



सत्यमेव जयते

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

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

(Monday the 8th day of March, 2021)

APPEAL No.168/2019

(Old No.850(7)2015)

Appellant : M/s.Eastern Mattresses Pvt Ltd
3rd Floor, Eastern Corporate Office
N.H.Bypass, Edappally P.O.
Ernakulam – 682024

By Adv.C.B.Mukundan

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

By Adv.Sajeev Kumar K. Gopal

This case coming up for final hearing on 05.02.2021 and this Tribunal-cum-Labour Court on 08.03.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KC/19101/ENF-3(4)/RB
No.22/2015/3206 dt.08.06.2015 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 05/2012. The total dues assessed is Rs.14,55,160/-.

2. The appellant is an establishment engaged in production of mattress. The appellant was regular in compliance. While so the Enforcement Officer from the office of the respondent conducted an inspection on 03.04.2013. The Enforcement Officer computed an amount of Rs.15,73,136/- being additional dues payable on various allowances. Thereafter the appellant received a notice dt.02.07.2013 from the respondent issued U/s 7A of the Act. The enquiry was scheduled on 16.07.2013. The authorised representative attended the hearing and produced the relevant records. The appellant also filed Annexure A2 representation before the respondent authority. The respondent issued the impugned order ignoring all the contentions raised before him. It is true that the appellant is paying basic wages and DA and also HRA, conveyance allowance and special allowance. The appellant was paying contribution only on basic and DA portion as required U/s 6 of the Act. The appellant has enrolled even the excluded employees to provident fund and the contribution is being paid. U/s 2(b)(II) of the Act, the legislature has clearly excluded certain allowances and similar allowances from basic wages. The respondent failed to provided a copy of the inspection report on the basis of which the enquiry was initiated. The

appellant was also not permitted to examine the Enforcement Officer who conducted the inspection of the records. It is a settled legal position that based on the definition of basic wages U/s 2(b) of the Act, no provident fund dues are payable on allowance which comes under the exclusion part.

3. The respondent filed counter denying the above allegations. The appellant is an establishment covered under the provisions of the Act w.e.f. 01.09.1999. A squad of Enforcement Officers conducted an inspection in the premises of the appellant and reported that the compliance position of the appellant is not satisfactory as there was a prima facie case of underreporting of basic wages. According to the report, the provident fund deduction is confined only to basic and DA. The appellant is paying special allowance, HRA and conveyance allowance on which no provident fund contribution is paid. Hence an enquiry U/s 7A of the Act was initiated. A representative of the appellant who appeared before the respondent admitted that they are paying various allowances like HRA, conveyance allowance and special allowance and also clarified that these allowances are not paid as per any terms of contract. The respondent also found from the records produced by the appellant that the allowances are paid ordinarily, universally and regularly to all the employees. Hence the respondent came to the conclusion that the splitting up of wages is

done with a deliberate intention of evading provident fund liability on a major part of the emoluments paid to its employees.

4. According to the learned Counsel for the appellant, the employees of the appellant are being paid basic + DA, HRA, conveyance allowance and special allowance. The respondent has taken all allowances excluding HRA for the purpose of assessing the provident fund dues. According to him, allowances such as conveyance allowance and special allowance are excluded from the assessment of provident fund dues and therefore such allowances will not attract provident fund deduction. The learned Counsel also pointed out that a copy of the report of the Enforcement Officer is not given to the appellant. However the appeal memorandum is specifically referring to the report of the Enforcement Officer when it states that the officer has calculated Rs.15,73,136/- as additional dues on evaded wages for the period from 03/2011 to 05/2012. The learned Counsel for the respondent also argued that when the Enforcement Officer conducts an inspection, a copy of the part 2 report where the non compliance is recorded is handed over to the responsible person in the appellant establishment. It was also pointed out by the learned Counsel for the respondent that there was no request on the side of the appellant to examine the Enforcement Officer who conducted the inspection of the appellant establishment. It is only an after thought by the appellant, to state that the appellant was not given an

opportunity to cross examine the Enforcement Officer. The learned Counsel for the appellant also pointed out that the respondent has no case that the allowances are paid universally to all employees. According to the learned Counsel for the respondent, there is a specific finding that the allowances are universally paid to all employees.

5. The issue involved in this appeal is whether the conveyance allowance and special allowance paid to the employees of the appellant will attract provident fund deduction. According to the learned Counsel for the appellant, the HRA component of the allowances is excluded from the assessment. The learned Counsel for the appellant also pointed out that the report of the Enforcement Officer is not given to them and they were not allowed to cross examine the Enforcement Officer who conducted the inspection of the appellant establishment. As already pointed out, it is very clear that a copy of the report of the Enforcement Officer was given to the appellant during the inspection itself. The issue involved in this appeal is legal in nature and the assessment is required to be made on the basis of the records produced by the appellant. In the impugned order, it is specifically indicated that the assessment is made on the basis of the records produced by the appellant and also the report of the Enforcement Officer. However he has not assessed the dues on the basis of the

provisional assessment given by the Enforcement Officer as there was some mistakes in the report noticed by him during the course of Sec 7A enquiry.

6. 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 “ .

7. 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. In this case, it is very clear that conveyance allowance and special allowance will form part of basic wages. However this is an issue to be examined in each case considering the facts and circumstances of the case.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer