



सत्यमेव जयते

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

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

(Thursday the 12th day of March, 2020)

**APPEAL No.229/2018
(Old No.A/KL-17/2017/10)**

Appellant : M/s.Enter Technologies Pvt Ltd
No.244, 'Nila'
Technopark Campus
Thiruvananthapuram - 695581

Respondent : The Assistant PF Commissioner
EPFO, Regional Office
Thiruvananthapuram - 695004

By Adv.S.Sujin

This case coming up for final hearing on 31.01.2020 and this Tribunal-cum-Labour Court on 12.03.2020 passed the following:

ORDER

Present appeal is filed from order no.KR/16476/ENF1(1)/2010/10259 dt.09.11.2010 assessing dues in respect of evaded wages U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as "the Act") from 03/2009 to 05/2010. The total dues assessed is Rs.11,34,455/-.

2. This appeal was dismissed by EPF Appellate Tribunal, New Delhi vide its order dt.19.05.2011 as the appellant failed to comply with the

direction issued by the EPF Appellate Tribunal U/s 7(O) of the Act to remit 40% of the assessed dues with the respondent. The appellant approached the Hon'ble High Court of Kerala in W.P.(C) 17494/2011 and the Hon'ble High Court vide order dt.29.06.2011 quashed the order of dismissal issued by the EPF Appellate Tribunal and granted time till 01.08.2011 to remit the pre-deposit amount and directed the EPF Appellate Tribunal to take back the appeal to file and directed the Tribunal to dispose of the appeal on merit. Accordingly notice was issued to both the parties and the matter was taken up for hearing.

3. The appellant is a private limited company incorporated under Companies Act, 1956 and is in the business of providing Information Technology Enable Services (ITES). The appellant was regular in compliance. The respondent through its Enforcement Officer conducted an inspection of the appellant establishment on 06.07.2010. The Enforcement Officer submitted a copy of the inspection report which is marked as Exbt.A1. As per Exbt.A1 report, the appellant was resorting to splitting off wages to avoid provident fund liability and is liable to remit contribution on total wages. On the basis of the report of the Enforcement Officer, an enquiry U/s 7A of the Act was initiated. A representative of the appellant appeared before the respondent and filed a written objection dt.26.08.2010 which is marked as Exbt.A3. Only during the enquiry it was disclosed that the

process was initiated to assess dues on the basis of the Exbt. A1 calculation given by the Enforcement Officer of the respondent. It was pointed out to the respondent that the Minimum Wages Act is not applicable to the appellant establishment and provident fund is being paid on the basic wages as provided in the EPF & MP act. Definition of basic wages expressly exclude the food concessions, dearness allowance, HRA, overtime allowance etc payable to the employees. It was also pointed out to the respondent that periodic inspections were being conducted by the respondent and nobody has pointed out any anomaly with regard to the payment of contributions. It was also pointed out that there was an agreement between employer and employee in respect of their wage structure and the contributions are being paid on the basis of the said agreement. The respondent failed to see that the salary pattern of the appellant establishment is the same from the very start of the appellant establishment. If basic wages is calculated as pointed out in Exbt.A1 report, majority of the employees will be thrown out of the Scheme as excluded employees. The respondent failed to notice that Minimum Wages Act is not applicable to the appellant establishment. As per Sec 6 of the Act, the contribution payable shall be 12% of the basic wages, dearness allowance and retaining allowances if any. If that be so, the appellant is liable to pay contribution only on basic wages. The respondent failed to notice that basic wages, house rent allowance, canteen allowance,

conveyance allowance etc., will vary from person to person according to their designation. The appellant was not given adequate opportunity to prove their case that the salary structure is decided on the basis of individual agreements between the employee and the appellant establishment.

4. The respondent filed counter denying the above allegations in the appeal memo. The appellant is an establishment covered under the provisions of the Act. As per notification no.SRO 1566 dt.04.07.1956, the appellant was covered w.e.f. 11.04.2000. During a routine inspection, the Enforcement Officer deputed by the respondent found that the appellant was splitting up wages to exclude various allowances from contribution and thereby trying to reduce the provident fund contribution. Splitting up of wages cannot be justified by any bilateral agreement between the appellant and its employees. On the basis of the report of the Enforcement Officer, an enquiry was initiated by the respondent U/s 7A of the Act which culminated in the impugned order which is challenged in this appeal.

5. The appellant herein has a pay structure which includes basic, HRA, canteen allowance, conveyance allowance, special allowance and incentive for its employees. The issue involved in this appeal is whether there is a deliberate attempt made by the appellant establishment to split the gross pay to its employees into various allowances so that the

employer's share of provident fund contribution can be reduced to minimum.

6. It may be relevant to examine the statutory provisions involved in this dispute. Sec 2(b) of EPF & MP Act, defines basic wages as “ 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.

