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

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

(Wednesday the 05th day of April, 2022)

Appeal No.174/2019
(Old No. ATA-902(7) 2015)

Appellant	:	M/s. Kaycee Distilleries, Changalur P.O Puthukad , Thrissur – 680 312.
		By Adv. C.B. Mukundan
Respondent	:	The Regional PF Commissioner EPFO, Kaloor Kochi – 682 017
		By Adv.Thomas Mathew Nellimmoottil

This case coming up for final hearing on 27/04/2021 and this Tribunal-cum-Labour Court on 05/04/2022 passed the following:

ORDER

Present appeal is filed from order No. KR/ KCH/ 24346/Enf-1(5)/2015/RB No.242/1/745E dt. 27/04/2015 issued U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 01/2011 to 07/2012. The total dues assessed is Rs.6,26,696/-. A copy of the

impugned order dt. 27/04/2015 is produced and marked as Annexure A1.

2. The appellant is a registered partnership firm and is covered under the provisions of the Act is running a distillery unit blending and bottling of India Made Foreign Liquor (IMFL). The appellant engaged a few employees through M/s. Obak Human Resource Outsourcing Pvt. Ltd. The contractor is independently covered under the provisions of the Act under code No. KR/KCH/24346. The contractor used to be regular in compliance and the appellant used to ensure proper compliance by the contractor. An Enforcement Officer of the respondent organization inspected the records of the contractor, M/s Obak Human Resource Outsourcing Pvt. Ltd. The Enforcement Officer in his report indicated that the contractor is not regular in compliance and is splitting up the wages paid to its employees. On the basis of the report of the Enforcement Officer, the respondent initiated an enquiry U/s 7A of the Act. The appellant was also summoned in the enquiry. The respondent authority took a view that the appellant is liable to pay contribution on the allowances paid by the contractor to its employees. The contractor paid certain amounts as re-imbursement of expenses towards

washing/ironing of their uniform and house rent allowance. Those amounts were paid as washing allowance and HRA respectively. As per the definition of basic wages U/s 2(b) of the Act such allowances are excluded for the purpose of assessing provident fund dues. As per Sec 6 of the Act, dues need to be paid only on basic, DA and retaining allowance. Other allowances are excluded for the purpose of quantifying the provident fund liability. The respondent organization vide his Circular No. C-III /110001/4/ 3(72)14/ Circular / Head Quarters / 6693 dt. 06/08/2014 has taken a policy decision that employers who are paying EPF dues only on less than 50% of wages have to be subjected for inspection. The appellant is remitting contribution on 60% of the total wages paid to the employees. The allowances were not paid as per terms of any contract, implied or express. The appellant produced all the relevant records but the respondent made a summary assessment. The appellant was not provided a copy of the inspection report and the appellant was not allowed to cross examine the Enforcement Officer who conducted the inspection of the records. The respondent authority failed to disclose the allowances on which the assessment is made as per the impugned order. The respondent authority failed to consider the contentions of the contractor raised by him in the written

explanation dt. 25/11/2014. The Tribunal has taken a consistent view that provident fund dues are not payable on allowances which comes under the exclusion part.

3. The respondent filed counter denying the above allegations. The appellant establishment is engaging employees from M/s Obak Human Resource Outsourcing Pvt Ltd. The contractor is engaged in providing man power to various principal employers. The terms of contract for providing manpower varies from principal employer to principal employer. The contractor is providing manpower to appellant also. The Enforcement Officer of the respondent during the inspection of M/s Obak Human Resources pointed out various discrepancies in the matter of compliance. It was reported that the appellant and the contractor are remitting contribution only on basic pay and a major part of the wages is left out claiming to be allowances. The Enforcement Officer also provided copies of the wage register as well as invoice. The respondent initiated an enquiry U/s 7A of the Act . The respondent found that contribution is being paid only on a small portion of wages and three employees are not enrolled to the fund. According to the report, three persons, namely Shri. Sudheer, Shri. Samson and Shri Munna were not enrolled to the

fund. The salary of the employees are also split into 60% basic and 40% allowance. No dearness allowance is being paid to the employees. A representative of the appellant attended the hearing and stated that 40% allowance being paid to the contract employees are required to be treated as overtime allowance and EPF is not applicable on the same. The appellant was directed to produce details regarding the allowance to prove that the same is being paid as overtime allowance for the extra work done by the employees. The appellant failed to attend the next date of enquiry. The appellant neither attended the enquiry, produced any records nor give any clarification on the issue of overtime allowance as claimed by the representative of the appellant. On the basis of Sec 2(f), the definition of employee, Sec 6, contribution and matters payable under the scheme, Sec 8A, recovery of money by employers and contractors Para 30, payment of contribution and Para 36B duties of contractors, it is clear that the appellant is liable to remit contribution in case the contractor fails to comply with the statutory provisions. The Hon'ble High Court of Kerala in W.P.(C) No 25080/2008 held that Sec 8A of the Act read with Para 30 of EPF Scheme enable the provident fund organization to recover contribution relating to contract employees in the first instant from the principal employer and the primary liability to

