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. 260(16)2017

M/s. Tact India Pvt. Ltd. Appellant

VS.

APFC, Gurgaon Respondent

ORDER DATED :-25/11/2022

Present:- Shri S. K Khanna, Ld. Counsels for the Appellant.
Shri S. N Mahanta, Ld. Counsel for the Respondent.

This appeal challenges the order dated 29.07.2015 passed u/s 7A and order dated 14/03/2017 passed u/s 7B of the EPF and MP Act by the APFC Gurgaon assessing Rs. 14,38,726/- as the deficit Pf contribution by the appellant in respect of its employees for the period December/2012 to March/2015.

The appellant has pleaded that it is a Pvt. Ltd. Company duly covered under the provisions of EPF and MP Act 1952. It has been diligent in making timely deposit of the PF subscription of its employees. Initially a summon was received from the respondent where under an inquiry u/s 7Aof the Act was proposed for the period 02/2014 to 03/2015. After appearance of the appellant the EO submitted the report and pursuant thereto the scope of the inquiry was extended from 12/2012 to 03/2015. The inquiry was proposed in respect of some employees whom the appellant describes as excluded employees. The plea of the appellant taken before the commissioner

in this regard was rejected on the ground that the establishment has failed to submit the form 11 of those excluded employees. The department representative/EO submitted a report on 25.06.2015 which was taken on record in the proceeding dated 26.06.2015. Unfortunately the appellant could not appear and participate in the proceeding held on 26.06.2015 and as such could not get a chance of rebutting the report of the EO dated 25.06.2015. The respondent a quasi judicial authority instead of taking steps for supplying the EO report to the appellant abruptly concluded the inquiry on 26.06.2015 and as such the appellant was deprived of the opportunity of cross examining the EO with regard to his report. The respondent thereafter in gross violation of the Principles of Natural Justice passed the impugned order dated 29.07.2015. Being aggrieved the appellant filed an application on 27.11.2015 for review of the order dated 29.07.2015. The said application filed u/s 7B of the Act remained pending till 14.03.2017 when the respondent in a mechanical manner and arbitrarily passed the order rejecting the application for review. Hence, this appeal. The appellant has stated that the impugned order u/s 7A is an exparte order and the order passed u/s 7B was passed mechanically without application of mind. Hence, both the orders are liable to be setaside.

Besides the factual aspects, the appellant has pleaded that the EPF and MP Act and scheme prescribes a wage limit for eligibility to be a member under the scheme. Any person drawing wage above the ceiling limit is to be treated as the excluded employee and his enrollment under the scheme is optional subject to the condition laid under the scheme. An excluded employee as per the provisions of Para 26(6) of the EPF Scheme can be enrolled as a member on the joint request of the employer and employee and subject to the undertaking by the employer that he shall pay the administrative charges payable and shall comply with all statutory provisions in respect of such employee. But in the case of the appellant no such joint request in terms of Para 26(6) for enrollment of excluded employees was submitted. Even though the appellant has not recovered the employee share of the PF contribution the respondent

assessed the employer as well as employee share ignoring the submission of the appellant that no liability can be fastened on the employer in respect of the non recovered employee share. All these points were raised in the review application filed u/s 7B of the EPF and MP Act. But the commissioner rejected the review application arbitrarily without considering the submission in the proper perspective. The other ground of challenge by the appellant is that the commissioner accepted the report of the EO in toto and without giving the appellant opportunity of rebutting the same passed the impugned order. Not only that the appellant has also pleaded that the commissioner having all the powers of summoning the witnesses failed to call the employees whom the appellant claims to be excluded employees to arrive at a proper conclusion during the inquiry. Hence, the appellant pleaded for setting aside the impugned order.

Being summoned the respondent filed objection. Besides pleading about the legislative intention behind the beneficial legislation it has been stated that the employer is under the obligation of enrolling all the eligible employees to extend the benefit of the Act. A complaint was received from an ex-employee of the appellant establishment where under it was alleged that the establishment deducted the employee share but never deposited the same in the account of the employee. The EO who visited the establishment for inspection found default in deposit of the PF dues for the period 02/2014 to 03/2015. The scope of the inquiry was enlarged as the EO found deficiency in deposit of the Pf Contribution for the period 12/2012 to 03/2015. There were few employees whom the establishment had shown as excluded employees. But in respect of many employees the establishment was found not to have deposited the EPF dues. Thus, the EO recommended the inquiry u/s 7A. The establishment was found to have deprived the eligible employees from the benefit and no form 11 was produced in respect of the excluded employees. The employees whom the appellant described as excluded employees were infact found to be eligible employees as the establishment had intentionally bifurcated the salary breakup to evade the statutory limit. So far as non supply of the Eos report and denial of

the opportunity as alleged by the appellant is concerned it is stated that ample opportunity was granted to the establishment since the date of inspection of the enforcement officer and till the final order was passed. On 12.05.2015 the date on which the hearing was fixed the establishment was advised to submit the records. Though the representative of the establishment appeared and promised to submit the documents with details of payments made to the respondent organization and asked for some time, on the later dates failed to produce the records. The case was finally fixed to 26/05/2015. On that day the A/R for the appellant appeared and took 5 days time to produce the records before the AEO. The matte was again adjourned to 02.06.2015. On 02.06.2015 neither anybody appeared on behalf of the appellant nor the documents were produced. On the next date the complainant Trilok Singh appeared and substantiated his complaint about non deposit of the PF contribution in respect of the deduction made from his wage. The matter was adjourned to 26.06.2015 giving a last opportunity for production of documents. On that day too none appeared from the establishment and the AEO appeared and submitted his report dated 25.06.2015 which was taken on record. Since, the appellant was not diligent in conduct of the proceeding and enough opportunity had already been provided, the commissioner rightly concluded the inquiry and passed the impugned order. The respondent has further pleaded that the establishment since failed to produce form 11 and other relevant records in respect of the employees whom the appellant described as excluded employees, the order was passed fixing liability on the appellant for not extending the benefits under the Act to those employees. The Ld. Counsel for the respondent thereby supported the impugned order as a reasoned order.

At the outset of the argument the Ld. Counsel for the appellant challenge the legality of the order on two grounds i.e. the Principles of Natural Justice were not followed since the report of the EO filed on 26.06.2015 was not supplied to the appellant giving opportunity to rebut the same and on the same date the inquiry was concluded and the order was passed on 29.07.2015. The other challenge is with regard to the power of the APFC in deciding the matter when the

eligibility of the employees to be members was challenged. On perusal of the record it appears that the appellant was participating in the inquiry on the dates preceding to 26.06.2015. It has been stated that for reasons beyond their control the establishment could not appear before the commissioner on 26.06.2005. The report of the EO dated 25.06.2015 was taken on record and no copy of the same was supplied to the appellant. On the contrary the inquiry was closed and the matter was reserved for passing of the final order. This caused prejudice to the appellant. In reply the Ld. Counsel for the respondent argued that prior to 26.06.2015 several opportunities were granted to the appellant for production of records. Neither the records were produced nor the A R for the establishment remained present. Hence, the commissioner was left with no option than concluding the inquiry and reserving the matter for passing the final order. This submission of the Ld. Counsel for the respondent doesn't sound convincing and it is found that the commissioner made least effort of supplying the report of the EO to the establishment inviting rebuttal to the same. On the similar facts the Hon'ble High Court of Jharkhand in the case of **State Housing Board vs. EPFO** came to conclude that the commissioner was under the duty of furnishing the inquiry report to the establishment giving opportunity to the establishment to file objection. That having not been done the order passed by the commissioner is not based upon the Principles of Fair Trial. The same view was also taken by the Hon'ble High Court of Calcutta in the case of **Anath Nath Pul and others vs. EPFO**.

The other point of challenge is with regard to the eligibility of the employees in respect of whom the assessment was made. From the impugned order it is seen that from the very beginning of the inquiry the establishment was disputing the eligibility of the employees in respect of whom the inquiry was conducted. Not only that the other ground of the inquiry was the complaint received from one Trilok Singh an ex employee. The impugned order further reveals that the EO visited the establishment to verify the contents of the complaints and the compliance status of the establishment and found that the establishment had deposited short PF dues for the period 12/2012 to

03/2015 and was found not to have deposited EPF dues at all in respect of many employees. The EO found many eligible employees being kept out of the benefits and few employees were shown in the category of excluded employees. But Form 11 in reference to those employees was not reflected in the return. Despite repeated visit and opportunity granted the establishment failed to produce form 11 in respect of those excluded employees. The argument of the Ld. Counsel for the respondent in this regard is that the establishment carries the burden to prove if any employee is an excluded employee and to do so the form 11 need to be produced. If the Form 11 would not be produced the commissioner shall hold the employee eligible.

In the reply argument the Ld. Counsel for the appellant submitted that the observation of the commissioner that the establishment failed to produce the documents is false. By filing the photocopy of the salary details including the eligibility of the employees the appellant has stated that all the documents though produced were never considered. A volume of the appointment letter of the employees has been placed on record including the appointment letter of the complainant Trilok Singh the ex-employee. On the basis of these documents the Ld. Counsel for the appellant submitted that the observation of the commissioner that the establishment has bifurcated basic wage to the different allowances to avoid liability is wrong. There is no observation about the individual employees who were eligible during the period of inquiry and kept away from the benefits granted under law. In the order the commissioner has observed that Shri S S Sangwan EO had visited the establishment and submitted a report dated 23.04.2015in which it is stated that the establishment has deposited the contribution for only one employee as against 35 persons employed. The commissioner made no effort of identifying the employees in respect of whom the establishment had allegedly omitted to deposit the PF contribution. The only factors which drove the commissioner to the conclusion is non submission of Form 11.

Before concluding it is worth mentioning that from the very beginning of the inquiry the establishment was disputing the eligibility of the employees for their enrollment under the scheme. The APFC who as per Para 26(B) is not authorized to decide the issue proceeded to conclude the inquiry instead of referring the matter to the RPFC for a decision on the said eligibility. This again makes the impugned order illegal.

Hence, for the discussion made in the preceding paragraphs it is held that the impugned order is not sustainable in the eye of law for being passed by the APFC who is not empowered to decide the eligibility of the employees for enrollment when such a dispute was raised by the appellant. It is also observed that the commissioner during inquiry also failed to identify the beneficiaries in respect of whom the appellant had defaulted and failed to observe as to why they are to be brought under the fold of the Act. Though, there is an observation in the EO report regarding bifurcation of the wage into different allowances, the order of the commissioner also lacks a finding in that regard. All these aspects taken together makes the order illegal and liable to be set aside. Hence, ordered.

ORDER

The appeal be and the same is allowed on contest. The order of the commissioner challenged in this appeal is hereby set aside. Any amount deposited/recovered with reference to the impugned order shall be refunded to the appellant.

Presiding officer

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-2/12/2019

M/s. Cadence Design Systems (India) Pvt. Ltd. — Appellant

VS.

RPFC-1, Noida — Respondent

ORDER DATED :-25/11/2022

Present:- Shri S. K Khanna, Ld. Counsels for the Appellant.
Shri S. N Mahanta, Ld. Counsel for the Respondent.

This appeal has been filed challenging the order passed u/s 7A of the EPF and MP Act wherein the appellant has been directed by the RPFC Noida to deposit Rs. 4,91,61,868/- towards the deficit PF dues of the employees deposited for the period 10/2008 to 05/2018.

The stand of the appellant according to the narratives in the appeal memo in short is that it is a Pvt. Ltd. company engaged in the business of providing tools, IP, Hardware and related expertise required for the electronics design chain. It has been duly covered under the EPF and MP Act for the subscription of the statutory dues of the employees. The appellant has employed some employees who are of Indian Origin but hold foreign passports. Under a mistaken understanding of the a relative provision of law, the appellant treated those workers of Indian Origin as International Workers and remitted contribution required under the EPF and MP Act on the salary of more than 15,000/- or 6500/- as applicable before. The Enforcement Officer of the respondent conducted an inspection of the appellant

establishment and submitted a report on 22.06.2018. In the said report the enforcement officer recommended for an inquiry u/s 7A of the Act in respect of the international workers with a preliminary observation that there is deficiency and short fall in the remittance. The respondent i.e. RPFC while acting on the said report issued summon dated 28.06.2018 calling upon the appellant establishment to participate in the inquiry to be held u/s 7A of the Act for determination of the dues in respect of the international worker for the period 10.2008 to 05/2018. The respondent appeared and participated in the inquiry. On 18.07.2018 the appellant was given a notice by the EO for production of records before him. In response thereto the appellant appeared and asked for supply of the earlier EO report dated 22.06.2018 on the basis of which the inquiry was initiated. In the written submission filed on 18.07.2018 the appellant apprised the respondent that under mistake of fact and law they have enrolled some employees as international workers and made the contribution in respect whom the department intends to assess the PF dues on the full pay of those employees by considering them as International Workers, though, infact, they are not international worker but Indian worker. They being the persons of Indian origin having recruited locally cannot be treated as International Workers. The appellant also submitted that the those employees in respect of whom inquiry has been initiated are excluded employee since drawing the basic wage more than 15000/- or 6500/- as applicable before. They not being the international workers as per the Para 83 of the EPF Scheme the appellant owes no liability for making contribution on their total salary. Therefore, in the submission dated 18.07.2018 the appellant requested the respondent to decide this issue relating to the applicability at the first instance and give a finding whether these workers are domestic workers or International Workers. The respondent instead of initiating the inquiry under Para 26-B of the EPF Scheme to ascertain the eligibility of the employees to be members under the scheme, arbitrarily and in violation of the Principles of Natural Justice proceeded with the inquiry. Without deciding the eligibility of the said employees and

without passing a reasoned order for rejecting the submission concluded the inquiry.

