



सत्यमेव जयते

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

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

(Monday the 26th day of April, 2021)

APPEAL No.116/2019
(Old no.886(7)2014)

Appellant : M/s.Private Eye (P) Ltd
E1/CC-51/2189
Lalsalam Road
Ponnurunni, Vyttila Post
Kochi - 682019

By Adv.Anil Narayanan

Respondent : The Assistant PF Commissioner
EPFO, Regional Office, Kaloor
Kochi - 682017

By Adv.Sajeev Kumar K. Gopal

This case coming up for admission on 12.02.2021 and the this Tribunal-cum-Labour Court on 26.04.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KC/21787/ENF-1(4)/2012/3528 dt.17.07.2014 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 08/2011. The total dues assessed is Rs.,9,78,930/-.

2. The appellant is a security agency providing guards to different establishments. An Enforcement Officer of the respondent conducted an inspection of the appellant establishment and pointed out that the contribution is not paid on the entire salary. The appellant bifurcated the salary into basic, DA, overtime allowance and HRA and paid contribution for basic and DA only. On the basis of the report of the Enforcement Officer the respondent initiated an enquiry U/s 7A of the Act. The appellant entered appearance and submitted the details of wages and explained the reason for excluding certain allowances from provident fund deduction. A copy of the inspection report was not provided to the appellant. Even on request of the appellant, during the enquiry a copy of the inspection report was not provided to the appellant. The details of the inspection report was not referred or discussed in the 7A order. The appellant was not allowed to cross examine the Enforcement Officer. The respondent has not examined the reasons for taking components such as overtime allowance, HRA/CCA as wages and had assessed dues without any valid reason. The wages of the employees are bifurcated as basic wages as per the Minimum Wages notification, DA based on consumer price index, HRA/CCA depending on the number of days present, overtime allowance based on extra hours of work in a month and washing allowance based on the attendance. A copy of the objection filed before the respondent authority is produced and

marked as Exbt.A2. A copy of the wage sheet for 03/2011 is produced and marked as Exbt.A3. The allowances paid by the appellant to its employees will not come within the definition of basic wages and therefore excluded from assessment of provident fund dues. The respondent failed to examine the appointment letters, wage details, service contracts and vouchers to arrive at the conclusion that the allowances will attract provident fund deduction.

3. The respondent filed counter denying the above allegations. It was noticed that the appellant was paying provident fund contribution only on a fraction of wages paid to the employees. A squad of Enforcement Officers who conducted the inspection of the appellant establishment reported that it is a case of underreporting of wages. It was observed that the wage is split up into basic, IPQC allowance, overtime allowance, conveyance allowance, ISO 9002 allowance, special allowance, HRA and washing allowance and the employer is remitting provident fund only on basic which is found to be very low. A major portion of the salary is shown as overtime allowance, HRA and conveyance allowance. DA is conspicuously absent. The appellant was therefore summoned U/s 7A of the Act directing them to produce the relevant records for deciding the issue. The appellant produced the wage registers. According to the appellant, they are remitting provident fund as per EPF Act. As per the wage register the wage components are basic, DA, overtime allowance and HRA and

provident fund is deducted and paid only for basic and DA. The respondent issued the impugned order assessing the dues for the period from 03/2011 to 08/2011 with a direction to remit the same within a period of 15 days. The appellant moved the Hon'ble High Court of Kerala in W.P.(C) no.20507/2014 and the Hon'ble High Court vide judgment dt.17.09.2014 let all the issues open to be decided by the Tribunal.

4. The basic issue in the appeal is with regard to the provident fund deduction on various allowances paid by the appellant to its employees. As per the impugned order, the salary of its employees is split by the appellant as basic, IPQC allowance, overtime allowance, conveyance allowance, ISO 9002 allowance, special allowance, HRA and washing allowance etc., and provident fund is deducted only on basic and the allowances are not considered for the purpose of provident fund deduction. The appellant is paying huge amount as HRA and overtime to majority of the employees and there is no justification forth coming from the appellant for the high component of these allowances. It is also pointed out in the impugned order that there is no DA or variable DA paid to its employees. The counter affidavit filed by the respondent also has taken a similar stand. But on perusal of the appeal memo and also the Annexure 2 objection filed by the appellant before the 7A authority, it is seen that the appellant is paying basic wages, DA, HRA/CCA, washing allowance and

overtime allowance to its employees. It is not clear whether the other allowances referred to in the impugned order is actually paid to the employees or a mistake committed by the respondent authority while issuing the impugned order. Further it is also seen that the appellant is paying DA to its employees whereas in the impugned order and the counter filed by the respondent it is stated that no DA is being paid to its employees. From the Annexure A3 wage register produced by the appellant for March 2011 it is seen that the salary is bifurcated into basic, DA, HRA/CCA and washing allowance. Though there is a column for other allowances, no such allowance is seen paid to these employees whose wage register is produced as Annexure A3. Further on perusal of Annexure A3, it is seen that for an employee who is drawing a salary of Rs.8,106/- the basic salary is Rs.871/- and the DA component is Rs.1948/- and provident fund contribution is paid only on basic plus DA ie., on an amount of Rs.2,819/-. The overtime component of wages is Rs.2,691/- and HRA/CCA is shown as Rs.2,581/. It is not clear how HRA and CCA can be bracketed for the purpose of paying allowance. It is seen that the overtime component is given uniformly to the employees for 7.75 working days. At any cost both these components are very high and seems to be artificial and it requires further verification by the respondent authority.

