BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE AVENUE, DISTRICT COURT COMPLEX, DELHI.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

M/s. Ahresty India Pvt. Ltd. Appellant

Vs.

RPFC, Gurgaon Respondent

ATA No. D-2/04/2019

ORDER DATED:- 05.04.2021

Present:- Shri Dinesh & Ms. Leena Tuteja, Ld. Counsel for the Appellant.
Shri Puneet Garg, Ld. Counsel for the Respondent.

This appeal assails the order passed by the RPFC Gurgaon on 18.02.2019 in a proceeding u/s 14B of the EPF and MP Act (in short the Act) against the appellant/establishment assessing Rs. 2,28,15,176/- to be paid by the appellant employer as damage for the delayed remittance of its employees for the period 02/10/12 to 28.09.2018.

Being noticed respondent appeared and filed Written objection to which rejoinder was filed by the appellant.

The grievance of the appellant, as set out in the memo of appeal in short is that it is a subsidiary of Ahresty Corporation Japan and was incorporated under the Companies Act in India in January 2007. The company is engaged in manufacturing of Automotive Parts of Die casting. The parent company i.e. Ahresty Corporation has been deputing its employees to India as per the written arrangement. Those deputed international workers are being paid salaries partly in India and partly in Japan. The appellant company was duly complying with its statutory obligation with respect to the salary paid to the international workers in India under a bonafide belief that the salary paid outside India to the employees, working on deputation are not covered under the EPF and MP Act for EPF contribution as similar contribution are being paid in Japan under its social security norm. The establishment was inspected time and again by the inspectors of the respondent department who had the opportunity of verifying the records of the establishment time and again. At no point of time it was pointed out that for the salary paid in Japan EPF contribution in India

is payable. By filing the inspection report of the inspectors alongwith the appeal the appellant has stated that the delay in remittance was never intentional nor with malafide purpose. While the matter stood thus, in August 2017 the appellant establishment changed its consultant, who for the first time pointed out the liability of the appellant for EPF contribution with respect to the salary paid to the international workers partly in India as well as partly in their country of origin. Thus, the establishment immediately and voluntarily took steps and made deposit of the EPF contribution alongwith other administrative charges on the salary of the International workers paid in Japan for the period October 2012 to September 2016, irrespective of the fact that the contribution stands deposited under the Social Security Scheme of Japan on the salary paid in Japan. Not only that while making such deposit the establishment deposited both the employer and employees share of the contribution alongwith the interest for the delayed remittance. But the respondent issued showcause notice on 04.10.2018 calling upon the appellant to showcause as to why damage on belated remittance shall not be levied as provided u/s 14B of the Act. Alongwith the notice a month wise and account wise statement of the late payment was provided to the appellant. In response to the notice the representative of the appellant appeared before the commissioner and sought for some time to file its reply. Accordingly a detailed written reply dated 26.10.2018 was filed denying the liability and explaining the mitigating circumstances for delay in remittance. But the commissioner without considering the submissions and explanations offered by the establishment passed the impugned order imposing damage at the maximum rate. The submissions of the appellant that there was no default on the part of the appellant and as such no damage can be imposed was not accepted by the commissioner. The appellant though had relied upon the law laid down by the Hon'ble Apex Court and High Courts observing that where there is no will full violation, the quantum of damage should be more or less compensatory in nature and if the default is found to be continuous or intentional the damage payable would be penal in nature the same was not taken into consideration. The commissioner without giving any finding on the mensrea of the establishment behind the delay and without passing a speaking order imposed the maximum percent of damage which is patently illegal. With such submissions the appellant has prayed for setting aside the impugned order.

On behalf of the respondent a written objection was filed wherein it has been stated that under the provision of the scheme the contribution for PF has to be deposited by the employer by the 15th day of the succeeding month in which the employee has worked in the establishment and the dues become payable to him. Any deviation amounts to denial of the legitimate dues of the employee by the employer. In order to put a cheque on the omission by the employer in