It has also been stated by the appellant that during the inquiry the departmental representative submitted the report on 27.11.2018 stating therein that the appellant is paying some allowances namely specialization allowance, LTA, conveyance allowance, special allowance, ex-gratia in lieu of allowance and allowances in lieu of benefit and that the said allowances being part of the basic wage attracts PF liability u/s 2(b) of the Act. The EO in his report also stated that the said allowances are treated to be basic wages since the appellant establishment could not explain as to why these allowances are being paid and the purpose behind payment of the same. The enforcement officer thereby while computing the dues had exceeded the scope of the inquiry as mentioned in the summon dated 28.06.2018 which was for inquiry in respect of the international workers. The appellant again filed a written submission dated 11.01.2019 disputing the EO'S report and reiterated that the scope of the inquiry cannot be enlarged basing upon the EO report. It was mentioned that the workers in respect of whom inquiry has been initiated are not international workers but Indian workers being the persons of Indian origin and have been hired locally. Not only that the said employees are the Overseas Citizen of India (OCI) card holders. As per the notification dated 11.04.2005 issued by the Government of India u/s 7B of the Citizenship Act 1955, such OCI card holders have the same right as available to the Non Resident Indians (NRI). Their pay structure is at par with the Indian workers. These persons being settled in India, are not the international workers within the meaning of Para 83 of EPF Scheme. The OCI Card Holders not being the International Workers, the appellant cannot be asked to make contribution on their entire salary. However, some amount has been paid treating them as International Workers and the appellant is entitled to refund of the said amount. It was also pleaded that the allowances pointed out by the EO, fall outside the ambit of section 2(b) of the Act to be computed as basic wage. With this the appellant has taken a stand that the respondent authority has passed a whimsical

and unreasoned order which is liable to be set aside. The appellant has further stated in the memo of appeal that it being a law abiding company and to avoid future complication made deposit of the entire assessed amount during the pendency of the inquiry.

Being noticed the respondent appeared and filed a written reply. Besides pleading on the legislative intention behind the beneficial legislation it has been stated in the written reply that there is no dispute about the employment or eligibility of these International Workers employed by the establishment since, the establishment has already enrolled all of them as PF members under the International Workers category and since the date of their joining the contribution both employer and employee share on part of the salary has been deposited. The EO during his inquiry observed short compliance in respect of those international workers. The other stand taken by the respondent is that on a plain reading of Para83 of the EPF Scheme it is clear that an employee other than an Indian employee, holding a foreign passport shall fall in the category of International Worker. Since, there is a specific provision for the I.W, under Para 83 of the scheme which suffers no ambiguity, assistance of other statute cannot be taken for giving a interpretation to the said provision. It has also been stated that the appellant is required to make PF compliance in respect of International Worker at par with the Indian workers except the monetary ceiling of Rs. 15000/- as applicable in case of Indian workers. That means except the specifically excluded allowances Pf contribution is to be made in respect of the other allowances as in the case of Indian workers. The EO during inspection noticed splitting of the remuneration paid to the workers into different types of allowance. Since the appellant could not explain the reason behind payment of the said allowances, the EO recommended to include the same for the inquiry and assessment of the Pf liabilities. Those allowances paid to the international workers are nothing but the part of the emoluments paid to them and the statute provides for contribution of Pf dues in respect of all the emoluments paid to the international workers. It has also been explained that the EO during his inspection observed that the said allowances paid to the international workers was neither

variable nor linked with any effort/production resulting in greater output. Thus, the respondent has pleaded that the order passed by the commission doesn't suffers from any infirmity and no relief can be granted to the appellant.

The Ld. Counsel for both the parties advanced detail argument in support of their respective stand.

The Ld. Counsel for the appellant submitted that during the inquiry by the commissioner a dispute was raised with regard to the applicability in respect of the workers whom the department describes as International Workers. The commissioner a quasi judicial authority should have decided that aspect at the first instance. But the commissioner never decided the same, and on the contrary, made the assessment on the basic salary as well as the allowances paid in lieu of benefits like conveyance facility, hiring bonus etc. The payment of these allowances, special allowances, LTA etc were never the basic wage but the emoluments paid as CTC. Though the respondent department has issued a circular not to assess the liability u/s 7A as per the CTC, the respondent in gross violation of circular dated 18th March 2014 made the assessment solely accepting the report of the EO. He also argued that the assessment has been made on the basis of the judgment of the Hon'ble Supreme Court in the case of Vivekanad Vidya Mandir and Surya Roshni which cannot be applied retrospectively. He emphasized during argument on the point that the employees in respect of whom assessment has been made are OCI Card Holder and enjoy the right and privilege at par with the NRIs. Thus, they cannot be treated as International Workers and the assessment made on the basis of their total emolument is wrong.

The counter argument of the Ld. Counsel for the respondent is that the EO reported about the default in contribution made in respect of International Workers. The workers in respect of whom the assessment has been done are the International Workers as defined under Para 83(2)(ja)(b) of the EPF Scheme 1952. Under the provisions of Para 26 every employee employed in an establishment to which the scheme applies, other than an excluded employee shall

be entitled and required to become a member of the fund from the day this paragraph comes into force in such factory or other establishment. Para 83 defines the excluded employees. Since, the workers who were employed by the appellant and identified during the inquiry by the EO were found to be the persons other than Indian citizen holding a foreign passport, the commissioner rightly assessed and directed for payment of the differential contribution on their total emoluments. He also argued that the commissioner in the impugned order has rendered a finding on the objection raised by the appellant regarding the applicability of the Act to the said employees holding foreign passport. The other argument advanced by the respondent is that these workers are American citizens working in India. The PF Act is a complete code and does not recognize overseas Indians or (OCI) Card Holders as a separate category. With regard to the objection raised by the appellant that the special allowance and LTA were variable in nature the Ld. A/R for the respondent argued that during the inquiry the appellant establishment could not justify the same and hence, the order was rightly passed.

Whereas the Ld. Counsel for the appellant relied upon the judgments of **RPFC vs. Vivekanand Vidya Mandir (2020)17 SCC 515**, **Surya Roshni Limited vs. EPF decided on 28.02.2019** and **Manipal Higher Academy vs. Provident Fund Commissioner on 12th March 2008 decided by the Hon'ble Supreme Court** to argue that the commissioner in order to bring allowances under the fold of EPF liability has to primarily give a finding on the universality of payment of the same. In the impugned order no finding in that regard has been given by the commissioner. On the other hand the Ld. Counsel for the respondent has placed reliance in the case of **Sachin Vijay Desai vs. Union of India and 3 others on 7th August 2019** decided by the Hon'ble High Court of Bombay to argue that the constitutionality of Para 83 has been upheld by the Hon'ble High Court wherein no ceiling has been prescribed in case of International Workers. The Ld. Counsel for the appellant has relied upon the judgment of **Sorab Singh Gil vs. Union of India decided by the Hon'ble High Court of Punjab and Haryana in CWP No. 18093 of**

2009 to argue that Overseas Citizen of India, as per the definition of section 7A of the Citizenship Act have been conferred the rights at par with NRIs and the Government of India Ministry of Home Affairs vide Gazette Notification dated 11th April 2005 have notified the said Conferment. As such the workers for whom the assessment has been made are the Indian Workers in the capacity of OCI Card Holders. They being excluded employees for the ceiling of Rs. 15000/- on the basic wage no assessment can be made on their total emoluments and they are to be treated as excluded employees.

