(2011) 01 DEL CK 0494

In the Delhi High Court

Case No : Writ Petition (C) No. 10898 of 2009

Union of India (UOI) and Others — APPELLANT

Vs

Hardwari Lal — RESPONDENT

Date of Decision : 19-01-2011

Acts Referred:

Citation : (2011) 01 DEL CK 0494

Hon'ble Judges : Veena Birbal, J;Anil Kumar, J

Bench : Division Bench

Advocate : Ashwani Bhardwaj, for the Appellant; S.C. Verma, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—The present petition is filed under Article 226 of the Constitution of India for the issuance of a writ in the nature of Certiorari for quashing the order passed by the Principal Bench, Central Administrative Tribunal, New Delhi dated 29th May, 2009 in O.A. No. 953/2009 titled Hardwari Lal v. Union of India and Ors. and to dismiss the O.A filed by the Respondent against posting and transfer order being establishment order No. 33/2009 dated 27.3.2009 posting the Respondent from Delhi II to LTU.

2. The Tribunal was of the view that at the time of appointment of the Respondent one of the condition was that the Respondent would serve in Delhi Collectorate (now Commissionerate) and no request for transfer to any of the Collectorate (now Commissionerate) would be considered. Relying on CBEC letter dated 11th August, 2003 it has also been observed that if an officer of the Board is transferred on loan basis from one organization to another organization without prior consent of the employee, the transfer shall be illegal. According to Tribunal, LTU is an all India unit with branches in Delhi also and it is not a part of Delhi Commissionerate. The Tribunal has further reasoned that the Delhi unit is under the administrative control of CBDT which clearly signifies that it is not under the control of CBEC administratively over the Respondent. Merely because

the salary of the Respondent and others service condition are not affected in any manner, posting/transfer of the Respondent could not be done in derogation of the policy laid down by CBEC Commissionerate dealing with the matters of central excise and customs and whose units are specified. Since LTU is not treated as part of Delhi Commissionerate, posting/transfer of the Respondent to LTU could not be done and also because the Respondent could not be transferred outside the Commissionerate. One of the reasons relied on by The Tribunal was that merely because there is participation of officers of CBEC in LTU would not mean that LTU will be part of the Commissionerate. In the opinion of the Tribunal since the service condition of the Respondent had been altered without affording him a reasonable opportunity, the posting/transfer of the Respondent to LTU is illegal and thus the posting/ transfer order of the Respondent was set aside.

3. The brief facts to comprehend the disputes are that the Respondent was appointed as an Inspector of Central Excise in April, 1985 whose parent department is Central Excise Commissionerate which comes under the control of Central Board of Excise and Customs (CBEC). In the memorandum of appointment, Clause 12 stipulates that the Head of the Department has full discretion to forward or withhold any of his applications for appointment in another department or office or elsewhere and Clause 15 provides that on the appointment in this Collectorate (now known as Commissionerate), no request for transfer from the Collectorate to any other Collectorate will be considered. After appointment as inspector, the Respondent was promoted in the Grade of Superintendent Grade-B vide Establishment Order No. 65/2003.

4. Pursuant to the proposal to set up Large Taxpayer Units (LT Us) to serve large taxpayers paying excise duty, corporate tax/income tax and service tax under a single window, a Circular No. 833/10/2006-CX was issued by the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (F. No. 201/24/2006-CX.6) addressed to All Chief Commissioners of Customs and Central Excise, All Commissioners of Customs and Central Excise and others informing about the creation of LTU and functions and powers of Chief Commissioner which were proposed to be from CBDT or CBEC. All aspects of business in relation to Central Excise and Service Tax such as filing of returns, scrutiny of returns, audit, giving various permissions, etc., has to be carried out by LTU for all the constituent units of a large taxpayer throughout the country. LT Us were to be established in phased manner in Bangalore, Chennai, Delhi, Kolkata and Mumbai. The said circular also contemplated that the LT Us would be headed by the Chief Commissioner of Central Excise from CBDT/ CBEC. Other Group "A", "B", "C" officers and supporting staff would be posted by CBEC/ CBDT. The Chief Commissioner, LTU has to assign Client Executive for each taxpayer from amongst the Additional/ Joint/ Deputy/ Asstt. Commissioner posted in LTU, and the said Client Executive would have single point interface with the large taxpayers for all purposes. The officers posted will have all India jurisdiction in respect of all registered premises of a large taxpayer registered in that particular LTU.

