



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

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

(Wednesday the 11th day of May, 2022)

Appeal No.378/2018 (Old No. ATA 515(7)/2014)
& **597/2019** (Old No. ATA 725(7)/2013)

Appellant

M/s. Muziris Softech (P) Ltd
Muziris House
Kurisupally Road,
Ravipuram
Kochi – 682 015

By Adv. C.B. Mukundan

Respondent

The Assistant PF Commissioner
EPFO, Sub Regional Office
Kaloor,
Kochi – 682017

By Adv. S.Prasanth

This case coming up for hearing on 02/03/2022 and this Industrial Tribunal-cum-Labour Court issued the following order on 11/05/2022.

ORDER

Appeal No 378/2018 is filed from order No. KR/KC/21208/Enf-3(3)/2014/970 dt. 25/04/2014 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as ‘the Act’) on omitted wages for the period from 01/2010 to 10/2011. The total dues assessed is Rs.4,71,292/-.

2. **Appeal No. 597/2019** is filed from order No. KR / KC / 21208 / Enf-3 (3) / 2013 / 2722 dt. 16/05/2013 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 01/2010 to 10/2011 and non-enrolled trainees for the period from 06/2011 to 10/2011. The total dues assessed is Rs.6,10,659/-.

3. Since common issues are raised and since separate enquiries were initiated as per the direction of the Hon'ble High Court of Kerala in W.P.(C) No.14111/2013, both the appeals are heard together and disposed of by a common order.

4. The appellant is a company registered under the Companies Act and covered under the provisions of the Act, engaged in the development of software. The appellant establishment was regular in compliance. The appellant establishment was remitting contribution even in respect of excluded employees restricting to the statutory limit of Rs.6500/- While so an Enforcement Officer of the respondent organization inspected the records of the appellant establishment on 19/01/2011. On the basis of the report of the Enforcement Officer, the respondent initiated an enquiry U/s 7A of the Act. The respondent authority passed an order holding that the appellant is

liable to remit contribution on various allowances paid by the appellant to his employees during the period from 07/2008 to 12/2009. The appellant filed Appeal No. ATA 121(7)/2012 before the EPF Appellate Tribunal. The Tribunal allowed the appeal. A copy of the order is produced and marked as Annexure A2. Even before the final decision by the Tribunal, the respondent initiated action for assessing dues on allowances for the period from January 2010 to October 2011. The appellant attended the enquiry and pointed out that the appellant is not liable to remit contribution on various allowances. The respondent, ignoring the contentions of the appellant, issued the impugned order assessing an additional amount of Rs.6,10,659/-. Out of the said claim Rs.4,71,292/- was assessed on allowances paid to the enrolled employees and an amount of Rs.1,39,367/- was assessed on the stipend paid to the non enrolled trainees. The appellant preferred a writ petition before the Hon'ble High Court of Kerala as W.P.(C)No.14111/2013 (L) challenging the 7A order. The Hon'ble High Court disposed of the said petition directing the respondent to reconsider his order in the light of the order passed by the Hon'ble EPF Appellate Tribunal in ATA No.121(7)/ 2012. The Hon'ble High Court further directed the appellant to deposit the dues assessed on stipend paid to trainees. But it will be provisional and subject to further challenge.

The order of the Hon'ble High Court is produced as Annexure A3. Hence separate appeals are filed challenging the assessment of dues on various allowances and also with regard to the assessment of dues on stipend paid to trainees. In pursuance of the directions of the Hon'ble High Court the respondent initiated an enquiry U/s 7A of the Act. However in spite of the decision of the Hon'ble EPF Appellate Tribunal in ATA No.121/(7)/2012, the respondent authority took a view that the allowances will attract provident fund deduction. The appellant establishment is paying travelling allowance, cell allowance, bonus, washing allowance etc to its employees which are all excluded allowances under the provisions of the Act. The allowances such as HRA, travelling allowance, field allowance etc are paid as a reimbursement for actual expenses incurred by the employees.

5. **In Appeal No. 597/2019**, the issue involved is whether the stipend paid to the trainees will attract provident fund deduction. Trainees are engaged by the appellant from 06/06/2011 onwards. The stipend fixed for each trainee was Rs.6600/- or 7000/- depending on their qualification and skills. In June 2011 the stipend drawn by the trainees was less than Rs.6500/-It is so, because the stipend was paid only for 25 days.

The copies of the stipend statement is produced as Annexure A4 series. It is true that the trainees are enrolled under ESIC Scheme as Sec 2(9) of ESIC Act excludes only apprentice engaged under the Apprentices Act. Further the wage sealing under EPF Act is Rs.6500/- where as the wage sealing for ESI coverage was Rs.15000/- during the relevant period. The respondent authority failed to consider the written statement filed by the appellant before the respondent authority at the time of Sec 7A enquiry.

6. The respondent filed counter denying the above allegations. Appellant is an establishment covered under the provisions of the Act with effect from 16/03/2005. The appellant establishment was remitting contribution only on a small portion of wages paid to its employees from the date of coverage. The appellant was also not enrolling eligible employees to provident fund membership. The respondent therefore initiated an enquiry U/s 7A of the Act. The appellant moved the Hon'ble High Court in W.P.(C) No. 19446/2012 against the summons. The writ petition was disposed of vide judgment dt.03/10/2012 whereby the Hon'ble High Court refused to interfere with the enquiry initiated by the respondent. The enquiry concluded vide Annexure A1 order assessing the dues on evaded wages for the period from

01/2010 to 10/2011 and non enrolled employees for the period from 06/2011 to 10/2011. The appellant challenged the said order before the Hon'ble High Court of Kerala in W.P.(C) No. 14111/2013, on the plea that the EPF Appellate Tribunal, in a similar assessment for the period 07/2008 to 12/2009 held that the allowances will not attract provident fund deduction. The EPF Appellate Tribunal in Annexure A2 order set aside the assessment of dues on allowances on the ground that there was no finding by the APFC that the allowances by the employer are earned by employees in accordance with the terms of the contract with the employer and there was no findings by the APFC that allowances are paid to all employees across the board or uniformly paid to all employees. Since the decision of the EPF Appellate Tribunal was not inconsonance with the various decisions of the Hon'ble Supreme Court and High Court, the respondent challenged the said order in W.P.(C) No. 28853/2014 and the case is still pending. After taking note of all the above contentions the Hon'ble High Court of Kerala disposed of W.P.(C) No.14111/2013 vide judgment dt. 04/07/2013 with the following directions.

i) APFC Kochi shall consider the determination of amount in respect of petitioner with reference to Annexure A1 order in the

light of Annexure A2 order and pass appropriate orders within a period of one month.

ii) The petitioner shall deposit the assessed amount with regard to the trainees, which will be provisional subject to further challenge, if advised.

In compliance with the Annexure A3 judgment, the appellant remitted the amount of dues assessed in respect of trainees. The respondent authority issued summons dt.16/08/2013. The appellant was represented in the enquiry. The respondent issued the impugned order after taking into account the Annexure A2 order of the EPF Appellate Tribunal and Annexure A3 judgment of the Hon'ble High Court of Kerala. While scrutinizing the records of the appellant establishment, the respondent authority found that the appellant is maintaining three separate sets of wage registers for three categories of employees, highly paid employees, ESI paid employees and trainees. The wages as split up as basic, dearness allowance, HRA, travelling allowance, cell allowance, position allowance, washing allowance and field allowance. The appellant is deducting provident fund only on basic + DA restricted to Rs.6500/-. All employees of the establishment are paid these allowances on a combined reading Sec 2 (b) & Sec 6 of the Act, it is

clear that the appellant is liable to remit contribution on all allowances other than the specifically excluded allowance. The Hon'ble High Court of Kerala in **Kitex Garments Vs Regional PF Commissioner**, W.P.(C) No. 9602/2014 held that going by the principle that each assessment year gives rise to a fresh cause of action, the inclusion in the subsequent period will have to be considered on the facts and also on a determination of what exactly the allowances are meant to be. Hence there is no inconsistency in taking up the issue of allowances for the subsequent years. HRA travelling expenses, washing allowance, field allowance and other allowances are emoluments earned by all the employees of the establishment. The Hon'ble High Court of Gujarat in **Gujarat Cympromet Ltd Vs Assistant PF Commissioner** has held that the term basic wages as defined U/s 2(b) of the Act includes all emoluments/benefits received by the employees and all such emoluments are considered for the purpose of calculating the provident fund contribution.

7. As per Sec 2(f), an employee means any person who is employed for wages in or in connection with the work of the establishment who gets his wages direct or indirect from the employer and includes any person engaged as an apprentice not

being an apprentice engaged under the Apprentice Act or under the Standing Orders of the establishment. As per Para 26 of EPF Scheme an employee as defined U/s 2(f) of the Act, other than the excluded employee are entitled and required to become a member of provident fund from the date of joining the establishment. As per the wage register for the month of June 2011, Annexure A4 series produced by the appellant, all the so called trainees were drawing wages less than Rs. 6500/- and these trainees are eligible and entitled to become members of the provident fund. In **Sree Rajesh Krishnan S, Secretary Vs Assistant PF Commissioner**, 2009(4) LLJ 720 the Hon'ble High Court of Kerala held that for excluding an apprentice from the purview of the term ' employees ' as defined U/s 2 (f) of the Act, they should have been engaged under the Apprentice Act 1961 or under the Standing Orders as provided in the Industrial Employment (Standing Orders) Act. In this case the appellant has no case that the trainees are engaged under Apprentices Act or under Standing Orders of the appellant establishment.