The argument advanced has made it imperative to decide the applicability on those workers who admittedly are not Indian workers and holding foreign passports. The facts in the case of Sorab Singh Gill referred supra are distinguishable from the facts of the present case. The admitted position is that if a person is holding a citizenship of a country other than India and having passport of the said other country he falls under the definition of International workers as per Para 83 of the Scheme. It is not disputed that the appellant has enrolled those employees holding foreign passports as member of the EPF and have made contribution irrespective of their salaries exceeding the statutory wage ceiling. Now the appellant has taken a stand that the said enrollment and deposit of Pf contribution were made by mistake and the appellant is entitled to get refund of the same. To support the argument the appellant has relied upon the provisions of section 7A and 7B of the Citizenship Act and the Gazette Notification dated 11th April 2005. In the case of Sorab Singh Gill referred supra the Hon'ble High Court of Punjab and Haryana have stated that the petitioner of that case who was born in USA in 19th August 1987, returned to India at the age of one year and persuaded and continuing his education in India and granted OCI status by Government Of India. Hence he is competent to participate for India in sport event like NRI since, all the facilities available to NRI is extended to the OCI Card Holders. But here is a different case. The employees are admittedly US citizen though recruited locally. To deal with the said category of employees a specific provision has been incorporated in the EPF Act and scheme which says that any person

who is not a citizen of India and holding a foreign passport shall fall under the category of International workers. Now it is to be seen if against the said specific provision of law available under the EPF and MP Act, can the provisions of Citizenship Act be considered for giving a meaningful interpretation to the issue of eligibility.

It is a decided principle of law that where a statute contains both general provision as well as specific provision, the latter must prevail. In other words where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control. Here the citizenship Act relied upon by the appellant refers to the General rights and privileges of the citizen and NRIs. But the EPF and MP Act is a special statute controlling the subject matter relating to the coverage of social security scheme and the conditions in which it can be extended to a person who is not a citizen of India. Hence, it would not be proper to gain support from the provisions of Citizenship Act to interpret the provisions of EPF and MP Act. The same view has been taken by the Hon'ble Supreme Court in the case of **Commercial Tax officer Rajasthan vs. M/s Binani Cement Ltd. and another, (2014) 3SCR1.** Thus, on consideration of the submission made by both the parties it is concluded that the employees of the appellant who are the OCI Card Holders, even though are otherwise entitled to the facilities granted to the NRIs, cannot be treated as excluded employees for the wage ceiling provided under the EPF and MP Act and scheme. The commissioner has rightly concluded that the employees who are not the citizen of India and holding foreign passports and enrolled as members of the Pf scheme are to get the benefits of Para 83 of the scheme and the employer is bound to make contribution on their total emoluments as prescribed under the Act and the Scheme.

The other objection of the appellant is with regard to the allowances and the ex-gratia paid by the employer to the employee which has been taken into the fold for computation by the EO. The Ld. Counsel for the appellant strenuously argued that the said allowances include the specialization allowance, LTA, conveyance

allowance, Special allowance, ex-gratia in lieu of allowance and allowances in lieu of the benefits. The commissioner took a wrong view of the matter and computed those allowances under the head of basic wage and thereby decided deficiency on the part of the appellant in remittance. In reply the Ld. Counsel for the respondent submitted that all the emoluments of the International workers come under the definition of basic wage earned by the said worker while on duty. Before the EO, and during the inquiry the appellant had not produced any document to show that these allowances were not being paid universally. Thus, the commissioner has appropriately passed the order. During course of argument the Ld. Counsel for the appellant pointed out that pursuant to the notice received from the EO during the inquiry on 27th July 2018 the detail salary sheet of international worker their appointment letter and the individual salary slips were produced. The copy of the correspondence and the documents have been placed on record. Not only that the appellant has also filed the photocopy of the correspondence made with the RPFC during the inquiry as annexure A-2 under which the salary slip of 33 International worker the list of such workers and the work agreement etc were produced. Pointing out to the said salary slips it was argued on behalf of the appellant that the allowances so paid where variable in nature and as decided by the Hon'ble Supreme Court in the case of Surya Roshni the foremost test for bringing those allowances under the fold for Pf Contribution is the universality test. But in this case these allowances though variable in nature the commissioner never considered the objection raised by the appellant in that regard and proceeded to decide the case whimsically. He thereby argued for setting aside the impugned order.

On a close and careful perusal of the documents relating to the emoluments of the international workers placed on record it is found that the allowances paid are not uniform but variable in nature. The commissioner has not rendered any specific finding as to why he considered all the allowances for PF contribution. That makes the impugned order a unreasoned and non speaking order. Hence, it is observed that the workers who are not the citizen of India and holding

foreign passports though are OCI Card Holders are the international workers and eligible to be members under the EPF Scheme and the order of the commissioner to that extent is correct. But it is held that the commissioner has not rendered any finding as to why he took all the allowances paid to the international workers into consideration for computation of the contribution when there is no order distinguishing the variable allowances and the allowances paid universally. To consider that aspect of the matter it is felt necessary to remand the matter to the commissioner for fresh adjudication. Hence, ordered.

ORDER

The appeal be and the same is allowed in part. The order passed by the commissioner holding the OCI Card Holders as international workers eligible to be members of the EPF Scheme is confirmed. But the order relating to computation of all the allowances for PF contribution is set aside. The matter is remanded to the commissioner to reconsider and reassess the allowances in respect of which PF Contribution is permissible and payable. The commissioner is directed to decide the matter as directed within 3 months from the date of receipt of the order as the entire assessed amount has already been deposited by the establishment, after giving due opportunity to the appellant to canvass its stand.

Presiding Officer

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-2/20/2019

M/s. Cadence Design Systems (India) Pvt. Ltd. Appellant

VS.

RPFC-1, Noida Respondent

ORDER DATED :-25/11/2022

Present:- Shri S. K Khanna, Ld. Counsels for the Appellant.
Shri S. N Mahanta, Ld. Counsel for the Respondent.

This appeal has been filed challenging the order passed u/s 7A of the EPF and MP Act wherein the appellant has been directed by the RPFC Noida to deposit Rs. 86,36,102/- towards the deficit PF dues of the employees deposited for the period 06/2018 to 03/2019.

