

**COMMITTEE ON THE WELFARE OF
SCHEDULED CASTES AND
SCHEDULED TRIBES
(2016-2017)**

(SIXTEENTH LOK SABHA)

SEVENTH REPORT

ON

**MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)**

**“RESERVATION FOR AND EMPLOYMENT OF SCHEDULED CASTES AND
SCHEDULED TRIBES IN THE CENTRAL BOARD OF EXCISE AND CUSTOMS”.**

Presented to Lok Sabha on 11.08.2016

Laid in Rajya Sabha on 11.08.2016



**LOK SABHA SECRETARIAT
NEW DELHI**

11 August, 2016/20 Sravana, 1938 (Saka)

CONTENTS

Page No.

COMPOSITION OF THE COMMITTEE -----(iii)

INTRODUCTION------(v)

CHAPTER I

INTRODUCTORY

- A. BACKGROUND NOTE
- B. AIMS AND OBJECTIVES
- C. ORGANISATIONAL SET UP

CHAPTER II

- A. CADRE RESTRUCTURING AND NON IMPLEMENTATION OF RESERVATION IN PROMOTION POLICY
- B. BRIEF OF M. NAGARAJ vs. UOI CASE
- C. KEY CONDITIONS LAID DOWN IN M. NAGARAJ CASE
- D. ACTION TAKEN BY CBEC FOR VACATION OF STAY OF INTERIM ORDER
- E. VACATION OF THE INTERIM ORDERS AND LEGAL ISSUES THEREAFTER

RECOMMENDATIONS AND OBSERVATIONS

ANNEXURES

- 1. APPLICATION FILED BY CBEC FOR VACATION OF CAT, CHANDIGARH BENCH INTERIM/ORDER DATED 03.09.2014.
- 2. CAT, CHANDIGARH BENCH REPLY ORDER DATED 22.09.2015.
- 3. DoPT O.M. DATED 29.03.2007 REGARDING SUPREME COURT JUDEMENT IN M. NAGARAJ CASE.
- 4. DoPT O.M. DATED 10.08.2010 REGARDING RESERVATION IN PROMOTION.
- 5. DoPT O.M. DATED 19.12.2003 REGARDING REPRESENTATION OF SCs/STs IN CENTRAL GOVERNMENT SERVICES.

MINUTES

- A. Minutes of the sitting of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes held on 16.07.2015.
- B. Minutes of the sitting of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes held on 12.08.2015.
- C. Minutes of the sitting of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes held on 21.09.2015.
- D. Minutes of the sitting of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes held on 06.11.2015.
- E. Minutes of the sitting of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes held on 03.03.2016.
- F. Minutes of the sitting of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes held on 27.07.2016.

**COMPOSITION OF THE COMMITTEE ON THE WELFARE OF SCHEDULED
CASTES AND SCHEDULED TRIBES (2016-2017)**

Dr. Kirit P. Solanki - Chairperson

MEMBERS - LOK SABHA

2. Shri Ram Charitra
3. Shri Santokh Singh Chaudhary
4. Shri R. Dhruvanarayan
5. Dr. (Smt.) Heena Vijay Gavitt
6. Dr. K. Gopal
7. Shri Rattan Lal Kataria
8. Dr. Virendra Kumar
9. Smt. Sakuntala Laguri
10. Smt. Pratima Mondal
11. Prof. Seetaram Ajmeera Naik
12. Dr. Ravindra Babu Pandula
13. Shri Kamlesh Paswan
14. Shri Ramchandra Paswan
15. Shri Vishnu Dayal Ram
16. Shri Charanjeet Singh Rori
17. Shri Krupal Balaji Tumane
18. Shri Vikram Usendi
19. Shri Bhanu Pratap Singh Verma
20. Shri Chintaman Navasha Wanaga

MEMBERS – RAJYA SABHA

21. Shri Shamsheer Singh Dullo
22. Shri D. Raja
23. Shri Amar Shankar Sable
24. Shri Veer Singh
25. Shri Tiruchi Siva
26. Smt. Wansuk Syiem
27. Shri Pradeep Tamta
28. Shri Dilip Kumar Tirkey
29. Mahant Shambhuprasadji Tundiya
30. Shri Ramkumar Verma

SECRETARIAT

- | | | | |
|----|---------------------|---|-------------------------|
| 1. | Shri N.C. Gupta | - | Joint Secretary |
| 2. | Shri D.R. Shekhar | - | Director |
| 3. | Shri Vinay P. Barwa | - | Deputy Secretary |
| 4. | Shri Rajeev Kumar | - | Sr. Committee Assistant |

INTRODUCTION

I, the Chairperson, Committee on the Welfare of Scheduled Castes and Scheduled Tribes having been authorised by the Committee to finalise and submit the Report on their behalf, present this Seventh Report (Sixteenth Lok Sabha) on the Ministry of Finance (Department of Revenue) on the subject "Reservation for and employment of Scheduled Castes and Scheduled Tribes in Central Board of Excise and Customs (CBEC)".

