



सत्यमेव जयते

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

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

(Thursday the 31st day of March, 2022)

APPEAL No.394/2019

(Old no.1270(7)2015)

Appellant : M/s.Share Wealth Securities Ltd
No.25/469, 23, 4th Floor
Pooma Complex
M. G. Road
Thrissur - 680001

By Adv.C. B. Mukundan

Respondent : The Regional PF Commissioner
EPFO, Regional Office, Kaloor
Kochi - 682017

By Adv.Thomas Mathew Nellimoottil

This case coming up for final hearing on 31.08.2021 and this Industrial
Tribunal-cum-Labour Court on 31.03.2022 passed the following:

ORDER

Present appeal is filed from order no.KR/KC/21588/ENF-IV(1)/2015/8384
dt.31.08.2015 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter

referred to as 'the Act') on evaded wages for the period from 04/2010 to 02/2011. The outstanding dues assessed is Rs.3,27,024/-.

2. The appellant is a company registered under the Companies Act and is covered under the provisions of the Act. The appellant is engaged in the trading of shares, stock and other equities of companies listed in the Stock Exchanges. An Enforcement Officer of the respondent inspected the appellant establishment on 22.03.2011. Thereafter the appellant received an ex-parte order dt.18.08.2011 issued by the respondent U/s 7A of the Act claiming an amount of Rs.7,11,175 as provident fund contribution on allowances. The appellant filed a review application dt.24.10.2011. The review application was rejected by the respondent after making some minor corrections in the arithmetical calculation and fixing the liability as Rs.6,89,855/-. The appellant approached the Hon'ble EPF Appellate Tribunal in ATA no.543(7)2012. The Tribunal set aside the impugned order and remanded the matter to the respondent to conduct fresh enquiry. A copy of the order of EPF Appellate Tribunal is produced as **Annexure A2**. The respondent initiated fresh enquiry. The appellant appeared before the respondent and submitted a written statement dt.23.01.2015. A copy of the same is produced as **Annexure A3**. The appellant informed the respondent that conveyance allowance was paid as a reimbursement incurred by the employees towards their journey. House

rent allowance is clearly excluded from the definition of basic wages. Special allowance was paid towards telephone and medical expenses of the employees. The respondent authority issued the impugned order dt.05.05.2015 assessing an amount of Rs.6,72,024/-, a copy of the said order is produced and marked as **Annexure A1**. The respondent authority has issued the impugned order presuming that these allowances are paid as per “terms of contract”. As per Sec 6 of the Act, the dues are required to be paid only on basic, DA and retaining allowance. Appellant is not paying any DA or retaining allowance to the employees. The appellant is not liable to pay dues on allowances. As per the definition of wages, only the emoluments earned by an employee in accordance with terms of the contract of employment will come under the purview of the definition of basic wages. It is settled legal position that U/s 2(b) of the Act provident fund dues are not payable on allowances which come under the exclusion part. The appellant is therefore not liable to remit contribution on the allowances paid by them to their employees.

3. The respondent filed counter denying the above allegations. An Enforcement Officer of the respondent during his routine inspection found that the appellant establishment is remitting contribution only on a part of the emoluments paid to its employees. The Enforcement Officer reported that the wage structure of the appellant consisted of basic, conveyance allowance,

special allowance, miscellaneous allowance and other allowance. The amounts paid as allowances are double that of basic and the appellant establishment was remitting contribution only on basic. The establishment was actually remitting contribution on 1/3rd of the actual wages paid to the employees. The Enforcement Officer reported that all allowances paid by the appellant establishment will attract provident fund deduction except house rent allowance, which is specifically excluded. The respondent authority initiated an enquiry on the basis of the report of the Enforcement Officer. The appellant though acknowledged the receipt of the summons, failed to attend the enquiry on any of the dates on which the matter was posted i.e. on 14.07.2011 and 18.08.2011. The respondent authority therefore issued an order assessing the dues on all allowances, except house rent allowance. The appellant filed a review application U/s 7B(1) of the Act. The appellant attended the enquiry and produced records. It was noticed that dues for 05/2010 on omitted wages reported by the Enforcement Officer included house rent allowance also. The respondent authority did not find any merit in the review application and the same was rejected. Subsequently a Corrigendum order was issued reducing the house rent allowance component for the month 05/2010. The appellant approached EPF Appellate Tribunal and the Tribunal vide order dt.22.04.2013 set aside the impugned order and remanded the case back to the respondent

authority. The respondent authority conducted enquiry on 11.02.2014, 08.04.2014, 12.05.2014, 23.06.2014, 04.08.2014, 29.10.2014, 23.01.2015, 13.02.2015, 10.03.2015 and 05.05.2015. On 23.01.2015 the appellant filed a written statement. The respondent authority found that the appellant avoided remittance of provident fund dues for the purpose of earning extra profit by bifurcating actual salary into various allowances and remitted provident fund dues hardly on 40% of the salary earned by an employee. This action of the appellant will eventually result in depriving the actual entitlement of the employees, like Pension and allied benefits. The appellant pointed out some arithmetical error and also an error in the month and year which was corrected by the respondent authority. The appellant was given more than adequate opportunity before concluding the enquiry. The respondent authority found that the claim of reimbursement of conveyance allowance is not correct. The conveyance allowance is being paid as 25% of the basic wages to all the employees. Conveyance allowance is not depended on the distance travelled or fair paid, but is paid uniformly to all employees. Hence it forms part of basic wages for the purpose of the Act. Special allowance, miscellaneous allowance and other allowances are given towards telephone and medical expenses of the employees. On examining the pay as per the wage register, it is seen that each allowances forms 25% of the basic salary and it is not limit to any expenses made

by the employees. 75% of basic salary is being paid to the employees as special allowance, miscellaneous allowance and other allowances. The appellant is not paying any DA. The appellant has crafted the nomenclature of allowances in such a manner that he can claim exclusion U/s 2(b) of the Act. The Hon'ble Supreme Court in **Rajasthan Prem Kishan Goods Transport Co. Vs RPFC**, 1996 (9) SCC 454 held that the Commissioner can lift the veil and read between the lines to find out the pay structure fixed by the employer to its employees and decide the question whether the splitting up of pay has been made only as a subterfuge to avoid its contribution to provident fund. The Circular no. C-III/11001/4/3(72)/14/Circular/Hqrs/6693 dt.06.08.2014 produced by the appellant as Annexure A4 has raised a concern that many of the employers are splitting the wages in such a way that the contribution is restricted to 50% of the total wages paid. This was an instruction to investigate cases where such splitting up of wages is done by the employers to reduce the liability of provident fund contribution.

4. An Enforcement Officer of the respondent organisation during his inspection noticed that the appellant establishment is remitting contribution only on 40% of the total wages paid to its employees. The Enforcement Officer therefore directed the appellant to correct the mistake as pointed out in his inspection report. Since the appellant failed to comply, the respondent

initiated an enquiry U/s 7A of the Act. The appellant failed to appear in response to the notices issued to appear on 14.07.2011 and 18.08.2011 and therefore the respondent authority issued an ex-parte order on the basis of the report of the Enforcement Officer. The appellant filed a review application which came to be rejected. The respondent authority subsequently noticed that for one month, the house rent allowance was also included in the assessment and therefore issued a corrigendum reducing the house rent allowance component for the month of 05/2010. The appellant challenged the 7A order before EPF Appellate Tribunal in Appeal no.543(7)2012. EPF Appellate Tribunal vide order dt.22.04.2013 set aside the impugned order and remanded the case back to the respondent authority for fresh enquiry. The respondent authority after providing adequate opportunity for hearing and taking into account the written statement dt.23.01.2015 filed by the appellant, issued the impugned order.

5. In this appeal, the learned Counsel for the appellant submitted that the pay structure of the appellant establishment consisted of conveyance allowance, special allowance, miscellaneous allowance and other allowances and the appellant is remitting contribution only on the basic wages. According to the learned Counsel for the respondent, the allowance formed almost 60% of the total pay package to its employees and contribution is being paid only on

40% of the gross pay. He further pointed out that no DA is being paid by the appellant establishment to its employees. The learned Counsel for the appellant pointed out that house rent allowance is excluded as per Sec 2(b)(2) of the Act. All other allowances are reimbursement for the expense incurred by the employees. On a perusal of the impugned order, it is seen that the respondent authority has in fact analysed the allowances being paid by the appellant to its employees. He found that claim of reimbursement of expenses has no basis. The conveyance allowance is being paid to the rate of 25% of basic wages uniformly to all the employees. Special allowance, miscellaneous allowance and other allowances are being paid at the rate of 25% each of the basic pay and therefore 75% of the basic salary is paid uniformly to all the employees and it has no linkage with any expenses incurred by the employees, though it is claimed that it is reimbursement of telephone and medical expenses of the employees.

6. It is relevant to examine the statutory and legal position with regard to the allowances. The relevant provisions of the Act to decide the issue whether the conveyance allowance, special allowance, miscellaneous allowance and other allowances paid to the employees by the appellant will attract provident fund deduction are Sec 2(b) and Sec 6 of EPF & MP Act.

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 Govt, 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 where 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.

