

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 1056/2014

Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)

Ghanashyam Sah, aged about 61 years, S/o Late Jadumani Sah (Retired Inspector of Income Tax), O/o the Income Tax Officer (TDS), Aayakar Bhawan, Shelter Chhak, Cuttack - 753008, Odisha, Permanent resident at Bangurkela, PO - Balinga, Via - Basundhara, PS - Hemgir, Dist. - Sujndargarh, Pin - 770076, Odisha.

.....Applicant.

VERSUS

1. Union of India, represented by the Secretary, Ministry of Finance, North Block, New Delhi – 110001.
2. Principal Chief Commissioner of Income Tax, Aayakar Bhawan, Rajaswa Vihar, Bhubaneswar – 751007, Odisha.
3. Commissioner of Income Tax (TDS), 2nd Floor, Aayakar Bhawan - Annexe, Rajaswa Vihar, Bhubaneswar – 751007, Odisha.
4. Joint Commissioner of Income Tax (TDS), 2nd Floor, Aayakar Bhawan - Annexe, Rajaswa Vihar, Bhubaneswar – 751007, Odisha.
5. Deputy Commissioner of Income Tax (TDS), 2nd Floor, Aayakar Bhawan - Annexe, Rajaswa Vihar, Bhubaneswar – 751007, Odisha.
6. Additional Commissioner of Income Tax, Rourkela Range, Aayakar Bhawan, Udit Nagar, Rourkela-769012, Odisha.
7. Addl. Commissioner of Income Tax, Range-1, Aayakar Bhawan, Shelter Chhak, Cuttack – 753008, Odisha.
8. Zonal Accounts Officer, O/o the Principal Chief Controller of Accounts, Zonal Accounts Office, CBDT, Aayakar Bhawan, Shelter Chhak, Cuttack – 753008, Odisha.
9. Commissioner of Income Tax, Aayakar Bhawan, Ainthia Palli, Sambalpur – 768004, Odisha.

.....Respondents.

For the applicant : Mr.P.C.Sethi, counsel

For the respondents: Mr.S.Bhera, counsel

Heard & reserved on : 1.3.2019 Order on : 6.3.2019

ORDER

Per Mr. Gokul Chandra Pati, Member (A)

The OA has been filed for the following reliefs:-

"(i) To hold that the non-disbursement of pension and pensionary benefits to the applicant by the respondents is illegal.

- (ii) To direct the respondents to disburse the pension and other retiral dues to the applicant along with interest @ 18% per annum from the date of superannuation i.e. from 31.3.2013.
- (iii) To hold that break in service entered in the service book as informed to the applicant under Annexure A/6 & A/7 is illegal.
- (iv) To hold that non disbursement of salary for the leave period to the applicant is illegal.

And/Or

- (v) To pass any other order and further order as deemed fit in the nature and circumstances of the case.
- (vi) To quash the order passed by the respondent No.2 under Annexure A/7 being illegal."

2. The applicant initially joined as LDC under the respondents on 23.4.1973 and was promoted as Inspector of Income Tax on 12.12.2003 before retiring on superannuation on 31.3.2013. The grievance of the applicant is that although his pension papers were forwarded to the respondent no.3, but no decision was taken by the respondents about sanction of his pensionary benefits in spite of his representations.

3. Being aggrieved, the applicant filed OA No. 343/2014 and vide order dated 14.5.2014 (Annexure-A.5), the Tribunal directed the respondents no. 2 to consider and dispose of the applicant's representation by passing a reasoned and speaking order within 60 days. Vide order dated 19.6.2014 (Annexure-A.6), the respondent no. 5 informed the applicant that there were many deficiencies in his pension papers which included an entry of 'break in service' in the applicant's service book as per the order of the Commissioner of Income Tax, Sambalpur (respondent no.9) for which the applicant should have approached the competent authority for condonation at that point of time, as stated in the order dated 19.6.2014. It was also stated that: "The office of CIT (TDS) has nothing to do with your regularization of 'break in service'. A factual report has been sent to CCIT vide this office letter No. CIT/TDS/2013-14/2698 dt. 30.09.2013....."

