



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

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

(Friday the 30th day of October, 2020)

Appeal No.26/2018

(Old No. A/KL-10/2016)

Appellant : M/s. Hykon Transcripts Pvt. Ltd
Plot No. 16-A SD,CSEZ,
Kakkanad, Kerala -682 037

By Adv. C.B. Mukundan

Respondent : The Assistant PF Commissioner
EPFO, Kaloor
Kochi -682017.

By Adv. S. Prasanth

This case coming up for admission on 25/02/2020 and this Tribunal-cum-Labour Court issued the following order on 30/10/2020.

ORDER

Present appeal is filed from Order No. KR/KC / 19387 /Enf.1 (6) 2016/17892/dt. 31/03/2016 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act'.) in respect of on evaded wages and also non

enrolled employees for the period from 03/2010 to 02/2013. The total dues assessed is Rs. 6,25,501/-

2. The appellant establishment is covered under provision of the Act. The appellant started compliance when the employment strength reached 20. The major chunk of the employees of the appellant are highly paid and drawing Basic + DA in excess of Rs. 6500/- from the beginning. The appellant had no legal obligation to enroll such excluded employees. The respondent issued a notice dt. 15/07/2014 U/s 7A of the Act, fixing date of enquiry as 21/08/2014. The appellant appeared before the respondent and informed him that the appellant is prompt in compliance and there was no default. The respondent found that the appellant is required to remit contribution on various allowances such as HRA, Travelling Allowance, City Compensatory allowance and Grade allowance. The appellant has already paid PF contribution on Basic and DA as provided U/s 6 of the Act. As per the provision of Sec 2(b) 2, it can be seen that legislature has clearly added the "similar allowances" which is forms part of exclusion. According to the respondent all allowance including HRA is included in the definition of basic wages hence contribution is required to be paid. The

allowance such as HRA, Travelling Allowances etc were paid as reimbursement of expenses incurred by employees towards their accommodation and journey hence those allowance will not attract Provident Fund deduction. Further, as per the first part of the definition emoluments earned by an employee in accordance with terms of contract of employment only will come under the purview of the basic wages. In this case the allowance in question were not paid as per the terms of implied or express contract. During the course of hearing the respondent advised the appellant to provide a calculation showing the dues on entire allowance paid to the employees except on HRA subject to the ceiling of Rs. 6500/-. Accordingly the appellant furnished a statement to the respondent. The assessment of dues in respect of an independent Medical Transcriptionist by the respondent is also not correct. Miss. Anitha was not direct or indirect employee of the appellant. She never used to work in the premises of the appellant. She was at liberty to offer her services to any other establishment. Her remuneration was in accordance with number of files attended at her residence. She had no fixed duty hours. Hence she cannot be considered as an employee of the

appellant for the purpose of EPF coverage. Further as per Para 26 (b) of EPF Scheme any question whether an employee is to become a member of this Scheme will have to be decided by Regional Provident Fund Commissioner.

3. The respondent filed counter denying the above allegations. The appellant establishment was covered under the provisions of Act w.e.f 01/07/2000. While reviewing an application for extension of exemption under EDLI Scheme the respondent noticed that the appellant establishment has not taken all the emoluments for the purpose of Provident Fund deduction. Hence the respondent issued a letter to the appellant granting seven days time to rectify the mistake. Since the appellant failed to respond to the letter an Enforcement Officer was directed to inspect the establishment. Even after inspection by the Enforcement Officer and providing a copy of his inspection observations to the appellant, they failed to comply with the provisions of the Act. Hence an enquiry U/s 7A was initiated and summons dt.15/07/2014 was issued fixing the date of enquiry as 21/08/2014. On the request of the appellant the enquiry were adjourned 12 times and the appellant failed to produce the required documents.