Sec 6 of the Act rates “contributions and matters which may be provided for in this Scheme. 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.

Explanation 2. For the purpose of this section, retaining allowance means allowance payable for the time being to an employee of any factory or to the establishments during any period in which the establishments is not working, for retaining his services.

7. In the definition of basic wages, all emoluments paid in cash to an employee in accordance with terms of contract of employment are included. However it excludes certain specific allowances such as DA, HRA etc. U/s 6, the Dearness allowance, cash value of food concession etc., are included for computing contribution to be paid by the employer. The apparent conflict between these two provisions has led to a lot of litigation which was finally resolved by the Hon'ble Supreme Court in **Bridgeroof (C) India Ltd Vs UOI**, 1963 AIR (SCC) 1474. The Hon'ble Supreme Court after elaborate consideration of the provisions held that the crucial test for deciding which are the allowances which are to be included within the definition of basic wages is that of universality. The Hon'ble Supreme Court in **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SCC 428 relying on **Bridge roof** case (Supra) held that

“ Para 10. The basic principles laid down in **Bridge roof** case (Supra) on a combined reading of Sec 2(b) and Sec 6 are as follows;

- 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 “.

In a recent decision in **RPFC Vs Vivekananda Vidyamandir**, 2019 KHC 6257 the Hon'ble Supreme Court again reiterated the above test for deciding as to which are the emoluments which are required to be considered to be part of basic wages.

8. The learned Counsel for the appellant pointed out that the 7A authority relied on the report of the Enforcement Officer to come to a conclusion that all these allowances will attract provident fund deduction. The learned Counsel for the respondent on the other hand pointed out that the assessment is made on the basis of the records and submissions made by the appellant at the time of the 7A enquiry. He specifically pointed out that as per the report of the Enforcement Officer, the assessment should have been to the tune of Rs.15 lacs whereas the actual assessment under the impugned order is only Rs.11.34 lacs. Further he has also pointed out the details of allowances along with the name of the employees provided in the impugned order which are not part of the report of the Enforcement Officer.

9. The learned Counsel for the respondent pointed out that the appellant is treating only 18% of the gross salary as basic wages and therefore provident fund contribution is confined to 18% of the salary and it is a deliberate attempt by the appellant to reduce his contribution. Though

the impugned order has elaborately discussed all the aspects regarding the representation made by the appellant and also the other data with regard to allowances the impugned order is silent with regard to the nature of allowance and why the authority decided to include all the allowances for the purpose of provident fund contribution. As already pointed out, the wage structure of the appellant includes basic, HRA, canteen allowance, conveyance allowance, special allowance and incentive. HRA is a specific exclusion under Sec 2(b) of the Act. The 7A authority ought to have given his reasons why he wanted to include HRA also within the definition of basic wages for calculating provident fund contribution. Apparently the HRA component is very high compared to the basic paid to the employees. In some case, it is seen that the HRA component is same as that of basic. But that by itself will not be a legitimate ground to argue that HRA shall also be included for the purpose of calculating provident fund contribution. It is further seen that incentive is not paid to all employees and it varies considerably from employee to employee. By applying the test of universality, it is not possible to include the incentive for the purpose of calculating provident fund contribution. All other allowances such as canteen, conveyance and special allowance will satisfy the test of universality because of it is being paid to all employees and is not considered as a reimbursement of actual expenses made by the employees.

In **Montage Enterprises Pvt Ltd Vs EPF** 2011 LLR 867(MP.DB) the Division Bench of Hon'ble Madhya Pradesh High Court held that conveyance allowance and special allowance paid to its employees will form part of basic wages U/s 2(b) of the Act as it will satisfy the law propounded by the Apex Court in various decisions. In **Mangalore Ganesh Beedi Works Vs APFC**, 2002 LIC 1578 (Karnat.HC) the Hon'ble High Court of Karnataka held that special allowance paid to its employees will not qualify for any exemption U/s 2(b) of the Act. In **Damodarvalley Corporation Vs UOI**, 2015 LIC 3524 (Jhar. KHC) the Hon'ble High Court of Jharkhand held that special allowance paid to its employees across the board will attract provident fund deduction.

10. Considering all the facts, pleadings and arguments as discussed above, I am inclined to hold that basic, canteen allowance, conveyance allowance and special allowance paid by the appellant to its employees will form part of basic wages and the appellant is liable to pay contribution on the same. However HRA and incentive will not form part of basic wages as per Sec 2(b) of the Act and is required to be excluded from the assessment of provident fund contribution.

For the reasons stated above, the appeal is partially allowed, the impugned order is set aside and the matter is remitted back to the respondent to calculate the contribution on the basis of the above direction with in a period of 3 months after issuing notice to the appellant.

Sd/-

(V. Vijaya Kumar)
Presiding Officer