The confusion regarding the exclusion of certain allowances from the definition of basic wages and inclusion of some of those allowances in Sec 6 of the Act was considered by the Hon'ble Supreme Court in **Bridge & Roof Company Ltd Vs UOI**, (1963) 3 SCR 978. After elaborately considering all the issues involved, the Hon'ble Supreme Court held that on a combined reading of Sec 2(b) and Sec 6 where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages. Where the payment is available to be

specially paid to those who avail the opportunity is not basic wages. The above dictum laid down by the Hon'ble Supreme Court was followed in **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SCC 428. In a recent decision in **RPFC, West Bengal Vs Vivekananda Vidya Mandir & Others**, AIR 2019 SC 1240 the Hon'ble Supreme Court reiterated the dictum laid down by the Hon'ble Supreme Court in **Bridge & Roof Company Ltd** case (Supra). In this case the Hon'ble Supreme Court was considering various appeals challenging the orders whether special allowance, travelling allowance, canteen allowance, lunch incentive and special allowance will form part of basic wages. The Hon'ble Supreme Court dismissed the challenge holding that the " wage structure and 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 basic wages camouflaged as part of an allowances so as to avoid deduction and contribution accordingly to the provident fund accounts of the employees. There is no occasion for us to interfere with the concurrent conclusion of facts. The appeal by the establishments are therefore merit no interference " .

7. In **Montage Enterprises Pvt Ltd Vs EPFO, Indoor**, 2011 LLR, 867 (MP.DB) the Division Bench of the Hon'ble High Court of Madhya Pradesh held that conveyance and special allowance will form part of basic wages. In **RPFC**,

West Bengal Vs Vivekananda Vidya Mandir, 2005 LLR 399 (Calcutta .DB) the Division Bench of the Calcutta High Court held that the special allowance paid to the employees will form part of basic wages particularly because no dearness allowance is paid to its employees. This decision was later approved by the Hon'ble Supreme Court in **RPFC Vs Vivekananda Vidya Mandir** (Supra). In **Mangalore Ganesh Beedi Workers Vs APFC**, 2002 LIC 1578 (Karnat.HC) the Hon'ble High Court of Karnataka held that the special allowance paid to the employees will form part of basic wages as it has no nexus with the extra work produced by the workers. In **Damodarvalley Corporation, Bokaro Vs UOI**, 2015 LIC 3524 (Jharkhand .HC) the Hon'ble High Court of Jharkhand held that special allowances paid to the employees will form part of basic wages. The Hon'ble High Court of Kerala also examined the above issue in a recent decision dt.15.10.2020, in the case of **Employees Provident Fund Organisation Vs M.S.Raven Beck Solutions (India) Ltd**, W.P.(C) no.17507/2016. The Hon'ble High Court after examining the decisions of the Hon'ble Supreme Court on the subject held that the special allowances will form integral part of basic wages and as such the amount paid by way of these allowances to the employees by the establishment are liable to be included in basic wages for the purpose of deduction of provident fund. The Hon'ble High Court held that

“ This makes it clear that uniform allowance, washing allowance, food allowance and travelling allowance forms the integral part of basic wages and as such, the amount paid by way of these allowances 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 “.

Hence the law is now settled that all special allowances paid to the employees excluding those allowances specifically mentioned in Sec 2(b)(ii) of the Act will form part of basic wages, depending on facts and circumstances of each case. In a recent decision dt.24.03.2022 in **Gobin (India) Engineering Pvt Ltd Vs Presiding Officer, CGIT and another**, W.P.(C) no.8057/2022 the Hon'ble High Court of Kerala examined the categorisation of allowances and the test evolved by the Hon'ble Supreme Court in **RPFC, West Bengal Vs Vivekananda Vidyamandir & Other**, 2020 17 SCC 643. The Hon'ble High Court held that there is no doubt that basic wages would also include allowances except HRA but the respondent authority will have to examine the nature of allowances

and the duties of the employees including the timings. The Hon'ble High Court held that

“ But the fact of the matter is both the authorities framed an opinion that the said allowances would be applicable to all the allowances. That finding according to me required a detailed examination of the records by considering the nature and duties of the jobs including the timings etc. In other words the universal formula of adding all allowances would not be appropriated as to what were the norms of the work prescribed for the workmen during the relevant period ”.

8. There is a clear finding by the respondent authority that the allowances are universally being paid to all employees. It is also found that the allowances are not in anyway linked to any incentive for production or paid especially to those who avail the opportunity. The appellant has no case that the workman concerned had become eligible to get the extra amount beyond the normal work which he was otherwise required to put in. Hence it is clear that the allowances paid by the appellant to its employees will satisfy the requirement to be considered as basic wages and therefore will attract provident fund deduction.

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