



सत्यमेव जयते

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

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

(Wednesday the 30th day of March, 2022)

Appeal No.665/2019
(Old No. ATA-144(7) 2013)

Appellant : M/s. Webcot
Kodikuthumala,
Ashokapuram ,
Aluva – 683 101.

By Adv. Benny P. Thomas

Respondent : The Assistant PF Commissioner
EPFO, Kaloor
Kochi – 682 017

By Adv. Sajeev Kumar K. Gopal

This case coming up for final hearing on 16/11/2021 and this Tribunal-cum-Labour Court on 30/03/2022 passed the following:

ORDER

Present appeal is filed from order No. KR/KC/19599/Enf-1(2)/2013/13734 dt. 15/02/2013 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 02/2012. The total dues assessed is Rs. 6,90,874/-.

2. The appellant establishment is covered under the provisions of the Act. An Enforcement Officer conducted inspection of the appellant establishment and submitted a report . The respondent issued notice U/s 7A of the Act. The issue involved is whether contribution was payable on all other allowances other than Dearness Allowance, such as conveyance allowance, medical allowance and travelling allowance. A representative of the appellant attended the hearing and informed that House Rent Allowance is excluded from the definition of basic wages. Conveyance allowance is paid towards actual cost of conveyance and medical allowance is also paid towards the expenses incurred by them. Travelling allowance is paid in terms of the settlement and the same is paid towards expenses incurred on travel and only to those who are not entitled for conveyance allowance. Ignoring the above contentions the respondent issued the impugned order. It is very clear from the impugned order that the respondent authority failed to consider the contentions raised by the appellant. The respondent authority failed to consider Sec 6 and Sec 2 (b) of the Act and Para 29 of EPF Scheme.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the

provisions of the Act with effect from 01/04/2002. An Enforcement Officer of the respondent organization inspected the appellant establishment and reported vide report dt. 17/02/2012 that ; (i) There is difference in wages as per profit and loss account and that reflected in Form 12A/6A. (ii) The appellant establishment is remitting contribution on lesser wages. (iii) Wages is split up as Basic, FDA/VDA, HRA, Conveyance, Medical allowance and shift allowance. (iv) Provident fund is remitted only on Basic and FDA/VDA. For casual employees the wages is split into Basic and conveyance. Provident fund is remitted only on basic wages. Based on the report of the Enforcement Officer, an enquiry U/s 7A was initiated. The enquiry was initiated on 22/06/2012 and posted on various dates. The respondent authority found that 1) Food concession was not accounted for provident fund. 2) Provident fund contribution was being paid on very low wages. 3) Wages components were basic, FDA/VDA, HRA, Conveyance, Medical and Travelling allowance. As per the wage register for 03/2011 all employees are given basic and either FDA /VDA. HRA is not paid to 18 employees. There was no uniformity in the pay structure. The appellant could not clarify the difference between the conveyance allowance and travelling allowance. Very few employees being provided for shift

allowance. The respondent authority concluded that the pay structure was revised by the appellant with the sole intention of evading wages. The Enforcement Officer submitted a further report after verifying the records up to 10/2012. He reported that 167 employees are required to be enroll to the fund and two are excluded employees. The Enforcement Officer suggested that all allowances excluding medical and travelling allowance subject to the limit of Rs.6500/- ought to be treated as wages for provident fund deduction. The respondent authority assessed the dues on all emoluments except certain allowances. The appellant establishment is an integral part of M/s. Dynamic Techno Medicals Pvt. Ltd which is a covered establishment. The appellant establishment merged with Dynamic Techno Medicals Pvt Ltd with effect from April 2018. There is a dispute pending with Dynamic Techno Medicals Pvt. Ltd in Appeal No. 654/2019 with regard to evasion of wages in respect of contract employees. The appellant manipulated the salary structure and devised it in such a way to exclude the maximum portion of salary from provident fund deduction. The appellant resorted to glaring subterfuge of wages in order to evade provident fund contribution. The definition of basic wages U/s 2 (b) of the Act provides that all emoluments which are earned by an employee other than those

specifically excluded components given under three clauses (i), (ii) and (iii) would be the basic wages for the purposes of contribution under the Act. The Hon'ble Supreme Court of India in **Rajasthan Prem Kishan Goods Transport Company Vs RPFC and other**, 1996 (9) SCC 454 held that it is up to the Commissioner to lift the veil and read between the lines to find out the pay structure fixed by the employer to its employee and to decide the question whether splitting up is done only as a subterfuge to avoid its contribution under the Act.

4. The appellant establishment split the wages paid to its employees into various allowances such as HRA, conveyance allowance, medical allowance, travelling allowance and shift allowance. An Enforcement Officer who conducted the inspection of the appellant establishment reported that the appellant is resorting to clear subterfuge to evade provident fund contribution. The respondent authority after hearing the appellant as well as the Enforcement Officer came to the conclusion that all allowances will attract provident fund contribution subject to the statutory limit of Rs. 6500/-.

5. In this appeal the learned Counsel for the appellant submitted that HRA is an allowance specifically excluded under

the provisions of the Act. He further pointed out that conveyance allowance is paid towards actual cost of conveyance. Medical allowance is paid towards the actual expenses incurred by the employees. Travelling allowance is paid in terms of settlement and is paid towards expenses incurred on travel to those who are not entitled for conveyance allowance. The appellant failed to produce any document to support these claims.

6. The learned Counsel for the respondent pointed out that the appellant establishment is maintaining the salary structure in such a way to avoid provident fund contribution and it is a clear subterfuge. The appellant establishment can fix the salary structure according to his requirement. However it is upto the respondent authority to examine the salary structure and decide whether there is any subterfuge for the purpose of evading provident fund contribution. According to him the appellant failed to clarify the difference between the travelling allowance and conveyance allowance being paid to the employees.

7. 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.

8. 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”.

9. The learned Counsel for the appellant submitted that in a similar case in respect of M/s Top Notch Health Care (Pvt) Ltd, Appeal no. 56/2018, this Tribunal as remanded the matter to the respondent authority to re-examine the admissibility of allowances for provident fund deduction. The respondent authority vide its order dt. 13/01/2020 found that the establishment is not liable to remit contribution on the allowances being paid to its employees. According to the learned Counsel the facts of the above case are also similar that of the present case. In the present case, the respondent authority assessed provident fund dues on various allowances including HRA. HRA is an allowance which is specifically excluded under 2(b)(2) from provident fund deduction. Hence it is not correct on the part of the respondent authority to include HRA in the definition of basic wages unless there is a specific reason for the same. With regard to the other allowance, it is not clear from the impugned order as to which are the allowance that are considered as basic wages for the purpose of provident fund deduction. It is also not clear from the written statement filed by the respondent. As already pointed out,

the claim of the appellant that certain allowances such as travelling allowance, medical allowance etc are paid as a reimbursement on actual expenses is also not supported by any evidence. The respondent authority shall take care of the fact that the Hon'ble Supreme Court as well as the High Court of Kerala has given certain tests while deciding whether a particular allowance will form part of basic wages as discussed above. It is for the respondent authority to ensure those test are applied while deciding the issue whether a particular allowance will form part of basic wages and therefore will attract provident fund deduction. In this case it is seen that the respondent authority considered all allowances including HRA as basic wages and issued the impugned order.

10. Considering the facts circumstances and pleadings and evidence in this appeal, I am not inclined to sustain the impugned order.

Hence the appeal is allowed, the impugned order is set aside and the matter is remitted back to the respondent authority to re-assess the dues, if required, on the basis of the above observations within a period of 6 months after issuing notice to the appellant . If the appellant fails to appear or produce the records called for

the respondent is at liberty to decide the matter according to law. The pre- deposit made 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