The stand of the appellant according to the narratives in the appeal memo in short is that it is a Pvt. Ltd. company engaged in the business of providing tools, IP, Hardware and related expertise required for the electronics design chain. It has been duly covered under the EPF and MP Act for the subscription of the statutory dues of the employees. The appellant has employed some employees who are of Indian Origin but hold foreign passports. Under a mistaken understanding of the a relative provision of law, the appellant treated those workers of Indian Origin as International Workers and remitted contribution required under the EPF and MP Act on the salary of more than 15,000/- or 6500/- as applicable before. The Enforcement Officer

of the respondent conducted an inspection of the appellant establishment and submitted a report. In the said report the enforcement officer recommended for an inquiry u/s 7A of the Act in respect of the international workers with a preliminary observation that there is deficiency and short fall in the remittance. The respondent i.e. RPFC while acting on the said report issued summon dated 20.05.2019 calling upon the appellant establishment to participate in the inquiry to be held u/s 7A of the Act for determination of the dues in respect of the international worker for the period 06/2018 to 03/2019. The respondent appeared and participated in the inquiry. On 14.06.2019 the appellant was given a notice by the EO for production of records before him. In response thereto the appellant appeared and asked for supply of the earlier EO report dated 14.06.2019 on the basis of which the inquiry was initiated. In the written submission filed on 02.07.2019 the appellant apprised the respondent that under mistake of fact and law they have enrolled some employees as international workers and made the contribution in respect whom the department intends to assess the PF dues on the full pay of those employees by considering them as International Workers, though, infact, they are not international worker but Indian worker. They being the persons of Indian origin having recruited locally cannot be treated as International Workers. The appellant also submitted that the those employees in respect of whom inquiry has been initiated are excluded employee since drawing the basic wage more than 15000/- or 6500/- as applicable before. They not being the international workers as per the Para 83 of the EPF Scheme the appellant owes no liability for making contribution on their total salary. Therefore, in the submission dated 02.07.2019 the appellant requested the respondent to decide this issue relating to the applicability at the first instance and give a finding whether these workers are domestic workers or International Workers. The respondent instead of initiating the inquiry under Para 26-B of the EPF Scheme to ascertain the eligibility of the employees to be members under the scheme, arbitrarily and in violation of the Principles of Natural Justice proceeded with the inquiry. Without deciding the eligibility of the said employees and

without passing a reasoned order for rejecting the submission concluded the inquiry.

It has also been stated by the appellant that during the inquiry the departmental representative submitted the report on 14.06.2019 stating therein that the appellant is paying some allowances namely specialization allowance, LTA, conveyance allowance, special allowance, ex-gratia in lieu of allowance and allowances in lieu of benefit and that the said allowances being part of the basic wage attracts PF liability u/s 2(b) of the Act. The EO in his report also stated that the said allowances are treated to be basic wages since the appellant establishment could not explain as to why these allowances are being paid and the purpose behind payment of the same. The enforcement officer thereby while computing the dues had exceeded the scope of the inquiry as mentioned in the summon dated 20.05.2019 which was for inquiry in respect of the international workers. The appellant again filed a written submission dated 11.01.2019 disputing the EO'S report and reiterated that the scope of the inquiry cannot be enlarged basing upon the EO report. It was mentioned that the workers in respect of whom inquiry has been initiated are not international workers but Indian workers being the persons of Indian origin and have been hired locally. Not only that the said employees are the Overseas Citizen of India (OCI) card holders. As per the notification dated 11.04.2005 issued by the Government of India u/s 7B of the Citizenship Act 1955, such OCI card holders have the same right as available to the Non Resident Indians (NRI). Their pay structure is at par with the Indian workers. These persons being settled in India, are not the international workers within the meaning of Para 83 of EPF Scheme. The OCI Card Holders not being the International Workers, the appellant cannot be asked to make contribution on their entire salary. However, some amount has been paid treating them as International Workers and the appellant is entitled to refund of the said amount. It was also pleaded that the allowances pointed out by the EO, fall outside the ambit of section 2(b) of the Act to be computed as basic wage. With this the appellant has taken a stand that the respondent authority has passed a whimsical

and unreasoned order which is liable to be set aside. The appellant has further stated in the memo of appeal that it being a law abiding company and to avoid future complication made deposit of the entire assessed amount during the pendency of the inquiry.

Being noticed the respondent appeared and filed a written reply. Besides pleading on the legislative intention behind the beneficial legislation it has been stated in the written reply that there is no dispute about the employment or eligibility of these International Workers employed by the establishment since, the establishment has already enrolled all of them as PF members under the International Workers category and since the date of their joining the contribution both employer and employee share on part of the salary has been deposited. The EO during his inquiry observed short compliance in respect of those international workers. The other stand taken by the respondent is that on a plain reading of Para83 of the EPF Scheme it is clear that an employee other than an Indian employee, holding a foreign passport shall fall in the category of International Worker. Since, there is a specific provision for the I.W, under Para 83 of the scheme which suffers no ambiguity, assistance of other statute cannot be taken for giving a interpretation to the said provision. It has also been stated that the appellant is required to make PF compliance in respect of International Worker at par with the Indian workers except the monetary ceiling of Rs. 15000/- as applicable in case of Indian workers. That means except the specifically excluded allowances Pf contribution is to be made in respect of the other allowances as in the case of Indian workers. The EO during inspection noticed splitting of the remuneration paid to the workers into different types of allowance. Since the appellant could not explain the reason behind payment of the said allowances, the EO recommended to include the same for the inquiry and assessment of the Pf liabilities. Those allowances paid to the international workers are nothing but the part of the emoluments paid to them and the statute provides for contribution of Pf dues in respect of all the emoluments paid to the international workers. It has also been explained that the EO during his inspection observed that the said allowances paid to the international workers was neither

variable nor linked with any effort/production resulting in greater output. Thus, the respondent has pleaded that the order passed by the commission doesn't suffers from any infirmity and no relief can be granted to the appellant.

The Ld. Counsel for both the parties advanced detail argument in support of their respective stand.

The Ld. Counsel for the appellant submitted that during the inquiry by the commissioner a dispute was raised with regard to the applicability in respect of the workers whom the department describes as International Workers. The commissioner a quasi judicial authority should have decided that aspect at the first instance. But the commissioner never decided the same, and on the contrary, made the assessment on the basic salary as well as the allowances paid in lieu of benefits like conveyance facility, hiring bonus etc. The payment of these allowances, special allowances, LTA etc were never the basic wage but the emoluments paid as CTC. Though the respondent department has issued a circular not to assess the liability u/s 7A as per the CTC, the respondent in gross violation of circular dated 18th March 2014 made the assessment solely accepting the report of the EO. He also argued that the assessment has been made on the basis of the judgment of the Hon'ble Supreme Court in the case of Vivekanad Vidya Mandir and Surya Roshni which cannot be applied retrospectively. He emphasized during argument on the point that the employees in respect of whom assessment has been made are OCI Card Holder and enjoy the right and privilege at par with the NRIs. Thus, they cannot be treated as International Workers and the assessment made on the basis of their total emolument is wrong.

