सत्यमेव जयते

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

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

(Friday the 12th day of November, 2021)

Appeal No.321/2019
(Old No. ATA-102(7) 2015)

Appellant : M/s. Dupo Print Pack (P) Ltd
VIII/406- A, Keen Industrial Area
South Vazhakulam
Aluva - 683105

M/s. Menon & Pai

Respondent : The Assistant PF Commissioner
EPFO, Kaloor
Kochi – 682 017

By Adv.Thomas Mathew Nellimmoottil

This case coming up for final hearing on 09/07/2021 and this Tribunal-cum-Labour Court on 12/11/2021 passed the following:

O R D E R

Present appeal is filed from order No. KR/KC/15577/ Enf-I (5) / 2014 / 11093 dt. 05/01/2015 issued U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 03/2012 to 08/2014. The total dues assessed is Rs.1,52,839/-.

2. Appellant is an establishment covered under the provisions of the Act. An Enforcement Officer conducted an inspection, verified the records and submitted a report. The respondent authority initiated an enquiry U/s 7A to decide whether allowances such as HRA and refreshment allowance will attract provident fund deduction. A representative of the appellant attended the hearing and explained the nature of allowances paid and also pleaded that these allowance will not attract provident fund deduction. Ignoring the contentions, the respondent authority issued the impugned order. HRA is specifically excluded U/s 2(b) of the Act, however the

respondent authority has included HRA also for the purpose of assessment. The appellant is liable to pay contribution only on basic wages and DA and all other allowances are excluded for provident fund deduction.

3. The respondent filed counter denying the above allegations. An Enforcement Officer conducted inspection of the appellant establishment and reported that the appellant has bifurcated 15% of the total salary as refreshment allowance till 03/2012 and from 04/2012 onwards the same has been added with HRA. HRA component has become 78% of the basic wages. The respondent authority initiated an enquiry U/s 7A of the Act. A representative of the appellant attended the hearing and submitted that the salary structure of the appellant upto 03/2012 comprised off 40% basic, 20% DA, 15 % refreshment allowance and 20% HRA. From 01/2014 the salary structure was revised and 70% of the total salary was classified as Basic and DA and 30% as HRA. He further contended that the allowances will not attract provident fund deduction. The

respondent authority after verifying the wage structure found that up to 03/2012 the wage structure of the appellant was Basic, DA, HRA and refreshment allowance. From 04/2012 the salary structure was revised to Basic, DA and HRA. The respondent authority noticed that the refreshment allowance was added to HRA to claim the benefit of exclusion. The respondent authority noticed that there is no terms of contract entered between the appellant and the employees and appellant has unlawfully transferred the refreshment allowance that were given to the employees to HRA so as to avoid provident fund deduction. Allowances which are universally, regularly and ordinarily being paid form the emoluments to be considered part of basic wage as defined U/s 2(b) of the EPF Act, The Hon'ble High Court of Madhya Pradesh in M/s. **Montage Enterprises Pvt. Ltd Vs RPFC, WP** No. 1857/2011 supported the above view .

4. During the course of routine inspection of the appellant establishment by the Enforcement Officer attached to

the office of the respondent, he reported that the appellant establishment is splitting wages into various allowance to evade the assessment of provident fund contribution. The appellant establishment was paying Basic, DA, HRA and refreshment allowance up to 03/2012. From 04/2012 onwards the appellant establishment revised the salary structure to Basic, DA and HRA. Upto 03/2012 the salary structure consisted of 45% Basic, 20% DA, 15% refreshment and 20% HRA. From 04/2012 onwards the Basic and HRA is made 70% and 30% respectively, merging refreshment allowance with HRA. The respondent authority therefore concluded that this is a deliberated attempt by the appellant establishment to evade social security contributions and therefore assessed dues on the same.

5. According to the learned Counsel for the appellant the, appellant establishment has no obligation to pay minimum wages as basic pay and DA alone in view of the decision of Hon'ble Supreme Court of India **in Air Freight Ltd Vs State**

of Karnataka, 1999 (2) LLJ 705. It is true that the respondent authority is not the competent authority to decide the minimum wages payable by the appellant establishment. The logic of the respondent authority in the impugned order is very clear when he held that " if the employer is paying salary to his employees, equal to or more than that of minimum wages payable and in addition to that such allowance like HRA, washing allowance, night allowance and other allowances are paid, certainly such allowance would not fall under the category of basic wages and if it is otherwise such allowance will form part of basic wages. In this case, the total amount paid is not more than minimum wages payable and splitting up of such lesser amount into different allowances is to be seen only to lessen the liability of the employer on account of dues payable under the Act". The finding of the respondent authority cannot be legally sustained. The respondent authority is required to examine each allowance paid by the appellant establishment and decide on the facts of

the case whether such allowances will form part of basic wages and therefore will attract provident fund deduction.

In the light of above discussion, it is relevant to examine the statutory and legal provisions.

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 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".

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".

As already pointed out that the respondent authority after considering the nature of the allowances paid, included only travelling allowance and refreshment allowances for the purpose of determining the dues and allowances like HRA are excluded from the assessment.

8. In this case, it is seen that the appellant establishment merged the refreshment allowance with HRA to claim exclusion from assessment of dues. Probably this provoked respondent authority to say that the HRA component also will attract provident fund deduction. It is seen that 30% HRA is definitely on a higher side and requires to be examined independently whether such higher HRA component is given only as a subterfuge. However it is not correct to say that the HRA, in the normal course, will attract provident fund deduction as it is specifically excluded U/s 2 (b) (ii) of the Act.

9. Considering the facts, circumstances and pleadings in this appeal, the impugned order cannot be sustained.

Hence the appeal is allowed the impugned order is set aside and the matter is remitted back to the respondent to reassess the dues within a period of 6 months 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, as per the direction of this Tribunal shall be adjusted or refunded after conclusion of the enquiry.

Sd/-

(V. Vijaya Kumar)
Presiding Officer