

Ministry of Law and Justice
Department of Legal Affairs

FTS 15140/2015/B

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MIB has sought our advice on the issue of recovery of MACP benefits in respect of certain categories of employees of erstwhile AIR and Doordarshan who are presently working in the Prasar Bharati on 'deemed deputation till retirement'.

1. The background of matter is that these employees prior to 'Transfer' to PB were given upgraded scales vide administrative order dated 25.2.99. Later, by virtue of S.11 of 2012 PB (Amendment) Act, they were conferred with the status of central government employees on 'deemed deputation till retirement'. The instant matter pertains to eligibility of ACP/ MACP benefits in respect of these employees.

2. In another case of MACP eligibility, a clarification was sought from DOPT which advised that "as the benefits under MACPs are allowed in the Grade Pay hierarchy, any up-gradation availed during their career would be counted against three up-gradations permissible under the MACPS". It was also clarified that since the order (25.2.199) was issued with the approval of F/Finance, MIB is to take up matter relating to withdrawal/discontinuation through IF Division. MIB however without consulting M/Finance conveyed to PB (letter dated 8.9.2014) about taking remedial actions and PAO started recoveries of MACP benefits in bulk. Later DOPT conveyed that advice given in another case cannot be applied and asked for self-contained note in given case.

3. Meanwhile, this department vide 4-5/N advised that administrative order dated 8.9.2014 (for taking remedial actions) does not appear to be justifiable as same is against the law laid down by the Supreme Court (Rafiq Masih) and till final views/determination, recoveries may not be executed. Later, DOPT vide 24/N stated that in terms of Supreme Court verdict dated 18.12.2014 recovery case pertains to employees of Class II and actions may be taken accordingly.

4. Association, ARTEE filed an OA before PB, (ND) (OA No. 2479) for challenging the tenability of recoveries and stay thereof and CAT vide order dated 13.7.2015 stayed the recovery proceedings however still cases of recoveries are being reported as per details sought by us and furnished. On next date the CAT made stay as absolute.

5. It is in background of above, our advice has been sought on the issues of recovery of MACP benefits given to these categories of employees with relevant details as sought by us.

6. We have perused the matter and submit that recoveries on account of excess payments without show cause notices are bad in law. DOPT vide OM dated 6th Feb, 2014 has also conveyed that due show cause notices are to be served upon and on receipt of representations, same may be recovered (in deserving cases) with due approval of competent authority.

7. We may submit that any advice/comments on ACP/MACP admissibility in instant matter without understanding the background of 25.2.1999 order viz a viz 2012 Act would be erroneous understanding of issue which involve recovery of monetary benefits to fairly large number of employees/retiring and have retired since.

8. There are four vital components of this matter (i) order dated 25.2.1999, (ii) S.11 of 1990 Act (substituted vide 2012 Act) (iii) ACP Patna case (iv) Rafiq Masih case.

9. The background of 25.2. 1999- prior to 5th CPC, there were issues of disparity in pay scales of EA/SEA/AEs with cameraman and sound recordists and other categories of employees which were settled at level of Supreme Court (YK Mehta case and Rajshekharan) Case. It was implemented w.e.f 01/01/1978. However, 5th CPC again brought down the pay scale of Sound Recordists and consequently, disparity again occurred. On representations, Cabinet on 6 Nov 1997 constituted COS which vide order dated 05.12.1997 (with concurrence of M/Finance) directed for 90% ad hoc increase in salaries of some grades of subordinate Engg service. Later, vide order dated 25.2.99 remaining 10% was granted. Pay scales of other categories were also upgraded with concurrence of M/Finance and DOPT w.e.f 01/01/1996 to maintain the Pay Parities with EA/SEA/AEs. These scales however were given not as govt. employees *per se* but as govt. employees working in PB (PB by that time had come into existence and to blunt their resistance to transfer to PB).

10. In short, these upgraded scales were given to redress the issues relating to disparity in pay (re-occurred pursuant to 5th CPC). Very opening words of 25.2.99 order read that 'certain cadres had been agitating ... than those recommended by Vth CPC...'. A complete reading of these two administrative orders explicitly explains the circumstances and purpose for which these were

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issued as intent was to Restore the pay parity which was disturbed and was restored by the M/Finance. These upgraded scales are continuation of recommendations of 5th CPC. The word 'up gradation' is misnomer.

11. Next component is S.11 of 1990 Act. Initially, the employees were to be transferred to PB on options and provision was "Transfer of service of existing employees to Corporation", however situation never arose and on directions of the Supreme Court to address the issues of uncertainty about status of employees, S.11 was substituted (By 2012 Act) as "Status of officers and employees". By specific amendment, employees were conferred the status of deemed deputation till retirement with pay and all other benefits as admissible to central government employees. With 2012 Act, there are no issues of undertaking/options/repatriation etc and 'All officers and employees recruited during the period on or after the appointed day till the 5th day of October, 2007, are on deemed deputation till retirement who are to given all benefits (which invariably include ACP/MACP benefits). A copy of our advice about the status of these employees and related issues as given recently is placed at F/X.

12. ACP Patna case- Assoc of EA, SEA and AEs in the uniform scale of Rs 6500 (since 1.1.96) being aggrieved by non-grant of ACP filed an OA 514 /2002 before CAT, Patna prayed for 1st financial up-gradation in pay scale of Rs 8000/- (these employees were denied ACP on the ground that they employees of Corporation and they have already availed up-gradations by 25.2.1999 order). The CAT vide order dated 07.09.2009 allowed OA. Appeal filed by MIB was dismissed by the High Court and later SLP was also dismissed on 10.01.2011 (This department not consulted).

13. On dismissal of SLP, the order of CAT Patna was implemented however in respect of applicants (also for few more applicants of other OA extending the benefit of CAT Patna). However, review petition (141/2012) was also filed and same was withdrawn and fresh writ petition as filed too was dismissed. The proposal for SLP was this time referred to us and Ld. AG opined that "No case for SLP is made out". The advice and details of ACP Patna case, as attained finality are placed at F/B.

14. Law laid down by the Supreme Court in Rafiq Masih case- The Supreme Court in said case has laid down principles in which monetary recoveries are impermissible in law if excess amount has been made by the employers in case there is no misrepresentation on the part of employees.

15. In light of above components, matter is examined and it is not understood as to how a nexus is established by word 'up-gradation' as occurring in order dated 25.2.1999 and ACP which came into existence on 9.8.1999 (later in time) The process of up-gradation of pay scales for reasons of disparity predated the passing of 1990 Act and 1997 (creation of PB). The justification for up-gradations of pay (25.2.1999) had different origin (removal of disparity settled by Supreme Court and disturbed by the 5th CPC) and linking it with subsequent development/scheme appears to be erroneous.

16. It is noted that an equation is trying to be established between 'up-gradation' and ACP/MACP. Up-gradation in context of 25.2.1999 is result of recognition of higher job content of posts and long due disparity of pay settled by the Supreme Court and has different connotation whereas ACP address the issues of stagnation and is granted where there are no promotions available. The pay scales (vide 25.2.1999 are in continuation of 5th CPC recommendations which created disparity and same was removed / restored through this order by MOF/D/of Exp). The distinction is clear and treating the 'upgradation' in 25.2.99 for the purpose of depriving ACP/MACP benefits to eligible benefits on the premise that they have already "availed financial up-gradations" or "ACP is inbuilt in 25.2.99" order appears to be erroneous view.

17. Pertinent to note that in in DEWA case, employees who did not submit undertaking (as were desired to be submitted at that time) filed OA (1867/1998) and were granted scales of 6500-10500/- as normal replacement scale. Later some of these employees availed these upgraded pay scales and were also given ACP benefits. This fact is admitted by MIB in minutes of first screening committee. (Copy of minutes enclosed).

18. With the Amendment Act, 2012 status of employees is re-determined by Parliament and stipulations of seeking options/repatriations/Undertakings are done away as history. The mandate of Parliament is that these employees would be on 'deemed deputation till retirement' (for entire service tenure) and consideration of cases of ACP/MACP eligibility on option basis on 25.2.1999 contingencies/stipulations (who opted and who did not) after 2012 Act is fallacious.

19. The intent of 25.2.99 viz a viz 2012 Act has been discussed in Professional Union case, (case relating to ACP benefits of employees of Doordarshan) in which Delhi High Court (WP 1834 & 1835/2004) (27.10.2014) held as follows :

"Such Central Government employees would be deemed to be deputationists in the entire tenure of their service life. This is expressly spelt in Section 11(i) Section 11(A) goes to the extent of saying that the existing terms, scales, etc. would be continued by PrasarBharti which would then have the option of framing any new rules etc. Such being the position, paragraph 2 (i) of the upgradation order merely reflects historical facts, and no more. The option exercised by the class of Central Government employees who wish to continue with that status became irrelevant"

20. Pertinent to note that an SLP in this matter was filed by PB (without consulting MIB and this Ministry on behalf of UOI) and same too was dismissed vide order dated 27.3.2015 and same has been implemented by DG Doordarshan an attaining finality.

21. Pursuant to 2012 Act, there are only two categories of employees (i) those joined prior to 5.10.2007 as central govt. employees and (ii) employees of PB Corporation. The issues of options/Undertakings do not survive and executive is not mandated to reject the cases of ACP/MACP on plea of option theory or acceptance of upgraded scales or otherwise as same is history and irrelevant. Employees up to 05/10/2007 belong to (i) category only and are eligible for ACP/MACP benefits without any distinction exercise on the part of executive.

22. In Rafiq Masih case, the Apex Court has decided the issue as to whether employees who have been conferred financial benefits by mistake should be exempted in law for reimbursement of same. The Court has summarized principles as follows:

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

23. As above stated, CAT in its order dated 13.7.2015 (OA No. 2479/2015) (ARTEE) has made the stay as absolute, still in such cases Recoveries/Withholding of monetary terminal benefits are being made by PAO (one of the respondents). Orders for recoveries without show cause notices will definitely invite contempt with penalties. We may point out that Mumbai HC vide order dated 12.1.2015 while referring to principles of law in Rafiq case directed the respondents to return the recovered amount with 12% interest.

24. It is noted that there are parallel litigations on this issue by PB without consulting MIB and this Ministry. In professional Union case as above noted, PB has filed appeal/SLP and later on dismissal of SLP has implemented the directions too. Litigation on behalf of UOI is conducted by PB without UOI/MIB made aware of it.

25. In view of the above stated examination of matter, we are of view that upgraded scales vide 25.2.1999 order have different connotations altogether for the reasons as stated above and cannot be termed as 'availed financial upgradations' and 'ACP inbuilt in 25.2 1999' for the purpose of depriving of ACP/MACP benefits to these employees/ effecting recoveries thereof. Pursuant to 2012 Act, these employees being central government employees appear to be eligible for ACP/MACP benefits in terms of ACP Patna case and Professional Union case which have attained finality.

(T. K Malik)
Dy. Legal Adviser
4.1.2016

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(Sh. Purnot Kansal
- JS - MIB)

(Hd. of MIB)
(Dept. of Legal Affairs)
B. No. 15/4/2016 (MIB)
D. No. 4/1/2016
Date: 4/1/2016

pls discuss
DS (B AE) 5/1/16

discuss with JS (B-1). We may refer the matter to Deptt for their view.
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