2. The Committee took evidence of the representatives of the Ministry of Finance (Department of Revenue) and those of Central Board of Excise and Customs on 16.07.2015, 12.08.2015, 21.09.2015, 06.11.2015 and 03.03.2016.

3. The Report was considered and adopted by the Committee at their sitting held on 27.07.2016.

4. The Committee wish to express their thanks to the officers of the Ministry of Finance (Department of Revenue) and Central Board of Excise and Customs for tendering evidence before them and for furnishing requisite material and information in connection with the examination of the subject.

New Delhi;
11 August, 2016
20 Sravana , 1938(Saka)

KIRIT P. SOLANKI
Chairperson,
Committee on the Welfare of
Scheduled Castes and
Scheduled Tribes.

CHAPTER I

INTRODUCTORY

A. **Background Note**

1.1 The Central Board of Excise and Customs (CBEC) was constituted under the statute the Central Board of Revenue Act, 1963 (54 of 1963) and is subordinate to the Department of Revenue under the Ministry of Finance, Government of India. It deals mainly with the tasks of formulation and implementation of policy concerning the levy and collection of Central Excise and Customs duties and Service Tax, prevention of smuggling and administration of matters relating to Customs, Central Excise, Service Tax and Narcotics. The board is the administrative authority for its subordinate organisations/field formations.

B. **Aims and Objectives**

1.2 Central Board of Excise & Customs aims at achieving excellence in the formulation and implementation of Customs and Excise initiatives by:-

1. Realizing the revenues in a fair, equitable and efficient manner;
2. Administering the Government's economic, tariff and trade policies with a practical and pragmatic approach;
3. Facilitating trade and industry by streamlining and simplifying Customs and Excise processes and helping Indian business to enhance its competitiveness; and
4. Creating a climate for voluntary compliance by providing guidance and building mutual trust.

1.3 Central Board of Excise & Customs (CBEC) is responsible for policy planning, collection and administration of the three indirect taxes of the Government of India i.e. Customs duties, Central Excise duties and the Service Tax with the

assistance of its field formations. The vast responsibilities of CBEC, *inter-alia*, include:-

- (a) Assessment and collection of Customs duties, Central Excise duties and Service Tax.
- (b) Prevention of smuggling and drug trafficking.
- (c) Prevention of evasion of Customs duties, Central Excise duties and Service Tax.
- (d) Implementation of Export-Import Policy and Foreign Exchange Management Act and regulations.
- (e) Audit of Central Excise and Service Tax assesses for compliance monitoring and for encouraging voluntary compliance.
- (f) Enforcing the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA).
- (g) Performing quasi-judicial functions of adjudication of tax related disputes.
- (h) Appellate functions of hearing and deciding appeals against decisions of quasi-judicial authorities.
- (i) Review functions viz. accepting/challenging adjudication and appellate orders.
- (j) Defense of cases before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) and monitoring and pursuing cases pending before Supreme Court, High Court.
- (k) Recovery of arrears.
- (l) Prosecution of offenders under the provisions of various Acts and monitoring conduct of cases before the Economic Offences Courts and other judicial fora.
- (m) Facilitation of international passengers and clearance of baggage at the international airports, seaports and land customs borders.
- (n) Performance of functions for enforcement of the provisions of various enactments like Opium and Dangerous Drugs Act, Antiquities Act, Arms Act.
- (o) Seizure, custody, confiscation, auction and disposal of confiscated goods.
- (p) Imposition and administration of safeguard duties.

1.4 According to the Central Board of Excise & Customs it has so far by and large achieved the aims and objectives for which it was set up and has been making a

significant contribution towards the national exchequer through revenue collection from indirect taxes. CBEC has achieved its objectives by making revenue collections, needs of trade and industry facilitation, and assessee satisfaction which is enhanced with the help of shifting emphasis from assessment based administration to audit based tax administration and extension of information technology to real-time workflow applications.

1.5 The growth in Revenue Collection as shown in the table given below indicates that the Central Board of Excise & Customs has been successful in achieving the intended objectives for which it was set up:

	Rupees in crore				
Source of Revenue	2002-03	2011-12	2012-13	2013-14	2014-15 (BE)
Central Excise	87383	150696	171996	170197	207110
Service Tax	5000	95000	132697	154778	215973
Customs	45500	153000	164853	172085	201819
Total	137883	398696	469546	565003	624902

C. Organisational Set-up

1.6 The Central Board of Excise & Customs (CBEC) consists of a Chairman (in the rank of Special Secretary to the Government of India) and 6 Members (also in the rank of Special Secretary to the Government of India), designated as Member (Customs), member (Central Excise), Member (Service Tax), Member (Personnel & Vigilance), Member (Law & Justice and Computerisation) and Member (Budget). In the performance of its administrative and executive functions, the CBEC is assisted by Central Excise, Service Tax and Customs Zones (headed by Principal Chief Commissioners/Chief Commissioners) and Central Excise, Service Tax and Customs Commissionerates (headed by Principal Commissioner/Commissioners) and various Directorates General/Directorates and headed by Directors General/Directors which are Attached Offices of CBEC. The present set up of the Board is effectively discharging its duties and has been able to achieve the goals and vision of CBEC.

1.7 The Committee shall in the succeeding Chapter deal with the issues emanating from the CAT, Chandigarh Bench Interim Order dated 03.09.2014 restraining the CBEC to implement the reservation in promotion from Group "B" to Group "A" to the post of Assistant Commissioner of Income Tax.

CHAPTER II

A. Cadre restructuring and non implementation of reservation in promotion policy

2.1 The Committee were informed that Ministry vide their letter F.No. A-11019/08/2013-Ad. IV dated 18.12.2013 with the approval of the Cabinet created 300 permanent posts and 2118 temporary posts in the Grade of Assistant Commissioner in the Central Board of Excise & Customs (CBEC) after cadre restructuring. Consequently a promotion order No.192/2014 dated 22.10.2014 was issued. However, this order was disputed by the All India Central Excise & Customs SC/ST Employees Welfare Association, Tamil Nadu and the All India Federation of Customs, Central Excise & Service Tax Employees Welfare Organization on the grounds that the said order did not follow the provision of reservation in promotion policy. These representations were taken up by the Members of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes with the Ministry who then vide their OM No.C-50/130/2014-Ad.II dated 18.12.2014 and Minister of State for Finance DO No.C-50/130/2014-Ad.II dated 31.01.2015 submitted a brief status report details of which are given in the following paragraphs.

2.2 According to the Ministry a proposal for promoting 421 officers from Group 'B' to Group 'A' on adhoc basis was returned by the UPSC with the advice to approach the Commission for holding regular DPC only. The Commission also invited attention of the Department to the interim order dated 03.09.2014 passed by the Hon'ble CAT, Chandigarh Bench in OA No.060/00770/2014 filed by Rajesh Rai Anr. restraining the respondents from extending the benefit of promotion in further promotion until the exercise mandated by the Hon'ble Supreme Court in the case of M.Nagaraj is undertaken by the Government.

2.3 In the case of M. Nagaraj cited above, Hon'ble Supreme Court has inter alia stated that the State is not bound to make reservation for SC/ST in matter of promotions. However, if they wish to exercise their discretion and make such

provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. DoPT has circulated the said order vide their letter NO. 36036/2/2007-Estt. (Res.) dated 29.03.2007 to all the State Government/Union Territories and Ministries/Departments of Government of India. Further, the reservation policy as enunciated by DoPT vide their OM dated 10.08.2010 has been quashed by Punjab and Haryana High Court vide order dated 15.07.2011 in CWP No. 13218/2009. This has been challenged by Shri Jarnail Singh in the Apex Court by an SLP. Besides, DoPT, being the nodal department, has not issued revised guidelines consequent upon quashing of their guidelines by the High Court.

2.4 Though the Government tried to get the restraint modified, it was not granted and the case was postponed from time to time. As many new formations had been created w.e.f. 15th October, 2014 with a view to have better and efficient tax administration and to mobilise revenue for the government exchequer, an administrative decision was taken to hold the DPC to fill up the posts through Ad hoc promotion as any further delay would have jeopardized the efforts of the Department to meet the revenue target of Rs.6.23 lac crores for the year 2014-15.

2.5 To fill up the vacant posts of Assistant Commissioner, it was decided to hold a DPC for adhoc promotion for 2539 (421 regular + 2118 temporary) posts in the grade of Assistant Commissioner. Accordingly, the meeting of the DPC was held on 17-20 October, 2014 and DoPT was informed on 21st October. The UPSC was also informed on 28th October, 2014.

2.6 As regard to other issues the Ministry has quoted the relevant portion of the minutes of DPC which is as under:-

The Committee was further informed that in terms of DoPT's OM No. 36011/14/83-Estt. (SC) dated 30.04.1983, para 6, there is no need for maintaining any separate formal roster for reservation for SCs/STs for adhoc promotions. The concept of de-reservation, carrying forward of reservation etc. will also not be applicable in the case of adhoc appointments. However, the number of vacancies equal to the share of SC/STs should be identified for

ensuring correct representation. Thereafter, the SC/ST officers should be considered in the order of the general seniority as per the gradation list. If sufficient numbers are not found fit, then additional candidates should be located by going down the seniority list.

The Committee was further informed of an interim order by the Honble Central Administrative Tribunal, Chandigarh Bench in O.A. No. 060/00770/2014 filed by Shri Rajesh Rai and another. The Committee has seen the order dated 03.09.2014 of Honble CAT, Chandigarh Bench wherein it has been ordered as follow:

Considering the promotions earlier made on the basis of reservation have already been made effective, as averred in para 4(xxi) of O.A., we restrain the respondents from extending the benefit of reservation in further promotion until the exercise mandated by the Honble Supreme Court in the case of M. Nagraj & others Vs. U.O.I & others 2006 (8) SCC 212 is undertaken by them.

2.7 The Committee took note of the interim directions of Honble Central Administrative Tribunal, Chandigarh Bench in OA No. 060/00770/2014 as cited above and DoPT's instructions mentioned at above, the Committee was of the view that since that is a DPC for ad-hoc promotion, and in the light of direction by the Honble Central Administrative Tribunal, Chandigarh Bench in the case as mentioned above, it may not be feasible to follow the DoPT's instructions in its entirety. Therefore, the DPC took a conscious decision that in case sufficient numbers of reserved category candidates are not found fit, the equivalent number of vacancies in the reserved categories may be kept unfilled until further and final directions/outcome in the ongoing case before Honble Central Administrative Tribunal, Chandigarh Bench.