5. As a LTU was also formed in Delhi being a part of CBEC and the staff was to be posted by CBEC, the posting/transfer order of the Respondent herein was passed on 27/03/2009 from Commissionerate of Central Excise, Delhi to LTU. The Respondent was therefore, relieved on 02/04/2009. Respondent, however, on 06/04/2009 challenged his posting/transfer order by filing an Original Application. The Respondent alleged his transfer to LTU to be illegal contending that his service liability extends to the Commissionerate of Delhi. However, he has been transferred to LTU which is outside his Commissionerate, without taking his prior consent which according to him was mandatory based upon a letter issued by the Ministry of Finance, Department of Revenue, CBEC dated 11.08.2003 which provides that the transfer of officers on loan basis is to be effected with the prior consent of the officer concerned. The Petitioners opposed the O.A contending inter-alia that LTU is as much a part of CBEC as Central Excise, Commissionerate of Delhi and the Respondent has not been transferred to a foreign establishment/organisation. Therefore, no prior consent of the Respondent as per circular dated 11th August, 2003 is required for posting/ transfer. Also, the Petitioners contend that the transfer of the Respondent is not on loan basis but a transfer on regular basis.

6. Since the Respondent had alleged that he had been posted to a foreign department, i.e., LTU, the Petitioners contended that LTU is working under the aegis of CBEC like the Central Excise, Delhi Commissionerate and the Respondent has not been transferred to some other organization/establishment on loan basis, as LTU is a part of CBEC. Since the LTU is a part of CBEC for all intent and purposes no consent from the Respondent was required. The Petitioners also asserted that Group-A, B, C Officers along with supporting staff had to be posted in LTU by CBDT and CBEC. Consequently, posting of the officers and the staff therein by CBEC is the cadre posting and it cannot be construed as posting outside the organization.

7. The Chief Commissioner of Central Excise, Delhi Zone being the cadre controlling authority, in accordance with the circular dated 5th October, 2006, has provided officers and its supporting staff to LTU. Referring to memorandum dated 11th August, 2003 of CBEC, it was contended by the Petitioners that it is applicable for posting of officers in other organizations on loan basis, which is not the case in case of Respondent as he has been posted/transferred in a regular manner and he would be drawing his salary and other requisite allowances allowable to him from LTU, Delhi. Posting of the Respondent was stated to be not on cost recovery/loan basis. Reference was also made to the fact that a number of officers of Delhi Central Excise Zone have been posted to LTU without obtaining their consent as the LTU is integral part of Delhi Commissionerate.

8. The Petitioners also asserted that the Central body in the case of excise organizations is CBEC and the Commissionerate of Central Excise and Customs are the field units. The Director General and other units like LTU are the constituents of CBEC. Impugning the order of the Tribunal, the Petitioners in the

writ petition specifically averred that the Tribunal has misconstrued the Circular dated 5th October, 2006, pursuant to which Large Taxpayers Unit (LTU) have been created by the Ministry of Finance, Department of Revenue. It has been contended that the salary of the officers of Central Excise and Service Tax posted in LTU is paid by the Income Tax Department, however, other administrative matters like posting/transfer of all officers of Central Excise are under the control of Chief Commissioner, Central Excise, Delhi Zone (CBEC). All the salaries for all the officers are drawn by CBEC and CBDT under their administrative control as per the arrangement made by the Department of Revenue, Ministry of Finance. Posting of the Respondent in the LTU also does not affect his seniority nor there is any change in his cadre and consequently, it could not be inferred that the Respondent has been transferred on loan basis or on deputation. Reliance was also placed on the fact that the staff posted in LTU from Central Excise and Service Tax is not paid any deputation pay/deputation allowance or any other incentive for their posting.

9. The learned Counsel for the Petitioners also emphasized that Notification No. 14/2002 relied on by the Tribunal was issued in 2002 and at that time, LTU was not in existence as it came to be constituted pursuant to the Circular dated 5th October, 2006. In any case, if the Notification No. 14/2002 does not include LTU of Delhi as within the jurisdiction of Chief Commissioner of Central Excise, it cannot be construed as a separate constituent. The said notification only specified different constituents under the Delhi Commissionerate at that time. It is further contended that if the officers from any of the constituents of Circular Notification No. 14/2002 are transferred to any other constituent as indicated in Column-2, the consent is required. However, if LTU is neither in Column-2 of the Circular nor in Column-3, the plea of the Respondent cannot succeed and LTU cannot be construed to be a different body independent of Delhi Collectorate (now Delhi Commissionerate). It is also apparent in the facts and circumstances, according to the contentions of the learned Counsel for the Petitioners that the LTU is a part of CBEC and CBDT and they are all parts of Department of Revenue, Ministry of Finance. The Petitioners denied the applicability of Circular dated 11th August, 2003 of CBEC in the present facts and circumstances.

