



सत्यमेव जयते

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

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

(Monday the 25th day of January, 2021)

**APPEAL Nos. 379/2018 , 145/2019, 154/2019, 198/2019
205/2019, 347/2019, 385/2019 & 382/2018**

(Old Nos. 511(7)2014, 687(7)2015, 43(7)2015, 36(7)2015
42(7)2015, 438(7)2015, 1450(7)2015 & 342(7)2014)

Appellants : 1. M/s.Kitex Garments Ltd
P.B.No.5, Kizhakkambalam
Aluva, Kochi – 683562

2. Kitex Childrenswear Ltd
P.B.No.5, Kizhakkambalam
Aluva, Kochi - 683562

By Adv.P.R.Venkatesh

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

By Adv.Thomas Mathew Nellimoottil &
SajeevKumar K. Gopal

This case coming up for final hearing on 04.01.2021 and this Tribunal-cum-Labour Court on 25.01.2021 passed the following:

ORDER

Appeal no.379/2018 is filed from order no.KR/KC/15513/Note III/ENF-III(3)/2014/1577 dt. 21.05.2014 assessing dues on allowances U/s 7A of EPF & MP Act (hereinafter referred to as 'the Act') for the period from 08/2011 to 03/2012. The total dues assessed is Rs.31,24,050/-.

2. **Appeal no.145/2019** is filed against order no.KR/KC/24301/ENF-3(3)/2014/1578 dt.21.05.2014 assessing dues U/s 7A of the Act on various allowances for the period from 06/2007 to 10/2012. The total dues assessed is Rs.66,67,450/-. The appellant also challenged order no.KR/KC/24301/Note 3/ENF-III(3)/2014/3203 dt.08.06.2015 issued U/s 7B of the Act.

3. **Appeal no.154/2019** is filed against order no.KR/KC/15513/Note VI/ENF-III(3)/2014/8269 dt.07.11.2014 assessing dues U/s 7A of the Act on various allowances for the period from 02/2014 to 04/2014. The total dues assessed is Rs.9,51,441/-.

4. **Appeal no.198/2019** is filed against order no.KR/KC/15513/Note 5/ENF-III(3)/2014/8268 dt.07.11.2014 assessing dues U/s 7A of the Act on various allowances for the period from 09/2012 to 01/2014. The total dues assessed is Rs.59,88,655/-.

5. **Appeal no.205/2019** is filed against order no.KR/KC/15513/ENF-3(3)/2014/17894 dt.10.03.2014 assessing dues U/s 7A of the Act on various

allowances for the period from 04/2012 to 08/2012. The total dues assessed is Rs.20,44,752/-.

6. **Appeal no.347/2019** is filed against order no.KR/KC/24301/ENF-III(3)/2015/BB no.2/14028 dt.27.02.2015 assessing dues U/s 7A of the Act for various allowances for the period from 11/2012 to 04/2014. The total dues assessed is Rs.14,78,145/-.

7. **Appeal no. 385/2019** is filed against order no.KR/KC/24263/ENF III(3)/2015/11313 dt.02.12.2015 assessing dues U/s 7A of the Act on various allowances for the period from 04/2010 to 03/2013. The total dues assessed is Rs.3,03,86,024/-.

8. **Appeal no.382/2018** is filed against order no.KR/KC/24263/ENF-III(3)/2014/17009 dt.20.02.2014 assessing dues U/s 7A of the Act on various allowances for the period from 01/2008 to 03/2010. The total dues assessed is Rs.63,71,366/-.

9. All the above appeals are filed by various units of Kitex group of establishments. Common issues are raised in all the above appeals and therefore all the appeals are heard and disposed of by a common order.

