

the controversy relates to the right to be promoted to the post of U.D. Clerk and Tax Assistant in the Central Excise Department. Both these cases arise out of Original Applications (O.A.s) filed before the Central Administrative Tribunal (CAT), Hyderabad and the Orders of the Tribunal in the cases being questioned in a batch of Writ Petitions. As far as Civil Appeal Nos. 1970-1975 of 2009 are concerned, the CAT allowed O.A. 1362 of 2002 and directed the appellants in Civil Appeal Nos. 1970-1975 of 2009 to be considered for promotion to the post of Inspectors. They were originally recruited as Data Entry Operators (DEOs) Grade 'A' and had been working as Data Entry Operators Grade 'B' from the year 2000. In short, the appellants, as applicants before the Tribunal, had called in question the legality of Notice dated 05.11.2002 seeking to confine the promotion to the post of Inspector, to category of Tax Assistant, Upper Division (UD) Clerk, Stenographer Grade-II, etc., with certain years of experience, for promotion. Six Writ Petitions came to be filed, including by the Union of

India and the official respondents, challenging the said verdict by which the appellants were also directed to be considered. A Division Bench of the High Court proceeded to consider the matter. Justice G. Bikshapathy wrote an opinion allowing the Writ Petitions, setting aside the Order of the Tribunal. The other learned Judge, who constituted the Division Bench, wrote a separate concurring Judgment, and thus, the Writ Petitions came to be allowed. What is found by the High Court is that the Writ Petitioners were having a legal right, under the erstwhile Rules which were made in the year 1979, to be considered for promotion to the vacancies which arose prior to the Rules which came to be made with effect from 07.12.2002 in regard to the post of Inspector. The High Court also found that it was only when the Rules were made in the year 2003 that the restructuring in the Department, to which the Cabinet gave its approval on 19.07.2001, came into effect. Regarding vacancies arising after 07.12.2002, it was left undecided.

3. As far as Civil Appeal No. 1976 of 2009 is concerned, it arises from O.A. 1040 of 2003, again decided by the CAT, Hyderabad.

4. The impugned Order of the High Court reveals that the High Court allowed the Writ Petition filed against the Order of the Tribunal following the Judgment of the High Court in the Writ Petitions which formed the subject matter of the controversy relating to Inspectors and which is the subject matter of Civil Appeal Nos. 1970-1975 of 2009. In other words, following the principle that the vacancies must be filled-up in accordance with the extant Rules, the court found that promotions to the post of U.D. Clerk and Tax Assistant must be effected on the basis of the rights crystallized under the 1979 Rules, as amended.

A LOOK AT THE RULES
THE 1979 RULES REGARDING POST OF INSPECTOR

5. In 1979, the Rules known as the Central Excise and Land Customs Department Group 'C' Posts Recruitment Rules, 1979, came to be enacted (in short, 'the 1979 Rules'). The Rules were made under

Article 309 of the Constitution of India. In the said Rules, apart from the post of Inspector (Senior Grade)(*inter alia*) with a scale of pay of Rs. 550-25-750-E.B.-30-900, which is shown as a post to be filled-up by promotion, there is the post of Inspector (Ordinary Grade). It is this post which has generated the controversy in Civil Appeal Nos. 1970-1975 of 2009.

6. The Method of Recruitment is mentioned as follows: a)75 per cent by Direct Recruitment;
 b)25 per cent by Promotion. Column 12, which relates to the Grade from which Feeder Category for promotion is shown as follows:

In case of recruitment by promotion/deputation/transfer grade from which promotion/deputation/ transfer to be made
12
Promotion: By selection from amongst: (i) Upper Division Clerks with 5 years service. (ii) Upper Division Clerks with 13 years of total service as UDC and Lower Division Clerk taken

- together subject to the condition that they should have put in a minimum of two years service in the grade of Upper Division Clerks;
- (iii) Stenographers (Senior Grade) with 2 years service.
 - (iv) Stenographers (Senior Grade) or Steno (Ordinary Grade) with 12 years service as Stenographer/ Upper Division Clerk and Lower Division Clerk if any taken together subject to the condition that they should have put in a minimum of two years service as Stenographer (Ordinary Grade) or Upper Division Clerk.
 - (v) Woman searcher with 7 years service in the grade.
 - (vi) Draftsman with 7 years service in the grade.

Note: Candidates will be required to possess such physical standard and pass such written test and practical tests and confirm to such age limits as may be

specified by the
Central Board of
Excise and Customs
from time to time.

THE ELECTRONIC DATA PROCESSING DISCIPLINE (GROUP-E
TECHNICAL POST) RECRUITMENT RULES, 1992

7. On 03.04.1992, Rules were made regulating the method of recruitment for Group 'C' (Technical Post) in the Electronic Data Processing Discipline of the field formations of the Central Board of Excise and Customs (CBEC). The posts included the post of Data Entry Operator Grade 'A', Data Entry Operator Grade 'B' and the post of Data Entry Operator Grade 'C'. Under Rule 5 under the heading "Initial Constitution", persons appointed on regular basis as Key Punch Operator, Terminal Operator and Lower Division Clerk performing the duties of Terminal Operator before the commencement of these Rules were to be deemed to have been appointed as Data Entry Operator Grade 'A' and to rank enblock senior to those appointed after the commencement of these Rules. The post of Data Entry Operator Grade 'A' was

to be filled-up by Direct Recruitment. The educational qualification was shown as 12th Standard Pass or equivalent. The post of Data Entry Operator Grade 'B' was to be filled-up by promotion, failing which, by transfer on deputation. As far as promotion is concerned, Data Entry Operators Grade-A, with six years Regular Service in the Grade, were rendered eligible for being considered for promotion. As far as Data Entry Operators Grade 'C' is concerned, again the post was to be filled-up by promotion, failing which, by transfer on deputation, Data Entry Operators Grade 'B', with 3 years Regular Service, were declared eligible for being considered for promotion as Data Entry Operator Grade 'C'. There is also the post of Data Entry Operator Grade 'D', to be filled-up by promotion, failing which, by transfer on deputation. Data Entry Operator Grade 'C', with four years regular service, was Feeder Category for promotion as Data Entry Operator Grade 'D'.

THE 1996 AMENDMENT TO THE 1979 RULES

8. On 12.07.1996, the 1979 Rules came to be amended. Under the said amendment, the post of Tax Assistant

was included. 1497 posts were shown as the number of posts, subject to variation dependent on workload. The scale of pay was indicated as Rs. 1350-30-1440-40-1800-E.B.-50-2200. The post was to be filled-up by promotion. The Feeder Category was to be U.D. Clerk, with three years regular service in the Grade, subject to their passing of Departmental Examination, with minimum marks of 40 per cent and above, in each paper.

THE CENTRAL EXCISE AND LAND CUSTOMS DEPARTMENT
INSPECTOR (Group 'C' POSTS) RECRUITMENT RULES, 2002

9. By Notification dated 29.11.2002, Rules were made in supersession of the 1979 Rules. The Rules are called the Central Excise and Land Customs Department Inspector (Group 'C' posts) Recruitment Rules, 2002 (hereinafter referred to as 'Inspector Rules, 2002', for short). The Rules were to come into force on the date of publication in the Official Gazette. It is not in dispute that the publication of the Gazette is effected on 07.12.2002.

10. In regard to the post of Inspector (Central Excise), under Column 11, viz., Method of Recruitment, the Rules proclaim that 66.23 per cent

is to be filled-up by Direct Recruitment and 33.13 per cent is to be filled-up by promotion. Column 12 is significant and we refer to the same. It reads as follows:

In case of recruitment by promotion/deputation/absorption, grade from which promotion/deputation/ absorption to be made
12
<p>Promotion:</p> <p>(a) By selection from those candidates working in the following restructured cadres;</p> <p>(i) <u>Tax Assistant with 2 years service as Tax Assistant or 5 years service as Tax Assistant and Upper Division Clerk put together;</u></p> <p>(ii) Upper Division Clerk or stenographer Grade III with 5 years service;</p> <p>(iii) Upper Division clerk with 13 years of total service as Upper Division Clerk and Lower Division Clerk taken together subject to the condition that they should have put in a minimum of 2 years service in the grade of Upper Division Clerk;</p> <p>(iv) Stenographer Grade II</p>

- (v) with 2 years service; Stenographer Grade II or Stenographer Grade III with 12 years service as Stenographer or Upper Division Clerk and Lower Division Clerk, if any, taken together subject to the condition that they have completed a minimum of 2 years service as Stenographer Grade III or Upper Division Clerk.
 - (vi) Woman searcher with 7 years service in the grade;
 - (vii) Draftsman with 7 years service in the grade.
- (b) By selection from those candidates working in the following restructured cadre:
- (i) Senior Tax Assistant with 2 years regular service in the grade;
 - (ii) Stenographer Grade II with 2 years regular service in the grade;
 - (iii) Women searcher with 7 years service in the grade;
 - (iv) Draftsman with 7 years service in the grade.
- (c) Failing the method of recruitment specified under Clause (b) above, by selection from those candidates working as Tax

Assistant and
Stenographer Grade III
having not less than 10
years service including
the service to be
included for this purpose
under the provisions of
the rules regulating the
method of recruitment to
the post of Tax
Assistant:

Note 1 : Promotion under
Clause (a) above shall be
only operative for a period
of two years from the date on
which the restructured cadres
mentioned under Clause (b)
above comes into existence.

The service rendered under
the new grade in the
restructured cadres shall be
counted towards considering
the eligibility for promotion
under Clause (a) above.

Note 2: Candidates shall be
required to pass such written
test as may be determined by
the Central Board of Excise
and Customs from time to
time. The maximum age of
eligibility for the
departmental candidates shall
be 45 years which shall be
relaxable to 47 years in the
case of candidates belonging
to the Scheduled Castes or
Scheduled Tribes category.
However, those of the
officials who were not
considered for such promotion
upto the age of 45 to 47

years, as the case may be, shall be granted the benefit of relaxation in age limit upto 50 years in order to enable a fair opportunity of a minimum of two chances. However, those officials who were considered for promotion upto the age limit of 45 to 47 years, as the case may be, on two or more occasions and were not found fit for promotion shall not be eligible for this relaxation.

Note 3: Candidates shall be required to pass physical tests and confirm the physical standards as specified in Column 8.

Note 4: The eligible officers under Clause (a), (b) and 9c) above shall be required to pass through an interview before promotion.

Note 5: Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, whichever is less and have successfully completed their probation period for promotion to the next higher

grade alongwith their juniors
who have already completed
such qualifying or
eligibility service.

CORRIGENDUM DATED 24TH APRIL, 2003 TO INSPECTOR
RULES, 2002

11. Under the same, in Clause (a) of Column 12, which we have already extracted, for the word "restructured" in third line, it was to be read as "pre-structured". The result of this amendment is that Clause (a) under Column 12 of the Inspector Rules, 2002, was to be read as by selection of those candidates working in the "pre-structured cadres".

THE CENTRAL EXCISE AND CUSTOMS DEPARTMENT SENIOR TAX
ASSISTANT (GROUP 'C' POSTS) RECRUITMENT RULES,
2003(in short S.T.A. Rules, 2003)

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12. The Rules made on 16.01.2003, came into force on the date of publication of the Gazette and the publication was effected on 20.01.2003. Rule 5, around which debate ensued before us, reads as follows:

"5. Initial constitution.-(i)All the persons appointed on the regular basis at the time of commencement of these rules to the

Grade of Assistant, Tax Assistant, Upper Division Clerk (Special Pay), Data Entry Operator Grade 'B' and 'C' shall be deemed to have been appointed as Senior Tax Assistants under these rules. The service rendered by them before commencement of these rules shall be taken into account for deciding the eligibility for promotion to the next higher grade.

(ii) Assistants(Rs. 5000-8000) and Data Entry Operator Grade 'C' (Rs. 5000-8000) are being redesignated as Senior Tax Assistants in the same scale of pay. Therefore, the Assistants and Data Entry Operator Grade 'C' shall be placed enblock senior to the other categories. However, their inter-se-placement shall be done according to the date from which they had actually been appointed to these grades on regular basis subject to the condition that their inter se placement in their respective category shall not be altered.

(iii) The Data Entry Operator Grade 'B' (4500-7000) and Tax Assistants (4500-7000) have been placed in their higher scale of 5000-8000 and they shall be placed below the Assistant and Data Entry Operator Grade 'C' and their inter-se placement shall be fixed in accordance with the date of regular appointment to the respective grade subject to the condition that their inter-se placement in respective category shall not be disturbed.

(iv) Upper Division Clerk with special pay shall be placed below Assistant, Data Entry Operator Grade 'c', Data Entry Operator Grade 'B' Tax Assistants.

(v) The present employees would be required to pass the required or suitable departmental examination, as specified by the Competent Authority, from time to time, in Computer Application and relevant procedures within two years falling which they would not be eligible for further increments."

THE CENTRAL EXCISE AND CUSTOMS DEPARTMENT TAX ASSISTANT (GROUP 'C' POSTS) RECRUITMENT RULES, 2003

13. Lastly, we may notice the Central Excise and Customs Department Tax Assistant (Group 'C' Posts) Recruitment Rules, 2003, hereinafter referred to as the 2003, Tax Assistant Rules. Rules are seen to be made on 02.05.2003 and they came into force on their publication in the Official Gazette on 05.05.2003. Rule 4 alone is relevant for our purpose.

"4. Initial Constitution.-(1) The person appointed on regular basis and holding the post of Upper Division Clerk and Data Entry Operator Grade A on the commencement of these rules shall be deemed to have been appointed as Tax Assistant under these rules and the service rendered by such persons in the respective posts before commencement of these rules shall be taken into account as regular service rendered on the post

of Tax Assistant for the purpose of promotion etc.

(2) The person holding the post of Data Entry Operator Grade -A appointed under these rules as Tax Assistant shall, within two years from the date of such appointment as Tax Assistant, pass the Departmental Examination as conducted by the competent authority, failing which he shall not be entitled to get any further increment.

(3) Any person, who holds a post of Lower Division Clerk on regular basis and falls within the seniority list as determined by the appointing authority at the commencement of these rules shall, on passing the Departmental Computer Proficiency examination conducted by the appointing authority, be deemed to have been promoted with effect from date of passing such examination on the post of Tax Assistant.

(4) The Upper Division Clerks and Data Entry Operator Grade - A shall be placed en-block senior and, their inter se placement shall be fixed in accordance with the date of regular appointment to the respective grade subject to the condition that their inter se placement in the respective grade shall not distributed.

(5) Lower Division Clerks shall be placed below Upper Division Clerks and Data Entry Operator Grade - A."

14. The Method of Recruitment is Direct Recruitment in regard to 90 per cent of the vacancies and 10 per

cent posts to be filled-up by promotion. Feeder categories, in regard to promotion, are shown as Lower Division Clerks, Head Hawaldars, who had rendered seven years of service in the Grade on regular basis and who possesses certain qualifications which are mentioned therein.

IN-BETWEEN THE RULES

15. On 11.03.1988, one-third of the posts of U.D. Clerks came to be abolished and a Grade of Tax Assistant came to be created. Tax Assistants also became part of the Feeder Cadre to the post of Inspector, *inter alia*. On 05.08.1988, Central Board of Excise and Customs (CBEC) clarified, *inter alia*, that Tax Assistants, with two years' experience in the Grade or five years' combined service in U.D. Clerk and Tax Assistant, were to be eligible for promotion. Stenographers, Women Searchers, Draftsmen, etc., were also declared eligible for promotion as Inspector. They are the old Tax Assistants and not to be confused with the Tax Assistants under the 2003 Rules.

16. The next crucial development took place in the following background. The Data Entry Operators

performed essentially technical functions and the very concept was linked with the object of bringing about computerization in the Department. As noticed the initial constitution consisted of Key Punch Operators, Terminal Operators and Lower Division Clerks performing duties of Terminal Operators, who were deemed to have been appointed as Data Entry Operator Grade 'A'. The Data Entry Operators began to complain that promotional avenues for Data Entry Operator Grade 'A', which is the entry post, was limited to promotions as Data Entry Operators Grade 'B', 'C' and at the top of the pyramid, Data Entry Operator Grade 'D'. Persons working in the Ministerial Cadre, including U.D. Clerks, Stenographers, etc., were eligible under the 1979 Rules, for being promoted to the Executive Post, viz., the post of Inspector, *inter alia*. Data Entry Operators complained that they would stagnate in the post of Data Entry Operator for years without promotion. It would appear that the post of Data Entry Operator Grade 'D' is not available in all the Commissionerates and only certain Commissionerates

had the post of Grade 'D'. It is pursuant to this simmering discontent being noticed apparently that the Union Cabinet decided to go in for cadre restructuring in the Central Excise and Customs Department. Since, much may turn on the purport of the said decision, articulated in letter dated 19.07.2001, we advert to the same:

"I am directed to say that the Central Government has approved the restructuring of Customs & Central Excise Department. As a result of restructuring there has been a change in the number of nomenclature of the various grades/ posts. The revised number and designation of the various posts at different level in Customs and Central Excise Department has been indicated in Annexure - I.

2. All the post at different levels as per Annexure-I stand sanctioned with immediate effect. Wherever there is a reduction in the number of posts at any level, such reduction will be effective after the existing incumbents of the posts are promoted to the higher level or the post fall vacant on account of retirement etc. The number of categories of the post other than those referred to in Annexure 'I' have been kept in their existing strengths and in their existing pay scales only.

3. No direct recruitment may be made to various grades for the year 2001-2002 without approval of Ministry/ Department as the Cabinet has approved a one time relaxation for filling of all vacancies by promotion in all Cadres.

4. The formation-wise distribution of post at different levels will be notified separately.

5. The details of the other Posts that have been included in the restructuring have not been proposed to be altered on the scale or strengths are indicated in Annexure -II.

6. The Cadres/ Post which have not been included in the Restructuring Proposal are indicated in Annexure - III.

7. This issue in pursuance to the approval conveyed vide Cabinet Secretariat note No. 28/CM/2001 (1) dated 16.07.2001.

Yours faithfully

Sd/-

(K.C. Jain)

Dy. Secretary to the Govt. of India

ANNEXURE - I

REVISED NUMBER OF POSTS AT DIFFERENT LEVELS IN THE CUSTOMS AND CENTRAL EXCISE DEPARTMENT ON RESTRUCTURING

S.NO.	POST	EXISTING PAY SCALE	POST REDESIGNATED AS	PAY SCALE	SANCTIONED STRENGTH
A' EXEC					
1.	Chief Commissioner	22400-24500	Chief Commissioner	22400-24500	47
2.	Commissioner	18400-22400	Commissioner	18400-22400	290
3.	Additional Commissioner	14300-18300	Additional Commissioner	14300-18300	300
4.	Joint Commissioner	12000-16500	Joint Commissioner	12000-16500	276
5.	Deputy Commissioner	10000-15200	Deputy Commissioner	10000-15200	701
6.	Assistant	8000-	Assistant	8000-	690

	Commissioner	13500	Commissioner	13500	
B' EXEC					
7.	SUPDT.CEX/S.I.O /I.O.A.D.D.	6500 - 10500	SUPDT.	6500 - 10500	9437
8.	SUPDT. CUS	6500 - 10500	SUPDT.	6500 - 10500	2520
9.	Appraiser	6500 - 10500	Appraiser	6500 - 10500	809
C' EXEC					
10.	Inspector/P0/ Examiner	6500 - 9000	Inspectors	5500 - 9000	18053
A' MIN					
11.	CAO	8000 - 13500	CAO	8000 - 13500	155
B' MIN					
12.	AO/CAO/EA0	6500 - 10500		6500 - 10500	972
13.	Sr.PA	6500 - 10500	Sr.PA	6500 - 10500	
14.	Programmer	New		6500 - 10500	20
15.	Others*				177
C' MIN					
16.	DOS L-I	5500 - 9000	DOS L-I	5500 - 9000	631
17.	DOS L-II	5000 - 8000	DOS L-II	5000 - 8000	1353
18.	DE0-GR. D	5500 - 9000	ASTT. PROG	5500 - 9000	60
19.	SR. TAX Assistant		NEW	5000 - 8000	3152
20.	TAX ASSISTANT		NEW	4000 - 6000	5525
21.	LDC	3050 - 4590	LDC	3050 - 4590	717
22.	STENO GR. - I	5500 - 9000	STENO GR. -I	5500 - 9000	244
23.	STENO GR. - II	5000 - 8000	STENO GR- II	5000 - 8000	490
24.	STENO GR. -III	4000 - 6000	STENO GR. - III	4000 - 6000	490
25.	OTHERS*				803
C' EXEC (OTHERS)					
26.	DRIVERS - I	4500 - 7500	DRIVERS-I	4500 - 7500	414
27.	DRIVERS - II	4000 - 6000	DRIVERS - II	4000 - 6000	526
28.	DRIVERS - III	3200 - 6000	DRIVERS-III	3200 - 6000	1130
29.	ARMOURER	3200 -	ASI (Weapon)	3200 -	51

		4900		4900	
30.	OTHERS*				55
31.	HAVALDAR	2650- 4900	HAVALDAR	2650- 4900	4326
32.	SEPOY	2550- 3540	SEPOY	2550- 3540	9339
33.	OTHERS*				1071
TOTAL					65161

NOTES:

1. The posts in the grade of Supdts. Also include of S.I.O., A.A.D.I.O. of various directorates (S.I. No.).
2. The posts in the grade of inspector also include the post of P.O. and Examiner and intelligence Officer (S.I. No. 10).
3. The post in the grade of A.O. also include the post of A.C.A.O. and E.A.O. (Sl. No. 12).
4. The existing post in the cadres of Asst., Tax Asst., UDC (Sp Pay), DEO Gr. (C) and DEO Gr.(B) have been merged into an redesignated as Sr. Tax Asst. (Sl. No. 19).
5. The existing posts in the cadres of UDC, DEO(A) and LDC (except 717 posts of LDC for the promotion of Group D) have been merged and redesignated as Tax Asstt. (New) (S.I. No. 20)
6. The cadre of O.S. has been abolished and the post have been merged in the posts of A.O. (Sl. No. 19)
7. Other posts which exists in the department and are not reflected in the above table have been kept in existing strengths in the existing pay scales only.
8. Details of Others posts are given in Annexure II (Sl. No. 15, 25, 30 & 33).

Sd...
(K.C.Jain)
Dy. Secretary to Govt. of India"

17. On 10.09.2001, the CBEC directed a freeze on promotion. It reads as follows:

"New Delhi, the 10.09.01

To,

All Chief Commissioners/Commissioners of
Customs and Central Excise,
All Directors Generals/Directors of
Customs and Central Excise
Narcotics Commissioner, C.B.N. Gwalior

Subject: Holding of DPC for promotion to
the grade of Group 'B' & 'C' in C.B.E.C.
Department - reg.

Sir,

I am directed to say that the issue of holding of DPCs in respect of Group 'B' & 'C' posts as well as making direct recruitment to the various posts pending distribution of posts of various field formations is being undertaken by the Implementation Cell in Pursuant to sanction issued by Board's letter F.No.A-11019/72/99-Ad.IV dated 19.07.2001 conveying the approval of the Cabinet to the restructuring of Customs and Central Excise Department has been considered by the Board.

2. It is felt that if the DPCs for group 'B' & 'C' are conducted by the cadre authorities it may lead to widening of imbalances in promotion prospects or create imbalances. The Board have, therefore, decided that the holding of DPC of group 'B' & 'C' post may be frozen and no DPC may be held for Group 'B' & 'C' post till the distribution of posts under

various level is completed and instructions are issued by the Board in this regard.

3. As you are aware that Board have already imposed a ban for filling up of posts of LDCs and Sepoys vide their letter F.No. A-11012/27/2000-Ad. IV dated 10.04.2001, it is reiterated that these instructions may be strictly adhered to and it is further stated that no direct recruitment may be made to any grade till further orders of the Board/ Department of Revenue.

4. The receipt of this letter may please by acknowledged.

Yours faithfully,
SD/-

(Y.P. Vashishat)

Under Secretary to the Govt. of India"

18. Thereafter, there is communication dated 19.09.2001, which will be adverted to later on.

19. It is necessary to note what is alleged to be an Order of the CBEC, lifting the ban on promotion, dated 03.01.2002:

"New Delhi, the 3rd Jan, 2002

To,
All Chief Commissioners/ Commissioners of
Customs and Central Excise,
All Directors Generals/ Directors of
Customs and Central Excise.
Narcotics Commissioner, C.B.N. Gwalior

Subject: Holding of DPC for promotion to the grade of Group 'B' & 'C' in C.B.E.C. Department - reg.

Sir,

I am directed to refer to Board's letter of even number dated 10.9.2001 imposing a ban on holding of DPCs for Group 'B' & 'C' posts. The Board have received representations against the aforesaid ban on promotions.

2. The matter has been considered by the Board and it has been decided that where ever the DPC, have already been held, the panel prepared by the DPCs may be given effect and the resultant vacancies in the feeder cadre may also be filled up. Where the DPCs have not been held, the DPCs may be held on the basis of pre-revised strength i.e. the strength existing before the cadre restructuring and the resultant vacancies may be filled up.

3. Action may be taken on priority basis under intimation to the Board.

Yours faithfully,
SD/-

(Y.P. Vashishat)

Under Secretary to the Govt. of India"

20. The communication dated 05.06.2002 by the CBEC purporting to allocate posts to each zone, and communicating the sanctioned strength, needs to be noticed:

"F. No. A-11013/4/2002-Ad.IV

Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs

Dated: 05th June, 2002

To All Chief Commissioners of Central
Excise and Customs,
All Chief Commissioners of Customs,
All Chief Commissioners of Customs
(Preventive),
All Directors General,
All Directors.
Chief Departmental Representative, CEGAT
Chairman, Settlement Commission.

Subject: Allocation of posts in Group 'A',
'B', 'C' and 'D' amongst various
Zones/Commissionerates and
Directorates Gen. / Directorates
- reg.

Sir,

I am directed to refer to
Ministry's letter F. No A-
11019/72/99-Ad.IV dated 19th July
2001, notifying the revised
sanctioned strength at different
levels in the Central Excise &
Customs department consequent to
approval of cadre restructuring of
Central Excise and Customs
departments by the Union Cabinet.

2. I am further directed to say
that the allocation of staff to the
Zones / Commissionerate /
Directorates Gen. / Directorates at
different levels has been decided by
the Board and approved by the
Government has been detailed in the
enclosed Folder. The allocation
indicated herein supersedes all
earlier allocations in respect of the
Cadres/Categories in the enclosed
folder. The number and categories of
posts in the Central Excise & Customs
department other than those referred
to in the enclosed Folder remains
unaltered.

3. Separate staff strength has been allocated for the offices of Chief Commissioner, Commissioner (Appeals) and Commissioner (Adjudication) for which no separate staff had been allocated till now. The staff allocated to these formations has been shown along with the allocation to the Commissionerate in which city it is located. The model adopted for the allocation is indicated in Annexure - IV of the enclosed folder.

4. I am also directed to request all Chief Commissioners and other Heads of Department to carefully study the details of reorganization of the Customs and Central Excise formations and bring to the notice of the Board any discrepancies or any aspects that may require review or may not have been taken into account, to enable necessary corrective steps may be taken at an early date with the approval of appropriate authority.

5. I am further directed to say that the sanctioned strength now indicated supersedes all previous sanction issued so far. The sanctioned strength now indicated will accordingly form your sanctioned strength of Group 'A', 'B', 'C' & 'D' posts. As indicated in the preceding paras, the Chief Commissioners are requested to study the allocation of posts within their respective jurisdiction and send proposal which are considered necessary within the overall sanctioned strength provided to the Commissionerates within their jurisdiction.

6. I am also directed to inform that the Cadre Control which is presently vested with respective Commissioners in particular Zones will continue to

vest with them for the present in order to ensure that there is no dislocation in the cadre management at the field level. Switch over of cadre control from Commissioners to Chief Commissioners would be effected from a date to be specified after the new formations come into existence.

7. It has been decided to extend the ban on direct recruitment imposed, in terms of para 3 of Deptt's letter F. No. A-11019/72/99 Ad.IV dated 19.07.2001 upto 31.12.2002. However, the ban would be applicable only to the posts that have been included in the cadre restructuring. It has also been decided that the ban on direct recruitment would not apply to compassionate ground appointments made with the approval of the Board.

8. The Detailed instructions/ orders/ Recruitment Rules governing the manner of filling up of the vacancies at all levels will be issued separately. No vacancy in respect of the posts included in the cadre restructuring should be filled up till such time as further orders are issued.

Yours faithfully

Encls.: As above

(Y.P.Vashishat)
Under Secretary to the Govt. of
India"

21. Still further, on 19.09.2002, the CBEC initiated process for filling-up of vacancies based on the post restructuring strength and permitting convening of Departmental Promotion Committees (DPCs) where the revised Recruitment Rules stood circulated. It was,

however, clarified that promotion orders would be issued only on the directions of the Ministry. That ban on Direct Recruitment was to continue. The Order reads as follows:

"New Delhi, Dated 19th September, 2002

To
All Chief Commissioner of Central Excise,
All Chief Commissioner of Customs,
All Chief Commissioners of Customs
(Preventive),
All Director General,
All Directors,
The Chief Department Representative CEGAT
The Chairman, Settlement Commission.

Sir,

Subject: Filling up of posts in Group B, C
and D - reg.

I am directed to refer to Ministry's letter F.No.A-11013/4/2002-Ad. IV dated 05.06.2002 on the allocation of posts in Group 'A', 'B', 'C' and 'D' amongst various Commissionerates and Directorates General/ Directorates. So far as Group 'A' posts suitable action is being taken by the Board. As for remaining posts, you have already been advised to hold DPCs for promotion to the grade of Superintendents of Central Excise, Superintendents of Customs (Prev) vide our letter no. F.A.600/11/23-2002-Ad. III B dated 26th June, 2002 and to the grade of AO/CAO/EOA Group 'B' vide letter F.No.A.32012/3/2002-Ad.IIB dated 15th July, 2002. The cadre of O.S. is to be merged with the cadre of A.O. and all the existing O.S. are only to be redesignated as Administrative Officer. Since the pay scale of both the cadres is

same, the re-designation can be done by an administrative order.

2. It has now been decided to initiate the process of filling up of vacancies that has arisen on account of cadre restructuring in all remaining cadres up to Grade 'B'. You are directed to ensure that DPCs are converted in respect of all grades where Recruitment Rules except for change in the number of posts, as also grades where revised Recruitment Rules have been circulated. You may accordingly hold DPCs immediately for filling up vacancies in various grades, and ensure that by 30th September, 2002 the lists are kept ready. It is clarified that promotion orders may be issued only on receipt of further directions from the Ministry.

3. The ban imposed on direct recruitment in terms of para-3 of letter F.No.A.11019/72/99-Ad.IV dated 19.07.2001 is applicable up to 31.12.2002. IT is clarified that this ban applies only to the posts that have arisen in the cadre restructuring and that the ban will not apply to posts in the lower grades which are not to be filled by promotion, and can only be filled up by promotion, and can only be filled up by Direct Recruitment. Requisite steps for filling up Direct Recruitment posts may also be initiated immediately in accordance with existing instructions on the subject so as to ensure that Direct Recruitment vacancies can immediately be filled up after 31.12.2002 of Board's letter of 05.06.2002.

3. Further, in suppression of the instruction contained in para 7 & 8 of Board's letter of 05.06.2002 the Commissioners are also permitted to make compassionate ground appointments as well as inter Commissionerate transfers, with the approval of Chief Commissioners, in

accordance with existing instructions on the subject. The instructions contained in paras (7) & (8) of Board's letter of even no. dated 05.06.2002 stand modified to this extent.

Yours faithfully,
(NISHA MALHOTRA)
Jt. Secy. (Admn.)"

22. The communication dated 28.10.2002 is the next development. It reads as follows:

"Dated 28th October, 2002

To
All Chief Commissioner of Customs &
Central Excise

Subject: Draft Recruitment Rules -
Circulation of reference and
necessary action-Reg.

Sir,

Please find enclosed Draft Recruitment Rules for Group 'C' Posts of Inspector (Central Excise & Land Customs), Inspector (Examiner), Inspector (Preventive Officer) & Senior Tax Assistant as approved by the Ministry. Notifications, notifying these Rules will be issued shortly. Meanwhile you may initiate the necessary action to start the process for DPC etc. You may, however, await issue of notifications before issue of any orders of promotions based on these Rules.

Draft of the Recruitment Rules of Tax Assistants will also be sent shortly as they are being finalized in consultation with law Ministry.

Yours faithfully,
Sd.....

(B.K. Gupta)
O.S.D. (Admn.) CBEC

Enclosures: As above"

23. On 06.11.2002, the Draft Recruitment Rules for Tax Assistant came to be forwarded with the caveat that promotion orders be not issued until the Rules were notified:

"Dated 6th November, 2002

To
All Chief Commissioner of Customs &
Central Excise

Sir,

Subject: Draft Recruitment Rules -
Circulation of reference and necessary
action-Reg.

In continuation of this office letter dated 28.10.2002 forwarding of Draft Recruitment Rules of Group "C" Post of Inspector (Central Excise and land Customs), Inspector (Examiner), Inspector (Preventive Officer) & Senior Tax Assistant, please find enclosed Draft Recruitment Rules for Tax Assistant (Group "C") as approved by the Ministry. The Notification for notifying these Rules will be issued shortly. Meanwhile you may get circulated these Draft Rules to all the Commissionerates, initiate the necessary action to start the process for DPC etc. Confirm the issue of Notification notifying these Rules before issue of any order based on these Rules.

Yours faithfully

Enclosures: As above

(B.K. Gupta)

O.S.D. (Admn.) CBEC"

24. On 14.11.2002, the CBEC permitted issuance of promotion orders subject to certain conditions:

"New Delhi the 14th November 2002

To
All Chief Commissioner
All Director General
All Director under CBEC

Subject : Cadre restructuring of
Customer and Central Excise -
regarding promotion in the
Grade 'B', 'C' and 'D' posts.

Sir,

I am directed to refer to Minister's letter F. No. A-11013/01/2002-AdIV dated 19th September, 2002 regarding holding of DPC's in all grade where Recruitment Rules Exits, us also in grades where revised recruitment rules have been circulated. In terms of Para 2 of the said letter, it was directed to hold the DPC's by 30th September, 2002 and keep the list ready for issue. It was also clarified that promotion orders may only be issued on receipt of further directions from Ministry.

2. In view of the above, you are requested to issue the promotion orders in respect of remaining Group 'B', 'C' and 'D' posts as stated below:-

(i) promotion orders in respect of Sepoy, Havaldar, Head Havaldar, Tax Assistant, Senior Tax Assistant and Inspector of Central Excise/Preventive Officer/Examiner of Customs may be issued on the basis of Recruitment Rules after allotment of GSR No by the Government of India Press. Wherever not yet allotted.

- (ii) DPC in respect of Appraisers and Administrative Officer may be held on the basis of existing Recruitment Rules and promotion orders may be issued.
- (iii) DPC in respect of remaining grades except DOS L-II may be held on the basis of existing Recruitment Rules and Promotion orders may be issued by 25.11.2002.
- (iv) Promotion in the grade of DOS L-II may be made only after the new recruitment rules are circulated by the Ministry.

Yours faithfully

(Angra Ram)
Under Secretary to the Government of
India"

25. Thereafter, as already noticed, the Inspector Rules, 2002 came to be notified on 07.12.2002. We may further notice that the Senior Tax Assistant (STA) Rules came to be notified on 20.01.2003. On 21.04.2003, the following decision was taken by the CBEC:

"New Delhi, the 21st April, 2003

To,
All Chief Commissioners of Central Excise,
All Chief Commissioners of Customs,
All Director Generals,
All Commissioner of Central
Excise/Customs/Directors under CBEC

Subject: Cadre Restructuring of Customs
and Central Excise - Fixation of

date of Existence of restructured cadres-reg.

Madam,

I am directed to say that clarification have been sought by field formations regarding the date of existence of restructured cadres. The matter has been examined in the Board and it has been decided that the restructured cadres would come into existence from the dates on which the new/amended rules are notified. Accordingly

- (a) The restructured cadre of Inspector (Central excise), Inspector (Preventive Office) and Inspector (Examiner) came into effect on and from 07.12.2002 i.e., the date of publication of Recruitment Rules.
- (b) The restructured cadre of Senior Tax Assistant came into existence on and from 20.01.2003 i.e. the date of publication of Recruitment Rule.