2.8 In terms of the Committee's decision as mentioned above, the Committee decided to keep 56 posts in the Grade of Assistant Commissioner unfilled, until further and final directions/outcome in the ongoing case before Honble Central Administrative Tribunal, Chandigarh Bench.

2.9 Based on the recommendation of the DPC and as accepted by the Competent Authority, promotion order No. 192/2014 dated 22.10.2014 was issued by this Department. The table below shows the number of officers promoted as Assistant

Commissioner of Customs & Central Excise vide order No. 192/2014 dated 22.10.2014.

Superintendent (Central Excise)			
Gen	SC	ST	Total
1497	232	134	1863
Superintendent (Preventive) Customs			
Gen	SC	ST	Total
239	39	21	299

2.10 As against vacant 2061 posts in the cadre of Superintendent (Central Excise) only 1863 posts have been filled up, leaving 198 posts vacant. As against reported 321 posts in the cadre of Superintendent of Customs (Preventive), only 299 posts have been filled up, leaving 22 posts vacant. Further, as on date there are 585 vacancies at the level of Assistant Commissioner.

2.11 The Ministry in their reply have stated that the Government is actively pursuing the case at Chandigarh and as soon as the stay is vacated by the Honble CAT, Chandigarh or formal orders are obtained, a review DPC will be conducted to promote eligible number of SC/ST officers.

B. Brief of M. Nagaraj vs UOI case

2.12 The Honble Supreme Court in the case of M.Nagaraj vs UOI & Ors. in its judgment dated 19.10.2005 ruled that Article 16(4A) is constitutionally valid but it is only an enabling provision. The Court, in concluding paragraph, inter alia, observed % .. The concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is a enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article

335. It is made clear that even If the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely. Subject to above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-First Amendment) Act, 2000, the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eight-Fifth Amendment) Act, 2001+.

C. Key conditions laid down in M. Nagaraj Case

2.13 The Supreme Court ruled that the Article 16(4A) is constitutionally valid but it is only an enabling provision. If a State Government (or Central Government) wants to provide reservation to Scheduled Castes and Scheduled Tribes in promotion, along with consequential seniority, a cause will have to be made out satisfying the following conditions:-

- (a) Collecting of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment.
- (b) Ensuring compliance with Article 335, which says that while making reservation, due consideration is to be given to maintenance of efficiency of administration.
- (c) Ensuring that the reservation provision does not cross the ceiling of 50% and does not obliterate the creamy layer and that the reservation does not extend indefinitely.

D. ACTION TAKEN BY THE CBEC FOR VACATION OF STAY OF THE INTERIM ORDER OF THE CAT, CHANDIGARH BENCH WITH RESPECT TO O.A.No.60/770/2014 FILED BY RAJESH RAI AND OTHERS

2.14 On being enquired by the Committee of the action taken by the CBEC for getting the stay vacated it was informed that the Department had filed an affidavit and an application on 12.10.2014 seeking vacation of the interim order of CAT dated

03.09.2014 (**Annexure-**). Hearing for the OA was fixed for 30.10.2014 however pending orders of the CAT the CBEC issued the promotion orders on 22.10.2014.

2.15 On the reasons for not waiting for the orders and going ahead with the promotion without the benefit of reservation the Chairman, CBEC stated as under:

Sir, with due respect, I can only guess the reason for this. Perhaps they felt a lot of officers are retiring which is why they should do this promotion. I cannot say anything else because it was done in 2014 and none present here were there at that point of time. So, I can only guess why they did it".

2.16 The Secretary, Department of Revenue stated as under:

"With regard to the filling up of the posts, we took some action last year. There was urgency to fill up the posts because in the Assistant Commissioner Grade, after the Cadre Re-structuring, the total Cadre strength was about 3,367 and prior to the last promotion we had only 662 officers, which means only 20 per cent of the posts had been filled up and 80 per cent of the posts in the Assistant Commissioner Grade were vacant. The Assistant Commissioners are the cutting edge of the Department responsible for collection, assessment, adjudication and a host of other statutory duties. So, that post had to be filled up. There was an urgency to fill up the posts so that the revenue collection targets -- which are very important for the Government -- are achieved so that the Government is able to implement all the development and welfare programmes that the Government has.

2.17 In the meeting held on the 21.09.2015, the Secretary, Department of Revenue stated as under:

" महोदय, उस समय 2300 पद असिस्टेंट कमिश्नर के खाली थे। कस्टम और सेंट्रल एक्साइज के आफिस में असिस्टेंट कमिश्नर नोडल प्वायंट होते हैं। उनके बिना काम नहीं चल पाता है। रिट्रोस्पेक्टिव इसे सही निर्णय कहा है क्योंकि एक सीटिंग में कैट ने कोई निर्णय नहीं दिया है। आज तक भी यह इश्यू रिजोल्व नहीं हो पाया है। So, in retrospect, it was a correct decision not to wait for CAT's judgement to come. CAT till today has not resolved that issue. आज तक भी हम कोई प्रमोशन नहीं दे पाए हैं।"

2.18 When the Committee desired to know the applicability of Interim Order dated 03.09.2014 of the CAT, Chandigarh Bench on jurisdictional basis or All India basis the CBEC, in their written reply have stated that an Inter-Ministerial meeting was convened on the 20th August 2015 with the Secretary, DoPT and Secretary,

Department of Legal Affairs to resolve the issue regarding grant of reservation in ad-hoc promotions to the grade of Assistant Commissioner of Customs and Central Excise for the vacancy year 2013-2014 and after detailed discussions on the issue the Secretary, Department of Legal Affairs opined that the said Interim Order dated 03.09.2014 is applicable on All India basis as promotions to the grade of the Assistant Commissioner of Customs and Central Excise is made on an All India Seniority List of the feeder grades and the order is based on the judgment of the Hon'ble Apex Court in M.Nagaraj case. He also stated that the interim order dated 03.09.2014 needs to be followed by the Respondents to avoid contempt of court proceedings till the restraint is lifted by the Hon'ble Tribunal or stayed by a higher court. Till such time, compliance with the said order dated 03.09.2014 will, however, be subject to final outcome of the case. The above position was agreed by all participants in the meeting

2.19 Further it was informed by the representative of the DoPT that the issues emanating from the Hon'ble Supreme Court judgment dated 19.10.2006 in M.Nagaraj case is under submission to the competent authority for a decision on implementation of the judgment of Hon'ble Supreme Court.

During evidence the Secretary, Department of Legal Affairs stated as under:

"Sir, the seniority for the post of Assistant Commissioner where the promotion has been made is maintained on all India basis. This is the information given to us by the administrative Department. If you are making promotions in a particular district or State with one formulae and promotion in another district or State with another formula, it will create a chaos in the all India seniority of the officers which will disturb the further promotions also. That is why, a uniform formula has to be followed and once if one bench has given a decision, automatically its application will be on all India basis because the seniority is maintained on all India basis. That is the legal position which we have taken".

2.20 On being enquired whether the Department was lax in pursuing the case or the counsels were not appearing before the CAT the Chairman CBEC stated during evidence:

"At each hearing we have been represented by the Additional Central Government Counsel. I have got the details from the Chief Commissioner of Chandigarh. Not a single hearing, as per the

information given to me by the Chief Commissioner, have we not been present. We have always been present and assisted by an officer of the rank of minimum of Deputy Commissioner or Assistant Commissioner. As the hon. Secretary informed, in the last two hearings we have been represented by the ASG, both on 31/8 and on 8/9. Tomorrow also he is going to be present. This is the position as per the information received by me from the Chief Commissioner ".

Adding further the Special Secretary and Member (P&V) stated as under:

"We would like to clarify as to why we went before the CAT. We went before the CAT to allow the reservation. In fact, our response to the OA which was moved by Shri Rajesh Rai, the case which is in CAT, was we contested it saying reservation should be allowed and since then all the hearings that have been there, including the last hearing, we have asked for . because this is an interim order . at least they should lift the restraint on us and then they can carry on discussing. But at least the restraint should be removed".

E. VACATION OF THE INTERIM ORDERS AND LEGAL ISSUES THEREAFTER

2.21 The Hon'ble CAT, Chandigarh Bench vide their order dated 22.09.2015 vacated their Interim Order dated 03.09.2014 with the modification to the extent that the "respondents can go ahead with future promotion in the view of the Law of the Land on this issue subject to final outcome of O.A".

2.22 On the issue of the "Law of the land" the opinion of the Ld.Solicitor General of India was obtained by the Ministry which is reproduced below

¶ Ergo, in my considered view, although reservation may be permitted for promotions from the feeder grades to the post of Assistant Commissioner, it will be subject to the necessary steps as required by M. Nagaraj (Supra)+

2.23 The Committee desired to be further clarified on the issue during the evidence held on 6.11.2015 the Committee. The representative of CBEC informed as now the stay has been vacated in the view of the law of the land on this issue. These are the wordings of the CAT's order. So, both DoPT and the Law Ministry were approached. The AG's view was also sought. The Law Ministry has marked the papers to the learned AG. The learned AG in turn marked the papers to the Learned Solicitor General and the opinion which the Committee have got is from the Learned Solicitor

General. The Solicitor General in effect has told that (a) the decision of the CAT Chandigarh will apply to the whole Country, (b) the law of the land he again quoted the Nagaraj Supreme Court decision and said unless and until the exercise mandated in the Nagaraj Decision is carried, it will be difficult to give promotions. He has concluded by saying in my considered view although reservation may be permitted for promotions from the feeder grades to the post of Assistant Commissioner, it will be subject to the necessary steps as required by M. Nagaraj. So, this is what has come to us from the Learned Solicitor General through the Law Ministry.