recover contribution from the contractor and pay the same to the provident fund organization is on the principal employer with a liberty to the principal employer to recover such contributions from the amount due from the principal employer to the contractor. The appellant establishment was also liable to enroll the three employees who will come within the definition of 'employee' U/s 2 (f) of the Act . The Hon'ble High Court of Gujarat in **Gujarat Cympromet Vs Assistant PF Commissioner** , 2004 (103) FLR 908 held that the term basic wages as defined under Sec 2 (b) of the Act includes all emoluments received by the employees and all such emoluments are to be considered for the purpose of calculating provident fund contribution . Any other 'similar allowance' mentioned in Clause(ii) of Sec 2(b) of the Act takes its colour from the expression "commission" because the said expression uses words 'similar allowance'. There is no similarity in the nature of allowances mentioned in Clause (ii) as they are founded on wholly unrelated consideration.

4. There are two issues involved in this appeal. One is with regard to non-enrollment of three employees. The appellant did not raise any dispute regarding the assessment of dues in

respect of these three employees nor raised any dispute regarding the eligibility of the three employees to be enrolled to the fund.

5. The other issue raised by the appellant is with regard to splitting up of wages, there by evading the statutory liability under the Act. The appellant establishment is engaging employees from M/s Obak Human Resource Outsourcing Pvt. Ltd. The wages to these employees are being paid on the basis of the agreement signed by the appellant and the contractor. The case of the appellant is that they are paying contribution on 60% of the wages paid to the employees. According to the learned Counsel for the respondent 40% of the wages are paid as allowance. The representative who attended the proceedings submitted before the respondent authority that 40% of the wages are paid as overtime allowance. The respondent authority directed the appellant to furnish the details of the overtime paid to each employee and also explain the extra work done by the employees for availing 40% benefit. The appellant failed to respond to the clarification sought by the respondent authority during the course of the enquiry. However the respondent authority on verification of the wage register produced by the appellant before him found that some of the employees were paid overtime allowance @ Rs.150/- per

month. The respondent authority excluded the actual overtime paid to the employees from the assessment and took a view that in the absence of any proper explanation for 40% allowance paid it is a clear case of subterfuge.

5. It is relevant to examine the statutory and legal provisions involved in this appeal.

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 :
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> 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.

6. It can be seen that some of the allowances such as DA, excluded U/s 2(b) (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".

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".

7. As already pointed out, the appellant failed to explain the 40% allowance paid by the employer to its employees inspite of a specific direction to that effect. Though the respondent provided an opportunity to the appellant to explain the allowance he did not avail the same. The representative of the appellant who appeared before the 7A authority took a stand that the 40% allowance paid by the appellant is overtime. The appellant in this appeal has taken a stand that the allowances paid are washing allowance and HRA. However the learned Counsel for the appellant failed to substantiate this claim also with any documentary support. In the written statement filed by the appellant before respondent authority, produced as Annexure

A2, the contractor admitted that they are remitting contribution only on 50 to 70% of the wages paid to the employees. The contractor also admitted in Annexure A2 that they are making the payments as per the directions and terms of agreement with the principal employer. The inconsistency in the claim by the appellant with regard to the nature of allowance before the respondent authority as overtime allowance and in this appeal as washing allowance and HRA clearly exposes the fact that the allowance component paid by the employer to its employees is a clear subterfuge to avoid provident fund liability. By applying the tests evolved by the Hon'ble Supreme Court of India in **Regional PF Commissioner West Bengal Vs Vivekananda Vidya Mandir and Others,** 2020 (17) SCC 643 as well as the Hon'ble High Court of Kerala in **Gobin (India) Engineering Pvt. Ltd Vs Presiding Officer, CGIT and Labour Court, Ernakulam and others,** W.P.(C) No. 8057 of 2022 it can be seen that the appellant establishment failed to establish the fact that the allowance involved in this appeal was linked to any incentive for production resulting in greater output by an employee or were being paid especially to those who avail the opportunity. The appellant also failed to prove that the workmen concerned had become eligible to get extra amount beyond the normal work which he was otherwise required to put

in. As already pointed out the failure on the part of the appellant becomes glaring since the respondent authority during the enquiry U/s 7A provided a specific opportunity to explain the same with the support of documentary evidence. The appellant failed to avail the same and took a contradictory stand before the respondent authority and in this appeal.

8. Considering the facts, circumstances and pleadings in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer