



सत्यमेव जयते

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

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

(Friday the 17<sup>th</sup> day of September, 2021)

**APPEAL No.439/2019**

(Old no.54(7)2016)

Appellant : M/s.Oriental Exim Agency  
CPOA Building, Indira Gandhi Road  
Willington Island  
Kochi - 682003

By Adv.K.K.Premalal

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 15.09.21 and this Tribunal-cum-Labour Court on 17.09.2021 passed the following:

**ORDER**

Present appeal is filed from order no.KR/KC/24951/ENF-3(3)/2015/16963 dt.13.11.2015 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 03/2012 to 03/2014. Total dues assessed is Rs.4,63,031/-.

2. The appellant establishment is covered under the provisions of the Act. An Enforcement Officer of the respondent authority visited the appellant establishment on 02.05.2014. The wage structure of the employees are fixed in terms of contract of employment between the appellant and its employees. According to the Enforcement Officer, the appellant was liable to pay contribution in respect of HRA, travelling allowance and administration allowance paid to the employees. The appellant disputed the same. The respondent authority therefore initiated an enquiry U/s 7A of the Act. The wage structure of the appellant establishment consists of basic wages, HRA, travelling allowance and administrative allowance paid to certain employees. Since increment in salary was paid every year to cover the cost of living index, the appellant was not paying DA to its employees. The HRA and travelling allowance are being paid to meet the actual expenditure. The appellant has not made any deduction from the salary of the employees in respect of these allowances. The employees didn't raise any dispute. Without considering the plea of the appellant, the respondent issued the impugned order. The HRA and travelling allowance being paid to the employees will specifically fall under the exemption in Sec 2(b)(II) of the Act. The HRA paid to the employees are much less than the actual prevailing rates of HRA in the locality. The term "in accordance with the terms of contract of employment" used in the definition of wages U/s 2(b) of

the Act is relevant as the wage structure as per contract of employment will have to be reckoned for the purpose of contribution. The respondent authority ought not have found that the HRA and other allowances are excessive. The respondent authority has considered all allowances paid to the employees as wages. If such an argument is accepted majority of the employees cannot even be covered under EPF Scheme.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act and it is liable to remit contribution as provided U/s 6 of the Act. The appellant establishment split up the wages into basic pay, travelling allowance, HRA and administrative expenses. PF contribution was paid only on the basic pay. No DA is being paid by the appellant establishment to its employees. The Enforcement Officer of the respondent during regular inspection noticed the difference in salary in Profit & Loss account, salary register and in Form 12A of the appellant establishment. On the report of the Enforcement Officer, an enquiry U/s 7A of the Act was initiated. The appellant was given adequate opportunity to appear, produce documents and defend the case. The appellant produced salary statement for the period from 03/2012 to 03/2014. The representative of the appellant also submitted that the appellant company is having an incentive scheme depending on the target achieved by employees.

From the documents produced by the appellant, it is seen that 60% of the total salary is paid as basic and 20% of the total salary is paid as HRA, 10% as travelling allowance and 10% as administrative allowance. The allowances were paid uniformly as per the above proportion. After examining the contentions taken by the appellant and also the documents produced by them in the enquiry, the respondent authority came to the conclusion that the different allowances are either part of basic wages or DA but given a different nomenclature for evading provident fund contribution. The respondent authority found that the wage structure of the appellant establishment is a clear subterfuge to evade provident fund contribution. Administrative allowance was paid to only few employees upto 04/2013 but paid universally from 05/2013 onwards. With regard to HRA the respondent authority noticed that in many cases HRA is paid at more than 50% and in few cases almost equal to the basic pay. Travelling allowance is being paid universally which is equivalent to HRA. It was also noticed by the respondent authority that the appellant made some changes in the salary structure in 08/2013 though the gross earnings of the employees remained the same. In view of the above findings the respondent authority assessed the dues on the allowances being paid to the employees. The appellant failed to produce any contract of employment as claimed in the appeal. Based on the available documents produced by the appellant during the

course of Sec 7A enquiry, it is very clear that the appellant is adopting a wage structure only to evade the payment of provident fund contribution to its employees. This is particularly so since the appellant is not paying any DA to its employees. The Division Bench of the Hon'ble High Court of Karnataka in **Group 4 Securities Guarding Ltd Vs RPFC and others** held that the Commissioner in exercise of the powers conferred on him U/s 7A, is entitled to go into the question whether splitting of the pay by the employer to its employees is a subterfuge intended to avoid payment of its contribution to the provident fund. Further the Hon'ble Supreme Court of India in **Rajasthan Prem Kishan Goods Transport Co. Vs RPFC and others**, 1996 (9) SCC 454 also held that it is upto the Commissioner 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 the splitting up of pay has been made only as a subterfuge to avoid its contribution to the provident fund.

4. According to the learned Counsel for the appellant, the appellant establishment is having its own pay structure in accordance with the terms of contract of employment. The respondent authority cannot dictate as to what should be the pay structure of the appellant establishment. It is a fact that the appellant establishment is not paying DA to its employees. The allowances are paid to compensate the actual expenditure incurred by the employees of

the appellant establishment. In this case admittedly the appellant is paying HRA, travelling allowance and administrative allowance to its employees. The respondent authority in the impugned order has explained the wage structure. As per the impugned order the appellant is paying 60% of the total salary as basic, 20% as HRA, 10% as travelling allowance, 10% as administrative allowance. The contention of the learned Counsel for the appellant is that in some cases the HRA paid is exorbitantly high and is equal to or more than the basic pay. The respondent authority has also cited certain specific cases in the impugned order. It can be seen that the HRA paid to its employees in those cases specified in the impugned order are really high and the respondent authority cannot be blamed to treat this as a subterfuge for evading provident fund contribution by appellant establishment. It was also pointed out by the learned Counsel for the appellant that administrative allowance was paid only to few employees upto 04/2013 and therefore the same will not satisfy the test of universality enunciated by the Hon'ble Supreme Court. In view of various recent decisions by the High Courts and also the Hon'ble Supreme Court of India, there is no dispute regarding the fact that travelling allowance will attract provident fund deduction.

5. The relevant provisions of the Act to decide the issue whether the travelling 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 “.

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.

7. On the basis of the above discussion of the facts and legal position, it is very clear that the travelling allowance being paid to all its employees by the appellant will attract provident fund deduction. The administrative allowance which was being paid to few employees upto 04/2013 will not attract any

provident fund deduction as it will not satisfy the test laid down by the judgments of the Hon'ble Supreme Court of India. However as admitted by the learned Counsel for the appellant, the administrative allowance is also being paid universally from 05/2013 and therefore it will form part of basic wages and will attract provident fund deduction. As rightly pointed out by the learned Counsel for the respondent HRA being paid by the appellant to some of its employees are exorbitantly high and therefore the respondent authority has taken the HRA also as a subterfuge. However considering the fact that HRA is an excluded allowance U/s 2(b)(2) of the Act, it is not fair to include the same for assessment of provident fund dues.

8. Considering the facts, circumstances, pleadings and evidence in this appeal, I am inclined to hold that the travelling allowance and administrative allowance being paid to the employees will form part of basic wages and will attract provident fund deduction. However administrative allowance shall be taken for assessment only from 05/2013. HRA being a specifically excluded allowance cannot be taken for provident fund assessment.

In view of the above, the impugned order cannot be sustained and the same is set aside. The matter is remitted back to the respondent to re-assess the dues on the basis of the observations made above within a period of 6

months after issuing notice to the appellant. The pre-deposit made by the appellant U/s 7(O) of the Act as per the direction of this Tribunal shall be adjusted/refunded after completing the assessment process. If the appellant fail to co-operate by producing the required documents for proper assessment of dues, the respondent is at liberty to assess the dues as per law.

Sd/-

(V. Vijaya Kumar)  
Presiding Officer