

**BEFORE PRESIDING OFFICER CENTRAL GOVERNMENT
INDUSTRIAL TRIBUNAL CUM LABOUR COURT, ROOM NO.208,
ROUSE AVENUE DISTRICT COURT COMPLEX, NEW DELHI-
110002**

Appeal No. D-1/27/2018

M/S B L Kashyap & Sons Ltd Appellant
Through:- Sh S.K.Gupta, learned counsel for the Appellant

Vs.

A P F C,Delhi(South) Respondent
Through:-Sh Rajesh Kumar learned counsel for the Respondent

Order Dated 28.04.2021

This appeal has been filed challenging two orders dated 10/09/18 passed by the APFC ,Regional Office, Delhi South in exercise of the power u/s 14B and 7Q of the E P F and M P Act ,assessing Rs2, 75,70,732/- as damage and Rs 1,62,51,744 /- as interest payable by the appellant on account of delayed remittance of EPF contribution of its employees for the period 3/2014 to 6/2018.

Bereft of unnecessary details the facts pleaded by the appellant are that it is an establishment covered under the EPF & MP Act . and has been diligent in contributing to the statutory dues of it's employees. On 26/6/2018 a combined notice was issued directing the appellant establishment to appear and participate in the inquiry fixed to be held on 26/7/2018 in the office of the APFC, Delhi, south. The authorized representative of the establishment appeared on the date fixed and submitted a written submission describing the mitigating circumstances for the delay in remittance of the P F Dues. The commissioner served the copy of the written submission on the area enforcement officer calling him to submit his reply. Two adjournments were allowed to the area enforcement officer for the purpose till 21/8/18 when the commissioner without giving opportunity to the appellant establishment of being heard, concluded the hearing and reserved the matter for orders. On 10/9/18 the commissioner passed the impugned order without giving adequate opportunity to the appellant to set up his defence. Not only that, when no rebuttal to the written submission of the appellant was made by the department, the commissioner in a whimsical manner passed the order without giving any finding on the mensrea and without assigning the reason for imposition of damage at the maximum percentage. Thus the appellant has prayed for setting aside of both the orders passed u/s 14B and 7Q of the Act describing those as one composite order.

Written objection was filed by the respondent to resist the stand taken by the appellant . But no document has been placed on record by the respondent.

During course of argument the learned counsel for the appellant raised questions on the legality and maintainability of the impugned order on the grounds of omission in following the principles of natural justice as no adequate opportunity was allowed to set up a proper defence, for want of finding on mensrea and for the delay on the part of the respondent in initiating the inquiry. The appellant has also challenged the impugned order as a non speaking order in as much as it does not assign reason for imposing maximum percentage of damage. By placing reliance in the case of APFC vs Management of RSL Textiles India Pvt Ltd reported in 2017(3)SCC 110, he submitted that the commissioner is duty bound to give a finding on the mens rea. No finding on the same , renders the order unsustainable in the eye of law.

The learned counsel for the respondent submitted that appellant was given proper opportunity of defending it's stand. The written submission filed during inquiry was taken in to consideration a proper finding has been given on the mensrea in the impugned order. He also argued that the commissioner has no discretion to reduce the percentage of damage enumerated under the statute though he has the discretion of imposing or not imposing the damage. He also argued on the maintainability of the appeal as both the orders under section 14B and 7 Q has been challenged as the order u/s 7Q is not appealable. Drawing attention to the separate orders passed he forcefully argued that the orders can not be termed as composite orders, in as much as separate proceedings were held leading to passing of separate orders. In support of his submission he placed reliance in the case of Arcot Textiles Mills Ltd VS RPFCL, decided by the Hon'ble Supreme Court. He also submitted on the legislative intention behind welfare legislation to provide social security to the employees. Citing the judgment of the Hon'ble SC in the case of Hindustan Times Ltd VS Union of India, he also submitted that mere delay in initiation of a proceeding u/s 14 B of the Act can not be made a ground of prejudice to the establishment.

Perusal of the impugned order shows that the appellant had filed the written reply to the notice proposing the amount of damage and interest on 26/7/18. There after two adjournments were allowed for the area enforcement officer to file reply to the said written submission of the establishment. On failure by the enforcement officer to file reply, on 21.08.18, the inquiry was closed. The appellant establishment had never stated to the commissioner about it's intention of advancing argument or placing more documents on record. In absence of any material to that effect it can not be accepted that the commissioner by closing the proceeding on 21.08.18 had omitted to provide adequate opportunity to the establishment for setting up defence.

