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.D-1/37/2020

M/s B2R Technologies Pvt. Ltd. — Appellant

VS.

APFC, Delhi South — Respondent

ORDER DATED:- 19.04.2021

Present:- Ms. Sanjana Bali, Ld. Counsel for the Appellant.
Shri Puneet Garg, 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 assailing the order dated 27.02.20 passed by the respondent u/s 14B of the Act hereby damage to a tune of Rs. 1,72,434/- has been assessed against the appellant for delayed remittance of PF dues for the period 04/2015 to 07/2018.

Bereft of unnecessary details, the facts pleaded by the appellant is that it is a Pvt. Ltd. Company engaged in training and providing employment to the Rural Youth in the state of Uttarakhand. Summon dated 18.09.2019 was served on the appellant with a direction to appear before the respondent for hearing in the proceeding initiated u/s 14B and 7Q of the Act alleging delayed remittance during the period January/2011 to 11/2013 proposing Rs. 8,77,376/- as damage u/s 14B and Rs. 04,46,756/- as interest u/s 7Q. The A/R for the appellant appeared before the respondent and submitted a representation pointing out the discrepancies in the calculation proposing levy of damage and interest as per the summons. In the said representation it was pointed out that there is an over laping period and the said period was the subject matter of inquiry as per a previous notice dated 04/12/2015. It was also pointed out that during the previous inquiry the entire interest assessed was paid and as such the inquiry u/s 7Q was closed by order dated 11th July 2016 and order on the same day was passed for the damage only. The said order is subject matter of adjudication in the appeal filed by the appellant numbered as ATA No. 831(4) of 2016. On receipt of the said representation during the impugned inquiry the commission directed the EO damage section to give a detailed reply to the objections mentioned in the representation of the appellant. Accordingly the matter was heard and a revised calculation dated 18.12.2019 was issued. In the meantime the

appellant also made deposit of the entire interest amounting to Rs 94,297/- proposed to be levied as per the notice.

The appellant has further stated that during the inquiry held u/s 14B the mitigating circumstances were shown and documents to that effect where placed before the commissioner. It was specifically pleaded that the company which is a business process management company in-corporated in the year 2009as a social enterprise to provide educational and employment to the youth living in Uttrakhand with the objective of creating livelihood opportunities for Rural Youth in a self sustainable manner incurred heavy operational losses since the date of inception as normally happens with all startup companies. The appellant establishment being covered under the EPFO despite the loss was diligent on timely payment of the EPF contribution till the month of October 2013. But on some occasions there was slight delay in deposit of the PF dues for some situations beyond the control of the company. Those defaults where never willful nor for any malafide intention. The calculation sheet supplied to the appellant clearly shows that there were delay ranging between 15 days to 50 days. Thereby the appellant has pleaded that the commissioner should have considered the financial hardship pleaded by the establishment to waive the damage as there was no material before him to presume the malafide intention or mensrea on the part of the establishment for the said delayed remittance. The representation submitted by the establishment explaining the cause of delay was not countered or responded by the representative of the respondent. The commissioner ignoring the law laid down by the Hon'ble Supreme Court in various judgments passed the impugned order dated 27.02.2020 levying damage of Rs. 1,72,434/- while acknowledging the payment of interest of Rs. 94,294/- during pendency of the inquriy. The commissioner has not given any finding on the mensrea on the part of the appellant for delayed remittance nor assigned any reason for rejecting the mitigating circumstances shown in the representation during the inquiry. She further submitted that the damage prescribed under the Act is compensatory in nature and cannot be imposed as a penalty without due consideration to the facts and circumstances of the case. To support the contention reliance has been placed 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 **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337.** 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.

The further argument of the appellant is that the respondent in the impugned order passed u/s 14B has acknowledged deposit of the entire

proposed interest by the establishment. Even thereafter the respondent during the pendency of this appeal and without giving notice of recovery, recovered the entire amount of damage assessed and the interest proposed having the effect of realizing the interest twice during the pendency of the appeal. The appellant has thus prayed for setting aside of the impugned order describing the same as an unreasonable and non speaking order with a further prayer for refund of the recovered damage and excess interest.

The respondent filed written objection to the appeal stating therein that the notice was initially issued for the period 01/2011 to 07/2018 proposing levy of damage and interest for the delay in remittance of the PF dues for the said period. Considering the objection raised by the appellant and verifying the challans produced by the appellant the revised calculation was supplied to the appellant. The respondent has stated that during the inquiry the A/R for the appellant appeared and submitted that the establishment has already paid the interest part assessed u/s 7Q of the Act. The same was noted by the commissioner. However, the appellant did not offer any reason to contest the rates at which penal damages were proposed to be levied. The provision of law laid u/s 14B has been enacted with an objective of compensating the loss suffered by the beneficiaries and to act as a deterrent for the establishments committing delay in remittance. During this impugned proceeding adequate opportunity was given to the establishment and considering the representation, the plea taken there under and the documents placed reasoned and speaking order was passed by the respondent. It has also been pleaded that the calculation sheet sent to the appellant alongwith the notice clearly shows the time of delay on the part of the appellant in remitting the PF dues. Drawing the attention to Para 38 of the EPF scheme and the judgment passed by the Hon'ble High Court of Delhi in **Birla Cotton Spinning and Waiving Mills Limited vs. Union of India reported in ILR 1984 Delhi 60**, he submitted that the employer is under the statutory obligation to deposit the contribution by 15th of subsequent month to the fund failing which proceeding u/s 14B can be initiated on the occurrence of default. The respondent has also pleaded that the financial crunch or any other difficulty encountered by the appellant/establishment cannot absolve it of its statutory obligations. This power is also not nullified by the mere fact of having paid the arrears subsequently. Reliance has been placed by the respondent in the case of **Maharashtra State Cooperating Bank Limited vs. APFC and another and in the case of Oregano Chemical Industries and Another vs. UOI** wherein it has been held that in assessing the damage the commissioner is not only bound to take into account the loss of the beneficiaries but also the default by the employer in making his contribution which occasion the infliction of damage. The damage so imposed u/s 14B includes a punitive sum qualified according to the circumstances of the case. Thus, the damage levied is not only compensatory but also punitive in nature. The Ld. Counsel appearing for the respondent thereby submitted that the impugned order has been rightly passed and needs no interference.

