

OA.No.170/00092/2017/CAT/Bangalore Bench
**CENTRAL ADMINISTRATIVE TRIBUNAL
 BANGALORE BENCH**

ORIGINAL APPLICATION NO.170/00092/2017

DATED THIS THE 13th DAY OF FEBRUARY, 2019

HON'BLE DR.K.B.SURESH, JUDICIAL MEMBER

HON'BLE SHRI C.V.SANKAR, ADMINISTRATIVE MEMBER

P.S.Uma Mahesh
 Joint Commissioner of Service Tax (Retired)
 No.1747, "Mahashakthikrupa"
 4th Cross, Chinnappa Layout
 Kammanahalli Main Road
 Bangalore – 560 084.

....Applicant

(By Advocate Sri H.S.Anantha Padmanabha)

Vs.

1. Union of India
 Ministry of Finance
 (Department of Revenue)
 North Block
 New Delhi-110 001.
 (Represented by its Secretary)

2. Member (P & V)
 Central Board of Excise & Customs
 Ministry of Finance
 (Department of Revenue)
 North Block
 New Delhi-110 001.

...Respondents

(By Advocate Sri V.N.Holla)

ORDER

(PER HON'BLE SHRI C.V.SANKAR, MEMBER (ADMN))

The applicant has filed the present OA seeking the following relief:

- a. *Set aside the impugned order F.No.-C.18011/04/013-Ad.II dated 06.05.2016(Annexure-A12);*
- b. *Direct the respondents to grant Non Functional Selection Grade to the applicant with all such admissible consequential relief w.e.f. 30.11.2010 on par with his contemporaries;*
- c. *Order of payment of interest on arrears of pay & Allowances*

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including retirement benefits at such appropriate rate as warranted;

d. Award the cost of this application.

2. The facts of the case are as follows:

Consequent upon the acceptance of the recommendations of 6th CPC, DOPT has issued orders for granting Non-Functional Selection Grade(NFSG) to officers of Organised Group 'A' services in PB-3 and PB-4 through OM dtd.24.4.2009(Annexure-A2). Subsequently, the 2nd respondent issued notification dtd.19.5.2011(Annexure-A4) granting NFSG with Grade Pay of Rs.8700/- to 8 officers w.e.f. 30.11.2010 wherein the applicant's name is not included which ought to have been figured between SI.No.6 and SI.No.7 of that notification. The applicant submitted a detailed representation on 30.5.2011(Annexure-A5) and reminder letter on 16.8.2011(Annexure-A6). In reply to his RTI application dtd.12.9.2011(Annexure-A7), it is found that the applicant's name was not considered for assessment to grant of NFSG and therefore, he could not find place in the empanelled list. The reasons for his non-selection are not disclosed and not providing an opportunity to the applicant to offer his explanation for such reason of non-selection, if any, is unfair and is in clear violation of the Principles of natural justice. Suo-motu decision of excluding the applicant from the selection process is not only unethical but also illegal. He submits that he complies with all the requirements required for granting the NFSG scale. There is no adverse remark in his service and no disciplinary action was contemplated against him. He fully satisfies the lone condition viz. 'no member(officer) of the service shall be eligible for appointment to NFSG until he has entered the fourteenth year of service on the first January of the year calculated from the year following the year of examination on the basis of which the member was recruited' for

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getting NFSG like his contemporaries and even juniors. There were clear vacancies to accommodate him as six junior officers to him have been granted the NFSG scale. Hence, he again sent a representation on 19.3.2012(Annexure-A8). Having not received any reply on the said representation, he sent further reminder on 20.4.2012(Annexure-A9). As the respondents have not given reply to any of his representations, the applicant sought certain particulars in his RTI application dtd.24.5.2012 and sent further reminder on 12.6.2012(Annexure-A10). Thereafter, the 2nd respondent's office informed the applicant that there is no record available in the section to establish as to whether any action was taken on his representations dtd.30.5.2011 & 19.3.2012. As no ostensible reason is given for denial of NFSG to the applicant, he has filed OA.No.66/2013(Annexure-A1) which was disposed of vide order dtd.1.3.2016(Annexure-A11) directing the respondents to treat the OA as representation and to take a considered decision on the prayer made in the OA and to issue a speaking order within two months of receipt of order. Consequently, the 2nd respondent has issued an order dtd.6.5.2016(Annexure-A12) rejecting the applicant's claim and hence he has filed the OA.

