



सत्यमेव जयते

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

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

(Monday the 5th day of April, 2021)

APPEAL No.387/2019
(Old no.1417(7)2015)

Appellant : M/s.Torry Harris Sea Foods (P) Ltd
Eramalloor Post
Alappuzha – 688537

By Adv.C. B. Mukundan

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

By Adv.Sajeev Kumar K. Gopal

This case coming up for final hearing on 25.02.2021 and the this Tribunal-cum-Labour Court 05.04.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KC/15511/ENF-2(2)/2015/8063 dt.25.06.2015 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 12/2013 to 03/2014. The total dues assessed is Rs.3,91,439/-.

2. The appellant is a private limited company engaged in seafood processing. The appellant was regular in compliance. Major chunk of the employees were drawing basic + DA of more than Rs.6500/- from the very beginning. Hence the appellant had no obligation to enroll such excluded employees. The appellant used to enroll all of them and used to remit contribution on higher salary without limiting the dues on Rs.6500/-. While so an Enforcement Officer from the office of the respondent conducted an inspection of the records of the appellant establishment. The Enforcement Officer computed the contributions on various allowances paid by the appellant to its employees. On the basis of the report filed by the Enforcement Officer the respondent initiated an enquiry U/s 7A of the Act. The respondent issued summons to the appellant directing him to appear in person or through an authorised representative along with the records. The representative of the appellant attended the hearing and produced the records called for. The appellant supplied uniform to the employees and hence an allowance is also being paid by the appellant for washing the uniforms. This is in nature of reimbursement of expenses entitled to the employee as part of their duty. The respondent has also taken HRA as part of basic wages and assessed dues on the same. The respondent failed to consider the written submission filed by the appellant at the time of the enquiry U/s 7A of the Act. A copy of the written

statement is produced and marked as Annexure A3. As per Sec 6 of the Act, the dues are required to be paid only on basic + DA and retaining allowance. Non payment of dues on allowances was not a subterfuge as alleged in the impugned order. As per Sec 2(b)(2) of EPF Act, washing allowance and HRA will not form part of basic wages. Further as per 1st part of the said definition emoluments earned by the employee in accordance with terms of contract of employment will also come under the purview of basic wages.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered U/s 1(3)(b) of the Act. During the course of regular inspection by an Enforcement Officer of the respondent on 02.05.2014 found that the compliance status of the appellant establishment is not satisfactory as there is evasion of wages while remitting provident fund contribution. On the basis of the report of the Enforcement Officer dt.07.05.2014, an enquiry U/s 7A of the Act was initiated and a summons dt.01.09.2014 was issued to the appellant establishment. The appellant was directed to appear in person along with the relevant records on 14.10.2014. The appellant was given 7 opportunities to appear and produce the records. The representative of the appellant who attended the hearing submitted that the wages component of the employees are basic wages, DA, HRA and washing allowance. According to the representative, the provident fund is remitted

only on basic and DA. The respondent during the course of enquiry on the basis of the records produced by the appellant observed that the pay earned by the employees was shown as consolidated wages and it is not split into basic and other emoluments as claimed by the appellant. The respondent noticed from the wage register of the appellant that many of the employees were contributing on provident fund above Rs.6500/- and no DA was seen paid to the employees. However it is seen that overtime and washing allowance were being paid to its employees. In the case of some employees who were drawing salary more than Rs.6500/-, provident fund was seen deducted without limiting the wages to Rs.6500/-. For some of the employees having salary of more than Rs.6500/- it is seen that the recovery of provident fund was restricted. During the course of hearing, though the representative of the appellant claimed excess wages on account of HRA and other allowances the same was not supported by the documents produced by the appellant. The wages were shown as consolidated wages without any bifurcation as claimed by the appellant. Washing allowance was excluded from provident fund deduction. As per the documents produced there is no HRA component in wage structure of the appellant. The Hon'ble Supreme Court in **Rajasthan Prem Kishan Goods Transport Co. Vs RPFC**, 1996 9 SCC 454 held that the Commissioner is competent to lift the veil and read between the lines to find out the pay

structure fixed by the employer to its employees and to decide the question whether splitting up of pay has been made only as a subterfuge to avoid the contribution to provident fund. The appellant never claimed a copy of the inspection report on the basis of which the enquiry was initiated.

4. The enquiry U/s 7A was initiated to assess the dues on evaded wages. On a perusal of the impugned order it is seen that the appellant was adopting different approaches while remitting provident fund in respect of its employees. For example in the case of Sri.Aloysious A.D. and Sri.Antonetta Debbora the appellant was remitting contribution on total wages without restricting to the statutory limit of wages. In the case of Sri.Ajayan A. G. and Sri.Ajeeshkumar though the salary beyond the statutory limit the contribution is being paid on a reduced amount. In the case of stipend workers Sri.Aji Suresh and Smt.Ambika V.S. also the provident fund deduction is done without any basis. According to the learned Counsel for the respondent, the documents produced by the appellant during the course of 7A would not disclose any bifurcation of wages as claimed by the appellant. The salary structure consists of wages, washing allowance and overtime allowance only. The claim of the appellant that HRA is being paid to the employees is not supported by any evidence. It is true that majority of the employees are drawing salary beyond the statutory limit and therefore the appellant has the discretion to enroll them to provident fund if

they were not provident fund members earlier. According to the learned Counsel for the respondent, only washing allowance was being paid to the employees which will form part of basic wages.

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 “.

In view of the above decisions and authorities it is very clear that washing allowance will form part of basic wages and therefore will attract provident fund deduction.

7. The learned Counsel for the appellant raised an argument that the report of the Enforcement Officer on the basis of which the enquiry U/s 7A was initiated was not provided to the appellant. It is a settled legal position that the report of Enforcement Officer on the basis of which an enquiry is initiated shall be provided to the appellant for them to take a proper defence in the enquiry. According to the learned Counsel for the respondent, the appellant never raised the question of the report of the Enforcement Officer before the 7A authority and the appellant never claimed a copy of the report during the course of Sec 7A enquiry. In this case it is seen that only a legal issue whether washing allowance will form part of basic wages and the issue is decided on the basis of the documents produced by the appellant and not on the basis of the report of the Enforcement Officer.

8. 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