10. The appellant is a public limited company engaged in the manufacture and export of garments. Since coverage under the Act the appellant was regular in compliance. The respondent initiated an enquiry U/s 7A of the Act during 01/2012. On receipt of the notice, the appellant

approached the Hon'ble High Court of Kerala in W.P.(C) no.30451/2012 as a similar issue was pending before the Hon'ble High Court in W.P.(C) no.12265/2011. The Hon'ble High Court of Kerala partly allowed W.P.(C) no.12265/2011 vide order dt.12.06.2013 including certain allowances for assessment and excluding milk, tea and egg allowance from the assessment. In W.P.(C) no.30451/2012 the Hon'ble High Court directed the respondent to complete the assessment on the basis of the judgment in W.P.(C) no.12265/2011. The respondent did not include milk, tea & egg allowance but included house rent allowance, travel/conveyance allowance and washing allowance which were excluded by an earlier order dt.23.10.2012 by the respondent. The appellant was paying wages in various categories which included staff category, workers category and masters category. For staff category the wage structure is basic, dearness allowance, house rent allowance and conveyance and for workers category the wage structure is basic, dearness allowance, travelling allowance and washing allowance. In the enquiry, it was pointed out to the respondent that the respondent vide order no.KR/KCH/15513/ENF-3(3)/2012/10089 dt.23.10.2012 specifically excluded house rent allowance, travelling allowance and washing allowance. However the said order included general allowance and milk, tea & egg allowance in the assessment. This order was challenged in W.P.(C)no.12265/2011 and the Hon'ble High Court

of Kerala excluded milk, tea & egg allowance and held that the general allowance will form part of basic wages and therefore will attract provident fund deduction. In the impugned order the respondent included 20% of the house rent allowance paid, conveyance allowance/travelling allowance and washing allowance which were excluded in the earlier order. The respondent ignored the fact that in its earlier order house rent allowance, travelling allowance and washing allowance were excluded. The inclusion of the payments under those heads in the assessment in the impugned order is not correct. The method adopted by the respondent to sift or make a self assessment in the guise of lifting the veil to find out the pay structure and decide the questions whether splitting up of pay has been made only as a subterfuge to avoid the contribution to provident fund is not correct. The travelling allowance and conveyance allowance are universally, ordinarily and regularly paid to the employees. Still these allowances cannot be taken for assessing contribution U/s 6 of the Act. Paying washing allowance in a textile industry cannot be a subterfuge. Hence the respondent ought to have considered the context and analyzed the allowances before coming into the conclusion that contribution is required to be paid on those allowances. In the case of house rent allowance, the entire amount paid ought to have been excluded. Since these allowances are already excluded by an earlier order of

the respondent, it is not legally permissible for the respondent to re-open those decisions and take a contradictory view in the impugned order. The Hon'ble Supreme Court in AIR 2006 SC 1383 and AIR 1992 SC 377 held that res judicata is not applicable in the matters pertain to tax for different assessment years. However the authority shall adopt an earlier pronouncement of law or a conclusion of fact unless there is a new ground urged or there is a material change in the factual position.

11. The respondent filed counter denying the above allegations. The appellant establishments are covered under the provisions of the Act. The appellant establishment is maintaining two types of wage structure, one for the workers and another one for the office staff. The wage structure of workers is basic, dearness allowance, travelling allowance and washing allowance. The wage structure of staff is basic, dearness allowance, house rent allowance, allowance and conveyance. The amount of wages reconed for the purpose of EPF contribution is considerably low and it was found that there was underreporting of wages and therefore evasion of statutory contribution to the detriment of the employees. Hence an enquiry U/s 7A of the Act was initiated and after verifying the records maintained by the appellant, the respondent came to the conclusion that there was clear subterfuge of wages by classifying it into various allowances and therefore quantified the dues and

