



सत्यमेव जयते

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

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

(Wednesday the 5th day of May, 2021)

APPEAL No.164/2018

Appellant : M/s.Unilog Transporting Company Pvt Ltd
2nd Floor, Unity Enclave
Civil Lane Road, Palarivattom
Kochi - 682025

By Adv.Prinsun Philip

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

By Adv.S. Prasanth

This case coming up for final hearing on 09.03.2021 and this Tribunal-cum-Labour Court on 05.05.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KCH/27279(7A)/ENF-3(5)/2018 dt.20.04.2018 assessing dues U/s 7A of EPF & MP Act, 1952 on evaded wages for the period from 11/2010 to 08/2011. The total dues assessed is Rs.5,87,040/-.

2. The appellant is a company incorporated under Companies Act, 1956. The appellant is engaged in the business of express transportation of goods and door delivery. The appellant establishment is covered under the provisions of the Act w.e.f. 01.11.2010. The appellant employed around 62 persons in head office and branches and remitted contribution in respect of all these employees. The appellant received a notice U/s 7A dt.01.10.2011 from the respondent requiring the appearance of the appellant before the respondent on 01.11.2011 to determine the dues for the period from 11/2010 to 08/2011. The appellant appeared and produced records before the respondent on 15.11.2011. The respondent issued an order assessing dues on evaded wages. The appellant preferred an appeal before the EPF Appellate Tribunal, New Delhi as ATA no.152(7)2012. While admitting the appeal the EPF Appellate Tribunal, New Delhi directed the appellant to deposit 40% of the determined amount. The appellant deposited the amount and the order dt.12.05.11.2011 was stayed by the Tribunal. The Tribunal vide its order dt.13.05.2013 set aside the order of the respondent and directed the respondent to conduct fresh enquiry after giving proper opportunity to the appellant. A copy of the order issued by the EPF Appellate Tribunal is produced and marked as Annexure A1. The respondent issued the impugned order after perusing the records produced by the appellant. The respondent assessed provident fund dues on various

allowances paid to the employees by the appellant. Assuming that the allowances paid are treated as basic wages then the gross amount received by most of the employees would be more than Rs.6500/- per month. As per Sec 2(b) of the Act HRA, overtime allowance, bonus, commission or any other similar allowance payable to the employees in respect of his employment is excluded from basic wages. Hence the HRA and other allowances paid by the appellant to its employees will not form part of basic wages. The respondent failed to consider the records produced by the appellant while deciding the matter.

3. The respondent filed counter denying the above allegations. The respondent initiated action U/s 7A on remand of the matter by the EPF Appellate Tribunal, New Delhi vide its order dt.13.05.2013. The EPF Appellate Tribunal, New Delhi felt that the appellant was not given adequate opportunity before issuing the orders U/s 7A. Hence the appellant was again summoned to appear before the respondent to decide the question whether the allowances paid by the appellant to its employees will form part of basic wages. The appellant was therefore given 25 opportunities to produce documents and substantiate their case. The appellant failed to attend the hearing and the notice was served on the appellant through an Enforcement Officer. The appellant attended the hearing and failed to produce any documents to substantiate their claim that the allowances paid to its employees will not form

part of basic wages. The only contention raised by the appellant before the respondent authority was that if the allowances are treated as basic wages, all the employees will become excluded employees and the benefit of social security cannot be extended to them. A copy of the report of the Enforcement Officer who conducted inspection of the appellant establishment was also forwarded to the appellant. After considering all the relevant records the respondent came to the conclusion that the difference in wages will attract provident fund deduction. The salary structure of the appellant is gross salary and some amount is shown as basic and DA. The difference in gross pay and basic + salary is not shown anywhere and even during the course of hearing the representative of the appellant could not explain the difference. With regard to the claim of the appellant that if the allowances are taken into account many of the employees will become excluded employees, it is pointed out that as per Para 26A of EPF Scheme, a member of the fund shall continue to be a member until he withdraws his contribution under Para 69 of the Scheme. The exclusion is applicable only when a new employee joins with a wage beyond the statutory limit. Once an employee becomes a member of the fund by virtue of Para 26A of the Scheme, he continues to remain a member as long as the amount standing in his credit is withdrawn from the fund, notwithstanding the statutory limit of wages. Even with regard to fresh employees, the appellant will have to

submit Form 11 as per Para 34 of the Scheme to substantiate its claim that they were not provident fund members prior to joining the appellant establishment. In **Steel Authority of India Vs National Union Water Front Workers**, the Hon'ble Supreme Court held that while interpreting a beneficial legislation enacted to give effect to Directive Principles of state policy, which is otherwise constitutionally valid the consideration of the Court cannot be diverse from those objectives. In **Montage Enterprises Pvt Ltd Vs RPFC**, W.P.(C) no.1857/2011 the Hon'ble High Court of Madhya Pradesh clarified that allowances like conveyance, transportation allowance, special allowance etc., will form part of basic wages for the purpose of provident fund deduction. In **Reynold Pens India Pvt Ltd Vs RPFC**, W.P.(C) no.15823/2010 the Hon'ble High Court of Madras held that various allowances paid to its employees by the employer will form part of basic wages.

4. The respondent initiated action to assess dues on evaded wages for the period from 11/2010 to 08/2011. An enquiry U/s 7A was initiated. The appellant failed to produce any documents however on the basis of the available information the respondent issued Annexure R2 order dt.15.12.2011. The appellant challenged the same before the EPF Appellate Tribunal, New Delhi and EPF Appellate Tribunal vide order dt.13.05.2013 found that adequate opportunity was not given to the appellant and the matter was remitted back to

the respondent. The respondent again initiated an enquiry U/s 7A of the Act. The enquiry was initiated on 20.11.2013 and continued up to 10.10.2017. The appellant was provided 25 opportunities to produce records and present their case. The appellant neither produced any documents nor submitted written statement of defence. The respondent also forwarded a copy of the report of the Enforcement Officer to the appellant. The appellant did not offer any comment on the report of the Enforcement Officer. The respondent therefore issued the impugned order.

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 “ .

5. 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.

6. In this particular case the appellant maintained the salary register according to which the gross salary was paid to the employees and from 11/2010 a portion of the wages is shown as basic + DA and provident fund is deducted and paid on the same. The appellant could not explain the difference between the gross pay and basic + DA. In the appeal, the appellant has taken a view that the difference due to various allowances. However the appellant failed to prove the allowances which are being paid to the employees. The respondent therefore took the gross wages and provident fund contribution is calculated on the basis of the statutory limit. As it is clear from the impugned order the only contention taken by the appellant before the respondent authority is that if all the allowances are taken into account, many of the employees will become excluded employees because their salary will exceed the statutory limit. According to the learned Counsel for the respondent, there is no merit in the claim as the assessment is made in respect of provident fund members and as per Para 26A a provident fund member continues to be the member of provident fund till his provident fund accumulation is withdrawn under Para 69 of EPF Scheme. Even for new employees the appellant will have

to substantiate their case of exclusion by producing Form 11 to confirm whether those employees were having provident fund membership earlier. If they were provident fund members, the appellant will have to continue remitting contribution since those employees will retain their membership. The appellant failed to substantiate their claim with regard to allowances and also with regard to the exclusion of membership by producing the required documents before the respondent authority or in this appeal.

7. Considering the facts, circumstances, pleadings and evidence in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer