सत्यमेव जयते

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

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

(Monday the 07th day of December, 2020)

Appeal No.342/2019

(Old No.A/KL-436(7)2015)

Appellant	M/s. V Guard Industries Ltd., LF Church Road Kaloor Kochi-682017
	By Adv. Ramakrishnan
Respondent	The Regional PF Commissioner EPFO, Sub Regional Office Kaloor Kochi – 682017
	By Adv. Sajeev Kumar K. Gopal

This case coming up for hearing on 06.11.2020 and this Industrial Tribunal-cum-Labour Court issued the following order on 7/12/2020.

O R D E R

Present appeal is filed from order No.KR/KCH/ 10905/ Enf 1 (3) 2015/ 13279 dt.16/02/2015 assessing the dues U/s 7A of EPF & MP Act,1952 (hereinafter referred

to as 'the Act') for the period from 03/2010 to 01/2012. The total dues assessed is Rs. 7,56,241/-.

2. An Enforcement Officer of the respondent conducted an inspection of the appellant establishment on 2/2010 and submitted a report alleging non-enrollment of certain employees. On the basis of the report, the respondent initiated action U/s 7A of the Act .During the course of hearing, the respondent also directed the appellant to produce the wage register specifying the wage structure for the previous year. The appellant was also directed to produce wage register for 03/2010 to 01/2012 and Balance Sheet and Profit and Loss Account for the year 2010-2011. All the documents were produced before the respondent. The respondent directed the appellant to remit contribution on HRA to its employees and also to ensure the enrollment of workers belonging to a House Keeping Agency. The appellant filed detailed reply dt. 09/03/2012 which is produced and marked as Annexure A2. The respondent later sought clarification regarding the nature and purpose of various components and wages. The appellant also informed the respondent that the House Keeping Agency is independently covered under the

provision of the Act. All the clarification sought by the respondent were provided vide Annexure A5 letter dt. 20/05/2012. The respondent also raised certain doubts regarding the trial balance which was also clarified by the appellant. The respondent issued the impugned order ignoring all the contentions raised by the appellant. Sec 2 (b) and Sec 6 of the Act adequately supports the claim of the appellant that all the allowances paid to the employees were excluded from the provisions of the Act. By virtue of Para 26 & 26A of EPF Scheme an excluded employee is liable to contribute only on a maximum monthly pay of Rs.6500/-.The appellant remitted contribution on salary limit of Rs.10000/- during the relevant period, though the salary limit under the Act was Rs.6500/-. The employees are paid wages in accordance with their terms of contract. As a matter of fact, the appellant discontinued certain allowances and merged them with basic wages as decided by the employees. The allegation of the respondent that the HRA component is 125 % of the basic wages is denied by the appellant. The inclusion of HRA which is specifically excluded U/s 2b(ii) of the Act, in the basic wages, is not legally correct. The

enquiry was initiated in respect of appellant with Code No. KR/10905 the said code number pertains to Kochi and Palakkad branches. All other branches are covered with respective PF offices. Hence the respondent cannot say that the details of the period of contribution in respect of other units were not provided to him. The house keeping agencies, M/s AGJ Property Management Services and M/s.Vinay House Keeping are covered under the provision of the Act as independent contractors. Being independent contractors with separate code number the respondent ought to have initiated action against those contractors in the event of any default on their side.

3. The respondent filed counter denying the above allegations. An enquiry U/s 7A of the Act was initiated by the respondent by considering the previous history of non-enrollment in the appellant establishment. During the enquiry the respondent noticed several discrepancies in the matter of compliance. On verification of the pay register of the establishment, it was noticed that the appellant was splitting wages under 27 difference heads of account. The employer gave clarification with regard to 15 heads. It was also noticed that DA was being paid to few employees. After

verifying the records, the respondent came to conclusion that allowances are paid selectively and the nature of allowance differs from person to person. Hence the respondent came to conclusion that all these allowances form part of basic wages and DA. It was also noticed that the HRA paid to the employees were unusually high which varies from 40% to 120% of the basic wages. . Hence the respondent arrived at the conclusion that the HRA paid to the employees are also not genuine, and therefore is required to be included for the purpose of assessment for PF dues. Sec 8A of the Act and Paras 30 & 36 B of EPF Scheme makes it abundantly clear that it is liability of principal employer in the first instance to deposit contribution in respect of contract employees also. The Hon'ble High Court of Kerala in WPC No. 25080/2008 held that Sec 8A of the Act read with Para 30 of EPF Scheme enable the respondent organization to recover contributions relating to contract employees in the first instance from the principal employer and that the primary liability to recover contributions from the contractor and paid same to the provident fund organization is with the principal employer.

