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

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

(Wednesday the 22nd day of December, 2021)

APPEAL No.579/2019
(Old No. ATA-515(7)2012)

Appellant	:	M/s. Soft Land India Ltd., St. Xavier's College, Thumba P.O Thiruvananthapuram – 695 022

By Adv. M. Gireesh Kumar

Respondent	:	The Assistant PF Commissioner EPFO, Pattom Trivandrum – 695 004.

This case coming up for final hearing on 03/09/2021 and this Tribunal-cum-Labour Court on 22/12/2021 passed the following:

ORDER

Present appeal is filed from order No KR / 16590 / ENF-1(4) / 2012 / 2786 dt.30/04/2012 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act'.) on evaded wages for the period from 01/2010 to 09/2011. Total dues assessed is Rs.1,50,794/-.

2. Appellant is an establishment registered under Company's Act 1956 and covered under the provisions of the Act w.e.f 01/09/2000. On 28/10/2011 an Enforcement Officer attached to the office of the respondent inspected the appellant establishment and provided an inspection report. Copy of the inspection report is produced as Exbt A1. In the report it is mentioned that the wages of the employees are split into allowances to evade provident fund contribution. According to the report, the appellant is liable to remit the contribution on all allowance except HRA. The respondent authority issued a notice U/s 7A to the appellant directing him to appear before him on 15/12/2011. Copy of the summon is produced and marked as Exbt A2. A representative of the appellant appeared before the respondent and produced all the documents as demanded in Exbt A2 summons. During the course of enquiry the respondent provided a calculation sheet showing how the amount is arrived at. A copy of the said calculation statement is produced and marked as Exbt A3. It was also pointed out to the respondent that the appellant establishment is remitting contribution on basic wages and there is no subterfuge or evasion in contribution. It was also pointed out that the establishment promised common conveyance to the employees but due to financial difficulties the same could not be paid. Hence all the

employees are paid travelling allowance as per the distance to the establishment. It was also pointed out to the respondent that many of the employees left the service of the appellant establishment and therefore it is difficult to recover the employee share of contribution. Since the appellant could not produce the challans for wage month of 09/2011, the respondent compelled the appellant to remit the contribution. The challan dt. 18/10/2011 for the month of 09/2011 is produced and marked as Annexure A5. Inspite of confirming the remittance, the respondent compelled the appellant to remit one lakh as regular contribution for the wage month of 09/2011. The appellant remitted Rs.50000/- each on 29/02/2012 and 21/03/2012. The copies of the challans are produced as Annexure A6 series. In the impugned order, the remittance made on 29/2/2012 under protest as per Annexure A6 series is shown as amount credited and the balance is shown as Rs.1,50,794/-. The respondent failed to notice that dearness allowance was paid to all employees irrespective of their salary and there is no subterfuge. The assessment of dues in respect of left employees is not correct. The wages shown in Annexure A7 is not correct and the said amount is not disbursed as travelling allowance for the respective months. The IT enabled services do not fall under

Minimum Wages Act and therefore any reference to minimum wages in the impugned order is not correct.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f 01/09/2000. The Enforcement Officer who conducted inspection of the appellant establishment reported that the appellant establishment failed to remit the regular contribution for the month of September 2011 and there is evasion for the period from 01/2010 to 09/2011. As per the report, the appellant establishment is bifurcating wages into allowances and contribution is restricted to basic wages only. The respondent therefore initiated an enquiry U/s 7A of the Act by issuing summons dt.18/11/2011. A representative of the appellant attended the hearing. Copy of the report of the Enforcement Officer dt. 28/10/2011 was handed over to the appellant. The representative of the appellant did not dispute the report of the Enforcement Officer. The appellant could not justify the exclusion of travelling allowance from the definition of basic wages U/s 2 (b) of the Act. After considering the representation of the appellant, the respondent issued the impugned order. The appellant did not deny the evasion of wages during the 7A enquiry. The travelling allowance paid to

the employees is not a reimbursement and it is an emolument paid through regular salary and found part of basic wages. The establishment remitted part of assessed dues before the conclusion of 7A. The contention that some employees left, has no relevance to the proceedings. The contention of the appellant that he was compelled to remit the regular monthly contribution for September 2011 twice is not correct. The Enforcement Officer reported that the regular dues for 09/2011 is outstanding. However it is not included in impugned order as the remittance is made before issuing the order. The remittance made by Exbt A5 chellan is Rs. 83,105/- and the remittance made by A6 series is Rs.1 lakh. The remittance made as per A6 series is a part payment made against the evaded wages which the appellant has admitted during the enquiry. It was paid voluntarily and not under any threat or compulsion. The issue regarding the definition of basic wages is now settled by the Hon'ble Supreme Court vide its judgment dt. 28/02/2019 in the case of **RPFC, West Bengal Vs Vivekananda Vidya Mandir and Others.** In the above case the Hon'ble Supreme Court held that the special allowance will form part of basic wages for EPF contribution since the employers cannot segregate from basic wages being paid universally to all employees and therefore it must be included in the calculation of provident fund contribution.

4. The only issue involved in this appeal is whether the travelling allowance paid to all the employees by the appellant establishment will form part of basic wages and will attract provident fund liability. It is seen that the appellant establishment is splitting wages into basic salary HRA ad TA. HRA being a excluded allowance the same was not considered by the respondent authority while assessing the dues. The respondent authority found that travelling allowance is being paid to all employees uniformly and the same is not a reimbursement against actual expenditure. Accordingly the respondent authority held that the travel allowance paid to its employees by the appellant will form part of basic wages and therefore will attract provident fund deduction.

5. The respondent authority has also made some observations regarding the minimum wages payable to the employees. According to the learned Counsel for the respondent the IT enabled services will not come under the Minimum Wages Act and therefore the observations by the respondent authority is not correct. The respondent authority is not the competent authority to decide quantum of benefits under Minimum Wages Act. It is upto the establishment and its employees to decide his wage structure. However the respondent is competent to examine whether the

allowances paid by the employer to its employees will form part of basic wages.

6. 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.

7. 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".

8. 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".

9. From the above discussion it is clear that the question of definition of basic wages and treatment of various allowances for the purpose of provident fund deduction has already been settled by the Hon'ble Supreme Court as well as various High Courts. If we apply the above tests to the present case, it is very clear that the

travelling allowance being paid by the appellant to its employees will form part of basic wages and therefore will attract provident fund deduction.

10. The contention of the learned Counsel for the appellant that the appellant establishment was forced to remit the 09/2011 contribution twice and that amount is being adjusted against the part of the assessed dues as per the impugned order is denied by the learned Counsel for the respondent. According to the learned Counsel for the respondent, the contribution as per Exbt A5 challan is only Rs.83,805/- whereas the amount remitted by the appellant is Rs.1,00,000/- which will clearly show that the amount of Rs.1,00,000/- remitted by the appellant during the course of 7A enquiry is a voluntary payment against the dues on evaded wages.

11. 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