issued the impugned orders. The respondent earlier issued orders assessing dues on various allowances for the period from 1999-2006. The order was confirmed by EPF Appellate Tribunal. The order of the Tribunal was challenged by the appellant before the Hon'ble High Court of Kerala in W.P.(C)no. 12265/2011. The Hon'ble High Court held that general allowance/special allowance will form part of basic wages and also held that milk, tea & egg allowance paid by the establishment cannot be equated to cash value of any food concession and therefore will not attract provident fund deduction. On a plain reading of Sec 2(b), the definition of 'basic wages' and Sec 6 of the Act will clearly show that all emoluments which are earned by an employee other than those specifically excluded components under Clauses 1, 2, 3 of Sec 2(b) would be basic wages for the purpose of contribution under the Act. The allowance such as dearness allowance and retaining allowance which are excluded U/s 2(b) are included in Sec 6 of the Act. Therefore the definition of 'basic wages' subsumes in its definition all emoluments earned by an employee while on duty in accordance with terms of contract of employment which are paid or payable to him in cash. Further any similar allowance mentioned in Clause 2 of Sec 2(b) of the Act takes its colour from the expression 'commission'. There is no similarity in other allowances mentioned in Clause 2 as they are founded on wholly unrelated

considerations. Dearness allowance is linked to the rise in cost of living, house rent allowance is provided to meet the housing concerns of the employees, overtime allowance is payable for the extra work done by the employees and the bonus is generally linked to productivity and profitability of the establishment. Hence it is not possible that the Parliament could have used the word "similar" to club these allowances when, in fact, there is no similarity in them. In **Montage Enterprises Pvt Ltd Vs RPFC**, W.P.(C)no. 1857/2011 the Hon'ble High Court of Madhya Pradesh held that conveyance allowance, transporting allowance, special allowances etc., will form part of basic wages for the purpose of provident fund deduction. In **Reynold Pens Ltd vs RPFC**, W.P.(C)no.15823/2010, 22480/2010 the Hon'ble High Court of Chennai held that any allowance which is not excluded will form part of basic wages. In **Commissioner of Income Tax, Mysore, Bangalore Vs Indo Mercantile Bank Ltd**, AIR 1959 SC 713 the Hon'ble Supreme Court held that "the territory of a proviso therefore is to carve out an exceptions to the main enactment and exclude something which otherwise would have been within in the Section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that is its necessary effect". The claim of the appellant

that the complete house rent allowance should be excluded from the assessment cannot be accepted. The rate of house rent allowance paid to the employees are unusually high and therefore it is felt that the exclusion shall be restricted to 20%. The house rent allowance paid to the employees was found to be 26% to 86% of the basic wages. The claim of the appellant that house rent allowance and other allowances which are excluded by the respondent in a previous order and shall not be included in the present assessment also has no legal basis. Every year of assessment is a separate cause of action and the decision taken by one authority U/s 7A of the Act is not binding on the subsequent assessments as the assessment officer, the period of assessment, the context of assessment etc., are different.

12. Facts of the appeals are common and is admitted by the parties. The respondent noticed that the appellant establishments had split the wages paid to its employees into various allowances and provident fund contribution is confined to basic and dearness allowance which was approximately 45% of the gross salary paid to the employees. In Appeal no.382/2018 in respect of Kitex Childrenwear unit, the respondent found that the provident fund contribution is confined to 26% of the total wages and there was no dearness allowance that was being paid to its employees. The appellant is having different wage structure for different category of employees. For the workers, the wage

structure is basic, dearness allowance, travelling allowance and washing allowance. The wage structure of the staff is basic, dearness allowance, house rent allowance, allowance and conveyance. The wage structure of masters is basic, dearness allowance, house rent allowance, allowance and washing allowance. Consequently an enquiry was initiated U/s 7A of the Act for the period from 1999-2006. The respondent authority issued an order assessing dues treating general allowances as part of basic wages and milk, tea & egg allowance as cash value of food concession. The respondent authority however excluded house rent allowance, travel and conveyance allowance and washing allowance from the assessment. The appeals filed before EPF Appellate Tribunal were dismissed. The appellant challenged this order before the Hon'ble High Court of Kerala in W.P.(C)no.12265/2011. The Hon'ble High Court after examining all the issues confirmed the assessment of EPF dues on general allowance/special allowance and held that milk, tea & egg allowance paid by the appellant shall not be reconed for determination of contribution payable U/s 6 of the Act. When the above writ petition was pending before the Hon'ble High Court, the respondent initiated action for assessing dues for further period. The appellant challenged the notice issued U/s 7A, in W.P.(C) no.9602/2014. The main plea of the appellant before the Hon'ble High Court was to direct the respondent to assess the contribution on the basis of the decision of the Hon'ble

