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BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, ERNAKULAM

Present: Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.

(Monday, the 4th day of April 2022)

APPEAL No. 141/2019

(Old No.ATA.647(7)2015)

Appellant : Shri.Kailash Logistics Limited,
52/3054 – 55
Palliyil Lane,
Kochi – 682 016.

By Adv.P.Ramakrishnan

Respondent : The Regional PF Commissioner
EPFO, Sub Regional Office,
BhavishyanidhiBhavan,
Kaloor, Kochi – 682 017.

By Adv.Sajeev Kumar K Gopal

This case coming up for final hearing on 10.09.2021 and this Tribunal-cum-Labour Court on 04.04.2022 passed the following:

ORDER

The final order in this appeal was issued on 04.04.2022. A typographical error crept into the date of the order. Instead of 04.04.2022, the date of the order is mentioned as 19.01.2022 in

the order. Necessary correction is incorporated as per Sec 7L(2) of EPF and MP Act 1952.

2. Present Appeal is filed from order No. KR/KCH/ 24346/Enf.1(5)/2015/RB No.242/1/745C dated 27.04.2015 issued by the respondent assessing dues under Sec7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') with regard to the contract employees engaged through M/s. Obak Human Resources Outsourcing Pvt. Ltd. for the period from 06/2008 – 07/2012. Total dues assessed is Rs.10,03,800/- (Rupees Ten lakh three thousand eight hundred only)

3. Appellant is a Public Ltd company incorporated under the companies Act engaged in the business of providing logistic support for various commercial activities. The appellant establishment is covered under the provisions of the Act w.e.f. 01.04.2008. The appellant entered into a service agreement dated 01.04.2011 with M/s. Obak Human Resources Outsourcing Pvt. Ltd. for logistic support. The agreement provided that M/s. Obak Human Resources Outsourcing Pvt. Ltd. would be under obligation to pay wages, salaries, contribution under ESI, PF and other statutory payments and its

employees would be employees of M/s. Obak Human Resources Outsourcing Pvt. Ltd. A true copy of the said agreement dated 01.04.2011 is produced and marked as Annexure A1. The appellant received a notice dated 04.10.2012 issued by the respondent under Sec7A of the Act. The appellant is designated as the principle employer. An authorised representative of the appellant attended the enquiry on 18.10.2012. The representative pointed out that M/s. Obak Human Resources Outsourcing Pvt. Ltd. was being paid a lumpsum amount for its service and that it was a separately covered entity. It was also pointed out that the agreement was on principle to principle basis. The enquiry was thereafter posted to 29.07.2013. The representative of the appellant could not attend the hearing. The appellant sought further time. However the respondent authority issued the impugned order dated 09.04.2015 on the presumption that the appellant is a principle employer under Sec8A of the Act. A true copy of the order dated 27.04.2015 is produced and marked as Annexure A2. The respondent failed to consider Annexure A1 agreement entered into between the appellant and M/s. Obak Human Resources Outsourcing Pvt. Ltd. As stipulated in the agreement, the obligation to remit the

contribution is with that of M/s. Obak Human Resources Outsourcing Pvt. Ltd. The respondent ought to have seen that the responsibility of the appellant was to make lumpsum payments, which included service charges and all other expenses. The respondent ought to have noticed that as perSec6 of the Act read with Para 29 of EPF Scheme, contribution under the Act is to be paid with reference to Basic wages, Dearness allowance and Retaining allowance only. Basic wages defined under Sec2(b) exclude cash value of concession, DA, HRA, overtime allowance, Bonus or Commission or any similar allowance. The respondent authority ought to have noticed that there was no employer-employee relationship between the appellant and the workers employed byM/s. Obak Human Resources Outsourcing Pvt. Ltd.

4. The respondent filed counter denying the above allegations. M/s. Obak Human Resources Outsourcing Pvt. Ltd. is covered under the provisions of the Act. The establishment is a contractor engaged in providing manpower to various principle employers. The terms of contract are different with each principle employer. The establishment is providing manpower to the appellant also and therefore the appellant is considered as

the principle employer in respect of the contract employees engaged through M/s. Obak Human Resources Outsourcing Pvt. Ltd. During the inspection of M/s. Obak Human Resources Outsourcing Pvt. Ltd, an Enforcement Officer of the respondent organisation pointed out several discrepancies in the matter of compliance under the Actin respect of the employees who are working on contract basis with their clients. The salary on which Provident Fund liability is calculated varied from principle employer to principle employer. In almost all cases, the salary is split into various components and contribution is paid only on basic pay which is less than 40% of the gross pay. It was also noticed that no DA is paid to these employees. The Enforcement Officer who conducted the inspection pointed out that many of these allowances doesn't have a proper explanation by the establishment and therefore all allowances except HRA and Overtime allowance will come within the definition of basic wages. It is a clear case where the basic wages are split into various allowances or DA is paid in the name of some allowance for evading Provident Fund liability. The Hon'ble High Court of Calcutta in ***RPFC, West Bengal & Another Vs Vivekananda Vidya Mandir***, 2005(II)LLJ 721, and the Hon'ble High Court of

