

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

+ **W.P.(C) No.9047 of 2011**

% Decision delivered on: December 23, 2011

UNION OF INDIA & ANR.

. . . PETITIONERS

Through: Mr. R.V. Sinha with Mr. R.N. Singh and Mr. A.S. Singh, Advocates.

VERSUS

BALJIT SINGH SONDHI

. . .RESPONDENT

Through: Nemo.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE (ORAL)

1. The respondent herein is working as Commissioner of Income Tax (Appeals) in the Income Tax Department, Central Board of Direct Taxes, Ministry of Finance, Government of India. In discharge of his quasi-judicial service, he had decided the proceedings filed by one Shri Subhash Singh, proprietor of M/s Mogra Service Station under Section 264 of the Income Tax Act (hereinafter referred to as 'the Act') in respect of Assessment Year 2002-03. That petition was filed by Shri Subhash Singh, the assessee. The assessee had questioned addition of ₹4,37,070/- on account of alleged inflation of purchases made by the Income Tax Officer. As per the Income Tax Officer, the assessee had shown the purchase of diesel at ₹6,12,52,775/- in the Profit and Loss account, but in the ledger account, the figure of purchase was shown at ₹6,08,15,705/-. The

difference between two figures was ₹4,37,070/-, which was treated as inflation of purchase by the ITO. The plea of the assessee while challenging this addition in his petition under Section 264 of the Act was that the assessee was running a petrol pump and while the stock was delivered by the oil companies free of charge, the assessee had to incur expenditure by way of payments to the drivers and khalasis for food etc. for the sake of ensuring proper quantity and quality of the goods. The explanation of the assessee was that ₹4,37,070/- was incurred on that account which was debited under the head 'trip expenses'. He also explained that though a separate account was maintained in the books of accounts in respect of this expenditure, during the year under consideration these expenses were merged with the figure of purchase of High Speed Diesel and that was a reason for difference of amount. He also submitted that the matter was reconciled before the ITO, but may have escaped his attention as the assessment was completed at the fag end of the year.

2. The respondent, before deciding the said petition, called for the comments of the ITO and the ITO submitted his report. Thereafter, order dated 30.8.2005 was passed by him allowing the said petition and accepting the plea of the assessee that it was not a case of showing inflated figure of purchase, but expenses incurred for payment to drivers and khalasis were, in fact, shown in 'trip expenses' and duly accounted for. Therefore, the addition made by the ITO was not sustainable.
3. This was clearly a quasi-judicial order passed on the petition filed on 15.5.2005 and decided on 30.8.2005 after inviting the

report of the ITO as mentioned above. It seems that thereafter a complaint dated 21.3.2008 was made on the same ITO who had passed the assessment orders against the respondent in the said complaint, the I.T.O. alleged that the respondent had changed the comments in his review report in the ACR which was earlier rated as 'excellent'. The ITO also referred to the aforesaid case and alleged that the respondent had shown undue favour to Subhash Singh while deciding the petition under Section 264 of the Act on receipt of the complaint. It is the version of the petitioner/employer that on receipt of the complaint, the matter was investigated. It was revealed during the course of investigation that the respondent had allowed unauthorized relief to the said assessee thereby conferring undue favour to it and causing loss to the Government's revenue. Show cause notice was issued to the respondent. The respondent submitted his response/reply to the said charge-sheet. He contended that the petition was decided after proper verification of the facts and not in undue haste as alleged in the complaint and that it was decided with due care. Even on merits, he justified the passing of the orders dated 30.8.2005 while accepting the petition of Subhash Singh under Section 264 of the Act, *inter alia*, submitted as under:

".....The bare facts brought on record by the ITO are that he assessee had shown the purchase of diesel at Rs.6,12,52,775/- in the profit & loss account, in the ledger account the figure of purchase was shown at Rs.6,08,15,705. The difference between the two figures was Rs.437070. This was treated as inflation of purchases by the ITO. In his report the ITO has stated that the plea taken in the petition under section 264 of the Act that the position was reconciled before the ITO was new and not taken before him at the assessment stage. But strangely enough his discussion on the matter

clearly shows that he was fully conversant with the issue and the point of view expressed by the assessee.

