

.1.

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No.180/00002/2016

Thursday, this the 11th day of April 2019

Hon'ble Mr.E.K.Bharat Bhushan, Administrative Member
Hon'ble Mr.Ashish Kalia, Judicial Member

M.Krishnankutty

S/o.Late K.Narayanan Nambiar, aged 60 years

Inspector of Central Excise & Customs (Retd.)

Vadakkirayerath Meledath Madhom

Lakkidi P.O, Palakkad District-679 301

..... **Applicant**

(By Advocate Mr.C.S.G Nair)

V e r s u s

1. Union of India
Represented by its Secretary
Department of Revenue
North Block, New Delhi – 110 001

2. Chairman
Central Board of Excise and Customs
North Block, New Delhi – 110 001

3. Chief Commissioner of Central Excise & Customs
Central Revenue Buildings
I.S.Press Road, Cochin – 682 018

4. Commissioner of Central Excise & Customs
Central Revenue Buildings
I.S Press Road, Cochin – 682 018

..... **Respondents**

(By Advocate – Mr.S.Ramesh,ACGSC)

This Original Application having been heard on 8.4.2019, the Tribunal on 11.4.2019 delivered the following:

ORDER

Per: Mr.E.K.Bharat Bhushan, Administrative Member

Original Application No.180/00002/2016 is filed by

.2.

Mr.M.Krishnankutty, Inspector of Central Excise & Customs (Retd.). He seeks the following reliefs:

“ (i) To declare that the applicant is entitled for 3rd financial upgradation to the pay band of Rs.9300-34800 with a grade pay of Rs.4800/- w.e.f 7.11.2009.

(ii) To direct the 3rd and 4th respondents to grant the applicant 3rd financial upgradation under MACP Scheme to the pay band Rs.9300-34800 with grade pay of Rs.4800/- w.e.f 7.11.2009 with all consequential benefits including arrears of pay and allowances within a stipulated time.

(iii) To direct the respondents to revise the gratuity and other retirement benefits including leave encashment benefits within a time frame.

(iv) Grant such other relief or reliefs that may be prayed for or that are found to be just and proper in the nature and circumstances of the case. ”

2. The applicant had joined service as Lower Division Clerk in the Ministry of Defence on 7.11.1979. Later on, he was promoted as Upper Division Clerk and subsequently, he was transferred to Central Excise Commissionerate, Cochin in September 1994 as U.D.C. He was upgraded as Tax Assistant (T.A for short) on 11.8.1997. A copy of the seniority list of Tax Assistant/UDC as on 1.1.2002 is produced and marked as Annexure A-1. The applicant came to be promoted as Inspector of Central Excise as per Order dated 18.12.2002. Although this promotion was reviewed by a subsequent DPC, there was no change in the promotion date as can be seen from Annexure A-2 order dated 24.2.2006.

3. As per Modified Assured Career Progression Scheme (MACP Scheme), that came into effect from 1.9.2008, an employee who has completed 30 years of service is entitled for 3 financial upgradations, if he did not get 3 promotions in the entire service. The applicant who had joined service on 7.11.1979, completed 30 years of service as on 6.11.2009. During the 30 years of service, he got 2 promotions, one as UDC and then as

.3.

Inspector. His case, in a nut shell, is that he is eligible for 3rd financial upgradation with effect from 7.11.2009. The applicant and other similarly situated Inspectors, when they approached the 4th respondent for obtaining the 3rd MACP was informed that they were not eligible for the same as they got three promotions in service as UDC, Tax Assistant and then Inspector. In the meanwhile, the Kolkota II Commissionerate of Central Excise issued an order granting 3rd financial upgradation under MACP Scheme to the Inspectors who joined as LDC and were promoted in similar fashion as UDC/Tax Assistant and then as Inspector on completion of 30 years service (Annexure A-4). In all cases, upgradation as Tax Assistant from the post of UDC was ignored as then only they would have been eligible for the 3rd financial upgradation.

4. The applicant submitted a representation for similar treatment (Annexure A-5) and followed it up with a reminder (Annexure A-6). On getting no response, applicant filed O.A No.522/2015 before this Tribunal and obtained a direction for the 4th respondent to dispose of the representations within two months from the date of receipt of a copy of that order (Annexure A-7). The disposal of the said representations is through Annexures A8, A8(a), A8(b) and A8(c) letters. It is stated in the Original Application that no sense can be made out of the decision taken in the said order that the promotion/upgradation for the purpose of ACP/MACP in the case of promotion of Tax Assistant to the grade of Deputy Office Superintendent will not be counted as promotion, but in the case of promotion of Tax Assistant to the grade of Inspector, it will amount to a promotion. This is illogical and requires to be set aside.

5 The respondents have filed a reply statement wherein they have joined issue with the averments made in the O.A. It is maintained that CBEC vide their letter dated 20.10.2014 (Annexure A-8(b)), in consultation with DoP&T had clarified that promotion of UDCs to the grade of Tax Assistants will be counted as promotion/upgradation for the purpose of granting ACP/MACP benefits. The Board has taken the view that the promotion to the grade of Tax Assistant from the grade of UDCs has to be taken into

.4.

account and further has directed to review the case of financial upgradation already granted. The 4th respondent has disposed of Annexure A-5 representation vide Annexure A-8 order in the light of the Board's direction. In so far as the orders issued by the Kolkatta II Central Excise Commissionerate, the benefits have been extended only to those officers figuring in the order dated 9.11.2012. The respondents plead lack of knowledge whether the Annexure A-4 Exhibit, which are the orders of the Kolkata II Central Excise Commissionerate, have since been reviewed but reiterate that those orders cannot be quoted as a precedent.

6 We have heard Mr.C.S.G Nair, learned counsel for the applicant and Mr.S.Ramesh,ACGSC, learned Standing Counsel for the respondents. Perused the documents. The controversy revolves around the sole point whether the upgradation of the applicant from the post of UDC to that of Tax Assistant is to be considered as a promotion for the purpose of granting financial upgradation under the MACP scheme.

7. The respondents while disposing of the representations have referred to the direction contained in the communication from the Central Board of Excise and Customs, a copy of which is available at Annexure A8(b) which unambiguously lays down the position of the respondents. For the purpose of greater clarity, the same communication is reproduced:

“ Subject: Financial up-gradation under MACP scheme –
regarding

Sir,

I am directed to invite reference to this Department's letter of even number dated 23rd May, 2013 on the subject mentioned above.

2. The issue regarding treatment of promotion granted to UDCs against the 1/3rd posts upgraded to Tax Assistant, on 11.3.1998, for grant of 2nd/3rd financial up-gradations under MACPS, has been examined in consultation with the Department of Personnel & Training (DOPT).

3. In terms of clarification No.35 on ACPS issued by DOPT, where only a part of the posts are placed in a higher

.5.

scale and rest are retained in the existing grade, thereby involving re-distribution of posts, it involves creation of another grade in the hierarchy requiring framing of separate Rrs for the upgraded posts. Placement of existing incumbents to the extent of upgradations involved, in the upgraded post will also be treated as promotion/upgradation and offset against entitlements under ACPS. Also, in terms of para 3(ii) of DoP&T's OM No.AB-14017/66/2008-Estt.(RR) dated 09.03.2009, where the upgradation or merger is part; where the upgraded post will be the promotion grade for the posts left in the lower grade, normal DPC procedure will apply. Hence, promotion of UDC (Rs.4000-6000/-) to the grade of TA (Rs.4500-8000/-) further upgraded to (Rs.5000-8000/-) would be counted as a promotion/upgradation for the purpose of grant of ACP/MACP benefits.

4. It has been observed that on the basis on clarification issued by the Board to the Commissioner, Central Excise & Customs vide letter F.No.32011/32/2003-Ad.IIIA dated 6th August, 2004 (copy enclosed), various Commissionerate have not counted the promotion to the grade of pre-structured TA from the grade of UDC for the purpose of ACP/MACPS. On the other hand some have counted this as promotion resulting in two different criteria been adopted across the zonal offices. In this context, **it is clarified that there are two different hierarchies for promotion i.e, from LDC to Superintendent and from LDC to Administrative Officer. The clarification of 2004 is not applicable for Tax Assistants promoted to Inspector. The clarification of 2004 is applicable only for promotion to DOS L-II & DOS L-I since in the promotion to the grade of DOS L-II, Tax Assistant are not placed en-bloc above UDCs and their seniority as UDCs shall be taken into account whereas in case of promotion of Tax Assistant to Inspector, Tax Assistants are placed en-bloc above the UDCs.**

5. It is requested that cases under ACP/MACP Scheme may be reviewed accordingly. Thereafter, further necessary action may be taken as per rules/guidelines. ”

(emphasis supplied)

It is in the light of this direction that the respondents have crystalized their stand.

8. Shri.C.S.G Nair, learned counsel for the applicants brought in a different perspective to the controversy by citing the judgment of the Hon'ble Supreme Court in **B.Thirumal v. Ananda Sivakumar & Others** in Civil Appeal Nos.10660-10662 of 2013 wherein on the subject of upgradation/promotion, the following has been stated.

.6.

“(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation. ”

9. The basis of the decision of the Apex Court thus is that in the case where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation. In the instant case, as is made out in the communication at Annexure A-8(b), the Tax Assistants are not placed en-bloc above UDCs and their seniority as UDCs shall be taken into account, while considering their eligibility for MACP.

10. The facts being so, we see no contradiction or lack of clarity in the stand advanced by the respondents. Their view that the promotion of UDC as Tax Assistant is indeed a promotion in the full sense of the term and will necessarily have to be taken into account for the purpose of granting upgradation under MACP holds good. The Original Application is dismissed as lacking in merit. No costs.

(ASHISH KALIA)
JUDICIAL MEMBER

(E.K BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

.7.

List of Annexures

- | | | |
|----------------|---|---------------------------------------------------------------------|
| Annexure A1 | - | True copy of the seniority list of TA/UDC |
| Annexure A2 | - | True copy of the order no.21/2006 dt.24.2.2006 |
| Annexure A3 | - | True copy of the OM No.35034/3/2008-Estt.(D) dated 19.5.2009 |
| Annexure A4 | - | True copy of the Estt.Order No.167/2012 dated 9.11.2012 |
| Annexure A5 | - | True copy of the representation dated 4.4.2013 |
| Annexure A6 | - | True copy of the reminder dated 13.12.2013 |
| Annexure A7 | - | True copy of the order dated 8.7.2015 in O.A No.522/2015 |
| Annexure A8 | - | True copy of the letter C.No.II/39/30/2015 Estt./986 dated 5.8.2015 |
| Annexure A8(a) | - | True copy of the letter dated 6.1.2015 |
| Annexure A8(b) | - | True copy of the letter dated 20.10.2014 |
| Annexure A8(c) | - | True copy of the letter dated 22.10.2014 |
| Annexure A9 | - | True copy of the letter C.No.III/20/3/2012 CC/KZ/I dated 8.10.2015 |

...