

CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI.

Dated this Thursday the 21st day of November, 2019

Coram: Dr. Bhagwan Sahai, Member (Administrative)
Ravinder Kaur, Member (Judicial).

(1) O.A. 210/00186/2017

V. Paramesh,
Assistant Director (Retired),
National Academy of Customs,
Excise and Narcotics (NACEN), Mumbai
and residing at -
34, 1st Floor, 8th Main, 4th Cross,
Yadavagiri, Mysore,
State of Karnataka-570020. .. Applicant.

Versus

1. Union of India, through its Secretary to Government, (Revenue) (Ad11), Central Board of Excise and Customs, Ministry of Finance, Department of Revenue, North Block, New Delhi - 110 001.
2. The Chairman, Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, North Block, New Delhi - 110 001.
3. Director General (NACEN), National Academy of Customs, Excise & Narcotics, NACEN Complex, Sector 29, Faridabad - 121 008.
4. Additional Director General, National Academy of Customs, Excise & Narcotics (NACEN), Regional Training Institute, Western Zone, Post Office Lane, Bhandup (East), Mumbai - 400 042.
5. The Pay and Accounts Officer, Central Excise, Mumbai-IV, B-91, 5th Floor,

New Excise Building,
Wagle Industrial Estate,
Road No.16, Thane (W)-400 604. ..Respondents.

(2) O.A.210/00117/2018

V.K. Shastri,
Assistant Commissioner (A.R.)
at Customs, Excise and Service
Tax Appellate Tribunal and
Residing at: 602, Vardhaman Tower,
Naupada, Thane (W)- 400 602. ..Applicant.

Versus

1. Union of India, through its
Revenue Secretary,
Central Board of Excise and Customs,
Ministry of Finance, Department of Revenue,
North Block, New Delhi - 110 001.
2. The Chairman,
Central Board of Excise and
Customs, Department of Revenue,
Ministry of Finance,
North Block, New Delhi-110 001.
3. The Secretary,
Department of Personnel and
Training, Ministry of Personnel,
Public Grievances & Pensions,
Government of India,
Room No.112, North Block,
New Delhi - 110 001.
3. The Secretary (Expenditure),
Department of Revenue,
Ministry of Finance,
North Block,
New Delhi - 110 001.
4. The Principal Commissioner,
Central Excise, Zone-I, Mumbai
115, M.K. Road, 4th Floor,
Central Excise Building,
Churchgate, Mumbai-400 020.
5. Additional Commissioner (P&V),
Raigad Commissionerate,
Central Excise, Rasayani Division,
Kendriya Utpad Shukla Bhavan,
Khandeshwar, New Panvel-410 206.

6. Administrative Officer/Assistant Commissioner, Office of the Deputy Commissioner of Central Excise, Rasayani Division, 2nd Floor, Kendriya Utpad Shukla Bhawan, Khandeshwar, New Panvel-410 206.
7. The Pay and Accounts Office, Central Excise & Customs Belapur & Raigad, 6th Floor, C.G.O. Complex, C.B.D. Belapur, Navi Mumbai - 400 614. .. Respondents.

(3) O.A.210/00324/2018

M.P.S.Sengar,
Assistant Commissioner (Retired),
PCCO, GST & Central Excise,
Mumbai Zone and
Residing at A-2/404, Vikas Complex,
L.B.S. Marg, Thane (W)-400 601. .. Applicant.

Versus

1. Union of India, through its Revenue Secretary, Central Board of Excise and Customs, Ministry of Finance, Department of Revenue, North Block, New Delhi - 110 001.
2. The Chairman, Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, North Block, New Delhi-110 001.
3. The Secretary, Department of Personnel & Training, Ministry of Personnel, Public Grievances & Pensions, Government of India, Room No.112, North Block, New Delhi - 110 001.
4. Joint Commissioner (P&V), CGST & Central Excise, Mumbai Central, 3rd Floor, GST Bhawan, 115, M.K. Road, Churchgate, Mumbai - 400 020.
5. The Pay and Accounts Office, GST & Central Excise, Mumbai Central,

Ground Floor, GST Bhawan,
115 M.K. Road, Churchgate,
Mumbai - 400 020.

6. The Principal Commissioner,
GST & Central Excise, Mumbai Central,
115, M.K. Road, 4th Floor,
GST Bhawan, Churchgate,
Mumbai-400 020. .. Respondents.

(4) O.A.210/00044/2017

Vijaykumar Umarshi Shah,
presently posted as
Assistant Commissioner of
Central Excise (Audit),
Commissionerate - Mumbai-I and
Residing at 101, Tarangan,
Vithalbhai Patel Road,
Mulund (West), Mumbai - 400 080 .. Applicant.

Versus

1. Union of India, through its
Revenue Secretary,
Central Board of Excise and Customs,
Ministry of Finance, Department of Revenue,
North Block, New Delhi - 110 001.
2. The Chairman,
Central Board of Excise and
Customs, Department of Revenue,
Ministry of Finance,
North Block, New Delhi-110 001.
3. The Secretary,
Department of Personnel & Training,
Ministry of Personnel,
Public Grievances & Pensions,
Government of India,
Room No.112, North Block,
New Delhi - 110 001.
4. The Secretary (Expenditure),
Ministry of Finance,
Government of India,
Room No.129-A, North Block,
New Delhi - 110 001.
5. Chief Commissioner,
Central Excise, Zone-I, Mumbai
4th Floor, New Central Excise Bldg,
115, M.K. Road, Churchgate,
Mumbai-400 020.

6. Commissioner of Central Excise (Audit),
 Commissionerate Mumbai-I,
 4th Floor, Navprabhat Chambers,
 Ranade Road, Dadar (West),
 Mumbai - 400 028. .. Respondents.

(5) O.A.210/00047/2017

Sayed Wasi Ahmed Rizvi,
 Assistant Commissioner (Retired),
 Directorate General of Valuation (CBEC),
 New Customs House, Ballard Estate,
 Mumbai and
 Residing at: 24/103, God Gift Building,
 Thakur Pada, Shailesh Nagar,
 Mumbra, Thane, Maharashtra-400 612 ...Applicant.

Versus

1. Union of India, through its Secretary to Government (Revenue) (Adll), Central Board of Excise and Customs, Ministry of Finance, Department of Revenue, North Block, New Delhi - 110 001.
2. The Secretary, Department of Personnel and Training, North Block, New Delhi - 110 001.
3. The Secretary (Expenditure), Department of Revenue, Ministry of Finance, North Block, New Delhi - 110 001.
4. The Chairman, Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, North Block, New Delhi-110 001.
5. The Directorate General of Valuation, CBEC, New Customs House, Ballard Estate, Mumbai - 400 001.
6. The Principal Commissioner of Customs (General) Personnel & Establishment Department, New Customs House, Ballard Estate, Mumbai - 400 001.
7. Chief Accounts Officer (Customs), New Customs House, Ballard Estate, Mumbai - 400 001.

8. The Pay and Accounts Officer,
 Customs, 9th Floor,
 New Customs House, Ballard Estate,
 Mumbai - 400 001. .. Respondents.

(6) O.A.210/00048/2017

S. Paramasivam,
 Assistant Commissioner,
 Central Excise, Audit, Mumbai I.
 Residing at 108/109, Sherawali
 Complex, Near Chopra Court,
 Behind Jai Hind School,
 Ulhasnagar - 421 003,
 Maharashtra ... Applicant.

Versus

1. Union of India, through its
 Secretary to Government (Revenue) (Adll),
 Central Board of Excise and Customs,
 Ministry of Finance, Department of Revenue,
 North Block, New Delhi - 110 001.
2. The Chairman,
 Central Board of Excise and Customs,
 Department of Revenue,
 Ministry of Finance, North Block,
 New Delhi - 110 001.
3. The Chief Commissioner,
 Central Excise, Mumbai zone-I,
 4th Floor, New Central Excise Building,
 115, Maharishi Karve Road,
 Opp. Churchgate Station,
 Mumbai - 400 020.
4. The Commissioner,
 Central Excise, Audit, Mumbai-I,
 4th Floor, Nav Prabhat Chambers,
 Ranade Road, Mumbai - 400 028.
5. The Pay and Accounts Officer,
 Central Excise, Mumbai - III,
 First Floor, Nav Prabhat Chambers,
 Ranade Road,
 Mumbai - 400 001. .. Respondents.