4. The respondent No.2 also passed the order dated 31.7.2014 (Annexure-A.7) rejecting the case of the applicant for pension stating as under:-

- "(vi) On the facts on record, it is clear that Shri Sah had remained absent from duty unauthorisedly during different spells during the period from 24.1.2000 to 12.12.2003 while posted in O/o the Joint Commissioner of Income Tax, Rourkela Range, Rourkela. Though, Shri Sah claims to have filed leave applications for all these spells of unauthorised absence, no such applications are reportedly available either in the office of the JCIT, Rourkela Range nor in office of the JCIT, Range-1, Cuttack, being the office to which he was transferred from the office of the JCIT, Rourkela Range, Rourkela. As per CCS (Leave) Rules, 1972, leave is not a matter of right and an employee can be allowed to proceed on leave only after sanction of the leave by the competent

authority. In this case, Shri Sah had remained absent from duty without sanction of leave. It appears that he was in the habit of remaining absent from duty unauthorisedly during the aforesaid period. It is also apparent from his service book that there is an entry regarding 'Break in Service' w.e.f. 19.8.2003 as per order of the CIT, Sambalpur. If this Break in Service is taken into consideration, the remaining period of his service till the date of his retirement on 31.3.2013 would be less than 10 years, and as per CCS (Pension) Rules, Shri Sah would not be entitled for any pensionary benefits.

(vii) It may be mentioned here that the Principal Chief Commissioner of Income Tax, Odisha, Bhubaneswar is not the Competent Authority to either sanction leave to cover up the unauthorised absences of Shri Sah or to order for grant of pension and other pensionary benefits. That is the reason why the representation of Shri Sah was forwarded to the CIT (TDS), Bhubaneswar and two other offices where Shri Sah worked before his retirement on superannuation. Further, it is not known why Shri Sah did not take any step for regularisation of his service before his retirement. In any case, this office had duly forwarded the representation of Shri Sah to the respective offices for necessary action as per rules, and nothing more can be done at this end. Moreover, there being an order regarding break in service with effect from 19.8.2003, Shri Sah will not be entitled for any pensionary benefits as per CCS (Pension) Rules."

5. Above orders of the respondents have been challenged in this OA mainly on the following grounds:-

- (i) Non-disbursement of pensionary benefits is arbitrary and illegal as no order under the pension rules has been passed.
- (ii) The entry of 'break in service' in the service book of the applicant after 11 years is illegal. Further, as per the F.R. 17-A, making an entry of 'break in service' in the service book as intimated to the applicant vide orders at Annexure-A.6 and A.7 without serving any show cause notice is illegal.
- (iii) The applicant was given a promotion to the grade of Inspector vide order dated 12.12.2003 (Annexure-A.11) after an entry of 'break in service' in the service book implies exoneration of 'break in service'.

6. In the counter, it is stated by the respondents as under:-

"9.It is to be mentioned here that the then ACIT (Hqrs.), Sambalpur had observed that Sri Sah, Sr. TA was most irregular in work. He remained absent without authorization for which the ACIT (Hqrs.), Sambalpur communicated to Joint Commissioner of Income Tax, Rourkela Range, Rourkela. The CIT, Sambalpur vide letter No. CIT/SBP/Estt./2003-04/1591 dated 19.8.2003 gave his remark as "*All unauthorized absence should be treated as leave without pay. There should be break in service book. Thereafter, records entry may be made in the service book.*"

10.It is submitted that the applicant has not bothered to rectify the mistake in the service book entry, if any, in the nick of time, as the break-in-service was entered in his service book w.e.f. 19.8.2003 as per the order of CIT, Sambalpur. The mistake pointed out by the applicant is not mistake on the part of the respondents. The applicant has not mentioned about his duty as a Govt. servant during the period of his unauthorized absence during the period from 24.1.2009 to 12.12.2003 and has only pointed to the duties of his superior authorities in this para."

7. The applicant filed the Rejoinder reiterating the contentions made in the OA and stating that the respondents have failed to follow the due procedure for treating any period as 'break in service'.

8. Learned counsels for the parties were heard and the pleadings on record were considered. It was stated by the applicant that the respondents did not

specify the rule under which the applicant is not entitled for the pensionary benefits.

9. The reason mentioned by the respondents for non-sanction of the pension in the Counter as well as in the order dated 31.7.2014 (Annexure-A.7) is the entry of 'break in service' in the service book of the applicant for unauthorized absence for some periods from 24.01.2000 till 12.12.2003 when the applicant was posted in the office of the Joint Commissioner of Income Tax, Rourkela Range and he was absent from duty for which he had applied for leave which was not sanctioned by the competent authority. For this reason, the respondent no. 9 had entered the period as 'break in service' w.e.f. 19.8.2003 in the service book of the applicant. As stated in para 9 of the Counter, the respondent no. 9 vide letter dated 19.8.2003 passed the following order:-

"All unauthorized absence should be treated as leave without pay. There should be break in service book. Thereafter, records entry may be made in the service book."

It is further stated in para 10 of the Counter that this entry in the service book of the applicant was not rectified by the applicant and it is not the mistake on the part of the respondents.

10. I have carefully considered the submissions made by the parties in their pleadings as well by the counsels for both the sides. It is unfortunate that the respondents have treated a period of service of the applicant as 'break in service' which has implication of the forfeiture of his past service upto the break in period in view of the rule 27 of the CCS (Pension) Rules, 1972 which states as under:-

"27. Effect of interruption in service

(1) An interruption in the service of a Government servant entails forfeiture of his past service, except in the following cases :-

- (a) authorized leave of absence ;
- (b) unauthorized absence in continuation of authorized leave of absence so long as the post of absentee is not filled substantively ;
- (c) suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the Government servant dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension ;
- (d) transfer to non-qualifying service in an establishment under the control of the Government if such transfer has been ordered by a competent authority in the public interest ;
- (e) joining time while on transfer from one post to another.

(2) Notwithstanding anything contained in sub-rule (1), the 1[appointing authority] may, by order, commute retrospectively the periods of absence without leave as extraordinary leave.

Footnote : 1. Substituted by G.I., D.P. & A.R., Notification No. 6 (1), Pen. (A)/79, dated the 19th May, 1980."

11. It is clear from the rule 27 of the CCS (Pension) Rules, 1972 as extracted above that the break in service entered by the respondent no. 9 in the service book of the applicant has the implication of the forfeiture of his past service. Government of India's Decisions No. (1) and (2) below rule 28 of the CCS (Pension) Rules, 1972 state as under:-

"GOVERNMENT OF INDIA'S DECISIONS

(1) Opportunity of representation to be given to Government servant before making entry in service book regarding forfeiture of past service. - FR 17-A provides that a period of an unauthorized absence, in the category of cases mentioned therein, shall be deemed to cause an interruption or break in the service of the employee, unless otherwise decided by the competent authority for certain purposes. An order passed by the P & T authorities in the case of some of their employees invoking FR 17-A was struck down by the Lucknow Bench of Allahabad High Court on the ground that issue of such an order without giving a reasonable opportunity of representation and being heard in person, if so desired, to the person concerned, would be against the principle of natural justice. In this Department's OM of even number, dated 20/23-5-1985 [Order No.(2) below], it was accordingly brought to the notice of all Ministries/Departments that an order under FR 17-A, etc., should be preceded by extending to the person concerned a reasonable opportunity of representation and being heard in person, if so desired by him/her.

.....
 (2) Reasonable opportunity to be given before invoking the penal provision. – FR 17-A provides that a period of an unauthorized absence, in the category of cases mentioned therein, shall be deemed to cause an interruption or break in the service of the employees, unless otherwise decided by the competent authority for certain purposes. An order passed by the P & T authorities in the case of some of their employees, invoking FR 17-A was struck down by the Lucknow Bench of Allahabad High Court on the ground that issue of such an order without giving a reasonable opportunity of representation and being heard in person, if so desired, to the person concerned, would be against the principle of natural justice. The question of amending FR 17-A as also Rule 28 of the CCS (Pension) Rules and SR 200 is under consideration in consultation with the Ministry of Law.

2. The above position is brought to the notice of all Ministries/Departments so that if there are occasions for invoking FR 17-A, etc., they may keep in mind the procedural requirement that an order under FR 17-A, etc., should be preceded by extending to the person concerned a reasonable opportunity of representation and being heard in person if so desired by him/her.

[G.I. Dept. of Per. & Trg. OM No. 33011/2 (S)/84-Estt. (B), dated the 20th/23rd May, 1985]."

12. The provisions of the CCS (Pension) Rules, 1972 and Decisions of Government of India as extracted above will imply that before making any entry in the service book of an employee about break in service implying forfeiture of past service for the purpose of pension, reasonable opportunity of being heard is required to be given to the concerned employee. In this case, the decision of the respondent no. 9 to make an entry in the service book of the applicant regarding treating some periods of service as break in service, which has implication of forfeiture of past service for pension, should have been taken after giving an opportunity of hearing or making a representation after issuing a notice to the applicant as per the decision of Government of India as discussed in the preceding paragraph. The applicant in para 4.40 of the OA has averred that reasonable opportunity of being heard was given to him before

treating the period as break in service, This averment of the applicant has not been contradicted by the respondents. There is nothing on record to show that any opportunity of hearing was given to the applicant by the respondent no. 9 before making the entry of break in service for some periods in the applicant's service book. Hence, such action of the respondent no.9 clearly violated the principles of natural justice and also violated the instructions of Government of India.

13. It is further noticed that the rule 59 of the CCS (Pension) Rules, 1972 provides for verification of service of a retiring employee prior to the date of retirement. The rule specified very clearly the action to be taken by the Head of the Office 2 years before the date of retirement of an employee. The rule 59 states as under:-

"59. Stages for the completion of pension papers

(1) The Head of Office shall divide the period of preparatory work of two years referred to in Rule

58 in the following three stages :-

(a) First Stage. - Verification of service :

.....
(b)Second Stage. - Making good omission in the service book.

.....
(c)Third Stage. - As soon as the second stage is completed and in any case not later than ten months prior to the date of retirement of the Government servant, the Head of Office shall take the following action :-

(i) He shall furnish to the retiring Government servant a certificate regarding the length of qualifying service proposed to be admitted for purpose of pension and gratuity as also the emoluments and the average emoluments proposed to be reckoned with for retirement gratuity and pension. In case the certified service and emoluments as indicated by the Head of Office are not acceptable to him, he shall furnish to the Head of Office the reasons for non-acceptance, inter alia, supported by the relevant documents in support of his claim.

(ii) In case of any difficulty in determining the length of qualifying service on account of non availability of service records, the retiring Government servant shall be asked to file a written statement of service as provided in Clause (ii) of sub-rule (1) and sub-rule (2) of Rule 64.

(iii) Forward to the retiring Government servant and Form 5 advising him to submit the same duly completed in all respects so as to reach the Head of Office not later than eight months prior to his date of retirement.

(2) Action under Clauses (a), (b) and (c) of sub-rule (1) shall be completed eight months prior to the date of retirement of the Government servant."

There is nothing on record in this case to show that the respondents have taken action in respect of the applicant as stipulated under the rule 59 of the CCS (Pension) Rules, 1972 as extracted above. Had this exercise been done two years prior to the retirement of the employee and the entry in his service book about the entry of break in service and qualifying service would have been communicated to the applicant at least 10 months prior to his retirement date, then the applicant could have taken appropriate steps for condoning such period entered as break in service. Instead of discharging the tasks as specified under the rule 59, the respondents have blamed the applicant for not taking

steps for condonation of the break in service period which was entered in his service book without giving him any opportunity of hearing to the applicant.

14. In view of the reasons as discussed in the preceding paragraphs, the decision of the respondents to make the entry of 'break in service' in the service book of the applicant due to unauthorized absence for some period and as a consequence, not to sanction the pensionary benefits to the applicant, is not legally sustainable. The respondents have violated the statutory rules as well as the principles of natural justice in treating some periods of the applicant's service as 'break in service' and for not processing the pension matter of the applicant as discussed earlier, for which, the applicant is entitled for the reliefs prayed for in the OA. But since there are some periods in the applicant's service prior to December, 2003 for which no leave has been sanctioned, as mentioned by the applicant in his letter dated 20.3.2013 (Annexure-A.13), these periods will be treated by the pension sanctioning authority as leave as due as per the rules if the applicant had furnished the required documents and is otherwise eligible for such leave as per the rules. If no leave can be sanctioned for some periods, then the same be treated as extra ordinary leave without salary with continuity in service and such periods of extra ordinary leave will not be counted as qualifying service for pension.

15. In the circumstances, the OA is allowed in terms of the directions in paragraph 14 above. The respondents are directed to sanction and disburse the pensionary benefits of the applicant as per law within three months from the date of receipt of a copy of this order. In case the disbursement of any of the pensionary benefit is made beyond three months as above, then the applicant will also be entitled for interest on the outstanding amount from the date of his retirement (i.e. from 31.3.2013) till the date of actual payment at the rate of 9% per annum and the interest so paid to the applicant will be recoverable as per law from the officials found responsible for delay in sanctioning or disbursing the amount due to the applicant. There will be no order as to cost.

(GOKUL CHANDRA PATI)

MEMBER (A)

I.Nath