



सत्यमेव जयते

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

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

(Friday the 15th day of January, 2021)

Appeal Nos.106/2019, 132/2019,131/2019,103/2019 & 108/2019

(Old Nos. ATA 1173(7)2014/ATA 1371(7)2014)/ATA 1370 (7) 2014
ATA 1186(7)2014 & ATA 1185(7)2014

Appellant : M/s. Spectrum Softtech Solutions Pvt.Ltd
Mahakavi G. Road
Kochi – 682 011

By Adv. Menon & Pai

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

By Adv. Sajeev Kumar K.Gopal

This appeals came up for hearing on 13/01/2021 and this Industrial Tribunal cum Labour Court issued the following order on 15/01/2021.

ORDER

Appeal No. 106/2009 is filed against order No. KR / KC / 19232 / Enf 1(1) RB No.82 / 2014 / 8770 dt.04/11/2014 assessing dues in respect of certain

allowances paid to employees U/s 7A of EPF & MP Act (hereinafter referred to as 'the Act'.) for the period 04/2001 to 08/2009. The total dues assessed is Rs. 93, 35,366/-.

2) **Appeal no. 132/2019** is filed against order No. KR/KC/19232/ Enf1(1)Note No.1/RB No. 79/ 2014/10113 dt.04/12/2014 assessing dues in respect of certain allowances paid to employees U/s 7A of the Act for the period from 09/2009 to 11/2010. The total dues assessed is Rs. 47,07,439/-

3) **Appeal No. 131/2019** is filed against order No. KR / KC / 19232 / Enf 1 (1) / Note No .5 /RB No. 83/2014/10114 dt. 04/12/2014 assessing dues in respect of certain allowances paid to employees U/s 7A of the Act for the period from 12/2010 to 03/2012. The total dues assessed is Rs. 44,38,470/-.

4) **Appeal No. 103/2009** is filed against order No.KR/KC/19232/Enf 1 (1) /RB No. 80/2014/8771 dt. 04/11/2014 assessing dues U/s 7A of the Act on various allowance for the period from 04/2012 to 07/2013. Total dues assessed is Rs. 29,62,732/-.

5) **Appeal No. 108/2009** is filed against order No. KR / KC / 19232 / Enf (1) RB No. 81/2014/8772 dt. 04/11/2014 assessing dues in respect of various allowances U/s 7A of the Act for the period from 08/2013 to 12/2013. The total dues assessed is Rs.7,47,369/.

6) All the above appeals raised a common issue whether various allowances paid by the appellant to its employees for the period from 2009-10 to 2013-14 will attract provident fund deduction. Hence all the appeals were heard together and disposed by a common order.

7) The appellant is a private limited company registered under the Company's Act, 1956. It is covered under the provision of the Act w.e.f 01/10/1999. The appellant is an IT Enabled Service Company with the primary business of medical transcription. The majority of the employee are working as transcriber, editors and reviewers. All of them are paid on the basis of their basic line target and over and above the targets they get

incentives. While recruiting these employees the appellant offer the salary for the basic target. The salary structure of the employees is Basic, HRA, Conveyance, Special Allowance, Production Allowance and Other Allowances. The special allowances are paid depending on the attendance and performance and other allowances are paid towards encashment of eligible leave. The production allowance is paid for extra work and this is just like overtime allowance. The respondent initiated action U/s 7A of the Act to decide the question whether these allowances will attract contribution under the Act. The appellant appeared before the respondent and argued that the heads like HRA are specifically excluded from the definition of the basic wages. Conveyance allowance is a compensatory allowance to meet the expenses of transportation. Production allowance and special allowances are paid depending on attendance and performance and other allowances are paid towards encashment of eligible leave. Production allowance is paid for extra work done by the employees. The allowance vary