Yours faithfully,
SD/-

(Y.P. VASHISHAT)
Under Secretary to the Govt. of
India"

THE SPATE OF LITIGATION

26. The position, as noticed, led to a scenario where the erstwhile Data Entry Operators Grade 'B' and 'C', who came to be re-designated as Senior Tax Assistants (STAs) and who were not invited to participate in the promotional exercise for the post

of Inspector, launched litigation in various Tribunals across the country.

THE PROCEEDING IN THE CHANDIGARH TRIBUNAL

27. O.A.1221 of 2002 came to be filed before the Tribunal at Chandigarh. The applicants were Data Entry Operators Grade 'A', who were promoted in the year 2000 as Data Entry Operators Grade 'B'. They contended that they being Data Entry Operators Grade 'B', were deemed to have been appointed as Senior Tax Assistants and were eligible to be considered for the post of Inspector. They were also placed in the higher Grade of Rs.5000 to 8000 and were senior to the U.D. Clerks. The applicants Complained that though they were eligible to be considered for promotion to the post of Inspector, Central Excise along with the candidates of the pre-structured cadre, they were not being considered. The Tribunal found merit in the contention of the applicants and held as follows:

"10. There is no doubt that the Data Entry Operators Grade B have now been redesignated as Senior Tax Assistants Recruitment Rules, 2002. It is also very clearly mentioned in the notification in para 4(i) that the service rendered by

them before commencement of these rules shall be taken into consideration for deciding the eligibility for promotion to the next higher grade. According to the Inspector Recruitment Rules, 2002, under Clause (b)(i) of schedule to these rules, Senior Tax Assistants with 2 years regular service are eligible for consideration for promotion. In other words, Data Entry Operators Grade b with 2 years service as Data Entry Operator and/or Senior Tax Assistants are eligible promotion. There is no such condition in the Recruitment Rules, that the categories of employees covered under clause (b) under column 12 of the schedule are required to put in 2 years of service exclusively as Senior Tax Assistant. Their past service as Data Entry Operators is also required to be taken into consideration. In fact the respondents are relying on the provision made in Note 1 under col.12 to emphasize that the Senior Tax Assistants will be considered for promotion only after 2 years from the date of restructured cadres come into existence. Note 1 reads as under:

Note 1: Promotion under clause (a) above shall be operative only for a period of two years from the date or which the restructured cadres mentioned under clause (b) above come into existence."

A close reading of the above Note would reveal that it is in respect of employees covered under Clause (a) and is not relevant to the employees under Clause (b). It is therefore, wrong to interpret the provision made in the above Note that Data Entry Operators (now redesignated as Sr.Tax Assistants) are not eligible for promotion for a period of 2 years. In fact, Senior Tax Assistant have been given

higher grade of Rs.5000-8000 and they are senior to the UDCs according to the Senior Tax Assistant Recruitment Rules, 2002, while UDCs have been considered for promotion for the post of Inspector, there does not appear to be any justification for denying senior Tax assistants their legitimate right for consideration for promotion.

11. Note 2 under col.12 specifically provides that the candidates shall be required to pass such written test as may be determined by the Central Board of Excise and Customs from time to time. The judgment in the case of Madan Singh & ors (supra) cited by the learned counsel for the applicant is, therefore, distinguishable to the extent that the departmental examination is prescribed in the relevant rules in the instant case. Senior Tax Assistants are, therefore, required to pass the written test before they are considered for promotion to the post of Inspector as has been done in the case of other categories employees. As Sr. Tax Assistants are senior to UDCs, they should also have been given an opportunity to appear in the departmental written examination and if they had passed, they should have been considered for promotion to the post of Inspector. Non-consideration of Sr. Tax Assistants for promotion is, therefore, in violation of the relevant Rules."

28. On the basis of the aforesaid discussion, the Tribunal directed applicants to be considered for promotion as Inspector, in terms of the relevant Rules, considering the service rendered by them as

Data Entry Operator Grade 'B', after giving them an opportunity to appear in the departmental examination, as provided in Note 2 in the Schedule to the Inspector Rules, 2002, *inter alia*.

29. The next, in the chronological order, is the Order dated 29.08.2003 passed by the CAT at Bombay. This decision went against the reasoning adopted by the Chandigarh Bench, which we have already noted. However, the High Court of Bombay, by its Judgment dated 07.10.2003, allowed the Writ Petitions filed against Order dated 29.08.2003. The High Court found the reasoning of the Chandigarh Bench appealed to it. No doubt, it related to filling-up the post of Inspector (Customs). The Special Leave Petition filed against the Judgment of the High Court of Bombay came to be dismissed on 09.02.2004 by this Court. In the interregnum, CAT, Madras, by Orders dated 04.09.2003 and 12.09.2003, adopted the view accepted by the Chandigarh Bench. Finally, CAT, Ahmedabad also, by its decision dated 07.05.2004, accepted the view propounded by the CAT, Chandigarh.

THE LITIGATION BEFORE US

ORIGINAL APPLICATION NO. 1362 OF 2002

30. The applicants, as already noticed, are the appellants in the Civil Appeal Nos. 1970-1975 of 2009. They approached the Tribunal on the following allegations, *inter alia*. They had been appointed as Data Entry Operator Grade 'A' between October, 1993 to March, 1994. On completion of six years' service, they came to be promoted as Data Entry Operator Grade 'B'. After completing the desired computerization, they were entrusted with regular work relating to the Executive Side. This included technical work, statistics, preventive audit and other legal work. They claimed that they were at par with the existing Tax Assistants. After the Fifth Central Pay Commission, they stood equated with the Tax Assistants. There were grievances raised relating to promotional avenues not being on par as between the Data Entry Operators and the Tax Assistants. There was reference made to the Order dated 19.07.2001. It was pointed out that the official respondent had communicated the Draft Recruitment Rules, which contained "an unconscionable condition". The

unconscionable condition referred to was the incorporation of Clause (a) that those working as Tax Assistants with two years of service, etc., were given preference for promotion over the restructured categories. They contended that Order dated 19.07.2001 had already come into force. They pointed out that there was no meaning in considering the pre-structured Cadre of Tax Assistants and U.D. Clerks, etc., after the restructuring [Apparently, they felt aggrieved by the invitation to the Tax Assistants and U.D. Clerks, based on the provisions contained under 2002 Rules (Column 12, Clause (a))]. The proposed promotion was dubbed as an attempted backdoor entry. It was only the restructured Cadre of Senior Tax Assistant (STA) alone, which was eligible for promotion as Inspector. The pre-structured Cadre should not be allowed to steal a march over the applicants, who were already placed in the higher scale. The unconscionable part of the Rules was dubbed as violative of Articles 14 and 16 of the Constitution of India. In the grounds, they attacked Note 1 to 2002 Rules found in Column 12. The Note was

alleged to have given "leverage to the Tax Assistants and the U.D. Clerks and Stenographers to count their pre-structured service". Being new Cadre, they could not have required period of two years under the restructured Cadre. The Draft Recruitment Rules were impugned as being issued with "*malafide* intention" for creating avenues for the "ineligible Lower Division Cadre". It is also contended that Draft Rules had not been finalised, and only after finalisation, the matter could be proceeded with.

31. The reliefs sought were as follows:

"(a) to set aside the intimation letters C.No.II/3/21/2002 Con. Sec. C.No. II/3/16/2003-Con. Sec. & C.No. II/03/52/2002 Estt. All dated 5.11.2002 conducting physical Test/interviews, in the absence of finalization of draft recruitment rules, on the basis of the unconscionable conditions stipulated in the draft recruitment rules for the purpose of promoting the in-eligible candidates, depriving the applicants from their due promotion to the posts of inspector of Customs and Central Excise, declaring the same as arbitrary, illegal, unwarranted, misconceived, frivolous and in violation of Articles 14 & 16 of the Constitution of India.

(b)to set aside that part of recruitment rules communicated vide F.No. A 12018/48/2000-Ad. III-B dated 28.10.2002 of R-1, incorporating certain unconscionable conditions under Clause

(a), as confirmed vide Gazette of India Notification dated 29.11.2002 and note(1) of clause (b) of column 12 of Group 'C' Recruitment Rules 2002, for eligibility condition for promotion to the cadre of inspector of Customs and Central Excise, providing illegal opportunities to the cadres that were existing prior to the restructured cadre when the restructured process has already been affected w.e.f. 19.7.2001, giving leverage to the ineligible candidates to march over the eligible candidates of DEOs Grade 'B' cadre for promotion to the cadre of Inspector of Customs and Central Excise, declaring that part of the said draft rules as arbitrary, illegal, un-warranted, misconceived, malafide and against the principles of natural justice and in violation of Articles 14 & 16 of the Constitution of India;

(c) to declare that the applicants who were working as DEOs in Gr. 'B' in the scale 4500-7000 even before re-structuring deemed to have been merged into the cadre of Sr. Tax Assistants in the scale of 5000-8000 as enumerated under the restructured scheme communicated vide R-1 Letter F. No. A-11019/72/99 Ad. IV dated 19.7.2001 communicating the approval of restructuring by the Ministry with immediate effect enclosing Annex. I therewith showing the cadres and the strength, duly directing the respondents to consider the cases of the applicants for promotion to the cadre of Inspectors, Customs and Central Excise, by way of 100% promotion under one time relaxation scheme on par with those Assistants, DEO Grade 'C', Tax Assistants, DEO Grade 'B' and UDC(Special Pay), who were redesignated as Senior Tax Assistants under the restructuring of cadres who are only to be

considered for promotion to the cadre of Inspectors of Central Excise & Customs; with all consequential benefits; and be pleased to pass such other and further order, or orders as the Hon'ble Tribunal may deem fit and proper in the circumstances of the case."

32. In the reply by the official respondents, it was, *inter alia*, pointed out as follows:

The post of Inspector was covered by 1979 Rules. Feeder categories were, as we had noted earlier. There was, in other words, reference to the 1979 Rules as amended in 1996. Regarding the Order dated 19.07.2001, the stand of the Government was that it was only approval of the Ministry for restructuring process. It was contended that it was incorrect to say that the new Cadre of Senior Tax Assistants and Tax Assistants were created from 19.07.2001. The restructuring became effective only after the formulation of the Recruitment Rules. The Order dated 19.07.2001 was silent as regards mode of restructuring and the process after merger. In regard to the claim of the appellants of parity with U.D. Clerks, it was pointed out that the

appellants could not compare themselves with the U.D. Clerks for promotion as Inspector. The initial scale of Data Entry Operator Grade 'A' (Entry Post) was Rs.1150-1500 prior to the Fifth Central Pay Commission, whereas, the pay of U.D. Clerk was Rs.1200-2040. The educational qualification required for being an U.D. Clerk was Graduation. For a Data Entry Operator Grade 'A', on the other hand, the educational qualification was pass in the Intermediate Course. It was further contended that the nature of duty was also different. The U.D. Clerks were selected on staff selection conducted on all-India basis. The Data Entry Operators Grade 'A' were employed through Employment Exchanges. As far as conditions in Column 12, which were challenged by the applicants, viz., the requirement of two years' service, which was dubbed as unconscionable, it was contended that the condition relating to two years' service was necessary to cover fair process for different categories. The Cadre of Inspector was a basic

work force. Promotions were effected on the basis of promotion to the post of Superintendent, on all-India basis, leading to large number of vacancies in the post of Inspector. In the Andhra Pradesh zone, there were 242 vacancies of Inspector. The applicants, it was contended, did not fall in the feeder categories. The contention of the applicants that they were doing various other works, was denied and it was contended that the Data Entry Operators were basically doing the work of data entry and when they were doing the other work, the nature of work was typing on computers.

ORDER OF THE TRIBUNAL IN O.A. NO. 1362 OF 2002

33. After setting out the pleadings, noting the contentions and also the orders passed by the Central Administrative Tribunal, Chandigarh, the Madras Bench and also the Division Bench of the Bombay High Court, the Tribunal proceeded to enter the following findings, *inter alia*:

- a. The above decisions referred, viz., by the Tribunals and the Bombay High Court,

were found to have been rendered on careful considerations of the Rules notified on 29.11.2002. The Tribunal agreed with the interpretation.

- b. The Tribunal proceeded to, therefore, express its inability to accept the contention of the respondents that the action initiated by sending the impugned intimation letter dated 05.11.2002, confining the consideration of selection for promotion to the post of Inspector only to candidates in the pre-structured Cadre, was in accordance with the provisions of the Rules.

34. It is further held that the further contention of the respondents that the 1979 Rules entitled them to fill-up the vacancies, could not be accepted, since the restructuring of the cadres had coming to effect on 19.7.2001 itself.

35. The existing Assistants, Tax Assistants, U.D. Clerks (Special Pay), DEOs Grade 'B' and 'C' were found to have been merged and re-designated as Senior

Tax Assistants (STAs). It was found that the restructuring cadres came into effect from the date of issue of letter dated 19.07.2001. Therefore, any further promotions to be effected from restructured cadres was to be only in accordance with the Rules promulgated under Article 309, viz., the Inspector Recruitment Rules, 2002. It was done in the supersession of the 1979 Rules. It was found that the Authorities were not justified in resorting to fill-up the existing vacancies in 242 posts in the Cadre of Inspector by following the old Rules of 1979 which were superseded by the new Rules, by initiating the process of selection before the new Rules, came to be notified in the Gazette after the date of restructuring of cadres came into force i.e. on 19.07.2001, thereby confining the selection only to the pre-structured category. The Tribunal did not agree with the contention of the respondents that the restructuring of the Cadre came into force only with effect from 16.01.2003 (apparently the date of publication of the Senior Tax Assistant (STA) Rules). The contention of the appellants was accepted that

the appellants must be deemed to have been absorbed into the Cadre of Senior Tax Assistants in the scale of pay Rs. 5000-8000 under the restructured scheme with effect from 19.07.2001. Therefore, for the purpose of promotion to the Cadre of Inspector, appellants became eligible for consideration under the new Rules framed which came into force with effect from 07.12.2002. Therefore, the Authorities were to consider the appellants for promotion to the cadre of Inspector of Central Excise and Customs based on the new Rules and not on the basis of the old Rules prevailing in respect of pre-structured cadres. Rejecting the contention of the respondents that the restructuring did not come into effect on 19.07.2001, as the Rules relating to all the restructured cadres were formulated subsequently, it was further found that since in Rule 5 of the Senior Tax Assistant Rules, it has been clarified that the service rendered by them before the amendment of the Rules was to be taken into consideration for promotion to the next higher cadre, it was found that in view of the said Rules, the Senior Tax Assistants

could take into consideration their service as Data Entry Operator Grade 'B', and therefore, Data Entry Operator Grade 'B' with two years' service in the said post was eligible for promotion. There was no condition in Clause (b) that the employees were to put in two years' service exclusively as Senior Tax Assistants. It is further found as follows:

"The learned counsel for the applicants has also relied upon a decision of the Supreme Court reported in 1998 SCC (L&S) page 1075 in the case of Rajasthan Public Service Commission Vs. Chanan Ram and another, in support of his contention that on cadre restructuring coming into force, the earlier cadres stand abolished. He further submitted that after merging of various cadres into restructured cadre of Senior Tax Assistant, the uniformity of restructured cadre of Senior Tax Assistant alone would be eligible for promotion to the cadre of Inspector of Customs and Central Excise. It is also pointed out by him that it is incumbent on the part of the respondents to work out the placement of the categories mentioned under sub para (3) of para 4 of the Recruitments rules of Senior Tax Assistants for working out the inter se seniority from among the integrated cadres and basing on such seniority, promotion to the cadre of Inspector of Customs and Central Excise has to taken place. According to him, even for the one time measure standard relaxation by way of 100% by promotion to the cadre of Inspector of Excise, the method shown in the recruitment rules of

Senior Tax Assistants for the purpose of inter se seniority placement of various cadres has to be followed and promotion to the next higher cadre of Inspector of Central Excise has to be given on the basis of such integrated seniority list as per sub-para (3) of Para 4 of the said recruitment rules. We agree with the above contentions of the learned counsel for the applicants, since we have taken the view that with effect from 19.7.2001 the restructuring of Senior Tax Assistants came into force and all the earlier cadres of Assistant, Tax Assistant/ UDC (Spl. Pay), DEOs Gr. B and C have been merged and redesignated as Senior Tax Assistant, the promotion from the said cadre to the next cadre of Inspector of Customs and Central Excise is to be considered only on the basis of the new recruitment rules which came into force. In this view of the matter, we find that all the applicants became eligible for consideration for promotion to the post of Inspector of Customs and Central Excise and the service rendered by them in the predesignated cadre for two years is also to be taken into consideration.

The learned Standing Counsel for the respondents submitted that the selection process initiated on 5.11.2002 for promotion to the post of Inspector of Central Excise and Customs from the other categories of employees other than the DEOs Gr.B and Gr.C has been finalised and the existing vacancies were filled up. Since it is now found that the applicants are also eligible for consideration for the promotion to the said post, we find it necessary to dispose of this O.A. by directing the official respondents to consider the cases of the applicants also

for promotion to the post of Inspector of Customs and Central Excise in terms of the relevant rules, taking into consideration the service rendered by them as DEO Gr.B after giving them an opportunity to appear in the Departmental Examination as notified in Note 2 in the schedule to the Inspector Recruitment Rules 2002 and in case they are successful and are finally selected as Inspectors, as per Rules, they should be promoted as Inspectors and assign suitably seniority vis-à-vis other categories of staff who have already been promoted.

In the result, this O.A. is allowed in part. The respondents are directed to consider the cases of the applicants for promotion to the post of Inspector of Customs and Central Excise in terms of the relevant recruitment rules taking into consideration the service rendered by them as Data Entry Operators Gr. B after giving them opportunity to appear in the departmental examination as provided in Note 2 in the schedule to the Inspector. Recruitment Rules, 2002. In case, they are successful and are finally selected as Inspectors, as per rules, they should be promoted as Inspectors and assigned suitably seniority vis-à-vis other categories of staff who have already been promoted by the revision of seniority as per the provisions of Rule 5 of Rules relating to recruitment of Grade C Senior Tax Assistants in the Central Excise and Customs Department. The declaration sought for by the applicants in para 8(C) of the O.A. is granted as prayed for."

36. As already noticed, the High Court came to the conclusion that the decision dated 19.07.2001 was an approval, in principle, for the restructuring. The

restructuring came into force with effect from the date on which Statutory Rules in 2003 were framed. It was further found that in regard to the existing vacancies, the erstwhile Rules of 1979 held the field and governed the parties.

37. We heard learned Counsel for the parties. Shri C.U. Singh, learned Senior Counsel, led the arguments on behalf of the appellants. We also heard Shri P.S. Patwalia, learned Senior Counsel on behalf of the party respondents and Shri K. Radhakrishnan, learned Senior Counsel on behalf of the Government of India besides Shri Sridhar Potaraju, learned Counsel on behalf of some of the party respondents.

38. The learned Senior Counsel for the appellants, undoubtedly, after referring to the Rules and the Government decisions, contended that this is a clear case where the High Court was in error in proceeding on the basis that the vacancies must be filled-up on the basis of the 1979 Rules. He pointed out that the principle enunciated in Y.V. Rangaiah and others v. J. Sreenivasa Rao and others¹ is, by no means, a

¹ (1983) 3 SCC 284

universal or unexceptionable norm. The decision was rendered in the special facts of the case. He drew our attention to the body of case law flowing from this Court, which has enunciated the principle that despite the fact that there exists Statutory Rules and unfilled vacancies, it is very much open to the Government, when it is mulling change, to take a conscious decision, though supported by reasons, to leave vacancies unfilled and to take a call at a relevant point of time.

39. As regards the effect of 2002 Rules and the 2003 STA Rules, it was the contention of Shri C.U. Singh that the Court may bear in mind the backdrop in which the restructuring came about as persons who were appointed as Data Entry Operators were found stagnating in comparison to their colleagues working in the ministerial cadre. Perceiving merit in their genuine grievances, the Government decided to completely restructure. It is accordingly that certain categories, which included Data Entry Operator Grade 'B' and 'C', were designated as Senior Tax Assistants. This is evidenced by the proceedings

dated 19.07.2001. The restructuring attained completeness from the said decision, as correctly found by the Tribunal. The Order of the Tribunal has not been properly appreciated by the High Court, it is complained. Our attention has been drawn to the view taken by the Chandigarh Bench and the High Court of Bombay, in particular. It is further impressed upon us that this Court lend its seal of approval to the view expressed by the High Court of Bombay. He pointed out, thus, that the Tribunal at Chandigarh, Madras, High Court of Bombay and the Tribunal at Ahmedabad, have spoken in one voice about the rights of the erstwhile cadre of Data Entry Operators to be treated as Senior Tax Assistants. They were entitled to count their previous service also for the purpose of calculating the period of two years' service as required in the 2002 Inspector Rules for promotion.

40. *Per contra*, the learned Senior Counsel Shri P.S. Patwalia, K. Radhakrishnan, Senior Counsel and Shri Sridhar Potaraju, learned Counsel stoutly defended the Order of the High Court. It is their contention that quite apart from the fact that in terms of the

principle laid down in Y.V. Rangaiah (supra) that existing vacancies should be filled-up under the old Rules, the Data Entry Operators were not in the feeder categories for promotion as Inspector under the 1979 Rules in 2002. They come into Feeder Category for promotion only when the Rules were framed in the year 2002, which was brought into force on 07.12.2002. Even proceeding under the said Rules, Shri P.S. Patwalia would point out that they would have to gain experience and work for two years as STA and they were certainly not eligible for being considered when the Government decided to fill the vacancies on 05.11.2002. Therefore, apart from the principle enunciated in Y.V. Rangaiah (supra), they would make the mark in terms of the Rules only on completion of two years' service from January 2003 as Senior Tax Assistants. Our Attention is drawn to 2002 Inspector Rules to point out that what is required under the said Rules is that the Senior Tax Assistants, with two years Regular Service in the Grade, alone, would be eligible. Having regard to the pay-scale of a Senior Tax Assistant, it is not open

to the appellants to contend that the requirement of Regular Service in the Grade, would be fulfilled, by taking into consideration the previous service rendered by them in the erstwhile Cadre of Data Entry Operator. It is also contended that the Memorandum dated 19.07.2001 also embodies a decision, in principle, in this regard. Our attention is drawn to Memorandums dated 05.06.2002 and 28.10.2002. It is only on issuance of the Rules that the restructuring happened. The Rules were brought into force in the year 2003. It is further contended that all the Data Entry Operators Grade 'A', 'B' and 'C' continued as such and were only re-designated as Tax Assistants or Senior Tax Assistants upon the enforcement of the 2003 Rules and not before. The pay-scale of Senior Tax Assistants was Rs.5000-8000. The appellants belonging to Data Entry Operator Grade 'B' did not draw the pay-scale of a Senior Tax Assistant, though, the Grade of Data Entry Operator Grade 'C' was same as that of the STA. Reliance was placed on the Memorandum of the Government of India dated 21.04.2003, which categorically states that

restructured Cadre of STA came into force only on 20.01.2003.

41. Under the 2002 Inspector Rules, there is a clear scheme. The earlier Ministerial Staff, who were eligible for promotion under the repealed Rules, continued to remain eligible under the 2002 Rules. The eligibility was for a period of two years. The period of two years started from the day on which the restructured cadres came into force. For the first two years, the earlier Ministerial Staff were eligible. During that period, the Rules contemplated that the restructured Cadres would acquire eligibility. Rule 5 of the 2003 STA Rules is sought to be explained away by pointing out, it would only mean that if any of the Ministerial Staff, who had been Tax Assistants/U.D. Clerks (Special Pay), who came into the restructured Cadre of Senior Tax Assistants, fall short of two years or five years under Part 12(a) of the 2002 Inspector Rules, then, their previous service, as also service after restructuring, would count towards their eligibility. In this regard, he drew our attention to Note 1 of

the 2002 Rules. Distinction is sought to be drawn between Rule 5 of the Senior Tax Assistant Rules, 2003 and Rule 4 of the Tax Assistant Rules, 2003. The Grade of Senior Tax Assistant is higher than the Grade of Data Entry Operator Grade 'B', both in terms of status and pay-scale.

42. Thus, it is contended that the service rendered by the Officers, prior to there being restructuring, could not be counted for the purpose of Clause (12) (b) of the 2002 Inspector Rules. As regards the question as to whether there was a ban on appointment, it is contended that though, initially a ban was imposed vide Memorandum dated 10.09.2001 by Memorandum dated 03.01.2002, the ban was clearly lifted. It is contended that the letter dated 05.06.2002 extended the ban relating to Direct Recruitment but it did not affect letter dated 03.01.2002, which had removed the ban. Reliance is also placed on letter dated 28.10.2002. It is contended also that since there was no ban during the period 2001-2002 and 2002-2003, and seeking to draw support from the O.M. dated 08.09.1998, which

provides for a model calendar for holding of DPCs, the principle in Y.V. Rangaiah (supra), is pressed into service. It is pointed out that promotions had already been made on the basis of the impugned judgment of the High Court and resultant vacancies were also filled-up by implementation Orders dated 26.09.2005, 17.05.2006 and 19.07.2006. Even the erstwhile Data Entry Operator Grade 'B', re-designated as Senior Tax Assistants, have been promoted as Inspectors. Many of the contesting parties have further been promoted as Superintendents. The judgment of the High Court of Bombay has not been implemented. The Order of the CAT, Chandigarh Bench, is sought to be faulted. It is pointed out that the Draft Recruitment Rules dated 28.10.2002 were taken as Final Recruitment Rules and the entire judgment proceeds on the said basis. It also failed to examine the scope of Clauses (a) and (b) in Column 12 as also the Note below Column 12 of the 2002 Inspector Rules. The High Court of Bombay also did not refer to and consider the effect of the 2002 Rules.

43. The Data Entry Operators were not in the category on 01.01.2001, for the Recruitment Year 2001-2002 and, on 01.01.2002, for the Recruitment Year 2002-2003, and therefore, they were not eligible.

AMENDMENT OF LAW AND FILLING-UP OF OLD VACANCIES

44. The appellants would point out that it is not a universal principle that vacancies must be filled-up in accordance with the unamended Rules. He would point out that the view taken by this Court, in this regard, may be noticed.

45. In Y.V. Rangaiah (supra), this Court was dealing a case under the Andhra Pradesh Registration and Subordinate Service Rules. The Rule in question, *inter alia*, contemplated preparation of a panel every year in September. That apart, the Government also issued very clear instructions, which emphasised prompt preparation of panels being essential for increasing administrative efficiency and filling of vacancies without delay. Instead of filling-up vacancies on the 01.09.1976, there was delay and the panel came to be drawn-up in 1977 by which time an amendment to the Rules purported to take away rights

of the Lower Division Clerks for promotion and the Feeder Category was sought to be confined to the U.D. Clerks. It was in the said factual context that the court proceeded to lay down as follows:

"9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than Respondents 3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

46. It suffices, for our purpose, to note that the view taken by the Court, in the said case, came to be followed in subsequent judgments, viz., P. Ganeshwar

Rao and others v. State of A.P. and others²; P. Mahendran and others v. State of Karnataka and others³; A.A. Calton v. Director of Education⁴ and N.T. Devin Katti and others v. Karnataka Public Service Commission and others⁵.

47. On the other hand, there is another line of decisions which is relied upon by the appellants. Very briefly, the principle is this:

Despite availability of vacancies, if the Appointing Authority consciously takes a decision to keep unfilled the vacancies for good reasons, the Rules, as on the day of consideration of the matters relating to promotion, would govern the situation.

48. The representative of this view would be the decision by the Bench of three Judges in K. Ramulu (Dr.) and another v. (Dr.) S. Suryaprakash Rao and others⁶ and P. Ganeshwar Rao (supra). In K. Ramulu (Dr.) (supra), the Government had taken a decision to amend the Rules in question. It also took a conscious

2 (1988) Supp. SCC 740

3 (1990) 1 SCC 411

4 (1983) 3 SCC 33

5 (1990) 3 SCC 157

6 (1997) 3 SCC 59

decision not to fill the vacancies till the amendment. For the years 1995-1996, there was no panel prepared. Essentially on the said facts, this Court held as follows:

"12. The same ratio was reiterated in *Union of India v. K.V. Vijeesh* [(1996) 3 SCC 139 : 1996 SCC (L&S) 683] (SCC paras 5 and 7). Thus, it could be seen that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on the relevant date. Shri H.S. Gururaja Rao, contends that this Court in *Y.V. Rangaiah v. J. Sreenivasa Rao* [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] had held that the existing vacancies were required to be filled up as per the law prior to the date of the amended Rules. The mere fact that Rules came to be amended subsequently does not empower the Government not to consider the persons who were eligible prior to the date of amendment. It is seen that the case related to the amendment of the Rules. Prior to the amendment of the Rules two sources were available for appointment as Sub-Registrar, namely, UDCs and LDCs. Subsequently, Rules came to be amended taking away the right of the LDCs for appointment as Sub-Registrar. When the vacancies were not being filled up in accordance with the existing Rules, this Court had pointed out that prior to the amendment of the Rules, the vacancies were existing and that the eligible candidates

were required to be considered in accordance with the prevailing Rules. Therefore, the mere fact of subsequent amendment does not take away the right to be considered in accordance with the existing Rules. As a proposition of law, there is no dispute and cannot be disputed. But the question is whether the ratio in *Rangaiah case* [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] would apply to the facts of this case. The Government therein merely amended the Rules, applied the amended Rules without taking any conscious decision not to fill up the existing vacancies pending amendment of the Rules on the date the new Rules came into force. It is true, as contended by Mr H.S. Gururaja Rao, that this Court has followed the ratio therein in many a decision and those cited by him are *P. Ganeshwar Rao v. State of A.P.* [1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957] , *P. Mahendran v. State of Karnataka* [(1990) 1 SCC 411 : 1990 SCC (L&S) 163 : (1990) 12 ATC 727] , *A.A. Calton v. Director of Education* [(1983) 3 SCC 33 : 1983 SCC (L&S) 356] , *N.T. Devin Katti v. Karnataka Public Service Commission* [(1990) 3 SCC 157 : 1990 SCC (L&S) 446 : (1990) 14 ATC 688] , *Ramesh Kumar Choudha v. State of M.P.* [(1996) 11 SCC 242 : (1996) 7 Scale 619] In none of these decisions, a situation which has arisen in the present case had come up for consideration. Even Rule 3 of the General Rules is not of any help to the respondent for the reason that Rule 3 contemplates

making of an appointment in accordance with the existing Rules.

13. It is seen that since the Government have taken a conscious decision not to make any appointment till the amendment of the Rules, Rule 3 of the General Rules is not of any help to the respondent. The ratio in the case of *Ramesh Kumar Choudha v. State of M.P.* [(1996) 11 SCC 242 : (1996) 7 Scale 619] is also not of any help to the respondent. Therein, this Court had pointed out that the panel requires to be made in accordance with the existing Rules and operated upon. There cannot be any dispute on that proposition or direction issued by this Court. As stated earlier, the Government was right in taking a decision not to operate Rule 4 of the General Rules due to their policy decision to amend the Rules. He then relies on para 14 of the unreported judgment of this Court made in *Union of India v. S.S. Uppal* [(1996) 2 SCC 168 : 1996 SCC (L&S) 438 : (1996) 32 ATC 668] . Even that decision is not of any help to him. He then relies upon the judgment of this Court in *Gajraj Singh v. STAT* [(1997) 1 SCC 650 : (1996) 7 Scale 31] wherein it was held that the existing rights saved by the repealed Act would be considered in accordance with the Rules. The ratio therein is not applicable because the existing Rules do not save any of the rights acquired or accruing under the Rules. On the other hand, this Court had

pointed out (in Scale para 23) thus: (SCC pp. 664-65, para 22)

"Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of Parliament as if it had never been passed; it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances. Therefore, when Section 217(1) of the Act repealed Act 4 of 1939 w.e.f. 1-7-1989, the law in Act 4 of 1939 in effect came to be non-existent except as regards the transactions, past and closed or saved."

49. In Deepak Agarwal and another v. State of U.P. and others⁷, one of the two appellants was a

⁷(2011) 6 SCC 725

Statistical Officer. The other one was a Technical Officer. The Rules prior to their amendment included them in the Feeder Category for the promotion to the post of Deputy Excise Commissioner. The amendment, by which they stood deprived of their right to be considered for promotion, was made considering work experience, duties and qualifications of Statistical Officer and Technical Officers rendering them unfit to be considered for the higher post. The question, which fell for consideration, was posed in paragraph 18 as follows:

“18. The short question that arises for consideration is as to whether the appellants were entitled to be considered for promotion on the post of Deputy Excise Commissioner under the 1983 Rules, on the vacancies, which occurred prior to the amendment in the 1983 Rules on 17-5-1999.”

50. This Court noticed that there was no statutory duty cast on the State to complete the selection process within a prescribed period. It further noted the statutory provision enabling the State to leave a particular post unfilled. It was still further found that the promotion to the vacancies had been made

under the amended Rules. The principle laid down in Y.V. Rangiah (supra) came to be distinguished in the following words:

"24. We are of the considered opinion that the judgment in *Y.V. Rangaiah* case [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] would not be applicable in the facts and circumstances of this case. The aforesaid judgment was rendered on the interpretation of Rule 4(a)(1)(i) of the Andhra Pradesh Registration and Subordinate Service Rules, 1976. The aforesaid Rule provided for preparation of a panel for the eligible candidates every year in the month of September. This was a statutory duty cast upon the State. The exercise was required to be conducted each year. Thereafter, only promotion orders were to be issued. However, no panel had been prepared for the year 1976. Subsequently, the Rule was amended, which rendered the petitioners therein ineligible to be considered for promotion. In these circumstances, it was observed by this Court that the amendment would not be applicable to the vacancies which had arisen prior to the amendment. The vacancies which occurred prior to the amended Rules would be governed by the old Rules and not the amended Rules."

51. Still further, we may notice the following statement of the law contained hereunder:

"26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the "rule in force" on the date the consideration took place. There is no rule

of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in *Y.V. Rangaiah* case [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] lays down any particular time-frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants has been taken away by the amendment."

52. This Court proceeded to follow the judgment in K. Ramulu (Dr.) (supra).

53. In M.I. Kunjukunju and others v. State of Kerala and others⁸, the Court proceeded to lay down that when Recruitments Rules were amended with retrospective effect, pending process of selection, the selection must proceed in accordance with amended Rules. The Court, *inter alia*, took the view that a candidate, on making an application to the post pursuant to the

⁸ (2015) 11 SCC 440

advertisement, do not acquire any vested right of selection (See paragraph 19).

54. In State of Tripura and others v. Nikhil Ranjan Chakraborty and others⁹, the Court, following Deepak Agarwal (supra), took the view that a candidate only has a right to be considered in the light of the extant Rules, on the date of which, the consideration for promotion takes place and there is no Rule of an absolute application that vacancies must invariably be filled-up under the existing law when they arose. We may only refer to paragraph 9:

“9. The law is thus clear that a candidate has the right to be considered in the light of the existing rules, namely, “rules in force on the date” the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by the law existing on the date when they arose. As against the case of total exclusion and absolute deprivation of a chance to be considered as in *Deepak Agarwal* [*Deepak Agarwal v. State of U.P.*, (2011) 6 SCC 725 : (2011) 2 SCC (L&S) 175] in the instant case certain additional posts have been included in the feeder cadre, thereby expanding the zone of consideration. It is not as if the writ petitioners or similarly situated candidates were totally excluded. At best, they now had to compete with some more candidates. In any case, since there was no accrued right nor was

9 (2017) 3 SCC 646

there any mandate that vacancies must be filled invariably by the law existing on the date when the vacancy arose, the State was well within its rights to stipulate that the vacancies be filled in accordance with the Rules as amended. Secondly, the process to amend the Rules had also begun well before the Notification dated 24-11-2011."

ANALYSIS

55. The post of Inspector, which is at the centre stage of the controversy in Civil Appeal Nos. 1970-1975 of 2009, is mentioned as the post of Inspector (Ordinary Grade) in the 1979 Rules. The Feeder Category, in regard to the post of Inspector, was:

- a. Upper Division Clerks with five years' service;
- b. Upper Division Clerks with 13 years of total service as Upper Division Clerk and Lower Division Clerk, taken together subject to the condition that they have a minimum of two years' service in the Grade of Upper Division Clerk;
- c. Stenographers (Senior Grade) with two years' service;
- d. Stenographers (Senior Grade) or Stenographers (Ordinary Grade) with twelve years' service as Stenographer/Upper Division Clerk and Lower

Division Clerk, if any, taken together subject to a minimum of two years' service as Stenographers (Ordinary Grade) or Upper Division Clerk Grade;

e. The next category, eligible was, Women Searchers with seven years' service in the Grade;

f. Draftsmen with seven years' service in the Grade.

