

Reportable  
\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WP (C) No. 13640 of 2006  
and  
WP (C) No. 7054 of 2009

1. WP (C) No. 13640/2006

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*Reserved on : February 26, 2009*  
*Pronounced on : March 20, 2009*

Arindam Lahiri

. . . Petitioner

through :

Mr. P.S. Patwalia, Sr. Advocate  
with Mr. D.C. Pandey and  
Mr. Piyush Sharma, Advocates

***VERSUS***

Union of India & Ors.

. . . Respondents

through :

Mr. H.K. Gangwani with  
Mr. Ashwani Bhardwaj,  
Advocates

2. W.P. (C) No. 7054 of 2009

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*Reserved on : March 06, 2009*  
*Pronounced on : March , 2009*

Union of India & Ors.

. . . Petitioners

through :

Mr. R.V. Sinha, Advocate

***VERSUS***

Arindam Lahiri

. . . Respondent

through :

Mr. Sandeep Sethi, Sr. Advocate  
with Mr. D.C. Pandey, Advocate

**CORAM :-**

**THE HON'BLE MR. JUSTICE A.K. SIKRI**

**THE HON'BLE MR. JUSTICE SURESH KAIT**

1. Whether Reporters of Local newspapers may be allowed  
to see the Judgment?

2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

**A.K. SIKRI, J.**

1. Subject matter of the afore-mentioned two writ petitions is different. In the petition filed by Shri Lahiri, challenge is to the penalty imposed upon him by the respondents therein after holding a departmental inquiry. His OA in this behalf has been dismissed by the Tribunal and, therefore, he has come up to this Court challenging the order of the Tribunal. Other writ petition is filed by the Union of India & Ors., which arises out of an OA filed by Shri Lahiri claiming promotion to the post of Chief Commissioner of Income Tax. That OA has been allowed by the Tribunal and certain directions are issued against which the Union of India has filed the writ.
2. Thus, though the subject matter is different, first writ petition preferred by Shri Lahiri has bearing on the second petition. There is some commonality of facts as well. In fact, promotion case is sequel to the departmental action. Because of this reason, though the two petitions were heard and reserved for judgment on different dates, *albeit* within a span of one week, we propose to pass one common judgment in order to avoid repletion of lengthy facts. However, in this common judgment, the two petitions are being considered separately.

We first take up the case of departmental enquiry.

3. WP (C) No. 13640/2006

The petitioner joined the services in the Income-Tax department as an Income Tax Officer (ITO) in the year 1972. He got promotions from time to time and rose to the position of Commissioner of Income Tax (Appeals), to which post he was promoted on 31.1.1994. While discharging his duties as CIT (Appeals), he was hearing appeals from the orders of the assessing authorities, obviously a quasi-judicial function. At the relevant period with which we are concerned, he was functioning as CIT (Appeals) (Central-IV), Mumbai. In respect of certain appeals decided by him, the respondent felt that the petitioner had not conducted himself properly. A charge memo dated 21/24.11.1995 was issued to him. However, in the meantime, one of his orders was upheld by the Income Tax Appellate Tribunal (ITAT). Because of that reason, said charge memo was withdrawn and instead another charge memo dated 28.2.1997 was served upon him under Rule 14 of the CCS (CCA) Rules, for major penalty proceedings. As per this memo, two articles of charge were leveled against him, which read as under :-

“Article-I

That the said Shri Lahiri while functioning as Commissioner of Income-Tax (Appeals) (Central) IV Mumbai in 1994, has with malafide intention entertained and disposed of a petition filed by M/s. GTC Industries Limited, for stay of demand in respect of A.Y. 1987-88, 89-90, 90-91 and 91-92. He passed an order dated 12.9.94 staying the recovery of demand in the above mentioned case ignoring statutory requirements and also the decision of ITAT on the same issue for A.Y. 84-85 to 86-87 and acted in a manner which was detrimental to the interest of revenue.

By above acts of misconduct Shri A. Lahiri has failed to maintain absolute integrity, devotion to duty and exhibited conduct unbecoming of Government Servant and thereby violated provisions of Rule 3(1)(i), 3(1)(ii) and 3(1)(iii) of CCS (Conduct) Rules, 1964.

#### Article-II

That during the aforesaid period and while functioning in aforesaid office, the said Shri A. Lahiri decided appeals by passing perverse and mala fide orders in the cases of (i) GTC Industries Ltd. (ii) Simplex Enterprises, (iii) Ashok Rupani and (iv) Hindustan Transmission Projects. The orders passed by him were prejudicial to the interest of revenue as material evidence on record was ignored and assessing officer was not given opportunity as required u/s. 250 of I.T. Act to represent revenue's case.

By above acts of misconduct Shri A. Lahiri has failed to maintain absolute integrity, devotion to duty and exhibited conduct unbecoming of a Government Servant and thereby violated provisions of Rule 3(1)(i), 3(1)(ii) and 3(1)(iii) of CCS (Conduct) Rules, 1964.”

4. The petitioner denied the charges; a departmental inquiry was conducted leading to report dated 29.4.1999 of the Inquiry Officer holding both the charges as proved. He was given a copy of the said Inquiry Report to enable him to make representation thereagainst, if any. He submitted his representation dated 28.10.1999 taking various pleas, thereby questioning the findings arrived at by the Inquiry officer. The disciplinary authority, however, accepted the findings of the Inquiry Officer. Matter was referred to the Central Vigilance Commission (CVC) for second stage advice. The CVC sent its advice on 10.7.2001, as per which imposition of major penalty was opined. Decision was taken by the disciplinary authority to impose a major penalty subject to the advice of the Union Public Service Commission (UPSC). After receiving that advice dated

13.8.2004 from the UPSC, the disciplinary authority passed orders dated 7.10.2004 holding the petitioner guilty of misconduct and imposed the penalty of reduction by three stages in the time-scale of pay for a period of three years upon the petitioner, with further direction that he would not earn increments during this period and that will also have the effect of postponing his future increments of pay.

5. The petitioner challenged the aforesaid penalty order by approaching the Tribunal in the form of an application under Section 19 of the Administrative Tribunal Act, which was registered as OA No. 189/2005. After eliciting response of the respondents in the form of reply to the said OA and hearing the parties, the Tribunal has passed impugned judgment dated 25.7.2006 dismissing the OA of the petitioner. Assailing this order, present writ petition is filed by the petitioner.
6. Mr. Patwalia, learned senior counsel appearing for the petitioner, made a fervent plea to the effect that the petitioner was exercising powers as a quasi-judicial authority when he had decided certain appeals in respect of which charge sheet was issued. These appeals related to three assesseees, namely, M/s. GTC Industries Ltd.; Shri Ashok Rupani and M/s. Simplex Enterprises. Submission was that a bare perusal of the allegations leveled against the petitioner in the charge sheet would demonstrate that only apprehension/doubts were expressed by the respondents alleging that the petitioner had

shown favours to those assesseees. There was no evidence at all to implicate the petitioner and prove that he had shown any such favours to the said assesseees while deciding the appeals. He submitted that the entire matter was to be examined keeping in view one important element, namely, the appeals were decided while discharging quasi-judicial functions and applying the test laid down by the Supreme Court while dealing with the charges relating to discharge of quasi-judicial function, on mere apprehension/doubts, such quasi-judicial authorities could not be proceeded departmentally. He pitched it to be a case of '*No Evidence*'.

7. To buttress this submission, Mr. Patwalia referred to the advice of the UPSC wherein the UPSC itself had only conjectured to rope in the petitioner, conceding at the same time that there was no direct evidence to establish that the petitioner had shown any favour to the said assesseees.
8. Mr. Patwalia also pointed out that Article of Charge No.1 related to the orders of stay of demand granted by the petitioner in the appeal filed by M/s. GTC Industries Ltd. Specific allegation was that while doing so, he ignored statutory requirements and also the decision of ITAT on the same issue for the assessment year 1984-85 to 1986-87. He submitted that there was no denial of the fact that the petitioner had the requisite power to grant the stay. The respondent could not show as to which statutory provision or the decision of the ITAT which the petitioner had ignored. Furthermore, even the UPSC had

accepted that the petitioner had power to grant stay; there was no evidence to prove that the petitioner had granted stay for some consideration and only doubt was expressed about the intentions of the petitioner in passing the orders, as is clear from para 7.3 of the UPSC advice.

9. His submission was that on the basis of such apprehension alone, it could not be stated that the charge is proved. He also made detailed submissions justifying the circumstances in which the petitioner had to pass order staying the recovery of demand. In this behalf, his submission was that proper explanation was given by the petitioner in defending the said charge which was not even taken due note of by the disciplinary authority.
10. As per the allegations of the department, the petitioner had granted stay against coercive recovery proceedings by means of attachment of overdraft bank account resorted to by the Income Tax Officer in favour of M/s. GTC Industries on 12.9.1994, the same day when the application was moved by the assessee. It was also alleged that when the jurisdiction in the case being transferred to some other CIT (A) has been made w.e.f. 24.10.1994 vide Circular issued on 18.9.1994, he passed the stay order in haste in order to circumvent the effect of circular dated 18.10.1994. Refuting this, the petitioner had explained that the application dated 12.9.1994 had been moved by the assessee namely M/s. GTC Industries in appeals pertaining to the assessment years 1986-87, 1987-88, 1988-89, 1990-91 and 1991-

92 which had been pending on the applicant since 30.4.1990. The perusal of the application clearly shows that the ITO had initiated coercive proceedings against the assessee and issued attachment orders of the overdraft bank account acting in utter contravention and violation of Board's Circular prescribing the coercive proceedings ought not be initiated till the demand is confirmed in the first appeal i.e. by the CIT (Appeals). Further the proceedings had been initiated by the ITO in the manner amounting to circumvent the fall out/consequence of the order dated 05.09.1994 passed by the Bombay High Court in CWP No. 1805 of 1994 directing that evidence of witnesses who have not been put to cross-examination to the assessee shall not be relied upon the department in excise proceedings having vital bearing to the Income Tax Proceedings also being one and similar. The same principle has been reiterated by the High Court vide order dated 31<sup>st</sup> July 1995 passed in CWP No. 707 of 1995 qua proceedings under the Income Tax Act. Further the coercive proceedings were in direct contravention to the Ld. ITAT Order dated 9.2.1989 in the case of M/s. GTC Industries itself pertaining to assessment year 1984-85 wherein the matter was remanded to the CIT (Appeal) for compliance with directions. Consequently the order dated 12.9.1994 had been passed by the petitioner following the proposition of law and directions contained in the orders passed by the Bombay High Court and the Ld. ITAT Orders. The other contention that the proposal of assessee to liquidate the demands in installments before the CIT (Admn.) was

also not correct. As held by the Kerala High Court in the case reported as 221 ITR 502, only CIT (Appeal) is empowered and competent to grant stay and CIT (Admn.) does not possess competence to entertain any such application. Even the High Courts have been pleased to hold that payment of demand in installments amounted to coercive recovery and thus cannot be resorted till first appeal is disposed.

11. His explanation was that the stay was granted by the petitioner looking to the fact that the ITO had issued attachment of overdraft Bank account of assessee which resulted in total closure of business operation of the company dealing in perishable goods viz. cigarettes in utter violation of the principles of natural justice, guidelines and circulars issued by the Board as also the Ld. ITAT order and Bombay High Court order on the aspect. The Board Circular vests such a discretion in the petitioner to stay demand pending disposal of the Regular Appeal in appropriate cases and so any allegation to the contrary is misplaced, fallacious and incorrect.
12. In nutshell, submission of the petitioner in respect of this charge was that the petitioner did not act beyond his powers and dealt with the application for stay as he was empowered to decide the same. Further, while granting the stay, he kept in mind the relevant factors and the law on the point. Furthermore, even when he granted the stay on 12.9.1994, at the same time he also assured that the appeals are decided within time bound period and, therefore, fixed the final

hearings from 15.9.1994 and decided the appeals on 20.10.1994. This was also done with *bona fide* intentions in discharge of judicial duties. Above all, when no oblique motives were found, even as per the report of the Inquiry Officer or CVC, it could not have been stated that charge is established on mere suspicion.

13. Referring to Article of Charge-II, it was argued that the main allegation was that he did not decide appeals relating to the aforesaid three assessees fairly. Allegation *qua* the appeals of M/s. Hindustan Transmission products was that he decided the appeal on 18.10.1994 despite request for more time by the Assessing Officer and more so when the jurisdiction of the case was transferred, he still hastened to pass the order in order to circumvent the Notification of the DG (Inv.). In the case of Simplex Enterprises, the allegation, even as per the Inquiry Officer, was that he passed the orders without properly verifying the full facts and the correctness of the assessee's submission. Likewise, in the case of Ashok Rupali, the charge was that the petitioner passed the orders without correctly examining the facts and considering the new evidence without giving an opportunity to the Assessing Officer. Mr. Patwalia, learned senior counsel, reiterated that in the absence of any motive, etc. these could not be treated as the charges of misconduct against a person who was discharging quasi-judicial function.
14. On merits *qua* each allegation, the explanation of the petitioner was as under :-

In terms of Section 119 of the Income Tax Act, even the board has not been authorized to interfere with the exercise of power and jurisdiction of CIT (Appeal) and thus the allegations so made are misplaced. Even otherwise the hearing in the appeal pertaining to M/s. GTC Industries had concluded on 18.10.1994 and the orders were reserved which had been pronounced on 20.10.1994. Thus even otherwise assuming, without admitting the veracity and legality of such contentions in any manner, that the jurisdiction was supposed to have been transferred in terms of Circular issued on 18.10.1994 when the hearing of appeal had already concluded it cannot be said that the same affected the pronouncement of orders on 20.10.1994 as in any case the petitioner had jurisdiction till 24.10.1994. The contentions of respondent that the Misc. Application dated 15.09.1994 filed by the Department seeking vacation of stay granted by Applicant vide order dated 12.09.1994 had been kept pending till 18.10.1994 when notice to the assessee for filing its response was fixed for 24.10.1994 is also not tenable. The petitioner while granting stay in favour of M/s. GTC Industries had directed day to day hearing of the appeal and the stay was to operate till 30.10.1994 (for 6 weeks) and he had made sure by that time the main appeal would be disposed of by him. Consequently, alleging contrary intentions by the respondents is highly untenable and unsustainable in the eyes of law. Further since the main appeal was disposed of on 20.10.1994, misc. application cannot be assumed to have been pending even after the disposal of the main appeal.

The petitioner has stated that the contentions of issuance of the Circular on 18.10.1994 cannot be meant to be in the knowledge on 18.10.1994 or even prior to that time.

The petitioner also refuted the contentions of the department that by passing the orders in the Appeals pertaining to M/s. GTC Industries the Applicant had caused loss to revenue. It is the settled position of law under the provisions of Section 220 of the Income Tax Act that the demand till it is confirmed in first appeal cannot be treated to be any demand as per the provisions of Income Tax Act and the assessee cannot be deemed to be in default thereby justifying any coercive proceedings being initiated against it by the Income Tax Department. Further the petitioner deleted those additions wherein the ITO himself has contradicted the basis of valuation being changed to MRP printed on the cigarette dealt with by M/s. GTC Industries i.e. double branding hypothesis being discontinued after September 1985 and so any additions made on that count was clearly contrary to such claims. The petitioner remanded the matter to the ITO to verify and after following the procedure prescribed in law as also the High Court's order and the Ld. ITAT directions to raise a fresh demand thus leaving it all open to raise demand afresh in accordance with law. Thus no loss had been caused to the revenue at all.

15. Explaining the appeal decided in *Ashok Kumar Rupani's* case, the petitioner submitted that it was wrong imputation that he relied upon the statement/order of the FERA Authorities while deciding the

appeal and thus allowed additional evidence in violation of Rule 46A of the Income Tax Rules. The ITO had relied and had referred to the proceedings before the FERA Authorities as is clear from question No. 13 appearing in this Assessment Order. Consequently the violation as alleged are absolutely not made out and is rather false and misplaced. The petitioner vide his detailed appellate order, deleted the entire addition made by the AO amounting to Rs.1.07 crores accepting the assessee's arguments and the findings of the FERA authorities that Shri Rupani was only a go between in these transactions and was not involved in any way in his personal capacity.

16. As regards the contentions raised by the respondents pertaining to the appellate orders passed by the petitioner in the cases of M/s. Simplex Industries is concerned, submission was that the petitioner had passed the order based upon the applicable provisions of laws relevant for the case in hand. As noticed in the Appellate Orders including others, the fact that the AO had not been able to point out any defects in the books of accounts of the appellant. If somebody scrawls some figures on a sheet of paper in his house the books of accounts of the appellant cannot be rejected on the basis of that sheet of paper. Noticing in his appellate order the petitioner concluded in appellant's case before him that most of the sales were on credit for which the AO had vouched that the sale bill do not contain names and addresses of the parties to whom the sales had

been made. Therefore, the additions made without confirming the transactions with the parties were also unwarranted.

