(e) of the afore OM dated 13.02.1991. The name of an officer, once included in the Agreed List, can only be excluded with the approval of the CBDT in the case of Group-A officers. For this purpose, the concerned Commissioner of Income Tax is required to submit a self-contained proposal to the Directorate of Income Tax (Vig.) including reasons for such exclusion. From a plain reading of both these provisions together, the following situation emerges:-

- (a) Once included in the Agreed List, the officer will continue there for one year;
- (b) Beyond this period of one year, the retention on the Agreed List will be made with the consent of the CBDT in case of Group-A officers on a specific recommendation sent by the CIT;

- (c) Extension should take place not in routine manner but as a well deliberated decision;
- (d) The extension of officers retained on the Agreed List for a period of three years is only as a matter of exception; and
- (e) The retention upto three years will take place one year at a time.

8. We take a note of the fact that the OM dated 14.12.2007 deals with the guidelines relating to grant of vigilance clearance to members of the Central Civil Services/Central Civil Posts. In this regard, the relevant part of the instructions provide as under:-

“2 The circumstances under which vigilance clearance shall not be withheld shall be as under:-

- (a) *Vigilance clearance shall not be withheld due to the filing of a complaint unless it is established on the basis of at least a preliminary enquiry or on the basis of any information that the concerned Department may already have in its possession, that there is, *prima facie*, substance to verifiable allegations regarding (i) corruption (ii) possession of assets disproportionate to known sources of income (iii) moral turpitude (iv) violation of the Central Civil Services (Conduct) Rules, 1964”*

9. This position has been reiterated in OM dated 12.06.2013. The issue of denial of vigilance clearance had been put into a clear perspective by the Hon'ble Supreme Court in the case of *Union of India etc. etc. vs. K.V.*

Jankiraman etc. JT [1991(3) SC 527]. Subsequently, the Government of India have also issued OM dated 14.09.1992, which provides as follows:-

“No. 22011/4/91-Estt(A)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel & Training
North Block, New Delhi-110001

Dated: 14.09.1992

OFFICE MEMORANDUM

Subject: Promotion of Government servants against whom disciplinary/court proceedings are pending or whose conduct is under investigation. Procedure and guidelines to be allowed.

<p>Board's L/No. <i>E(D&A) 88RG6-21 dt.</i> <i>21.9.88 & 2.7.90.</i></p>	<p><i>In supersession of all instructions contained in Bd's letters referred to in the margin on the above subject, the procedure and guidelines laid down below shall be followed in the matter of promotion from Group 'B' to Group 'A' and within Group 'A' of Railway Officers against whom disciplinary/Court proceedings are pending.</i></p>
<p><i>2. Cases of Govt. to whom sealed cover procedure will be applicable.</i></p>	<p><i>At the time of consideration of the cases of Govt. servants for empanelment details of Govt. servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committee:-</i></p> <p class="list-item-l1"><i>(i) Government Servants under suspension;</i></p> <p class="list-item-l1"><i>(ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending;</i></p> <p class="list-item-l1"><i>(iii) Government servants in respect of whom prosecution for a criminal charge is pending.</i></p>
<p><i>7. Sealed cover procedure applicable to officers coming under cloudholding of DPC but before promotion.</i></p>	<p><i>A Govt. servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the</i></p>

	<p><i>recommendations of the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a Sealed Cover by the DPC. He shall not be promoted until the conclusion of disciplinary case/criminal proceedings and the provisions contained in this letter will be applicable in his case also.”</i></p>
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10. We have also taken note of the decision of the Tribunal (Bombay Bench) in *Vivek Batra Vs. Union of India & Ors.* [OA No.150/2012 decided on 12.06.2012]. In this case the applicant was working as Additional Director of Income Tax in Mumbai and was put on Agreed List on the ground that his name could not have been retained on the Agreed List beyond a period of three years. The Tribunal, after taking into account para 2(e) of Central Board of Direct Taxes Instructions No.1881 of 13.02.1991 held as under:-

“8. We have carefully perused the entire materials available on record and we have heard learned counsel for the parties. In our view the lackadaisical or indifferent attitude shown by the respondents cannot be justified under any circumstances. If the respondents are of the view that the applicant has to be proceeded against departmentally, nothing stops them from doing so. If in fact the respondents are satisfied that the antecedents of the applicant are bad, undoubtedly, law will have to take its own course. But the minimum that could have been done by the Department proposes to take against him. Respondents cannot turn a blind eye to the instruction issued by the Central Board of Direct Taxes itself.

9. Still further, this Original Application has been pending before this Tribunal for more than three months. More than two or three chances were given to the respondents to inform the Tribunal as to what action has been taken by the respondents on Annexure A3 representation submitted by the applicant. The

respondents have not even bothered to file their written statement, nor have they chosen to inform the Tribunal about the action taken on the representation.

10. Keeping in view the above facts and circumstances, we are satisfied that the grievance of the applicant is liable to be redressed. We have carefully perused the materials available on record. The instruction issued by the respondent no.2 which has been extracted in the earlier part of this order is unambiguous. Similarly, relevant portion of O.M. No.130/1/66-AVD dated May 6, 1966, a copy of which is available on record as Annexure A-1, will also show that the action of the respondents is tainted with illegality and irregularity. Therefore, the action of the respondents in keeping the applicant in the "Agreed List" cannot be sustained."

11. We find that applicant is similarly placed as the applicant in *Vivek Batra's* case (supra) and, therefore, the instant OA appears to be well covered by that decision. However, the problem in this decision is that it was not a contested decision in the sense that no reply had been filed on behalf of the respondents. The other problem is that the enquiry against the applicant is in advanced stage and representation of the applicant has been forwarded to the CBI by the CBDT on 23.11.2015 and 15.12.2015. The reply of the CBI is awaited.

12. The question would then arise is that can an officer against whom enquiry has proceeded to such an advanced stage, be excluded from the Agreed List? In this regard, we are swayed by a number of decisions. In the first instance, it is a well accepted ratio that a thing required to be done in a particular way can only be done in that way. In

Association of Management of Private Colleges Vs. All India Council for Technical Education & Ors. [2013 (8) SCC 271],
the Hon'ble Supreme Court has held as under:-

“67. The position of law is well settled by this Court that if the Statute prescribes a particular procedure to do an act in a particular way, that act must be done in that manner, otherwise it is not at all done. In the case of Babu Verghese v. Bar Council of Kerala[1999 (3) SCC 422], after referring to this Court's earlier decisions and Privy Council and Chancellor's Court, it was held as under:

“31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor which was followed by Lord Roche in Nazir Ahmad v. King Emperor who stated as under:

32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of V.P. and again in Deep Chand v. State of Rajasthan. These cases were considered by a three-Judge Bench of this Court in State of U.P. v. Singhara Singh and the rule laid down in Nazir Ahmad case was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law.”

13. We have seen that Act provides a certain mode of retention of names in the Agreed List on the basis of fair consideration and proposal submitted to the CBI with prior approval of competent authority. From the averments and the reply filed by the respondents, it can be inferred that this procedure had not been adopted by the respondents. We also take note of the fact that the period of three years is a maximum for which a name could be retained on the

Agreed List and that position has been taken in *Vivek Batra's case* (supra) vide which the instant case is well covered.

14. We have also considered the seeming contradiction between the retention on Agreed List and the enquiry being conducted against the applicant. We are to remark here that the purpose of instructions pertaining to the Agreed List is different from that of the enquiry. Once an officer is included in the Agreed List, he will be on closer watch; an enquiry can be launched against him; punishment to be imposed will depend upon the outcome of the enquiry which will take its own course. We also cannot overlook the fact that the applicant has been promoted during this period.

15. Therefore, in view of the aforementioned facts and that there being guillotine acting on retention of a person for more than three years, we dispose of this Original Application with a direction to the respondents to remove the name of the applicant from the Agreed List forthwith and grant him all consequential benefits flowing therefrom. There shall be no orders as to costs.

(Dr. B.K. Sinha)
Member (A)

(V. Ajay Kumar)
Member (J)