On 07.06.05 a letter was addressed to the ITO vide letter No.CIT-XX/Kol/264/05-06/1020 once again (Annexure-9). In this letter all the points raised by the ITO had on 01.03.05 made a query about the difference of Rs.137070 and called for reconciliation. Thereafter he took two more hearings on 09.03.05 and 21.03.05. the record is silent about any examination of the issue made by the ITO. On 24.03.05 he finalized the assessment. It was mentioned in this letter addressed to the ITO that on account of this it could not be determined if he had examined this issue before passing his order even though he had made a specific query in this regard. Hence he was directed to examine the "Trip expenses" account and if this tallied with the difference of Rs.437070 as stated above then possibly no adverse presumption would be possible. Without such an exercise the addition was premature. The report of the ITO was called for.

The reply of the ITO was received vide letter No.wd-1(4)/Hg/revision petition/05-06/338 dated 23.08.05 (Annexure-10). The ITO clearly made no worthwhile enquiry as directed but has commented that such "Trip expenses" were not seen in the accounts of the year 2001-02. The specific plea of the assessee was not addressed by the ITO as was required. He has made certain other irrelevant observations having no bearing on the limited enquiry entrusted to him. He has also acknowledged that the appeal filed in this case stood withdrawn by the assessee.

Hence, the record clearly shows that the ITO was entrusted with the enquiry, verification and reconciliation with regards the "Trip expenses" of Rs.437070. Despite the lapse of two and a half months his report finally submitted on 23.08.05 does not cast any light on the issue or supports his contentions made in his letter dated 27.05.05. The order passed by me is very elaborate and it is clearly brought out as to why the order of the AO does not bring on record evidence sufficient to merit the addition made by the AO. Hence the report of the AO was not ignored but taken due cognizance of. Despite the fact that the AO on 01.03.05 had made a specific requirement for reconciliation of the difference of Rs.437070 and has also taken two hearing on 01.03.05 & 21.03.05 after he was given the benefit of doubt and was asked vide letter dated 07.06.05 to examine the plea

taken in the petition under section 264 of the Act in this regard. His verification did not yield anything to support his conclusion in the assessment order. As the verification was entrusted to the AO there was no requirement of any enquiry by me. Hence, in conclusion it is stated that there was no haste in passing the order under section 264 of the Act and further the report of the AO was not ignored and no blind reliance was placed on the submission of the assessee, as the AO was required to verify the same before they were accepted. Lastly, the order passed by the Commissioner under section 264 of the Act must satisfy the well settled test of "judicial act" (Dwarka Nath v ITO [1965] 57 ITR 349 SC)."

4. The matter was referred to the Central Vigilance commission (CVC) vide U.O. Note dated 23.2.2009 for its first stage advice. CVC vide its OM dated 03.3.2009 advised for initiation of major penalty proceedings against the respondent herein. The Competent Authority initiated disciplinary proceedings against the respondent herein under Rule 14 of CCS (CCA) Rules, 1965 vide Memorandum dated 24.8.2009.
5. On receipt of the said charge-memo, the respondent filed the application, i.e., O.A. No.288/2010 under Section 19 of the Administrative Tribunal Act, 1985 (hereinafter referred to as 'the Act') seeking quashing of the charge-sheet on various grounds including the ground that the issuance of charge-sheet was actuated by *mala fide*; he had discharged his quasi-judicial duties while disposing of the petition under Section 264 of the Act and there was no undue favour shown to Subhash Singh; and the order was justified on merits. He submitted that while taking decision to initiate disciplinary proceedings, his reply was not even put before the Finance Minister and therefore, was not looked into by the Finance Minister.

6. The petitioner herein filed reply to the said OA to which the respondent filed his rejoinder. Thereafter, matter was argued which resulted in passing the impugned order dated 16.3.2011 by the Tribunal allowing the OA to quash the charge-sheet primarily on the ground that this charge-sheet was against the principles of natural justice as the explanation of the respondent was not even looked into. However, liberty was granted to the petitioner to examine the explanation furnished by the respondents carefully as per the decisions of the Supreme Court in the cases of **Union of India & Others Vs. A.N. Saxena** [JT 1992 (2) SC 532] and **Union of India & Others Vs. K.K. Dhawan** [AIR 1993 SC 1478]. The relevant portion of the Tribunal's order is as under:

"12. The impugned charge memo dated 24.8.2009 being against the principles of natural justice, is thus quashed and set aside with liberty to the respondents to examine the explanation furnished by the applicant carefully as per the decision of the Supreme Court in **A.N. Saxena** and **K.K. Dhawan** (supra), and also to take into consideration the fact that the complaint was filed by Sandipan Khan whose order only the applicant was hearing the revision, and the fact that the applicant being his reviewing authority had downgraded his reports, as also that the allegations subject matter of charge emanated from an order passed by the applicant in his judicial or quasi-judicial capacity, and that the charge memo was issued to the applicant in 2009 pertaining to the events of the year 2005. The respondents will also consider the factum of the order passed by the applicant having attained finality, as mentioned above, having not been challenged in any judicial forum, as *prima facie* it appears to us that if the order passed by the applicant is said to be tainted with *mala fides* with a view to help the assessee, as is the case of the respondents, normally such order should have been challenged."

7. Assailing that order, present writ petition is preferred by the Department.

8. The submission of Mr. R.V. Sinha, learned counsel appearing for the petitioner, was that it was improper on the part of the learned Tribunal to go into the validity of the charge-sheet at this stage inasmuch as all these aspects could be gone into only after the completion of inquiry. He submitted that in view of the judgment of the Supreme Court in **A.N. Saxena (supra)** and **K.K. Dhawan (supra)**, disciplinary proceedings could be initiated even against the employee who committed misconduct while discharging his quasi-judicial duties and therefore, there is no bar holding such an inquiry. Therefore, the judgment of the Tribunal was contrary to law laid down by the Supreme Court in the aforesaid cases and various other judgments.
9. It cannot be disputed that under certain circumstances, disciplinary proceedings can be initiated against the Government employee even when he was discharging quasi-judicial function. However, in the aforesaid cases itself, the Supreme Court particularly stressed the fact that such an action has to be taken only after great caution and a close scrutiny of his actions, and only if the circumstances so warrant. Following dicta has been laid down by the Apex Court in **A.N. Saxena (supra)**:

“In our view, an argument that no disciplinary action can be taken in regard to actions taken or purported to be done in the course of judicial or quasi-judicial proceedings is not correct. It is true that when an officer is performing judicial or quasi-judicial functions disciplinary proceedings regarding any of his actions in the course of such proceeding should be taken only after great caution and a close scrutiny of his actions and only if the circumstances so warrant. The initiation of such proceedings, it is true, is likely to shake the confidence of the public in the officer concerned and also if lightly taken

likely to undermine his independence. Hence the need for extreme care and caution before initiation of disciplinary proceedings against an officer performing judicial or quasi-judicial functions in respect of his actions in the discharge or purported to discharge his functions. But it is not as if such action cannot be taken at all. Where the actions of such an officer indicate culpability, namely a desire to oblige himself or unduly favour one of the parties or an improper motive there is no reason why disciplinary action should not be taken."