Gujarat in ***Cypromet Limited Vs Assistant Provident Fund Commissioner***, 2004 (3)CLR 485 held that all such allowances will form part of basic wages particularly when there is no component of DA in wages paid to the employees. As per Sec2(f), Sec6 and Sec8A and Para 30 and 36B of EPF Scheme, the appellant is also equally liable to remit contribution in respect of employees deployed by the contractors. The contractor is also under a statutory obligation to submit a statement showing the recovery of contribution in respect of the contract employees to the principle employer within 7 days of close of every month. Sec8A of the Act empowers the principle employer to recover the contribution from the contractor either from the amount payable to the contractor or under any contract as a debt payable by the contractor. Any provision in an agreement which is contrary to or inconsistent with the statutory provision cannot have any bearing on the liability of the principle employer under the Act. As per the invoice for the month of February 2012, the salary component reimbursed is Rs. 2,25,135/- for 28 persons.PF is seen remitted for 27 persons and the wages reported for PF is Rs.92,797/-. The employers' share of contribution paid by the principle employer is Rs.13,152/- on a wage component of

Rs. 1,09,600/-.As per the register, the components of pay are Basic pay, Shift allowance, Food allowance, Conveyance allowance, Washing allowance and Additional allowance. Cleaning workers are paid basic pay and shift allowance only. The element subject to PF is only basic pay and shift allowance which is less than 40% of the gross pay. Though salary of the supervisor is reimbursed, no such payment is seen in the wage register. Taking into account all the above facts, the respondent authority held that the appellant as well as the contractor is jointly and severally liable to remit the statutory dues in respect of the contract employees engaged by the appellant through M/s. Obak Human Resources Outsourcing Pvt. Ltd.

5. The appellant establishment engaged 29 employees through M/s. Obak Human Resources Outsourcing Pvt. Ltd. as drivers, supervisors and also cleaning staff. They entered into Annexure A1 agreement. The respondent authority through its Enforcement Officer inspected the books of accounts and remittance position in respect of M/s. Obak Human Resources Outsourcing Pvt. Ltd. and found that M/s. Obak Human Resources Outsourcing Pvt. Ltd. is supplying manpower to various industries and establishments. The Enforcement Officer

also noticed that M/s. Obak Human Resources Outsourcing Pvt. Ltd. is following different wage structure for different establishments. It was also noticed that the wages paid to these contract employees are split into various allowances to evade PF deduction. It is reported that M/s. Obak Human Resources Outsourcing Pvt. Ltd. is restricting PF contribution to 40% of the gross pay given to the employees deployed in various factories and establishments. The respondent authority therefore initiated an enquiry under Sec7A of the Act summoning the contractor as well as various principle employers. After hearing all the parties involved, the respondent authority issued a Composite order, however individually assessing the dues in respect of various establishments where M/s. Obak Human Resources Outsourcing Pvt. Ltd. supplied manpower and also deciding the liability of M/s. Obak Human Resources Outsourcing Pvt. Ltd. and that of the principle employer. In this case, the respondent authority found that the allowances paid by M/s. Obak Human Resources Outsourcing Pvt. Ltd. will form part of basic wages and the appellant as well as M/s. Obak Human Resources Outsourcing Pvt. Ltd. are held to be jointly

and severally liable to remit the contribution for the reasons stated there in.

