



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

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

(Monday the 9th day of May, 2022)

Appeal Nos. 392/2019 (Old No. ATA- 1271 (7) 2015)
& **410/2019** (Old No. ATA 943(7) 2015)

Appellant

St. Thomas English Medium School,
Kattanam , Pallickal P.O
Kayamkulam
Alappuzha – 690503.

By Adv. R.Sankarankutty Nair

Respondent

The Assistant PF Commissioner
EPFO, Sub Regional Office
Kaloor, Kochi – 682 017

By Adv. Sajeev Kumar K Gopal

This case coming up for hearing on 20/04/2022 and this Industrial Tribunal-cum-Labour Court issued the following order on 09/05/2022.

ORDER

Appeal No. 392/2019: is filed from order No. KR/ KC/ 21449 / Enf-2(5) / 2015-2016 dt. 08/09/2015 issued U/s 7C of EPF & MP Act, 1952 (hereinafter referred to as ‘the Act’) assessing dues on omitted wages for the period from 04/2011 to 12/2012 and dues on non enrolled employees from 04/2011 to 12/2012. The total dues assessed is Rs. 11,77,647/-.

2. **Appeal No: 410/2019:** is filed from order No. KR / KC / 21449E/ Enf-2(5)/2015-16/4853 dt. 02/07/2015 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on omitted wages for the period from 05/2006 to 03/2010 and dues in respect of non-enrolled employees for the period from 04/2007 to 03/2011 and 01/2013 to 02/2014. Total dues is Rs. 20,81,267/-.

3. Since common issues are raised both the appeals are heard together and disposed of by a common order.

4. The appellant is a school covered under the provisions of the Act. The appellant used to avail the service of teachers on temporary basis against leave vacancies. The appellant is not maintaining the particulars of such temporary staff. The appellant was paying provident fund contribution on basic wages and DA in respect of coverable employees who were drawing monthly salary less than Rs. 6500/-. Since HRA and other allowances are not part of wages no contribution was paid. The area Enforcement Officer visited the appellant establishment and submitted a report stating that the appellant is not paying the contribution for entire amount of wages. He also reported that the temporary employees are not enrolled to the fund. The Enforcement Officer provided a copy of the inspection report on omitted wages and also with regard to the non-enrolled employees. The respondent authority initiated an enquiry U/s 7A of the Act. During the enquiry the

respondent provided copies of the inspection reports. The enquiry was adjourned to various dates. Without considering the request of the appellant the respondent issued the impugned order.

5. The respondent filed counter denying the above allegations. The appellant is an establishment is covered under the provisions of the Act with effect from 02/05/2006. During the course of inspection conducted by the Enforcement Officer it was revealed that there is large scale evasion of statutory provisions by the appellant establishment by not enrolling the eligible and entitled employees and also by resorting to the gross under reporting of wages. The Enforcement Officer reported that the appellant establishment was maintaining separate registers for two categories of employees, one for employee who were paid salary through bank account and two, employees who were paid salaries in cash. The Enforcement Officer forwarded copies of wage register in respect of both categories of employees. This Special allowance paid to the employees were also not considered for provident fund deduction. The report of the Enforcement Officer was provided to appellant for compliance. In view of non-compliance, the respondent initiated an enquiry U/s 7A of the Act. The appellant vide letter dt. 16/08/2014 requested for adjournment and accordingly the enquiry was adjourned to 18/11/2014 and then to 06/01/2015. There was no representation from the appellant on any of these days. The respondent authority therefore issued notice under CPC 32 and the enquiry was adjourned to 05/03/2015. Again the appellant requested for adjournment and the

enquiry was adjourned to 22/04/2015. On 22/04/2015, representatives of the appellant attended the hearing. But no records were produced. Copy of the inspection report of the Enforcement Officer was given to the representatives. The hearing was adjourned to 21/05/2014. There was no representation for the appellant. The appellant did not file any objection on the inspection report. Therefore the respondent authority issued the impugned order. As per Para 26 of EPF Scheme, every employee employed in connection with the work of the factory or establishment to which the EPF Scheme applies, other than excluded employees, shall be entitled and required to become member of the fund from the date of joining the establishment. The constitutional validity of the above amendment was upheld by the Hon'ble Supreme Court of India in **J.P. Tobacco Products Vs Union of India**, 1996 (1) LLJ 822 SCC. All the non-enrolled employees are clearly identified by the respondent authority in the impugned order itself. As per Sec 2(b), basic wages means all emoluments which are earned by an employee. The appellant establishment failed to remit contribution on the special allowance paid by them to the employees, universally, regularly and ordinarily and therefore the appellant is liable to pay contribution on evaded wages.