56. Later on, by an amendment, the post of Tax Assistant was created out of the Cadre of Upper Division Clerks (This must be referred to as the old Cadre of Tax Assistants in contrast with the Cadre of Tax Assistants as a result of restructuring and by Rules dated 03.05.2003). The old Tax Assistants were also, by virtue of Order dated 19.03.1988, rendered eligible for consideration as Inspector.

57. On the other hand, the Data Entry Operators, a Cadre, which was thought of and created to bring about computerization in the Excise and Customs Department, came into being and came to be governed by the Rules made in the year 1992. There were four Grades. The Entry Grade was Data Entry Operator Grade 'A', and Data Entry Operator Grade 'A' with six years' service, could aspire for promotion as Data

Entry Operator Grade 'B'. Likewise, Data Entry Operator Grade 'B' could aspire to be entitled as Data Entry Operator Grade 'C'. At the top of the pyramid, was the post of Data Entry Operator Grade 'D'.

58. It is seen from the above that the Data Entry Operators were not eligible to be considered for promotion as Inspector. The post of Inspector is a Group 'C' post. The Data Entry Operators were also Group 'C' but in the technical branch. The Upper Division Clerks, Stenographers, Women Searchers, Draftsmen, etc., who constituted the feeder categories, were holding posts in the Ministerial Category. The post of Inspector was a Group 'C' post in the Executive Category. The holders of the post in the Ministerial Cadre were in the Feeder Category for promotion to the Executive post but holders of posts of Data Entry Operators, though a Group 'C' post, but being in the technical side, they constituted a different and separate Cadre. There was no avenue for them to get further promotions by getting promoted as an Inspector.

59. According to the Data Entry Operators, they were actually, after the period of computerization was over, doing various other works and had gained experience which entitled them to be considered for promotion as Inspector. This issue apparently engaged the attention of the Government. Government Decided to bring about restructuring. Accordingly, the decision regarding restructuring is seen captured in the proceedings dated 19.07.2001. As to what is the effect of the same, will be the heart of the controversy. Hence, we deem it appropriate to dissect the said proceedings in detail.

60. The Order dated 19.7.2001, recites that Government has approved restructuring. It is further stated that as a result of the restructuring, there has been a change in number and nomenclature of the various Grades and posts. The revised pay and designation of the various posts at different levels, in both the Customs and Central Excise Departments, has been indicated in Annexure-1. The post of Inspector is at Serial No.10. It refers to the post of Inspector, Preventive Officer and Examiner. The

existing pay is shown as Rs.5500-9000. The restructured post has been shown as Inspector. The pay-scale remains the same. The sanctioned strength is shown as 18053. The Notes are significant and they read as follows:

"Notes:

1. The posts in the grade of Superintendents also include posts of SIO, AAD, IO of various directorates (Sl. No. 7).
2. The posts in the grade of Inspectors also include the posts of P.O. and Examiner and Intelligence Officers (Sl. No. 10).
3. The posts in the grade of AO also include the posts of ACAO and EAO (Sl. No. 12)
4. The existing posts in the cadres of Asst., Tax Asstt. UDC (Sp Pay), DEO Gr(C) and DEO Gr (B) have been merged into and redesignated as Sr. Tax Asstt (Sr. No. 19).
5. The existing posts in the cadres of UDC, DEO(A) and UDC (except 717 posts of LDC for the purpose of promotion of Group D) have been merged and redesignated as Tax Asstt. (neew) (Sl No. 20).
6. The cadre of OS has been abolished and the posts have been merged in the posts of A.O. (Sl. No. 12).
7. Other posts which exist in the department and are not reflected in the above table have been kept in their existing strength in the existing pay scales only.
8. Details of other posts are given in Annexure II (Sl. No. 15, 25, 30 and 33)."

61. No doubt, at Serial No.4, the expression used in existing posts 'have been' merged into and re-designated as Senior Tax Assistant (New).

62. The post of Senior Tax Assistant is shown as 'New' with a pay-scale of Rs.5000-8000. The sanctioned strength is shown as 3152. So also, the post of Tax Assistant is shown as 'New'. The sanctioned strength is shown as 5525. The pay-scale is Rs.4000-6000. Coming back to the body of the communication, it is stated that all the posts at different levels, as per Annexure-1, stand sanctioned with immediate effect. It is next stated that whenever there is a reduction in the number of posts at any level, such reduction will be effective after the existing incumbents are promoted to the higher level or the post falls vacant on account of retirement, etc. For the year 2001-2002, no Direct Recruitment was to be made without approval of the Ministry/Department as the Cabinet had approved a one-time relaxation for filling-up of all the vacancies by promotion in all the cadres. Next, it is stated that the formation-wise distribution of posts,

at different levels, will be notified separately. The other posts included in the restructuring proposal but where there is no proposal for alteration of the scale or strength, were included in Annexure-2. The post of Inspector does not figure in Annexure-2.

63. At first blush, on a perusal of the decision, as embodied in the communication dated 19.07.2001, the view, we may tentatively take, would be that Government has not only approved the restructuring, but it has intended it to be effective. It is not in dispute that the post of Inspector was formerly the post of Inspector/Preventive Officer/Appraiser. In place of these three posts, there was only to be the post of Inspector. In terms of the sanctioned strength, it is common case that there was formerly in excess of 22000 posts of Inspector. The number of posts, in fact, came down to 18053 as a result of restructuring. The restructuring has also resulted in abolishing of certain posts, as for instance, the post of O.S.. Certain posts came to be merged and new posts have emerged. Of interest to us, in resolving the dispute, are the cadres of Assistant, Tax

Assistant, U.D. Clerk (Special Pay), Data Entry Operator Grade 'C' and Grade 'B', which merged, and the post of Senior Tax Assistant, emerged. In place of the enumerated posts, as above, it was contemplated that the post of Senior Tax Assistant will take their place. The existing posts of U.D. Clerk, Data Entry Operator Grade 'A' also underwent a merger and, in their place, emerged the post of Tax Assistant (New).

64. A perusal of the proceeding dated 19.07.2001 also drives home the point that the posts in different levels, consequent upon restructuring, have been articulated in Annexure-1. What is more, they stood sanctioned with immediate effect. These circumstances, undoubtedly, do point to the restructuring exercise being not one only in principle but also to have effect immediately. Even more, in this direction, is the further decision that as a result of restructuring, there has been reduction in the number of posts and if there is a person, holding the post, the restructuring in the form of reduction, was not to come into force except

after the person holding the post was to either retire or he was promoted to the next higher post. An illustration would clarify the point. As noticed, prior to the restructuring, there were more than 22000 posts of Inspector. The number of posts of Inspector was reduced to a little over 18000. What would happen to the persons who were holding the posts of Inspector in excess of 18000, is, what is provided in the order. The person holding the posts of Inspector, in excess of the reduced sanctioned strength, would continue to hold the post till either retirement or he was promoted, whereafter, the post would die a natural death. The expression used in Note 4 also indicates that the posts were merged and re-designated. Undoubtedly, these aspects do provide circumstances for us to hold that the decision of the Cabinet, as provided in the communication dated 19.07.2001, was not just a principle set in motion towards achieving the target of actual restructuring, but it itself exhaustively brought about the restructuring *per se*.

65. The next letter is dated 25.07.2001. Therein addressing all Chief Commissioners of Customs/Central Excise and Commissionerate besides Director Generals, it is stated that the cadre restructuring proposal has been approved. In addition to the communication, a number of activities had to be initiated, including the issuance of Customs and Excise notifications, indicating jurisdiction and also distribution of posts in various Grades among the Commissionerates and Customs House. An implementation Cell was constituted consisting of seven members. The next communication is dated 10.9.2001. It reads as follows:

"I am directed to say that the issue of holding of DPCs in respect of Group 'B' & 'C' posts as well as making direct recruitment to the various posts pending distribution of posts of various field formations is being undertaken by the Implementation Cell in pursuant to sanction issued by Board's letter F.No. A-11019/72/99-Ad.IV dated 19.07.2001 conveying the approval of the Cabinet to the restructuring of Customs and Central Excise Department has been considered by the Board.

2. It is felt that if the DPCs for group 'B' & 'C' are conducted by the cadre authorities it may lead to widening of imbalances in promotion

prospects or create imbalances. The Board have, therefore, decided that the holding of DPC of group 'B' & 'C' post may be frozen and no DPC may be held for group 'B' & 'C' post till the distribution of posts under various level is completed and instructions are issued by the Board in this regard.

3. As you are aware that Board have already imposed a ban for filling up of post of LDC and Sepoys vide their letter F.No.A-11012/27/2000-Ad.IV dated 10.04.2001. It is reiterated that these instructions may be strictly adhered to and it is further stated that no direct recruitment may be made to any grade till further orders of the Board/ Department of Revenue.

4. The receipt of this letter may please be acknowledged."

(Emphasis supplied)

66. It may be noticed that by the said letter the holding of DPC for Group 'B' and Group 'C' posts was frozen till the distribution of posts under various levels was completed and instructions were received. The next communication is dated 19.09.2001.

"As you are aware, some reports have earlier been called from the field formations by this Directorate with regard to sanctioned and working strength of different cadres and additional requirements, if any, keeping in view the model structure of the new Commissionerates which was circulated (copy again enclosed for ready

reference). It is observed that either reports have not been received or where received, there are some deficiencies. Many commissionerates have still projected requirements of OS, UDCs, Examiners, DEO etc. which cadres have already been merged into new cadres and will not exist under the new dispensation. Similarly some of the Commissionerates have accepted the model structure without considering the actual requirement. As stated in earlier communications, the model structure indicates average requirement for one Commissionerate and it may not be possible to apply it across the board. Airport and Preventive Customs Commissionerates may not require 19 or 12 Appraisers whereas they may need more Supdts. and Inspectors than indicated in the model structure. It is therefore, necessary to adjudge the actual requirement of staff of different cadres keeping in view the quantum and nature of work handled by the particular Commissionerates and the principles governing the cadre restructuring proposals which envisage the deptt. To be officer-oriented, technology driven with reduced manual processing of documents by greater use of computers and reducing interface with tax-payers. This means a reduction in man-power in general.

2. It is, therefore, requested that precise information in the proforma I to III annexed to this letter may please be provided. Proforma I relates to existing sanctioned strength prior to cadre review for each cadre. In case, any cadre which is existing but has been left out in the proforma the same may be added at the end of proforma. This

proforma has to be in reference to cadres existing prior to the cadre restricting exercise. Proforma II seeks information on actual requirement of staff of each cadre which will exist after the coming into effect of the cadre restructuring proposal. While providing information in this proforma the following points should be carefully considered:

(i) Since new Zones are being created by bifurcating or trifurcating the existing Zone, the staff proposed in this proforma will be for the same overall jurisdiction for which staff indicated in proforma I was sanctioned. Any deviation may please be indicated as footnote to this proforma. This means where one zone has been divided into three zones, the staff strength of cadres not affected by the restructuring exercise would remain same for all three zones i.e. total strength of such cadre in three zones would be equal of strength in earlier combined zone.

(ii) Requirement in this proforma should be in the reference to cadres which will exist henceforth. For example, requirement of Sr. Tax Assistants should be adjudged with reference to the work earlier handled by Tax Assistants, Special Pay UDCs, DEOs Grade B and C as all these cadres have been merged into the cadre of Sr. Tax Assistants. Similarly requirement of AOs should include the requirement for work earlier handled by OS as the cadre of OS has been merged with cadre of AO. Similarly, all POs/Examiners/Inspectors will be designated as Inspector only. A chart showing the merger/abolition of cadres and increase/decrease in the no. of posts is enclosed.

(iii) While indicating requirements for the Zone, it may be ensured that where no. of posts have been reduced the requirement of staff has to reduce proportionally for the Zone. For example, the number of Inspector level posts having been reduced from 21222 to 18053, the Zones' sanctioned strength has also to be reduced in the same ratio. Similarly where posts have been increased (for example, superintendents and Appraisers), the requirement can be increased proportionately. In case of any deviation required in any Zone in this regard, full justification should be provided in a separate note. Since total no. of posts in any cadre cannot be more than posts approved for the country as a whole, the Chief Commissioners should consider the requirements projected work carefully. It may please be noted that purpose of this exercise is to allocate the staff already sanctioned to Zones/Commissionerates and not to consider sanction of additional staff. Proposals for additional staff should not therefore be made while furnishing the information.

(iv) Staff required for the Chief Commissioners' office and for Commissioner(Appeal)/Adjn. should also be adjudged keeping in view the modern tools of administration available.

(v) Wherever requirement of any cadre for the new Zones/Commissionerates exceeds the staff managing the same jurisdiction at present, the proposal for additional staff should be supported by the study conducted by the S.I.U. If in any formation S.I.U. has recommended

reduction in staff, the same should also be indicated.

3. Proforma III seeks information on staff sanctioned and required for handling Customs work falling in the jurisdiction of Central Excise Commissionerates under the proposals for re-organization forwarded by the Chief Commissioners. Requirement of staff projected must be supported by the statistics of work being handled by the Customs Division/ICD/CFS etc. The staff sanctioned/required this work should not be included in the data provided in proforma I and II and a confirmation to this effect recorded in the proforma. However, if no staff has been sanctioned for customs work earlier and the work was being managed by staff sanctioned for Central Excise work, this may be indicated in this proforma and staff sanctioned should be included in proforma I with suitable remarks. The staff required should be only with reference to designations which will be functional after implementation of the proposal.

4. In respect of each Commissionerate, the name of the cadre controlling Commissionerate should also be informed alongwith details of cadres controlled by them.

5. Since giving effect to the proposal of restructuring including promotions etc., is dependant on the information being sought, you are requested to ensure that carefully compiled information complete in all respects is made available within a week's time."

The chart is omitted.

67. On 03.01.2002, the following communication is seen sent:

"I am directed to refer to Board's letter of even number dated 10.09.2001 imposing a ban on holding of DPCs for Group 'B' & 'C' posts. The Board have received representations against the aforesaid ban on promotions.

2. The matter has been considered by the Board and it has been decided that wherever the DPCs may also be filled up. Where the DPCs have not been held, the DPCs may be held on the basis of re-revised strength i.e. the strength existing before the cadre restructuring and the resultant vacancies may be filled up.

3. Action may be taken on priority basis under intimation to the Board."

68. In proceeding dated 02.04.2002, promotion was effected to the post of Tax Assistant from the post of U.D. Clerk. According to Shri C.U. Singh, this was by way of filling-up the posts in terms of Order dated 03.01.2002. Further proceedings to be noticed is dated 05.06.2002. Therein reference is made to 19.07.2001 while notifying the revised sanctioned strength at different levels consequent to approval of cadre restructuring. It is further stated that the allocation of staff to the zones Commissionerates,

Director General and Directorate at different levels has been decided by the Board and approved by the Government as detailed in the enclosed folder. The allocation superseded all earlier Notifications in respect of Cadre categories in the enclosed folder separately. All the Chief Commissioners and other Head of Departments were required to carefully study the detail of reorganisation of the formation and to bring to the notice of the Board any discrepancy that may require review or may not have been taken into account for corrective action. Cadre control was to vest to the respective Commissioners in the particular zones and it is further stated that the ban on direct recruitment was to continue till 31.12.2002. The ban was to be applicable only to posts including in the cadre restructuring. Finally, in paragraph 8, it is stated as follows:

“The detailed instructions/orders/recruitment rules governing the manner of filling up of the vacancies at all levels will be issued separately. No vacancy in respect of the posts included in the cadre restructuring should be filled up till such time as further orders are issued.”

(Emphasis supplied)

69. It may be noted at once that though there is case for the respondents that the ban on restructuring was lifted by letter dated 03.01.2002, such contention appears to be categorically belied by the prohibition against filling-up of any vacancy in respect of posts included in the cadre restructuring, till such time, as further orders are issued. Though vacancies may have arisen, which could be filled-up under the 1979 Rules, this appears to be a case where a conscious decision was taken not to fill-up the vacancies in the wake of the restructuring process which was undertaken by the Government. Though a contention is taken that the post of Inspector is not part of the cadre restructuring, we are of the view that there may not be merit in the said contention. The post of Inspector emerged as re-designated post in place of the erstwhile post of Inspector/Preventive Officer/Appraiser. More importantly, that it was a part of the restructuring, is clear from the fact that the number of posts fell from a little over 22000 to a little over 18000. Therefore, the post of Inspector was a post which can

be treated as included in cadre restructuring. The taboo against filling-up of the vacancy, is clearly reflected in the communication dated 05.06.2002. On 26.6.2002, urgent direction is issued to hold DPC to the post of Superintendent of Central Excise and Superintendent of Customs. Therein, it is, *inter alia*, stated as follows:

"I am further directed to say that while drawing up the panel for promotion to the cadre of Superintendents of Central Excise from the Grade of Inspectors of Central Excise and Superintendents of Customs (Preventive) from the grade of Preventive Officers, the vacancies arising on account of the cadre restructuring scheme as also regular vacancies arising on account of retirement etc., during the year 2002-2003 may be taken into account after observing the procedure for DPC etc. However, posts indicated in the cadre restructuring scheme shall be filled up only after necessary orders are issued by the Ministry in this regard.

I am also directed to draw your attention to this Ministry's letter F.No.A. 32012/9/89-Ad.II B dated 26.06.1990 (Copy enclosed) and to say that this year orders of promotion instead of being issued on the last working day of June may issued on the 1st working day of July 2002."

70. The next letter to notice is the letter dated 19.09.2002. Therein, after referring to letter dated 26.06.2002, it is stated that it was decided to initiate the process for filling-up vacancies that have arisen on account of cadre restructuring in all remaining cadres up to Grade 'B'. It was directed to ensure that apparently DPC was convened in respect of all Grades for the change of number of posts, as also Grades, where revised Recruitment Rules have been circulated. On 23.09.2002, promotion orders in respect of Superintendents were allowed to be issued. On 28.10.2002, the Draft Recruitment Rules for Group 'C' post of Inspector and Senior Tax Assistant was communicated to all Chief Commissioners, both, Customs and Central Excise. It was further stated that Notifications notifying the Rules will be issued shortly. Direction was given to start the process of DPC. Thus, it could be said that by the issuance of this communication, the Government decided to proceed with the recruitment by promotion to the post of Inspector.

71. A perusal of the communication dated 28.10.2002, reveals the following:

All chief Commissioners were favoured with Draft Recruitment Rules for the Group 'C' post of Inspector (Central Excise and Land Customs), Inspector (Examiner) and Inspector (Preventive Officers). Besides the Draft Recruitment Rules for the post of Senior Tax Assistant, as approved by the Ministry, was also dispatched to the Chief Commissioners. It is specifically stated that the Notifications, notifying the Rules, will be issued shortly. The Chief Commissioners were told that they may initiate necessary action to process for DC (apparently DPC). The next sentence is of crucial significance. It reads as follows:

"You may however await issue of notification before issue of any order of promotion based on these Rules."

72. This communication establishes further, the following aspects:

Restructuring the post of Inspector, contemplated under the order dated 19.07.2001, had not yet come into being. This is because there is reference to the post of Inspector (Central Excise & Customs), Inspector (Examiner) and Inspector (Preventive Officer). If the post of Inspector, as contemplated under the Order dated 19.07.2001, had already come into existence with the issuance of the Order dated 19.07.2001, there was no occasion to continue to refer to pre-designated posts from which the post of Inspector emerged.

73. Still further, what was obviously contemplated was that the post of Inspector was to be filled-up after the process of restructuring was over. In other words, the Rules relating to Inspector and the Rules relating to recruitment of Senior Tax Assistants, was to be brought into force simultaneously. This conclusion appears inevitable from the circumstance that the Chief Commissioners were directed to await issuance of Notification notifying the Rules before orders of promotions were

issued based on the Rules which were the Draft Recruitment Rules. It is not indicated in the Order dated 28.10.2002 that promotion to the post of Inspector was to be made under 1979 Rules. What was, in fact, contemplated was that the process, viz., the holding of the DPC for the post of Inspector, was to begin and operationalised under the Draft Rules but the actual orders of promotion were to be issued only after the Rules were actually brought into force. The Draft Recruitment Rules for the Tax Assistant was also sent by letter dated 06.11.2002. By letter dated 14.11.2002, it is directed as follows:

"I am directed to refer to Minister's letter F.No.A-11013/01/2002-AdIV dated 19th September 2002 regarding holding of DPC's in all grade where Recruitment Rules exist, as also in grades where revised recruitment rules have been circulated. In terms of Para 2 of the said letter, it was directed to hold the DPC's by 30th September, 2002 and keep the list ready for issue. It was also clarified that promotion orders may only be issued on receipt of further directions from Ministry.

2. In view of the above, you are requested to issue the promotion orders in respect of remaining Group 'B', 'C' and 'D' posts as sated below:-

(i) promotion orders in respect of Sepoy, Havaladar, Head Havaladar, Tax Assistant, Senior Tax Assistant and Inspector of Central Excise/Preventive Officer/ Examiner of Customs may be issued on the basis of Recruitment Rules after allotment of GSR No by the Government of India Press, Wherever not yet allotted.

(ii) DPC in respect of Appraisers and Administrative Officer may be held on the basis of existing Recruitment Rules and promotion orders may be issued.

(iii) DPC in respect of remaining grades except DOS L-II may be held on the basis of existing Recruitment Rules and Promotion orders may be issued by 25.11.2002.

(iv) Promotion in the grade of DOS L-II may be made only after the new recruitment rules are circulated by the Ministry."

(Emphasis supplied)

74. In the Order dated 14.11.2002, it is specifically, *inter alia*, ordered that promotion orders in respect of the post of Inspector (Central Excise)/Preventive Officer/Examiner of Customs may be issued on the basis of the Recruitment Rules after the allotment of GSR Number by the Government of India Press. Thus, the green signal was given to go ahead with the issuance of promotion order for the post of Inspector, *inter alia*, based on the

Recruitment Rules, after the allotment of the GSR, which means the Notification of the Rules.

75. What actually happened was, however, as follows:

The Inspector Rules and the Senior Tax Assistant Rules were not published and brought into force on the same date. The Inspector Rules came to be finalised and published on 29.11.2002. It is brought into force on 07.12.2002. The STA Rules, though published on 16.01.2003, was brought into force on 20.01.2003.

WHEN CADRE RESTRUCTURING TOOK PLACE

76. The next question, however, which would arise as to when was the cadre restructuring actually effectuated. In this regard, we have already noticed the contents of the communication dated 19.07.2001. We have also pointed out the circumstances which tends to indicate that not only the Cabinet took a decision to bring about restructuring in the Central Excise and Customs Department in principle but evidencing an actual sanctioning of posts with immediate effect in various cadres. We have also

noticed how the Government has provided that in case of reduction in strength, as a result of the restructuring, persons holding posts in excess of the revised and reduced strength, were permitted to continue till their promotion or retirement, etc.. We have noticed the language used in Note 4 also. The time is now ripe for us to have a look at the Statutory Rules. The contention of the respondents and the finding of the High Court is that restructuring came into effect only with the issuance of the Statutory Rules in the case of Senior Tax Assistants on 16.01.2003, which was published in the Official Gazette on 20.1.2003. Therefore, the actual restructuring became a reality only on 20.01.2003, runs the argument of the respondents.

77. Inspector Rules, 2002 came into force on 07.12.2002. The Senior Tax Assistant Rules came into force with effect from 20.01.2003. In Column 12 to the Schedule to the 2002 Inspector Rules, which deals with how promotion is to be effected; Clause (a) contains, apparently, those categories, which were among the feeder categories under the 1979 Rules. In

fact, Clause (a) itself recites by selection from those candidates working in the pre-restructured cadre. No doubt, the words 'pre-structured' is added by Corrigendum in 2003. Clause (b) provides for selection from those candidates working in the restructured cadre. The third Feeder Category is to operate, failing the method of recruitment specified under clause(b). It is apposite that we notice, at this juncture, Note 1. For the purpose of convenience, it is recapitulated again. It reads as follows:

In case of recruitment by promotion/deputation/absorption, grade from which promotion/deputation/absorption to be made.
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Promotion: (a) By selection from those candidates working in the following restructured cadres:
Note 1: Promotion under Clause (a) above shall be only operative for a period of two years from the date on which the restructured cadres mentioned under Clause (b) above comes into existence.
The service rendered under the new grade in the restructured cadres shall be counted towards considering the eligibility for promotion under Clause (a) above.

78. It is strenuously argued before us on behalf of the respondents that Note 1 reveals the Legislative

intent that the feeder categories, mentioned in Clause (a), would be given the right exclusive in nature, thereby excluding those categories in Clause (b). This exclusive right, it is pointed out, was to last only for a period of two years. We may shift focus also to the STA Rules of 2003. We may advert to it as much may turn on its purport:

"5. Initial constitution.-(i) All the persons appointed on the regular basis at the time of commencement of these rules to the Grade of Assistant, Tax Assistant, Upper Division Clerk (Special Pay), Data Entry Operator Grade B' and 'C' shall be deemed to have been appointed as Senior Tax Assistants under these rules. The service rendered by them before commencement of these rules shall be taken into account for deciding the eligibility for promotion to the next higher grade.

(ii) Assistants (Rs. 5000-8000) and Data Entry Operator Grade 'C' (Rs. 5000-8000) are being redesignated as Senior Tax Assistants in the same scale of pay. Therefore, the Assistants and Data Entry Operator Grade 'c' shall be placed enblock senior to the other categories. However, their inter-se placement shall be done according to the date from which they had actually been appointed to these grades on regular basis subject to the condition that their inter se placement in their respective category shall not be altered.

(iii) The Data Entry Operator Grade 'B' (4500-7000) and Tax Assistants (4500-7000) have been placed in their higher scale of 5000-8000 and they shall be placed below the Assistant and Data Entry Operator Grade 'C' and their inter-se-placement shall be fixed in accordance with the date of regular appointment to the respective grade subject to the condition that their inter-se-placement in respective category shall not be disturbed.

(iv) Upper Division Clerk with special pay shall be placed below Assistant, Data Entry Operator Grade 'C', Data Entry Operator Grade 'B' Tax Assistants.

(v) The present employees would be required to pass the required or suitable departmental examination, as specified by the Competent Authority, from time to time, in Computer application and relevant procedures within two years falling which they would not be eligible for further increments."

79. We may notice that under the 2003 STA Rules, Rule 5 contemplated the initial constitution of the Cadre of Senior Tax Assistants. It was to consist of the former categories of Tax Assistant, U.D. Clerk (Special Pay), Data Entry Operator Group 'B' and 'C'. The future method of recruitment was by way of 100 per cent promotion from Tax Assistants, as provided in Column 12 of the said Rules. It is also necessary

to notice Rule 4 of the Tax Assistant Rules 2003, which was brought into force with effect from 05.05.2003.

"4. Initial constitution:- (1) The person appointed on regular basis and holding the post of Upper Division Clerk and Data Entry Operator Grade A on the commencement of these rules shall be deemed to have been appointed as Tax Assistant under these rules and the service rendered by such persons in the respective posts before commencement of these rules shall be taken into account as regular service rendered on the post of Tax Assistant for the purpose of promotion etc.

(2) The person holding the post of Data Entry Operator Grade-A appointed under these rules as Tax Assistant, shall, within two years, from the date of such appointment as Tax Assistant, pass the Departmental Examination as conducted by the competent authority, failing which he shall not be entitled to get any further increment.

(3) Any person, who holds a post of Lower Division Clerk on regular basis and falls within the seniority list as determined by the appointing authority at the commencement of these rules shall, on passing the Departmental Computer Proficiency examination conducted by the appointing authority, be deemed to have been promoted with effect from date of passing such examination on the post of Tax Assistant.

(4) The Upper Division Clerks and Data Entry Operator Grade -A shall be

placed en-block senior, and their inter se placement shall be fixed in accordance with the date of regular appointment to the respective grade subject to the condition that their inter se placement in the respective grade shall not be disturbed.

(5) Lower Division Clerks shall be placed below Upper Division Clerks and Data Entry Operator Grade -A."

80. The dispute, as to when the restructuring was completed, must be resolved on a conspectus of the decision dated 19.07.2001 and the subsequent decisions, as expressed in communications which we have adverted to, and the combined effect of all these Rules.

81. Now, turning back to Note 1 to the 2002 Inspector Rules, we notice that promotion under Clause (a) was to be operative for a period of two years from the date on which the restructured Cadre in Clause (b) comes into existence. If the interpretation sought to be placed by the appellants is accepted, and we are to hold that the restructured cadre of Senior Tax Assistant came into force with effect from 19.07.2001, the result would be that promotion under Clause (a) would be limited by a period of two years

from 19.07.2001. In other words, no promotion could be ordered from the Feeder Category mentioned in Clause (a) in Column 12 of the 2002 Inspector Rules after 18.07.2003. This also means that promotions could be, therefore, effected during the period commencing from 19.07.2001. This produces the anomalous result that promotions are to be countenanced under the 2002 Rules, retrospectively from 19.07.2001. What is more, according to the appellants, promotions were banned during the period. This, in our view, completely militates against the idea that the restructured Cadre came into being from 19.07.2001. We are not oblivious and we have indeed expressly articulated the circumstances from communication dated 19.07.2001 which probablised the appellant's contention that restructuring became a reality from 19.07.2001. But, we, at this juncture, must also notice that the actual distribution of posts in different formations was postponed. It may not be in apposite, at this juncture, to also notice another factual aspect. There is a definite case for the respondents that the Data Entry Operator Grade

'B' and 'C' continued as such and they were only re-designated as Senior Tax Assistant or Tax Assistant on the enforcement of the 2003 Rules and not before such enforcement. In fact, it was also not seriously disputed before us that this was indeed the case on the ground. We may also find light from the STA Rules. Rule 5 declares that "all the persons appointed on regular basis at the commencement of the Rules in the Grade of Assistant, Tax Assistant, U.D. Clerk (Special Pay), Data Entry Operator Grade 'B' and Grade 'C', shall be deemed to have been appointed as Senior Tax Assistant under these Rules". No doubt, the Rule contemplated that the persons to be deemed to have been appointed as Senior Tax Assistant under the 2003 Rules, were the categories, which we have already indicated. What is more relevant is, they are referred to as the persons appointed at the commencement of "these Rules". The words used are "persons appointed". The intention appears to be to indicate that the persons were appointed and working on the commencement of the Rules, which is on 20.01.2003. It is those persons, who were referred

to by the designation, which were the posts which were held by them prior to the restructuring. In other words, appellants, who were working as Data Entry Operator Grade 'B', upon being promoted in the year 2000, were indeed persons who were appointed on regular basis as Data Entry Operator Grade 'B' as on 20.01.2003, when the Rules, admittedly, were brought into force.

82. We find further support for the view that the appellants became Senior Tax Assistant upon Rules being brought into force from the further limbs of Rule 5. Sub-Rules (ii), (iii) and (iv) deal with the issue of *inter se* seniority of the different erstwhile restructured categories from which the designated category of Senior Tax Assistant was born. Those Assistants, who were drawing salary of pay scale of 5000-8000, and Data Entry Operator Grade 'C', drawing the same pay scale, were re-designated as Senior Tax Assistants in the same scale. They were to rank at the top of the seniority list of the newly created posts of Senior Tax Assistants. Just below them were put the categories of Data Entry Operator

Grade 'B' and Tax Assistants, both drawing the pay scale of 4500-7000, and they have been placed in the higher pay scale of 5000-8000 and they were to be placed below the Data Entry Operator Grade 'C'. Similarly, at the bottom of the pyramid, there is the post of Upper Division Clerk with special pay, who were to be placed below all the above categories as aforesaid.

83. We also bear in mind that the language used in Note 1, in Column 12 of the 2002 Inspector Rules. It provides that the promotion in Clause (a) was to be operative for a period of two years from the date on which the restructured cadres, mentioned under Clause (b) above, comes into existence. Had it been the case where the restructured cadre in Clause (b) had already come into existence, by virtue of order dated 19.07.2001, the Law Giver would have used language indicating the past tense. The Law Giver, thus, contemplated that the restructured cadre in Clause (b), which includes cadre of Senior Tax Assistants, had not come into existence and it was to

come into existence. It came into existence, indeed, in the future, viz., on 20.01.2003.

84. We are, thus, of the view that on a consideration of the Government Orders and, more importantly, the Statutory Rules that the conclusion appears to be inevitable that restructured cadre actually came into force in the cadre of Senior Tax Assistant with the Rules being brought into force on 20.01.2003. Quite apart from the fact that this is the legal interpretation that flows, we are also supported by the fact on the ground that the appellants appeared to continue till after the Rules were brought into force with the designation as Data Entry Operators Grade 'B'.

A perusal of Rule 5(v) of the STA Rules 2003 would also show reference to 'present employees' and they were to pass the departmental examination 'within two years'. Failure was to result in their being rendered ineligible for future increments. Certainly, the period of two years would commence only from 20.01.2003. If so, the 'present employees', including the appellants continued as Data Entry Operator Grade

'B' till 20.01.2003. The view that the STA Cadre emerged only on 20.01.2003, is supported by official understanding, as reflected in proceedings dated 21-04-2003. The principle of *contemporanea expositio* is apposite in the facts.

APPELLANTS RIGHTS AS SENIOR TAX ASSISTANTS ON RESTRUCTURING

85. Having found that restructuring was effective from the date of the promulgation of the Statutory Rules in case of Senior Tax Assistant w.e.f. 20.01.2003, and also having found that there was a ban on carrying out promotions under the earlier Rules, as evident from a perusal of communications dated 10.09.2001, 03.01.2002 and 05.06.2002, and thus, it manifested a conscious decision on the part of the Government not to fill the vacancies in accordance with the earlier Recruitment Rules, viz., 1979 Rules, the question arises as to what is the nature of the right which the appellants had. It must be remembered that the appellants filed the Original Application before the Tribunal taking exception to the Notice dated 05.11.2002. Now, let us analyse the reasoning of the Tribunal with reference to the case

set up by the parties. The case of the appellants must be understood as follows:

- The restructured cadre has come into existence on 19.07.2001.
- Promotion to the post of Inspector could be made only from the restructured cadres while so the draft recruitment rules came to be issued on 28.10.2002.

86. In the said Rules, preference was sought to be given to the pre-structured cadres, which included the old tax assistants with a certain number of years. It was Clause (a) to Column 12 of the 2002 Inspector Rules, which was alleged as unconscionable and violative of Articles 14 and 16 of the Constitution of India. It was the further complaint that Note 1 in Column 12 of the 2002 Inspector Rules was also flawed insofar as the persons in the pre-structured cadre, viz., those falling in Clause (a), were enabled to steal a march by being promoted, taking into consideration their service in the new Grade in the restructured Cadre for the eligibility for promotion under Clause (a). The only Cadre, which

was eligible for promotion after the order dated 19.07.2001, was the restructured Cadre, including the Cadre of Senior Tax Assistants, ran the argument. 87. The Tribunal proceeded on the basis that the restructuring became complete with the issuance of the order dated 19.07.2001. It must be noted that the Original Application came to be filed on 19.11.2002 at a time when the Inspector Rules had not even been finalized as the Rules came to be finalized only on 29.11.2002 and, in fact, brought into force till later on 07.12.2002. Undoubtedly, the Note contemplated, giving persons in Clause (a), viz., those falling in the pre-restructured cadre, the benefit of taking into consideration the service rendered in the restructured Cadre, for being promoted as Inspector. The persons falling in the restructured Cadre, were not conferred with such advantage. However, by the time the Original Application came to be heard, the Senior Tax Assistants Rules 2003 came into force with effect from 20.01.2003. Under Rule 5 of the 2003 Rules, the persons working as Data Entry Operator Grade 'B', *inter alia*, stood re-designated as Senior Tax

Assistants and they were also given the benefit of reckoning the past service and calculating the qualification of experience of two years under the Inspector Rules, 2002. In fact, the Tribunal has also taken note of the 2003 Rules. Both the persons in the pre-structured cadre and those in the restructured cadres, were, by virtue of Note 1 to Column 12 to the 2002 Rules and Rule 5(i) of the Senior Tax Assistants Rules 2003, respectively, were given the benefit of counting service as provided therein. The Tribunal, in fact, has gone on to find that the Senior Tax Assistants under Rule 5(i) of the 2003 Rules were entitled to reckon their service as Data Entry Operator Grade 'B' for eligibility for promotion as Inspector. The Tribunal goes on to find that the unified restructured cadre of Senior Tax Assistants alone would be eligible for promotion as Inspector. The integrated seniority is to be worked out in terms of Rule 5 of the 2003 Senior Tax Assistant Rules. This is based on the premise that with effect from 19.07.2001, the restructuring of Senior Tax Assistant came into force and all the earlier Cadres stood

merged. We notice also the following findings by the Tribunal:

The Tribunal noticing the contention of the respondents that the selection process initiated on 05.11.2002 has been finalized from categories other than of the employees i.e. Data Entry Operator Grade 'B' and 'C' and the existing vacancies were filled-up, it was, thereafter, found by the Tribunal as it is now found that the appellants were also eligible, the Original Application was to be disposed of by directing the appellants be considered eligible for promotion after considering the service rendered by them as Data Entry Operator Grade 'B'. The Original Application was accordingly disposed of directing the appellants be considered for promotion based on the years of service on the post of Data Entry Operator Grade 'B' after allowing them to appear for the examination contemplated in Note 2 under the 2002 Inspector Rules. The further relief granted was to direct to

promote them if they were successful and to fix the seniority based on Rule 5. The declaration which was sought for by the appellants in paragraph 8(c) of the Original Application, which we have already extracted, was granted.

88. Thus, the Original Application has been allowed in part. It is necessary to notice that the effect of granting the said relief and also the effect of not granting the reliefs in paragraph 8(b). Granting of the Relief 8(c) would mean that this Court would also have to accept that under the 2002 Inspector Rules, it is only the restructured Cadre, which would be entitled for promotion to the cadre of Inspector. To put it differently, the persons falling in Category (a), which corresponds to feeder categories, under the 1979 Rules, would not be entitled for promotion as Inspector.

89. It is now necessary to look at their prayer, i.e., 8(b) and the effect of not granting any relief thereunder. Prayer 8(b) was sought by the appellants to set aside the Recruitment Rules communicated vide

28.10.2002, as confirmed vide Gazette of India Notification dated 29.11.2002, incorporating the unconscionable conditions under Clause (a) and Note 1 of Column 12 of the 2002 Inspector Recruitment Rules. This prayer is also based on the restructuring process, having effect from 19.07.2001. The Tribunal has not granted the relief in paragraph 8(b) of the Original Application. This means that the persons in Category (a) of Column 12 of the Inspector Rules, cannot be affected. The result is that it exposes the fallacy in grant of Relief 8(c). In fact, there are two basic flaws. In the first place, as we have noticed, the restructuring did not come into effect on issue of communication dated 19.07.2001. The restructuring came into effect only with the issuance of Rules, for reasons, which we would have already explained. This by itself takes away the entire basis of the Tribunal's Order. Secondly, the Tribunal has not declared the Statutory Rule infirm, which was the specific relief sought for by the appellants in Relief 8(b). In other words, Clause (a) of Column 12 and the Note, in the 2002 Inspector Rules impugned on

the one hand, continues on the Statute Book, whereas, the declaration is purportedly granted under paragraph 8(c), which necessarily involves declaring that only persons re-designated under the restructured cadres in Clause (b) as Senior Tax Assistants, *inter alia*, would be entitled to be considered for promotion as Inspector of Central Excise and Customs. In fact, the Order of the Tribunal at Chandigarh also did not involve granting any exclusive right to the persons in the restructured Cadre falling in Clause (b). The decision of the Bombay High Court also does not reflect any such reasoning. It is well-settled that when Statutory Rules are challenged, they are upheld, or if warranted, declared *ultra vires* or read down, if possible. The Order of the Tribunal is specific that what is granted, is the relief contained in paragraph 8(c) of the Original Application. Resultantly, Clauses (a) and (b) continued to be on the Statute Book. The Tribunal has rather allowed the Original Application partly and found that the appellants are also entitled to be considered for

promotion as Inspector. In Arriving at this conclusion, the Tribunal has drawn support undoubtedly from the views expressed by the Central Administrative Tribunal, Chandigarh, the Central Administrative Tribunal, Madras and the High Court of Bombay.

WHETHER STA COULD ADD SERVICE AS DATA ENTRY OPERATORS AND WHETHER PERSONS IN CLAUSE (A) HAD AN EXCLUSIVE RIGHT FOR TWO YEARS?

90. What is to be the eligibility condition flowing from the requirement in Clause (b) that Senior Tax Assistants should have put in two years' service in the Grade. It is the contention of the respondents that what is contemplated by the Law Giver is that only persons mentioned in Clause (a) to Column 12, who were incidentally persons, who fell in the feeder category under the 1979 Rules, are to be considered for filling-up vacancies for a period of two years, and it is therefore their contention that the right of persons mentioned in Clause (b) arises only after the expiry of two years, and till then, the persons, who are qualified in Clause (a), are alone to be considered during these two years. It is also seen

that the use of the word 'Grade' is referred to, to contend that appellants, who were working as Data Entry Operator Grade 'B', were not in the same Grade, in terms of the pay-scale to which they became entitled upon the restructuring coming into effect w.e.f 20.01.2003. In other words, appellants, who were on a lower pay-scale than the Senior Tax Assistants, and thus only after 20.01.2003, when the actual restructuring became a reality, the appellants would commence working in the Grade, meaning the post with the scale of pay attached to the post of Senior Tax Assistant.

91. On the other hand, the case of the appellants is that a perusal of the Rule 5 of Senior Tax Assistant Recruitment Rules, 2003, would show that the appellants were entitled to take into consideration the service which was rendered by them prior to 2003. We also notice another aspect, viz., there is the case for the respondents that Note 1 to Column 12 contemplates that the service rendered by persons, falling in Clause (a) in the restructured cadre, could be considered for the purpose of calculating

the period required under Column 12. Therefore, an attempt is made to contend that the provisions of Rule 5 must also be understood in the said vein. Let us look at the issue with concrete examples:

- (i) An U.D. Clerk is eligible to be considered for promotion as Inspector under Clause (a). He has to, however, put in certain number of years.
- (ii) The U.D. Clerk, who has less than requisite service as on 20.01.2003, in order that he be considered for promotion as an eligible person under Clause (a), it is quite clear that he can add the service after 20.01.2003 as Senior Tax Assistant to the previous service and make a claim for being considered. The latter part of Note 1 to Column 12, in our view, is only to clothe persons falling in Clause (a) with the right to add the service in the restructured Cadre. But that is not to say that Rule 5 of the Senior Tax Assistant Recruitment Rules, 2003, has the same object.

92. Coming back to the issue, as to whether a person falling within the four walls of Rule 5 of the 2003, Rules can stake a claim for counting the previous service prior to 20.01.2003, we are of the view that the appellants are right that they are entitled to count the previous service. The words used in Rule 5 are unambiguous and clear. In this regard, we must also deal with the yet another contention based on the differences between Rule 5 of the Senior Tax Assistant Recruitment Rules, 2003 and Rule 4 of the Tax Assistant Rules, 2003. It may be true that there is some difference but, in our view, the words used differently in the two provisions, are not meant to take away the right, which was conferred on persons who were on restructuring to be designated as Senior Tax Assistants and Tax Assistants.

93. In Rule 5, what is contemplated is that the service rendered by Data Entry Operators Grade 'B' and 'C', *inter alia*, before commencement of the Rules is to be taken about for eligibility for promotion to the next higher grade. No doubt, in Rule 4, of the Tax Assistant Rules, the Rule Maker has become more

articulate. They have referred to the words like 'respective post', before commencement of Rules and 'regular service' which expressions are conspicuous by their absence in Rule 5 of the Senior Tax Assistant Rules. Better wisdom prevailed on the Law Giver in the course of few months to attain clarity in thought and expression but we would not be gleaning the intention of the Law Giver, if we were oblivious to the context and the object with which the entire exercise of restructuring was carried out. They would also amount to introducing an element of discrimination between the Senior Tax Assistants and the Tax Assistants in the conferring of benefits. Of foremost importance is that the view we have taken is warranted by even the plain words used in Rule 5. Rule 5 clearly indicates that the service which was rendered by a Data Entry Operator Grade 'B' and 'C', *inter alia*, prior to the commencement of the Rules, would be considered for promotion. This leaves us in no doubt that the intention was to allow the Data Entry Operator both Grade 'B' and 'C', *inter alia*, to tag their previous service that is prior to

20.01.2003 for the purpose of calculating the requisite period of service under the 2002 Inspector Rules. It would appear that what was contemplated was that the Inspector Rules and the STA Rules would be brought into force at the same time. If it had so happened, the following consequences would have followed. Not only would STA would be a feeder category but STA would have been able to count their previous service as Data Entry Operator Grade 'B', *inter alia*. Still further, under Note 1, promotion under Clause (a), was to be operative for a period of two years, from the date the restructured cadre, under Clause (b), was to come into existence. Apart from indicating that the restructured cadre 'was to come into force' and, therefore, it had not come into force as on 19.07.2001 as contended by the Data Entry Operators, the promotion from Clause (a) being predicated on the point of time when the restructured cadre came into force, if the STA Rules were also brought into force from 07.12.2002, the service rendered by persons under the restructured Grade

could have been availed of by persons in Clause (a) from 07.12.2002.

94. As regards the argument that under the 2002 Inspector Rules, persons in Clause (a) were given an exclusive right to be promoted for a period of two years, we see little merit in the same. Clause (c) of Column 12 provides for promotion from the categories thereunder, in the absence of persons falling in Clause (b). No such rider is found in Clause (b). If the STA Rules had been brought into force on 07.12.2002, then, it is clear that adding two years as Data Entry Operator Grade 'B', the appellants would certainly be eligible, particularly, keeping in mind the intent in Order dated 28.10.2002. There can be doubt that nothing stands in the way of appellants and others similarly situated being considered from 20.01.2003 by adding the service as Data Entry Operator Grade 'B'. Both, persons in Clause (a) and persons in Clause (b), subject to being possessed of qualifications, could compete for the vacancies. The right of those in Clause (a), would come to an end from 19.01.2005.

95. The effect of STA Rules, 2003 coming into force only on 20.01.2003 qua vacancies that existed prior to 20.01.2003, the effect of promotion made from other categories, and the direction by the Tribunal to consider appellants for promotion and apply Rules as to seniority.

96. There can be no doubt that the STA Rules came into effect on 20.01.2003. The restructured cadre of STA became a reality from 20.01.2003.

97. The problem, however, arises as what is to be done qua vacancies of Inspector which were purportedly filled-up as on 20.01.2003 pursuant to Notice dated 05.11.2002 which was impugned in O.A. 1362 of 2002. The Tribunal has not interfered with the notice dated 05.11.2002 but it has found that it was not in accordance with the Rules (apparently Inspector Rules 2002 which superseded the 1979 Rules). But this is again premised on the restructuring becoming a reality with effect from 19.07.2001. This, we have found to be erroneous.

98. The Tribunal notices the contention of respondents that selection has been finalised for

categories other than Data Entry Operator Grades 'B' and 'C' and existing vacancies were filled-up. Thereafter, the Tribunal, on the basis that it found appellants were also eligible, directed appellants to be considered taking into consideration their service as Grade 'B' and with opportunity to take the exam. If they were found successful and selected as Inspector, suitable seniority was to be assigned based on Rule 5.

99. Here, it is necessary to notice that persons in Clause (a), under the 2002 Rules, could be promoted for a period of two years from the date the restructured categories under Clause (b) came into force. Thus, the promotion involving 2002 Rules from Clause (a) could be for a two year from 20.01.2003 as the restructured category came into force only on 20.01.2003, even according to the respondents. Thus, for both categories in Clauses (a) and (b) (STAs), their eligibility under 2002 Rules, commenced only from 20.01.2003.

100. If so, the question would be the effect of promotion already made as noted by the Tribunal

itself. As on 05.11.2002, the 1979 Rules governed promotions. The status of the draft Recruitment Rules is no longer *res integra*. While, promotion can be based on draft Recruitment Rules, it cannot be done, if the draft Rules are in the teeth of existing Statutory Rules. In this regard, we may notice the following discussion in Union of India through Govt. of Pondicherry and another v. V. Ramakrishnan and others¹⁰:

"28. Valid rules made under proviso appended to Article 309 of the Constitution operate so long the said rules are not repealed and replaced. The draft rules, therefore, could not form the basis for grant of promotion, when Rules to the contrary are holding the field. It can safely be assumed that the principle in Abraham Jacob; (1998) 4 SCC 65 : 1998 SCC (L&S) 995, Vimal Kumari; (1998)4 SCC 114: 1998 SCC(L&S) 1018 and Gujarat Kishan Mazdoor Panchayat; (2003)4 SCC 712 : 2003 SCC (L&S) 565 that draft rules can be acted upon, will apply where there are no rules governing the matter and where recruitment is governed by departmental instructions or executive orders under Article 162 of the Constitution."

101. The Tribunal granted relief by giving the declaration under 8(c), which we have found

10 2005(8) SCC 394

unwarranted. The High Court has found that regarding the vacancies prior to 07.12.2002, it is to be filled-up as per the 1979 Rules.

102. Thus, it is clear that vacancies were filled-up as per notice dated 05.11.2002 from persons falling under Clause (a), who corresponded to the feeder category in the 1979 Rules. The appellants have not laid any challenge to the Order of the Tribunal.

103. It is to be remembered that the ban on direct recruitment was to come to an end on 31.12.2002. There were 242 vacancies of Inspectors in Hyderabad Commissionerate. It is true that under letter dated 28.10.2002, and even read with letter dated 14.11.2002, what was contemplated was promotion under the draft Recruitment Rules for Inspector and STA. Promotion orders were to be made only after GSR Number were made for the Draft Rules, meaning thereby, after it was finalised. They were intended, as already found, to be operated at the same time, thus, rendering both categories in Clauses (a) and (b), to be considered. We are of the view that having regard to the fact that vacancies were not filled-up,

as can be seen from communications dated 10.09.2001 and 05.06.2002, in the light of the restructuring that took place in the Department, it would appear that a conscious decision was taken to not fill-up the vacancies arising from the restructuring based on 1979 Rules. Instead, communication dated 28.10.2002 clearly would show that the vacancies were to be filled-up, based on the proposed new Recruitment Rules. This being the case, the High Court was in error in proceeding on the basis that the principle in Y.V. Rangaiah (supra) would apply.

104. Till 07.12.2002, the STA was not even in Feeder Category. We have also held that the STA Cadre is born on 20.01.2003. There is a case for the respondents that the ban on direct recruitment (which is also a method of appointment) was to come to an end. There was a need to have Inspectors in a larger number of vacancies. The STA Cadre could not have been used to fill the vacancies. The finding that from 19.07.2001, the restructured Cadre came into being, is unsustainable. In such circumstances, though it may be true, intention was to fill-up the

vacancies after both sets of Rules were operationalised, promotions were made. As to whether it is legal, the answer can be that promotion, as per extant Rules, given in vacancies prior to the new Rules, is recognized. This is not a case where the Authority was denying promotion to vacancies based on the earlier Rules. We also notice that based on such promotion, further promotions have been given. The appellants were directed to be considered for vacancies, which were filled-up after. We cannot, in the circumstances, be persuaded to hold that the Tribunal was right in directing the respondents to revise the seniority *qua* promotion made earlier.

LEGALITY AND CORRECTNESS OF HIGH COURT DIRECTING VACANCIES TO BE FILLED WHICH EXSISTED PRIOR TO 07.12.2002

105. The High Court has left open the question about entitlement to promotion to vacancies after 07.12.2002. It has directed all vacancies, which are prior to 07.12.2002, to be filled-up as per the 1979 Rules. While, we agree that the STA cadre was born on 20.01.2003, clearly, the whole purpose was to simultaneously operate the Rules, both relating to

Inspector and STAs. This would have resulted in STA being considered with the experience they had as Data Entry Operator Grade 'B' also. This, as already noticed, was a case where the Authority clearly intended to fill-up the vacancies of Inspector under the new Recruitment Rules. However, the vacancies, which were filled-up, cannot be subjected to a review based on Rules relating to seniority in Rules 5(i) of the STA Rules, based on promotion orders on dates, when on the dates, on which the vacancies stood filled-up, the appellants were not even in the cadre.

106. But the High Court was not right in directing filling-up of vacancies prior to 07.12.2002, based on the 1979 Rules, as after the 2003 Rules came into force, going by the intention of the Authority, the right to promotion would be based on the new Rules, even if the vacancies arose prior to the new Rules. That is to say, when the High Court disposed of the matter, if any vacancy remained to be filled-up in the Cadre of Inspector, then, as the STA Rules had come into existence on 20.01.2003, the STAs armed with the right to add service as Data Entry Operator

Grade 'B', were entitled to be considered. However, it is here that the impact of the matter, having been pending in this Court for more than a decade, and, in the meantime, the judgment being implemented and further promotions being made, cannot be lost sight of, even in an Appeal, which is maintained by grant of Special Leave, as in this case. It is open to the Court to decline to interfere. We bear in mind the principles laid down by this Court in Taherakhatoon (D) By Lrs. v. Salambin Mohammad¹¹ and would not disturb the direction to fill-up the vacancies which arose prior to 07.12.2002, as directed.

VACANCIES OF INSPECTOR WHICH AROSE AFTER 07.12.2002

107. As noted, the High Court has left open the question about entitlement to vacancies after 07.12.2002. The STA rules came into force on 20.01.2003. The restructured cadre of STA came into force on that said day. We have already found that STAs are entitled to count their previous service as Data Entry Operators Grade 'B' for the purpose of promotion under 2002 Inspector Rules. Even, persons

¹¹ (1999) 2 SCC 635]

in Clause (a) of the 2002 Inspector Rules, would be entitled to be considered for promotion under 2002 Rules from the date on which the restructured cadre in Clause (b) came into force. Thus, both persons in Clauses (a) and (b)(STA Cadre) became entitled to be considered for promotion under the two sets of Rules with effect from 20.01.2003. Certainly, the appellants having worked as Data Entry Operator Grade 'B' are entitled to add the period of service as Data Entry Operators Grade 'B'. Thus, vacancies of Inspector, to be filled-up by promotion, must be filled-up by considering both on the basis of the seniority, under Rule 5 of the 2003 STA Rules. The appellants would be entitled also to be considered for promotion based on the same on the basis of the entitlement, as aforesaid.

