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-2/28/2022

M/s. Rivigo Services — Appellant

VS.

RPFC Gurugram East — Respondent

ORDER DATED :-28/09/2022

Present:- Shri S.K Khanna, Ld. Counsel for the appellant.
Shri Chakardhar Panda, Ld. Counsel for the respondent.

This order deals with appellant's prayer for condonation of delay, admission of the appeal and stay on the execution of the impugned order pending disposal of the appeal.

The appeal challenges the order passed on 11/05/2022 u/s 7A determining an amount of Rs. 2,46,16,887/- as the EPF contribution of the employees omitted from being deposited for the period 10/2014 to 07/2018. Notice being served on the respondent, learned counsel Shri Chakardhar Panda appeared and participated in the hearing by filing a written reply to the application filed u/s 7O of the Act by the appellant.

Perusal of the record and office note of the registry reveals that the impugned order was passed on 11/05/2022 and the appeal has been filed on 18/07/2022, i.e beyond the period of limitation. Thus objection has been raised with regard to the maintainability of the appeal. Separate prayers have been made by the appellant for condonation of delay for the reasons explained therein. Another prayer has also been made for waiver of the condition for pre deposit and stay on the execution of the impugned orders passed u/s 7A of The Act pending disposal of the appeal. Appellant has filed several documents to support the stand taken in the appeal.

Since the registry has pointed out about the inordinate delay in filing of the appeal and Respondent's counsel took serious objection to the same, it is desirable that the prayer for condonation of delay be dealt at the first instance.

It has been contended that the establishment against which the impugned order has been passed was served with a summoned for

inquiry and the A/R of the establishment appeared and participated. That inquiry was on the basis of the report of the EO. The appellant could not file the appeal within 60 days since it tried to consult the concerned advocate. Moreover, the courts were closed for summer vacation. Hence, there was a delay of about 7 days in filing the appeal. The appellant has further stated that he has a good case on merit and if the delay would not be condoned serious prejudice shall be caused. He also pointed out that the tribunal has power to extend the period of limitation for further 60 days in appropriate cases. It is not disputed that the tribunal under the provisions of Rule 7(2) of the EPF Appellate Tribunal Rule has the power of extending the limitation upto 120 days. Since, there is only 7 days delay in filing the appeal it is felt proper to condone the delay. Accordingly the prayer for condonation of delay is allowed.

A separate petition has been filed u/s 7O of the Act praying waiver of the condition of pre deposit for admission of the appeal. While pointing out the defects and discrepancies in the impugned order including non application of mind and improper interpretation of the statute, he submitted that the appellant has a strong arguable case in the appeal and the Tribunal should not act in a hyper technical manner in dealing with the prayer for waiver of the condition of predeposit. The submission on facts is that the appellant is a establishment who has engaged a good number of drivers as pick and drop partner for transportation purpose. A summon dated 24.09.2018 was served for a 7A inquiry. The establishment representative appeared and produced all relevant documents indicating that it has been depositing the PF contribution of its employees diligently. A list of 12 contractors as independent establishment having PF code No. was placed on record during the inquiry to state that the drivers and other workers employed through those contractors are not the employees of the establishment. Hence, no PF contribution is detected from the salary of those workers for whom payment is being made to the contractors. It was also pointed out that in the EO report the liability under the EPF Act has been worked out illegally in respect of the drivers engaged as pick and drop partners and they are not the employees of the appellant company. It was also pointed out that these pick and drop partners have entered into an agreement to that effect with the appellant company as Principal to Principal. It was also stated that the said PDPs are not working exclusively with the appellants company and the company has engaged trainees who have not been enrolled as members of the PF. But none of the submissions of the appellant were considered neither the written submission. The report of the EO was not supplied. The commissioner by passing a very lengthy order but not considering the submission of the appellant concluded the liability of the establishment. The amount assesses is

exuberantly high and the appellant if would be directed to deposit 75% of the same as a pre condition for admission of the appeal serious prejudice shall be caused. Hence, the appellant has prayed for waiver/reduction of the pre deposit amount.

In his reply the learned counsel for the Respondent submitted about the legislative intention behind the beneficial legislation and argued that the establishment omitted to deposit the PF contribution of the employees for a pretty long period and the circumstances do not justify total waiver of the pre deposit. He also submitted that the appellant has entered into an agreement with the pre existing employees under the cover of PDPs to avoid PF liability. The commissioner had never accepted the EO report in toto and had applied his mind before coming to a conclusion. The impugned order is a well discussed and well reasoned order. Mr. Panda further argued that the appellant establishment for a pretty long period has avoided deposit of EPF contribution of employees. Reduction in the condition of Pre deposit and interim stay on the impugned order shall be prejudicial to the beneficiaries.

Of course the appellant strenuously canvassed the grounds of the appeal and the defects in the impugned order to make this tribunal believe at this stage about it's fair chance of success. But the Tribunal, at this stage is not expected to make a roving inquiry on the merit of the appeal when respondent is yet to file it's objection.