Court in W.P.(C)no.12265/2011 and 30451/2012. It was also pointed out to the Hon'ble Court that travelling allowance, conveyance allowance and house rent allowance which were excluded by the respondent in an earlier assessment shall not be part of the assessment in the subsequent proceedings. The Hon'ble High Court while disposing of the writ petition observed that " At an earlier point of time the organization has excluded travelling allowance, washing allowance and house rent allowance but going by the principle that, each assessment gives right to a fresh cause of action it is submitted that the inclusion in the subsequent period will have to be considered on the facts and also on a determination of what exactly the allowances are meant to be ". Hence the Hon'ble High Court left it open for the respondent to decide the issue whether conveyance allowance, travelling allowance, washing allowance and house rent allowance will form part of basic wages and therefore will attract provident fund deduction. After hearing the parties involved, the respondent authority took a view that house rent allowance paid to the employees are exorbitantly high and therefore only 20% of the house rent allowance paid can be excluded for the purpose of assessment. However it is seen that he has not taken a consistent view in all the cases. In Appeal no.379/2018, 154/2019 and appeal no.198/2019 the respondent authority held that only 20% of the house rent allowance can be excluded for the purpose of assessment of provident

fund contribution. But in other appeals he has taken a view that complete house rent allowance can be excluded from the assessment of provident fund contribution. In Appeal no.145/2019 the respondent authority has excluded house rent allowance completely whereas he has included milk, tea & egg allowance for the purpose of assessment. Similarly in Appeal no.154/2019 the respondent allowed only exclusion of 20% of house rent allowance whereas the food allowance, which according to the appellant is same as milk, tea & egg allowance, was seen included in the assessment. Taking into account the fact that the respondent has taken inconsistent views in different orders it is felt appropriate to clarify the whole issue involved in these appeals.

13. The learned Counsel for the appellant pointed out that since the respondent has already excluded house rent allowance, travelling allowance, washing allowance and conveyance allowance from assessment of provident fund dues vide its order dt.23.10.2012, it is not correct on the part of the respondent to include these allowances for the purpose of assessment of provident fund liability. According to the learned Counsel, the Hon'ble Supreme Court of India in AIR 2006 SC 1383 and AIR 1992 SC 37 has clarified that where the facts and law in a subsequent assessment year are the same no authority can be generally permitted to take a different view. However in this case as already pointed out this issue was already agitated

before the Hon'ble High Court in W.P.(C) no.9602/2014 and the Hon'ble High Court has, in fact, upheld the view that the inclusion of certain allowances, excluded in the first assessment can be considered in the subsequent period depending on the facts and also on determination of what exactly the allowances are meant to be. Further the Hon'ble Supreme Court of India in AIR 2006 SC 1383 also held that " no one can dispute that in our judicial system it is open to a Court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority to over rule it ". In the light of the above finding we will have to examine which are the allowance which will form part of basic wages and will attract provident fund deduction.

14. The relevant provisions in the Act for deciding the controversy are Sec 2(b) and Sec 6 of the Act.

Sec 2(b) of the Act reads as follows;

" **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 allowance 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 : Contribution and matters which may be provided for in Schemes.

The contribution which shall be paid by the employer to the fund shall be 10% of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees (whether employed by him directly or by or through a contractor) and the employee's 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 establishments which the Central Govt, after making such enquiry as it deems fit, may, by notification in the official gazette specify, this Section shall be subject to the

modification that for the words “10%”, at both the places where they occur, the words “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 off 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.

15. The basic wages as defined U/s 2(b) includes all emoluments paid in cash to an employee in accordance with the terms of contract of employment. But it carve out certain exceptions with in the definition of basic wages. But some of these allowances like dearness allowance is included in Sec 6. This conflict has created a lot of confusion and the Hon’ble Supreme Court of India in **Bridge & Roof Company (India) Ltd V Union of India, 1963 AIR SCC 1474** finally resolved the issue. The Hon’ble Court examined why certain allowances are excluded in basic wages and why some of those allowance are included U/s 6 of the Act for the purpose of remittance of provident fund contribution. The Hon’ble Court summed up its findings holding that on a combined reading of Sec 2(b) and Sec 6, it follows that

- 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 the opportunity is not basic wages.

The above dictum laid down by the Hon'ble Supreme Court was later followed by the Court in **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SCC 428 and **The Daily Prathap Vs RPFC**, 1998 (8) SCC 90 and also in **Kicha Sugar Co Ltd Vs Tarai Cheeny Mill Musdoor Union**, 2014(4) SCC 37. The Hon'ble Supreme Court of India considered all the above decisions in a recent decision in **Vivekananda Vidyamandir & Others Vs RPFC**, 2019 KHC 6257. In the above case the Hon'ble Supreme Court considered various decisions of High Courts holding that travelling allowance, canteen allowance, lunch allowance, special allowance, management allowance, conveyance allowance, education allowance, food allowance and medical allowance will form part of basic wages attracting provident fund deduction. 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 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 facts. The appeals by establishments therefore merit no interference “.

The above decision virtually closed all attempts by the establishments to split the wages into various components to avoid provident fund deduction. In a recent decision in similar circumstances rendered by the Hon’ble High Court of Kerala on 15.10.2020, in **M.S. Raven Beck Solutions (India) Ltd Vs Employees Provident Fund Organisation**, W.P.(C) no.17507/2016, following the decision of the Hon’ble Supreme Court in **Vivekananda Vidya mandir & Others Vs RPFC** (Supra) 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 to 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 award payment of provident fund contribution by the respondent establishment “.

16. In the present case it is not disputed that washing allowance, travelling allowance and conveyance allowance are being paid to its employees uniformly and is not limited to such employees who avail special opportunities. Applying the above test to the facts and circumstances of the present case, there is no doubt that the allowances such as travelling allowance, washing and conveyance will indeed form part of basic wages and will attract provident fund deduction. To that extend, the findings of the respondent authority in his order dt.14.03.2007 that travelling allowance/conveyance allowance and washing allowance will not form part of basic wages is not good law.

17. On the basis of the above observations, the findings are summed up as follows.

1. General allowance/special allowance/allowance paid by the appellant to its employees will attract provident fund deduction in view of the decision of the Hon'ble High Court of Kerala in W.P.(C)no. 12265/2011.
2. House rent allowance will not form part of basic wages in view of the specific exclusion U/s 2(b) of the Act.
3. Milk, tea & egg allowance will not form part of cash value of food concession as decided by the Hon'ble High Court in W.P.(C)

no.12265/2011 and shall not be included in the assessment of provident fund contribution.

4. Travelling allowance/conveyance allowance and washing allowance will form part of basic wages and therefore will attract provident fund deduction.

In view of the conflicting nature of the impugned orders, the appeals are partially allowed, the impugned orders are set-aside and the matter is remanded back to the respondent to decide and assess the dues on the basis of the above observations within a period of 3 months from the date of receipt of this order after issuing notice to the appellant. The pre-deposit made by the appellant U/s 7(O) of the Act on the basis of the direction by this Tribunal shall be adjusted after the final orders are issued.

Sd/-

(V. Vijaya Kumar)
Presiding Officer