Similarly, in the case of M/s. Hindustan Transmission, the petitioner stated that in his appellate order he had stated the fact that the AO ought to have verified the contracts, statements, affidavits filed by the parties and Sh. Bothra. It was not open to the AO to simply brush them aside by saying that they were self serving and the AO should have pointed out fallacies and inconsistencies with facts. The petitioner further pointed out that the AO had not at all dealt with the explanation filed by the company vide their letters dt. 25.1.94 and 11.3.94. The petitioner found that there was no evidence to suggest that the company had allowed discount to the extent of 13.44% and the entire evidence relied upon by the AO related to the subsequent AY 1992-93.

17. On the basis of the aforesaid submissions, the learned senior counsel summed up his legal arguments in the following manner :-
  - (a) No charge of misconduct, in law, was made out against the petitioner.
  - (b) There was a delay in completing the inquiry. The appeals were decided in the year 1994 by the petitioner. However, charge sheet was served in the year 1997. The inquiry was unnecessarily prolonged even when there was full cooperation on the part of the petitioner, which is clear from the fact that the Inquiry Officer was appointed only on 11.2.1998. Though

he concluded the inquiry and submitted his report on 29.4.1999, it was forwarded to the UPSC for advice more than four years thereafter, i.e. on 22.8.2003. UPSC took one year in submitting its observations on 13.8.2004; and punishment imposed on 7.10.2004. In this manner, argued the counsel, seven years were allowed to pass, which affected the petitioner adversely. Punishment which was ultimately imposed, namely, reduction of 3 stages in the time-scale for a period of three years in 2004 had its affect till 7.10.2007. Had it been imposed immediately after the conclusion of the inquiry, it would have been over much before the petitioner was considered for promotion to the post of Chief Commissioner of Income Tax in the year 2005 and would have been granted promotion as he was found fit for promotion by the DPC. Legal submission was that because of delay the punishment be quashed in view of the following judgments of the Supreme Court :-

- (i) *P.V. Mahadevan v. MD, T.N. Housing Board*  
(2005) 6 SCC 363
- (ii) *State of A.P. v. N. Radhakishan*  
(1998) 4 SCC 154
- (iii) *State of M.P. v. Bani Singh*  
1990 (Supp.) SCC 738
- (iv) *M.V. Bijlani v. Union of India*  
(2006) 4 SCC 88

Alternatively, he submitted that even if such a penalty is to be maintained, it should be ante-dated so as not to effect the promotional chances of the petitioner, as held in :-

- (i) *Major Singh Gill v. State of Punjab*  
1992 (1) SCT 436
- (ii) *State of Punjab v. Major Singh Gill*  
1994 (1) SCT 811
- (iii) *Shiv Kumar Sharma v. HSEB & Ors.*  
AIR 1988 SC 1673
- (iv) *FCI v. S.N. Nugarkar*  
2002 (1) SCT 1049

- (c) There was no application of mind in the order passed by the disciplinary authority inasmuch as advice of the UPSC was followed mechanically thereby violating Rule 15(3) of the CCS Rules.
- (d) The UPSC advice was passed on extraneous material which was not even the charge and since this was followed mechanically by the disciplinary authority, the order of the disciplinary authority stood vitiated because of this reason.
- (e) Stand of the petitioner was vindicated in view of the judgment dated 9.12.2005 passed by the CESTAT, Principal Bench, New Delhi in the case of *GTC Industries v. Collector of Central Excise, Delhi*, 2006 198 ELT 121. In that case, the demand raised by the excise authorities on similar/identical allegation of generation on premium on sale of cigarettes, flow back of money received by M/s. GTC Industries from the retailers/

whole-sale dealers/buyers and charging process over and above the printed price on the packets of cigarettes, which was also the basis of assessments in the case pending before the petitioner in the appeals for the same assessment years, had been negated and the demand raised on such bases was quashed by the CESTAT.

18. Mr. Gangwani, learned counsel for the respondent, on the other hand submitted that the scope of judicial review in such cases was very limited. Though no direct evidence of oblique motives was available, from the attendant circumstances, which were quite apparent and would constitute “material”, the Inquiry Officer rightly concluded that the petitioner had not conducted himself properly in granting the stay in the matter of GTC Industries or deciding the appeals of the three assesseees/parties. Referring to the same observations of the Inquiry Officer in the Inquiry Report and the UPSC’s advice, to which reference was made by learned counsel for the petitioner, he submitted that such an inference was legitimately drawn by the concerned authorities on the basis of material produced. This Court, he reminded, would not sit as an appellate authority and come to a different conclusion than arrived at by the disciplinary authority. He also referred to the reasons given by the Tribunal in its impugned judgment to support his submission.
19. Mr. Gangwani further argued that the CVC, UPSC and the respondents have considered entire material on record, which clearly

shows that the petitioner acted in a hasty, biased and non judicious manner as has already been reflected in the penalty order. There was sufficient material on record and the petitioner was found guilty on the principles of preponderance of probability and the petitioner had failed to show any prejudice caused to him, from any action of the IO. In fact from the conduct of the petitioner it is clear that the petitioner had been too eager to oblige the assesseees without taking a judicious approach and passing orders in a hurry before the date on which the jurisdiction over the case was to be withdrawn from him which shows his bias in favour of the assesseees. The department had no option but to go in appeal to the higher authority in the cases decided by him. The disciplinary proceedings have been held in accordance with the rules and the Inquiry Officer has come to the conclusion based on the relevant reports and documents which form part of the case. The petitioner has been afforded reasonable opportunity to defend himself and the penalty awarded is justified.

20. Referring to various judgments of the Supreme Court, he argued that in such circumstances, even a quasi-judicial authority whose action is not *bona fide* can be charge sheeted. He submitted that the inquiry was conducted as per the rules and sufficient opportunity was given to the petitioner to defend himself during the inquiry. Further opportunities, as admissible under law, were also given before passing the penalty order.

21. He further submitted that the disciplinary proceedings in the present case were lengthy and time consuming and it is not unusual for delay to take place in following the due procedure as laid down in the rules in the interest of natural justice and also to provide sufficient opportunity for defence. After a preliminary show cause was issued, the response to it has to be well considered before taking CVC advice in initiating disciplinary action, after which a charge sheet is to be prepared with care and issued. The reply received from the petitioner was processed to decide whether the enquiry is to be held and only then the IO and presenting officer were appointed. Later when the enquiry report was received it was required to be examined and CVC approached for second stage advice in the matter. A copy of the enquiry report was served along with CVC advice and the representation received analyzed. Once again the matter had to be referred to the UPSC for advice before final orders were passed imposing the penalty. Even the final orders to be passed by the disciplinary authority require intense application of mind and have to be detailed speaking order. In view of the above process, the inquiry proceedings took some time in the present case. But the petitioner had not been prejudiced from the same in any manner, more so, when the inquiry proceedings have been conducted as per the rules and in accordance with the principles of natural justice.
22. Learned counsel for the respondent further submitted that the petitioner wants this Court to reappraise the evidence, which is not

permissible in law. This Hon'ble Court would not like to re-appreciate the evidence nor will it decide whether the conclusions drawn by the disciplinary authority are necessarily correct in the eyes of this Court. It may interfere only when it is a case of no evidence or legally inadmissible evidence is taken into account and the finding recorded is perverse or that there is material irregularity and illegality in the decision making procedure which caused prejudice to the delinquent in his defence. He refuted the contention that the disciplinary authority did not have any material or evidence for recording the finding. Referring to the judgment of the Supreme Court in *State of Orissa v. Bidya Bhushari Mohapatra*, AIR 1963 SC 779, he submitted that the Court had pointed out that an order of punishment can be supported on any finding as to the substantial misdemeanor which the punishment can lawfully be imposed and it was not for the court to consider whether that ground alone would have weighted with the authority in dismissing the public servant. In the decision in *Krishna Chandra Tandon's* case, (1974) 4 SCC 374, the Apex Court has also observed that if an allegation or two fell, it hardly mattered if the order could be supported on other counts. In the present case, there is sufficient material on record for coming the view that this cannot be said to be a case of "No Evidence". He pleaded that so long as the findings are based on evidence, this Court would not like to interfere in the present case.

We have considered the respective submissions

## 23. LEGAL POSITION

The petitioner acted in a quasi-judicial authority in passing orders of stay in one case or deciding appeals of certain assesseees, which acts of the petitioner became the basis of serving charge sheet against him, thereby bringing the acts on the part of the petitioner within the ambit of 'misconduct'. It is now well settled principle of law that an officer taking decision in exercise of quasi-judicial function is not immune from disciplinary proceedings. However, it is only the conduct of the officer in discharge of his duties and not correctness or legality of his decision which could be subject to disciplinary action. Various nuances explaining this legal principle can be found in the judgment of the Supreme Court in the case of *Union of India & Ors v. K.K. Dhawan*, 1993 (2) SCC 56, which has become a classic on this subject. The Supreme Court in that case held that when an officer in exercise of judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person, he is not acting as a Judge. There is a great reason and justice for holding in such cases that the disciplinary action could be taken. It is one of the cardinal principles of administration of justice that it must be free from bias of any kind. The observation of the Supreme Court in *V.D. Trivedi v. Union of India*, (1993) 2 SCC 55 that that "the action taken by the appellant was quasi-judicial and should not have formed the basis of disciplinary action" was made to buttress the ultimate conclusion that the charge framed against the delinquent officer had not been established and, therefore, it could

not be construed as laying down the law that in no case disciplinary action could be taken if it pertains to exercise of quasi-judicial powers.

