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

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

(Thursday the 31st day of March , 2022)

Appeal No.395/2018

(Old No. ATA. 281(7)/2014)

Appellant : M/s. Nedspice Processing India (P) Ltd.,
(Formerly known as Harmony Spices)
12/597-8, Jawahar Road,
Koovapadam,
Kochi- 682 002.

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 31/08/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 31/03/2022.

ORDER

Present appeal is filed from order No. KR / KC/15111/ Enf-1(1)/ 2014/ 14030 dt. 12/02/2014 assessing dues U/s 7A of EPF & MP Act (hereinafter referred to as 'the Act') on evaded

wages for the period from 01/2011 to 12/2012. Total dues assessed is Rs. 1,73,327/-.

2. Present appeal is filed from order dt. 12/02/2014 issued by the respondent authority which is produced and marked as Annexure A1. The appellant is a company registered under the Companies Act and covered under the provisions of the Act. An Enforcement Officer of the respondent inspected the books of account of the appellant establishment. The Enforcement Officer directed the appellant to compute the dues on the total wages paid subject to the statutory limit of Rs.6500/-. Thereafter the appellant received a notice dt. 17/05/2013 issued u/s 7A of the Act fixing the date of enquiry on 12/06/2013. An authorized representative of the appellant attended the hearing and explained the facts. The appellant establishment was paying allowances such as overtime allowance, IPQC allowance, conveyance allowance, HRA and washing allowance to its employees. The allowances were not paid as per any terms of contract. Sec 2 (b) of the Act excludes such allowances from computing provident fund contribution. The appellant also used to pay dues on higher salary, in excess of Rs.6500/- which is a clear indication that the non-payment

of dues on allowances which includes overtime allowance and HRA is not a subterfuge to minimize his liability under EPF Scheme. The respondent authority ignored the contentions of the appellant and issued the impugned order. The respondent authority has no statutory authority to assess dues on allowances which are specifically excluded under the provisions of the Act. HRA, Overtime allowance, bonus, commission or similar allowance will not form part of basic wages. The respondent authority has included HRA and OT also for calculation of provident fund dues. The finding of the respondent authority that the appellant is not paid any DA is without any authority. There is no minimum wages prescribed for industries in spice industry and no wage structure is prescribed for the industry. EPF Appellate Tribunal in ATA No. 389(7)/2012 set aside a similar order issued by the respondent claiming dues on very same allowance for the earlier period. A copy of the order in ATA No. 389(7)/2012 is produced and marked as Annexure A2. The EPF Appellate Tribunal has taken a view that provident fund dues are not payable on allowances which comes under the exclusion part.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act with effect from 30/01/1996. An Enforcement Officer who conducted the inspection of the appellant establishment pointed out that the appellant establishment is underreporting basic wages and thereby evade statutory contribution towards provident fund. The Hon'ble Supreme Court of India in **Regional PF Commissioner Vs Vivekananda Vidya Mandir and another,** Civil Appeal No. 6221/ 2011 held that the allowances in question were part of basic wages camouflaged as part of allowance to avoid deduction and remittance of provident fund contribution. The appellant was given adequate opportunity to represent the case before the impugned order was issued. The appellant establishment paid HRA, conveyance allowance, overtime allowance, IPQC allowance and washing allowance to its employees. Washing allowance is paid only to certain employees ie, factory staff but conveyance allowance, HRA, special allowance, IPQC allowance etc are paid universally, regularly and ordinarily to all enrolled employees. As such these allowances will come under the definition of basic wages. Hence the contribution is assessed on these allowances subject to the

statutory limit of Rs. 6500/-. The appellant establishment is not paying any dearness allowance to its employees. The respondent has sufficient reason to believe that a major portion of the salary is shown as allowance just to evade the liability of remitting provident fund contribution. Inspite of giving ample opportunities the appellant failed to explain the criteria for payment of these allowances and also the nature of the same. All the allowances are universally and uniformly paid to the employees.

4. An Enforcement Officer of the respondent organization during the course of his inspection found that the appellant establishment is paying various allowances to its employees. But the same was not considered while calculating provident fund dues. The respondent therefore initiated an enquiry U/s 7A of the Act. The respondent authority found that all the allowances excluding washing allowance is uniformly and universally being paid to all the employees and therefore will form part of basic wages, attracting provident fund deduction.

5. In this appeal the learned Counsel for the appellant pleaded that the appellant establishment is paying HRA, overtime allowance, conveyance allowance, IPQC allowance

and washing allowance to its employees. According to him HRA and overtime allowance are specifically excluded U/s 2(b) (2) of the Act and therefore cannot be considered for the purpose of calculating provident fund dues. He also pointed out that other allowances will come within the exclusion clause of "any similar allowance". According to the learned Counsel for the respondent the appellant establishment is not paying any DA to its employees and the DA component of wages is split into various allowances to escape provident fund liability. He also pointed out that the allowances are being paid universally and uniformly to all the employees and therefore will attract provident fund deduction.

6. The issue to be decided in this appeal is whether the allowances such as HRA, overtime allowance, conveyance allowance, IPQC allowance and washing allowance will form part of basic wages attracting provident fund deduction. The relevant provisions to be considered 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 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.

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".

8. As already pointed out the appellant establishment is paying HRA, conveyance allowance, overtime allowance, IPQC allowance and washing allowance to its employees. HRA and overtime allowance are specifically excluded U/s 2(b)(2) of the Act and therefore the same cannot be considered while calculating provident fund dues of the employees of the appellant establishment, unless there is a specific finding that there is real subterfuge in the payment of these two allowances. The Hon'ble Supreme Court in **Regional PF Commissioner, West Bengal Vs Vivekananda Vidya Mandir and others**, 2020 17 SCC 643 and also the Hon'ble High Court of Kerala in **Gobin (India) Engineering Pvt. Ltd Vs Presiding Officer, CGIT**

and Labour Court, Ernakulam, WP (C) No. 8057/2022 has evolved certain tests before deciding whether a particular allowance will form part of the basic wages. Relying on the decision of the Hon'ble Supreme Court the Hon'ble High Court of Kerala pointed out that the authorities will have to examine whether the allowances are linked to any incentive for production resulting in greater output by an employee or the allowances were being paid especially to those who avail the opportunity. Inorder that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get the extra amount beyond the normal work which he was otherwise required to put in. The respondent authority in this particular case has not attempted to assess the nature of the allowances such as IPQC allowance applying the above test. He has also included the excluded allowances such as HRA and overtime allowance in the assessment of dues. Hence it is not possible to sustain the impugned order in the light of the above decisions.

9. Considering the facts, circumstances and pleadings in this appeal, I am not inclined to uphold the impugned order.

Hence the appeal is allowed the impugned order is set aside and the matter is remitted back to the respondent to reassess the dues, if any, on the above directions, within a period of 6 months, after issuing notice to the appellant. If the appellant fails to appear or produced the records called, for the respondent is at liberty to decide the matter according to law.

Sd/-

(V. Vijaya Kumar)
Presiding Officer