However the appellant submitted in the enquiry that all the records were produced before the Enforcement Officer during his inspection. The Enforcement Officer after his inspection has reported that the compliance of the appellant establishment was not satisfactory as the wages paid to the employees was split up to avoid statutory contribution on actual wages to the detriment of the beneficiary employees. He also reported that an employee who was allowed to work from home was paid wages under the head outsourcing charge and was not enrolled the Provident Fund. The Enforcement Officer found that the appellant remitted statutory dues only on Basic and DA, which was only 40% on actual wages paid to the employees. 60% of gross salary was split into HRA 20%, TA 20%, CCA 5% and GA15%. The Enforcement Officer submitted a report calculating the dues on omitted wages excluding HRA. It was also reported by the Enforcement Officer that provident Fund was being remitted on maximum wage ceiling up to August 2014 and the appellant started splitting up of wages from September 2014. The Enforcement Officer also reported the dues in respect of the nonenrolled employee. A copy of the inspection report - part 2 was served on the appellant with

an instruction to remit the contribution at the earliest. Since the appellant failed to comply with the directions, the enquiry U/s 7A was initiated. The claim of the appellant that the copy of the inspection report was not given to them is without any basis as the enquiry U/s 7A was initiated only because the appellant failed to comply with the inspection observation given to them by the Enforcement Officer. Further the appellant never raised the issue of nonreceipt of the inspection report before the 7A authority. On a close reading of definition of basic wages U/s 2(b) of the Act and the contribution that is required to be paid U/s 6 of the Act it is very clear that the appellant is expected to remit contribution on all emoluments except those that are specifically excluded U/s 2(b). The definition of basic wages thus subsumes in its definition all the emoluments earned by an employee while on duty or (on leave or on holidays with wages in either case) in accordance with the terms of contract of employment and which are paid or payable to him. In **Gujarat Cypromet Ltd VS APFC**, 2004(103) FLR 908, the Hon'ble High Court of Gujarat held that the term basic wages as defined U/s 2 (b) of the Act includes all emoluments/benefits received by the employees

under the headings of Medical allowance, Conveyance Allowance and Lunch Allowance and those allowance are to be considered for the purpose of calculating provident fund contribution. According to the above judgment except House Rent Allowance all other allowance like Travelling Allowance, Conveyance allowance, and Grade Allowance are covered under the term emoluments and therefore form part of basic wages. All allowances which are universally, regularly and ordinarily being paid will form part of basic wages. The Division Bench of Hon'ble High Court of West Bengal in **RPFC Vs. Vivekananda Vidya Mandir and Others**, 2005 2 LLJ 721 held that in order to exclude any allowance from the purview of Sec 6, such allowances should fall under clause 1 (2) and (3) of Sec 2(b) which enumerate allowances which are not included in the definition of basic wages. In **Jai Engineering Works Vs Union of India**, AIR 1963 SCC 1480 the Hon'ble Supreme Court held that the expression any other allowance should be of the same type as mentioned in 2(b) of the Act. As per Para 26(b) EPF Scheme if any question is raised whether an employee is entitled or required to become or continue as a member or as regard to the date from which he is entitled or

required to become a member, the decision of the Regional Provident Fund Commissioner shall be final. In this case the appellant has not raised any objection during the course of enquiry regarding the enrollment of the non enrolled employee. The definition of the employee U/s 2(b) of the Act is wide enough to take into account the employees working from home also. As per Para 26 of EPF Scheme, every employee employed in connection with factory/establishment to which the scheme applies other than excluded employees shall be entitled and required to become member of Provident Fund from the date of joining in this establishment. The above said amendment in Para 26 of the EPF Scheme was upheld by the Hon'ble Supreme Court in **JP Tobacco Products Vs Union of India** , 1996(1)LLJ 822 (SC)

4. The main issue raised in this appeal by the learned Counsel for the appellant was with regard to the assessment of dues on certain allowances paid to the employees. According to the learned Counsel for the respondent, he noticed some difference in wages paid to the employees of the appellant when their request for exemptions from EDLI Scheme was being processed. The

respondent therefore informed the appellant to rectify the mistake within a weeks time. Since there was no response from the appellant an Enforcement Officer was deputed to inspect the appellant establishment. The Enforcement Officer after verifying the records of the appellant found that the wages paid to the employees of the appellant were split into basic + DA,HRA, TA, CCA & GA . He also reported that the appellant is paying contribution only on 40% of the wages paid to the employees and 60% of the wages are put in the category of various allowances and there by excluded for the purpose of remittance of provident fund contribution. The Enforcement Officer also noted that an employee working from home was not extended the benefit of Provident Fund. The inspection observations were given to appellant and they were requested to correct the mistakes pointed out by the Enforcement Officer. Since the appellant failed to comply with the instructions of the Enforcement Officer, the appellant was summoned U/s 7A of the Act and they were directed to produce all relevant records. The appellant was represented in the enquiry but did not produce any records called for by the respondent. However the representative of the appellant submitted that

all relevant records were produced before the Enforcement officer. The appellant was given adequate opportunity before the impugned orders were issued.