6. The learned Counsel for the appellant filed a rejoinder denying the claim of the respondent in the written statement in terms of the memorandum of appeal filed by the appellant.

7. In the above two impugned proceedings the respondent authority assessed the dues U/s 7A & 7C of the Act on non-enrolled employees and also on evaded wages for the period from 05/2006 to 02/2014. According to the learned Counsel for the respondent the appellant failed to enroll 64 employees during the period 04/2007 to 03/2010 and 86 employees for the period from 04/2020 to 02/2014. According to the learned Counsel for the appellant, these are teachers who are employed temporarily against leave vacancies and it is difficult to identify these teachers by name. According to the learned Counsel for the respondent these non-enrolled employees are identified from the records maintained by the appellant and therefore the appellant establishment cannot escape the liability by arguing that it is not possible to reach the benefits to these non-enrolled employees. The learned Counsel for the appellant also submitted that the appellant was not given adequate opportunity by the respondent authority to produce the records and substantiate their case.

8. It is seen that the Enforcement Officer during his inspection extracted the details of the non-enrolled employees from the records of the appellant establishment and a copy of the report was provided to the appellant. The appellant failed to appear in the enquiry in spite of acknowledging the notice. On 06/01/2015 the respondent authority was compelled to impose a fine of Rs. 500/- for non-appearance of the appellant in the enquiry. Even thereafter there was no representation. On 22/04/2015 a representative of the appellant attended the hearing

and sought a copy of the report of the Enforcement Officer and the same was provided to him. Even after that the appellant failed to attend the enquiry or filed any objection regarding the report of the Enforcement Officer. In view of the above the respondent authority issued the impugned order after providing seven opportunities to the appellant to appear and substantiate their claim. Hence the claim of the appellant that they were not provided adequate opportunity cannot be accepted.

9. Another contention taken by the appellant in this appeal is that they will not be in a position to identify the non enrolled employees to extend the benefit. According to the learned Counsel for the respondent all the non enrolled employees are clearly identified from the records of the appellant and therefore the claim of the appellant has no basis in fact or law. As per Sec 2 (f) of the Act read with Para 26 of EPF Scheme it is the duty of the appellant to enroll all the employees from day one of their employment.

10. The appellant has no case that these non-enrolled employees were not working in or in connection with the work of the establishment. Having violated by the provisions of Act and Schemes the appellant cannot claim any benefit due to their violation. It is a well settled principle of common law that a wrong doer cannot take advantage of his own wrong.

11. Hence I don't find any infirmity in the order assessing dues in respect of non-enrolled employees.

12. The learned Counsel for the appellant further pointed out that the respondent authority assessed dues on allowances paid to its employees including HRA. On a perusal of the impugned order it is not clear as to what are the allowances paid by the appellant and what are the allowances included in the assessment of dues on evaded wages. As per the decision of the Hon'ble Supreme Court in **Regional PF Commissioner, West Bengal Vs Vivekananda Vidya Mandir and Others**, 2020 (17) SCC 643, it is to be examined whether the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and the allowances in question are paid to all the employees in a particular category. In order that the amount goes beyond the basic wages it has to be shown that the concerned employee had become eligible to get the extra amount beyond the normal work which he was otherwise required to put in. The above observation of the Hon'ble Supreme Court was recently reiterated by the Hon'ble High Court of Kerala in **Gobin (India) Engineering Pvt Ltd Vs Presiding Officer CGIT & LC Ernakulam**, W.P.(C) No. 8057/2022. When the allowances itself is not identified by the respondent authority it is not possible to examine whether the above tests laid down by the Hon'ble Supreme Court and High Court are satisfied. HRA if any, paid to the employees, will not attract provident fund deduction in view of the exclusion U/s 2 (b) (2) of the Act .

13. In view of the above, the assessment of dues in the impugned orders on evaded wages, cannot be sustained.

14. Considering the facts, circumstances, pleadings and evidence in this appeals, I am inclined to uphold the assessment of dues in respect of non-enrolled employees. However the assessment of dues on evaded wages cannot be sustained in view of the reasons provided in the earlier paras.

Hence the appeal is partially allowed. The assessment of dues in respect of non enrolled employees is upheld. The assessment of dues in respect of evaded wages is set aside and the matter is remitted back to the respondent authority to reassess the dues after issuing notice to the appellant. If the appellant fails to appear or produce the records called for, the respondent is at liberty to assess the dues according to law. The pre deposit made by the appellant U/s 7(O) of the Act as per the direction of this Tribunal shall be adjusted /refunded after finalization of the enquiry.

Sd/~

(V. Vijaya Kumar)
Presiding Officer