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

% Date of decision : November 01, 2018

\+ **WP(C) 6098/2018 with CM APPL. 23614-23615/2018 & 37057/2018**

AMARENDRA NATH MISRA & ORS ..... Appellants
Through Mr. Arunav Pathak and Mr. Shikhar Saha, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through Mr. Arun Bhardwaj, CGSC with Mr. Nikhil Bhardwaj, Ms.Gauraan and Mr. Shaswat Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

1. Petitioners, who have been the Members of either Central Board of Direct Taxes (CBDT) or Central Board of Excise and Customs (CBEC), are aggrieved of the order dated 06.11.2017 passed by Central Administrative Tribunal (CAT), Principal Bench, New Delhi, whereby, the OA no.1586/2010 made by them seeking quashing of the memorandums dated 11.02.2009, 13/16.03.2009 and 18.11.2009 with directions for re-fixation of

their pension with consequential benefits w.e.f. 01.01.2006, was dismissed.

2. Petitioners belong to Indian Revenue Service (Income Tax and Customs & Central Excise), in short, 'IRS(IT) & (C&CE)'. They retired prior to the implementation of the recommendations of 6th Central Pay Commission (CPC) w.e.f. 01.01.2006. Having exhausted the remedies by way of representations to the respondents, petitioners approached CAT for re-fixation of their pension on the premise that prior to the implementation of the recommendations of the 6th CPC they were working as Members of CBDT and CBEC in the pay scale of `24050-650-26000 (5th CPC). It is their case that 6th CPC in its report had recommended `80,000/- (fixed pay) for the Members of CBDT and CBEC. Relevant to the subject, petitioners also state that as per the 6th CPC recommendations, in no case, the pension of pre-2006 retirees was to be lower than 50% of the minimum pay + Grade Pay. On the acceptance of the 6th CPC recommendations and the issuance of the notifications dated 24.12.2008 by the Ministry of Personnel, the amended recruitment rules of Chairman and Members of CBDT and CBEC provided for the pay scale of ₹80,000 (fixed). On this, the petitioners made their respective representations for seeking commensurate pensionary benefits considering the pay scale of ₹80,000/-(fixed). For the said purpose, few others also made similar representations. It is thereafter that an OM dated 11.02.2009 was issued by the

Ministry of Personnel stating that the benefit of upgradation of posts subsequent to the retirement was not admissible to the pre-2006 pensioners and thereby, all the references/representations made in that regard stood disposed of. The petitioner no.1 however made another representation which came to be declined vide letter dated 13.03.2009 observing that the benefit of upgradation of post subsequent to the retirement was not admissible to pre-2006 pensioners and that the department had adopted a similar approach for the other pre-2006 pensioners and that action has been upheld by the Supreme Court in its judgment dated 23.11.2006 in C.A. No. 3173-3174/2006 (K.S. Krishnaswamy etc. vs. Union of India & Anr.). On the receipt of more representations from the pensioners/pensioners' associations and with regard to the applicability of judgment of Supreme Court in C.A. No. 5566 of 2006 [SLP (Civil) no. 12357 of 2006] Union of India vs. S.P.S. Vains, the respondents issued another O.M. dated 18.11.2009 stating that *Vains* judgment (supra) was not applicable to the pensioners who retired from the civil departments and, who, before their retirement, were governed by CCS (Pensions) Rules, 1972, thereby, all references/ representations on the subject stood equally disposed of. Petitioners thus approached CAT for the relief by way of OA no.1586/2010. This came to be dismissed vide the impugned order. Aggrieved thereof, the petitioners have preferred the instant writ petition.

3. Moot question agitated by the petitioners all along has been for their entitlement to pension equivalent to 50% of the minimum of the revised pay scale of the post they occupied at the time of retirement.

4. Undisputedly, the pay scale of the Members of CBDT/CBEC came to be fixed at ₹80,000/- (fixed) vide notification dated 24.12.2008 and accordingly, they asserted for fixation of their pension at 50% of such pay in consonance with the 6th CPC recommendations w.e.f. 24.12.2008. CAT did not accept their such plea with the observations made in para 13 of the impugned order, as follows :

> "Since the applicants had retired in the pay scale of ₹24,050-650-26000(5th CPC), whose replacement scale in the 6th CPC is ₹75.500-80,000 (without Grade Pay), they are entitled for fixation of their pension in terms of DoPT O.M. dated 28.01.2013 read with O.M. dated 30.07.2015. Since the upgraded pay scale of ₹80,000/- (fixed) is applicable to those officers, who came to occupy the posts of Members of the CBDT & CBEC on selection, these applications cannot be given the benefits of this pay scale for fixation of their pension. Pertinent to mention that the applicants are basically seeking benefits on the lines of 'one rank one pension'. A decision in this regard lies exclusively within the domain of the Executive. The financial implications of such decision would be huge considering its applicability across all the Departments of the Government and their entities."

The afore-going conclusions proceed on the premise of the upgradation of the pay scale and that, only those officers are entitled to it, who come to occupy it on selection. Do the recruitment rules even indicate so, the impugned order is however silent. On the perusal of the notification dated 24.12.2008 we observe that the posts of Chairman and Members of CBDT/CBEC are to be filled either by Deputation or Absorption. Said rules, which were notified on 24.12.2008 and were issued in exercise of the power conferred upon the President by way of proviso to Article 309 of the Constitution read, as under :

"1. These rules may be called the Central Board of Direct Taxes (Chairman and Members) Recruitment (Amendment) Rules, 2008.

2. In the Schedule to the Central Board of Direct Taxes (Chairman and Members) Recruitment Rules, 2006,

(i) against serial no.(1) relating to the post of Chairman, for the existing entries in columns (4) and (12) the following entries shall be substituted, namely :-

(4)	(12)
Rs.80,000/- (fixed)	Deputation/absorption: Members of Central Board of Direct Taxes who have a residual service of one year or more on the date of occurrence of the vacancy of Chairperson: Provided that, in the eventuality of no Member having a residual service of one year or more on the date of occurrence of the vacancy in the post of Chairperson, Government may relax the condition of residual service. AND possessing the following essential qualification:- (i) Having at least twenty years of experience

	in administering and running the direct tax administration in the Central Government with at least ten years of experience in the field formations of Central Board of Direct Taxes. (ii) Having high professional merit and excellence; and (iii) Having impeccable reputation of integrity. Note : The normal eligibility conditions of maximum age of 56 years on the date of closing of applications shall not be applicable in cases of absorption.

(ii) against serial number (2) relating to the post of Member, for the existing entries in columns (4) and (12) the following entries shall be substituted, namely :-

(4)	(12)
Rs.80,000/- (fixed)	Deputation/Absorption (i) Officers of the Central Government appointed on a regular basis in the grade of Pay Band-4 Rs.37,400-67,000 with Grade Pay of Rs.12,000/-. AND possessing the following qualification:- (i) Having at least fifteen years of experience in administering and running the direct tax administration in the Central Government with at least ten years of experience in the field formations of Central Board of Direct Taxes. (ii) Having high professional merit and excellence; and (iii) Having impeccable reputation of integrity. Note : 1. The normal eligibility conditions of

	maximum age of 56 years on the date of closing of applications shall not be applicable in cases of absorption. 2. No person with less than one year residual service on the date of occurrence of vacancy for which selection is being made shall be eligible for consideration"

Sd/-"

Recruitment rules for CBEC are akin to the afore-going rules applicable to CBDT Chairman/Members. The afore-going rules are crystal clear to the effect that the pay scale of ₹80,000/- (fixed) is applicable to both the Chairman and the Members as well, irrespective of the process by which they join such posts. These rules also by no means even suggest that such pay scale is applicable to only the officers who come to join on selection. We are therefore of the considered view that CAT fell in error in coming to a conclusion to the contrary.

5. The next question that now falls for consideration is as to whether the said rules provide for or even indicate that the subject pay scale of ₹80,000/- (fixed) was so provided on account of any upgradation of the rank or the post. Having given our thoughtful consideration, we do not observe any element even to that effect in the rules, which are notified on 24.12.2008. It should therefore necessarily follow that when said the recruitment rules were notified on 24.12.2008, these provided for only the revised pay scale for the posts of Chairman/Members of

CBDT and CBEC. Respondents on their part seek much reliance on the Ministry of Finance's communication dated 01.01.2009 to contend that the post of Chairman/Member of CBDT and CBEC was upgraded to apex pay of ₹80,000/- (fixed) equivalent to the status of Special Secretary to the Govt. of India w.e.f. 24.12.2008. Rules notified on 24.12.2008 do not suggest so. Communication of the Ministry of Finance dated 01.01.2009, reads as under :

> "F. No. 50/37/2008-Ad:1
> Government of India
> Ministry of Finance
> Department of Revenue
>
> New Delhi, the 1st Jan, 2009
>
> SANCTION ORDER NO.01/2009
>
> Subject : Up-gradation of the rank and pay of the post of Members in the Central Board of Excise & Customs (CBEC) and the Central Board of Direct Taxes (CBDT)-Sanction regarding.
>
> The President is pleased to sanction the up-gradation of the pay scale of the post of Member in the Central Board of Excise & Customs (CBEC) and the Central Board of Direct Taxes (CBDT) from HAG+Scale of Rs.75,500-80,000/- (pre-revised scale of Rs.24050-650-26000) to the apex scale of Rs.80,000 (fixed) with the rank of Special-Secretary to the Govt. of India with effect from 24/12/2008.
>
> 2. The expenditure involved shall be met out of the budget grant of the Ministry of Finance, Department of Revenue- Grant No.41.
>
> 3. This issues with the concurrence of the Department of Expenditure vide their ID Note F 2623/JS(Per) dated

01/10/2008 and IFU's Diary No. 1506/2008-IFU.III dated 29.12.08.

Sd/-"

Does this sanction order no. 01/2009 have the effect of amending the recruitment rules notified on 24.12.2008 and that too retrospectively, one wonders. To our mind, it cannot be construed so. Recruitment rules which are promulgated by the Ministry of Personnel cannot be altered or amended by the Ministry of Finance, as is sought to be contended. Plea of the respondents to the contrary is therefore bound to fail. It appears that CAT has overlooked such a vital aspect of the matter. Fixation of pay scale of ₹80,000/- (fixed) under the rules notified on 24.12.2008, in our considered view, cannot be said to be premised on upgradation of either the rank or the post. The recruitment rules notified on 24.12.2008 simply provide for revised pay scale for the post of Chairman/Member, CBDT/CBEC, without any reference to their posts being upgraded to be equivalent to the rank of Special-Secretary to the Govt. of India. Drawing any other conclusion adverting to sanction order no.01/2009 dated 01.01.2009 would therefore be not sustainable. In view thereof, the contention of Mr. Bhardwaj, learned Central Govt. Standing Counsel that the posts of Member, CBDT/CBEC were upgraded to apex pay of ₹80,000/- (fixed) w.e.f. 24.12.2008 placing reliance upon the judgment of the Supreme Court in *K.S. Krishnaswamy etc. vs. Union of India*

& Anr. [Appeal (Civil) 3174 of 2006] and *Union of India vs. R. Sethumadhvan & Anr.* (Civil Appeal no.3173 of 2018) is wholly misplaced and is rejected. In *Krishnaswamay's* case (supra), the question(s) *inter alia* was only as regards the applicable corresponding scale of pay on the implementation of the 5th Pay Commission and not the post, from which the incumbent retired. Similar was *Sethumadhvan's* case (supra). *Vains* case (supra) adverted to by the respondents is of course, of no avail to the petitioners inasmuch as the petitioners' case is of the Civil servants governed by CCS (CCA) Rules.

6. As regards the contention of benefit of upgradation inuring only to the persons who were in service on the date of upgradation of the post, it would be relevant to note that the computation of pension has to be with respect to the scale of pay applicable to the post on which the incumbent retired. Suffice to say, the petitioners' case is of revision of their pension on the basis of the revised pay scale and not on the basis of any assumed or categorised upgraded post. O.M. dated 01.09.2008 which *inter alia* relates to the implementation of Government's decision on the recommendations of the 6th CPC-revision of pension of pre-2006 pensioners/family pensioners etc. in para 4.2 provides as under :

> "The fixation of pension will be subject to the provision that the revised pension, in no case, shall be lower than fifty percent of the minimum of the pay in the pay band plus the grade pay corresponding to the pre-revised pay scale from which the pensioner had retired. In the case of HAG+ and above scales,

this will be fifty percent of the minimum of the revised pay scale."

The above-said clause of the said O.M. dated 01.09.2008 squarely covers the case of the petitioners. In view thereof, the impugned O.M.s, as far as the petitioners are concerned, have no application to their cases. Here, it is also relevant to note that in the instant writ petition, the petitioners have restricted the relief only as regards the fixation of their pension w.e.f. 24.12.2008 as it appears the pension prior thereto has already been fixed as asserted to by them in the O.A. no. 1586/2010.

7. In view of the foregoing, the impugned order of CAT is set aside and the respondents are directed to re-fix the pension of the petitioners @ ₹40,000/- per month w.e.f. 24.12.2008 and the arrears be paid within eight weeks from today. Petition stands disposed of accordingly. No order as to costs.

A. K. CHAWLA, J

VIPIN SANGHI, J

NOVEMBER 01, 2018

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