5. The relevant provisions of the Act to decide the issue whether the conveyance allowance and special allowance paid to the employees by the appellant will attract provident fund deduction are Sec 2(b) and Sec 6 of EPF & MP Act.

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 Govt, 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.

The confusion regarding the exclusion of certain allowances from the definition of basic wages and inclusion of some of those allowances in Sec 6 of the Act was considered by the Hon'ble Supreme Court in **Bridge & Roof Company Ltd Vs**

UOI, (1963) 3 SCR 978. After elaborately considering all the issues involved, the Hon'ble Supreme Court held that on a combined reading of Sec 2(b) and Sec 6 where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages. Where the payment is available to be specially paid to those who avail the opportunity is not basic wages. The above dictum laid down by the Hon'ble Supreme Court was followed in **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SCC 428. In a recent decision in **RPFC, West Bengal Vs Vivekananda Vidya Mandir & Others**, AIR 2019 SC 1240 the Hon'ble Supreme Court reiterated the dictum laid down by the Hon'ble Supreme Court in **Bridge & Roof Company Ltd** case (Supra). In this case the Hon'ble Supreme Court was considering various appeals challenging the orders whether special allowance, travelling allowance, canteen allowance, lunch incentive and special allowance will form part of basic wages. The Hon'ble Supreme Court dismissed the challenge holding that the "wage structure and 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 basic wages camouflaged as part of an allowances so as to avoid deduction and contribution accordingly to the provident fund accounts of the employees. There is no

occasion for us to interfere with the concurrent conclusion of facts. The appeal by the establishments are therefore merit no interference “ .

6. In **Montage Enterprises Pvt Ltd Vs EPFO, Indoor**, 2011 LLR, 867 (MP.DB) the Division Bench of the Hon’ble High Court of Madhya Pradesh held that conveyance and special allowance will form part of basic wages. In **RPFC, West Bengal Vs Vivekananda Vidya Mandir**, 2005 LLR 399 (Calcutta .DB) the Division Bench of the Calcutta High Court held that the special allowance paid to the employees will form part of basic wages particularly because no dearness allowance is paid to its employees. This decision was later approved by the Hon’ble Supreme Court in **RPFC Vs Vivekananda Vidya Mandir** (Supra). In **Mangalore Ganesh Beedi Workers Vs APFC**, 2002 LIC 1578 (Karnat.HC) the Hon’ble High Court of Karnataka held that the special allowance paid to the employees will form part of basic wages as it has no nexus with the extra work produced by the workers. In **Damodarvalley Corporation, Bokaro Vs UOI**, 2015 LIC 3524 (Jharkhand .HC) the Hon’ble High Court of Jharkhand held that special allowances paid to the employees will form part of basic wages. The Hon’ble High Court of Kerala also examined the above issue in a recent decision dt.15.10.2020, in the case of **Employees Provident Fund Organisation Vs M.S.Raven Beck Solutions (India) Ltd**, W.P.(C) no.17507/2016. The Hon’ble High Court after examining the decisions of the Hon’ble Supreme Court on the

subject held that the special allowances will form integral part of basic wages and as such the amount paid by way of these allowances to the employees by the establishment are liable to be included in basic wages for the purpose of deduction of provident fund. The Hon'ble High Court held that

“ This makes it clear that uniform allowance, washing allowance, food allowance and travelling allowance forms the integral part of basic wages and as such, the amount paid by way of these allowances 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 “.

Hence the law is now settled that all special allowances paid to the employees excluding those allowances specifically mentioned in Sec 2(b)(ii) of the Act will form part of basic wages, depending on facts and circumstances of each case.

7. As already pointed out the respondent authority will have to examine in detail whether the HRA/CCA paid has any element of HRA in the allowance. The respondent also will have to examine whether the overtime component is

uniformly paid to all the employees just to avoid provident fund payment by the appellant. Further as already pointed out the impugned order is not at all speaking and is not giving the correct exposition of facts. According to the impugned order there is no DA being paid to the employees however as per the evidence available it is seen that DA is being paid to the employees. Further some of the allowances mentioned in the impugned order is not at all reflected in the copy of register of wages produced by the appellant and therefore the respondent will have to confirm whether those allowances are being paid by the appellant and if at all paid whether it is being paid to all the employees universally attracting provident fund deduction.

8. Considering the facts, circumstances, pleadings and evidence 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 re-assess the dues on the basis of above direction within a period of 6 months after issuing notice to the appellant.

Sd/-

(V. Vijaya Kumar)
Presiding Officer