



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

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

(Monday the, 16th day of May 2022)

APPEAL No. 158/2018

(Old No. Appeal No. AKL-97/2016)

Appellant : Mr. Andrew Nettikadan
Carrier Station Road
Ernakulam – 682 016

By Adv. C.B.Mukundan

Respondents : 1. The Assistant PF Commissioner
EPFO, Sub Regional Office,
Kaloor,
Kochi – 682 017

2. Recovery Officer &
The Assistant PF Commissioner
EPFO, Sub Regional Office,
Kaloor,
Kochi – 682 017

By Adv.S.Prasanth

This case coming up for final hearing on 10.03.2022 and this Tribunal-cum-Labour Court on 16.05.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KCH/15891/Enf.1(3)/2015/10383 dated 13.10.2015 assessing dues under Sec 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from April 2012 – March 2013. The total dues assessed is Rs.3,23,724/- (Rupees Three lakh twenty three thousand seven hundred and twenty four only)

2. The appellant is a partnership firm. It is covered under the provisions of the Act. The establishment is closed due to financial difficulty w.e.f. 30.11.2014. The appellant received a summons from the respondent. One of the staff of the appellant appeared before the 1st respondent on 25.11.2014 and produced a copy of the wage register for the period from 04/2012 – 03/2013. He also submitted that the contribution in respect of all the employees for the period from 04/2012 – 03/2013 had already been paid. In the meanwhile the appellant establishment closed its function w.e.f. 30.11.2014. Subsequent to closure of the establishment, all the employees

were retrenched and the fact was brought to the notice of the respondent vide letter dated 02.12.2014. One of the staff of the 1st respondent contacted the managing partner over telephone on 07.09.2016 and informed that an amount of Rs.3,23,724/- is due to the Provident Fund. A representative of the appellant approached the respondent and collected a copy of the order dated 13.10.2015 issued under Sec 7A of the Act. A copy of the said order is produced and marked as Annexure 1. On 08.09.2016, the 1st respondent's office informed the Managing Partner of the appellant that revenue recovery action is being taken against the appellant. A representative of the appellant contacted the 1st respondent's office and obtained a copy of notice of demand to defaulter dated 17.06.2016 issued by the 2nd respondent. A copy of the notice is produced and marked as Annexure 2. The appellant never committed any default till the closure of the unit. The appellant is producing copies of wage register and chalans for ready reference. Photocopy of the wage register in question is produced and marked as Annexure 3 series. It could be seen from Annexure

3 that there were employees who were outside the ambit of the statutory limit of wages. The chalans for the wage months 04/2012 – 03/2013 (except 02/2013) are produced and marked as Annexure A4 series. The wages shown in Annexure A3 series is only the Basic and Dearness Allowance on which provident fund contribution was remitted. The other amounts paid are the incentive depending upon their work and House Rent Allowance. The above payments were made against vouchers. Sample copies of the said vouchers are produced and marked as Annexure A5 series. Summary statement showing the month wise Basic wages, Dearness Allowance, House Rent Allowance, Incentive and Bonus given to all the covered employees and the aggregate salary, employees contribution, employers contribution, date of remittance etc. is produced and marked as Annexure 6. Bifurcation of Annexure 6 for the month from 04/2012 – 03/2013 is also produced and marked as Annexure 7 series. The notices from 23.04.2015 alleged to have been issued to the appellant is not received as the appellant establishment is closed w.e.f. 30.11.2014. The

appellant is not liable to pay any dues on incentive and House Rent Allowance paid to its employees. The appellant preferred a Writ Petition No.30595/2016 before the Hon'ble High Court of Kerala and obtained a stay of the recovery action on deposit of Rs.50,000/- before the 1st respondent.

3. The respondent filed counter denying the above allegations. The notice number KR/KC/15891/Recovery/2016-2017/698 dated 17.06.2016 is issued under the sec 8B to 8G of the Act. Sec 7(I) of the Act does not allow an appeal from the recovery action under Sec 8 of the Act. Hence the appeal against recovery action is not maintainable. The appellant establishment is covered under the provisions of the Act w.e.f. 01.01.1999. During the course of inspection by an Enforcement Officer of the respondent organisation, it was noticed that there is a huge variation in the balance sheet of the establishment with regard to the wages. The Enforcement Officer reported a difference of Rs.12,64,022/- between the Wage register and Balance sheet for the year 2012 – 2013. The appellant did not produce any documents or provide any

clarification for the difference of wages. Hence an enquiry under Sec 7A of the Act was initiated. The appellant was provided nine opportunities to appear before the respondent and explain the difference. Except one posting, nobody appeared representing the appellant. On 02.12.2014, the respondent received a letter from the appellant stating that the business activity of the appellant is stopped w.e.f. 30.11.2014. No documents were submitted regarding the closure. The appellant admits that the employees were paid two wages. One for which contribution under the Act are paid and entered in the wage register which are maintained as per statutory requirement. The other part of the wages are paid thorough vouchers. In view of the decision of the Hon'ble Supreme Court and the Hon'ble High Court's any wages universally necessarily and ordinarily paid to all the employees are basic wages. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in that basic wages.

4. The Enforcement Officer of the respondent organisation noticed during inspection that there is huge variation in wages between the wage register and also the balance sheet. The Enforcement Officer reported a variation of Rs.12,64,022 for the year 2012-2013. The respondent therefore initiated an enquiry under Sec 7A of the Act. A representative of the appellant attended the hearing on 25.11.2014 and there was no representation thereafter. Since the appellant failed to produce any documents other than wage register and no proper explanation was forthcoming from the appellant, the respondent issued the impugned order on the basis of the report of the Enforcement Officer.

5. In this appeal, the appellant contented that apart from the wages paid, the appellant has also paid incentive and House Rent Allowance to its employees. The incentive and House Rent Allowance were paid through vouchers. The appellant produced the copies of vouchers along with a detailed statement of wages paid. It is further pointed out that the appellant establishment is closed w.e.f. 30.11.2014 and the

subsequent summons issued by the respondent were not received by the appellant. On a perusal of the records now produced by the appellant in this proceedings particularly cash vouchers, it is seen that in addition to basic and Dearness Allowance, the appellant establishment was also paid House Rent Allowance and incentive to its employees. According to the learned counsel for the appellant, incentives were being paid on the basis of the output by the employee. The House Rent Allowance being paid to the employees will not attract any provident fund deduction. Whether the incentives will attract provident fund deduction depends on the facts of the case and the law laid down by the Hon'ble Supreme Court in **Regional Provident Fund Commissioner, West Bengal Vs Vivekananda Vidhyamandir and Others**, 2020 (17) SCC 643 and also the Hon'ble High Court of Kerala in **Gobin (India) Engineering Pvt. Ltd. Vs Presiding Officer, CGIT & Labour Court and Another**, W.P(C)No. 8057/2022. As per the above decisions, the test to be applied is whether the allowance in question being paid to its employees were either variable or

were linked to any incentive for production resulting in greater output by an employee. In order that the amount goes beyond the basic wages, it has to be shown that the workmen had become eligible to get this extra amount beyond the normal work which he was otherwise required to be put in. There is no data available on record to show what were the norms of work prescribed during the relevant point of time. If the incentives are being paid for the extra work done by the employees as an incentive for production resulting in greater output, then the incentive cannot be treated as part of basic wages. Since the impugned order is issued ex-parte, it is appropriate that the matter is remitted back to the respondent to exclude the House Rent Allowance from the assessment and also examine whether the incentive paid to the employees are an extra payment for an extra output.

Considering the facts, circumstances and evidences in this appeal, I am not inclined to sustain the order. Hence the appeal is allowed, the impugned order is set aside and the matter is remitted back to the respondent to re-assess the dues

after issuing notice to the appellant. If the appellant fails to appear or produce the records called for, the respondent is at liberty to decide the matter according to law. The pre-deposit made by the appellant as per the direction of the Hon'ble High Court shall be adjusted or refunded after finalisation of the enquiry.

Sd/-
(V.Vijaya Kumar)
Presiding Officer