The counter argument of the Ld. Counsel for the respondent is that the EO reported about the default in contribution made in respect of International Workers. The workers in respect of whom the assessment has been done are the International Workers as defined under Para 83(2)(ja)(b) of the EPF Scheme 1952. Under the provisions of Para 26 every employee employed in an establishment to which the scheme applies, other than an excluded employee shall

be entitled and required to become a member of the fund from the day this paragraph comes into force in such factory or other establishment. Para 83 defines the excluded employees. Since, the workers who were employed by the appellant and identified during the inquiry by the EO were found to be the persons other than Indian citizen holding a foreign passport, the commissioner rightly assessed and directed for payment of the differential contribution on their total emoluments. He also argued that the commissioner in the impugned order has rendered a finding on the objection raised by the appellant regarding the applicability of the Act to the said employees holding foreign passport. The other argument advanced by the respondent is that these workers are American citizens working in India. The PF Act is a complete code and does not recognize overseas Indians or (OCI) Card Holders as a separate category. With regard to the objection raised by the appellant that the special allowance and LTA were variable in nature the Ld. A/R for the respondent argued that during the inquiry the appellant establishment could not justify the same and hence, the order was rightly passed.

Whereas the Ld. Counsel for the appellant relied upon the judgments of **RPFC vs. Vivekanand Vidya Mandir (2020)17 SCC 515**, **Surya Roshni Limited vs. EPF decided on 28.02.2019** and **Manipal Higher Academy vs. Provident Fund Commissioner on 12th March 2008 decided by the Hon'ble Supreme Court** to argue that the commissioner in order to bring allowances under the fold of EPF liability has to primarily give a finding on the universality of payment of the same. In the impugned order no finding in that regard has been given by the commissioner. On the other hand the Ld. Counsel for the respondent has placed reliance in the case of **Sachin Vijay Desai vs. Union of India and 3 others on 7th August 2019** decided by the Hon'ble High Court of Bombay to argue that the constitutionality of Para 83 has been upheld by the Hon'ble High Court wherein no ceiling has been prescribed in case of International Workers. The Ld. Counsel for the appellant has relied upon the judgment of **Sorab Singh Gil vs. Union of India decided by the Hon'ble High Court of Punjab and Haryana in CWP No. 18093 of**

2009 to argue that Overseas Citizen of India, as per the definition of section 7A of the Citizenship Act have been conferred the rights at par with NRIs and the Government of India Ministry of Home Affairs vide Gazette Notification dated 11th April 2005 have notified the said Conferment. As such the workers for whom the assessment has been made are the Indian Workers in the capacity of OCI Card Holders. They being excluded employees for the ceiling of Rs. 15000/- on the basic wage no assessment can be made on their total emoluments and they are to be treated as excluded employees.

The argument advanced has made it imperative to decide the applicability on those workers who admittedly are not Indian workers and holding foreign passports. The facts in the case of Sorab Singh Gill referred supra are distinguishable from the facts of the present case. The admitted position is that if a person is holding a citizenship of a country other than India and having passport of the said other country he falls under the definition of International workers as per Para 83 of the Scheme. It is not disputed that the appellant has enrolled those employees holding foreign passports as member of the EPF and have made contribution irrespective of their salaries exceeding the statutory wage ceiling. Now the appellant has taken a stand that the said enrollment and deposit of Pf contribution were made by mistake and the appellant is entitled to get refund of the same. To support the argument the appellant has relied upon the provisions of section 7A and 7B of the Citizenship Act and the Gazette Notification dated 11th April 2005. In the case of Sorab Singh Gill referred supra the Hon'ble High Court of Punjab and Haryana have stated that the petitioner of that case who was born in USA in 19th August 1987, returned to India at the age of one year and persuaded and continuing his education in India and granted OCI status by Government Of India. Hence he is competent to participate for India in sport event like NRI since, all the facilities available to NRI is extended to the OCI Card Holders. But here is a different case. The employees are admittedly US citizen though recruited locally. To deal with the said category of employees a specific provision has been incorporated in the EPF Act and scheme which says that any person

who is not a citizen of India and holding a foreign passport shall fall under the category of International workers. Now it is to be seen if against the said specific provision of law available under the EPF and MP Act, can the provisions of Citizenship Act be considered for giving a meaningful interpretation to the issue of eligibility.

It is a decided principle of law that where a statute contains both general provision as well as specific provision, the latter must prevail. In other words where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control. Here the citizenship Act relied upon by the appellant refers to the General rights and privileges of the citizen and NRIs. But the EPF and MP Act is a special statute controlling the subject matter relating to the coverage of social security scheme and the conditions in which it can be extended to a person who is not a citizen of India. Hence, it would not be proper to gain support from the provisions of Citizenship Act to interpret the provisions of EPF and MP Act. The same view has been taken by the Hon'ble Supreme Court in the case of **Commercial Tax officer Rajasthan vs. M/s Binani Cement Ltd. and another, (2014) 3SCR1.** Thus, on consideration of the submission made by both the parties it is concluded that the employees of the appellant who are the OCI Card Holders, even though are otherwise entitled to the facilities granted to the NRIs, cannot be treated as excluded employees for the wage ceiling provided under the EPF and MP Act and scheme. The commissioner has rightly concluded that the employees who are not the citizen of India and holding foreign passports and enrolled as members of the Pf scheme are to get the benefits of Para 83 of the scheme and the employer is bound to make contribution on their total emoluments as prescribed under the Act and the Scheme.

The other objection of the appellant is with regard to the allowances and the ex-gratia paid by the employer to the employee which has been taken into the fold for computation by the EO. The Ld. Counsel for the appellant strenuously argued that the said allowances include the specialization allowance, LTA, conveyance

allowance, Special allowance, ex-gratia in lieu of allowance and allowances in lieu of the benefits. The commissioner took a wrong view of the matter and computed those allowances under the head of basic wage and thereby decided deficiency on the part of the appellant in remittance. In reply the Ld. Counsel for the respondent submitted that all the emoluments of the International workers come under the definition of basic wage earned by the said worker while on duty. Before the EO, and during the inquiry the appellant had not produced any document to show that these allowances were not being paid universally. Thus, the commissioner has appropriately passed the order. During course of argument the Ld. Counsel for the appellant pointed out that pursuant to the notice received from the EO during the inquiry on 27th July 2018 the detail salary sheet of international worker their appointment letter and the individual salary slips were produced. The copy of the correspondence and the documents have been placed on record. Not only that the appellant has also filed the photocopy of the correspondence made with the RPFC during the inquiry as annexure A-2 under which the salary slip of 33 International worker the list of such workers and the work agreement etc were produced. Pointing out to the said salary slips it was argued on behalf of the appellant that the allowances so paid where variable in nature and as decided by the Hon'ble Supreme Court in the case of Surya Roshni the foremost test for bringing those allowances under the fold for Pf Contribution is the universality test. But in this case these allowances though variable in nature the commissioner never considered the objection raised by the appellant in that regard and proceeded to decide the case whimsically. He thereby argued for setting aside the impugned order.

On a close and careful perusal of the documents relating to the emoluments of the international workers placed on record it is found that the allowances paid are not uniform but variable in nature. The commissioner has not rendered any specific finding as to why he considered all the allowances for PF contribution. That makes the impugned order a unreasoned and non speaking order. Hence, it is observed that the workers who are not the citizen of India and holding

foreign passports though are OCI Card Holders are the international workers and eligible to be members under the EPF Scheme and the order of the commissioner to that extent is correct. But it is held that the commissioner has not rendered any finding as to why he took all the allowances paid to the international workers into consideration for computation of the contribution when there is no order distinguishing the variable allowances and the allowances paid universally. To consider that aspect of the matter it is felt necessary to remand the matter to the commissioner for fresh adjudication. Hence, ordered.

