सत्यमेव जयते

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

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

(Thursday the, 7th day of April 2022)

APPEAL No. 518/2019

Appellant	:	M/s. Saptha Zeal Private Limited Royal Towers, Pottakuzhy Junction Pattom.P.O., Trivandrum - 695 004 By Adv. Ajith S Nair
Respondent	:	The Assistant PF Commissioner EPFO, Regional Office, Pattom.P.O. Trivandrum – 695 004 By Adv. Ajoy P.B

This case coming up for final hearing on 01.12.2021 and this Tribunal-cum-Labour Court on 07.04.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/22077/Enf.1(4)/ 2008/207 dated 10/04/2008 assessing dues under Sec 7A of EPF and MP Act (hereinafter referred to as 'the Act') on evaded wages for the period from 05/2005 to 03/2007. The total dues

assessed is Rs. 2,32,262.30/- Rupees Two lakh thirty two thousand two hundred sixty two and thirty paisa only)

2. The appellant is a company incorporated under the Companies Act 1956. The appellant is engaged in the business of providing various services to other establishment such as House Keeping Services, Security Services and providing drivers. The appellant is covered under the provisions of the Act. The appellant is also covered under the ESIC Act. The appellant establishment is issued with a licence under the provisions of Contract Labour (Regulation and Abolition) Act 1970 by the licensing authority. The appellant establishment is regular in compliance. The remittance challans and wage register copy for April 2005, December 2006, January 2007 and April 2007 are produced herewith. These documents will clearly establish the fact that the appellant is regular in compliance. A copy of the Form 6-A return submitted by the appellant is also produced herewith. The appellant entered into an agreement with M/s.PRS Hospital, M/s.Great India Car & Coach Rental Pvt. Ltd. and M/s.Hotel Geeth for providing services to them. As per the terms of agreement the appellant provided manpower to those establishments. The appellant is receiving payments on

monthly basis. The appellant claims all inclusive charges and is not pertaining to the wages of employees alone. The appellant is an independent contract. While so the appellant received a notice from the respondent under Sec 7A of the Act. The appellant produced all the records before the respondent authority. During the course of enquiry, all the above three principle employers were also summoned in the enquiry. The respondent obtained monthly bill submitted by the appellant to them and held that the appellant is liable to pay contribution on the bill amounts. The respondent issued the impugned order holding that the appellant is paying contribution only on Basic and DA and the other allowances will also attract provident fund contribution. The respondent authority issued the impugned order without giving adequate opportunity to the appellant in violation of principles of natural justice. The appellant establishment is independently covered and therefore the finding regarding the principle and contractor cannot be sustained. The appellant is having its own wage structure for its employees. The bill amount submitted by the appellant to the principal employer cannot be the basis for assessment of dues. There is no whisper in the impugned order why the respondent has

considered the allowances as wages. The percentage of allowance and percentage of Basic and DA in the wage structure of an employee has not been considered by the respondent authority.

3. The respondent filed counter denying the above allegations. The appellant is an establishment engaged in the supply of manpower to various establishments and covered under the provisions of the Act. The appellant split wages of its employees for evading provident fund contribution. The respondent therefore initiated an enquiry under Sec 7A of the Act. The enquiry was held on 11.06.2007, 15.06.2007, 06.07.2007 02.08.2007, 20.08.2007, 11.09,2007, 31.12.2007, 07.02.2008, 14.02.2008, 20.02.2008 and finally on 03.03.2008. The appellant establishment entered into contract with

1. The Great Indian Car & Coach Rental (P) Ltd.
2. Hotel Geetha and
3. PRS Hospital.

4. Hence the principal employers were also summoned in the enquiry. The principle employers submitted that the provident fund and other statutory liabilities is met by the

contractor himself and the principle employers are not responsible for any default by the contractor. The respondent authority after verifying the records, found that the appellant establishment has split the wages of its employees for the purpose of evading provident fund contribution. The respondent authority therefore issued the impugned order holding the appellant as well as the principle employer liable for the defaulted provident fund contribution. The appellant establishment is not regular in compliance, which is clear from the documents produced by the appellant. It is also clear that the appellant is not remitting contribution uniformly in respect of its employees. The appellant is remitting contribution in respect of each principle employer separately. The claim of the appellant that the appellant establishment is having its own wage structure and terms and conditions of the employment is not correct. It is seen that the wage structure of the employees varies from principle employer to principle employer. As per Sec 2(f) of the Act, an employee means any person employed for wages 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.

As per Sec 8A of the Act, the principle employer is empowered to recover the contribution in respect of the contract employees and adjust the same in the contract amount or recover the same from the contractor. Para 30(2) of EPF Scheme mandates that the contractor shall recover the provident fund contribution and account the same through the principle employer. The special allowance being paid by the appellant to its employees universally will form part of basic wages and therefore will attract Provident fund deduction. The appellant failed to produce any documents before the respondent authority to demonstrate that the allowances in question being paid to its employees were either variable or linked to any incentive for production resulting in greater output by an employee or that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those avail of the opportunity.

5. The main issue involved in this appeal is whether the special allowance being paid to the employees by the appellant will form part of basic wages and therefore will attract provident fund deduction. The learned Counsel for the appellant also raised the issue whether the principle employer is liable for the

contribution in respect of the contract employees employed by them.

6. According to the learned Counsel for the appellant, as per Sec 2(b), Basic wages means all emoluments which are earned by an employee while on duty or on holidays with wages in accordance with terms of contract with the employees. However certain exclusions are provided such as House Rent Allowance, Overtime allowance, Bonus, Commission or any other similar allowance payable to the employees. It is not at all mandatory under the provisions of the labour legislations that wages shall be paid in the manner prescribed in Minimum Wages Act. The Apex Court has already clarified that the requirement of minimum wages is met if the total amount received by the employee is equal to or more than the prescribed wages. Hence the appellant has the liberty to bifurcate the wages and pay allowances to its employees. There is no evidence before the respondent that the appellant bifurcated the wages as a subterfuge to escape the statutory liability. Therefore the special allowance being paid by the appellant to its employees will not form part of Basic wages.

7. According to the learned Counsel for the respondent, the special allowance is being uniformly and universally paid to all employees. The appellant failed to establish whether the special allowance has lead to any incentive for production resulting in greater output by an employee and the allowances in question were not paid across the board to all employees in a particular category. Hence the special allowance will form part of basic wages and therefore will attract provident fund deduction. 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 :
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> 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.

6. 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 allowance paid is special allowance being paid to the employees by the appellant. 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, the above allowance which is 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 the present case the appellant establishment is paying special allowance universally to all the employees across the Board. The appellant establishment did not produce any evidence to establish that the special allowance being paid to its employees are link to any incentive for production. In order that the amount goes beyond basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. In view of the above, it is not possible to accept the argument of the learned Counsel for the appellant that the special allowance being paid by the appellant to its employees is an excluded allowance. Hence the special allowance being paid by the appellant to its employees comes

within the definition of Basic wages and therefore will attract provident fund deduction.

9. The Secs' 2(f), 8A of the Act and Para 30 of EPF Scheme clearly defines the liability of the principle employer with regard to the contract employees engaged by them. Hence the principle employer cannot escape the liability of provident fund in respect of contract employees engaged by them. In the event of default by the contractor even if, the contractor is independently covered under the provisions of the Act. Allotment of an independent code number is only an administrative requirement and is not mandated under any provisions of the Act or Schemes. Hence allotment of an independent number by itself cannot be a ground for escaping the liability by the principle employer under the statute.

10. 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