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

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

(Monday the 24th day of January, 2022)

Appeal No.400/2019

(Old No. ATA. 1268(7)/2015)

Appellant : M/s. Dentcare Dental Lab Pvt. Ltd.,
NAS Road, Near KSRTC,
Muvattupuzha – 686 661.

By Adv. C.B.Mukundan

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 31/08/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 24/01/2022.

ORDER

Present appeal is filed from order No. KR / KC / KCH / 24649 / Enf-3(2) / 2015 / 8849 dt. 17/09/2015 assessing dues U/s 7A of EPF & MP Act (hereinafter referred to as 'the Act') on evaded wages for the period from 10/2008 to 08/2013. Total dues assessed is Rs.5,75,329/-.

2. The appellant is an establishment covered under the provisions of the Act. The compliance of the appellant establishment was regular. Majority of the employees are highly paid and drawing basic + DA beyond Rs.6500/- from the very beginning. However the appellant enrolled all such employees. An Enforcement Officer of the respondent organization conducted an inspection of the appellant establishment. During his inspection he pointed out that the basic + DA in respect of these employees' are reduced when the number of working days are also reduced. Therefore the Enforcement Officer directed that the appellant establishment will have to remit contribution on wages including allowances subject to the statutory limit of Rs. 6500/-. On the basis of the report filed by the Enforcement Officer, the respondent initiated an enquiry U/s 7A of the Act. The appellant could not attend the hearing scheduled on 10/09/2014. The notice regarding the posting on 10/09/2014 was received by the appellant only on 13/09/2014. The appellant informed the respondent regarding the delayed receipt of the notice and explaining the reasons for non-appearance. Still the respondent is imposed a fine of Rs.3500/- without calling for any explanation from the appellant establishment. The contention of the respondent that the appellant is liable to pay dues on allowances

such as conveyance allowance, education allowance and special allowance is not according to law. The appellant has made a specific plea that these allowances are paid towards expenses incurred by the employees for their travel and also the education expenses of the employees' children. Special allowance was paid towards the mobile expenses of the employees. As per the provisions such allowances need not be taken into account while determining the dues. The appellant submitted a written statement dt. 26/12/2014, a copy of which is produced and marked as Annexure A2. As per Sec 6 of the Act the appellant is liable to pay dues only on basic, DA, and retaining allowance. Without considering any of the submissions made by the appellant the respondent issued the impugned order, a copy of which is produced and marked as Annexure A1. As per Sec 2 (b) (2) certain allowances are excluded from the definition of basic wages. "Similar allowances" mentioned in the above provision will include the allowances such as conveyance allowance, education allowance and special allowance. The respondent organization vide circular No. C-III / 11001 / 4 / 3 / (72)14 / Circular/Head Quarters/6693 dt. 06/08/2014 has taken a policy decision that employers who are paying EPF dues on less 50% of wages only have to be subjected to inspection. As per the first part

of the definition of basic wages all emoluments earned by an employee in accordance with "terms of the contract" with the employment will alone come within the purview of the basic. In the instant case the allowance were not paid as per the terms contract. The appellant was not permitted to examine the Enforcement Officer who conducted the inspection of the appellant establishment. EPF Appellate Tribunal in various cases, held that the employers are not liable to remit contribution on allowances which are specifically excluded under the provisions of the Act.

3. The respondent filed counter denying the above allegations. An Enforcement Officer of the respondent organization, during her regular inspection of the appellant establishment, noticed that the appellant establishment has not remitted provident fund dues on actual wages paid to the employees for the period from 10/2008 to 08/2013. It was also reported that one employee was not enrolled to the fund. The Enforcement Officer submitted Balance Sheet , Profit and Loss account for the year 2008-2009 and 2011-2012 and the salary register to show that the appellant establishment is evading contribution on actual wages by splitting up the wages. The

appellant establishment remitted contribution on basic wages alone. The respondent authority initiated an enquiry U/s 7A on the basis of the report of the Enforcement Officer. The appellant filed written statement. The appellant also produced copies of wage register from 10/2008 to 2012-2013, Profit and Loss account and balance sheet from 2008-2009 to 2012-2013. The appellant establishment is paying allowances such as HRA, conveyance, education and special allowance. HRA is excluded from the definition of basic wages. The respondent authority took a view that all the allowance which are ordinarily, universally and regularly paid by the appellant shall be counted as part of basic wages. The records produced by the appellant proved that the allowances other than HRA were not considered as basic wages for EPF contribution. After taking into account all the relevant facts, the respondent authority issued the impugned order. The impugned order is issued on the basis of the records produced by the appellant establishment, during the course of the enquiry and also on the basis of the report of the Enforcement Officer. The respondent is a statutory authority and the authority conducting the enquiry U/s 7A of the Act shall for the purpose of such enquiry have the same powers as vested in a Court under the Code of Civil Procedure, 1908. The respondent U/s 32 (C) of Code of

Civil Procedure can impose fine to compel the attendance of any person to whom a summons has been issued. During the enquiry the respondent authority noticed from the documents produced by the appellant that the salary of the employees included allowances paid towards HRA, conveyance, education and special allowance. But provident fund is deducted and paid only on basic and DA. As per Sec 2 (b) of the Act all emoluments which are earned by an employee other than those specifically excluded under Clause 1, 2 & 3 of Sec 2(b) would be basic wages for the purpose of contribution under the Act. The appellant resorted to glaring subterfuge of wage in order to evade provident fund contribution. The Division Bench of the Hon'ble High Court of Karnataka in **Group 4 Securities Guarding Ltd. Vs RPFC**, held that the Commissioner in exercise of power conferred on him U/s 7A is entitled to go into the question whether splitting of the pay by the employer to its employees is a subterfuge intended to avoid payment of its contribution to provident fund. The Hon'ble Supreme Court of India in **Rajasthan Prem Kishan Goods Transport Company Vs RPFC,** 1996 (9) SCC 454 also held that the Commissioner in exercise his powers U/s 7A can lift the veil and read between the lines to find out the pay structure fixed by the employer and decide the question whether the splitting up of pay