ORDER

The appeal be and the same is allowed in part. The order passed by the commissioner holding the OCI Card Holders as international workers eligible to be members of the EPF Scheme is confirmed. But the order relating to computation of all the allowances for PF contribution is set aside. The matter is remanded to the commissioner to reconsider and reassess the allowances in respect of which PF Contribution is permissible and payable. The commissioner is directed to decide the matter as directed within 3 months from the date of receipt of the order as the entire assessed amount has already been deposited by the establishment, after giving due opportunity to the appellant to canvass its stand.

Presiding Officer

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-2/13/2022

M/s. AA Foundation for Safety — Appellant

VS.

RPFC-Raipur (Chhattisgarh) — Respondent

ORDER DATED:- 25/11/2022

Present:- Shri S.P Arora & Shri Rajiv Arora, Ld. Counsels for the Appellant.
Shri B B Pradhan, Ld. Counsel for the respondent.

This order deals with the admission of the appeal and a separate petition filed by the appellant praying waiver of the condition prescribed u/s 7 O of the Act directing deposit of 75% of the assessed amount, as a pre condition for filing the appeal, for the reasons stated in the petitions.

Copy of the petition being served on the respondent, learned counsel Shri B B Pradhan appeared and participated in the hearing held on 27.09.2022. Perusal of the office note reveals that the impugned order u/s 7A was passed on 31.12.2021 by the RPFC-II Chhattisgarh and the appeal has been filed within time. In the impugned order passed u/s 7A of the Act the appellant has been directed to deposit Rs. 1533977 as the deficit Pf Contribution of its employees for the period February 2015 to March 2016. Being aggrieved the establishment had filed an application u/s 7B of the Act

praying review of the order dated 31.12.2021 which was rejected on 10.02.2022. Thereafter the appeal was filed on 21.04.2022. The office has pointed out that there is no delay in filing of the appeal.

The other petition filed by the appellant is for waiver/reduction of the pre deposit amount contemplated u/s 7O of the Act. The learned counsel for the appellant submitted that the impugned order has been passed without identifying the beneficiaries. It is an establishment engaged in providing manpower and housekeeping service it is also a partnership firm jointly operated and owned by highly decorated senior retired army officer. The partnership firm was awarded with a contract for providing manpower to AIIMS Raipur on 01.10.2015. The said contract was extended upto 30.11.2016. to facilitate compliance of the statutory deposits the appellant establishment primarily covered under the Act at Delhi also obtained a Code No. from the Regional Office of the respondent in the State of Chhattisgarh, District Raipur vide coverage letter dated 21.01.2016 w.e.f 01.02.2016. During the continuance of the contract the appellant was diligently making deposit of the PF Contribution of its employees. Post completion of the contract with AIIMS Raipur the appellant is still maintaining the local office at Raipur for any legal requirement and compliance of the PF dues. The respondent on the basis of some complaint received from the persons employed at Airforce Bal Bharti School Lodhi Road and one Rajnish Kumar working with AIIMS Raipur and on receipt of a correspondence from RO Delhi North initiated the inquiry u/s 7A of the Act. The showcause notice received from the respondent was replied by letter dated 19.12.2019. The inquiry continued but the appellant never received the notice u/s 7A. On 15.03.2021 the enforcement officer submitted his deposition which was taken on record on 29.03.2021. But the said deposition was never supplied to the appellant. On the basis of the said deposition the commissioner passed the impugned order without assigning any reason and without identifying the beneficiaries. The appellant though filed a review application u/s 7B of the Act the same was arbitrarily rejected by order dated 10.02.2022 the said order was received by the appellant on 16.02.2022. Surprisingly before expiry of the appeal period the respondent initiated the recovery proceeding and attached the bank account of the appellant at Gurgaon. Being aggrieved the appellant filed this appeal in Delhi. The appellant has stated that the impugned order passed u/s 7A and 7B are illegal and opposed to the decided Principle of law.

The commissioner in gross violation of its own guidelines issued for initiation of inquiry only after receipt of actionable and verifiable information passed the impugned order without examining the complainants, without giving opportunity to the appellant establishment to rebut the complaints and without identifying the beneficiaries. This makes the order illegal and arbitrary and the appellant has a strong case to argue and fair chance of success. Insistence of the compliance of the provisions of section 7O shall be highly prejudicial. The entire determination being illegal is liable to be set aside and on the background of the same the tribunal should pass the order waiving the condition of pre deposit contemplated u/s 7O of the Act. He also argued that the commissioner has passed the impugned order on the basis of the EO report only by way of mathematical calculation. The other arguments advanced by the appellant are that the inquiry started in the year 2016 and continued till 2021. The branch of the appellant establishment at Chhattisgarh was closed in 2018 and all the records relating to Chhattisgarh where submitted before the commissioner. But the commissioner in the impugned order has made assessment in respect of the persons employed in its site at Chhattisgarh as well as in respect of the employees at other establishments of the appellant across the country for which the RPFC Chhattisgarh lacks territorial jurisdiction. He also pointed out that the assessment has been made in respect of HRA and overtime allowance which is not paid universally. Thereby the appellant submitted that the impugned order is illegal and not sustainable in the eye of law.

In reply the Ld. Counsel of the respondent while supporting the impugned order as a reasoned order pointed out the very purpose of the beneficial legislation and insisted for compliance of the provision of section 7O by depositing 75% of the assessed amount. The Ld. Counsel also cited the order passed by the Hon’ble High Court of Madras in the case of JBM Auto System Pvt. Ltd. vs. RPFC to submit that the tribunal cannot grant waiver in a routine manner which will have the effect of defeating the very purpose of the Act.

The commissioner in this case made the assessment on the basis of the deposition of the EO without paying least consideration to the submissions by the appellant establishment. In this regard reliance can be placed in the case of **Small Gauges Ltd &Others VS V P Ramlal APFC** decided by the Hon’ble High Court of Bombay, wherein it has

been held that unless the documents ,deposition, and calculation forming basis of the order are made available to the establishment, it cannot be said that the basic tenets of the principle of *audialterampartem* was followed.

Considering the submission advanced by the counsel for both the parties an order need to be passed on the compliance/waiver of the conditions laid under the provisions of sec 7-O of the Act. At the same time it need to be considered that the period of default in respect of which inquiry was initiated are from February 2015 to March 2016 and the amount assessed is 1533977/-.There is no mention in the order about the basis of the calculation arrived at and identification of the beneficiaries. Without going to the other details pointed out by the appellant challenging the order as arbitrary, and at this stage of admission without making a roving inquiry on the merits of the appeal, it is felt proper to pass an order keeping in view the principle decided in the case of **Small Gaudge Ltd.,** referred supra, as well as considering the grounds of the appeal, the period of default, the amount assessed. The courts and tribunals are obliged to adhere to the question of undue hardship when such a plea is raised before it.