from employee to employee and from month to month and is paid depending on the attendance and performance. They are not regularly, universally or ordinarily paid to all employees. Ignoring the above contentions the respondent issued orders assessing dues on all the allowance. The appellant challenged the order in ATA Nos. 165(7) /2012 and ATA No. 533(7) 2013 before the EPF Appellate Tribunal. After considering the pleadings the Hon'ble Tribunal set aside the order passed by the respondent and the matter was remitted back to the respondent for fresh disposal. The true copy of the orders are produced and marked as Annexure A3 and Annexure A4. The respondent initiated fresh enquiry U/s 7A and ignoring all the contentions made by the appellant issued the impugned orders. The appellant was following the same salary structure for so many years. The respondent went wrong in going into the concept of minimum wages for assessing the PF contribution. If the allowances are to be treated as wages for the purpose of contribution 80 % of the employees were not required to be covered, as they would

be excluded employees drawing the salary above the ceiling limit of Rs.6500/-. The respondent ought to have considered Sec 6 of the Act and also definition of basic wages in Sec 2(b) of the Act. The above provision supported the claim of the appellant.

8. The respondent filed counter denying the above allegations. The Enforcement Officer of the respondent during the regular inspection of the appellant establishment found that the appellant was paid contribution only on a very small portion on the actual wages paid to employees, to their detriment. The Enforcement Officer also reported that the wages paid to the employees are split into various allowances to escape the liability of paying PF contribution on full wages. The respondent therefore took up the matter U/s 7A and issued an orders assessing dues on total wages. The appellant filed an appeal against the order before EPF Appellate Tribunal. The EPF Appellate Tribunal set aside the order of the respondent and remanded the case back to

the respondent to conduct a fresh enquiry and assess dues in accordance with law. While disposing the appeal the EPF Appellate Tribunal observed that the blund decision of the Enquiry officer to include all allowances as part of wages and inclusion of 80% of HRA as part of basic wages is not legal. On the basis of the above direction fresh notices were issued to the appellant. The appellant produced the wage registers and other documents. On the basis of the documents produced by the appellant, it is seen that the allowances like conveyance allowance, special allowance and other allowances were paid to most of the employees and therefore forms part of basic wages as per the various decisions of Hon'ble Supreme Court. Travelling allowance was not considered as part of basic wages as the allowance was paid only to few employees. The HRA was also excluded from the assessment. Appeal No. ATA 533(7)/2013 was also disposed of by the EPF Appellate Tribunal with a direction to examine the wage records of the appellant to confirm whether the allowances are paid universally, regularly and ordinarily to all the employees.

As already stated the assessment order was issued excluding HRA and also travelling allowances which was not uniformly paid to all the employees. The respondent denied the allegation that the conveyance allowance, special allowance and production allowance and other allowance will not attract PF deduction as the same is not consistent with various decisions of High Court and also the Hon'ble Supreme Court. It is submitted that " any other similar allowance " mentioned in Clause 2(b) of the Act takes its colour from the expression " commission". There is no similarity in the nature of allowance mentioned Clause 2 as they are founded on wholly unrelated considerations. Dearness allowance is linked to the rise in cost of living, house rent allowance is provided to meet housing concerns of the employees, overtime allowance is payable for the output by the employees, bonus is linked to productivity and profitability and commission is to be linked to the turn over generated by the employees on his own output. The Parliament could not have used words similar to club these allowance when there is no similarity

in them. In **Commissioner of Income Tax, Mysore, Bangalore Vs the Indo Mercantile Bank Ltd**, AIR /1959 SC 713 the Hon'ble Supreme Court held that the territory of a proviso is to carve an exception to main enactment and exclude something which otherwise would have been within the section. If the language in the main enactment is clear, the proviso cannot be used for the purpose of interpreting the main enactment. Allowance under consider are earned by all employees of the establishment and therefore fall within the definition of basic wages U/s 2(b) of the Act. The Hon'ble High Court of Kerala in **RPFC Trivandrum Vs. The Cosmopolitan Hospital Private Limited**, 2010 (1) LLJ 14 held that the special allowances answers the definition of basic wages in which case contributions are payable by the employer on that payment also. It was also clarified by the Hon'ble High Court that the employer cannot waive that statutory obligation by an agreement between the management and employees. In **Kitex Garments Vs RPFC**, WP (C)No.12265/2011 the Hon'ble High Court of Kerala held that general allowance/special allowance which are

paid in terms of an agreement will form the part of basic wages and will attract contributions under the Act. In **Jai Engineering Works Ltd Vs Union of India** AIR 1963 SCC 1480 the Hon'ble Supreme Court clarified that the payment for production upto the target has nothing of the nature of an allowance, it is straight payment for the daily work and shall be included within the definition of basic wages. In **Gujarat Cypromet Ltd Vs APFC**, the Hon'ble High Court of Gujarat held that the definition of basic wages includes all emoluments paid to the employees except those which are specifically excluded under the definition. Hence the court concluded that allowances like medical allowance, conveyance allowance etc. are all covered and forms part of basic wages. **Maharashtra State Co-operative Bank Ltd Vs PF Commission**, 2009 (10) SCC 123 the Hon'ble Supreme Court held that " Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e., the workers employed in factories and other establishments, it is imperative for the Court to give a purposive interpretation to the provisions".

9. The common question raised in all these appeals are whether the various allowances paid to their employees by the appellant will form part of basic wages. The respondent also considered the question whether the basic wages is split into various allowances to evade employers' share of provident fund contribution. The two sections which are relevant for deciding the above issues are Sec 2(b) of the Act which defines basic wages and Sec 6 which provides for contribution to be paid under the Act. These sections are reproduced below : -

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.

It can be seen that some of the allowance which are excluded in the definition of basic wages U/s 2(b) is included in Sec 6 of the Act wherein the components of wages on which the contribution is required to be paid is explained in the Act. The confusion regarding the above provisions prevailed for sometime and Hon'ble Supreme Court in **Bridge & Roof Co Ltd Vs Union of India**, 1963 (3) SCR 978 finally clarified the legal provisions : After elaborately discussing various aspects and issues involved, the Hon'ble Supreme Court held that on a combined reading of Sec 2(b) and Sec 6, where the wages 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 opportunities are not basic wages. The above decision was later followed by the Courts all over India and Hon'ble Supreme Court also confirmed the same in **Manipal Academy of Higher Education Vs RPF**, 2008 (5) SCC 428. In a recent

decision in **RPFC, West Bengal Vs Vivekanda Vidya Mandir and Others**, AIR 2019 SC 1240 the Hon'ble Supreme Court reiterated the dictum laid down in **Bridge & Roof Company** case (Supra), In the above case the Hon'ble Supreme Court was considering various appeals challenging the orders whether special allowance, travelling allowance, canteen allowance and lunch incentive will form part of basic wages. The Hon'ble Supreme Court dismissed the challenge holding that "the wage structure and components of the salary have been examined on facts both by the authority and appellate authority under the Act who have arrived at a factual conclusion that the allowance in question were essentially part of basic wages camouflaged as part of an allowance so as to avoid deduction of contribution to the provident fund accounts of the employees. There is no occasion for us to interfere with the concurrent conclusion of the facts. The appeal by the establishments therefore merit no interference".

11. In the present case it is seen that the wages paid to the employees are split into HRA, conveyance

allowance, production allowance, special allowance and other allowance. The respondent, when he issued the first order U/s 7A included all the allowances including HRA in the assessment of the contribution. The Hon'ble EPF Appellate Tribunal in the appeal preferred by the appellant held that "The blund decision of enquiry officer to include all the allowance as part of wages and inclusion of 80% HRA as part of wages is illegal and hence the impugned order is not sustainable being in contravention to Sec 6 and Sec 2(b) of the Act" In view of the above observation, the respondent excluded HRA and allowance like travelling allowance from the present assessment. However, he included all other allowances for the purpose of assessment of dues as per the impugned order. It is seen from the impugned order that the appellant produced the required documents before the respondent and the respondent arrived at the conclusion that all these allowances are uniformly paid to all the employees in the appellant establishment. The respondent also elaborated a few examples as to how the appellant was splitting the wages to

