

Reserved**CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH
JABALPUR****Original Application No.200/00863/2016**

Jabalpur, this Thursday, the 02nd day of May, 2019

**HON'BLE MR. NAVIN TANDON, ADMINISTRATIVE MEMBER
HON'BLE MR. RAMESH SINGH THAKUR, JUDICIAL MEMBER**

Sunil Kumar Namdeo, Retired as OS from Income Tax Department, Son of late Shri Narmada Prasad Namdeo 1154/1, Behind LIC Quarters Jai Prakash Nagar, Adhartal, Jabalpur – 482003
-Applicant

(By Advocate – Shri Sapan Usrethe)

V e r s u s

1. Union of India through Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi – 110001.
2. Principal Chief Commissioner of Income Tax, Aayakar Bhawan, Hoshangabad Road, Opposite Maida Mill, Bhopal (M.P) – 462011.
3. Principal Commissioner of Income Tax-1, Aayakar Bhawan, Station Road, Napier Town, Jabalpur (M.P) – 482002.
4. Joint Commissioner of Income Tax – Range – I, Aayakar Bhawan, Station Road, Napier Town, Jabalpur (M.P) – 482002.
5. Zonal Accounts Officer, Central Board of Direct Taxes, 82, Maharana Pratap Nagar, Zone-II, Bhopal - 462011 - **Respondents**

(By Advocate – Shri Sanjay Lal)

(Date of reserving order : 19.09.2018)

O R D E R

By Navin Tandon, AM.

The applicant is aggrieved by recovery of about Rs.4.6 lakh from his retirement dues due to wrong fixation of pay.

2. The applicant has made following submissions in this O.A:

2.1 He joined the Income Tax Department as a Stenographer on 05.03.1980. He was promoted from time to time and was promoted as Office Superintendent on 02.11.2012. He superannuated on 29.02.2016.

2.2 His retiral dues were not being paid. He approached this Tribunal in OA/200/744/2016, which was disposed of on 27.07.2016 (Annexure A-7) by directing the respondent department to decide the representation dated 01.06.2016 within two months.

2.3 Respondents vide letters dated 05.08.2016 (Annexure A-1) and 12.08.2016 (Annexure A-10) have issued orders to deduct Rs.4,59,872/- from his retiral dues.

3. The applicant has, therefore, sought for the following reliefs:

“8.0 Relief Sought

In view of averments of facts and grounds as enumerated above, the applicant prays that the Hon’ble Tribunal may be pleased:-

8.1 To call for the entire records.

8.2 To quash and set aside the impugned order dated 5.8.2016 (Annexure A-1) and letter dated 12.08.2016 (Annexure A-10) and further be pleased to direct the respondent to make payment of gratuity without deduction of recovery and along with interest.

8.3 To direct respondent to pay commutation of pension, GPF, leave encashment, insurance, regular pension and other retirement dues along with interest.

8.4 Any other relief which the Hon'ble Tribunal deems appropriate may be granted.

8.5 Cost of the application.”

4. The respondents have filed their reply, wherein it has been submitted as under:

4.1 The applicant was appointed w.e.f. 05.03.1980 (F.N.) in the Income Tax Department as Stenographer (OG) purely on ad-hoc basis.

4.2 As the appointment was purely on ad-hoc basis, he with similarly appointed ad-hoc Stenographers, Late Shri C. Samuel were given an opportunity to appear in special skill test for regularising of services as Stenographer (OG). This opportunity was given with the option that in case of non-qualifying the said skill test, their services will be regularised as LDC.

4.3 Both, Late Shri C. Samuel and the applicant, qualified only for the post of LDC in the said examination held by the SSC in April, 1985. They both opted for the post of LDC.

4.4 Accordingly, the applicant was appointed as LDC w.e.f. 08.04.1986 vide order dated 10.09.1996 (Annexure R-1).

4.5 On regularisation of services as LDC, pay was provisionally fixed by protecting the pay drawn by him as Stenographer (ad-hoc) vide order dated 01.10.1996 (Annexure R-2). Copy of the said pay fixation order was also endorsed to the applicant. Para 2 of the pay fixation order stated that:

“As regards pay fixation, the Dy CIT Range II Jabalpur has directed that it may be provisionally fixed at the stage of which the approval was drawing pay as on 8/4/86, subject to the condition that it may be modified consequently as per rule/instruction of the Govt in this regards.”

4.6 Respondents vide letter dated 06.04.1993 (Annexure R-3) under the subject “Regularisation of Ad-hoc Stenographers Gr III/LDCs” has clarified that:

“However, the services rendered by the ad-hoc Stenographers would count for purposes of fixation of pay on the date of their regularisation without payment of arrears, if they were already drawing pay in the prescribed scale of pay. Otherwise, they would be granted the minimum of the scale of pay from the date of regularisation. According to the existing instructions, 50% of ad-hoc service would also count for purposes of pension.”

4.7 The applicant passed departmental examination for ministerial staff and was promoted to the post of T.A., Sr. T.A and Office Superintendent.

4.8 The pension case of the applicant was forwarded to the Accounts Officer on 20.01.2016. At that stage, objections were raised about pay fixation as LDC.

4.9 The applicant submitted his mandatory forms for preparation of his pension case on 20.01.2016 (Annexure R/8).

4.10. The applicant worked as Office Superintendent in-charge of Establishment and Accounts section of the office from 28.01.2014 till his superannuation on 29.02.2016.

4.11 The post of Office Superintendent, from which the applicant retired, is a Group B non-Gazetted post.

(Note : The annexures in the reply are listed as 1, 2, 3 etc. To avoid confusion, the same are mentioned as R/1, R/2 etc).

5. Heard the learned counsel for the parties and perused the pleadings and the documents available on record.

6. Learned counsel for the applicant relies upon the judgment of Hon'ble Apex Court in the case of **State of Punjab and others** vs. **Rafiq Masih (White Washer) and others**, (2015) 4 SCC 334

to emphasise that excess payment made cannot be recovered at the time of retirement. DoPT vide O.M dated 02.03.2016 (Annexure A-3) has reiterated the same. Further, relying upon **Rafiq Masih** (supra), the Hon'ble High Court of Madhya Pradesh has granted relief in the matters of **Sushma Pyasi vs. State of M.P.** in WP No.15083/2015 (Annexure A/4).

7. Learned counsel for the respondents places reliance on the judgment of Hon'ble High Court of Madhya Pradesh at Jabalpur in Writ Petition No.1026/2006(s) decided on 09.01.2008 in the case of **Union of India & four others vs. C. Samuel** as also the judgment of Hon'ble Apex Court in **High Court of Punjab and Haryana and others vs. Jagdev Singh**, (2016) 14 SCC 267 to say that excess amount can be recovered. He also brought to our notice the orders of this Tribunal in TA 362/1986 passed on 19.12.1990, where the present applicant Shri S.K. Namdeo and Shri C. Samuel were litigants.

FINDINGS

8. Hon'ble Apex Court in matters of **Rafiq Masih** (supra) has observed as under:-

“10. In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country has to be the basis of all governmental

actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.

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12. Reference may first of all be made to the decision in *Syed Abdul Qadir v. State of Bihar* [Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475 : (2009) 1 SCC (L&S) 744] , wherein this Court recorded the following observation in para 58: (SCC p. 491)

“58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess.

See *Sahib Ram v. State of Haryana* [Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248] , *Shyam Babu Verma v. Union of India* [Shyam Babu Verma v. Union of India, (1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , *Union of India v. M. Bhaskar* [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] , *V. Gangaram v. Director* [(1997) 6 SCC 139 : 1997 SCC

(L&S) 1652] , *B.J. Akkara v. Govt. of India* [B.J. Akkara v. Govt. of India, (2006) 11 SCC 709 : (2007) 1 SCC (L&S) 529] , *Purshottam Lal Das v. State of Bihar* [(2006) 11 SCC 492 : (2007) 1 SCC (L&S) 508] , *Punjab National Bank v. Manjeet Singh* [(2006) 8 SCC 647 : (2007) 1 SCC (L&S) 16] and *Bihar SEB v. Bijay Bhadur* [(2000) 10 SCC 99 : 2000 SCC (L&S) 394] .”

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18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

(Emphasis supplied by us)

9. In the matters of **Jagdev Singh** (supra), the Hon'ble Supreme Court has held that the proposition (ii) specified in **Rafiq**

Masih (supra) can not apply when the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded.

10. The present applicant Shri Sunil Kumar Namdeo along with Shri C. Samuel and 6 others had filed Writ Petition M.P. No.1947 of 1985, which was transferred to this Tribunal and registered as TA 362/1986. It was decided on 19.12.1990, wherein following directions were given on page 10/11 of the order:

“7. Therefore, the service of these petitioners cannot be terminated only because they have not been sponsored by the Staff Selection Commission or they have not passed the Special Examination conducted by the Union of India in 1985. Regarding the relief, which the petitioners are entitled to get like petitioners in the case of Ros Varghese & others (T.A.171/86), we hold that these petitioners are also entitled to get relief like Rose Varghese & others in the following similar terms:

“The Government may examine and review the position as whether it is possible to regularise the services of these petitioners by relaxing the rule requiring their recruitment through the Staff Selection Commission. If it is not considered feasible by the Government, then we direct that the petitioners should be continued in service and the respondents are restrained from terminating their services but two opportunities be given to the petitioners to attain proficiency in Stenography and clear the test with the requisite standard of speed in Shorthand etc. before

their regularisation. In other words their appointments as Stenographers will be treated as officiating appointment although not confirmed but also not ad-hoc pending such a regularisation. In order to provide a lien in the department they may be treated to be LDSs since according to the respondents, the Staff Selection Commission has already cleared some of them for the post of LDC but they may be allowed to officiate as Stenographer (Ord. Gr) until their regularisation by clearing the prescribed test of fitness. The two chances may be afforded to the petitioners at an interval of one year each to clear the test in shorthand etc. in consultation with the Staff Selection Commission. If any of the petitioners are still unable to clear the prescribed test then he/she may be reverted to the post of L.D.C.

If any of the petitioners has not even been approved for the post of L.D.C. because the returns of the respondents do not make it clear as to which of the petitioners have been approved for the post of LDCs in these petitions then in that case if the applicants still fail to pass the prescribed tests their services would be then liable to termination.”

11. Respondent's letter dated 20.03.1995 (Annexure R-9) reads as under:-

“Sub: Regularisation of services to Lower Division Clerk from adhoc Stenographers – Representation of Shri C. Samuel, LDC and Shri S.K. Namdeo, LDC – Regarding –

I am directed to refer to your letter F.No. CIT/JBL/Estt/4(c)/Stgr/42/94-95/3435 dated 10.02.1995 forwarding therewith the representation of Shri C. Samuel, LDC and Shri S.K. Namdeo, LDC and to inform that from the Letter No. Establishment/IAC/adhoc/86-87/57 dated

8.4.1986 enclosed with the representation and other documents, it appears that the applicants have already cleared the SSC examination, 1985 held at Allahabad and both have opted for the post of LDC in April, 1986 but no action was taken on their option, probably because of the direction of CAT at last para of page 10 of their judgement in OA No. 362/1986 dated 19.12.1990.

You are therefore, requested to regularise the services of the applicants under intimation to this office from the date of receipt of intimation from the SSC in 1985 or in 1986 as the case may be, after verification of documents and facts. However, they may be exempted from observation of all the formalities of new recruit i.e. medical examination, police verification etc..

So far, the fixation of pay of the applicants in the post of LDC is concerned, the matter is being taken up with the Board separately.”

12. Hon'ble High Court of Madhya Pradesh in the case of C.

Samuel (supra) ordered as under:

“7. We are also of the considered opinion that as the respondent has been regularly appointed on the post of L.D.C., on the basis of an unequivocal willingness in writing submitted by him and, therefore, he is only entitled to the pay and other benefits as admissible to an L.D.C. and he cannot be permitted to claim pay-protection to the extent that he should be continued to be granted pay and benefits as admissible to a stenographer in the circumstances of the present case.

8. In view of the above, the impugned order of the Tribunal whereby the entire recovery of the excess amount paid to the respondent has been quashed and it has been directed that the pay drawn by the respondent in the cadre of stenographer shall continue to remain protected in spite of the fact that he is working only on the post of an L.D.C. and was neither appointed or confirmed on the post of a stenographer in accordance with rules deserves to be and is hereby set aside, except that part of the order which relates to the recovery of the excess paid for the period up to 28-3-

95 which is hereby upheld and the recovery for the said period is quashed.”

13. The applicant has not questioned the pay fixation or due/drawn statement that the respondents have prepared. His main ground is that no recovery is permissible in terms of **Rafiq Masih** (supra) since he has retired. The judgment in case of **C. Samuel** (supra) is also not applicable to him since C. Samuel was a working employee, whereas the applicant has retired. He has also questioned the statement of the respondents that he was occupying Group – B, a non-gazetted post. In support, he has filed office order dated 20.02.2017 (Annexure RJ-1) wherein he has been shown as Group ‘C’ on the date of retirement.

14. We find that the applicant joined the Department as Stenographer purely on ad-hoc basis. He cleared the SSC examination, 1985 alongwith Shri C. Samuel. Both opted for the post of LDC in April, 1986. Both of them were contesting their reversion in TA 362/1986, which was decided on 19.12.1990. They had also represented in 1995, attaching UOI’s letter dated 08.04.1986. In their reply dated 20.03.1995 (Annexure R-9), it has been stated that the fixation of pay is being taken up separately.

15. From the above, it is clear that the applicant was conscious of his rights and was agitating for getting the desired relief from the

respondents. His pay fixation was not finalised till 20.03.1995 (Annexure R-9). In this background, he can not be unaware of the judgment in matters of **C. Samuel** (supra).

16. It has been a common thread in all the judicial pronouncements, including **Rafiq Masih** (supra) that recovery can be made if the employee had knowledge that the payment received was in excess of what was due or wrongly paid.

17. It has been conclusively held in the case of **C. Samuel** (supra), a similarly situated person, that pay fixation done in the case of ad-hoc Stenographers, who are subsequently regularly appointed as LDC, at the pay of Stenographer, is against the law.

18. Therefore, following the directions in Para 18(v) of **Rafiq Masih** (supra), we are of the considered view that recovery made in this case as per correct fixation of pay would not be iniquitous.

19. Accordingly, the Original Application is dismissed. No costs.

(Ramesh Singh Thakur)
Judicial Member

am/-

(Navin Tandon)
Administrative Member