(7) O.A.210/00230/2017

Shri Chintamani G. Shahane,
 Assistant Director (Retired),

Directorate General of Goods
and Service Tax,
9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug, Parel,
Mumbai - 400 012 and
Residing at - 06/B-002, Parera Ngar CHS,
Behind ST Workshop, Khopat,
Thane - 400 601. . . Applicant.

Versus

1. Union of India, through its
Secretary to Government (Revenue) (Adll),
Central Board of Excise and Customs,
Ministry of Finance, Department of Revenue,
North Block, New Delhi - 110 001.
2. Chairman,
Central Board of Excise and Customs,
Ministry of Finance, Department of Revenue,
North Block, New Delhi-110 001.
3. Department of Personnel & Training,
through Secretary,
Ministry of Personnel,
Public Grievances & Pension,
North Block, New Delhi - 110 001.
4. Principal Chief Commissioner
of Central Excise, Mumbai Zone-I,
Central Excise Building,
15th, Maharishi Karve Road,
Churchgate, Mumbai - 400 020.
5. Additional Director General,
Directorate General of Goods
and Service Tax,
9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug, Parel,
Mumbai - 400 012.
6. Assistant Director,
Directorate General of Goods
and Service Tax,
9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug, Parel,
Mumbai - 400 012.
7. Administrative Officer,
Directorate General of Goods
and Service Tax,
9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug, Parel,
Mumbai - 400 012. . . Respondents.

(8) O.A.210/00231/2017

Debashish Banerjee,
 Assistant Commissioner,
 Central Excise & Service Tax,
 LTU-Audit, Mumbai and
 Residing at B/3, Chitrakut CHSL,
 R.G. Gadkari Path, Near Karwa Hospital,
 Dombivali (E) - 421 201. .. Applicant.

Versus

1. Union of India, through its
 Secretary to Government (Revenue) (Adll),
 Central Board of Excise and Customs,
 Ministry of Finance, Department of Revenue,
 North Block, New Delhi - 110 001.
2. The Chairman,
 Central Board of Excise and
 Customs, Department of Revenue,
 Ministry of Finance,
 North Block, New Delhi-110 001.
3. Department of Personnel and Training,
 Ministry of Personnel,
 Public Grievances & Pensions,
 North Block, New Delhi - 110 001.
4. The Commissioner,
 Central Excise & Service Tax,
 LTU-Audit, Mumbai
 30th Floor, Centre-I,
 World Trade Centre, Cuffe Parade,
 Mumbai - 400 005.
5. The Joint Commissioner,
 Central Excise & Service Tax, Zone-I, Mumbai
 LTU-Audit, Mumbai,
 30th Floor, Centre-I,
 World Trade Centre, Cuff Parade,
 Mumbai-400 005. .. Respondents.

(9) O.A.210/00232/2017

Shri Lalit Suneja,
 Assistant Commissioner (Audit),
 Office of Commissioner of
 Central Excise and Service Tax
 LTU-(Audit),
 30th Floor, Center-1, World Trade
 Centre, Cuffe Parade,
 Mumbai - 400 005. .. Applicant.

Versus

1. Union of India, through its Secretary to Government (Revenue) (Ad11), Central Board of Excise and Customs, Ministry of Finance, Department of Revenue, North Block, New Delhi - 110 001.
2. Chairman, Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, North Block, New Delhi-110 001.
3. Department of Personnel & Training, through Secretary, Ministry of Personnel, Public Grievances & Pensions, North Block, New Delhi - 110 001.
4. Principal Chief Commissioner of Central Excise, Mumbai Zone-I, Central Excise Building, 15th Maharishi Karve Road, Churchgate, Mumbai - 400 020.
5. Commissioner of Central Excise and Service Tax, LTU (Audit), 30th Floor, Centre-I, World Trade Centre, Cuff Parade, Mumbai-400 005. .. Respondents.

(10) O.A.210/00233/2017

Joseph Lobo,
Assistant Commissioner of
Central Excise, Wagle-I Division,
Commissionerate-Mumbai III
and residing at
Shree Nandanvan Apartment,
Mohan-1, Louiswadi,
Thane - 400 604. ..Applicant.

Versus

1. Union of India, through its Revenue Secretary, Central Board of Excise and Customs, Ministry of Finance, Department of Revenue, North Block, New Delhi - 110 001.
2. The Chairman,

Central Board of Excise and
Customs, Department of Revenue,
Ministry of Finance,
North Block, New Delhi-110 001.

3. The Secretary,
Department of Personnel & Training,
Ministry of Personnel,
Public Grievances & Pensions,
Government of India,
Room No.112, North Block,
New Delhi - 110 001.
4. Chief Commissioner,
Central Excise, Zone-II Mumbai,
9th Floor, Piramal Chamber,
Jijibhoy Lane, Lalbaug, Parel,
Mumbai - 400 012.
5. Commissioner of Central Excise
Commissionerate Mumbai-III,
4th Floor, Vardaan Center,
Wagle Industrial Estate,
Thane - 400 604. .. Respondents.

(11) O.A.210/00234/2017

Pandit Rama Bagade,
Assistant Commissioner A.C. (Adj)
Thane I, C.Ex. Commissionerate,
Dadar, Mumbai and residing at
D-23, Mulund Sahakar Vishra CHS Ltd.,
Nahur Village Road, Mulund West,
Mumbai - 400 080. ... Applicant.

Versus

1. Union of India, through its
Secretary to Government (Revenue) (Ad11),
Central Board of Excise and Customs,
Ministry of Finance, Department of Revenue,
North Block, New Delhi - 110 001.
2. The Chairman,
Central Board of Excise and
Customs, Department of Revenue,
Ministry of Finance,
North Block, New Delhi-110 001.
3. Chief Commissioner of Central Excise,
4th Floor, New Central Excise Bldg,
115, M.K. Road, Churchgate,
Mumbai - 400 020.

4. Commissioner of Central Excise,
Thane - I, 4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (West),
Mumbai - 400 028.
5. Additional Commissioner (P&V),
Central Excise, Thane-I, 4th Floor,
Navprabhat Chambers, Ranade Road,
Dadar (West), Mumbai - 400 028.
6. Pay & Accounts Officer,
Central Excise, Mumbai - I,
2nd Floor, Navprabhat Chambers,
Ranade Road, Dadar (West),
Mumbai - 400 028. .. Respondents.

(12) O.A.210/00374/2017

Shakil Mohammad Patel,
Assistant Commissioner of Central Excise(Rebate),
Mumbai III Commissionerate
and Residing at
C-404, Devashree Garden,
R.W. Sawant Marg,
Near Rutu Park, Majiwada,
Thane (W) - 400 601. ... Applicant.

Versus

1. Union of India, through its
Secretary to Government (Revenue) (Adll),
Central Board of Excise and Customs,
Ministry of Finance, Department of Revenue,
North Block, New Delhi - 110 001.
2. The Chairman,
Central Board of Excise and Customs,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi-110 001.
3. Chief Commissioner of Central Excise,
Mumbai Zone-I,
4th Floor, Central Excise Building,
115 M.K. Road, Churchgate,
Mumbai - 400 020.
4. Commissioner of Central Excise
Mumbai-III Commissionerate,
3rd and 4th Floor, Vardaan Trade Center,
MIDC Wagle Industrial Estate,
Thane (W) - 400 604. .. Respondents.

(13) O.A.210/00394/2017

Prabhakar Ganesh Kulkarni,
 Assistant Director (Audit),
 Mumbai Zone Unit, Mumbai and
 Residing at B/33, Parijat,
 3rd Floor, Opp. MET College,
 Bandra Reclamation, Bandra (W),
 Mumbai, Maharashtra-400050. . .Applicant.