making PF contribution the legislature in-corporated the provisions u/s 14B and 7Q of the Act for imposition of penal damage and interest for such default and omission by the employer. In this case the appellant is a covered establishment having both Indian and International employees. It was noticed by the department that the establishment had failed to deposit the PF dues in time in respect of the International workers. Thus, inquiry u/s 14B was initiated and ample opportunity was given to the establishment to explain the circumstances. The notice clearly mention the period of delay and the accounts on which delay in remittance was caused. The reply submitted by the establishment in form of representation was duly considered and the commissioner did not accept the explanation that the establishment had no knowledge about the liability for the contribution in respect of the salary paid to the international workers in their country of origin. While not accepting the ignorance of law as a proper defence, the commissioner passed the impugned order which is proper and needs no interference. It has also been pleaded that the appellant is a habitual defaulter and therefore no case is made out for leniency. By drawing the attention of the tribunal to Para 83 of the EPF Scheme the respondent further took a stand that misreading or misunderstanding the provision of law by the appellant would not exempt it from the statutory liability. He also submitted that Para 83 of the EPF Scheme categorically states that an excluded employee means an international worker who is contributing to a social security programme of his country of origin either as a citizen or with whom India has entered into a social security agreement. The international worker who is contributing as such in his country of origin with which country India has entered into a bilateral comprehensive economic agreement containing a clause on social security prior to 1st October 2008 which specifically exempts natural persons of either country to contribute to the social security of the host country shall be treated as the excluded employee. Neither of the situations is applicable to the appellant/establishment and its employees. The establishment might have misunderstood or misinterpreted the special provision of the scheme. With regard to the mensrea the respondent has pleaded that the establishment is a reputed establishment having so many responsible employee. As such the plea of ignorance taken by the appellant is not acceptable. The respondent has further stated that the tribunal cannot reduce or waive the damage levied in relation to an establishment as the power has been granted to the central Board only on special circumstances enumerated in the second proviso to section 14B of the Act. Describing the impugned order as a well reasoned and speaking order, he argued for dismissal of the appeal.

During course of argument the Ld. Counsel for the appellant took the tribunal through the impugned order and submitted that the order is very cryptic and contains no reason supporting the finding.

Rather the commissioner has observed about the misunderstanding in deposit of PF dues related to international workers. He thereby submitted that the said observation of the commissioner itself stands in favour of the appellant to leave aside the criminal intention or mensrea for the delayed remittance.

There is no dispute on facts that remittance has been made after considerable delay. The appellant has offered an explanation of its bonafide on account of ignorance. In this case the period of default as seen from the impugned order is from 02.10.12 to 28.09.2016. The Ld. Counsel for the appellant forcefully argued that mensrea is the guiding factor for imposition of penal damage u/s 14B as has been held by the Hon'ble Supreme Court in the case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri & Others reported in (2014)15 S.C.C 263** and in the **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337**

In the case of DCW employees cooperative canteen vs. PO EPFAT in which the principle decided in the case of Mcleod Russel referred supra has been elaborately discussed it has been held that all the delays or default in remittance of PF dues shall not make the establishment liable for damage unless the mensrea for the same is evident. As seen from the circumstances the expat employees were brought under the fold of the EPF and MP Act for the first time w.e.f November 2008 and there was no clarity in the direction until those were clarified from time to time by the department. A clarification was issued in the year 2010 to obviate the confusion and ambiguity in respect of contribution to be made on the salary paid to such expat employees in India as well as in their home country. In this case the period for which the damage has been assessed is a period subsequent to the clarification issued in the year 2010**.** Thus the explanation offered by the appellant/establishment about the ignorance seems not acceptable.

The Ld. Counsel for the appellant also argued that the impugned order doesn't contain any finding of the commissioner on the mensrea. In this regard it is pertinent to observe that mensrea is a state of mind and need to be gathered from circumstances. The establishment is a big organization covered under the Act since the year 2004 i.e. much prior to the date of the alleged inquiry. The commissioner in his order has clearly stated that it is difficult to accept that the appellant establishment were there are no derth of competent officer at every level continued to commit the lapse in deposit for a period of 4 years when the matter was clarified by the department on various occasion and particularly in 2010.

Merely because the enforcement officer at some point of time or other submitted reports that the establishment has not defaulted in remittance of PF dues will not exonerate the establishment from its liability. Moreover, the report of the Eos filed as annexure 3and 4 nowhere contains the observation that the establishment is not liable to make the contribution under the EPF Act in India in respect of the salary paid in Japan. The reports only contain the observation that subscriptions are being made in Japan on the salary paid in Japan. Thus, the order passed by the commissioner cannot be found with fault entailing interference. Hence, ordered.

ORDER

The appeal be and the same is dismissed on contest. Order of the commissioner is hereby confirmed.

Sd/-

Presiding Officer