BEFORE THE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE AVENUE, DISTRICT COURT COMPLEX, DELHI.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

ATA No. 831(4)2016

M/s B2R Technologies Pvt. Ltd. — Appellant

VS.

APFC, Delhi South — Respondent

ORDER DATED:- 02/08/2021

Present:- Ms. Sanjana Bali, Ld. Counsel for the Appellant.
Shri Rajesh Kumar, Ld. Counsel for the Respondent.

The present appeal u/s 7-I of the EPF and MP Act 1952 (In short the Act) has been preferred by the appellant a Pvt. Ltd. Company challenging the order dated 11/07/2016 passed by the APFC, Delhi (South) u/s 14B of the Act in which an amount of Rs. 7,04,942/- has been assessed against the appellant as damage for the delayed remittance of the PF dues for the period 01/2011 to 07/2015.

The stand of the appellant taken in the appeal is that it is a Pvt. Ltd. Company established in the year 2009 with an objective to create livelihood opportunities for rural youth in a self sustainable manner. To achieve the objective the appellant has setup its operation centers in the villages of Uttarakhand and works closely with the local NGOs to provide BPO service to the selected Youth. The establishment has been covered under the EPF Act and a code no. has been provided. But since the date of inception the company is suffering loss which became acute in the year 2009-2010, 2010-2011 and 2011-2012. The external funders stopped funding and the company for the heavy loss suffered was at the verge of closure. But the establishment somehow or other managed to survive and during this period little delay was caused in the remittance of the PF contribution. Infact, substantial delay in the remittance started from the month of November 2013. All these dislocation occurred for the acute financial hardship and loss suffered by the establishment. However, the establishment was depositing the PF contribution of the employees with slight delay with exception of some months. On 07/12/2015 the respondent served a showcause notice on the establishment for an inquiry u/s 14B and 7Q of the Act for levying damage and penal interest respectively for the delayed remittance during the period from 04/1996 to 12/2015. The

representative of the establishment appeared and participated in the inquiry on different dates. He also submitted a written statement explaining the circumstances leading to delay in remittance of the PF dues. The sole ground taken during inquiry as defence was the financial instability of the company. During the inquiry it was also mentioned before the commissioner that the establishment is fully aware of its statutory liability and social security of its employees. Materials were placed before the commissioner to show that during the pendency of the inquiry the proposed interest was deposited. The commissioner though took note of the same and mentioned about the deposit of the interest in the impugned order passed u/s 14B of the Act, in his cryptic and non speaking order failed to give any finding on the mensrea of the appellant and passed an order imposing penalty at the highest rate as provided under the scheme. The said finding of the commissioner is not backed by any good reason or mensrea of the establishment which is required to be proved before imposition of damage. Thereby, the Ld. Counsel for the appellant has prayed for setting aside of the impugned order.

On behalf of the respondent reply was filed supporting the impugned order. It has been stated in the said reply that adequate opportunity was offered to the appellant to explain the mitigating circumstances. The appellant establishment and thus has least concern for the sanctity and dignity of the judicial process has raised false and frivolous contention with regard to the levy of damage. Not only that the appellant has suppressed material facts. The respondent also resisted the appeal contending that there was default on the part of the appellant in depositing the EPF contribution during the time limit and the same has not been disputed. For such admitted delay and default interest and penal damage are to be computed in exercise of the power u/s 7Q and 14B of the Act read with Para 32-A of the EPF scheme 1952. The Scheme is a guideline and the EPF commissioner normally follows the said guideline unless mitigating circumstances for the default is shown by the establishment. The respondent has taken a further stand that the realization of the interest for the default period is meant to be deposited in the account of the beneficiary as the delay in payment causes loss to them. While arguing on the legislative intention behind the provision, the respondent has pleaded that the Provision of EPF Act is meant to indemnify the beneficiaries against the loss and the order passed by the respondent, in view of the admission by the establishment about the delay in remittance, is logical, correct and an outcome of proper application of mind and thus, entails no interference.

To support it's stand the respondent has placed reliance in the cases of **Bharat Plywood & Timber Products (P) Ltd vs. EPF Commissioner (1977)ILLJ -379 Ker, Hindustan Times Ltd vs.**

Union of India, AIR 1998 S.C 851 and Birla Cotton Spinning and Weaving Mills Ltd vs. Union of India, ILR 1984 Delhi-60 and Chairman, SEBI vs. Shri Ram Mutual Fund-AIR2006 S.C 2287.

