

Brief facts for defending CAT/Court cases filed by Superintendents for grant of 3rd MACP in the grade pay of Rs.6600/-.

Under the provisions of the erstwhile ACP Scheme of 1999, financial up-gradations were granted in the then existing promotional hierarchy. This gave rise to uneven benefit to employees falling in the same pay scale as several organizations adopted different hierarchical pattern. Consequently, employees working in organizations having greater number of intermediary grades suffered because financial upgradation under ACPS placed them in lower pay scale vis-à-vis similarly placed employees in other organizations that had lesser intermediary grades.

2. The 6th CPC recommended a systematic change in the ACPS whereby all employees, irrespective of the hierarchical structure as prevalent in their organization/cadre, would get the same benefit under the Scheme. Accordingly, the ACP Scheme was replaced by Modified ACP (MACP) Scheme which provided for three up-gradations after 10, 20 and 30 years respectively in the successive grade pay **in the hierarchy of recommended revised pay band and grade pay as prescribed in the CCS(RP) Rules, 2008(Annexure-2) and not in the promotional hierarchy as was available under the ACP Scheme.** The MACP Scheme issued by DOP&T vide its OM No. 35034/3/2008-Estt.(D) dated 19.05.2009(Annexure-1) superseded the ACP Scheme. Wherever in any cadre of the Government the ACP Scheme is applicable, the benefits of MACP Scheme would automatically be extended to such cadre.

3. In para 8.1 of MACP Scheme, it has been provided that the Grade Pay of Rs. 5400 in PB-2 and Rs. 5400 in PB-3 shall be treated as separate Grade Pay for the purpose of grant of up-gradation under MACP Scheme.

4. Superintendents in the grade pay of Rs.4800 get NFG in **GP of Rs. 5400 in PB-2** after 4 years of regular service. After promotion to the grade of Assistant Commissioner they are placed in **GP of Rs. 5400 in PB-3**. Such Superintendents are claiming MACP benefit after ignoring NFG granted to them i.e. they are basically claiming financial upgradation under MACP in the promotional hierarchy which is against the MACP Scheme.

5. Central Civil Services (Revised Pay) Rules, 2016 (**Annexure-3**) issued after acceptance of the recommendation of 7th Central Pay Commission, have placed both the grades in different Pay levels. GP of Rs.5400 in PB-2 has been placed in Pay Level-9 with initial pay of Rs. 53100/-andGP of Rs.5400 in PB-3has been placed in Pay Level-10 with initial pay of Rs. 56100/-.

6. Earlier, on a reference from Office of the Pr. Chief Controller of Accounts, CBEC, the DoP&T, vide their clarification dated 26.07.2010,(**Annexure-4**) had clarified that the benefit of Non-functional up-gradation granted to the Superintendents (Group-B Officers) on completion of 4 years of service would be treated/viewed as up-gradation in terms of para 8.1 of the Annexure to OM dated 19.05.2009 and the same would be offset against one financial upgradation under MACP Scheme. To make its point clear and uniform, the DoP&T published a comprehensive FAQ on MACP Scheme on its website on 01/04/2011(**Annexure-5**)wherein at FAQ No. 16 it was clarified that Non-functional Grade Pay would be viewed as one financial upgradation for the purpose of MACPS in terms of para 8.1 of Annexure-1 of MACPS dated 19.05.2009.

7. In addition, the Board in consultation with DoP&T issued a circularvide F.No.A-23011/29/2010-Ad.IIA dated 20.05.2011 (**Annexure-6**)that there would be no effect of grant of Non-functional Scale in erstwhile ACP Scheme. However, in terms of para 8.1 of Annexure of MACPS, financial upgradation granted in the Grade pay of Rs.5400 in PB-2 and PB-3 would be counted as separate up-gradation and would be offset against financial upgradation under MACP Scheme.

8. When it was observed that in some of the Commissionerates, grade pay of Rs. 6600/- is being allowed under MACPS to the Superintendents without taking into account the NFU granted after 4 years of service, it was again clarified vide Board's letter F.No.A-23011/29/2010-Ad.IIA dated 4th June, 2014 (**Annexure-7**)thatNFU granted to Superintendents would be counted/offset against the financial upgradation under MACP Scheme. On the basis of this clarification dated 4th June, 2014 many Commissionerate took appropriate corrective action.

9. One Shri R. Chandrasekaran moved the Court in the matter of financial up-gradations granted under MACPS. The Hon'ble High Court of Madras vide order dated 08.12.2014 (**Annexure-8**) in Writ Petition No. 19024 of 2014 (**Shri R. Chandrasekaran Vs. UOI & Ors**) directed as under:-

“We set aside the order passed by the Central Administrative Tribunal dated 24.2.2014 in OA No. 675 of 2013 and remit the matter to the Department of Personnel, Public Grievances and Pensions for fresh consideration. The Department of Personnel Public Grievances and Pensions is directed to consider the issue in extenso in the light of the provisions of MACP Scheme and the benefits given to the employees like the petitioner to count the non-functional scale for the purpose of ACPS. Such exercise shall be completed within a period of three months from the date of receipt of a copy of this writ petition.”

10. In view of the above direction of the Hon'ble High Court of Madras, the case of Shri R. Chandrasekaran was referred to DoP&T for taking appropriate action. Initially, the DoP&T vide Dy. No. 1078183 CR.15 dated 06.05.2015 (**Annexure-9**) opined that since Shri R. Chandrasekaran got only one promotion and 2nd ACP in the grade pay of Rs.5400/- in his service career prior to implementation of MACP Scheme w.e.f. 01.09.2008, he is entitled to the grant of 3rd MACP in the grade pay of Rs.6600/- under MACP Scheme w.e.f. 04.06.2012 on completion of 30 years of service. Subsequently, the DoP&T, re-examined the issue and clarified that the grant of non-functional grade pay of Rs. 5400/- in PB-2 to the Superintendents needs to be counted as one financial upgradation for the purpose of MACP Scheme.

11. The initial advice of the DoP&T was communicated to the Chennai Commissionerate vide letter F. No. A-23011/25/2015-Ad.IIA dated 26th May, 2015 (**Annexure- 10**) for taking appropriate action and filing compliance report before the Hon'ble High Court of Madras.

12. Meanwhile, a number of similarly placed officers of CBEC moved the Hon'ble CAT for similar benefits as that extended to Shri R. Chandrasekaran. The advice of the DoP&T was considered in the CBEC and it was observed that the DoP&T has not counted the NFU granted to Shri R. Chandrasekhar on 04.06.2006 in

PB-2, GP Rs.5400/- as one financial up-gradation under the MACPS. Therefore, a proposal to extend similar benefits to similarly placed officers i.e. officers who were granted NFU in PB-2, GP Rs.5400/- during the period 01.01.2006 to 31.08.2008 (*when the ACP Scheme was in vogue*) was sent to the DoP&T.

13. The DoP&T re-examined the proposal of this Department (CBEC) in consultation with the Department of Expenditure and decided vide I.D. Note No. 1135911/2016/CR dated 02.05.2016(**Annexure-11**) that the grant of non-functional grade of Rs.5400 in PB-2 to the Superintendents needs to be counted as one financial up-gradation for the purpose of MACP scheme. Therefore, they did not agree to the request of this Department for issuance of general instructions for ignoring grant of non-functional grade pay of Rs.5400/- in PB-2 to the Superintendents during the period 01.01.2006 to 31.08.2008 for the purpose of MACP.

14. The decision of the DoP&T was again examined in this Department (CBEC) and it was observed that the initial advice of DoP&T dated 06.05.2015 is not in consonance with their second opinion dated 02.05.2016. As a number of similar cases were pending in various Tribunals, the DoP&T was again consulted to provide inputs for defending these cases. The DoP&T vide their I.D. Note No. 1173060/2016/CR dated 02.06.2016 (**Annexure-12**) reiterated the earlier opinion dated 02.05.2016(**Annexure-11**) that the grant of non-functional grade of Rs.5400/- in PB-2 to the Superintendents needs to be counted as one financial upgradation for the purpose of MACP scheme. The DoP&T also advised this Department to take appropriate action in the case of Shri Chandrasekharan as well as all similar cases in terms of their earlier opinion dated 02.05.2016. Further, it was also advised that the court cases including the case of R. Chandrasekaran may be agitated/defended as per the MACP Scheme vide DoP&T O.M. dated 19.5.2009 read with FAQ No. 16 (**Annexure-5**).

