सत्यमेव जयते

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

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

(Tuesday the 6th day of April, 2021)

APPEAL Nos.610/2019 & 456/2019

(Old Nos.653(7)2013 & 153(7)2016)

Appellant : M/s.Air India Sats Airport Services Pvt Ltd
II Floor, Janvilla Building
Janvilla House
Sasthamangalam P.O.
Trivandrum - 695010

By Adv.Anil Narayan

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

By Adv.Nita N. S.

This case coming up for final hearing on 12.02.2021 and this Tribunal-cum-Labour Court on 06.04.2021 passed the following:

O R D E R

Appeal no.610/2019 is filed from order no.KR/26381/ENF-1(3)/2013/1755-A dt.19.06.2013 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter

referred to as 'the Act') on evaded wages for the period from 01/2011 to 01/2013. The total dues assessed is Rs.88,45,396/-.

2. **Appeal no.456/2019** is filed from order no.KR/26381/ENF-1(3)/2015/ 6341 dt.21.12.2015 assessing dues U/s 7A of the Act on evaded wages for the period from 02/2013 to 12/2014. The total dues assessed is Rs.61,78,215/-.

3. Since common issues are raided in both these appeals, the appeals are heard together and disposed of by a common order.

4. The appellant is a company registered under the Companies Act, 1956. The appellant is engaged in ground handling activities in the Airport at Trivandrum since May 2011. The ground handling activities involve customer service, RAM department, loading and unloading of cargo etc. The appellant engages around 600 to 700 employees in the Airport. The appellant is covered U/s 2A of the Act as a branch unit of the main unit situated at Bangalore. Based on an inspection report that the appellant evaded wages while remitting contribution, the respondent initiated proceedings U/s 7A of the Act. The appellant filed detailed objection. Subject to the provisions contained in Sec 16, the Act applies to every establishment which is a factory engaged in any industry specified in Schedule 1. The appellant is a ground handling company and not an industry that provides expert service. Many of the activities of the appellant establishment are that of unskilled labour and therefore the

appellant cannot be covered under the scheduled head “expert service”. Ground handling is not specified in the schedule head. The mere fact that the appellant establishment started compliance at Trivandrum w.e.f. 01.01.2011 onwards does not by itself preclude the appellant from challenging the coverage. The Enforcement Officer who conducted the inspection informed the appellant that all the allowances paid by the appellant to its employees shall be included for the purpose of paying contribution under the provisions of the Act. When the pay package of the employees are discussed and standardised, certain allowances unique to the establishment will be introduced. The present salary structure was in vogue for years together and it was not introduced on or after 09/2014 to evade the contribution. As per Sec 2(b)(2) of the Act, any other similar allowance payable to the employees in respect of employment or of work done in such employment is excluded from the definition of basic wages. As per Sec 6 of the Act read with Para 38 of EPF Scheme the employer is liable to remit the contribution on basic wages + DA + retaining allowance and cash value of food concession only. Therefore the decision of the authority to include attendance bonus, special allowance etc., for the purpose of contribution U/s 6 of the Act is without any basis in law. The allowances in question are not universally, naturally and ordinarily paid across the board. Without looking into the objection raised by the appellant establishment the

respondent initiated proceedings U/s 7A of the Act. The appellant was also given an opportunity for personal hearing. An authorised representative of the appellant appeared for personal hearing and furnished written objection to the respondent. It was brought to the notice of the respondent that the disputed allowances are not universally, necessarily and ordinarily paid to all across the board. The documents called for by the respondent was also produced and a detailed description of the allowances was also provided to the respondent during the course of hearing. The respondent issued the impugned orders rejecting the contention of the appellant. The impugned orders suffer from the denial of right of the appellant to bifurcate the salary.

5. The respondent filed counter denying the above allegations. The appellant establishment is covered U/s 2A of the Act w.e.f. 01.01.2011. M/s.Air India Sats Airport Services Pvt Ltd at Bangalore was brought under the provisions of the Act w.e.f. 01.08.2010 under code no.KN/44339. On the request of the appellant and on the basis of the Form 5A submitted by the appellant company, a separate code number was allotted w.e.f. 01.01.2011 as a branch unit of the Bangalore based company. The respondent received a complaint from All India Airport Contract Workers Sangam and an inspection was ordered into the complaint. During the inspection it was found that the appellant establishment was illegally bifurcating wages into various allowances and

reported lesser wages for provident fund contribution. Accordingly an enquiry U/s 7A was initiated. The enquiry culminated in a proceedings assessing dues on evaded wages for the period from 01/2011 to 01/2013. The appellant appealed against the order and is still pending before the Tribunal. The Enforcement Officer again conducted an inspection for subsequent period and reported that the appellant continued with the bifurcation of wages for computing provident fund contribution. Hence an enquiry U/s 7A was initiated which culminated in the impugned order. On verification of the records produced by the appellant it is seen that the total salary paid to its employees are bifurcated into 10 allowances and none these allowances were taken into consideration while calculating provident fund contribution. Hence it is taken as a clear subterfuge adopted by the appellant. During the hearing the appellant could not justify the exclusion of these allowances from the definition of basic wages U/s 2(b) of the Act and the respondent considered those allowances as part of basic wages and issued the impugned orders. The Enforcement Officer of the respondent organisation filed a rejoinder to the objection filed by the appellant establishment. A copy of the same is produced an marked as Exbt.R1. The dispute regarding the applicability has no relevance as the issue is already settled and the appellant is remitting provident fund dues in the code number allotted to the Bangalore and Trivandrum for many years. The respondent