3. The respondents, on the other hand, have submitted in their reply statement that as per the provisions of Indian Customs & Central Excise Service Group 'A' Rules 1987 'no officer shall be appointed to the Selection Grade unless he has been appointed to Grade IV of Service to the post of Deputy Commissioner of Customs & Central Excise (now re-designated as Joint Commissioner) and has entered the 14th year in that service on the 1st July of the year calculated from the year following the year of the examination on the basis of which he was recruited. Further as per the DoPT instructions

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dtd.9.11.1998, the crucial date for determining eligibility for grant of NFSG is 1st January of the year. Further, the officers granted NFSG w.e.f.30.11.2010 on the basis of recommendations of the Review DSC dtd.6.5.2011 are senior to the applicant in terms of their appointment/promotion to the grade of Assistant Commissioner of Customs & Central Excise, Group 'A'. The 8 officers referred by the applicant as juniors to him were promoted in Group IV w.e.f. 8.9.1997 and are seniors to the applicant. Since the applicant was promoted to Group 'A' vide order dtd.12.8.1998 and he had not entered 14th year as on 1.1.2011, his name was not considered by the said DSC held on 6.5.2011. He retired from service on 31.10.2011 on attaining the age of superannuation. Therefore, his name was not considered by the DSC held subsequently on 11.1.2012 for grant of NFSG in the grade of Joint Commissioner. As directed by this Tribunal in OA.No.66/2013 filed by the applicant, the department has considered the applicant's prayer in that OA and issued speaking order on 6.5.2016 wherein they submit that in terms of Indian Customs & Central Excise Service Group 'A' (Amendment) Rules, 1998, 15% of the senior duty posts shall be operated in the NFSG of Rs.14300-18300 and appointment to this grade, shall be made according to seniority based on, suitability taking into account the overall performance, experience and any other related matter, provided that no officer shall be appointed to the Selection grade until and unless he has been appointed to grade IV of service to the post of Deputy Commissioner of Customs and Central Excise, re-designated as Joint Commissioner of Customs and Central Excise and has entered the 14th year in that service on the 1st July of the year calculated from the year following the year of examination on the basis of which he was recruited. The applicant who was granted ad-hoc promotion to the Assistant Commissioner of Customs and Central Excise, Group 'A' vide

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 order dtd.27.8.1998 and to the grade of Joint Commissioner of Customs &
 Central Excise on 23.7.2009 has not completed 13 years of service as
 Assistant Commissioner (Gr.'A' of IRS) nor entered the 14th year of service
 on the crucial date of eligibility i.e. 1st January 2011 prior to the date of his
 superannuation on 31.10.2011. Further he was not regularized in that post up
 to 2002 and his name is not figuring in the seniority list of the Assistant
 Commissioner. Thus, he was not eligible for grant of NFSG on or before his
 retirement on 31.10.2011. The two officers referred by the applicant as juniors
 were promoted to the grade of Joint Commissioner vide orders dtd.17.3.2010
 & 17.6.2010 and were granted NFSG vide notification dtd.19.5.2011. The Civil
 List is not the appropriate list for determining the seniority. In view of the
 above, the OA being devoid of merit is liable to be dismissed.

4. The applicant has filed the rejoinder wherein he submits that all the 8 individuals referred to by him are promoted as Group-A officers purely on ad-hoc basis. There is no such examination for promotes and they all have only one examination, soon after their joining the service on first appointment, which is the criteria in their entire service for confirmation, promotion etc., and obviously they have completed the same. The individuals at Sl.No.1, 4 & 5 of the notification dtd.19.5.2011(Annexure-A4) retired on 30.09.2011, 31.12.2010 & 30.04.2011 respectively and they were not in service when the NFSG order was issued on 19.5.2011. As the effective date of granting NFSG is 30.11.2010, retirements occurring subsequent to 30.11.2010 are inconsequential. Respondents' plea is that availability of vacancy is a criteria for granting NFSG, since 15% of the post is fixed for NFSG grade. Availability of a vacancy cannot be a valid reason to be advanced in the case of the applicant, because when a vacancy is available to a junior, it can never be

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said that the same was not available to a senior. Since the cut-off date is 1st January, immaterial of the month of appointment, all those individuals of 1998 batch will stand on the same footing. Precisely, one Sri.S.C.Gupta who is at Sl.No.6 at Annexure-A4 and the applicant are belong to August-1998 and when he entered 14th year, the applicant has also entered 14th year and therefore, if the said Gupta is eligible, there can be no ground to say that applicant is ineligible. If an individual is appointed even on 1.1.1998, the year of examination might be 1997 or even earlier. The respondents in their reply contend that 1998 batch direct recruit IRS (C&CE) had become eligible for grant of the said grade as on 1.1.2011 and accordingly they were granted NFSG. The lone condition mentioned above for granting NFSG wherein the phrase “entered the fourteenth year of service on the first January of the year calculated from the year following the year of examination” warrants emphasis. Respondents have not made it clear as to how they computed 14 years in respect of the applicant vis-à-vis other 8 individuals. The individuals at Sl.No.7 & 8 in the notification at Annexure-A4 who were granted promotion as Group ‘A’ on 21.4.2004 & 7.1.2000 respectively cannot have completed 14 years of service while they were granted NFSG. Hence, denial of legitimate right of the applicant to NFSG scale is in clear violation of Article 16 of the Constitution of India.

5. Heard the Learned Counsel for both the parties and perused the materials placed on record in detail. The issue in this case is in a very short compass. The main condition for grant of Non Functional Selection Grade(NFSG) is as follows:

“No member(officer) of the service shall be eligible for appointment to NFSG until he has entered the fourteenth year of service on the first January of the year calculated from the year following the year of examination on the basis of which the member was recruited”.