But in this case from the facts pleaded, it is felt that the circumstances do not justify total waiver of the condition of pre deposit. But the ends of justice would be met by reducing the amount of the said pre deposit from 75% to 30%. Accordingly, the appellant is directed to deposit 30% of the assessed amount within 4 weeks from the date of this order towards compliance of the provisions of sec 7-O of the Act by way FDR in the name of the Registrar of CGIT initially for a period of one year with provision for auto renewal. On compliance of the above said direction, the appeal shall be admitted and there would be stay on execution of the impugned order till disposal of the appeal. List the matter on 12.01.2023 for compliance of the direction failing which the appeal shall stand dismissed. The interim order of stay granted on the previous date shall continue till the next date. Both parties be informed accordingly.

Presiding Officer

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-2/37/2022

M/s. Accuster Technology Pvt. Ltd. Appellant

VS.

RPFC, Gurgaon (W) Respondent

ORDER DATED :-25/11/2022

Present:- Shri Kamlesh Anand, Ld. Counsels for the Appellant.
Shri B B Pradhan, Ld. Counsel for the Respondent.

This order deals with the applications filed by the appellant for condonation of delay in filing the appeal and a separate application filed u/s 7O of the EPF and MP Act praying therein for waiver of the condition of pre deposit for admission of the appeal. The respondent has filed a written reply to the applications filed for condonation of delay alongwith some documents. Argument was heard at length on both the petitions.

The facts relevant for consideration of the application for condonation of delay is that the RPFC Gurgaon had passed an order dated 21.01.2022 u/s 7A of the Act against the appellant establishment assessing Rs. 55,77,627/-. It is alleged that the said order was never communicated to the appellant. On 06.07.2022 the appellant establishment received one email from the recovery wing of the EPFO, RO Gurgaon. The appellant immediately contacted his counsel and instructed him to do the needful and also supplied all the documents. But the advocate concern did not take any action and the respondent attached the bank account of the appellant on 21.09.2022.

The efforts made by the appellant to contact his advocate became futile and finding no other way the appellant filed the appeal challenging the recovery notice. The appellant has stated that there is admittedly delay in filing the appeal but the same is attributable to the respondent who failed to communicate the order and also to the advocate who did not file the appeal soon after the knowledge of the appellant. The registry of this tribunal raised objection with regard to the maintainability of the appeal challenging the recovery notice. Then the appellant verified the website of the respondent, downloaded the impugned order and filed the amended memo of appeal. Thus, the appellant for the first time came to know about the impugned order on 11.10.2022 when the order was downloaded and prior to that on 28.09.2022 when the bank account was freezed. Hence, the appellant has pleaded that the delay in filing the appeal is for reasons and circumstances beyond the control of the appellant. Unless for the bondafide mistake of the appellant, the delay would not be condoned serious prejudice shall be caused as the appeal involves valuable right of the appellant.

In the written reply the Ld. Counsel for the respondent has stated that the appellant was regularly appearing before the commissioner during the inquiry. On 18.01.2022 the A/R of the appellant was present before the commissioner conducting the inquiry and the amount proposed was explained to the appellant. Thereafter the matter was reserve for orders and on 21.01.2022 the order was passed. On 24.05.2022 the recovery officer issued notice of demand before attachment of the properties and the said notice was forwarded in the email address of the appellant registered in the Sharam Suvidha Portal. The order dated 21.01.2022 was uploaded in the website of the respondent and the demand notice was also uploaded in the same website. Since, the appeal has been filed on 07.10.2022 the same is hopelessly barred by limitation. Drawing the attention of the tribunal to Rule 7 of the appellate tribunal rules, the Ld. Counsel for the respondent argued that the tribunal has the power of condoning the limitation upto 120 days and not beyond that. To support his contention he has placed reliance in the case of **Saint Soldier**

Modern Sr. Sec. School vs. RPFC, 2014(18) SCT 609 and APFC vs. EPFAT 2006 (2) LLJ 388 decided by the Hon'ble High Court of Delhi and submitted that EPF and MP Act being a special legislation having its own procedure relating to limitation and condonation, the provisions of section 5 of Limitation Act doesn't apply. The delay beyond the prescribed period of 120 days cannot be condoned under any circumstance.

On perusal of the record it is found that the impugned order was passed on 21.01.2022 and as stated by the appellant he could know about the same when the recovery notice was sent on 06.07.2022 in his email address. He immediately filed the appeal. But for the objection of the registry searched the web portal of the respondent and could download the order on 11.10.2022 which is the date of knowledge of the impugned order. Hence the appeal is well within the limitation prescribed. To support his contention he has relied upon the case of **State of Punjab vs. Amar Singh Harika AIR 1966 SC 1313** and submitted that the actual date of knowledge is the date when the party gains knowledge on the grounds which had weighed with the respondent for passing the order. He thereby argued that the date of knowledge with regard to the recovery action is not the actual date of knowledge and the date on which the order was actually downloaded and the appellant got to know the reason for passing the order should be construed as the date of knowledge. If that date is accepted as the date of knowledge, the appeal is well within the period of limitation.

On behalf of the respondent no document has been placed to prove that the hard copy of the order was communicated to the appellant. However the respondent has stated that after the outbreak of pandemic the respondent has adopted the practice of uploading the day to day proceedings in the E-Proceeding Portal on daily basis. The daily proceedings of the inquiry as well as the final order passed u/s 7A were uploaded in the E-proceeding Portal. Not only that the respondent has filed printout of the uploaded proceedings and the final orders passed in the web portal of the EPFO. He has also filed

documents to prove that the daily orders of the recovery proceeding were uploaded.

The appellant has taken the only plea that neither the hard copy nor the soft copy of the order was ever communicated. It is the specific plea that on 25th May 2022 a notice of demand prior to attachment was sent via email to the accounts department of the appellant. On 06th July 2022 the recovery notice was sent to the managing Director of the appellant establishment. Thus, on 06th July for the first time the appellant came to know about the impugned order and after contacting the advocate within the 95 days filed the appeal. This stand of the appellant has been strongly objected to by the respondent who took a stand that the order was uploaded in the E-portal as well as communicated in the registered mail ID. Hence, the appeal is barred by limitation.

The appellant has failed to show that the order was not communicated in the registered mail Id. On the contrary the respondent has filed document to prove that the order was uploaded in the web portal on the same day when it was passed. The appellant cannot take protection with a plea that he could not know about the same. When at one point it has admitted that on 25th May 2022 a notice of demand prior to attachment was issued in the mail-id of its Account Section.

In the case of Saint Solder Modern Secondary School referred supra the Hon'ble High Court of Delhi have clearly held that the tribunal has no power to condone the delay beyond 120 days. Keeping the said principle in view it is held that the appeal has been filed beyond the prescribed period of limitation and the tribunal in absence of bonafide excuses is not empowered to condone the delay. The appeal cannot be admitted as barred by limitation. Since, the appeal is barred by limitation it is not felt proper to pass any order on the application filed u/s 7O of the Act.

The appeal is dismissed as barred by limitation.

Presiding Officer