24. While stating this principle, the Supreme Court also outlined the circumstances in which disciplinary action can be taken against the erring official, which are as under :-

- (i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion of duty;
- (ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;
- (iii) if he has acted in a manner which is unbecoming of a Government servant;
- (iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;
- (v) if he had acted in order to unduly favour a party;
- (vi) if he had been actuated by corrupt motive, however small the bribe may be.

25. The Apex Court also added immediately thereafter that the aforesaid instances were exhaustive and made following pertinent observations in this behalf :-

“29. The instances above catalogued are not exhaustive. However, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances, disciplinary action is not warranted. Here, we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated.”

26. While the aforesaid principles are not difficult to fathom, it is the application of these principles in given cases which may become a thorny issue. In the present case itself the department has tried to allege that the manner in which the orders were passed by the petitioner, it manifests that he acted in order to unduly favour those assesseees. At the same time, it is also accepted by the department that there is no evidence or even allegation that the petitioner was actuated by corrupt motive or he had acceded his statutory powers while passing those orders.

27. Before dealing with the issue as to whether inference of the disciplinary authority that the petitioner acted in order to unduly favour the assesseees, it would be of immense help to us to take note of the approach which is to be adopted by the Court while making such an assessment of the findings recorded by the Inquiry Officer or, for that matter, the disciplinary authority.

In *K.K. Dhawan* (supra), article of charge against the respondent ITO mentioned that nine assessments against various assesseees were completed: (i) in an irregular manner, (ii) in undue haste, and (iii) apparently with a view to confer undue favour upon the assesseees concerned. In case of the nine cases of the assesseees the details relating to misconduct or misbehaviour were furnished. Therefore, it was charged that the respondent had violated the provisions of Rule 3(1)(i), 3(1)(ii) and 3(1)(iii) of the Central Civil

Services (Conduct) Rules, 1964. What is of relevance is not the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or reversion under the Act. But the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules.

28. Some other judgments which may be useful for us while discussing the respective arguments in the present case may also be noted at this stage.
29. *Ramesh Chander Singh v. High Court of Allahabad & Anr.*, JT 2007 (4) SC 135

This was a case where inquiry was initiated by the High Court against its judicial officer on receiving complaint against the said Officer, namely, the appellant in that case. The appellant had granted bail to an accused who was charged with the offence of murder. There was no allegation of receiving any illegal gratification for granting bail to the accused. The charge was that he had passed the orders of bail for extraneous consideration with oblique motive and insufficient grounds, without cogent and tangible reasons, and that he attempted to justify his order by superfluous reasoning by making adverse comments on the conduct of the Executive Magistrate who recorded the dying declaration. The learned Judge of the High Court, who conducted the inquiry, held that in the facts

of the case where a heinous and daring offence has been committed in broad day light and two persons had been shot dead in a crowded area next to the Collectorate at Jhansi and the accused were named in the FIR as well as in the dying declaration and the bail applications having been considered and rejected twice on merits by the respective courts, the third bail application granted by the charged officer in utter disregard of the judicial norms and on insufficient grounds appeared to be based on extraneous considerations. The Supreme Court, in the aforesaid conspectus, formulated the following issue which needed determination:

“8. The question for consideration is whether the appellant had granted bail on insufficient grounds or was justified in passing such an order...”

The Apex Court thereafter observed that granting of bail to the accused, pending trial, is one of the significant judicial functions to be performed by a judicial officer. Neither the State nor the complainant had filed appeal against the bail order passed by the appellant. The State had also not alleged that the accused, who had been granted bail, was likely to abuse his bail or likely to abscond. Commenting upon the reasons given by the Inquiry Officer, the Apex Court noted the following material aspects which were ignored:

“9....The learned enquiry Judge did not care to take notice of the fact that the co-accused who were similarly situate had been granted bail by the High Court and that accused Ram Pal, who was a student and had been in jail for more than one year was granted bail for cogent reasons, set out in the order passed by the appellant. In the bail order, the appellant stated that there was an allegation that the Magistrate who recorded the dying declaration was once upon a time a tenant in one of the houses owned by the complainant. Taking cognizance of this

fact by the appellant in the order could not be said to be a totally unwarranted and a superfluous reasoning.”

30. The Apex Court was also of the view that solely on the basis of the complaint, decision to initiate disciplinary proceedings should not have been taken by the High Court. It counseled that there should be strong grounds to suspect the officer’s *bona fides* and that the order passed by a judicial officer is actuated by malice, bias or illegality. This action can be found in the following passage from the said judgment :-

“11. We fail to understand as to how the High Court arrived at a decision to initiate disciplinary proceedings solely based on the complaint, the contents of which were not believed to be true by the High Court. If the High Court were to initiate disciplinary proceedings based on a judicial order, there should have been strong grounds to suspect officer’s *bona fides* and the order itself should have been actuated by malice, bias or illegality. The appellant-officer was well within his right to grant bail to the accused in discharge of his judicial functions. Unlike provisions for granting bail in TADA Act or NDPS Act, there was no statutory bar in granting bail to the accused in this case. A Sessions Judge was competent to grant bail and if any disciplinary proceedings are initiated against the officer for passing such an order, it would adversely affect the morale of subordinate judiciary and no officer would be able to exercise this power freely and independently.”

31. At this juncture, we deem it proper to discuss the case of *Zunjarrao Bhikaji Nagarkar v. Union of India & Ors.*, (1999) 7 SCC 409 and other judgments which tend to show a discordant note to the *Nagarkar’s case* (supra).

In this case, disciplinary proceedings for major penalty were initiated under Rule 14 of the CCS (CCA) Rules, 1965 against the appellant. The charge against him was that he, while working as

Collector/Commissioner, Central Excise, “passed an Order-in-

Original... in which he had favoured (an assessee party) by not imposing any penalty on the said party even though he had held that (the party) had clandestinely manufactured and cleared the excisable goods and evaded the excise duty willfully. (The appellant) thus failed to maintain absolute integrity and devotion to duty and acted in a manner unbecoming of a government servant and contravened Rules 3(1)(i) and (ii) and (iii) of the CCS (Conduct) Rules, 1964.” The appellant ordered imposition of excise duty and confiscation of the goods but his Order-in-Original was silent about imposition of penalty. The Supreme Court on reviewing the legal position regarding imposition of penalty, concluded that the appellant had no discretion not to impose penalty though he had discretion to decide quantum of penalty. His approach in not imposing penalty was therefore not in conformity with the law. The Court however considered the question whether mistaken view of law itself was sufficient to proceed against the appellant. The Supreme Court while deciding this question also took into consideration the explanation given by the appellant that he had acted in the overall interest of revenue in not imposing penalty on assessee party. In this process, it is held as under :-

- “(a) A wrong interpretation of law cannot be a ground for misconduct. It is a different matter altogether if it is deliberate and actuated by mala fides. Negligence in quasi-judicial adjudication is not carelessness, inadvertence or omission but a culpable negligence.
- (b) When penalty is not levied, the assessee certainly benefits but it cannot be said that by not levying penalty, the officer has favoured assessee or shown undue favour to him. There has to be some basis for the disciplinary

authority to reach such a conclusion even prima facie. Records in the present case do not show that the disciplinary authority had any information within its possession from where it could form an opinion that the appellant showed “favour” to the assessee by not imposing penalty. He may have exercised his jurisdiction wrongly but that wrong can be corrected in appeal. That cannot always form a basis for initiating disciplinary proceedings against an officer while he is acting as a quasi-judicial authority. It must be kept in mind that being a quasi-judicial authority, he is always subject to judicial supervision in appeal.

- (c) Initiation of disciplinary proceedings against an officer cannot take place on information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. Merely because penalty was not imposed and the Board in exercise of its power directed filing of appeal against the order-in-original passed by the appellant could not be enough to proceed against him. There is no other instance to show that in similar case, the appellant invariably imposed penalty.
- (d) If every error of law were to constitute a charge of misconduct, it would impinge upon independent functioning of quasi-judicial officers like the appellant. Misconduct, in sum and substance, is sought to be inferred in the present case from the fact that the appellant committed an error of law. The charge-sheet on the face of it, does not proceed on any legal premise and is thus liable to be quashed. To maintain a charge-sheet against a quasi-judicial authority, something more has to be alleged than a mere mistake of law, e.g. in the nature of some extraneous consideration influencing quasi-judicial order. Since nothing of the sort is alleged herein, the impugned charge-sheet is rendered illegal. The charge-sheet, if sustained, will impinge upon the confidence and independent functioning of a quasi-judicial authority. The entire system of administrative adjudication whereunder quasi-judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of constant threat of disciplinary proceedings.”