Versus

1. Union of India, through its
 Secretary to Government
 Central Board of Excise and Customs,
 Ministry of Finance, Department of Revenue,
 North Block, New Delhi - 110 001.
2. The Chairman,
 Central Board of Excise and Customs,
 Department of Revenue,
 Ministry of Finance,
 North Block, New Delhi - 110 001.
3. Directorate General of Audit,
 Customs and Central Excise,
 C.R. Building, I.P. Estate,
 New Delhi - 110 009.
4. The Principal Additional Directorate
 General, Mumbai Zonal Unit,
 Room No.111 & 112, 1st Floor,
 D.D. Building, Old Custom House,
 Shahid Bhagat Singh Marg,
 Mumbai - 400 023.
5. The Pay and Accounts Officer,
 Central Excise, Mumbai - I,
 M.K. Road, New Central Excise Building,
 Churchgate, Mumbai - 400 020. . .Respondents.

(14) O.A.210/00433/2017

M.O.Varghese,
 Assistant Commissioner (Retired),
 Central Excise and Customs Audit,
 Commissionerate, Mumbai II, and
 Residing at C-701, Bhumiraj Hermitage,
 Sector - 18, Palm Beach Road, Sanpada,
 Navi Mumbai - 400 705. . . Applicant.

Versus

1. Union of India, through its Revenue Secretary, Central Board of Excise and Customs, Ministry of Finance, Department of Revenue, North Block, New Delhi.
2. The Chairman, Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, North Block, New Delhi - 110 001.
3. The Secretary, Department of Personnel & Training, Ministry of Personnel, Public Grievances & Pensions, Government of India, Room No.112, North Block, New Delhi - 110 001.
4. Additional Commissioner (P&V), Central Excise, Audit, Mumbai-II, 4th Floor, MTNL Building, Administrative Wing, Sector - 16A, Vashi, Navi Mumbai - 400 703.
5. Pay and Accounts Office, Central Excise, Mumbai - II, Central Board of Excise and Customs, 8th Floor, Piramal Chambers, Jijibhoy Lane, Lalbaug, Parel, Mumbai - 400 012.
6. The Principal Commissioner, Central Excise, Zone-I, Mumbai 115, M.K. Road, 4th Floor, Central Excise Building, Churchgate, Mumbai - 400 020. .. Respondents.

All the Applicants in the above mentioned OAs are represented by Advocates Shri H.G. Dharmadhikari, Shri D.A. Bhalerao and Ms. Minal Kanade and the respondents are represented by Advocates Shri R.R. Shetty, Shri D.A. Dube, Shri Suhas Mandal, proxy counsel for Shri N.K. Rajpurohit, Shri M.N. Mulla, proxy counsel for Shri A.M. Sethna.

Order reserved on : 19.07.2019

Order delivered on : 21.11.2019.

O R D E R
Per : Dr.Bhagwan Sahai, Member (A)

1(a). These 14 OAs have been filed by the applicants under Section 19 of the Administrative Tribunals Act, 1985 on these dates :

18.11.2016	- O.A.44/2017 & O.A.48/2017,
19.12.2016	- O.A.374/2017,
12.01.2017	- O.A.47/2017,
30.01.2017	- O.A.186/2017,
31.01.2017	- O.A.230/2017
16.03.2017	- O.A.234/2017,
17.03.2017	- O.A.231/2017, O.A.232/2017 and O.A.233/2017
21.06.2017	- O.A.394/2017,
06.07.2017	- O.A.433/2017,
13.09.2017	- O.A.117/2018 and
09.04.2018	- O.A.324/2018.

In these OAs they have sought the following reliefs:-

(i). declaration that they are entitled for grant of 3rd MACP from different 8 dates in 2012 and 6 dates in 2013;

(ii). setting aside of orders withdrawing 3rd MACP granted to them and refixation of pay issued in four cases in 2014, in one case in 2015, in seven cases in 2016 and in two cases in 2017; and

(iii). setting aside of orders of respondents for recovery of amount of 3rd MACP benefit released to them and refund of already recovered amounts from them in view of Apex Court decision in case of State of Punjab Vs. Rafiq Masih dated 18.12.2014 and DOPT OM dated 02.03.2016.

1(b). In all these OAs the respondents have filed their replies. In response, the applicants have filed their rejoinders and then the respondents have filed sur-rejoinders.

As submitted by the counsels for the parties, the subject matter of all these OAs involves common issues relating to grant and withdrawal of 3rd MACP to the applicants. Therefore, with their consent, by taking O.A.48/2017 as the lead case, they have been heard together by us on 23.04.2019, 25.04.2019 and 17.07.2019 and all these fourteen OAs are being decided by this common order.

2. Summarized facts:

2(a). At the time of filing of the O.A.48/2017, applicant Shri S. Paramsivam was working as Assistant Commissioner, Central Excise (Audit) Mumbai - I. He joined as Inspector on 19.03.1983 (pay scale of Rs.5000-9000), on completion of 12 years he was granted first ACP in 1999, then was promoted as Superintendent of Central Excise from 24.09.2002 (pay scale of Rs.7500-12000), after completing four years of service as Superintendent, he got upgradation under non-functional selection grade from 24.09.2006 (Pay Band of Rs.9300-34800) with grade pay of Rs.5400/-, then on completion of 24 years he was granted upgradation as 2nd ACP from

19.03.2007 in PB-3 with grade pay of Rs.5400/- and from 19.03.2013 he was again granted financial upgradation under 3rd MACP in PB-3 with grade pay of Rs.6600/- by order dated 21.01.2013.

2(b). Subsequently based on clarification issued by Ministry of Finance vide letter dated 04.06.2014 as per DOPT OM dated 26.07.2010, by order dated 25.09.2014 the benefit of 3rd MACP was withdrawn by treating the benefit of non-functional grade granted to him earlier as offset against the financial upgradation under the MACP Scheme and revised pay fixation order was issued on 26.07.2016, contemplating recovery of the benefit of 3rd MACP and letter dated 30.09.2016 was issued for recovery of the excess amount paid of Rs.2,04,093/- in 10 instalments of Rs.22,677/- from October, 2016 to June 2017. The first instalment of Rs.22,677/- was recovered from the applicant's salary of October, 2016. Therefore, the present OA has been filed challenging the order of withdrawal of benefit of 3rd MACP and order of recovery of the excess amount paid to him.

On 19.01.2017, recovery of the already paid amount of 3rd MACP was stayed by this Tribunal and that interim relief has continued thereafter.

2(c). The facts in all these OAs have been summarized in the following table:

Sl. No	OA Nos. and date of filing	Name of Applicants and their designations when OAs were filed	Date of grant of 3 rd MACP	Date of withdrawal of 3 rd MACP and date of refixation of pay	Date of order of recovery	Date of Retirement
1	<u>47/2017</u> 12.01.17	Sayed Wasi Ahmed Rizvi, Asstt. Commr. (Retired), Central Excise	01/03/13	25/09/14	26/09/16	30/09/16
2	<u>48/2017</u> 18.11.16	S. Paramsivam, Asstt. Commr., Central Excise	19/03/13	25/09/14	26/07/16	30/06/17
3	<u>186/2017</u> 30.01.17	V. Parmesh, Asstt. Dir.(Retd) NACEN	08/04/12	25/09/14	03/06/16	30/06/16
4	<u>230/2017</u> 31.01.17	C.G. Shahane, Asstt. Dir. (Retd), Dte.Gen of Goods and Service Tax	01/03/12	25/09/14	26/11/15	31/01/16
5	<u>233/2017</u> 17.03.17	Joseph Lobo, Asstt. Commr., Central Excise	01/06/12	25/09/14	31/05/17	31/05/17
6	<u>234/2017</u> 16.03.17	Pandit Bagade, Asstt. Commr., Central Excise	01/11/12	25/09/14	31/08/16	30/04/17
7	<u>394/2017</u> 21.06.17	U.P. Kulkarni, Asstt. Dir. (Audit)	15/02/13	28/11/16	30/04/17	31/07/17
8	<u>433/2017</u> 06.07.17	M.O. Varghese, Asstt. Commr. (Retd.) Central Excise	21/01/13	25/09/14	31/03/17	31/03/17
9	<u>374/2017</u> 19.12.16	S.M. Patel, Asstt. Commr., Central Excise	21/03/13	25/09/14	05/06/18	31/08/18
10	<u>324/2018</u> 09.04.18	MPS Sengar, Asstt. Commr., (Retd.) PCCO, GST & Central Excise	21/01/13	25/09/14	05/03/18	28/02/18
11	<u>44/2017</u> 18.11.16	Vijaykumar U. Shah, Asstt. Commr., Central Excise	10/05/12	25/09/14	03/08/16	30/11/16
12	<u>231/2017</u> <u>17.03.17</u>	Debashish Banerjee, Asstt. Commr., Central Excise & Service Tax	28/06/12	25/09/14	15/12/16	31/01/20
13	<u>232/2017</u> 17.03.17	Lalit Suneja, Asstt. Commr.(Audit), Central Excise & Service Tax	10/02/12	25/09/14	15/12/16	30/11/18
14	<u>117/2018</u> 13.09.17	V.K. Shastri, Asstt. Commr, Customs, Excise and Service Tax App. Tribunal	21/01/12	<u>22/10/13</u> <u>25/09/14</u>	26/09/16	31/08/17 (VRS)

2(d). The other 13 applicants also joined the Department initially as Inspectors during 1982 (9 of them) and 1983 (5 of them). Under the ACP Scheme issued by DOPT OM dated 09.08.1999, they were granted first financial upgradation in the year 1999, then they were promoted as Superintendents during 2001 and 2002. Thereafter on completion of four years service as Superintendents, they were granted the benefit of Non-Functional Selection Grade in that post during 2000 to 2006.