In this case the period of default as seen from the impugned order is long, and the amount assessed is equally big. Hence on hearing the argument advanced, it is held that the circumstances do not justify total waiver of the condition of pre deposit. But ends of justice would be served by reducing the same to 25% of the assessed amount. Accordingly it is directed that the appellant shall deposit 25% of the amount assessed by order dated 11/05/2022 towards compliance of the provisions of sec 7O of the Act by way of FDR in the name of the Registrar CGIT initially for a period of one year with provision of auto renewal, within six weeks from the date of communication of the order failing which the appeal shall not be admitted. On admission of the appeal the interim stay granted earlier shall continue till disposal of the appeal. Call on 15.11.2022 for compliance of the direction. Interim order of stay granted earlier shall continue till then.

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-2/35/2022

M/s. Brown Forman Worldwide LLC Appellant

VS.

RPFC, Gurgaon Respondent

ORDER DATED :-28.09.2022

Present:- Ms. Abhilasha Nautiyal, Ms. Binny Kalra & Ms. Aishwarya Kane, Ld. Counsels for the appellant.

Shri B. B Pradhan, Ld. Counsel for the Respondent.

The matter came up today for consideration on maintainability of the appeal. Perusal of the office note and the pleadings in the memo of appeal, showed that the appellant has challenged the communication dated 02/06/2022 received from the RPFC II Gurgaon, wherein the appellant establishment has been directed to submit the parawise compliance report to the observation made by the EO and to deposit Rs 4,87,22,957/- as worked out in the inspection report. A further direction has been given in the said communication dated 2/6/22 to deposit the said amount creating separate ECR and deposit the ECR and challan within 7 days from the date of receipt of the letter failing which action will be initiated to recover the dues.

Being aggrieved the establishment has filed the appeal.

On a bare reading of the communication dated 2/6/2022, it appears that the same is not an order passed by the commissioner u/s 7A, 7B, 7C or 14B of the EPF&MP Act, which can be challenged invoking the provisions of sec 7-I of the Act. Since the learned advocate for the establishment expressed apprehension about the

recovery action proposed, this Tribunal by order dated 26/09/2022 had directed for production of the LCR and also directed for appearance of any responsible official of the Respondent conversant with the matter to assist the Tribunal.

Today though the LCR has been filed no responsible official of the Respondent Department found present.

Perusal of the LCR shows that on 2/06/2022 the RPFC made a communication directing the establishment tomake deposit within 7 days. But on 18/7/2022 an EO has been deputed to make inquiry. It thus leads to a conclusion that the inquiry is in progress but an adhoc assessment has simultaneously been made and the department is taking steps for recovery of the said amount.

Even though the communication challengedis not an appealable order, the establishment has a reasonable apprehension about recovery of the said amount which is not the determined amount but only the proposed amount assed by the EO. The learned counsel for the Respondent Mr. B B Pradhan made a statement in court that the department shall not take any step towards recovery of the amount mentioned in the communication dated 2/06/2022 until the inquiry is completed and the amount payable by the establishment is determined.

The appeal as has been framed not being maintainable is dismissed without admission. LCR be returned.

Copy of this order be made available to both the parties for Dasti service.

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. 544(16)2016

M/s. Cosmique Pvt. Ltd. Appellant

VS.

APFC, Gurgaon Respondent

ORDER DATED :-28.09.2022

Present:- Shri S.P Arora & Sh. Rajiv Arora, Ld. Counsel for the appellant.
Shri Chakardhar Panda, Ld. Counsel for the Respondent.

This appeal challenges the composite orders passed by the RPFC Gurgaon on 01.03.2016 u/s 14B and 7Q of the EPF and MP Act 1952 (herein after referred to as the Act) levying damage and interest of Rs. 28,154/- and Rs. 18,961/- respectively on the appellant/establishment for the period from 02/01/2014 to 14.10.2015.

The plea of the appellant taken in this appeal is that it is an establishment duly covered under the provisions of the Act. Since the date of it's coverage, the establishment is diligent in deposit of PF dues of it's employees including compliance of different provisions of the Act. Notice dated 14.10.2015 along with statement showing delay in deposit of PF dues proposing levy of damage and interest was served on the appellant for the above said period. In the said show cause notice the appellant was directed to appear before the respondent on 02.11.2015. On the said day and thereafter the authorized representative of the appellant establishment appeared and raised dispute with regard to the method of calculation of the damage and interest and pointed out the anomalies. Not only that during the inquiry, it was submitted by filing a written representation raising various legal objections including the fact that the Respondent has initiated the inquiry belatedly for the reason that the appellant establishment deposited the PF dues proposed by the EO during the inspection. The authorized representative had also pointed out that the delayed remittance was not on account of any default at the instance of the appellant but for the inspection made by the EO. By filing the copy of the written representation which was submitted during the inquiry as Annexure A-3 the appellant has stated that the EO had made an inspection of the establishment on 24.03.2014 and reported that the establishment has omitted to make the PF contribution on the PF wages. He calculated an amount of Rs. 23,836/-. The