2.24 The Ministry has informed that on the advice of the Committee the following six cases were sent to the Ministry of Law for examination:

- (i) Judgement dated 15.07.2014 of Hon^{ble} SC in Civil Appeal Nos 6046-6047 of 2004 in the case of Rohtas Bhankar & Ors Vs UoI and Another;
- (ii) Judgement dated 09.01.2015 of Hon^{ble} SC in Civil Appeal Nos 209 of 2015 in the case of CMD, Central Bank of India & Ors Vs Central Bank of India SC/ST Employees Welfare Association & Ors;q
- (iii) Judgement dated 08.11.2011 of Hon^{ble} HC of Bombay in Writ Petition No 8986 of 2011 in the case of Union of India & Ors Vs All India Income Tax SC/ST Employees Welfare Federation & Orsq
- (iv) Judgement dated 14.05.2012 of Hon^{ble} HC of Delhi in WP (C) 3646/1999 in the case of A.K. Gautam Vs. UoI & Ors;
- (v) Judgement dated 26.09.2014 of Hon^{ble} HC of Delhi in WP (C) 2671/2014 in the case of UoI and Anr Vs Anil Kumar;
- (vi) Judgement dated 24.10.2013 of Hon^{ble} CAT, PB, New Delhi in O.A. No 2449/2012 (in the case of Bengali Babu Agarwal & Anr Vs MCD & Ors.

2.25 The Ministry has further informed that in the Inter-Ministerial Meeting held on 26.11.2015, the Department of Legal Affairs was requested vide the Department's Note dated 30.11.2015 to seek the legal opinion of the Learned AG of India, after examining all the relevant judgments in the matter regarding reservation in promotion

including validity and applicability of DoPT's O.M dated 10.08.2010 regarding reservation in promotion . treatment of SC/ST candidates promoted on their own merit. In addition, it was also requested to provide opinion of the Learned AG on the following points:-

- (i) In view of the circumstances in the matter, whether the Department of Revenue can hold DPC for promotion to the grade of Assistant Commissioner on ad-hoc basis by extending the benefit of reservation in promotion including provision in respect of own merit promotion as contained in DoPT's OM dated 10.08.2010.
- (ii) If not, whether the Department of Revenue can hold DPC without extending the benefit of reservation as was done earlier in October, 2014 and June, 2015 for promotion to the grade of Assistant Commissioner on ad-hoc basis for the vacancy year 2013-14.

2.26 The Learned Attorney General of India requested the Learned Solicitor General of India to consider the matter once again. The Learned SG in his opinion dated 11.01.2016 has stated as under:-

- (i) Reservation in promotion is not compulsory.
- (ii) If granted, it must only be done after empirical study mandated by M. Nagaraj (Supra); and
- (iii) The 10.08.2010 OM stands quashed and is subjudice. The Supreme Court in the Jarnail Singh matter (Supra) is considering the validity of the OM.

2.27 The Ministry has informed that several OAs/WPs (in total 27) have been filed in various CATs/Courts in the matter of reservation in promotion to the grade of Assistant Commissioner of Customs and Central Excise. In the OAs/WPs filed for

direction to the Respondents for not providing reservation in promotions, Tribunals/Courts have stayed/restrained the Department to make further promotion in the grade of Assistant Commissioner.

2.28 Meanwhile, the Department of Revenue has taken the following follow-up action in the matter:-

- (i) Chief Commissioner of Customs and Central Excise, Delhi Zone has been asked to move an application before the Hon^{ble} CAT, PB, praying for transfer of all the OAs relating to the subject matter filed in different Benches of the Hon^{ble} CAT across the Country so that a uniform decision can be taken expeditiously, as the issue involved in all these OAs is the same and also Respondent (UOI) is the same.
- (ii) All Chief Commissioners of Customs and Central Excise under CBEC have been asked to move application for urgent hearing, praying for vacation of the stay or lifting of the restraint as the case may be, wherever restrained/interim stay has been ordered by the Hon^{ble} CATs/High Courts and transfer the case to CAT (PB) New Delhi.
- (iii) Proposal has been sent to Department of Legal Affairs for filing an SLP in the Apex Court praying for getting all such OAs/WPs transferred to it, keeping in view the complexities involved and of the fact that the interim orders passed by the Hon^{ble} CATs/High Courts are based on or with reference to order the Apex Court Nagaraj case. The information sought for by DOLA in the matter is being sent to them separately in the relevant file.
- (iv) Directorate General of Human Resource Development under CBEC has been asked to keep ready all the requisite information/documents

for holding review DPC for the vacancy year 2013-14, at a very short notice, if it is so warranted.

- (v) Since many OAs filed by the Officers/Associations of Officers belonging to CBEC in various CATs/Courts belonging to general category are related to non-reversion of officers already promoted, this Department is also taking action to conduct DPCs for the vacancy years 2014-15 and 2015-16 in order to avoid reversion of the officers already promoted.
- (vi) One of the grievances of the SC/ST Association is that the Department needs to take into account various judgments indicated by them which supports reservation in promotion, while filing reply in OA/WPs in the matter pending before various benches of CATs/High Courts. Letter in this regard has been sent to all concerned Commissionerates. This scrutiny and examination of the orders regarding favourable judgements have also been taken up with DOLA.