Then they were granted 2nd financial upgradation under ACP Scheme on completion of 24 years of service i.e. from different dates in 2006-2007 in PB-2 with grade pay of Rs.5400/-. Thereafter they were again granted the third financial upgradation under MACP Scheme in PB-3 with grade pay of Rs.6600/- on completion of 30 years from different dates in 2012 and 2013. However, in view of clarification issued by the DOPT in OM dated 19.05.2009, the financial upgradation granted as 3rd MACP was withdrawn, their pay was refixed and the amount already released to them was ordered to be recovered. Therefore, these OAs have been filed for the reliefs summarized in Para 1(a) above.

3. Contentions of the parties:

In O.A.48/2017, rejoinder dated 24.07.2017 and during hearing of arguments, the applicant has contended that -

3(a). Chennai Bench of the Tribunal while dealing with identical issue in case of Shri S. Balakrishnan in O.A.280/2012 by decision dated 22.07.2013 quashed the order of recovery from the applicant as being illegal. That decision was challenged before Madras High Court in Writ Petition No.11535/2014 and in the decision dated 16.10.2014, the order of the Tribunal was upheld. The High Court order was further challenged by the respondents as Special Leave Appeal (C) No.15396/2015 in the Supreme Court and by condoning the delay that SLP was dismissed. Thus the order of DOPT in para 8.1 of MACP Scheme and clarification contemplating withdrawal of 3rd MACP benefit due to NFSG benefit granted earlier have been set aside by the Chennai Bench of the Tribunal, Madras High Court and Apex Court decisions. Therefore, the decision of the Chennai Bench of the Tribunal has attained finality and become judicial precedent binding on all the Courts. As a result, the corrigendum issued by the respondents to him dated 25.09.2014 withdrawing the earlier granted benefit of 3rd MACP and revised

fixation of his pay followed by order dated 26.07.2016 contemplating recovery of the amount paid to him are not correct. In view of the Apex Court decision in case of **State of Punjab Vs. Rafiq Masih dated 18.12.2014**, the DOPT has also issued the OM on 02.03.2016. Since he was due for retirement on 30.06.2017, the recovery is not permissible;

3(b) . the financial upgradation as grade pay of Rs.5400/- in PB-2 granted to the applicant under NFSG was distinct from the financial upgradation in grade pay of Rs.5400/- in PB-3 and, therefore, he is entitled for the grade pay of Rs.6600/- in PB-3 as 3rd MACP;

3(c) . his representation dated 11.08.2016 has also not been considered by the respondents and the letter dated 30.09.2016 has been issued by Assistant Commissioner Central Excise, Audit, Mumbai-I for recovery of Rs.2,04,093/- in 10 instalments from October, 2016 to June 2017 which is not justified;

3(d) . the applicant was granted the grade pay of Rs.6600/- as 3rd MACP and not under the Central Civil Services (Revised Pay) Rules, 2016. Issuance of corrigendum by the respondents dated 25.09.2014, is incorrect in view of the aforesaid decisions of Chennai Bench of the Tribunal, Madras High Court

and Apex Court. Thus inspite of contrary view taken by the DOPT in letter dated 21.07.2010, similarly placed employees have been granted by the respondents the grade pay of Rs.6600/- by order dated 21.01.2013;

3(e). the decision of Chennai Bench of the Tribunal in R. Chandrasekharan is a factual position, so the applicant has no comments on it.

3(f). During hearing of these OAs, the applicants have given copies of the following caselaws:-

(i). Decision of Chennai Bench of the Tribunal in O.A.280/2012 dated 22.07.2013 in S. Balakrishnan & Others Vs. Union of India and others and its upholding by Madras High Court order dated 16.10.2014 in Writ Petition No.11535/2014;

(ii). Decision of C.A.T., Chennai of the Tribunal dated 24.02.2014 in R. Chandrasekaran and Madras High Court order in W.P.19024/2014 dated 08.12.2014;

(iii). C.A.T., Lucknow Bench decision in O.A.467/2012 (Ashwani Kumar Choudhary Vs. Union of India & Others) dated 15.05.2017;

(iv). Decision in O.A.633/2015 (Prakash V. Ratnaparkhi Vs. Union of India) of this Bench of the Tribunal dated 21.06.2017;

(v). Decision in O.A.849/2016 & 4 other OAs

(Rajendra Kumar Vidyarthi & others Vs. Union of India & Others) of Jabalpur Bench of this Tribunal dated 20.09.2018;

(vi) Decision of CAT, Ernakulam Bench, O.A.816/2012 (M.V. Mohanan Nair Vs. Union of India & Others) dated 29.01.2013;

(vii). Decision of CAT, Ahmedabad Bench in O.A.18/2015 (Manubhai Bhagwanji Rathod Vs. Union of India & Others) dated 16.10.2015;

(viii). Decision of CAT, Calcutta Bench in O.A.195/2014 (S.H.K. Murthy & Others Vs. Union of India & Others) dated 28.04.2016;

(ix). Decision of CAT, Principal Bench in O.A.904/2012 in Sanjay Kumar & Others Vs. Secretary, Ministry of Defence & others, dated 26.11.2012;

(x). Decision of CAT, Principal Bench in O.A.1586/2014 in Vinai Kumar Srivastav & Anr. Vs. East Delhi Municipal Corporatio & others, dated 08.09.2015.

(xi). Delhi High Court decision in Writ Petition No.3420/2010 (R.S. Sengor & Ors. Vs. Union of India & Ors.) dated 04.04.2011;

(xii). Delhi High Court decision in Writ Petition No.5082/2013 (Swaran Pal Singh & Ors. Vs. Union of India & Ors.) dated 17.03.2015;

(xiii). Delhi High Court decision in

W.P.No.5146/2012 (Union of India Vs. Delhi Nurses Union (Regd.) & Anr.) dated 24.08.2012;

(xiv). Punjab & Haryana High Court, Chandigarh decision in CWP No.19387/2011 (Union of India & Ors. Vs. Raj Pal & Another) dated 19.10.2011; and

(xv). Apex Court decision in Union of India & Ors. Vs. M.V. Mohanan Nair, in SLA No.21803/2014 dated 09.08.2017;

3(g). the decision of Kolkata Bench of the Tribunal dated 28.04.2016 rejecting the G.A. of Shri SHK Murthy for grant of the benefit under the MACP Scheme is not applicable to the applicant's case in view of finality attained by S. Balakrishnan decision. Respondents' interpretation of Para 8.1 of MACP Scheme is incorrect. The Delhi High Court judgment in case of Sengor dealing with interpretation of Para 8.1 of MACP Scheme did not decide the issue of offsetting of NFSG benefit as contended by the respondents and that decision cannot be said to be ratio decidendi. The Punjab and Haryana High Court decision in case of Rajpal and another was not with respect to Para 8.1 of the MACP Scheme.