6. In this appeal, the learned Counsel for the appellant pointed out M/s. Obak Human Resources Outsourcing Pvt. Ltd. is not a contractor to the appellant and the Annexure A1 agreement would clearly show that M/s. Obak Human Resources Outsourcing Pvt. Ltd. is not a contractor of the appellant establishment and the relationship between the appellant and M/s. Obak Human Resources Outsourcing Pvt. Ltd. is that of principle to principle. The only ground pleaded by the learned Counsel for the appellant is that lumpsum payments including service charges are paid by the appellant to M/s. Obak Human Resources Outsourcing Pvt. Ltd. The appellant pleaded that a representative of the appellant attended the 7A enquiry, but the impugned order refers to only a letter dated 20.11.2012 from the appellant seeking adjournment and it is seen that the enquiry under Sec 7A commenced on 18.10.2012 and concluded vide order dated 27.04.2015. This is a case in which M/s. Obak Human Resources Outsourcing Pvt. Ltd. deployed 29 employees as supervisor, drivers and cleaners to the appellant establishment. The salary of these employees and the service

charges payable by the appellant is specified in the agreement itself. In this contest it may be relevant to examine the definition of employer under Sec 2(e) of the Act. As per Sec 2 (e)(II), employer means in relation to any other establishment the person who or the authority which has the **ultimate control over the affairs of the establishment**. The appellant cannot deny that the ultimate control over the affairs of the appellant establishment is with them. Further the definition of employee under Sec 2(f) reads as follows: 2(f) Employee means any person who is employed for wages in any kind of work manual or otherwise **in** or **in connection with the work of the establishment** and who gets his **wages directly** or **indirectly from the employer** and includes any person employed by or through a contractor in or in connection with a work of the establishment. The term "in connection with the work of the establishment" was elaborately considered by the Hon'ble Supreme Court in ***Royal Talkies Hyderabad Vs Employees State Insurance Corporation***, 1978 (4)SCC 204. The Hon'ble Supreme Court held that "the expression 'in connection with the work of an establishment' ropes in a wide variety of workmen who may not be employed in the establishment but may be

engaged only in connection with the work of the establishment. Some nexus must exist between the establishment and the work of the employee. But it may be a loose connection. 'In connection with the work of the establishment' only postulates some connection between what the employee does and the work of the establishment. He may not do anything directly for the establishment; he may not do anything statutory obligatory in the establishment; he may not even do anything which is primary or necessary for the survival or smooth running of the establishment or integral to the adventure. It is enough if the employee does some work which is ancillary incidental or has relevance to or link with the object of the establishment". Applying the above text, the appellant cannot argue that M/s. Obak Human Resources Outsourcing Pvt. Ltd. is not a contractor supplying human resources and the employees deployed by M/s. Obak Human Resources Outsourcing Pvt. Ltd. will not come within the definition of "employee" under the provisions of the Act. The learned Counsel for the respondent took this Tribunal through the provisions of Sec8A and Para 30 and 36B to argue that the appellant establishment, as a principle employer cannot escape the liability of remitting the PF

contribution in respect of the contract employees deployed by M/s. Obak Human Resources Outsourcing Pvt. Ltd.

7. The learned Counsel for the appellant also pointed out that the allowances paid by M/s. Obak Human Resources Outsourcing Pvt. Ltd. to its employees deployed in the appellant establishment will not come within the definition of basic wages under Sec 2(b) of the Act. The learned Counsel for the respondent pointed out that the appellant is not paying any DA to its employees and splitting the wages into various allowances. The wage structure of the appellant establishment is Basic pay, Shift allowance, Food allowance, Conveyance allowance, Washing allowance and Additional allowance. M/s. Obak Human Resources Outsourcing Pvt. Ltd. is remitting contribution only on basic pay and shift allowance which accounts only for 40% of the gross pay.

Sec 2 (b) of the Act defines the basic wages and Sec 6 of the Act provides for the contribution to be paid under the Schemes:

> ***Section 2(b)*** *: "**Basic wages**"* means all emoluments which are earned by an employee while on duty or(on leave or holidays with wages in either case) in accordance

with the terms of contract of employment and which are paid or payable in cash to him, but does not include :

1. Cash value of any food concession.

2. Any Dearness Allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living) HRA, overtime allowance, bonus, commission or any other similar allowances payable to the employee in respect of his employment or of work done in such employment.

3. Any present made by the employer.

Section 6: Contributions and matters which may be provided for in Schemes. The contribution which shall be paid by the employer to the funds shall be 10% of the basic wages, Dearness Allowance and retaining allowances if any, for the time being payable to each of the employee whether employed by him directly or by or through a contractor and the employees contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so

desires, be an amount exceeding 10% of his basic wages, Dearness Allowance, and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Section. Provided that in its application to any establishment or class of establishment which the Central Government, after making such enquiry as it deems fit, may, by notification in the official gazette specified, this Section shall be subject to the modification that for the words 10%, at both the places where they occur, the word 12% shall be substituted. Provided further that there were the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding of such fraction to the nearest rupee half of a rupee, or quarter of a rupee.