CIVIL APPEAL NO. 1976 OF 2009

108. The appellants challenge the common judgment passed by the High Court in Writ Petition No. 2378 of 2005 and Writ Petition No. 45 of 2005. The appellants filed this Appeal with the leave of the Court as they were not parties to the Writ Petitions. The Writ

Petitioners, two each in the two Writ Petitions, were the four applicants (hereinafter referred to as 'the applicants') in O.A. 1040 of 2003 filed before the CAT, Hyderabad.

109. The case in brief, set up by the four applicants before the Tribunal, was as follows:

Applicant nos. 1 and 2 were appointed as Lower Division Clerk (L.D.) and they were working as such. Applicant nos. 3 and 4 were appointed as L.D. Clerks and were working as U.D. Clerks. Applicant nos. 1 and 2 set the claim for promotions as U.D. Clerk under the Recruitment Rules of 1979. Applicant nos. 3 and 4, on the other hand, claimed promotion as Tax Assistant under the said Rules. There is reference to the various orders, which we have already referred to in connection with the post of Inspector, including order dated 19.07.2001. It is the further case that the respondents who, it may be noted, were official respondents, had conducted DPC for all other cadres upto Inspectors and issued promotion orders. Only with regard to the

post of Inspector, promotion orders were not issued before 31.12.2002 in view of the stay passed in O.A. 1362 of 2002. The stay was vacated on 31.12.2002 and the promotion orders were issued on the same day. It is further stated that promotions were given to the extent of 214 on 31.12.2002. Due to the delay, U.D. Clerks were not being considered for promotion as Tax Assistants and L.D. Clerks for U.D. Clerks. There is discrimination. Meanwhile, new Recruitment Rules, i.e., STA Rules 2003 and Tax Assistant Rules 2003, which we have already referred to, have come into force in the process of restructuring and re-designating of the posts. The said Rules are prospective in nature. The old Rules prevailed till the new Rules came into force. Even if the DPC is conducted after 31.12.2002, the vacancies that will be considered would be only those which have arisen on or before 31.12.2002. The restructuring cannot take away the accrued rights. They sought promotion as per the old Rules. A direction was sought to

promote them under the Rules as U.D. Clerks and Tax Assistants from the date of their eligibility and availability of vacancies with all consequential benefits.

110. In their reply, the stand taken by the respondents to the O.A. was as follows, *inter alia*:

Since restructuring was directed, it was further directed that no vacancy included in the restructuring, should be filled-up. The STA Rules 2003 and the Tax Assistant Rules 2003 came into force. On the publication of the said Notification of the STA Rules of 2003 on 20.01.2003, further promotions were regulated as per the Notification. Under the Tax Assistant Rules 2003, under Section 4, all the U.D. Clerks were deemed to have been re-designated as Tax Assistants and their promotions have to be regulated further in the said cadre only. As far as L.D. Clerks were concerned, under the 2003 Tax Assistant Rules, on passing departmental examination, they were to be deemed to have been promoted as Tax Assistants. Thus, the stand was

that Applicant nos. 1 and 2 would, on passing departmental examination under the 2003 Rules, become Tax Assistant, whereas, Applicant nos. 3 and 4, who were U.D. Clerks, were deemed to have been appointed as Tax Assistants in the very same pay-scale and they have to work out the promotions under the said cadre. Delay was attributed to court cases. It was denied that Department has not followed instructions in Order dated 19.07.2002 as all the vacancies, which arose before the restructuring, were duly filled-up under the old Rules. It is lastly pointed out that the chain vacancies in the Inspector cadre, upon filling up the post of 373 posts of Superintendent, were filled-up by following the Recruitment Rules notified on 29.11.2002 superseding the earlier Recruitment Rules. Filling-up of the post was done by from those candidates working in the pre-structured cadre. The consideration of the pre-structured cadre was to be operative for two years from the date on which the restructured cadre came into force. The

said promotions were part of restructuring following the amended Rules. The Draft Recruitment Rules were also notified for the restructured Cadre and, as such, the contention of the applicants that the said promotions were done following the earlier Rules and as such they were entitled to be considered based on the earlier Recruitment Rules, was pointed as untenable and liable to be rejected (Thus, it may be noted that the stand taken in this O.A. by the official respondents was the persons who were promoted as Inspectors, were give promotions in terms of their being part of the pre-structured cadre). The Tribunal dismissed the O.A. by Order dated 10.12.2004 after noticing the contentions and noticing the arguments based on Y.V. Rangaiah (supra) among the other decisions and found that there is no case for grievance. Noticing that with regard to one of the grievances, viz., need to pass ministerial staff examination, it was already redressed by deleting this requirement for promotion as Senior Tax Assistant. Through

proceedings dated 04.06.2001, the further contention relating to seniority was also dealt with by noticing that since the date of their entry into the feeder cadre would be one of the relevant factors and it had not been finalised, the applicants could represent against the seniority. It also drew support from another order passed by Tribunal in two other O.A.s dated 15.10.2004 (O.A.s 834-835 of 2009) and found that the issue involved was one and the same and agreed with it. It was found that the applicants had been placed on the higher pay-scale.

111. The High Court, in the two Writ Petitions, filed by the four Applicants, allowed the same drawing support from the judgment rendered in the case relating to the Inspectors and it found that promotions to the post of U.D. Clerk and Tax Assistant was to be made as per the old Rules in respect of the vacancies which arose prior to 05.05.2003. Substantially, the contention, appellants have taken, is based on Dr. Ramulu (supra). The contention is also that the intention and the

conscious decision of the Government was not to fill-up any vacancies by way of 100 per cent promotions until the amended Recruitment Rules were notified in the Official Gazette. There is also a case for the appellants that the order of the High Court runs counter to the judgment of the Bombay High Court and the orders of the Tribunal which we have already referred to in connection with other cases.

112. Under the 1979 Rules, on the basis of an amendment, the post of Tax Assistant (old) was incorporated by GSR 314 dated 12.07.1996. Thereunder, post of Tax Assistant (old) was included in the 1979 Rules. Promotion to the post was to be from the post of U.D. Clerk with three years' service subject to their passing a departmental exam with minimum marks of 40 per cent. There are other rights given to Senior Clerks under the Note. We have already extracted the Tax Assistant Rules 2003. It is the appellants case that it is established law that vacancies created due to cadre restructuring shall be filled in accordance with new Recruitment Rules. There is reference, in fact, to order dated

26.09.2005, implementing the orders of the High Court.

113. Under the 1979 Rules, the post of U.D. Clerk was to be filled-up 50 per cent from direct recruitment and 50 per cent by promotion. One of the feeder categories was L.D. Clerks with seven years' service which was relaxable up to five years. The second Feeder Category was Women Searchers recruited prior to 09.05.1975 with five years' combined service as Women Searcher and L.D. Clerk and who have passed departmental or promotional exam.

114. It may be noted that the 1979 Rules, insofar as it related to the post of U.D. Clerks and Tax Assistants, continued to remain in force even after the promulgation of the Inspector Rules, 2002 and the Senior Tax Assistant Rules. It is when the Tax Assistant Rules were made in supersession of the 1979 rules so far as it related to the post of U.D. Clerk and L.D. Clerk that the 1979 Rules ceased to apply. Thus, 1979 Rules continued to be in force in regard to the post of U.D. Clerk and L.D. Clerk till 05.05.2003.

115. Under the 2003 Tax Assistant Rules, brought into force w.e.f. 05.05.2003, as contended by the official respondents before the Tribunal, the persons working as U.D. Clerks, were to be established as initial cadre of Tax Assistants. So also, the L.D. Clerks, upon passing the examination, were to become Tax Assistants. The posts of U.D. Clerk and L.D. Clerk are Group 'C' posts. No doubt, the ban, which was imposed on direct recruitment, was to continue till 31.12.2002 (See Order dated 19.09.2002). By Order dated 28.10.2002, which we have already extracted, the draft Recruitment Rules for Inspector and Senior Tax Assistants was communicated and the process was to be set in motion and promotion was to await the issue of Notification.

116. As far as the post of Tax Assistant is concerned, by the order dated 06.11.2002, all the Chief Commissioners were forwarded the draft Recruitment rules for Tax Assistants which was approved by the Ministry. The Commissioners were to initiate necessary action for the process of DPC, etc. The issue of any order passed under the draft Tax

Assistant Recruitment Rules was to await issue of Notification of the said Rules. However, on 14.11.2002, it ordered, *inter alia*, that DPC in the remaining Grades except DOSL-222 may be held on the basis of the existing Recruitment Rules and the promotion orders issued by 25.11.2002.

117. As far as the post of L.D. Clerks and old Tax Assistants is concerned, the vacancies, which existed as on 06.11.2002, were to be filled-up under the existing Recruitment Rules (See letter dated 14.11.2002). The orders were to be issued by 25.11.2002. By 25.11.2002, the Tax Assistant Rules were not even finalised, leave alone brought into force. The Tax Assistant Rules came into force only by publication on 03.05.2003 and brought into force two days thereafter, i.e., on 05.05.2003. Going by letter dated 14.11.2002, the principle that vacancies must be filled-up in accordance with the existing Rules, would appear to apply. The intention of the Authority would also appear to be the same as is evident from Clause (3) of Order date 14.11.2002.

118. In such circumstances, there is no scope for any ambiguity and we are unable to find fault with the order of the High Court.

SUMMARY OF CONCLUSIONS IN C.A. NOS.1970-1975 OF 2009

119. Summary of Conclusions in C.A. Nos. 1970-1975 of 2009, is as follows:

- 1) Promotion to the post of Inspector was governed by the 1979 Rules till 07.12.2002.
- 2) Under the 1979 Rules, Data Entry Operators were not among the feeder categories for promotion as Inspector.
- 3) By 19.07.2001, Cabinet approved restructuring of certain posts including the post of Inspector. The number of posts of Inspector fell from a little over 22000 to a little over 18000. Thereunder, the post of Data Entry Operator Grade 'B' among other categories, were merged and the cadre of Senior Tax Assistants emerged. However, the restructured cadre of Senior Tax Assistants, did not come into being.
- 4) The restructured Cadre of Senior Tax Assistants was born with the bringing into force of the Senior Tax Assistant Rules 2003, on 20.01.2003.

Data Entry Operators Grade 'B', among other categories, were re-designated as Senior Tax Assistants under Rule 5.

- 5) The Inspector Rules 2002, was brought into force on 07.12.2002 superseding the 1979 Rules relating to Inspectors.
- 6) The post of Senior Tax Assistant, which was not among the feeder categories under the 1979 Rules, became one of the feeder categories for promotion as Inspector, under Inspector Rules, 2002 under Clause (b) of Column 12.
- 7) There was a ban of promotion to the posts of Inspector. This is clear from communications dated 10.09.2001, 03.01.2002 and 05.06.2002. The communication dated 28.10.2002 read with communication dated 14.11.2002, establish that the

Draft Recruitment Rules which were finalized on 29.11.2002 and brought into force on 07.12.2002 as far as Inspectors are concerned and Draft Recruitment Rules finalized and brought into force on 20.01.2002 as far as Senior Tax

Assistants are concerned, were to be basis for promotion to the post of Inspector. As per Order dated 28.10.2002, Departmental Promotion Committee (DPC), was to operate, based on the draft rules but no promotion orders were to be issued till the draft rules were finalized. With order dated 04.11.2002 even the promotion orders were permitted. The authority apparently contemplated simultaneous bringing into force of the Inspector Rules and the STA Rules.

8) The High Court was in error in holding that it has to be necessarily held that the vacancies which arose prior to the revised Recruitment Rules coming into force has to be filled-up under then existing Rules (the 1979 Rules) relying upon case law including Y.V. Rangaiah (supra). There was a conscious decision taken to not fill-up vacancies based on the restructuring, and what is more, letters dated 28.10.2002 and 14.11.2002 show that promotion to the post of Inspector was to be effected based on the new recruitment rules.

- 9) It is while so, that in the Hyderabad Commissionerate, by Notice dated 05.11.2002, persons falling under Clause (a) of Column 12 of the 'Draft Inspector Rules' who also corresponded to the feeder categories under the 'extant' Statutory Rules, the 1979 Rules, alone were called for selection as Inspector.
- 10) The benefit of reckoning service under Note 1 to categories in Clause (a) would be available only after the restructuring came into effect which was on 20.01.2003. This also indicates that the powers that be contemplated simultaneous operation of the 'Inspector Rules' and the Senior Tax Assistant Rules.
- 11) However, the Inspector Rules and the Senior Tax Assistant Rules were enforced with a gap of about six weeks.
- 12) The appellants even proceeding on the basis that they were to be treated as Senior Tax Assistant as on 07.12.2002, were not having the two years' experience required under the 2002 Inspector Rules.

- 13) With the 2003 Senior Tax Assistant Rules brought into force on 20.01.2003 under Rule 5(1), the appellants who were working as Data Entry Operators Grade 'B' could take into consideration their service as Data Entry Operators Grade 'B' for reckoning the period of two years stipulated under the 2002 Inspector Rules. In this regard, the finding of the Tribunal is correct. Appellants in O.A. have stated that they were promoted as Data Entry Operator Grade 'B' in April 2000. If so, their service as such would count and even as on 07.12.2002, they would have 2 years' service as contemplated under the 2002 Rules. As on 20.01.2003, certainly, they would be eligible to be considered for promotion as Inspectors.
- 14) The Tribunal not having granted prayer 8(b), the Draft Recruitment Rules, 2002 relating to Inspectors as finalized which was impugned remained intact. The Tribunal clearly erred in granting the declaration, as sought for in

paragraph 8(c), recognizing exclusive right to the restructured Cadre.

15) The restructuring Order under letter dated 19.07.2001, fructified and became complete and effective relating to the post of Senior Tax Assistant only on 20.01.2003. The findings to the contrary by the Tribunal stood correctly set aside by the High Court.

16) The Tribunal has not interfered with the promotion already granted to persons drawn from the categories other than the Senior Tax Assistant pursuant to Notice dated 05.11.2002.

17) Ban of Direct Recruitment was to end on 31.12.2002. In respect of promotion made earlier and not interfered with, the Tribunal could not have directed review of seniority based on later promotions as Inspector. The appellants cannot be given seniority based on later promotions *qua* promotions given, which cannot be termed illegal, when as on the date of earlier promotions, appellants were not even in the cadre. Promotion from Senior Tax Assistant could have been made

only 20.01.2003 at the earliest. Even the categories in Clause (a) could have been promoted under the 2002 Inspector Rules, vide Note 1 only for two years starting from the date the restructured Cadre in Clause (b) come into force, i.e., 20.01.2003.

18) We reject the contention that persons in Clause (a) of Column 12 of the Rules, who were also in the feeder categories for promotion under 1979 Rules, had an exclusive right to be considered for promotion for a period of two years.

19) While promotions can be made based on Draft Recruitment Rules, it cannot be so made, if the Draft Rules are in the teeth of existing Statutory Rules [V. Ramakrishnan and others (supra)]. In this case, however, under Orders dated 28.10.2002 and 14.11.2002, what was contemplated was processing by DPC under the Draft Recruitment Rules and issue of the promotions orders after the Draft Rules were finalized.

20) However, till 07.12.2002, under the 1979 Rules, being also feeder categories under the said rules,

those in Clause (a) Column 12, 2002 Inspector Rules could be promoted. While it may be contrary to what was contemplated by the Central Authority (as evident from letters dated 28.10.2002 and 14.11.2002) promotions were made, which could not be termed illegal. Even the Tribunal has not set aside the promotions.

- 21) The High Court has directed the filling-up of vacancies prior to 07.12.2002 as per the 1979 Rules. In this regard, having regard to the fact that the vacancies were not filled-up as per the ban, as can be seen from 10.09.2001 and 05.06.2002, and it was specifically contemplated under letter dated 28.10.2002 that vacancies arising from restructuring be filled-up, as per the new Recruitment Rules, the principle in Y.V. Rangaiah (supra) may not apply and it was the Rules as on date of filling-up the vacancies, that would count. As on the date of the High Court Order, the STA Rules 2003, had come into force on 20.01.2003. Thus, vacancies existing prior to 07.12.2002 and which were not filled-up,

must be filled-up by considering STA (Appellants) including their service as Data Entry Operators Grade 'B'.

22) But it is here that the impact of the matter remaining pending, and in the meantime, implementation of the judgment and what is more, further promotions being made cannot be lost sight of. We bear in mind the principle laid down in Taherakhatoon (D) By Lrs. (supra) and would not disturb the directions to fill-up vacancies which arose prior to 07.12.2002, as directed.

23) However, in case of vacancies of Inspector, which arose after 07.12.2002, the appellants would, undoubtedly, have a right to be considered as explained hereinbefore. In regard to such vacancies, the matter must be looked into and seniority fixed, based on Rule 5 of the STA Rules. The persons working in Clause (a) are also entitled to be considered for a period of two years from 20.01.2003 under the Inspector Rules to be considered for promotion.

RELIEF IN CIVIL APPEAL NOS. 1970-1975 OF 2009

120. Civil Appeals Nos. 1970-1975 of 2009 are disposed of as follows:

The restructured cadre of Senior Tax Assistants came into force on 20.01.2003. Appellants are not entitled to have seniority determined in respect of vacancies of Inspector which arose prior to 07.12.2002. The appellants are eligible to be considered for promotion from 20.01.2003 and they are entitled to add their service as Data Entry Operator Grade 'B' for the purpose of the 2002 Inspector Rules and considered for vacancies to be filled by promotion, which arose after 07.12.2002. The persons in Clause (a) under Column 12 of the 2002 Rules, are also entitled to be considered for two years from 20.01.2003. Seniority is to be considered based on Rule 5 of the STA Rules. The exercise, as above, if not carried out already shall be carried out. Further promotions based on the above will be granted. However, we direct that the promotions shall be notional where promotions have already been effected, however, entitling the parties to seniority and

pensionary benefits. The above exercise shall be completed at the earliest.

121. Civil Appeal No. 1976 of 2009 will stand dismissed.

122. There shall be no order as to costs in all the appeals.

.....J.
(SANJAY KISHAN KAUL)

.....J.
(K.M. JOSEPH)

NEW DELHI,
FEBRUARY 05, 2020.