5. The issue with regard to splitting up of wages for the purpose of evading statutory contribution under Provident Fund was a subject matter of discussion by various forums for quite a long time. The controversy started because of some conflict in the definition of the basic wages U/s 2(b) of the Act and the contribution payable U/s 6 of the Act. According to the definition, “basic wages” means all emoluments which are earned by an employee while on duty (or leave or on holidays with wages in either case) in accordance with the terms of contract which are paid or payable in cash but does not include the cash value of any food concession any dearness allowance, house rent allowance, over time allowance, bonus, commission or any other similar allowance payable to the employee. U/s 6 of the Act, EPF contribution is required to be paid on basic wages DA, cash value of food concession and retaining allowances. It can be seen that some of the allowances excluded U/s 2(b) are included U/s 6. The Hon’ble Supreme Court resolved the conflict in **Bridge &**

Roof India Ltd Vs Union of India, 1963 AIR (SC)1474. The Hon'ble Supreme Court held that ;

a) Where the wages 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 reiterated the above classification in **Manipal Academy Vs RPFC**, 2008(5) SCC 428. The above position was further confirmed by the Hon'ble Supreme Court in **Kicha Sugar Company Ltd Vs.Tarai Chini Mill Muzdoor Union**, 2014(4) SCC 37. In a recent decision in **RPFC Vs Vivekananda Vidya Mandir**, 2019 KHC 6257 the Hon'ble Supreme Court considered whether travelling allowance, canteen allowance, lunch allowance, special allowance etc, will form part of basic wages. After considering all the earlier decisions of the Court, the Hon'ble Supreme Court declined to interfere in the finding of various high Courts that these allowance will form part of basic wages. In this particular case, the respondent has considered travelling allowance, city

compensatory and grading allowance as part of basic wages. Though, in the pleadings the appellant has taken a view that HRA was also included for the purpose of assessment, at the time of hearing the learned Counsel for the appellant fairly conceded that HRA was not taken into account for the purpose of calculating the dues. It is also interesting to note that till August 2014 the appellant was paying contribution on total wages restricted to the wage limit. In September 2014, the wage limit under the scheme was enhanced from Rs. 6500/-to Rs.15000/-. According to the learned Counsel for the respondent the appellant started splitting up of wages after the wage limit is enhanced to Rs.15000/- from September 2014.

6. Considering all the facts discussed above I am of the considered view that the assessment of dues done by the respondent, including the allowances is in accordance with law and calls for no interference.

7. Another issue taken by the learned Counsel for the appellant was with regard to the assessment of dues in respect of one employee who was allow work from home. As per Para 26 of EPF Scheme, 1952 every employee employed in connection with factory or establishment to which EPF

Scheme applies other than excluded employees shall be entitled and required to become a member of Provident Fund from the date of joining in this establishment. The above amendment to Para 26 was upheld by the Hon'ble Supreme Court in **JP Tobacco Products Vs Union of India**, 1996 1 LLJ 822 (SC). In **Satheesh Plastics Vs RPFC**, 1981 2 LLN 197(Gujarat DB) the Division Bench of Hon'ble High Court of Gujarat held that the definition of employee U/s 2 (f) is wide enough to include a person permitted to work from his own residence or at the hours of his own choice. In **Rathanlal Vs RPFC**, 1977 LIC 1765 the Hon'ble High Court of New Delhi held that the employee as defined in Sec 2(f) include all those persons employed in work connected with the work of the establishment. As per Sec 2 (f) of the Act " an employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets wages directly or indirectly from the employer. This definition of the "employee" under the Act takes into its fold any employee who is working in or in the connection with establishment, within the premises

or the employed or working from home and all those employees engaged through contract as well.

8. In view of the above discussion it is very clear that an employee working from home and drawing wages from the appellant will have to be enrolled to Provident Fund and the contribution is also required to be paid.

9. Considering all the circumstances, pleadings and evidence in this appeal I don't find any merit in the appeal, calling for any interference with the impugned order.

Hence the appeal is dismissed.

Sd/-

(V.Vijaya Kumar)
Presiding Officer