15. In view of subsequent advice of DoP&T, the CBEC's letter dated 26.05.2015 addressed to Chief Commissioner of Central Excise, Chennai Zone in the case of Shri R. Chandrasekaran was withdrawn vide CBEC's letter F.No.A-23011/25/2015-Ad.IIA dated 20.06.2016(**Annexure-13**) and the Chennai Commissionerate was requested to take appropriate corrective action and file a fresh compliance report

before the Hon'ble High Court of Madras. Accordingly, Chennai Commissionerate (LTU) vide letter dated 08.08.2016 (**Annexure-14**) withdrew the 3rd financial upgradation granted to Shri R. Chandrasekaran in Grade Pay of Rs. 6600 in PB-3. Aggrieved against the denial of 3rd financial upgradation under MACPS with grade pay of Rs.6600/- and consequent order for recovery of excess paid amount, Shri R. Chandrasekaran has filed another OA bearing No. 310/01380/2016 before the Hon'ble Tribunal, Chennai Bench. The OA No. 310/01280/2016 is pending in the Hon'ble CAT, Chennai Bench.

16. Further, with reference to para-16 of order dated 08.12.2014 of Hon'ble High Court, Madras Bench in Writ Petition No. 19024 of 2014 (Shri R. Chandrasekaran case), CBEC's circular F.No.A-23011/25/2015-Ad.IIA dated 20.06.2016 (**Annexure-15**) was issued to all Cadre Controlling Authorities under CBEC clarifying that NFG of Grade Pay of Rs.5400/- in PB-2 granted to Superintendents needs to be counted as one financial upgradation for the purpose of MACP Scheme. The above clarification was once again reiterated by the Ministry vide letter F. No. A-26017/203/2016-Ad.IIA dated 07.12.2016 (**Annexure-16**) and the CCAs were directed to follow the guidelines of DOP&T/CBEC on MACPS in letter and spirit. Further with regard to recovery of wrongful/excess payment made to individual officials, the Ministry had directed to take action in terms of DOP&T OM No.18/03/2015-Estt(Pay-I) dated 02.03.2016.

17. A number of Superintendents have been wrongly granted 3rd financial upgradation under MACP Scheme in the grade pay of Rs. 6600/- by many Commissionerates, despite CBEC's earlier clarification F.No.A-23011/29/2010-Ad.IIA dated 4th June, 2014 (**Annexure-7**). This was an administrative error by field offices and the up-gradation wrongly granted needed to be withdrawn. After issuance of CBEC's recent clarification dated 20.06.2016, Commissionerates have been withdrawing grade pay of Rs. 6600/- wrongly granted to Superintendents. Aggrieved by this action, many Superintendents have filed cases in various Tribunals. With regard to recovery of wrongful/excess payment made to individual

official, it has been clarified vide the Board's letter F.No.A-23017/203/2016-Ad.IIA dated 7th December, 2016 (**Annexure-16**) that the action may be taken in terms of DOPT OM No. 18/03/2015-Estt.(Pay-I) dated 02.03.2016(**Annexure-17**)

18. In these cases, Superintendents are basically seeking MACP benefit in Promotional hierarchy. However, MACP benefit is admissible only in hierarchy of Grade Pay. In this regard, following DoP&T's OMs are relevant wherein DOPT has forwarded CAT/Court orders in favour of Union of India: –

- i. DoP&T vide OM dated 20.1.2016 (**Annexure-18**) has forwarded a copy of the stay order dated 08.08.2014 passed by Hon'ble Supreme Court in CC No. 8271/2014 (converted to SLP NO. 21803/2014) in the matter of UOI Vs. Shri M. V. Mohanan Nair on the order of the High Court of Kerala in OP(CAT) No. 2000/2013(Z) regarding grant of MACP benefit in the promotional hierarchy.
- ii. DoP&T vide its OM. No. 22034/04/2013-Estt.(D) dated 01.03.2016 (**Annexure-19**) has forwarded a copy of the decision of Hon'ble CAT, Ahmedabad Bench's order in OA No. 120/000018/2015 filed by Shri Manubhai B. Rathore Vs. UOI & Ors whereby the demand of the applicant for MACP in promotional Hierarchy was dismissed.
- iii. DoP&T vide its OM. No. 22034/04/2013-Estt.(D) dated 17.05.2016(**Annexure-20**) has forwarded a copy of the decision dated 28.04.2016 of Hon'ble CAT, Calcutta Bench in OA No. 351/00195/2014 filed by Shri S.H.K. Murti & Ors Vs. UOI & Ors whereby the demand of the applicant for MACP in promotional hierarchy was dismissed. The Hon'ble Tribunal in the aforesaid decision dated 28.04.2016 has held that the MACP benefit would be given in the hierarchy of next higher Grade Pay and not in the Grade Pay of Promotional Hierarchy which will be payable on actual promotion.

19. Hon'ble CAT, Ernakulam Bench vide its's common order dated 06.04.2017(**Annexure-21**) disposed of OAs No. 05/2016, 89/2016, 91/2016,

176/2016, 262/2016, 488/2016, 651/2016, 725/2016 and 726/2016 holding that Non-Functional Grade Pay Granted to Superintendent *on completion of 4 years of service will be counted as an upgradation under MACP Scheme*. Relevant paras of order dated 06.04.2017 is quoted below:-

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20. Another argument of the applicants is the grant of same Grade Pay Rs. 5400/- in PB-2 and PB-3. **We note that the Grade pay remaining the same, financial benefit has been provided by upgrading PB-2 Rs. 9300-34800 to PB-3 Rs. 15600-39000/-.** Hence, this is not a case where there is no financial benefit in the movement from PB-2 to PB-3. Hence, there appears no need to intervene in the instructions of the Government of India in the notified scheme, on this argument. The arguments of applicants were based on similarity of Grade Pay, but the increase of pay in the movement from one pay band to the next which gave a financial benefit was not addressed by applicants. The crucial term used is financial upgradation. The upgradation can be by way of movement from lower pay band to the higher Pay Band, movement from lower Grade Pay to the next Grade Pay, and also grant of NFU which is also a financial upgradation. The crucial term is “financial upgradation” and not the manner in which it is granted i.e. by way of conduct of DPC or a selection/screening process or by way of a residency period prescribed. We note that even the High Court of Madras had remitted the matter back to DOPT for a re-consideration and the decision so taken on the High Court order would be applicable to applicants in this case also.

21. While issuing the MACP memorandum it is stated that any clarification to the scheme will be given by DOP&T, the nodal Ministry which introduced the Scheme. As a matter of fact in another OA the interpretation given by the Railway Board to the Scheme was set aside by the Tribunal on the ground that clarification, if any, will be given by the Department who introduced the scheme and no other. DOPT has issued a comprehensive FAQs which has addressed various clarifications sought on the scheme produced as Annexure R-1(o) in OA NO. 488/2016. In query No. 16 it has been clarified that NFU Grade Pay would be viewed as one financial upgradation. This would be in consonance with para 8.1 of the MACP Scheme which intended to provide a financial upgradation by the upward movement from PB-2 to PB-3. This upgradation can take the form of a DPC in case of promotion, a screening committee in case of MACP or simple time related upgradation as in the case of NFU – all intended to give a financial benefit so that stagnation in the same pay can be averted. To ignore NFU upgradation would be ignoring a financial benefit or giving an

unintended financial benefit without accounting for the same in the financial hierarchy. Movement from PB-2 to PB-3 similarly is a financial upgradation, Grade Pay being the same, and as stated by the nodal Ministry DOPT in para 8.1 of the O.M. introducing the scheme there is a financial benenfit in moving from a lower to a higher pay Band.