Similarly the decision of Principal Bench of the Tribunal in case of Sanjay Kumar was not about offsetting NFSG benefit while granting MACP benefit. Also the decisions in case of Vinai Kumar

Shrivastava and Vikas Bhutani involved different issues. The decision of Ernakulam Bench of the Tribunal in M.V. Mohanan Nair case also did not deal with the issues related to the present applicants and that decision has also been stayed by the Apex Court;

3(h). the main issue involved in the present case is whether the benefit of financial upgradation under the MACP Scheme can be offset against the benefit of upgradation granted under NFSG. The Lucknow Bench of the Tribunal has also followed the S. Balakrishnan decision in deciding the O.A.467/2012 in case of Ashwini Kumar Choudhary (page 282) in view of Apex Court decision in case of Maharaj Kishan Bhat holding that the benefit granted cannot be denied to other similarly situated persons. Therefore, all the letters issued by the respondents i.e. 20.01.2016, 01.03.2016 and 17.05.2016 are not relevant. Hence the O.A. be allowed.

In their reply, sur-rejoinder and arguments during hearing, the respondents have contended that -

3(i). while granting interim relief by order dated 19.01.2017, this Tribunal considered only the order passed by the Chennai Bench of the Tribunal in case of Shri S. Balakrishnan, which was upheld

by the Madras High Court. In DOPT OM dated 19.05.2009 issuing the MACP Scheme, it has been unambiguously stipulated that the MACP Scheme envisages merely placement in the immediate next higher Grade Pay in the hierarchy of the recommended revised pay bands and grade pay as given in Section 1, Part-A of the first Schedule of the CCS (Revised Pay) Rules, 2008, and not in promotional hierarchy as was available under the ACP Scheme;

3(j). it has been further clarified that promotions earned / upgradations granted under the ACP Scheme in the past are to be ignored for MACP upgradation only when those grades which carry the same grade pay due to merger of pay scales / upgradation of post as per accepted 6th CPC recommendations.

In terms of Para 8.1 of the MACP Scheme, grade pay of Rs.5400/- in PB-2 and Rs.5400/- in PB-3 have been treated as separate grade pay for the purpose of upgradations under the MACP Scheme;

3(k). after the applicant joined as Inspector on 19.03.1983, he was promoted as Superintendent from 24.09.2002. As per the 6th CPC recommendations, Superintendents in Department of Revenue on completion of 4 years of regular service in that grade became eligible for NFSG in the grade pay of

Rs.5400/- in PB-2. Accordingly, the applicant as Superintendent was granted NFS grade pay of Rs.5400/- in PB-2 on 24.09.2006. Since he had already been granted the NFSG financial upgradation from 24.09.2006 and placed in pre-revised Group 'A' pay scale of Rs.8000-13500/-, his pay was revised in Group 'A' i.e. PB-3 with grade pay of Rs.5400/-. After completion of 24 years of service he was granted the second ACP benefit in pay scale of Rs.8000-13500/- with effect from 19.03.2007. Then 3rd financial upgradation was granted to him in PB-3 with grade pay of Rs.6600/- from 19.03.2013. However, as per the objection raised by the Pay & Accounts Officer, the applicant was not eligible for grant of 3rd MACP because he had already got one promotion in 2002 and two financial upgradations as NFSG and 2nd ACP in 2006 and 2007;

3(1). DOPT vide letter of 26.07.2010, clarified that the benefit of Non-Functional Grade was granted to Superintendents (Group 'B' officers) on completion of 4 years. So as per Para 8.1 of the MACP Scheme, the same would be offset against one financial upgradation under the MACP Scheme (Annex-R-4, P.178). For clarity and uniformity in application of the MACP Scheme, the DOPT published comprehensive clarifications on Frequently Asked Questions (FAQs) on 01.04.2011. Among them the

clarification no.16 clarified that Non-functional Selection Grade Pay would be viewed as one financial upgradation for the purpose of MACP Scheme in terms of Para 8.1 of Annex-1 of DOPT OM dated 19.05.2009 (P.182);

3(m). therefore, as per letter of CBEC, dated 06.05.2013 it was clarified that as per Para 5 of the Board's Circular dated 20.05.2011, the NFSG had no effect under ACP Scheme for grant of financial upgradation upto 31.08.2008, but the demand that NFSG should not offset financial upgradation under MACP Scheme has not been agreed to by the DOPT because it was against the stipulation under Para 8.1 of the MACP Scheme (Annex-R-6, P.187). Further as per letter of CBEC dated 04.06.2014, the decision was reiterated that NFSG granted during 01.01.2006 to 31.08.2008 would be counted / offset against the financial upgradation under MACP Scheme (Annex-R-7, P.190). However, before the above clarifications dated 06.05.2013 and 04.06.2014 were received, the Commissioner, Central Excise, Mumbai-I after conducting Screening Committee meetings granted the 3rd financial upgradation of Rs.6600/- under MACP Scheme to all officers who had completed 30 years of regular service (Annex-R-8, pages 200-223);

3(n). based on those clarifications from the

Ministry, the respondents have issued corrigendum on 25.09.2014, thereby withdrawing the grant of 3rd MACP from the applicants who had been earlier granted NFSG benefit;

3(o). in view of different representations received citing various caselaws such as the Punjab & Haryana High Court decision dated 19.10.2011 in case of Union of India & others Vs. Rajpal and another and Madras High Court decision dated 16.10.2014 in case of Union of India & others Vs. S. Balakrishnan and others by which the grant of grade pay of Rs.6600/- as 3rd financial upgradation for direct recruit Inspectors in the hierarchical grade pay of post of Dy. Commissioner, the Respondent No.3 again sought on 15.01.2015 clarification from the Ministry as to whether in view of the above High Court decisions, grant of grade pay of Rs.6600/- as 3rd MACP, which is the grade pay in the hierarchical grade pay of Dy. Commissioner, was correct;

3(p). however, the Chennai Bench of the Tribunal vide order dated 24.02.2014 dismissed O.A.675/2013 filed by Shri R. Chandrasekaran, objecting to withdrawal of earlier granted 3rd MACP with grade pay of Rs.6600/-. In Writ Petition, the Madras High Court in its decision dated 08.12.2014 set aside the order of the Tribunal dated 24.02.2014 in

O.A.675/2013 and remitted the matter to the DOPT for consideration of all the circulars issued earlier and to issue a fresh circular explaining the nature and scope of MACP Scheme and whether the NFSG would be counted for the purpose of this Scheme (Annex-R-9). Thereafter the DOPT re-examined the proposal of the CBEC and Department of Revenue in consultation with the Department of Expenditure and it was decided vide note dated 02.05.2016 that grant of NFSG in grade pay of Rs.5400/- in PB-2 to the Superintendents needs to be counted as one financial upgradation for the purpose of MACP Scheme. Thus the DOPT did not agree to the request of the CBEC and Department of Revenue for ignoring the grant of NFSG of Rs.5400/- in PB-2 to the Superintendents from 01.01.2006 to 31.08.2008 for the purpose of MACP Scheme (Annex-R-15).

Subsequently vide note dated 02.06.2016 the DOPT reiterated its opinion given on 02.05.2016 and advised the respondents to take appropriate action in case of R.Chandrasekaran as well as other similar cases in terms of its earlier opinion dated 02.05.2016. Then the respondents issued letter dated 20.06.2016 to the Chief Commissioner of Central Excise, Chennai with reference to Shri R. Chandrasekharan to take appropriate action and

accordingly the benefit of 3rd financial upgradation under MACP with grade pay of Rs.6600/- granted to Shri R. Chandrasekaran was withdrawn, revised pay fixation was issued on 08.08.2016 (Annex-R-18) and recovery of excess amount paid was also ordered;

3(q). thereafter the Department of Revenue, vide instructions dated 07.12.2016 directed all Cadre Controlling authorities under CBEC to follow the guidelines of DOPT on MACP Scheme in letter and spirit, and to take action in terms of DOPT OM dated 02.03.2016 about excess payment wrongfully made to the individuals.

In pursuance to that letter, the Respondent No.4 has informed the applicant on 30.09.2016 that his representation had been considered and the amount of Rs.2,04,093/- needs to be recovered in instalments. That action has been challenged in the present O.A.

3(r). the DOPT vide letter dated 20.01.2016 and 17.05.2016 forwarded a copy of the Apex Court stay order dated 08.08.2014 in the matter of Union of India Vs. M.V. Mohanan Nair regarding grant of MACP benefit in the promotional hierarchy. Thereafter the DOPT also forwarded on 01.01.2016 copies of the decisions of the Ahmedabad Bench of the Tribunal in case of Manubhai B. Rathod Vs. Union of India and others and the decision of Kolkata Bench of the

Tribunal in case of SHK Murthy and others whereby the demand of the applicants for grant of MACP in promotional hierarchy was dismissed holding that the MACP benefit should be given in the hierarchy of the next higher grade pay and not in the grade pay of promotional hierarchy (Annex-R-20);

3(s). as per letter of CBEC dated 31.08.2016 the Cadre Controlling Authorities have been directed to review all cases of doubts and ensure that there are no cases of excess payments made to Government servants. Wherever any excess payment has been made on account of fraud, misrepresentation, collusion, favouritism, negligence, carelessness, etc, role of those responsible for overpayment in such cases and the employees who benefitted from such actions should be identified, and departmental/criminal action should be considered in appropriate cases;

3(t). the Delhi High Court decision in case of R.S. Sengor Vs. Union of India and others has not been challenged before the Apex Court and thus it has attained finality. In view of dismissal of Punjab & Haryana High Court decision in case of Union of India Vs. Raj Pal by the Apex Court only because the delay and laches and not on merit, and stay granted by the Apex Court to Kerala High Court decision in case of M.V. Mohanan Nair, the

applicant is not eligible for grant of 3rd financial upgradation on the basis of Madras High Court decision in case of S. Balakrishnan;

3(u). since the order of withdrawal of 3rd MACP to the applicant had been issued on 25.09.2014, filing of this O.A. on 18.11.2016 is barred by limitation. The applicant had been granted first ACP from 09.08.1999, then he was promoted as Superintendent from 24.09.2002, further granted NFSG in PB-2 from 24.09.2006, and then he was granted 2nd ACP benefit from 19.03.2007 in PB-3 with grade pay of Rs.5400/-. Hence he was not eligible for grant of 3rd MACP in the grade pay of Rs.6600/- on completing 30 years of service. Based on the clarification issued by the CBEC dated 20.06.2016 in consultation with DOPT and Department of Expenditure, the grant of NFSG with grade pay of Rs.5400/- in PB-2 to Superintendents on completion of 4 years service in that grade has to be counted as one financial upgradation under the MACPs.

Therefore, the revised pay fixation order was issued for the applicant by Respondent No.4 on 25.09.2014 and order dated 30.09.2016 for recovery of Rs.2,04,093/- as excess payment made to him from 19.03.2013 to 31.07.2016. Further as per letter from CBEC dated 31.08.2016, with instructions to ensure that no excess payment is made to the

officers and to initiate departmental or criminal action against employees who have benefitted from grant of wrong MACP upgradation, necessary action for recovery has been initiated; and

3(v). as cited in the decision of Ahmedabad Bench of the Tribunal dated 22.09.2017 in O.A.581/2016 and other OAs, the Apex Court judgment in case of S. Balakrishnan did not attain finality and the dismissal of the SLP against that judgment does not result in affirmation or confirmation or approval of the High Court decision. In R. Chandrasekaran case, in the decision of the Madras High Court there is no categorical finding as to which grade pay should be granted under MACP, and the DOPT was directed to examine afresh the nature and scope of MACP Scheme and clarify as to whether the NFSG granted would amount to MACP benefit, etc. Therefore, the applicant not being eligible and entitled for 3rd MACP, its withdrawal and order of recovery issued against him are fully justified. Similarly all these 14 OAs be dismissed.

4. Analysis and conclusions:

4(a). We have carefully considered the OA memo and its annexes, rejoinder filed by the applicant, reply and sur-rejoinder filed by the respondents, relevant DOPT OMs on MACP Scheme and various case laws cited by them as well as their arguments

during the hearing on 19.07.2019. Based thereon our analysis of the issues involved is discussed hereunder.

4(b). The main issue for decision in these OAs is as to whether the withdrawal by the respondents of earlier granted 3rd MACP benefit with grade pay of Rs.6600/- to the applicants (Superintendents in CBEC) and resultant recovery from them are justified.

4(c). In the context of these OAs, the applicable main stipulations under the MACP Scheme are these- (i). The Modified Assured Career Progression (MACP) Scheme for Central Government Civilian employees was introduced by DOPT, Government of India vide OM dated 19.05.2009, replacing the earlier ACP Scheme implemented since 1999. The DOPT is the final authority to decide scope and modalities of this Scheme.

(ii). As per para 9 of that OM, any interpretation/clarification of doubt as to the scope and meaning of the provisions of the MACP Scheme shall be given by the Department of Personnel and Training. The scheme would be operational from 01.09.2008.

(iii). As per para 2 of the MACP Scheme, it envisages merely placement in the immediate next higher grade pay in the hierarchy of recommended

revised pay bands and grade pay as given in Section 1, Part-A of First Schedule of CCS (Revised Pay) Rules, 2008.

(iv). In para 4 of the Scheme it has been stipulated that there shall, however, be no further fixation of pay at the time of regular promotion if it is in the same grade pay as granted under MACP Scheme. However, at the time of actual promotion if it happens to be in a post carrying higher grade pay than what is available under the MACP Scheme, no pay fixation would be available and only difference of grade pay would be made available.

(v). As provided under Para 5 of the Scheme, promotion earned or upgradation granted under the ACP Scheme in the past to those grades which now carry the same grade pay due to merger of pay scales/upgradations of posts recommended by the 6th CPC shall be ignored for the purpose of granting upgradations under MACP Scheme.

(vi). As per Para 8, promotions earned in the post carrying same grade pay in the promotional hierarchy as per Recruitment Rules shall be counted for the purpose of MACP Scheme.

(vii). Para 8.1 has provided that consequent upon implementation of the 6th CPC recommendations, the grade pay of Rs.5400/- is now in two pay bands i.e. PB-2 and PB-3. The grade pay of Rs.5400/- in PB-2

and PB-3 shall be treated as separate grade pays for the purpose of grant of upgradations under the MACP Scheme.

(viii). Para 17 of the Scheme stipulates that the financial upgradation would be on non-functional basis subject to fitness and other grading at different levels.

(ix). As provided in the last part of the Scheme, if a Government servant has been granted either two regular promotions or 2nd financial upgradation under ACP Scheme after completion of 24 years of regular service, then only 3rd financial upgradation would be admissible to him under the MACP Scheme on completion of 30 years of service, provided that he has not earned third promotion in the hierarchy.

(x). In the subsequently issued clarifications on the Scheme by the DOPT OM dated 09.09.2010, clarification at Point No.6 - Whether the promotion in the same grade would be counted for the purpose of MACP Scheme, it has been clarified that the financial upgradation under the MACP Scheme is in the immediate next higher grade in the hierarchy of recommended revised pay bands and grade pay as given in the CCS (Revised Pay) Rules, 2008. However, if the promotional hierarchy as per Recruitment Rules is such that promotions are

earned in the same grade pay, then the same shall be counted for the purpose of MACP.

(xi). As per the clarification on item no.16, whether 'Non-functional Scale' of Rs.8000-13500 (revised to grade pay of Rs.5400 in PB-3) would be viewed as one financial upgradation for the purpose of MACP Scheme, Yes, in terms of para 8.1 of Annex-I to the DOPT OM dated 19.05.2009.

(xii). As per DOPT letter dated 26.07.2010, benefit of Non-functional Grade was granted to Superintendents (Group 'B' Officers) on completion of four years and as per Para 8.1 of the MACP Scheme, the same would be offset against one financial upgradation under the MACP Scheme.

4(d). The applicants have relied on number of caselaws. However, their main reliance is on S. Balakrishnan decision. They contend that the issue involved in the Mohanan Nair and Raj Pal's case is about the parity in granting grade pay in the higher grade pay whereas issue involved in the S. Balakrishnan is withdrawal of benefit of 3rd MACP Scheme in view of para 8.1 of MACP Scheme on account of granting non-functional grade pay in grade pay of Rs.5400/- in PB-2. Hence the issues being different the decision in case of Mohanan Nair and Rajpal are not binding precedent for the 13 applicants in these OAs. The judgment of

C.A.T., Chennai in case of S. Balakrishnan in O.A.280/2012 is having the binding precedent since the said decision has attained finality in view of dismissal of Writ Petition filed by respondents against the order of CAT before the Madras High Court and further dismissal of SLP by the Apex Court filed by respondents against the order of Madras High Court and finally dismissal of Review Petition by Apex Court which was filed by respondents on merits as well as on delay against the order of dismissal of SLP.