The appellant on the other hand has placed reliance in the case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri & Others reported in (2014)15 S.C.C 263** and in the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337** to argue that existence of mensrea at the time of delay is material for imposition of damage and the quasi judicial authority is required to give a finding in this regard before imposing damage u/s 14B of the Act. The appellant has also placed reliance in the case decided by the Hon'ble High Court of Madras in the matter titled **DCW Employees Co operative Canteen VS PO EPFAT**, to submit that all the failure in timely remittance cannot come under the category of default and the damage u/s 14B cannot be imposed automatically. It depends on the fact and circumstances of each case.

While arguing on the discretionary power of the Assistant Provident Fund Commissioner she also placed reliance in the case of **Employees State Insurance Corporation vs. HMT Ltd. 2008-I-LLJ-814(SC)** & the case of **Assistant Provident Fund Commissioner vs. Ashram Madhyamik, 2007 LLR 1249**, and submitted that levy of maximum damage as per the scheme is not the rule and the Provident Fund Commissioner is empowered to reduce the amount of damage in exercise of discretion.

A plain reading of the provision laid u/s 14-B of the Act lead to a conclusion that E.P.F Commissioner can exercise the discretion which is evident from the use of the word "may. Not only that the provision also prescribes that the said damage shall not exceed the amount of arrear. This implies that the upper limit of the damage can be quantified to the amount of arrears. While fully agreeing with the argument advanced by the Ld. Counsel for the appellant, with regard to the discretion of the E.P.F Commissioner in imposing damage and in computing the damage, it is pertinent to mention here that the discretion, whenever is vested with a statutory authority, the same is required to be exercised with full care and caution considering the fact and circumstance of a given case.

In the case of ESI vs. HMT and **Assistant Provident Fund Commissioner vs. Ashram Madhyamik** Hon'ble Court have held that discretionary power should be exercised by taking into consideration the mitigating circumstances. The impugned order of the Assistant Provident Fund Commissioner passed on 11.07.2016 doesn't discuss about the mitigating circumstances shown by the appellant making out a case for waiver of damage. The only reason

given in the impugned order is that the establishment during the inquiry proceeding deposited the proposed interest and hence the inquiry is closed. Perhaps the commissioner was guided by the impression that payment of interest amounts to admission of the default and liability for the damage. The stand taken by the appellant during the 14-B enquiry was that it is a Company working to provide education and employment to the youth living in Uttrakhand with the objective of creating livelihood opportunities among the rural youth in a self sustainable manner. No profit was ever earned by the company; rather it experienced heavy financial loss during the period under inquiry. Though, documents were placed to substantiate the same and a written submission was filed no observation in that regard was ever made in the impugned order. Nowhere the Assistant Provident Fund Commissioner in the impugned order has observed about mensrea and/or actus-reus prevailing on the part of the appellant at the relevant time, when the deposits were to be made but not made. In the case of **MCLEOD RUSSEL INDIA LIMITED vs. REGIONAL PROVIDENT FUND COMMISSIONER, JALPAIGURI & OTHERS reported in (2014)15 S.C.C 263,** which was again discussed by the Hon'ble Apex Court in the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337,** the Hon'ble Apex Court have held that when there is no finding in the impugned order with regard to mensrea or actus-reus, the order is not sustainable.

In the case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri** referred supra while discussing the case of **E.S.I Corporation vs. HMT Limited (2008)3 S.C.C 35** the Hon'ble Apex Court have held that damages by way of penalty was not mandated in each and every case. Imposition of penalty is not a mere formality. Alternatively stated, if damages have been imposed u/s 14-B, it will be only logical that mensrea and/or actus-reus was prevailing at the relevant time. The same view has been taken in the case of **Assistant Provident Fund Commissioner, E.P.F.O and Another vs. The Management of RSL Textiles India Pvt. Ltd. reported in 2017LLR 337** the Hon'le Apex Court have held in the case of where there is no finding rendered by the original authority or the appellate authority with regard to mensrea or actus-reus, except discussing about the financial crisis, the order cannot be held to be a speaking or logical order.

It is a settled principle of law that the Commissioner while exercising power u/s 14-B shall act within the limits fixed by the statute and the order must be a speaking order containing reasons in support of the order. While fixing the amount of damage, the

Commissioner has to take into consideration various factors like the number of defaults, the period of delay, the amount involved etc.

In this case the assessment was made for a period of almost 5 years commencing from January 2011 to July 2015. But the impugned order nowhere contains any discussion about the mitigating circumstances or the mensrea if prevailing when default in deposit was made. This by itself establishes that no logical or speaking order was passed by the APFC and as such the impugned order passed u/s 14B of the EPF and MP Act 1952 cannot sustaine in the eye of law. Hence, ordered,

ORDER

The appeal be and the same is allowed. The impugned order passed by the APFC which has been challenged in this appeal is liable to be set aside and accordingly the same is set aside.

Presiding Officer