is resorted to, avoid its contribution to provident fund. Circular No. C/(3) 11001/4/3/(72)/14/ Circular / Head Quarters / 6693 dt. 06/08/2014 actually raised the concern of the Head Quarters of the respondent that many of the employers are resorting to splitting up of wages and therefore the Head Quarters of the respondent organization decided to conduct a study in respect of evasion restricting the cases where the employers have deducted provident fund contribution on 50% of total wages paid to the employees. There is no policy decision in the above circular to restrict the inspection to establishments who reduce the wages for contribution below 50%. The appellant actively participated in the enquiry. However the appellant never raised the question of cross examining the Enforcement Officer who conducted the inspection of the appellant establishment .

4. The main issue raised by the learned Counsel for the appellant in this appeal is whether the allowances such as conveyance allowance, education allowance and special allowance which are being paid to the employees by appellant will attract provident fund deduction. According to the learned Counsel for the appellant the above allowances are being paid as a reimbursement and therefore they will not form part of the basic

wages. According to the learned Counsel for the respondent all these allowances are being paid ordinarily , universally and regularly to all the employee and therefore will come within the definition of basic wages and therefore will attract provident fund deduction. Though the learned Counsel for the appellant pleaded that HRA was also included in the assessment the learned Counsel for the respondent opposed the same arguing that the HRA component of wages is not included in the assessment of dues.

5. To examine the issue raised by the appellant in this appeal, the relevant statutory and legal provisions are required to be examined.

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 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".

The Hon'ble High Court of Kerala examined the above judgments in a recent decision in **Gobin (India) Engineering (P) Ltd Vs. Presiding Officer, Central Government Industrial Tribunal and Labour Court an another** W.P.(C) 8057/2022. The Hon'ble High Court held that basic wages would also include allowances except HRA, it will depend on the tests evolved by the Hon'ble Supreme Court of India in **Regional Provident Fund Commissioner II Vs. Vivekananda Vidya Mandir & Others,** (2020) 17 SCC 643.

7. In this case the allowances involved in the assessment are conveyance allowance, education allowance and special allowance. According to the learned Counsel for the appellant, conveyance allowance is paid towards the expenses incurred by the employee for their travel to the company and back home. Education allowance is paid towards the expenditure of children education of the employees. Special allowance is paid towards the mobile expenses of the employees. According to him all the allowance are being paid as re-imbursement of the actual expenditure incurred by the employees of the appellant establishment. According to the learned Counsel for the respondent these allowances are being paid as a percentage of basic wages to all employees uniformly and universally and it has got no relevance to the actual expenditure incurred by the employees. There is no specification anywhere in the records of the appellant establishment produced before the respondent authority regarding the distances travel by the employees while computing the conveyance allowance, but is paid as a percentage of the basic wages paid to the employees. Similarly education allowance is not restricted to employees who are having children and therefore the claim of the appellant that the education allowance is being paid as a reimbursement of a actual

expenditure for children education is also without any basis in evidence. It is a new case by the appellant that the special allowance is being paid towards the mobile expenses of the employees. It is not clear from the pleadings of the appellant and taking into account the nature of business run by the appellant establishment, as to how the mobile expenses are directly or indirectly linked to the business of the appellant establishment. According to the learned Counsel for the respondent, it is clear that the appellant establishment deliberately split the wages into various allowances to evade remitting contribution on the actual wages paid to the employees. From the contentions taken by the learned Counsel for the appellant, it is clear that the allowances are not linked to any incentives for production resulting in a greater output by the employees. The allowances are also not being paid especially to those who avail the opportunity. In order to establish that the allowances will not come within the definition of basic wages it has to be shown that the employees concerned had become eligible to get this extra amount beyond the normal work, which was otherwise required to be put in. The appellant has no such case. Therefore the conveyance allowance, education allowance and special allowance being paid

by the appellant to its employees will form part of basic wages and therefore will attract provident fund deduction.

8. The learned Counsel for the appellant also argued that the allowances paid by the appellant is not in accordance with the "terms of contract" of employment. According to him only those allowance which will form part of "the terms of contract" only will come under the purview of basic wages. I am not in a position to agree with the argument of the learned Counsel for the appellant. The "terms of contract of employment" can be either in writing or by implication. In majority of cases, the terms of contract of employment is by implication and therefore the allowances which are being universally paid by the appellant establishment to its employees will form part of basic wages.

9. The learned Counsel for the appellant also pointed out that the respondent authority during the course of the enquiry U/s 7A of the Act imposed a fine of Rs.3500/- since the appellant failed to attend the enquiry on 10/09/2014. According to him, the notice regarding the date of posting on 10/09/2014 was received by the appellant only on 13/09/2014 and the position was also communicated to the respondent authority on the same day. Without considering the pleadings of the appellant the

respondent authority imposed a fine of Rs.3500/-. In the circumstances explained by the learned Counsel for the appellant I am of the considered view that the imposition of fine by the respondent authority is uncalled for and the same is required to be cancelled and excluded from the assessment.

10. Considering the facts, circumstances pleadings and evidence in this appeal, I am not inclined to interfere with the assessment of dues except for the cancellation of the fine imposed by the respondent authority.

Hence the appeal is dismissed. However the fine of 3500/- imposed by the respondent authority is cancelled and the appellant is directed to remit an amount of Rs. 5,71,829/- being the actual assessed amount on the evaded wages.

Sd/-

(V. Vijaya Kumar)
Presiding Officer