4(e). The respondents have also attempted to benefit mainly from these caselaws:-

(i). C.A.T., Mumbai Bench in O.A.Nos.286/2017, O.A.287/2017 & O.A.288/2017 (Madhukar R. Natu & 2 Others Vs. Union of India and others) dated 06.02.2019;

(ii). CAT Chennai and Madras High Court decisions in case of R. Chandrasekaran;

(iii). Apex Court decision in Kunhayammed and others Vs. State of Kerala and another, Civil Appeal No.12309/1996 decided on 19.07.2000;

(iv). Apex Court decision in H.S.E.B. & Anr. Vs. Rajbir Singh & Ors., Civil Appeal No.6506/2000 dated 08.10.2002;

(v) Delhi High Court decision in R.S. Sengor & Ors. Vs. Union of India & Ors. in Writ Petition

No.3420/2010 dated 04.04.2011;

(vi) Delhi High Court decision in Writ Petition No.5082/2013 (Swaran Pal Singh and others Vs. Union of India and others) decided on 17.03.2015;

(vii). Gujarat High Court decision in Hasmukh B. Desai Vs. Director General, Spl. Civil Appln. No.4464/2016 dated 28.06.2016;

4(f). Our careful consideration of the above case details shows that in **S. Balakrishnan and others**, the Chennai Bench of the Tribunal in its order dated 22.07.2013 allowed the O.A. for grant of 3rd MACP with grade pay of Rs.6600/- in PB-3 for refixing pension and disbursing the terminal benefits to the applicants. The Madras High Court by its order dated 16.10.2014 upheld the decision of the Tribunal by referring to decision of Chandigarh Bench of the Tribunal, (which was upheld by the Punjab & Haryana High Court) in case of Raj Pal, and stating that the grade pay of Rs.5400/- in PB-2 in that case had been earlier granted on non-functional scale, which cannot be a functional grade for Assistant Directors and it cannot be counted as one financial upgradation under MACP as per Para 8.1 of the MACP Scheme. An SLP No.15396/2015 filed against that order of the Madras High Court was dismissed by two-Judge Bench of the Supreme Court vide order dated 31.08.2015,

after condoning the delay, (copy at page 97). On this basis the applicants claim that the decision of the Chennai Bench of the Tribunal has attained finality and its benefit should be allowed to them. However, this contention is not correct.

4(g). The contention of the respondents on this issue is correct in view of Supreme Court decision of a larger Bench in **Kunhayammed and others Vs. State of Kerala and another in Civil Appeal No.12309/1996 decided on 19.07.2000, (AIR 2000 SC 2587)**, explaining that the exercise of jurisdiction conferred on the Supreme Court by Article 136 of the Constitution consists of two steps : (i) granting special leave to appeal, and (ii) hearing the appeal. This distinction is also clearly demonstrated by the provisions of Order XVI of the Supreme Court Rules framed in exercise of the power conferred by the Article 145 of the Constitution.

As per Para 40 of that decision, a petition seeking grant of special leave to appeal may be rejected for several reasons such as barred by time, being a defective presentation, petitioner having no locus standi to file the petition, conduct of the petitioner disentitling him to any indulgence by the Court, question raised by the petitioner for consideration by the Court being not fit for consideration or deserving. The

expressions often used by the Apex Court while disposing of such petitions are heard and dismissed, dismissed; dismissed as barred by time and so on.

When at the admission stage itself the opposite party appears on caveat or on notice and contests the maintainability of the petition, the Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say dismissed on merits. Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the Special Leave Petition. When an order refusing special leave to appeal is by a non-speaking order or a speaking on, it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

4(h). Similarly in H.S.E.B. & Another. Vs. Rajbir Singh & Ors. In Civil Appeal No.6506/2000

decided on 08.10.2002, Para 3 states that as in case of Kunhayammed & Ors. Vs. State of Kerala & Anr., the Apex Court repeatedly held that when an SLP to the Supreme Court is dismissed by a non-speaking order, such dismissal neither attracts the doctrine of merger nor amounts to declaration of law by this Court under Article 141 of the Constitution.

4(i). Since the Apex Court decision dismissing the SLP against the order of Madras High Court and Chennai Bench of the Tribunal in case of S. Balakrishnan and others was not by a speaking order on merits, in our opinion it did not amount to finality of that decision of the Chennai Bench of the Tribunal, hence that decision does not have binding effect. Thus the contention of the applicants that the decision has binding effect is rejected.

The same was the view of Ahmedabad Bench of the Tribunal in **O.A.581/2016 and 8 other OAs dated 22.09.2017**, concluding that in addition to the principle laid down in Kunhayammed and others, and subsequently in case of **Bhakra Beas Management Board Vs. Krishan Kumar Vij and Another and State of Punjab Vs. Davinder Pal Singh Bhullar**, the earlier Apex Court judgment in case of S. Balakrishnan, dismissing the SLP does not result in

affirmation or confirmation or approval. There is no categorical finding on the issue in question and the issue did not attain finality.

4(j). We also note that after the S. Balakrishnan decision, the same Chennai Bench of the Tribunal dismissed **O.A.675/2013 on 24.02.2014** (**in case of R. Chandrasekaran**) by taking a different view than the one taken in case of S. Balakrishnan and others. That decision was challenged by Shri R. Chandrasekaran before the Madras High Court in Writ Petition No.19024/2014, which was decided on 08.12.2014.

In para 10 and 11 of that decision the High Court observed that -

"10. We have dismissed the writ petition filed by the respondents herein and confirmed the order passed by the Central Administrative Tribunal. The circulars and instructions given by the Ministry of Personnel, Public Grievances and Pensions and the earlier circular issued by the Central Board and Excise and Customs dated 20 May 2011, the order dated 21 February 2013 on the file of Central Board of Excise and Customs passed pursuant to the direction in O.A.No.140 of 2012 on the file of Central Administrative Tribunal, Madras Bench were not before us while considering the writ petition in W.P.No.11535 of 2014. It was only in the present writ petition the petitioner and the respondents have produced the classificatory circulars dated 25 February 2011, 20 May 2011, and the order passed by the Central Board of Customs and Excise dated 21 February 2013.

11. We have perused the circulars issued by the concerned authorities and the order

dated 21 February 2013 on the file of Central Board of Excise and Customs."

Hence the order of the Tribunal dated 24.02.2014 was set aside but the High Court remitted the matter to the DOPT to consider the issue in light of the provisions of MACP Scheme and earlier clarifications as to whether the MACP benefit can be given to the employees such as petitioners in that case who had been granted non-functional scale earlier.

This was the subsequent decision of the Madras High Court on the same issue i.e. after the earlier decision in S. Balakrishnan, clearly observing that the decision in the earlier cases (i.e. S. Balakrishnan): was without considering various clarifications issued by DOPT and Department of Revenue. In view of that categorical observation by the same High Court, the Balakrishnan decision cannot be applied to other cases.

4(k). Thereafter the DOPT re-examined the proposal of the respondents CBEC and Department of Revenue in consultation with the Department of Expenditure and vide note dated 02.05.2016 decided that the grant of NFSG in grade pay of Rs.5400/- in PB-2 to Superintendents needs to be counted as one financial upgradation for the purpose of MACP

Scheme. The DOPT reiterated the same view again on 02.06.2016 and advised the respondents to take appropriate action in case of R. Chandrasekaran as well as other similar cases. Thereafter the 3rd MACP granted to Shri R. Chandrasekaran has been withdrawn and recovery made. There has not been any challenge to this. Therefore, the above decision of DOPT is the final view on interpretation of the MACP Scheme to be complied with.

4(1). We further observe that the decision of **Ernakulam Bench of the Tribunal in O.A.816/2012, in case of M.V. Mohanan Nair**, relying upon view of Chandigarh Bench of the Tribunal case of **Raj Pal in O.A.1035/2010**, allowed the fixation of his pay with grant of 2nd MACP in PB-2 (Rs.9300-34800) with grade pay of Rs.4600/-, which was upheld by the Kerala High Court as grant of higher pay scale under MACP Scheme was purely on the basis of completion of requisite years of service by the incumbent. But that High Court decision has been stayed by the Apex Court in SLP No.10791/2014 on 08.08.2014.

In the above various caselaws, we note that varying views have been taken with reference to grant of MACP upgradation in the next grade pay in the same pay band or in grade pay in promotional hierarchy and for counting grant of NFSG as an MACP

upgradation. However, with reference to the main question involved in these OAs i.e. whether the applicants were at all eligible for grant of 3rd MACP upgradation with grade pay of Rs.6600/- after having received NFSG upgradation earlier, the main stipulations under the MACP Scheme, rules and the caselaws directly relevant to the present case have to be considered.

4(m). The unambiguous stipulations under the MACP Scheme and consistent clarifications issued by DOPT have already been explained by us in para 4(c) above. From them it is clear beyond doubt that the financial upgradation granted to the respondents under NFG is to be counted as one MACP upgradation. Therefore, the applicants were not entitled for grant of 3rd MACP as grade pay of Rs.6600/-.

The Delhi High Court decisions in Writ Petition No.3420/2010 (R.S. Sengor and others Vs. Union of India and others decided on 04.04.2011) and Writ Petition No.5082/2013 (Swaran Pal Singh and others Vs. Union of India and others) decided on 17.03.2015 have also confirmed that as per stipulations of the MACP Scheme, the financial upgradation is to be given in the next higher grade pay and not the grade pay of the next hierarchical post. This view has also been adopted by the Kolkata Bench of the Tribunal in O.A.195/2014

(S.H.K. Murthy and others Vs. Union of India) decided on 20.04.2016. The respondents have submitted that the above decisions of the Delhi High Court have not been challenged and, therefore, they have become final.

4(n). In Writ Petition No.8515/2014 (Union of India & Ors. Vs. All India CGHS Employees Association and others) decided on 09.11.2016, the contention of the respondents that grant of non-functional grade pay is treated as financial upgradation for the purpose of MACP Scheme was accepted.

4(o). From the details of the case it is clear that the applicants had joined in 1982 to 1983 initially as Inspectors. After introduction of the ACP Scheme, they got financial upgradation as 1st ACP from 1999. They got promoted as Superintendents during 2002-2003. Then in 2006-2007 they were also granted NFSG. That means before completing 24 years of service, they had got 1st ACP benefit and one regular promotion as Superintendents. Thereafter they got 2nd ACP benefits in 2006-2007. Therefore, after introduction of MACP in 2009, they could have become eligible for grant of 3rd MACP only when after completing 20 years of service and upto 30 years of their service, they did not get any

promotion or financial upgradation. However, after completing their 20 years of service in 2002-03, they got upgradation as NFSG in 2006, i.e. before completing 30 years of service.

4(p). As per stipulation of the MACP Scheme, since they had already received one regular promotion, one ACP upgradation and one upgradation as NFSG before completing 24 years of service, how they became eligible for grant of financial upgradation as 2nd ACP during 2006-07 is not clear. However, benefit of that upgradation was given to them. Subsequently on completion of 30 years, without verifying the fact of the receipt of financial upgradation after completing 20 years, they were also granted the financial upgradation as 3rd MACP in 2013. This was not allowed under the MACP Scheme and the applicants were not eligible for grant of the 3rd MACP in 2013. Therefore, the corrective action taken by the respondents subsequently by withdrawing the benefit of 3rd MACP was not only justified but it was necessary.

4(q). We note that the case of the applicants in the present OAs is different from S. Balakrishnan and R. Chandrasekaran cases. In S. Balakrishnan's case, the applicants were found eligible for grant of 3rd MACP and since they were already drawing grade pay of Rs.5400/- they were found eligible for

grant of grade pay of Rs.6600/- . However, in the present OAs the applicants were not eligible for grant of 3rd MACP.

4(r). As per clear stipulation under Para 8.1 of the MACP Scheme and clarification on Item No.16 of the Scheme that on grant of financial upgradation under the Scheme, there shall be no change in the designation, classification or higher higher studies. Financial upgradation under the MACP Scheme being only financial upgradation on Non-Functional basis, the availing of benefit of Non-Functional Grade by the applicants before grant of MACP benefit obviously amounted to granting of one financial upgradation under the MACP Scheme.

Therefore, after having availed of the benefit of the NFG in the form of higher grade pay, the applicants were not entitled for grant of 3rd MACP. Because of this unambiguous position under the stipulations of the MACP Scheme, and on having failed in their attempts through the Department of Revenue in getting the benefit of NFG waived for becoming eligible for grant of 3rd MACP, the applicants know it very well and realise that they were not entitled for grant of 3rd MACP. That is why in their written notes of arguments in Para 11, they have submitted an alternative prayer that except in case of Mr.Banerjee, O.A.231/2017 and

Mr. Suneja, O.A.232/2017, if the MACP benefits have been granted to the applicants erroneously atleast action of recovery in case of 10 applicants i.e. O.A.Nos.44, 47, 48, 186, 230, 233, 234, 394, 433/2017 and 374/2018 is unsustainable in view of Apex Court decision in case of State of Punjab & Others Vs. Rafiq Masih as the recovery has been ordered within one year of their retirement or after retirement.

4(s). However, the applicants have not explained as to how the recovery of the excess payment made to them as 3rd MACP would result in extreme hardship to them. In fact as per Rule 71 of the Pension Rules, even from the retiring employees recovery is to be made and it is the duty of the Head of the Office to ascertain and assess Government dues payable by Government servant due for retirement. The Government dues as ascertained and assessed by the Head of the Office that remain outstanding till the date of retirement shall be adjusted against the amount of gratuity being payable and the expression government dues includes overpayment of pay and allowances or leave salary. Therefore, the applicants are liable for recovery of the overpayment made to them in the form of grant of 3rd MACP benefit.

4(t). Similarly as held by the Apex Court in

Chandi Prasad Uniyal case the law is that the excess payment made due to wrong / irregular pay fixation can always be recovered.

Keeping in view the above discussed provisions, the Department of Revenue and CBEC have directed the Cadre Controlling authorities to recover excess payment from the applicants and similarly placed other employees and fix the responsibility in such cases of overpayments.

4(u). In view of the above analysis, in our considered view the OAs have no merit. The action of the respondents of withdrawing the wrongly granted 3rd MACP benefit from the applicants and initiating recovery of the overpayment was fully justified.

However, after withdrawal of 3rd MACP earlier granted to the applicants and refixation of their pay, there was delay by the respondents themselves in issuing the orders of recovery. Therefore, in view of the Apex Court decision in case of State of Punjab and others Vs. Rafiq Masih and DOPT OM dated 02.03.2016 in case of applicants in O.A.47/2017 (Syed Wasi Ahmed Rizvi), O.A.48/2017 (S. Paramsivam), O.A.186/2017 (V. Parmesh), O.A.230/2017 (C.G. Shahane), O.A.233/2017 (Joseph Lobo), O.A.234/2017 (Pandit Bagade), O.A.433/2017 (M.O. Varghese), O.A.374/2017 (S.M. Patel),

O.A.324/2018 ((MPS Sengar), O.A.44/2017 (Vijaykumar U. Shah), O.A.394/2017 (U.P. Kulkarni) and O.A.117/2018 (V.K. Shastri) against whom the orders of recovery were issued within one year of their retirement, should be withdrawn and in their cases it would be better to refund the amount of recovery already made. In rest of the OAs (O.A.No.231/2017 and O.A.232/2017) the recovery should be made.

5. Decision:

O.A.47/2017, O.A.48/2017, O.A.186/2017, O.A.230/2017, O.A.233/2017, O.A.234/2017, O.A.394/2017, O.A.433/2017, O.A.374/2017, O.A.324/2018, O.A.44/2017 and O.A.117/2018 are partly allowed only with respect to setting aside of orders of the recovery of 3rd MACP benefit which were issued within one year of their retirement. However, O.A.Nos.231/2017 and O.A.232/2017 are dismissed. No order as to costs.

All Mas filed by the parties also stands disposed of.

(Ravinder Kaur)
Member (J)

(Dr. Bhagwan Sahai)
Member (A).

H.