2.29 On being enquired whether the CBEC had at any time carried out the study as mandated by the Supreme Court in the M.Nagaraj Case (Supra) the Secretary Department of Revenue stated during evidence as under:

The Court has asked us to undertake this exercise. Please see the first point, we cannot do this for a post in a department. Statistics of a Caste is to be worked out by DoPT. So we are dependent on other department+.

Adding further the Secretary DoPT stated as under:

I would like to make it clear that as our colleague is saying.

Collecting of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment.+

This exercise will be done for whole of the Country. The 117th amendment could not be passed. That amendment was only passed in Rajya Sabha.

2.30 When enquired about the legal solution on the issue the CBEC in their written reply have stated that the DoP&T is the nodal Ministry in service matters as well as in providing reservation including reservation in promotion in favour of SCs/STs in the service under the state. The matter requires a policy decision to be taken by the Government in this regard.

RECOMMENDATIONS AND OBSERVATIONS

2.31 The Committee note that matter regarding reservation in promotion was challenged in the Central Administrative Tribunal (CAT), Chandigarh Bench vide OA No.060/00770/2014 by Rajesh Rai & Others and that there was a Interim Order dated 03.09.2014 of the CAT restraining the CBEC from providing reservation in promotion until the exercise as mandated by the Hon'ble Supreme Court in the case of M.Nagaraj & Others(Supra) was carried out. The next date of hearing was fixed for 20.10.2014. The Committee further note that an affidavit was filed by the Department on 12.10.2014 in the CAT requesting for vacation of the interim order. However, the Committee are surprised to note that CBEC issued a promotion order No.192/2014 dated 22.10.2014 in haste without waiting for the outcome of the OA and without implementation of the reservation in promotion policy. Thus, the Committee find that the CBEC denied the benefit of reservation to the SCs/STs in the said promotion order. The reasons put forth by the Department for their actions are not found plausible by the Committee. The Committee are also aghast on the fact that the CAT order which was applicable on 300 regular posts of the Assistant Commissioner of Central Excise in the CBEC was further extended to cover all the posts in the CBEC post cadre restructuring. This shows the Departments apathy towards the SCs and STs within their organisation. The situation is all the more peculiar since the sister Department of CBEC namely CBDT had carried out promotions without any such hurdles. The Scheduled Castes and Scheduled Tribes Welfare Association of the CBEC had expressed concern on the issue and keeping this in view the Committee had held multiple meetings within a span of few months with all the concerned Ministries/Departments viz. Ministry of Finance (Department of Revenue), CBEC, Ministry of Personnel,

Public Grievances & Pensions (Department of Personnel & Training) and the Ministry of Law.

2.32 During discussion with CBEC they expressed their inability to go ahead with promotion. On the insistence of the Committee the opinion of the Learned Solicitor General of India was also taken. The Committee note that the Learned Solicitor General has opined on the particular issue that (i) Reservation in promotion is not compulsory(ii) If granted, it must only be done after empirical study mandated by M. Nagaraj (Supra); and (iii) The 10.08.2010 OM stands quashed and is subjudice. The Supreme Court in the Jarnail Singh matter (Supra) is considering the validity of the OM. In this regard the Committee are surprised to note that the issue was pending in the CAT, Chandigarh Bench since a long time the CBEC remained inactive after merely filing an affidavit for vacation of the interim order and it was not actively pursued. Neither the Department of Personnel & Training who is the nodal Department for all service related matters of Government was consulted during that time. The Ministry of Law too was not consulted. The issue was languishing without any seriousness. It only after the active interest and pursuance of the Committee the CBEC stirred into action. However, when the stay was vacated by the CAT, Chandigarh bench with the direction to go ahead with promotions by following the "Law of Land" the CBEC found it fit to obtain the opinion of the Ministry of Law thereby stalling the issue. This puts a question mark on the earnestness of the CBEC. The Committee find that the issue that was confined to a particular region snowballed throughout the country and numerous OAs/cases were filed in the various Courts/Tribunals further complicating it without any remedy in sight.

2.33 The Committee note with concern that while obtaining the views of the Ministry of Law the CBEC has cited only those cases where there has been

negative judgments of the Apex Court/High Courts about the reservation in promotion, numerous favourable judgments of the Courts regarding the reservation in promotion were ignored. The Committee cannot help but wonder whether this was a deliberate attempt in weakening the case to deprive the SC/ST employees of their legitimate right. During the meetings on the subject the Committee was also appalled to find that the representatives of the DoPT and the Ministry of Law were unaware of such favourable judgment/rulings. The Committee are of the view that the DoPT is the nodal Department on the service matters and the Ministry of Law is invariably consulted for legal matters. Whereas, directions exist wherein the Central Government Departments have to consult the DoPT on legal issues/while filing review petitions in courts/tribunals when Government service orders have been challenged, it appears that these are not being followed stringently and they are independently fighting out service related cases to the detriment of employees particularly those belonging to the reserved categories. The Committee desire that the DoPT may reiterate such instructions. The Committee find that in the present instance if the case had been properly presented by citing the relevant judgments/rulings favouring the reservation in promotion the present situation could have been averted. The Committee also desire that the DoPT may make an upto date repository of judgments of the Apex Court, High Courts and Tribunals wherein the issue of reservation in promotion etc. to SCs and STs have been decided by directing all the Ministries/Government Departments/States to invariably send copies of the judgments to the DoPT for information and record. Although in the beginning this might seem to be a huge exercise but the Committee feel that this will go a long way to safeguard the rights of the SC/ST employees through proper and effective presentation of cases in litigations.