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This rule applies as it stands in the case of direct recruits since they all are appointed through a competitive examination. In the case of promotees, the date of their appointment to Group-A is taken as the date of entry into the service for being eligible to the various further promotions, NFSG etc. The date of appointment of the applicant to Group-A is 27.8.1998. The respondents have taken a plea that based on this date, the applicant had not completed 14 years on 1.1.2011 for him to be considered along with 8 other similarly situated promoted officers who have been promoted based on the Departmental Screening Committee meeting held on 6.5.2011. In the case of these 8 officers, the NFSG has been granted on ad-hoc basis w.e.f. 30.11.2010 that is the date, the juniors were granted NFSG. The list of selected persons includes Sri Suresh Chandra Gupta who is apparently junior to the applicant as per the civil list furnished at Annexure-A13, the applicant's serial number being 143 and that of Sri S.C.Gupta is 168. The respondents would contend that such civil list cannot be considered as the final seniority of the persons in view of the series of litigations still in process relating to the seniority of promoted officers and direct recruits. Even if it can be accepted that the civil list need not be the authoritative final list of seniority, it is obviously based on the facts relating to the service rendered by the various persons in the list and can be taken as authentic in the absence of any contrary evidence. Sri S.C.Gupta has been appointed to Group-A on 3.8.1998 as per the data in the list. This point has not been specifically answered by the respondents except claiming that all the persons in the select list are seniors to the applicant. On what basis they make this claim is not clear. As rightly contended by the applicant, if Sri Gupta's date of promotion to Group-A being 3.8.1998 could be taken as having completed 13 years as on 1.1.2011, obviously, the applicant, as his date of promotion to Group-A is 27.8.1998,

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could certainly be considered as having completed 13 years of service in Group-A. Further there are two more persons in the list one Mr.Subodh Dhar and another Mr.U.H.Jadhav whose dates of appointment to Group-A is seen from the civil list as 21.4.2004 and 07.1.2000 respectively. By no stretch of imagination can these two persons be considered as having completed 13 years on 1.1.2011. Further, the claim of the respondents that retired officers are not normally considered for NFSG is also clearly wrong as can be seen from Annexure-A3 at clarification for doubt No.5 where the DOPT instructions clearly provide that "the benefits should be from the due date. Therefore, even the retired officers who are otherwise eligible as on due date would need to be considered". In view of all the above, it is very obvious that the applicant is fully entitled for NFSG w.e.f. 30.11.2010 as has been given to the persons cited at Annexure-A7. This shall be done within a period of one(1) month from the date of receipt of this order with all consequential benefits. We regret to point out that even though in OA.No.66/2012 relating to the same subject, this Tribunal vide its order dtd.1.3.2016 had directed the respondents to consider the representations of the applicant, they had never examined the representations of the applicant on merits. It is obvious from Annexure-A12 that the same mechanical application of mind is evident on the side of the respondents.

6. The OA is allowed as above. No costs.

(C.V.SANKAR)
MEMBER (A)

(DR.K.B.SURESH)
MEMBER (J)

Annexures referred to by the applicant in OA.No.170/00092/2017

Annexure A1: Order F.No.C.50/RTI/85/2011-Ad.II dtd.5.7.2012 issued by the 2nd respondent, communicating non-availability of the records

Annexure A2: GOI, Ministry of Personnel & Public Grievances and Pension, DOPT Office Memorandum No.AB.14017/64/2008-Estt.(RR) dtd.24.4.2009

Annexure A3: GOI, Ministry of Personnel & Public grievances and Pension, DOPT Office Memorandum No.AB.14017/64/2008-Estt.(RR) dtd.25.9.2009

Annexure A4: Notification F.No. – A 32012/29/2010–Ad.II dtd.19.5.2011 granting NFSG with Grade Pay of Rs.8,700/- to certain 8 officers with effect from 30.11.2010 issued by the 2nd respondent

Annexure A5: Applicant's representation dtd.30.5.2011

Annexure A6: Reminder letter dtd.16.8.2011 of the applicant

Annexure A7: Letter F.No.-C.50/RTI/84/2011-Ad.II dtd.12.09.2011 along with its enclosures obtained under RTI Act

Annexure A8: Applicant's further representation dtd.19.03.2012

Annexure A9: Reminder letter dtd.20.4.2012 of the applicant

Annexure A10: Applicant's RTI application dtd.24.5.2012 and a further reminder on 12.6.2012

Annexure A11: Final order dtd.1.3.2016 of this Hon. Tribunal in OA.No.66/2013, directing the respondents to treat the OA as representation and to take a considered decision on the prayer in paragraph 8 (2) and to issue a speaking order within two months of receiving a copy of the said order

Annexure A12: Order F.No.-C.18011/04/013-Ad.II dtd.6.5.2016 rejecting applicant's legitimate claim (impugned order)

Annexures with reply statement:

-NIL-

Annexures with rejoinder:

Annexure-A13: Extract of Civil List at pages No.120, 123-125 & 223

Annexure-A14: Various office orders promoting the applicant

Annexures with MA.No.223/2018 filed by the applicant:

Annexure-1: Copy of the final order dtd.12.3.2018

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Annexure-2: Copy of adjournment memo dtd.8.2.2018