authority considered all the relevant objections raised by the appellant and independently analysed the issues involved while issuing the impugned orders. Basic wages means all emoluments which are earned by an employee while on duty with specific exclusions. The basic issue raised by the appellant has already been settled by the Hon'ble Supreme Court vide its judgment dt.28.02.2019 in **RPFC Vs Vivekananda Vidya Mandir and others**. No materials were placed by the appellant to demonstrate that the allowances in question including various special allowances being paid to the employees were either variable or were linked to any incentive for production resulting in greater output by the employee and that the allowances in question were not paid across the board to all employees in a particular category.

6. The learned Counsel for the appellant raised two issues in these appeals. The first one is with regard to the applicability of the Act to the appellant establishment. The 2nd issue is whether various allowances being paid by the appellant to its employees will attract provident fund deduction.

7. According to the learned Counsel for the appellant, the appellant establishment is covered under the scheduled head 'expert service' and the appellant cannot be classified under 'expert service' as few of the employees are engaged only in loading and unloading and other similar manual work. According to the learned Counsel for the respondent the establishment is

covered under 1(3)(b) of the Act as an establishment employing 20 or more persons and not U/s 1(3)(a) as a notified industry as claimed by the appellant. It is not covered as a factory engaged in any industry specified in schedule 1. The appellant establishment is indeed rendering expert service of handling air line passengers though a few of the employees may be handling loading and unloading work. It is seen that the appellant establishment is covered under the provisions of the Act w.e.f. 01/2011. The respondent initiated proceedings U/s 7A of the Act to assess provident fund dues on evaded wages for the period from 01/2011 to 01/2013. This proceedings culminated in a final order which is under challenge in Appeal no.610/2019. In the said appeal the appellant has not raised any contention regarding the applicability of the Act. Further it is also reported that the appellant has filed W.P.(C) no.17728/2013 challenging the same order before the Hon'ble High Court of Kerala. Even in that proceedings the appellant failed to raise the issue of applicability. It is seen that the appellant is covered U/s 2A of the Act as a branch unit of the main establishment at Bangalore which is also covered under the provisions of the Act. When the main unit has no dispute regarding the applicability of the Act, the branch unit cannot on its own raise a question of applicability unless the activities are entirely different. In the present case it is seen that the main unit covered at Bangalore under code no.KR/44339 w.e.f. 01.08.2010 is also carrying

out the same kind of activities at Bangalore Airport. It is further seen that in the Exbt.A3 produced by the appellant, an offer appointment given to one of its employees it is specifically stated at Sl.No.4 that the employee will be eligible for provident fund as per Employees' Provident Funds and Miscellaneous Provisions Act, 1952 or any amendments thereto after deducting appropriate sums from his gross salary. Taking into account all these aspects I am of the considered view that the provisions of the Act and Schemes thereunder are applicable to the appellant establishment and the coverage of the appellant under the Act is legally correct.

8. The second issue raised by the learned Counsel for the appellant is with regard to the various allowances being paid to the employees of the appellant establishment and whether those allowances will come within the definition of basic wages. According to the learned Counsel for the respondent the appellant is splitting the wages paid to its employees into basic, HRA, special allowance, shift allowance, uniform maintenance allowance, festival allowance, mobile allowance, meal allowance, education allowance and additional allowance. 60% of the total pay package is covered under allowances and the appellant is paying provident fund contribution only in respect of 40% of the wages. The appellant is also not paying any DA. According the learned Counsel for the respondent the DA component of wages is split into various allowances by the appellant to

claim exemption from paying provident fund contribution. On a perusal of the impugned order in Appeal no.610/2019 it is seen that the proceedings U/s 7A was initiated on the same ground alleging that the wages paid to the employees of the appellant are bifurcated into various allowances and excluded from the contribution paid under the provisions of the Act. This assessment for the period from 01/2011 to 01/2013. It is seen that during the course of hearing of the case the representative of the appellant submitted before the respondent authority that the appellant is remitting contribution on wages including allowances subject to the statutory limit of Rs.6500/- from 2013 onwards. Hence it is very clear that the appellant is aware of its statutory obligation to remit the contribution on various allowances subject to the statutory limit. However the respondent in that case also assessed the dues for the period from 01/2011 to 01/2013. In Appeal no.456/2019 the appellant again went back on its earlier contention that the allowances will not attract provident fund contribution, probably because the statutory limit of wages for remitting contribution was enhanced to Rs.15,000/- w.e.f. 09/2014. Hence it is very clear that the change in the stand of the appellant is prompted by the fact that the statutory limit of paying provident fund contribution was enhanced to Rs.15000/- from 09/2014. In the impugned order issued in Appeal no.456/2019 the respondent authority elaborately examined all the allowances paid by the