Perusal of the record shows that the commissioner at the end of the inquiry has passed a very short and cryptic order in which no finding has been rendered on the mensrea and/or actusreus on the part of the appellant at the relevant time of default. Though the respondent in his written submissions has stated that the appellant did not offer any reason to contest the rates at which the damage was proposed to be levied, the written representation of the appellant submitted during the inquiry and available in the record clearly explains the circumstances for which the deposits were not made in time. The reasons assigned is that the company being a startup incurred huge operating losses. Despite the loss the company struggled to survive instead of closing down. The company was diligent in making the deposit of PF dues barring few instances. But as seen from the impugned order these submissions of the establishment were neither countered by the department representative nor answered by the commissioner while passing the order.

Admittedly there is delay on the part of the appellant in remittance of the PF dues. On behalf of the appellant the A/R arguing on the appeal strenuously argued on the non existence of mensrea on the part of the appellant entailing it for levy of damage u/s 14B of the Act. Relying on the judgment of **DCW Employees Cooperative Canteen** referred supra she submitted that a failure on the part of the employer to deposit the contribution in time cannot be interpreted as default in all the cases. To support her argument she placed reliance in the case of DCW and other judgments of the Hon'ble Apex Court wherein it has been held that:-

> "the expressions "default" and failure are synonymous terms. Failure, in the dictionary sense means, a failing short deficiency or lack. Default means omission of that which ought to be done. From this, it could be understood that failure to constitute default must go with some animus to commit such failure. A failure simplicitor without such an animus would not constitute a default in the sense of the expression, in which it has been used in section 14B of the Act "

While arguing on the discretionary power of the Regional Provident Fund Commissioner he 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 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 Regional Provident Fund Commissioner doesn’t discuss about the mitigating circumstances shown by the appellant making out a case for waiver of damage. The stand taken by the appellant during the 14-B enquiry was that it is a startup company and doing the business which earns a nominal profit and during the past years it has encountered huge operational loss. Of course except that stand no other circumstance was shown by the appellant before the Regional Provident Fund Commissioner. The order of the Regional Provident Fund Commissioner though contains a discussion about the objection raised by the appellant, nowhere the Assistant Provident Fund Commissioner in the impugned order has observed about the pleading of the respondent on the 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 time.

In the case of DCW Employees Cooperative Canteen referred supra the Hon’ble High Court of Madras have clearly held that unless the existence of mensrea is pleaded and established against the employer, the levy of damage u/s 14B of the Act cannot be done automatically. It is not that every delay is willful and intentional. It depends on the facts and circumstances of each case, more particularly, based on the reasons stated for making such belated payments. In this case the appellant has specifically pleaded about the business hazards faced by it and a written submission to that effect was filed before the commissioner. But the department never refutted the said stand of the appellant nor any pleading to that effect was made or evidence was placed to disprove the plea.

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 referred supra the Hon’ble court had also referred to the earlier judgment in the case of ESI

Corporation vs. HMT Limited (2008)3SCC35 and held that damage by way of penalty is not mandated in each and every case. Imposition of penalty is not a mere formality. Alternatively stated, if damage has been imposed u/s14B, it will be only logical that mensrea or actus reus was prevailing at the relevant time.

In this case originally notice was served for the period 01/2011 to 11/20113 and for the objection raised by the establishment indicating that the period of earlier inquiry and the period of the present inquiry are overlapping the same was revised and the order was passed for the period 04/2015 to 07/2018. Though, the inquiry was initiated for levy of damage and interest, the inquiry for the interest was closed considering the fact that the entire proposed interest amounting to Rs. 94,297/- was deposited during the pendency of the inquiry. The commissioner has acknowledged the same in the impugned order. However, as submitted by the appellant the entire levied damage and proposed interest has been recovered pending disposal of this appeal. It is also pertinent to mention that the commissioner has not assigned any reason for imposition of the damage at the maximum rate as prescribed under this scheme. All these go to show that the commissioner had failed to consider the mitigating circumstances shown by the appellant establishment, gave no finding on the mensrea of the establishment making the delay into default so as to attract liability u/s 14B of the Act. Not only that no reason has been assigned by the commissioner for assessing the damage at the maximum rate prescribed under the scheme.

Thus, having regard to the overall facts and circumstances of the appeal discussed above the tribunal is of the view that the impugned order is an unreasonable and non speaking order passed in a mechanical manner treating the failure on the part of the appellant for timely deposit as default mentioned u/s 14B of the Act and as such unsustainable in the eye of law and bound to be set aside. Hence, ordered.

ORDER

The appeal be and the same is allowed. The impugned order dated 27.02.2020 passed by the RPFC u/s 14B is hereby setaside. The respondent is directed to refund the entire damage amount recovered from the appellant during the pendency of the appeal within one month from the date of communication of this order without interest failing which the amount shall carry interest @9% per annum from the date of recovery and till the payment is made. No order can be passed to direct the respondent to refund the interest recovered in excess since the tribunal lacks jurisdiction in respect of any order passed u/s 7Q of the Act. The appellant is at liberty of moving the appropriate forum for refund of the same.

Sd/-

(Pranita Mohanty)

Presiding Officer