The other point raised by the appellant is belated initiation of inquiry u/s 14 B of the Act. The learned counsel for the appellant argued that as per the accounting manual of the respondent any default in remittance is to be informed to the damage cell by the account section, who in turn would take

immediate action for levy of damage. When covered establishments are remitting administrative charges for this purpose, delay in initiation of inquiry, is causing prejudice. The learned counsel for the respondent countered the same with the submission that the Act or Rule does not prescribe any time limit for initiation of 14B inquiry.

The Hon'ble Supreme Court in the case of Hindustan Times Ltd VS Union of India have held

“ the fact that proceedings are initiated or demand for damage was made after several years, can not by itself be a ground for drawing an inference of waiver ,or the employer was lulled into a belief that no proceeding u/s 14 B would be taken. Mere delay in initiating a proceeding u/s 14 B can not amount to prejudice in as much as the delay on the part of the department, would have only allowed he employer to use the money for it's own use.”

Hence, I find no merit in the submission of the appellant that for the failure by the department in prompt initiation of the proceeding had caused prejudice to it and the impugned order suffers from illegality.

On behalf of the appellant argument was advanced on the omission on the part of the commissioner in giving a finding on the mensrea. The learned counsel for the appellant submitted that the mitigating circumstances shown in the written submission were never considered while passing the impugned order. Drawing the attention of this Tribunal to judgments of the Hon'ble SC in the case of Mcleod Russel India Ltd VS RPFJ Jalpaiguri, reported in (2014) 15 SCC, 263 and in the case of APFC vs Management RSL Textiles ,2017,LLR 237, he submitted that omission to give a finding on mensrea makes the order illegal and not sustainable in the eye of law.

But mensrea is a state of mind to be inferred from the circumstances. In this case as seen from the impugned order, and written reply, the appellant has described the loss in business and crunch in the cash flow to be the circumstances for the delay in remittance. Besides that no other circumstance has been pleaded. As per the admission of the appellant it was diligent earlier in remitting the contribution, but default happened for the loss. In the written submission made by the establishment before the commissioner, the summary of the audited financial account was shown. This summary no doubt shows decline in the profit margin of the establishment, but not so much of financial loss to prevent the establishment from remitting the contribution. The commissioner in his order has assigned reasons for not accepting the circumstances shown by the establishment. This shows the mensrea of the appellant establishment for the delay in remittance. More over law is now well settled that financial hardship can not be accepted as a mitigating circumstance for the delay in deposit of statutory dues. No doubt mensrea is the determinative factor in imposing damage u/s 14 B of the Act and the mensrea of the appellant in

this case is evident from the circumstances. Hence the impugned order can not be held prejudicial to the interest of the appellant in this regard.

The Hon'ble supreme court in the case of Shri Swamiji of Sri AdmarMutt vs The Commissioner Hindu Religious and Charitable Endowment Dept reported in AIR 1980 SC 1 have held that reason is the soul of the law and when the reason of any particular law seizes, so does the law itself.

In this matter the impugned order contains the reasons for imposition of damage. The commissioner did not accept the plea of poor market condition or plea of loss taken by the establishment as a reasonable defence for belated remittance. Neither during the inquiry nor during hearing of the appeal evidence to prove the plea was placed on record. The percentage of the damage has been imposed following the table provided under the statute. The period of default spreads over four years and three months. Hence no infirmity is noticed in the order in respect of the amount of damage imposed. The appeal has been filed challenging the orders passed u/s 14B and 7 Q of the Act. (Annexure A-1). Prayer has been made for setting aside both the orders. There is no dispute on law that the order passed u/s 7Q of the Act is not appealable. But the appellant argued that the commissioner issued a joint notice dt 26/6/2018 and also conducted the proceeding jointly. More over a common order has been passed though by adopting copy/paste method on computer two separate orders have been prepared to deprive the establishment of it's statutory rights. The learned counsel for the Respondent rebutted the said argument on the ground that calculation of the interest being a clerical work, no elaborate proceeding was held though separate orders have been passed. Hence this Tribunal lacks jurisdiction to interfere with the order of the commissioner in respect to the interest.

The Hon'ble SC in the case titled Arcot Textile Mills Ltd VS RPF(Civil Appeal No9488/2013) have clearly held that the order passed u/s 7Q if passed as a composite order, is open for challenge in an appeal. But the said order is passed separately, the remedy in appeal is not available. In this case two separate orders u/s 14B and 7Q having been passed by the commissioner, the argument advanced in this regard by the appellant is not accepted. Hence on a careful analysis of the fact and law this Tribunal finds no merit in the Appeal. Hence ordered.

ORDER

The appeal be and the same is dismissed on contest. The impugned order is hereby confirmed. Consign the Record as per Law.

Sd/-
(Pranita Mohanty)
Presiding Officer