appellant to its employees and came to the conclusion that attendance bonus, special allowance, meal voucher and shift allowance will answer the definition of basic wages and therefore will attract provident fund deduction. It is seen that the attendance bonus has no direct nexus and linkage with extra output produced by the employee in the establishment. It was also noticed that the appellant establishment has no specific approved scheme regarding payment of attendance bonus. It has got nothing to do with any additional work and is being paid as a regular payment for normal working days. Similarly special allowance is being paid to all employees though it may vary from employee to employee and depends on merit and qualification and experience of the employee. This allowance also has no nexus with higher production and is uniformly being paid to all the employees depending on the qualification of the employee. The meals voucher or allowance is being paid to all officials of grade 4 and above. This is being paid to employees who are present for duty for a minimum of 20 days. The meals voucher is paid in cash and it has got nothing to do with food concession or canteen subsidy. The shift allowance is being paid to those employees who attended their duties between 22.00 Hrs to 6.00 Hrs. Basically it is an allowance paid to those who work in the night shifts. This allowance is being paid to all employees who attended their duty during specified timings.

9. It is seen that the respondent included holiday wages also as part of basic wages and therefore assessed provident fund dues on the same. According to the learned Counsel for the appellant the holiday wages are paid to grade 1 to grade 5 employees. This is paid to the employees who attended the work on holidays. This is in addition to the regular wages being paid to the employees and hence the holiday wages will not form part of basic wages and therefore no contribution can be assessed on the same. It is seen that holiday wages are paid as an extra amount for the employees for working on holidays. Hence it amounts to payment of overtime allowance which is specifically excluded U/s 2(b)(2) of the Act. Hence it is not correct on the part of the respondent to assess the provident fund dues on holiday wages being paid to the employees for doing extra work on holidays.

10. the learned Counsel for the appellant argued that as per the dictum laid down by the Hon'ble Supreme Court in **Bridge & Roof Company India Ltd Vs UOI**, 1962 2 LLJ 490 and **J. Engineering Works Ltd Vs UOI**, 1963 2 LLJ 72 whatever is payable in all concerns and earned by all permanent employees is included for the purpose of contribution U/s 6 of the Act. But whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. According to him this decision is being followed by various High Courts in the country. It can be seen that many of

these allowances are being paid to all the employees and some of the allowances are being paid to all the employees in particular grades of employment. Hence the decision of the Hon'ble Supreme Court of India in the above cited cases will be squarely applicable to the appellant and the allowances discussed above. The learned Counsel for the appellant also pointed out that the special allowances are not paid under contract of employment or award but paid purely out of management's own will and pleasure. According to him such allowances will not form part of basic wages. According to the learned Counsel for the respondent, the terms of contract of employment reflected in Sec 2(b) includes the implied contract also and the appellant cannot escape the liability only on the ground that there is no written contract to pay such allowances. Further it is also seen that some of the allowances such as attendance bonus, special allowance etc., are included in the terms of contract as per Exbt.A3 at page 30 produced by the appellant which is an offer of appointment given to one of its employees.

11. 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 " .

12. 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.

13. The basic philosophy of the appellant regarding the provident fund contribution payable to its employees is very clear from its statement in Annexure A3 objection filed by them before the respondent authority. According to them

" the corporate sector is facing global recession wherein cost cut exercise is badly needed to sustain survival instincts else economic

dehydration would be inevitable. The payment of allowances and indiscriminate provident fund contribution there-on could be one of the areas where the employer can save a lot. It is now a legal truism that except DA, all other allowances would enjoy immunity from payment of provident fund contribution and the cauldron of confusion has already ended and now things are crystal clear on its front of payment of allowances besides provident fund contribution ".

It will be appropriate for the appellant to understand the legal implications of denying social security benefits to the employees on the ground of cost cutting exercise by splitting wages into various allowances. The legal requirement is that the appellant shall remit contribution on the statutory limit prescribed under the Act and Schemes thereunder. Model employers will remit contributions to its employees without restricting to the statutory limit as it is the responsibility of the employers to secure the social security needs of their employees after their retirement. The appellant will be failing in their duty if they continue to litigate on these issues and thereby deny the minimum social security to its employees.

14. Considering the facts, pleadings, evidence and arguments in this appeal, I am inclined to hold that attendance bonus, special allowance, meal voucher and shift allowance will form part of basic wages and the appellant is

liable to pay provident fund contribution on the same subject to the statutory limit of wages. The holiday wages will not form part of basic wages and therefore will not attract provident fund deduction.

Hence the appeal is partially allowed, the impugned orders are set aside and the respondent is directed to re-assess the dues including the attendance bonus, special allowance, meal voucher and shift allowance as part of basic wages and excluding holiday wages from the assessment. The assessment shall be done within a period of 6 months after issuing notice to the appellant. The deposit made by the appellant U/s 7(O) of the Act as per direction of this Tribunal shall be adjusted after finalisation of the enquiry.

Sd/-

(V. Vijaya Kumar)
Presiding Officer