



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

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

(Friday the 24th day of December, 2021)

APPEAL No.386/2018
(Old No. ATA-523(7)/2014)

Appellant

M/S. Shrivenkateswara Heavy
Equipments
29/1288-C 2nd Floor, NH-47,
Byepass, Vyttila Jn.,
Cochin -682019 .

By Adv. Paulson C. Varghese

Respondent

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

By Adv. S. Prasanth

This case coming up for final hearing on 20/09/2021 and this Tribunal-cum-Labour Court on 24/12/2021 passed the following:

ORDER

Present appeal is filed from order No. KR/ KC/ 27147/ Enf-3(5)/ Enf 1(4)/ 2014/1130 dt. 30/04/2014 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the

Act'.) on evaded wages for the period from 03/2011 to 03/2013. The total dues assessed is Rs.7,07,694/-.

2. The appellant is an establishment engaged in the service of heavy equipments. The appellant establishment is covered under the provisions of the Act w.e.f 10/2009. The appellant has 2 categories of employee, executive and non executive. An Enforcement Officer of the respondent organization who conducted the inspection of the appellant establishment reported that there is default in payment of contribution as the contribution is not paid on actual wages paid to the employees. The respondent issued a notice dt. 13/08/2013 U/s 7A of the Act. The appellant filed an objection and clarified all the queries raised by the respondent authority. A true copy of the summons is produced and marked as Annexure A1. The appellant also filed a detailed statement regarding the mode of calculation of the provident fund by the appellant establishment. The appellant is paying contribution as per the provisions of law. As per the salary policy of the appellant, the employees have been paid basic wages, dearness allowance, conveyance allowance and HRA. The appellant establishment has been contributing on basic wages

and dearness allowance. The appellant was not deducting contribution on conveyance allowance and HRA from the employees. The Apex Court in many cases held that the principles of determination of basic wages includes all emoluments earned by the employees under all circumstances but the employers are not liable to pay contribution on other allowances. The Hon'ble Supreme Court held that on a combined reading of Sec 2(b) of and Sec 6 of 1952 Act, the wages which is universally necessarily and ordinarily paid to all across the board are basic wages and where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. The appellant also pointed out the circular dt. 30/11/2012 issued by the respondent organization laying down guidelines to assess the liability of the employers in compliance under provident fund laws. According to the circular “ thus basic wages is subject to exclusion expressly referred to in the definition and, no other”. The appellant establishment is not a scheduled establishment notified in the Minimum Wages Act. Hence there is no relevance for the statement regarding the minimum stipulated wages. The basic wages, dearness allowance and all other allowances availed

by employee is varying nature depending on the various factors of work. So it is not possible to consider these varying allowances for assessment of provident fund contribution. Hence the impugned order issued by the respondent authority is without any basis in law.

3. Respondent filed counter denying the above allegations. During the course of inspection conducted by an Enforcement Officer of the respondent organization appointed U/s 13 of the Act on 09/05/2012, it was revealed that the wage structure of the appellant establishment consisted of basic, dearness allowance, conveyance allowance and HRA. Provident fund dues were remitted only for basic wages and dearness allowance excluding other allowances. The respondent authority therefore issued a summons dt. 13/08/2013 directing the appellant to appear and produce records on 24/02/2013. A representative of the appellant attended the hearing. The appellant submitted salary register, attendance register and cash book for the period 03/2011 to 30/2013 and balance sheet for 2011-12. On scrutiny of the records produced by the appellant, the respondent authority found that the appellant establishment

is paying allowances like HRA and conveyance. The total amount paid is less than minimum wages payable and splitting of the salary into different allowances is only to lessen the liability under the Act. After examining all the records produced, the respondent authority concluded that the appellant establishment is liable to remit contribution on all allowances excluding HRA subject to the wage limit of Rs.6500/-. On a combined reading of Sec 2(b) and Sec 6 of the Act it is cleared that all emoluments which are earned by an employee other than those specifically excluded component would be basic wages for the purpose of contribution under the Act. The definition of basic wages thus subsumes in its definition all emoluments earned by an employee while on duty in accordance with terms of contract of employment which are paid or payable to him. The Hon'ble High Court of Gujarat in **Gujarat Cympromet Ltd Vs Assistant PF Commissioner**, 2004(103) FLR 908 held that the term basic wages as defined U/s 2(b) of the Act includes all emoluments earned by the employees and all such emoluments are to be considered for the purpose of calculating provident fund contribution. The Division Bench of the Hon'ble High Court of

Madhya Pradesh in **Surya Roshni Vs Employees PF Commissioner and Others**, Writ Petition No. 1891/2011 held that any emoluments paid or payable to the employees universally and across the board are liable to be included under basic wages for the purpose of contribution. In the instant case the allowance is universally, regularly and ordinarily being paid to all enrolled employees. In **RPFC, West Bengal and Another Vs Vivekananda Vidya Mandir and Others**, the Division Bench of the Hon'ble High Court of Calcutta held that in order to exclude any allowance from the purview of Sec 6, which provides for liability to pay contribution based on basic wages, such allowance should fall under clauses 1,2,3 of Sec 2(b) which enumerates allowance which are not included in the definition of basic wages.

4. The appellant establishment is having a salary structure consisting of basic, dearness allowance, conveyance allowance and HRA. The Enforcement Officer who conducted the inspection of the appellant establishment reported that the appellant is remitting contribution only on basic and DA and no contribution is being paid on allowances paid by the appellant establishment. The respondent authority initiated enquiry U/s 7A

of the Act and concluded holding that the appellant is liable to remit contribution on allowances excluding HRA as other allowances form part of basic wages.

5. In this appeal the learned Counsel for the appellant pointed out that the reference of the respondent authority to Minimum Wages Act is not correct as the Minimum Wages Act is not applicable to the appellant establishment. Even otherwise this Tribunal has taken a consistent view that the respondent authority is not the competent authority to decide the correctness of the pay structure of an establishment under Minimum Wages Act. However the respondent authority can examine the pay structure, lift the veil and examine whether the pay structure of an establishment is manipulated in such a way to avoid provident fund contribution.

6. 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.

7. 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 on the appellant 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 petitioners' 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”.

8. In this case the appellant establishment is paying basic, dearness allowance, conveyance allowance and HRA to its employees. According to the learned Counsel for the appellant the allowances are paid universally, and uniformly to all employees. According to him the contention of the learned Counsel for the appellant that the allowances are paid on the basis of the work of the employees is not correct. It was upto the appellant to substantiate the same through evidence before the respondent authority. The respondent authority has cited 2 examples to explain the wage structure of the appellant establishment. In the wage register for March 2013, Shri. Ajayakumar PV is drawing a basic salary of Rs.1700/-, DA is Rs. 1500/- and Conveyance allowance is Rs.2300/- and HRA is Rs.2500/- similarly in the case of Mr. Jayamon whose basic is Rs.1900/-DA is Rs. 2000/- conveyance allowance is Rs. 1800/- and HRA is Rs. 2300/-., Hence it is very clear from the above examples that the salary structure is designed in such a way that the contribution to provident fund is restricted to the minimum. For example in the case Shri Ajayakumar, for an employee drawing Rs.8000/- as salary the contribution is restricted to Rs.384/-only. As pointed

out by the learned Counsel for the respondent though the HRA component is exorbitantly high the same is excluded from assessments being an allowance excluded U/s 2(b) of the Act .

9. 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