10. The learned Counsel for the Respondent reiterated the pleas and contentions raised before the Tribunal and justified the order of the Tribunal contending that LTU is a different constituent and posting of the Respondent to LTU will make him liable to any Commissionerate throughout the country. During the arguments, the learned Counsel for the Respondent also relied on two communications. First communication, dated 17th March, 2009, Reference No. A-12034/2/2009 is a communication from Under Secretary to Govt. of India to Mr. H.K. Sharan, Chief Commissioner of Central Excise, Kolkata Zone, approving the proposal of Chief Commissioner of Central Excise, Kolkata for treating posting of Group B, C & D officers in LTU, Kolkata as outside Kolkata posting like Bolpur and Siliguri (under non-CCA category) and restricting the benefit to three years. The other communication relied on by the Respondent is a letter dated 19th May, 2009

from Administrative Officer, Central Excise and Service Tax to the ITO (LTU), New Delhi. This communication stipulates that LTU, Delhi is under the administrative control of CBDT/Income Tax, Delhi and pays salary and allowances to the officers of Central Excise and Service Tax and bears all establishment cost for Central Excise and Service Tax.

11. Though, these documents were not produced by the Respondent before the Tribunal nor any permission was taken by the Respondent to produce these documents, however, since these documents have been produced during the arguments and the learned Counsel for the Petitioners has not denied these documents and has rather contended that these documents support the pleas and contentions of the Petitioners., they are being considered. From the perusal of the letter dated 17th March, 2009, pertaining to the request of Chief Commissioner of Central Excise, Kolkata Zone, about the posting of Group B, C & D officers in LTU, Kolkata as outside Kolkata, rather reflects that posting in LTU Kolkata normally is to be considered as a posting within the Commissionerate of Kolkata. Since such posting is considered to be within the Commissionerate, that is why for the special reasons prevalent in that area and other circumstances, specific permission was sought to treat the posting of Group B, C & D officers in LTU, from Bolpur which is constituent of Kolkata Commissionerate as of outside Kolkata. Under the Circular No. 14/2002 Bolpur is shown as under the Commissionerate of Kolkata but from the letter dated 17th March, 2009, it appears that the posting at Bolpur was permitted to be treated as outside Kolkata Commissionerate posting. No such permission has been sought or granted in respect of Delhi II to LTU nor has been granted. Siliguri is not shown as constituent of the Kolkata Commissionerate under the Circular notification No. 14/2002. Even for such a constituent which is not shown in the Circular of 2002, specific permission has been granted for posting of employees from such constituent to LTU, Kolkata as outside the Kolkata Commissionerate. In the circumstances, what emerges is that the posting from various constituents of Kolkata Commissionerate as reflected in Notification No. 14/2002 to LTU are not the postings outside the Kolkata Commissionerate and for treating the posting from some of the constituents as outside the Kolkata Commissionerate, specific request was made and permission was sought, which was allowed and only thereafter LTU, Kolkatta has been treated differently and outside Kolkata Commissionerate in respect of two constituents. A fortiori from the constituents of Delhi Commissionerate which includes Delhi-II where the Respondent was working, his posting to LTU, Delhi will not be a posting outside the Delhi Commissionerate in the facts and circumstances.

12. The copy of the letter dated 17th March, 2009 was also sent to the Chief Commissioners of Central Excise, Bangalore, Chennai, Mumbai and Delhi with a stipulation that the posting in the metro city in the LTU will be treated as posting outside that city for the purposes of transfer policy. The learned Counsel for the Petitioners has clarified that this posting of the Respondent from Delhi-II to LTU, Delhi is not under transfer policy. The learned Counsel has clarified that under

the transfer policy a person can be transferred from various other sub constituents of Delhi to Panchkula which is also a constituent of Delhi Commissionerate for a particular period in accordance with the transfer policy and vice-a-versa, however, that will not cover the LTU. The transfer from constituent Delhi I to Delhi-V does not come under the transfer policy and the stipulation in the communication dated 17th March, 2009 is only pertaining to transfer policy and cannot be relied on by the Respondent to negate the pleas and contentions of the Petitioners. Similarly, the letter dated 19th May, 2009 relied on by the Respondent does not substantiate the pleas and contentions of the Respondent.

13. This is also apparent from the order dated 27th March, 2009 of the Respondent posting him from Delhi-II to LTU that it does not stipulate that the Respondent is sent on loan basis or on deputation. If the order of posting does not stipulate that the Respondent has been sent on loan basis, the circular dated 11th August, 2003 would not be applicable as it is applicable in those cases only where an officer is sent on loan basis from one organization/establishment to other organization/establishment which requires prior consent of the officer concerned.

