



सत्यमेव जयते

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

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

(Tuesday the 16th day of November, 2021)

APPEAL No.596/2019

(Old no.225(7)2013)

Appellant : M/s.Trayi
11/32-A, East Desam
Desam P.O., Aluva
Ernakulam – 683103

By M/s.Menon & Pai

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

By Adv.Thomas Mathew Nellimoottil

This case coming up for final hearing on 16.07.2021 and this Industrial Tribunal-cum-Labour Court on 16.11.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KC/27366/ENF-1(5)/2013/14764 dt.13.03.2013 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 07/2010 to 10/2012. The total dues assessed is Rs.3,39,874/-.

2. The appellant is engaged in manufacture of medical devices and orthopaedic products. All the employees are covered from the date of commencement of activity. An Enforcement Officer of the respondent's office inspected the appellant establishment and suggested to include all allowances for the purpose of EPF contribution. The appellant explained that the contribution is not attracted on allowances such as HRA, incentive, conveyance etc. The respondent authority initiated an enquiry U/s 7A. A representative of the appellant attended the hearing. The appellant during the course of hearing requested for a copy of the inspection report to submit a detailed reply statement but the same was not given by the respondent. The respondent authority failed to accept any of the contentions raised by the appellant and issued the impugned order. From Sec 6 of the Act, it is clear that the appellant is liable to pay contribution only on basic wages, DA and the retaining allowance. Sec 2(b) of the Act defines basic wages which specifically excludes certain allowances paid by the appellant to its employees. Para 29 of the EPF Scheme also makes the appellant liable to pay contribution only on basic wages, DA and retaining allowance. The legal position regarding the issue has been considered by the Hon'ble Supreme Court of India and various High Courts which were not considered by the respondent while issuing the impugned order.

3. The respondent filed counter denying the above allegations. An Enforcement Officer of the respondent inspected the appellant establishment and submitted a report dt.04.01.2013 stating that

1. The appellant employer was complying on lesser wages and thus defaulted in payment of contributions under the Act.
2. Only a small portion of the salary is treated as basic, and provident fund is deducted for that amount only.
3. Bulk of the payment is made as production incentive and further there is HRA and conveyance.
4. The production incentive is actually piece rate wages and not real production incentive .
5. No DA was seen paid.
6. No minimum wages seen fixed for the industry.
7. The entire gross wages is required to be treated as wages for the purpose of provident fund.

On the basis of the report of the Enforcement Officer, the respondent initiated an enquiry U/s 7A. On the basis of the records produced by the appellant, the respondent found that

1. The wage structure upto 05/2011 was basic, incentive and conveyance.
No HRA is seen paid.

2. From 06/2011 there was basic, incentive, conveyance and HRA is being paid to the employees.

After considering the documents produced and the report of the Enforcement Officer, it was decided that the appellant establishment is liable to remit contribution on all allowances. On the basis of the records and also the report of the Enforcement Officer it was clear that production incentive is only piece rate wages and not real production incentive. No DA was seen paid by the appellant. The appellant failed to produce any terms of contract of wages payable to the employees to find out how the HRA component is introduced from 06/2011 onwards. From the proceedings of enquiry, it is seen that the appellant never requested for a copy of the report of the Enforcement Officer during the course of enquiry. However a copy of the report of the Enforcement Officer is produced and marked as Exbt.R1. It is clear from the documents produced by the appellant that the appellant manipulating the salary structure and devised the same in such a way to exclude the maximum portion of wages from the provident fund deductible salary. The appellant resorted to glaring subterfuge of wages in order to evade provident fund contribution.

4. An Enforcement Officer of the respondent's office during his inspection found that the appellant establishment is splitting the wages of its employees in such a way that the contribution to provident fund is restricted

to a small portion of the wages. The Enforcement Officer in his Exbt.R1 report stated that all the components of wages shall be considered for the purpose of provident fund deduction. The respondent authority therefore initiated an enquiry U/s 7A of the Act. During the enquiry the respondent authority found that the wage structure of the appellant establishment upto 05/2011 was basic, production incentive and conveyance allowance. No HRA or DA was paid. From 06/2011, the appellant establishment changed the structure to basic, incentive, conveyance and HRA. The respondent authority felt that this change in wage structure is done only to evade provident fund contribution by the appellant. According to the learned Counsel for the respondent, the respondent authority is competent to examine the wage structure to see whether there is any evasion in wages. The Hon'ble Supreme Court of India in **Rajasthan Prem Kishan Goods Transport Company Ltd Vs RPFC**, 1996 9 SCC 454 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.

5. The relevant statutory provision and the decisions concerned in the issue are discussed below. The relevant provisions of the Act to decide the

issue whether the allowances 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 “.

The Hon'ble High Court of Madras in a recent decision in **Universal Aviation Services Pvt Ltd Vs Presiding Officer, EPF Appellate Tribunal**, 2022 LLR 221 considered the question and held that “ The predominant ground raised by the petitioner before the Court is that such “other allowances” and “washing allowances” will not attract contributions. In view of the aforesaid discussions and the law laid down by the Hon'ble Supreme Court in **Vivekananda Vidyamandir's** case (Surpa), the petitioner's claim cannot be justified or sustained, since “other allowances” and “washing allowance” have been

brought under the purview of Sec 2(b) read with Sec 6 of the Act. Accordingly, I do not find any infirmity in the claim made in the impugned order of the Assessing Authority, as confirmed by the Appellate Authority". 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 a perusal of the impugned order, I find that the same is an absolute non speaking order. Though there is mention regarding the allowances paid, it is absolutely unclear as to which are all the allowances included in the assessment of dues. It is seen that HRA component which is specifically excluded U/s 2(b)(2) of the Act is also included in the assessment. The impugned order is that " The allowance is merely a balancing component after allocating the total wages into various nomenclatures like basic, HRA, conveyance etc. and the same possess all the characteristic of basic wages as per the definition ". Impliedly all the allowances are taken into consideration including that of HRA. The learned Counsel for the appellant pointed out that since HRA is specifically excluded under the provisions of the Act, it is not correct on the part of the respondent authority to include HRA for assessment of provident fund contribution. It is felt that the respondent authority took such

a decision in view of the fact that the HRA component was introduced by the appellant from 06/2011 which was not available earlier and there is no DA paid to the employees. However the HRA being a specifically excluded allowance it is not correct on the part of the respondent authority to include the same in the assessment of provident fund dues.

8. Considering the facts, circumstances, pleadings and evidence in this appeal, I am not inclined to sustain the impugned order.

Hence the appeal is allowed, the impugned order is set aside and the matter is remitted back to the respondent to re-assess the dues, after excluding HRA, within a period of 6 months, after issuing notice to the appellant along with a copy of the report of the Enforcement Officer. In case the appellant fails to appear or produce the records called for, the respondent is at liberty to assess the dues according to law.

Sd/-

(V. Vijaya Kumar)
Presiding Officer