On the aforesaid analysis, the Supreme Court was of the opinion that no case for initiation of any disciplinary proceedings

against the appellant therein had been made out and the penalty imposed upon him.

32. This case came up for discussion before the Supreme Court in *Union of India & Ors. v. Duli Chand*, (2006) 5 SCC 680. Following passage therefrom was relied upon by the learned counsel for the respondent to argue that the ratio of *Nagarkar* (supra) was not approved by the Supreme Court :-

“9. In our opinion, *Nagarkar case* was contrary to the view expressed in *K.K. Dhawan case*. The decision in *K.K. Dhawan* being that of a larger Bench would prevail. The decision in *Nagarkar case* therefore does not correctly represent the law. Inasmuch as the impugned orders of the Tribunal and the High Court were passed on the law enunciated in *Nagarkar case* this appeal must be allowed. The impugned decisions are accordingly set aside and the order of punishment upheld. There will be no order as to costs.”

33. However, interestingly in two subsequent judgments, there is a note of approval put by the Apex Court to the *Nagarkar's* case. These are:-

- (i) *Ramesh Chander Singh v. High Court of Allahabad & Anr.* (2007) 4 SCC 247

“12. This Court on several occasions has disapproved the practice of initiation of disciplinary proceedings against officers of the subordinate judiciary merely because the judgments/orders passed by them are wrong. The appellate and revisional courts have been established and given powers to set aside such orders. The higher courts after hearing the appeal may modify or set aside erroneous judgments of the lower courts. While taking disciplinary action based on judicial orders, High Court must take extra care and caution.

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17. In *Zunjarrao Bhikaji Nagarkar v. Union of India* (1999) 7 SCC 409, this Court held that wrong exercise of jurisdiction by a quasi judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course,

if the Judicial Officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Article 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grass root level.”

- (ii) *Inspector Prem Chand v. Govt. of NCT of Delhi & Ors.*  
(2007) 4 SCC 566

“11. A finding of fact was arrived at that the accused did not make demand of any amount from the complainant and thus no case has been made out against him. This Court in *Zunjarrao Bhikaji Nagarkar v. Union of India and Ors.* (1999) 7 SCC 409, has categorically held:

42. Initiation of disciplinary proceedings against an officer cannot take place on information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. Merely because penalty was not imposed and the Board in the exercise of its power directed filing of appeal against that order in the Appellate Tribunal could not be enough to proceed against the appellant. There is no other instance to show that in similar case the appellant invariably imposed penalty.”

34. All these cases, and precisely the issue whether *Nagarkar* (supra) stands disapproved by the Supreme Court in subsequent judgments, has been discussed by the Madras High Court in its illuminous judgment in WP (C) No. 11433/2001 and 16592/2001 entitled *Union of India & Ors. v. P. Parameswaran*. In its decision rendered on 10.1.2008, the Division Bench of the High Court affirmed the view of the Tribunal which had quashed the penalty imposed upon the

respondent therein who was charge sheeted in the course of discharge of his quasi-judicial duties. In that case the concerned officer took up the stand that as an Assessing Officer under the Central Excise Act, he was discharging a quasi-judicial function and that he had passed orders only after considering the relevant aspects of the case and also after referring to the binding precedents in that regard. He also stated that when that order came to be reversed by the appellate authority or by any other higher authority, no disciplinary action can be taken only on the ground of wrong interpretation of law. Even the appellate authority did not find that there was any mala fide intention on the part of the first respondent and, therefore, there was no negligence on his part. He had also relied upon the judgment of the Supreme Court in the case of *Nagarkar* (supra) to contend that the Government has no right to initiate disciplinary action on an information which is vague and indefinite and that suspension has no role to play in such matter. It was also contended that wrong interpretation of law cannot be a ground for misconduct. In the absence of any deliberate act or any action actuated by mala fides, no such action can be taken.

35. Submission of the department, on the other hand, was that such a blanket immunity cannot be available even in respect of a Government officer discharging quasi-judicial functions and if his action results in any negligence thereby causing loss to the State, the same can be recovered as provided under the relevant Service Rules.

The High Court found that judgment of the CAT was solely based on *Nagarkar's* case (supra). In this context, question arose as to whether *Nagarkar's* case (supra) was contrary to the view expressed by the Supreme Court in *K.K. Dhawan* (supra), as noted in *Duli Chand* (supra). After taking note of the observations in *Duli Chand* that *Nagarkar's* case was contrary to the view expressed in *K.K. Dhawan*, the High Court referred to subsequent judgments in *Ramesh Chander Singh* (supra) and *Inspector Prem Chand* (supra), wherein *Nagarkar's* case was approved and resolved the dactylonomy in the following manner :-

“14. Once again, in this matter also, there is no reference to the earlier three Judge Bench judgment in Duli Chand's case. However, since Nagarkar's case was found to be contrary to the earlier judgment of the Supreme Court in K.K. Dhawan case wherein the Supreme Court had laid down six instances under which a Government servant discharging quasi-judicial function can be proceeded in a disciplinary action (which have been already extracted). We will have to apply those facts also in the present case. But the subsequent judgment in Ramesh Chander Singh case (cited supra), K.G. Balakrishnan, CJ had referred to Nagarkar's case and quoted it with approval. Ultimately, the decisions will have to be applied depending on the fact situation of each case.

15. Therefore, if the decisions in K.K. Dhawan case, Nagarkar case, Duli Chand case, Ramesh Chander Singh case and Inspector Prem Chand case are read together, it is necessary that before initiating disciplinary action, the Department must have a prima facie material to show recklessness and that the officer had acted negligently or by his order unduly favoured a party and his action was actuated by corrupt motive. In fact, K.G. Balakrishnan, CJ in Ramesh Chander Singh's case even took an exception to the practice of initiating disciplinary action against Officers merely because the orders passed by them were wrong.”

Applying the aforesaid test in the case at hand, the Madras High Court affirmed the view of the Tribunal in the following manner :-

“16. If all these tests are cumulatively applied, the Tribunal in the present case had correctly found that there was no mala fide motive on the part of the first respondent in passing the order and that a Government servant cannot be punished for a wrong interpretation of law. In the light of the above discussion, we feel that the CAT has correctly understood the scope of judicial review and has set aside the order of recovery passed against the petitioner.”

36. We are in agreement with the aforesaid view of the Madras High Court which has, in our respectful submission, correctly culled out the principle on the basis of all the aforesaid judgments in para 15 above.

37. With this, we proceed to discuss the present case in the light of the aforesaid principle.

38. **ANALYSIS**  
**Re.: Article of Charge No.1**

Reading of this charge would demonstrate that in the matter of grant of stay of demand to M/s. GTC Industries Ltd., allegation against the petitioner was that: (i) he entertained and disposed of the said application ‘with mala fide intention’; (ii) he passed the order ‘ignoring the statutory requirement’ and ‘decision of the ITAT’. Second ingredient of the charge is not established in the inquiry. The authorities have conceded that the petitioner did not exceed his

statutory powers as he was empowered to decide the application for stay. No decision of ITAT is shown which was ignored by the petitioner. Insofar as the first ingredient is concerned, it is conceded that there is no direct evidence which would prove *mala fide* intentions. Notwithstanding the same, the charge is treated as proved on the basis of 'strong suspicion'. The UPSC itself has observed as under in this behalf in para 7.3 of its advice, which is to the following effect :-

“7.3 In view of the above facts the Commission observe that although the CO had the power to grant stay, yet he did not exercise this power in a judicious manner. The application for stay was put up to him directly and he passed orders on the same day without giving an opportunity to the Assessing Officer or obtaining the comments of the Administrative Commission. He also did not verify the facts mentioned by the assessee. The Commission note that it is indeed astonishing that the CO granted a stay on demand to the tune of Rs.85,64,58,769/- on the same day on which the application was filed without taking into consideration the version of the Assessing Officer and without fully considering the merits of the case. However, there is no evidence on record to prove that the CO granted the stay for some considerations. However, the haste and the manner in which the CO disposed of the applications does create a serious doubt regarding his intentions in passing such an order. The Commission, in view of these facts, consider Article-I of the charge as proved.  
(Emphasis supplied)”

Thus, the authorities are mainly influenced by the fact that the petitioner passed the orders on the said application on the same day without giving an opportunity to the Assessing Officer or obtaining the comments of the Administrative Commissioner and without verifying the facts mentioned by the assessee. Accepting that though there was no evidence on record to prove that he had granted the stay for some consideration, only on the ground that he had passed

the orders in a hasty manner, it was concluded that the same creates “a serious doubt regarding his intentions in passing such an order”.

39. No doubt, the petitioner passed the stay order in the application on the same day. He had, however, explained the urgency which was involved which, according to his wisdom, necessitated grant of stay, as according to him otherwise the functioning of the assessee would have come to a standstill. He had justified the order on the ground that the Income Tax Officer had initiated coercive proceedings against the assessee and attachment orders of the overdraft bank account were passed by him in contravention and violation of Board's circular. He had also kept in mind the orders passed by the Bombay High Court in CWP No. 1805/94 and 707/95. He, therefore, decided the application with *bona fide* intentions in discharge of his judicial duties. While granting stay of 12.9.1994, which was to remain operative till 30.10.1994, at the same time he also assured that the appeals are decided within time bound period and, therefore, fixed the judicial hearings from 15.9.1994 and ultimately decided these appeals before the deadline, i.e. on 20.10.1994. The petitioner, thus, had his own explanation and we feel that the same is not given due consideration by any of the authorities.

40. Be that as it may, even if one goes by the observations of the UPSC, the question would be as to whether there were sufficient circumstances to create ‘a serious doubt’ regarding his intentions.

Significantly, even as per the respondents, conduct of the petitioner had created only the doubts in the mind of the authorities. When the petitioner was exercising his quasi-judicial powers, he had necessary powers to decide the stay application as well and had taken certain factors on record in mind while passing the order, only a doubt about his intention cannot take place of '*proof*'. Matter could have been different if the petitioner was exercising administrative powers. No doubt, better course of action on the part of the petitioner could have been to grant stay for some days and, in the meantime, seek comments of the Assessing Officer as well. Instead of taking this course of action, in his wisdom, the petitioner chose to decide the appeals finally at an early date so that stay does not remain in operation for long period. Once the matter is to be looked into from this perspective, which we feel is the right perspective having regard to the law laid down by the Supreme Court in various judgments noted above, we feel that the finding of the disciplinary authority is based on presumptions and surmises. We may hasten to add that the power of judicial review over such decisions of the disciplinary authorities is limited and courts are not to sit as appellate authorities, as rightly pointed out by the learned Tribunal. At the same time, it cannot be denied that the court has the power to examine as to whether there is any evidence worth the name which may connect with the specific charge levelled against the delinquent employee.

We are of the opinion that except some doubts, there is no other evidence to show *mala fide* intention on the part of the petitioner in deciding the say application of the assessee. Moreover, for this purpose we have not made any attempt to go through the evidence ourselves like the appellate authority, but have gone by the observations of the respondents themselves.

41. Re.: Article of Charge No. II

Insofar as second charge is concerned, it relates to passing of assessment orders in respect of certain assesseees. Four assesseees are specifically mentioned. At the outset, we may point out that instead of limiting the discussion to the appeals of the said four assesseees, the authorities are influenced by the fact that out of total 85 appeals disposed of by the petitioner from June 1994 to October 1994, the department filed appeals in as many as 55 cases. Further fact noticed is that out of 15 appeals decided in the month of October 1994, 12 appeals have been decided during the short period from 17 to 21<sup>st</sup> October 1994. This is clear from the following comments contained in the report of the UPSC :-

“7.1 The Commission note that the IO has held that both the Articles of charge are provide and the DA has agreed with him. The disciplinary proceedings against the CO were initiated on the basis of a comprehensive vigilance inspection of the work of the CO carried out by the Vigilance Wing of Central Board of Direct Taxes. According to the vigilance report, the CO was appointed as CIT(A), Central-IV, Mumbai on 28.4.1994. The jurisdiction of the CIT (A) Central-IV, Mumbai underwent change by virtue of order dated 18.10.94 of DGIT (Inv.), Mumbai. This order was effective from 24.10.94. Thus, the CO held jurisdiction over the old charge upto 23.10.94. The report pointed out that a total of 85 appeals were disposed of from June, 94 to October, 94 by the CO and, out of these 85,

second appeals have been filed by the department in as many as 55 cases. It is only in 5 cases out of 85 that appeals have been dismissed by the CO. It would be further seen from the vigilance report that out of 15 appeals decided in the month of October, 94, 12 appeals have been decided during the short period from 17<sup>th</sup> to 21<sup>st</sup> October 1994. The Deputy Director of Income Tax (Vigilance) in his forwarding letter has concluded that the appellate orders passed by the CO show that he has tended to heavily rely on assessee's submissions without subjecting the same to judicial scrutiny. He has not paid adequate attention to the arguments of the Assessing Officer in the assessment orders. In some cases, he has not given reasonable opportunity to the assessing officer to represent his case. All this has led to the miscarriage of justice and the appellate orders passed by him have a definite bias towards the assessee and against the Department."

42. On the aforesaid comments, we are constrained to make the following observations :-

- a) It was not even a charge against the petitioner that he had decided most of the appeals in favour of the assessees and against the department or that he had decided 12 appeals during short period from 17 to 21<sup>st</sup> October 1994. Thus, extraneous material is brought on record which has influenced the decision making process.
- b) For want of any allegation to this effect in the charge memo, the petitioner was denied any opportunity to explain the circumstances.
- c) Merely because the petitioner decided more appeals in favour of the assessees and against the department, because of which the department had filed second appeals, cannot be a ground to doubt his intentions.
- d) That apart, allegation is that while passing those orders, the conduct of the petitioner was prejudicial to the interest of the

Revenue “*as material evidence on record was ignored and AO was not given opportunity as required under Section 250 of the Income Tax Act to represent Revenue’s case*”. Thus, charge does not relate to the discharge of quasi-judicial duties simplicitor. Undisputedly, the petitioner had power to decide these appeals one way or the other as per his wisdom. Even if the orders are wrong in law, that would not become matter of misconduct.

However, charge is that appeals were decided “*by passing perverse and mala fide orders*” inasmuch as material evidence on record was ignored and opportunity was not given to the Assessing Officer.

43. Insofar as the appeal of M/s. GTC Industries is concerned, the disciplinary authority found that no sufficient opportunity was given to the assessing authority to collect evidence as directed by the petitioner. The petitioner had fixed the appeal of M/s. GTC Industries for final hearing from 15.9.1994. On that date, he had requested the Assessing Officer to make available the correspondence that he had entered into with the various persons in the course of his inquiry to the assessee so as to enable the assessee to present his defence. The Assessing Officer was also directed to record the cross-examination of various parties as early as possible. The petitioner had also requested the Assessing Officer to forward transcripts of the cross-examination with one copy endorsed to the assessee as the case had to be decided before 31.10.1994. The Assessing Officer in his

letter dated 19.9.1994 requested the CIT (A) for more time in collecting information wanted by the petitioner. CIT, Centr-I in his letter dated 19.9.1994 to the petitioner, requested him to give sufficient time to the Assessing Officer. The CIT, Central-I, Mumbai wrote to the petitioner on 6.10.1994 to keep his decision pending till the matter was decided by the ITAT. However, the petitioner went ahead with the hearing of the appeal without giving an opportunity to the Assessing Officer and decided the same.

Once the petitioner had granted stay of demand and the assessee was protected by that stay order, his anxiety to hear the appeal and decide the same turning down the request of the Assessing Officer to give some time to enable him to collect information as wanted by the petitioner may be erroneous. However, even here he has some explanation which is not given any due consideration.

44. In respect of M/s. Simplex Enterprises, the allegation is that while allowing the appeal, the petitioner deleted the additions made by the assessing authority ignoring the material facts. These additions were on account of suppression of sales and on account of unsecured loans. We find from the report of the Inquiry Officer that entire comments related to the merits of the case, which give an impression that according to the Inquiry Officer, appeal should not have been decided in that manner.

As far as the merits of the case are concerned, the department has filed an appeal in the ITAT. This, therefore, could not have been the basis of charge even if the decision of the petitioner, on merits, is wrong.

45. In respect of assessment in the case of Mr. Ashok Rupani, it is pointed out that while deciding the appeal, the petitioner had considered the statement given by Mr. S.K. Neotia before the FERA authorities. This statement was not referred to by the Assessing Officer in the assessment order. Therefore, the petitioner should have given an opportunity to the Assessing Officer while adducing additional evidence and by not doing so, the petitioner violated Rule 46-A of the 1956 Rules. If the petitioner failed to notice the provisions of Rule 46-A of the Income Tax Rules, 1956 and passed the order based on the aforesaid statement of Shri Neotia, that would only mean that he committed some error in passing the order in appeal. However, when we apply the principles of *K.K. Dhawan* and *Nagarkar's* case (supra), it cannot constitute a misconduct.