14. The facts and circumstances as detailed hereinabove does not lead to any inference that organization/establishment of Commissionerate of Delhi and LTU are distinct and separate. In the circumstances, the reasoning of the Tribunal that the Respondent was sent on loan basis is contrary to the document produced on record and the condition which would not be a part of the posting/ transfer order of the Respondent could not be read into it nor it can be inferred in the facts and circumstances as has been inferred by the Tribunal. Consequently, the Tribunal has committed an error, which cannot be sustained in the facts and circumstances. If the posting of the Respondent was not on loan basis, neither the circular dated 11th August, 2003 would be applicable in the case of the Respondent nor it can be held that any illegality has been committed in consonance with the requirement of OM dated 11th August, 2003 in the facts and circumstances. If the said OM dated 11th August, 2003 is not applicable in the case of Respondent, no prior consent of the Respondent was required for his posting from Delhi II to LTU.

15. Reliance of the Tribunal on the letter of appointment of the Respondent especially Clauses 14 & 15 is also misplaced. Rather Clause-14 of the appointment letter of the Respondent contemplates that the Respondent had agreed to serve wherever required in the jurisdiction of Delhi Collectorate (now Commissionerate), which may be constituted from time to time. If LTU was constituted in 2006 and it is under administrative control of Commissionerate of Delhi, the Respondent rather cannot decline to sub-serve in LTU in terms of Clause14 of his appointment letter and his consent is not required for his posting to LTU. Even Clause15 of the appointment letter cannot be construed against the Petitioners as it only puts a restriction on the rights of the Respondent to claim

transfer from the Collectorate at Delhi (now Commissionerate) to any other Collectorate (now Commissionerate). However, in view of the subsequent circular, specially the circular dated 11th August, 2003, with the consent of the employee, he can be transferred from one Collectorate (now Commissionerate) to other Collectorate (now Commissionerate).

16. The reasoning of the Tribunal that by posting the Respondent to LTU under the Commissionerate of Delhi will alter the service condition of the Respondent is also not justified on the basis of the documents produced on record. The learned Counsel for the Respondent has not been able to convince us that posting of the Respondent to the LTU will result into change in his service condition, especially in view of the specific averments by the Petitioners that appointment of the Respondent in LTU will not change his salary and allowance even if it is paid from the Income Tax Department, which department is also under the control of Central Board of Direct Taxes(CBDT) and the Delhi unit of LTU is under the administrative control of CBDT. The Petitioners have categorically asserted that there would be no change in the service conditions of the employee of the CBEC and consequently of the Respondent.

17. The learned Counsel for the Respondent has also contended that on posting to LTU at Delhi, the Respondent would be liable for posting anywhere in the country and has relied on para-5 of the Circular No. 833/10/2006-CX dated 5th October, 2006 stipulating creation of Large Taxpayers Unit (LTU). Para-5 of the said circular is as under:

5. The officers posted in LTU will have All India jurisdiction in respect of all registered premises of a large taxpayer registered in that particular LTU. The erstwhile Central Excise or Service Tax commissionerate officers will have concurrent jurisdiction. However, the interaction with these units will be limited to specific functions requiring physical presence of the officer for purposes as warehousing, sealing or any other work as assigned by the LTU.

18. Perusal of Clause-5 of circular dated 5th October, 2006 rather shows that the officers posted in LTU will have jurisdiction in respect of all registered premises of a tax payer concurrent with Central Excise or Service Tax Commissionerate officers. It cannot be construed to mean that the Respondent would be liable to be transferred to any other Commissionerate. Even while working as an officer in a constituent, Delhi-II if the Respondent would have a tax payer having properties in different jurisdiction, the procedure applicable in such a case will be applicable in case of a tax payer in LTU. The interpretation as given by the learned Counsel for the Respondent is apparently not sustainable and cannot be used in support of plea of the Respondent that LTU is a different organization/ establishment and once he joins there he would be liable for transfer throughout the country in different Commissionerate without his consent.

19. In the totality of the facts and circumstances, and for the reasons detailed hereinabove, it cannot be held that the consent of the Respondent was required

for posting him to Delhi- II to LTU in terms of Circular dated 11th August, 2003 and he has been posted/transferred to LTU under Delhi Commissionerate on loan basis nor it can be held that the posting of the Respondent from Delhi-II to LTU is a transfer from one organization to another organization.

20. In the circumstances, the order of the Tribunal dated 29th May, 2009 in OA 953/2009 titled as Hardwari Lal v. Union of India is not sustainable and apparently suffers from errors holding that posting of Respondent from Delhi II to LTU required his prior consent. The writ petition is, therefore, allowed and the said order is set aside and consequently, the finding of the Tribunal that the order of posting and transfer of the Respondent dated 27th March, 2009 cannot be sustained in law is also set aside and it is held that the Respondent is liable to be posted to LTU (Delhi) from Delhi-II in terms of order dated 27th March, 2009 without his prior consent.

With these observations, the writ petition is disposed of. However, the parties are left to bear their own costs in the facts and circumstances.