10. Two things follow from the above, viz:
 - (a) Disciplinary proceedings can be initiated only if an action of the officer indicates culpability, that is to say, desire to oblige himself or giving undue favour to one of the parties or where there is an improper motive; and
 - (b) A close scrutiny of his action is required and a great caution is adopted before taking a decision as to whether disciplinary proceedings are to be initiated or not.
11. The question is as to whether such parameters were kept in mind by the petitioners while taking the decision to initiate the disciplinary proceedings.
12. We find from the reading of the impugned judgment of the Tribunal that the matter was placed before the Finance Minister along with the relevant records. As per Note Sheet at Pages 16/N and 17/N of the file, there was not even a whisper that the respondent had submitted his reply to the show cause notice issued to him. The Tribunal, in this behalf, remarked as under:

"Pages 16/N and 17/N as reproduced above, is a note prepared by the Director General of Income Tax (Vigilance) and CVO, CBDT, which was put up before the concerned authorities up to the Finance Minister for charge sheeting the applicant. There is not a word mentioned as regards issuance of the show cause notice and the reply filed by the applicant, least, consideration of the same. From the documentary evidence relied upon by the respondents, themselves, it is thus proved that before issuing the charge memo to the applicant, concerned authorities would not even consider the reply filed by the applicant to the show cause notice."

13. We have already indicated the nature of orders passed by the respondent in the petition filed by Shri B.S. Sondhi under Section 264 of the Act and the manner in which he had given his explanation justifying his order and taking a categorical stand that neither the order was passed in undue haste nor in a negligent manner. He justified the orders on merits and argued that his case was that it is the ITO who made unsustainable addition and even when the matter was referred to him, in his report he did not deal on the actual issue raised. It is also very important to note that the action against the respondent was initiated on the complaint by the same ITO. Again, it would be of interest to note that against the orders of that ITO only, the respondent was hearing the revision petition. The respondent was also a reviewing authority and had downgraded the reports of the said ITO. On this basis, the respondent had submitted that the said ITO had his own axe to grind and he had made a frivolous complaint and these aspects were of vital importance. It was necessary to place the same before the disciplinary authority to arrive at a judicious decision whether to hold an inquiry or not. In the absence of explanation, the representation of the assessee before the disciplinary authority and obviously, the decision to initiate disciplinary proceeding was tainted and was violative of the

principle of natural justice. The Tribunal has, thus, not committed any wrong in quashing the charge-sheet on this ground. At the same time, opportunities were given to the petitioner to examine the explanation furnished by the respondent and take afresh decision in the light of the judgments of the Supreme Court in **A.N. Saxena (supra)** and **K.K. Dhawan (supra)** etc. as per its observations made in Para 12 which are extracted above. Therefore, this is not a case for any interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution while sitting any judicial review of the orders of the Tribunal.

14. Before we part with, we would like to point out that the respondent had also set up a specific case that the whole action was tainted with *mala fide* and in fact, there was a motivated attempt on the part of the petitioner to harm the career prospect of the respondent, who is very young and also senior in his batch. He has mentioned that on earlier two occasions also two charge-sheets were served upon the respondent which were quashed by the Tribunal. According to him, he was even denied promotion for which he had again to knock the door of the Tribunal and after the OAs were allowed and vide orders dated 12.2.2009, directions were given to the Department to open the sealed cover regarding the DPC held in 2006 for the post of Chief Commissioner of Income Tax and giving effect to it will all consequential benefit. Even this order was not obeyed which forced the respondent to file the contempt proceedings on 08.7.2009. However, instead of complying with the direction, in total disregard of the observations of the Tribunal, charge-sheet dated 24.8.2009

was issued. Subject matter of which was quasi-judicial passed by him as above. These facts are mentioned in detail in Para 2 of the Tribunal's order. All these facts are not denied, which can give us an impression that somewhere in the office of Income Tax Department, some persons have grudge against the respondent.

15. We are leaving the matter at that without any further comments as the Tribunal has allowed the OA of the respondent on different grounds and we have examined those grounds while undertaking judicial review of the orders of the Tribunal. Thus, finding no merit in this writ petition, the same is dismissed *in limine*.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

DECEMBER 23, 2011

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