8. There are two issues involved in these appeals. One is with regard to the assessment of dues on various allowances paid

by the appellant to its employees and second whether the stipend paid to the trainees will attract provident fund deduction.

9. The impugned orders in these appeals were issued by the respondent authority as per the directions of the Hon'ble High Court of Kerala in W.P.(C) No. 14111/2013 and therefore the earlier decision of the EPF Appellate Tribunal, New Delhi and the pendency of the Writ Petition No. 28853/2014 before the Hon'ble High Court of Kerala challenging the said order need not come in the way of finally deciding the issues.

10. The appellant establishment is paying various allowances such as HRA, travelling allowance, cell allowance, position allowance, washing allowance and field allowance to its employees. According to the learned Counsel for the appellant all these allowances are excluded from basic wages and therefore the appellant is liable to remit contribution only on basic and DA. According to the learned Counsel for the respondent the appellant is liable to remit contribution on those allowances other than which are specifically excluded U/s 2 (b)(2) of the Act.

11. 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 :

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 where 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.

12. 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.

13. 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”.

14. 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”.

15. In the present case as already stated the allowances include HRA, travelling allowance, cell allowance, position allowance, washing allowance and field allowance. According to the learned Counsel for the respondent all the employees are entitled for these allowances and therefore applying the above tests laid down by the Hon'ble Supreme Court as well as the High Court the appellant is liable to remit contribution on all allowances. HRA is an allowance specifically excluded U/s 2(b)(2) of the Act and therefore will not come within the definition of basic wages and therefore will not attract provident fund deduction. It is already a settled legal position and travelling allowance and washing allowance will form part of basic wages and therefore will attract provident fund deduction. It is not clear from the impugned order or from pleadings as to the nature of the “ position allowance” “field allowance” and “cell allowance”. As per the tests laid down by the Hon'ble Supreme Court in **RPFC Vs Vivekananda Vidya Mandir and other**, 2020 (17) SCC 643 and also by the Hon'ble High Court of Kerala in **Gobin (India) Engineering Pvt Ltd Vs The Presiding Officer CGIT and LC and another** , W.P.(C) No. 8057/2022 the respondent authority failed to examine whether the said allowances are linked to any incentive for production resulting in greater output by an employee, though the allowances

are universally paid to all the employees. The respondent authority in the impugned order cited a few examples as to how the wages paid to the employees are split to avoid provident fund contribution. In the case of Shri. Muthu Gopalan, the total salary paid is Rs.6350/- and provident fund is being paid only on Rs.3300/-. Similarly in the case of Shri. Sudheesh M.S, the gross salary paid was Rs.8189/- where as contribution is paid only on Rs.4000/-. Hence it is clear that there is a subterfuge in bifurcating the wages of employees to avoid provident fund deduction. However including HRA which is an excluded allowance and not considering the nature of “position allowance”, “field allowance” and “cell allowance” will definitely impact the impugned order issued by the respondent authority.

16. The next issue raised by the learned Counsel for the appellant is with regard to stipend being paid to the trainees. As rightly pointed out by the learned Counsel for the respondent, Sec 2(f) of the Act excludes only trainees engaged under the Apprentices Act 1961 or under the Standing Orders of the appellant establishment. The appellant has no case that the trainees engaged by the appellant establishment will come in any of these categories. According to the learned Counsel for the appellant some

of the trainees are getting stipend beyond the statutory limit. According to the Counsel for the respondent this is again a subterfuge by the appellant showing the stipend of some of the employees as Rs.6600/- to argue that they were drawing basic + DA beyond the statutory limit. Having taken such a position the appellant ought to have produced further evidence to show that some of the trainees were drawing basic + DA beyond the statutory limit. The evidence available on record would substantially prove that the trainees engaged by the appellant received an emolument below the statutory limit. In view of the above I am not inclined to interfere with the assessment of dues on the emoluments/basic + DA paid to the trainees.

17. Considering the facts, circumstances pleadings and evidence in this appeal, I am of the considered view that the assessment on allowance such as field allowance, cell allowance, position allowance and HRA cannot be sustained. The assessment of dues on stipend/ basic + DA paid to the employees is in accordance with law and therefore is upheld.

Hence the appeal is partially allowed. The assessment of dues on HRA, cell allowance, field allowance and position allowance is set aside and the matter is remitted back to the respondent to

re-assess the dues on the basis of the observations here in above.
The assessment of dues in respect of stipend paid to the trainees is upheld.

Sd/~

(V. Vijaya Kumar)
Presiding Officer