the detriment of its employees. He has cited the example of the pay structure of an Accountant of the appellant wherein he is paid the basic wages of Rs. 1400/- whereas he is given the special allowances of Rs.12,500/-and his total earning is Rs. 23,267/-. Similar examples are quoted in all the impugned orders to justify the claim of the respondent that there is clear subterfuge of wages to avoid employer's share of contribution to its employees. In **Montage Enterprises Pvt Ltd Vs EPFO**, 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 Hon'ble High Court of Calcutta held that special allowance paid to the employees will form part of basic wages particularly because no dearness allowance is paid to its employees. This decision of the Hon'ble High Court of Calcutta 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 (Kart.HC)) the Hon'ble High Court of Karnataka held that 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 **Damodar Valley Corporation Bokaro Vs. Union of India**, 2015 LIC 3524 (Jharkhand HC) the Hon'ble High Court of Jharkhand held that special allowance paid to the employees will form part of basic wages. In recent decision dt.15/10/2020 in **Employees PF Organization Vs. M/s. Raven Beck Solutions India Ltd**, WP(C) No. 17507 of 2016 (K) the Hon'ble High Court of Kerala 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 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 up of 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 above observations of the Hon'ble High Court of Kerala is relevant and applicable to the facts of the present case.

12. The learned Counsel for the respondent the vehemently argued that all the allowances paid to the employees by the appellant excluding HRA will attract provident fund deduction. The learned Counsel for the appellant on the other hand argued that production allowance is equal to overtime wages. According to him the production allowance are the payment for extra line count achieved beyond the target by spending extra hours and are exclusively based on extra performance of the employees. The learned Counsel for the appellant therefore argued that the production allowance paid to the employees cannot form part of basic wages. On a perusal of the impugned order there is no finding on this issue by the

respondent. However it is seen that the same was brought to the notice of the respondent at the time of 7A hearing through a statement filed by the appellant. If the production allowance is paid for extra work done by the employees, it will not qualify to be the basic wages as per the decision of the Hon'ble Supreme Court in **Bridge & Roof Company** case (Supra). This is an issue that is required to be clarified by the respondent before the assessment process is completed.

13. The learned Counsel for the appellant also argued that if all the allowance are included in basic wages, majority of the employees will be excluded as per the provisions of the Act as they will be drawing more than the statutory limit of Rs. 6500/-. That is a call to be taken by the appellant when an employee takes up an employment for the first time. If an employee draws more Rs. 6500/15000/- at the time of joining, the appellant has the option to exclude him from the provision of the Act provided the employee was not a member of provident fund prior to joining appellant. However, this is not an issue in

the present appeal and hence the final decision is left to the respondent in an appropriate case.

14. In view of the above the appeal is partially allowed, the impugned order is set aside and the matter is remitted back to the respondent to re-decide the matter on the basis of the following directions :

(i) The allowances such as conveyance allowance, special allowance and other allowance will form part of basic wages and therefore will attract provident fund deduction.

(ii) The respondent shall examine whether production allowance is paid for extra work done by the employee and is similar to overtime payment. If it is so, the same shall be excluded from the assessment as the same will not form part of basic wages. If the production allowance is paid as an incentive to majority of the

employees, it will also form part of basic wages and same will attract provident fund deduction.

(iii) The respondent shall issued notice to the appellant immediately on receipt of this order and the assessment of dues shall be finalized within a period of three months.

(iv) The pre deposit made by the appellant as per the directions of this Court shall be adjusted/refunded after finalization of the enquiry U/s 7A of the Act.

Sd/-

(V. Vijaya Kumar)
Presiding Officer