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24.*The difference between V CPC ACP and VI CPC MACP is that whereas former gave the upgradation benenfit to the promotional post, MACP extends the upgradation benefit to the next grade pay. Hence, **there appears no reason to not read the NFU upgradation from Rs. 4800 to Rs. 5400- on completion of 4 years residence as a upgradation as the same is upgradation to the next GP as envisaged in the MACP Scheme and para X(e) has also not given any contrary instruction.** We say this in view of the second view taken by the High Court of Madras in WP No. 19024 of 2014 dated 08.12.2014 which is in supercession of High Court order in WP No. 11535/2014 order dated 16.10.2014. In the concluding para 17 of latter WP No. 19024 of 2014 the matter was remitted back to the Department of Personnel to consider the issue once again. The High Court set aside the order passed by the Tribuanl dated 24.02.2014 in OA No. 675/2013, which the applicants rely upon to argue their contention, and remitted the case back to DOPT for fresh consideration. Hence neither the above OA nor earlier WPC No. 11535/2014 order of 16.10.2014 will come to the aid of the applicants.....*

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30. *As per MACP Scheme Clause 8.1 the Grade Pay of Rs. 5400 in two pay bands viz. PB2 and PB3 will be treated as separate Grade Pays for the purpose of MACP upgradation. The benefit of applicants, GP being the same, is in moving from PB2 Rs. 9300-34800 to PB3 Rs. 15600-39100. Hence a financial benefit is already in built in the scale of the higher pay band, treating the GP of Rs. 5400/- in PB2 and PB3 as distinct and separate grade pays for the purpose of MACP upgradation. Rule 8.1. of Annexure-1 of the MACP order dated 19.05.2009 holds, and any further or additional interpretation is not necessitated. **Even the High Court of Madras has revisited its earlier judgment in WP No. 11535/2014 granting the benefit, and in WP No. 19024/2014, delivered two months later on 08.12.2014 directing DOPT to consider the issue in extenso in the light of the provisions of MACP Scheme. DOPT in its re-consideration order dated 02.05.2016(Annexure R-1(h) has upheld clause 8.1 of MACP OM that grant of non-functional upgradation GP Rs. 5400/- in PB-2 to***

Superintendent needs to be counted as one financial upgradation for the purpose of MACP Scheme

*31. If applicants are claiming the benefit of 2nd ACP as Assistant Commissioner in the 24th year which falls between 01.01.2006 and 01.09.2008 and their pay fixation under VI CPC on a date thereafter, applicants can claim Non-functional upgradation after 4 years in Superintendent scale as this is a benefit provided under clause X(e) of the VI CPC Government Resolution. If they claim pay fixation as on 01.01.2006 then also clause X(e) can be extended to those applicants who were holding the post of Superintendent on 01.01.2006 and have completed four years and become eligible for non-financial upgradation to Rs. 5400 on completion of 4 years of service. However this **upgradation will be counted as an upgradation and cannot be ignored on the ground of same grade pay.***

20. On the same issue, the Hon'ble CAT, Ahmedabad vide common Order dated 22.09.2017 has dismissed a number of OAs in favour of the Govt. The said Order dated 22.09.2017 of the Hon'ble CAT has been circulated to all field formation vide Board's letter F.No.A-23011/96/2016-Ad.IIA dated 25th May, 2018 (**Annexure-22**) with requested that the said judgment may be cited/referred to while diffending the CAT/Court cases on the subject of grant of 3rd financial upgradation under MACP Scheme to Superintendents who were granted non-functional grade pay in grade pay of Rs. 5400/- PB-2. The Hon'ble CAT, Ernakulam Bench vide Order dated 19.06.2018 has dismissed OA No. 180/00123/2017, OA No. 180/00404/2017, OA No. 180/00983/2016 and OA No. 180/00405/2017. The said Order dated 19.06.2018 has been circulated to all field formation vide Board's letter F.No.A-23011/58/2017-Ad.IIA dated 1st November, 2018 (**Annexure-23**) under CBIC for defending the pending court cases on the issue.

21. Keeping in view the above facts, appropriate action may be taken to defend the interest of the Government in the CAT/Court on the issue of grant of 3rd financial upgradation under MACP Scheme to Superintendents who were granted non-functional grade pay in grade pay of Rs. 5400/- in PB-2.

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