46. Upshot of the aforesaid discussion would be as under :-

(a) Charge No.1, as levelled, cannot be said to be proved. As per the view taken by the disciplinary authority, the same is based on circumstances creating suspicion. It is accepted by the disciplinary authority that there is no direct evidence of mala fide intention. On the basis of alleged circumstances also, the disciplinary authority has pointed that it raises “*strong suspicion*”

*regarding his intentions*". We do not find any such circumstances which could establish his bad intentions. Even if we presume from the alleged circumstances that the petitioner acted recklessly, that is not the charge which is levelled. Moreover, had the matter been viewed from this angle, the disciplinary authority may not have taken such a serious view and imposed the impugned penalty, which is a major penalty.

- (b) Charge No.II, if at all, can be said to be proved *qua* M/s. GTC Industries Ltd. only and that also cannot be said to be of such a serious nature, having regard to our discussion above. In respect of other appeals decided by the petitioner, there is no evidence to show perversity or *mala fides*. In order to implicate a quasi-judicial authority, infraction of some procedural requirement cannot become the basis of charge. Admittedly, there is no evidence of *mala fides* against the petitioner.
- (c) Since the punishment was imposed upon the petitioner on the basis that both the charges are proved, and as per our aforesaid analysis Charge No.I cannot be said to be proved and likewise, Charge No.II is proved to limited extent, that too *qua* the orders passed in the appeals relating to M/s. GTC Industries, the disciplinary authority shall pass fresh orders of penalty keeping in view that aspect only. While doing this, here also extenuating circumstances, as pointed out by the petitioner,

shall be taken into consideration. It is obvious that fresh penalty order passed, if any, would be lesser penalty and not as was imposed earlier.

47. Accordingly, Rule is made absolute. The writ petition stands allowed in the aforesaid terms and the impugned order of the Tribunal, as well as that of the disciplinary authority, are set aside. Fresh orders shall be passed by the disciplinary authority within four weeks.

No order as to costs.

48. WP (C) No. 7054/2009

Mr. Arindam Lahiri is the respondent herein and is due to retire on 31.3.2009 when he attains the age of superannuation. Before his retirement, he aspires to become Chief Commissioner of Income Tax, which is the next promotional post. He became eligible to be considered for this post against the vacancies of the year 2004-05. The DPC, which considered his case for promotion in its meeting held on 25.11.2005, found him '*fit*' for promotion. But his name for inclusion in the panel for promotion was not approved by the Appointing Committee of the Cabinet (for short, 'ACC') because of the reason that he had been inflicted with penalty of reduction in time-scale of pay, which was imposed after holding a departmental inquiry vide orders dated 7.10.2004. Though this penalty was for a period of three years and expired on 7.10.2007, the respondent was denied promotion even after the period of the said penalty was over. In the interregnum, as many as 55 persons junior to the

respondent have been promoted to the post of Chief Commissioner of Income Tax.

49. The respondent, against the aforesaid denial, approached the Central Administrative Tribunal by means of an application under Section 19 of the Administrative Tribunals Act. This application has been allowed by the Tribunal vide its judgment dated 20.10.2008 directing that he be given promotion with effect from the date when the punishment period got over. The Department was directed to do the needful within three months of receipt of the certified copy of the order. However, the petitioners perceived the said direction has not legally valid and, therefore, feeling aggrieved by that, present writ petition is filed.
50. As noted above, the respondent herein was appointed as Income Tax Officer (ITO) on the basis of Civil Services Examination in the year 1972. He got promotions from time to time and raised to the rank of Commissioner of Income Tax. During the period 1995-97, he acted as Commissioner of Income Tax (Appeals), Mumbai. At that time, memorandum of charge dated 21/24.11.95 was issued against him by the petitioners herein, followed by charge memo dated 28.2.1997 under Rule 14 of the CCS (CCA) Rules, 1965 for major penalty proceedings. A departmental inquiry was held, which culminated in the report dated 29.4.1999 submitted by the Inquiry Officer holding the charges as proved. On that basis, disciplinary authority passed orders dated 7.10.2004 imposing the penalty of

reduction by 3 stages in the time-scale of pay for a period of three years upon the respondent with further direction that during this period, the respondent shall not earn increments and that will have the effect of postponing his future increments of pay as well.

51. After the imposition of the penalty vide orders dated 7.10.2004, the case of the respondent for promotion to the post of Chief Commissioner of Income Tax was considered by the DPC in its meeting held on 25.11.2005 against the supplementary vacancies for the year 2004-05. The DPC found him '*fit*' for promotion against those supplementary vacancies of the year 2004-05. As per the practice and procedure, his name was forwarded to the ACC for approval. However, ACC did not approve the recommendation of the DPC for promotion of the respondent on the ground that the penalty of reduction in time-scale of pay was imposed on him as recently as on 7.10.2004. Note dated 31.12.2005 in this behalf, which was prepared for ACC under the signatures of Shri B.K. Chaturvedi, the then Cabinet Secretary, reads as under :-

“3. The officer at Sl.No. 01 of the panel for the year 2004-05, Shri Arindam Lahiri does not appear to be suitable for promotion as a penalty of reduction of pay was imposed on the officer as recently as 7<sup>th</sup> October, 2004.”

52. It may be pointed out at this stage that DPC in its meeting held on 25.11.2005 also undertook the exercise in respect of vacancies for the year 2005-06 as well. However, the respondent was found '*fit*' for promotion against vacancies of the year 2004-05, his case was not even considered for promotion by the DPC against the vacancies of

the year 2005-06. For filling up of the vacancies of the year 2006-07, DPC was convened on 29.9.2006. The case of the respondent was considered, but result kept in sealed cover on the ground that there was no vigilance clearance given in his case (though during the course of arguments before the Tribunal, it was admitted by the petitioners that reason for keeping the DPC result in sealed cover was imposition of penalty vide orders dated 7.10.2004 for period of three years and was, thus, still in operation). For the vacancies of 2007-08, case of the respondent was again considered by the DPC which was held in August 2007. This time, however, the respondent was declared '*unfit*' for promotion.

53. The penalty order passed against the respondent herein has already been set aside by us in WP (C) No. 13640/2006. This penalty was the only reason, even as per the petitioners herein, to deny the promotion to the respondent to the post of Chief Commissioner of Income Tax. Even if fresh penalty order is passed, that would be much lesser. Further, the charge which remains is miniscule of the charges originally levelled against the petitioner. Had this position been before the Appointing Authority, the respondent would have been promoted. Interestingly, even when this penalty was taken into consideration, the respondent was recommended for promotion. Therefore, this writ petition warrants to be dismissed on this ground alone. However, notwithstanding the above, we still proceed to

examine the judgment of the Tribunal on the presumption that penalty was rightly imposed.

54. The submission of learned counsel for the petitioner was that the exercise undertaken by the DPC on 25.11.2005 and finding the respondent fit for promotion is only recommendatory in nature. Competent authority is the ACC and it is within the discretion of the ACC to accept or reject the recommendation of the DPC. In the instant case, ACC had rejected the proposal of the DPC, that too for valid reasons, namely, infliction of the penalty as a result of the departmental inquiry which had been imposed as recently as on 7.10.2004. He, thus, submitted that it was not a case where the ACC deferred the promotion during the currency of the penalty period. Conscious decision was taken not to promote the respondent because of the said penalty. Therefore, there was no question of giving him the promotion on the expiry of the said penalty period. He further submitted that no employee has vested right in getting the promotion once it is shown that discretion is exercised for valid reasons and the judicial authorities would not interfere with such a discretion or issue any mandamus directing giving of the promotion.
55. Mr. Sinha, learned counsel for the petitioners, was vehement in his submission that the Tribunal had acceded its jurisdiction while exercising the power of judicial review, which was limited to the decision making process and in this case it could not be shown as to how the decision of the ACC, the appointing authority, was vitiated

on account of the decision making process. To buttress his aforesaid submissions, learned counsel placed strong reliance upon the following judgments:-

- (i) ***Shankarsa Dash v. Union of India***  
(1991) 3 SCC 47

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha and Ors.* (1974) 3 SCC 220; *Miss Neelima Shangla v. State of Haryana and Ors.* (1986) 4 SCC 268 and *Jitendra Kumar and Ors. v. State of Punjab and Ors.* (1985) 1 SCC 122.