4. There are two issues involved in this appeal one is with regard to the splitting up of wages for the purpose of evading PF contribution. The law in this regard is settled by the Hon'ble Supreme Court of India in ***Bridge & Roof Company India Ltd Vs Union of India,*** 1963 (3) SCR 978. The test laid down in the said case by the Hon'ble Supreme Court is that

a) Where the wage is universally 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 the opportunity is not basic wages.

The Hon'ble Supreme Court of India again considered the above proposition in ***Manipal Academy of Higher Education Vs. PF Commissioner,*** 2008(5) SCC 428. The Hon'ble Supreme Court in a recent decision examined whether travelling allowance, canteen allowance, lunch allowance, special allowance, management allowance etc will form part of basic wages for the purpose of PF deduction. The Hon'ble Supreme Court concluded that " the wages structure and component of 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 a part of basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the PF account of the employees. There is no occasion for us to interfere with the concurrent conclusion of facts. The appeals by the establishments therefore merits no interference". The Hon"ble High Court of Kerala in a recent judgment dt.15/10/2020 in **EPFO *Vs M/s. Raven Beck Solutions India Ltd,*** WPC No. 17507/2016 examined the whole issue once again and held 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 classifying it as payable for washing allowance, food allowance and travelling allowance certainly amounts to subterfuge

intended to avoid payment of Provident Fund Contribution by the respondent establishment". From the above discussion it is clear that the appellant is liable to pay contribution on allowances such as Conveyance allowance, fixed allowance, fuel allowance, additional compensatory allowance, Mobile allowance, Deputation allowance, loading allowance, additional allowance, disturbed personal allowance etc. The only thing is that the allowances are named differently for different categories of employees, probably to argue that these allowances are not universally paid to all 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.

5. The issue regarding the allowances which will come within the definition of Sec 2(b) and therefore will attract PF deduction is settled in view of the above decisions. The learned Counsel for the appellant pointed out that HRA is excluded U/s 2(b)(ii) of the Act. However the respondent included the same for the purpose of assessment. The learned Counsel for the appellant also pointed out that contributions to the employees, even for excluded employees up to the salary limit of Rs.10000/- is being paid by the appellant when the salary limit prescribed under the Act was Rs.6500/-.The impugned order is not clear with regard to the above aspects. From the example cited by the respondent in the impugned order it can be

seen that the HRA component in respect of certain employees are indeed, very high and in some cases it is more than or equal to the basic wages. Generally, the HRA component cannot be included for the purpose of assessment. However if the employees are being paid contribution up to the statutory limit of wages, it shall not make any difference as far as the assessment is concerned. There are certain payments such as leave encashment which will not form part of basic wages. It is also required to be examined whether performance incentive is being paid for additional work done.

6. The respondent has also assessed dues in respect of a an independent contractor doing house keeping job in the appellant establishment. According to the learned Counsel, it is the primary responsibility of the contractor to pay contribution in respect of its employees to the respondent. It is seen that the assessment is made without issuing notice to the contractor which cannot be legally accepted even though the Act and Schemes put the primary responsibility on the principal employer. The assessment shall be made only after issuing notice to the contractor.

7. During the course of argument, the learned Counsel for the appellant submitted that the impugned order in this appeal is an interim order and the respondent continued with the enquiry for the period from 02/2012 to 12/2014. The learned Counsel also produced letter No. KR/KCH/10905/Enf 1 (3) 2018/2327 dt. 30/10/2018 issued by the respondent stating that the further enquiry for the subsequent period is dropped. The letter specifically states that the 7A enquiry was being continued for the period 02/2012 to 12/2014 was closed by the competent authority. However the letter further points out that the interim order assessing dues for the period 03/2010 to 01/2012 is not interfered with since the ATA No. 436(7)/15 (Appeal No.342/19) is pending before the EPF Appellate Tribunal. The learned Counsel requested that the whole matter requires the re-examination, in view of the decision taken by the respondent in the above cited letter.

8. Considering all the facts, circumstances and pleadings in this case, it is felt that the whole issue regarding on assessment on allowances and also the assessment in respect of contract employees will have to be re-examined by the respondent .

Hence the appeal is allowed, the impugned order is set aside and matter is remitted back to the respondent to re-decide the issue on the basis of the observation made above within a period of three months after issuing notice to the respondent and the contractor, if required. The amount deposited by the appellant U/s 7(O) of the Act, as per the direction of this Tribunal shall be adjusted or refunded on conclusion of the enquiry.

Sd/-

(V. Vijaya Kumar)
Presiding Officer