Explanation 1 – For the purpose of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

It can be seen that some of the allowances such as DA, excluded U/s 2b (ii) of the Act are included in Sec 6 of the Act. The confusion created by the above two Sections was a subject matter of litigation before various High Courts in the country. The Hon'ble Supreme Court of India in ***Bridge & Roof Company Ltd Vs Union of India,*** 1963 (3) SCR 978 considered the conflicting provisions in detail and finally evolved the tests to decide which are the components of wages which will form part of basic wages. According to the Hon'ble Supreme Court of India,

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages.

The Hon'ble Supreme Court of India ratified the above position in ***Manipal Academy of Higher Education Vs PF Commission,*** 2008(5)SCC 428. The above tests were again reiterated by the Hon'ble Supreme Court in ***Kichha***

Sugar Company Limited Vs. Tarai Chini Mill Majzoor Union 2014 (4) SCC 37. The Hon'ble Supreme Court of India examined all the above cases in ***RPFC Vs Vivekananda Vidya Mandir and Others,*** 2019 KHC 6257. In this case the Hon'ble Supreme Court considered whether travelling allowance, canteen allowance, lunch incentive, special allowance, washing allowance, management allowance etc. will form part of basic wages attracting PF deduction. After examining all the earlier decisions and also the facts of these cases the Hon'ble Supreme Court held that "the wage structure and the components of salary have been examined on facts, both by the authority and the Appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wages camouflage as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusion of the facts. The appeals by the establishments therefore merit no interference". The

Hon'ble High Court of Kerala in a recent decision rendered on 15/10/2020 in the case of ***EPF Organization Vs MS Raven Beck Solutions (India) Ltd,*** WPC No. 1750/2016, examined Sec 2(b) and 6 of the Act and also the decisions of the Hon'ble Supreme Court to conclude that

> "this makes it clear that uniform allowance, washing allowance, food allowance and travelling allowance, forms an integral part of basic wages and as such the amount paid by way of these allowance to the employees by the respondent establishment were liable to be included in basic wages for the purpose of assessment and deduction towards contribution to the provident fund. Splitting of the pay of its employees by the respondent establishment by classifying it as payable for uniform allowance, washing allowance, food allowance and travelling allowance certainly amounts to subterfuge intended to avoid payment of provident fund contribution by the respondent establishment".

The Hon'ble High Court of Madras in ***Universal Aviation Service Private Limited Vs Presiding Officer EPF Appellate Tribunal,*** 2022 LLR 221 again examined this issue in a recent decision. The Hon'ble High Court of Madras observed that it is imperative to demonstrate that the allowances paid to the employees are either variable or linked to any incentive for production resulting in greater output by the employee. It was also found that when the amount is paid, being the basic wages, it requires to be established that the workmen concerned has become eligible to get extra amount beyond the normal work which he is otherwise required to put. The Hon'ble High Court held that

> "Para 9: The predominant ground raised by the petitioner before this Court is that other allowances and washing allowance will not attract contributions. In view of the aforesaid discussions and law laid down by the Hon'ble Supreme Court in ***Vivekananda Vidya Mandir case (supra)***, the petitioner claim cannot justified or sustained since "other

allowance" and washing allowance have been brought under the purview of Sec 2 (b) read with Sec 6 of the Act".

In this case, the allowances paid are shift allowance, food allowance, conveyance allowance, washing allowance and additional allowance being paid to the employees by the appellant. According to the Counsel for the respondent all these allowance are being paid universally to all employees and none of the allowances are paid especially to those who avail the opportunity or for doing any work beyond the norms. Hence applying the tests laid down by the Hon'ble Supreme Court in ***RPFC Vs Vivekananda Vidya Mandir and Others,*** 2020 17 SCC 643 and also in ***Gobin (India) Engineering Pvt. Ltd. Vs Presiding Officer, CGIT & Labour Court and Another***, W.P.(C)No. 8057/2022, all the above allowances which are uniformly and ordinarily paid to all employees and are not linked to any incentive for production or being paid especially to those who avail the opportunity, will form part of Basic wages and therefore will attract Provident Fund deduction.

8. In this case, it is clear from the nomenclature itself that for what purpose allowances are being paid. It is clear that these allowances are paid for not doing any additional work or to those who avail the opportunity. It is also universally paid to all the employees. The appellant failed to produce any documents or evidence to show that the workman concerned had become eligible to get the extra amount beyond the normal work which he was otherwise required to put in.

9. Considering the facts, circumstances, pleadings and evidence in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-
(V.Vijaya Kumar)
Presiding Officer