- (ii) ***Union of India & Ors. v. K.V. Jankiraman & Ors.***  
(1991) 4 SCC 109

“28. The Tribunal has also struck down the following portion in the second sub-paragraph after Clause (iii) of paragraph 3 which reads as follows: "If any penalty is imposed on the officer as a result of the disciplinary proceedings or if he is found guilty in the court proceedings against him, the findings in the sealed cover/covers shall not be acted upon" and has directed that if the proceedings result in a penalty, the person concerned should be considered for promotion in a Review DPC as on the original date in the light of the results of the sealed cover as also the imposition of penalty, and his claim for promotion cannot be deferred for the subsequent DPCs as provided in the instructions. It may be pointed out that the said sub-paragraph directs that "the officer's case for promotion may be considered in the usual manner by the next DPC which meets in the normal course after the conclusion of the disciplinary/court proceedings". The Tribunal has given the direction in question on the ground that such deferment of the claim for promotion to the subsequent DPCs amounts to a double penalty. According to the Tribunal, "it not only violates Articles 14 and 16 of the Constitution

compared with other employees who are not at the verge of promotion when the disciplinary proceedings are initiated against them but also offends the rule against double jeopardy contained in Article [20\(2\)](#) of the Constitution". The Tribunal has, therefore, held that when an employee is visited with a penalty as a result of the disciplinary proceedings there should be a Review DPC as on the date when the sealed cover procedure was followed and the review DPC should consider the findings in the sealed cover as also the penalty imposed. It is not clear to us as to why the Tribunal wants the review DPC to consider the penalty imposed while considering the findings in the sealed cover if, according to the Tribunal, not giving effect to the findings in the sealed cover even when a penalty is imposed, amounts to double jeopardy. However, as we read the findings of the Tribunal, it appears that the Tribunal in no case wants the promotion of the officer to be deferred once the officer is visited with a penalty in the disciplinary proceedings and the Tribunal desires that the officer should be given promotion as per the findings in the sealed cover.

29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee

in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-paragraph after Clause (iii) of paragraph 3 of the said Memorandum. We, therefore, set aside the said findings of the Tribunal.

30. In the circumstances, the conclusions arrived at by the Full Bench of the Tribunal stand modified as above. It is needless to add that the modifications which we have made above will equally apply to the Memorandum of January 12, 1988.”

(iii) ***Union of India & Ors. v. N.P. Dhamania & Ors.***  
1995 Supp (1) SCC 1

“18. It will be clear from the above that the recommendations of the DPC are advisory in nature. Such recommendations are not binding on the appointing authority. It is open to the appointing authority to differ from the recommendations in public interest. That is beyond doubt.

19. Notwithstanding the fact that it is open to AAC which alone is the appointing authority and not the Minister concerned, as urged by the respondent to differ from the recommendations of the DPC, it must give reasons for so differing to ward off any attack of arbitrariness. Those reasons will have to be recorded in the file. It requires to be stated at this stage that we have perused the file in the instant case. We find no reasons have been recorded for differing from the recommendations of the DPC. That is why the tribunal also inter alia observes in the impugned judgment as under :

“However, the counsel for the respondent felt helpless in the matter and he failed to provide us any inkling of what prevailed with the ACC in dropping the petitioner and four others out of the select panel of 59 officers.”

(iv) ***Union of India and Others v. Kali Dass Batish & Anr.,***  
(2006) 1 SCC 779

“15. In this matter, the approach adopted by the Jharkhand High Court commends itself to us. The Jharkhand High Court approached the matter on the principle that judicial review is not available in such a matter. The Jharkhand High Court also rightly pointed out that mere inclusion of a candidate's name in the selection list gave him no right, and if there was no right, there could be no occasion to maintain a writ petition for enforcement of a non-existing right.”

56. Mr. Sandeep Sethi, learned senior counsel appearing for the respondent, stoutly contested the arguments advanced by learned counsel for the petitioner. His submission was that, when read in proper perspective, the reason for denying the respondent his promotion was only the aforesaid penalty, which was still operative at that time and, therefore, there was no fault in the directions given by the Tribunal to make the promotion effective on the expiry of the penalty period i.e. w.e.f. 7.10.2007. He also referred to the communication dated 23.12.2005 from the office of the Chief Commissioner of Income tax, Bangalore addressed to the respondent, as per which the respondent was asked to intimate his choice of posting *“consequent on promotion to the cadre of CCIT by 28.12.2005, since the same has to be communicated to the Board.”* As per this letter, argues the learned senior counsel, the respondent was treated as promoted to the cadre of CCIT and, therefore, he was asked to give his choice of postings. He also referred to some of the orders of this court passed in WP (C) No. 13640/2006 where issue of promotion was taken up by the Court on the miscellaneous application filed by the respondent in this behalf in the said writ petition. Reference was also made to the Government instructions contained in Comptroller & Auditor General of India Circular No. NGE/38/1990 (497-N.2/39-90) dated 30.8.1990, which are reproduced in Swamy's Compilation of Seniority and Promotion, and particularly para 12.2 of the said instructions, which reads as under :-

“12.2 An officer whose increments have been withheld or who has been reduced to a lower stage in the time-scale, cannot be considered on that account to be ineligible for promotion as the specific penalty of withholding promotion has not been imposed on him. The suitability of the officer for promotion should be assessed by the Committee as and when occasion arises. They will take into account the circumstances leading to the imposition of the penalty and decide whether in the light of overall service records of the officer and the fact of the imposition of the penalty, he should be considered for promotion or not. Even where the Committee considers that despite the penalty the officer is suitable for promotion, the officer may be promoted only after the currency of the penalty.”

57. On the basis of the aforesaid provision, his submission was that the suitability of the respondent for promotion to the post of Chief Commissioner of Income tax was to be assessed by the DPC after taking into account the circumstances leading to the imposition of the penalty.
58. Having regard to the said penalty as well as the overall service record of the respondent, it was for the DPC to consider as to whether the respondent was fit for promotion or not. It is obvious that even after taking into consideration the circumstances which led to imposition of the penalty, the DPC found the respondent ‘Fit’ for promotion. When seen in this context, it would be obvious that the ACC did not approve the recommendation of the DPC only for the reason that the said penalty was still in operation inasmuch as due to the aforesaid provisions, even if the DPC finds an officer suitable for promotion, such an officer can be promoted only after the currency of the penalty. Learned counsel also took support from the reasons given by the Tribunal while allowing the OA of the respondent.

59. We have considered these submissions. We are of the opinion that it is a case where in exercise of our extraordinary jurisdiction under Article 226 of the Constitution of India, we should not interfere with the direction given by the Tribunal in the impugned judgment. From the minutes of the DPC meeting held on 25.11.2005, it is clear that the DPC had found the respondent fit for promotion even after taking into consideration the penalty imposed upon the respondent herein. The note of the Cabinet Secretary, which was prepared for ACC, has to be read in this backdrop. The Tribunal is right that it is only because the period of penalty had not been over the recommendation was that the respondent should not be promoted at that stage. Matter would have been different if after taking into consideration the said penalty, the DPC would have held the respondent to be “unfit” for promotion inasmuch as it is within the jurisdiction of the DPC to check the overall record of the candidate. However, as mentioned above, penalty was taken into consideration.
60. We may also take note of Para 12.2 of the Government Instructions dated 30.8.1990 as per which, when the employee is found fit for promotion, notwithstanding the penalty, such promotion is to be given after the currency of the penalty. Moreover, had the intention of ACC was to deny the promotion outright, even when DPC had recommended the case of the respondent for promotion finding him

“fit”, as per the procedure ACC would have sent the matter back to the DPC, which was not done.

61. Taking into consideration all these factors into account, the order of the Tribunal needs no interference. However, in the passing, we may note that though the Tribunal had rendered its judgment on 20.10.2008 and gave three months’ time to the petitioners to do the needful, that was not done and after a lapse of almost four months, the present petition is filed. In the process, valuable time is lost and the respondent is almost driven to the wall, who is retiring on 31.03.2009. Therefore, while dismissing this writ petition, we direct the petitioners to place the matter before the ACC for clearance of the respondent’s case for promotion to the post of Chief Commissioner of Income Tax. The exercise in this behalf shall be completed within two months from the date of receipt of copy of this order.

(A.K. SIKRI)  
JUDGE

(SURESH KAIT)  
JUDGE

March 20, 2009  
nsk

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WP (C) No. 7054 of 2009

Union of India & Ors. . . . Petitioners

through : Mr. R.V. Sinha, Advocate

*VERSUS*

Arindam Lahiri . . . Respondent

through : Mr. Sandeep Sethi, Sr. Advocate  
with Mr. D.C. Pandey, Advocate

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI  
THE HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see WP (C) No. 13640/2006.

(A.K. SIKRI)  
JUDGE

(SURESH KAIT)  
JUDGE

March 20, 2009  
nsk