2.34 On the issue of implementation of the exercise as mandated by the Hon'ble Supreme Court in the case of M.Nagaraj(Supra) the Committee observe that the judgment came in the year 2006. Thereafter, the DoPT issued a clarification OM No.36036/2/2007-Estt.(Res.) dated 29.03.2007 in the matter of M.Nagaraj and this OM is still in vogue. Notwithstanding this, the Committee fail to understand the complexities in determining the backwardness, administrative efficiency or representations when data is available or should have been available, after all it is now close to a decade since the judgment came. The inexplicable delay in collection of the data has resulted in the situation going against the favour of SC/ST employees. In the case of CBEC the buck has been passed on to the DoPT for undertaking the exercise as mandated by the Apex Court in the M.Nagaraj case. The Committee would like to point out that it is the duty of the DoPT to have the data regarding the representation of SCs/STs in Government Service as all Ministries/Departments of the Government of India have been directed vide DOPT OM No.43011/10/2002-EStt.(Res.) dated 19.12.2003 to do so. It appears that either the Ministries/Departments are not sending the information or the DoPT has stopped collecting the information. The Committee feel that had the data been available it would have been easy task to meet the requirements set by the Apex Court. If the Ministries/Departments are not sending the information it would be viewed as a deliberate attempt to thwart the progress of SCs/STs in services. The Committee desire that the DoPT should not be lax in this regard and begin to compile the data urgently. In the instant case of CBEC the Department seems to have compiled the information as is evident from the affidavit dated 12.10.2014 that was filed in the Hon'ble CAT, Chandigarh Bench *wherein it had been submitted that the three conditions as mandated by the Apex Court have been fulfilled.* The Committee fail to

understand that when the stay was vacated by the CAT the CBEC suddenly got cold feet and backtracked on their own stand denying reservation in promotion to its SC/ST employees despite meeting with the requirement mandated by the Apex Court.

2.35 The Committee are of the view that the implementation of the cadre restructuring in the CBEC has been held up for the past several months, on account of disputes/litigations that has arisen regarding granting of reservation in promotions and stalling the promotion aspects of general candidates as well. The Committee feel that it is neither in the interest of the department to leave such a huge number of posts in the cadre of Assistant Commissioners vacant, nor in the interest of the officers who will superannuate without getting their due promotions, for no mistake of theirs. It is only right and just that promotions are made subject to the outcome of pending litigations. This is in the interest of general candidates and also in the interest of reserved candidates. Therefore, the Committee strongly recommend that SC/ST officers may be given promotion without further delay as has already been done in other departments including CBDT. While doing so, it may be ensured that those who have been promoted earlier are not adversely affected.

2.36 As regard the three conditions mentioned in M. Nagaraj case, the Committee are of the view that "Efficiency" of the officer(s) can be assessed through his ACR/APAR and "quantifiable data" can be seen from the present cadre strength of the officers. As regard the 'Backwardness' is concerned the Committee are of the view that this concept is applicable to Other Backward Class (OBC) not for SCs/STs. As in the case of Indra Sawhney, Supreme Court has decided in this regard. Thus, the concept of creamy layer defining

economic criteria for reservation is only applicable for OBC not for SCs/STs reservation.

2.37 It has also been brought to the notice of the Committee that the DoPT OM No.36012/45/2005-Estt. (Res.) dated 10.08.2010 that deals with the subject reservation in promotion- Treatment of SC/ST candidates promoted on their own merits stands quashed and is sub-judice. Further the Supreme Court in the Jarnail Singh matter (Supra) is considering the validity of the OM. The Committee would like to be apprised about the status of the case and steps taken by DoPT in this regard.

2.38 On a larger note the Committee observe that in general reservation in promotion policy is being followed in Government services. However, wherever objections were raised in the Court of Law, the decisions were kept pending. In total there is ambiguity on the issue and needs to be resolved through statutory means on an urgent basis. The Committee also note that to provide impediment-free reservation in promotion to the Scheduled Castes and the Scheduled Tribes and to bring certainty and clarity in the matter a step was taken in this direction with the introduction of the Constitution (One Hundred and Seventeenth) Amendment Bill, 2012. The Bill was introduced in the Rajya Sabha but lapsed in Lok Sabha. In order to safeguard the rights of the SCs/STs in services, the Committee strongly urge the Government to pass the Constitution Amendment Bill expeditiously.

New Delhi;
11 August, 2016
20 Sravana , 1938(Saka)

DR. KIRIT P. SOLANKI
Chairperson,
Committee on the Welfare of
Scheduled Castes and
Scheduled Tribes.