establishment in order to avoid future complication by challan dated 24.07.2014 deposited the said amount without prejudice to his future liability. But surprisingly respondent authorities considered the said deposit as delayed remittance and started the enquiry for damage and interest. The authorized representative of the establishment before the commissioner took a stand that the proposed damage and interest pertain to such deposits which were actually not on any wage paid by the establishment to the employees but for the report of the EO in which the beneficiaries were never identified. The amount deposited for the report of the EO is lying with the EPFO without being paid to any beneficiaries. But the commissioner took a wrong view of the matter and imposed damage and interest on the said amount. The order is patently illegal as the same does not contain any reason behind imposition of interest at the highest rate and for no discussion made on the mensrea of the appellant establishment behind such deposit as a delayed remittance. The commissioner in clear violation of the Principles of Natural Justice passed the impugned order wherein no finding on mensrea has been given. On that ground alone the order is illegal and liable to be set aside.

The counsel appearing on behalf of the respondent has filed a written reply objecting the stand taken by the appellant. Citing various judgments of the Hon'ble High Courts and the Apex Court he submitted that the proceeding for determination of damage and calculation of interest being a civil nature proceeding a finding on the mensrea is not the sine qua non. Thus the plea of the appellant is baseless and cannot be accepted. While placing reliance in the judgment of Hon'ble Supreme Court in the case of **Horticulture Experiment Station Gonikoppal, Coorg vs. RPFO Civil appeal No. 2136 of 2012 decided on 23rd February 2022** he argued that the Hon'ble Supreme Court in the said latest judgment have clearly held that mensrea is not an essential element for imposing penalty for breach of civil obligation. He has also relied upon the judgment of the Hon'ble High Court of Delhi in the case of **Birla Cotton Spinning and Waiving Mills Ltd. vs. Union of India ILR 1984 Delhi 60,** to argue that the provisions of section 14B has relevance only to the limit of the damage imposable and not to the power to impose damage which is distinct and is available the moment when the default is committed. He thereby rejected the argument of the appellant with regard to non existence of mensrea behind the delay in remittance.

The Ld. Counsel for the appellant during course of argument submitted that the RPFC at the first instance initiated the inquiry as soon as the establishment made the deposit as observed by the EO in his report. The mitigating circumstance explained in the written objection was not at all considered and no finding has been rendered

on the mensrea of the establishment behind the delayed remittance which in view of the judicial pronouncements makes the order illegal. He also argued that the commissioner has not assigned any reason as to why damage at the maximum rate was imposed when the commissioner has the discretion of reducing the same which is evident from the word "May" used in the section 14B of the Act. The impugned order passed u/s14B also suffers from patent illegality in as much as not considering the written submission of the establishment.

The Ld. Counsel for the appellant further argued that the commissioner in this case has imposed the damage at the maximum rate prescribed under the scheme. He was neither aware of the discretion vested on him nor has assigned any reason for arriving at such a decision. To support his contention he relied upon the judgment of **APFC vs. Ashram Madhyamik, 2007LLR1249** wherein the Hon'ble High Court of Madhya Pradesh have held that imposition of full damage is not compulsory and it is discretionary as understood from the word "May" used. Not only that the Hon'ble Supreme Court in the case of **ESIC vs. HMT Limited (2008ILLJ814SC)** have clearly pronounced after considering the Hindustan Times case that when a discretion was conferred on the statutory authority to levy penal damage the provision could not be construed as imperative. While pointing towards the written objection dated 02.11.2015 and 23.12.2015 filed by the establishment before the commissioner during the impugned inquiry, he argued that the said representation was containing all the pleas of the appellant in detail including misconception by the department with regard to the will full delay in remittance. But none of the same was considered and answered in the impugned order. He also argued that the establishment in its objection before the commissioner had clearly indicated about the mitigating circumstances but the commissioner while passing the impugned order failed to consider the same. Non consideration of the same makes the order again illegal. To support his contention reliance was placed in the case of M/s **Prestolite of India Ltd. vs. the Regional Director and other, AIR1994 Supreme Court, 521.**

On hearing the argument and on perusal of the impugned order it appears that the commissioner never accepted the objection with regard to the mitigating circumstances and, gave no finding in that regard. It is also evident from the record that during the inquiry the appellant establishment made deposit of the proposed damage and interest through challan and copy of the challans have been placed on record.

The Ld. Counsel for the appellant during course of argument forcefully argued that besides the objection raised during the inquiry the impugned order also suffers from the deficiency of reasoning which is the spirit of any administrative or judicial order. To support his argument he has placed reliance in the case of **Shri SwamiJi of Shri Admar Mutt etc vs. the Commissioner of Hindu Religious and Charitable Endownment, AIR 1980 SC, 1** wherein the Hon'ble Apex Court have held that "reason is the soul of law and when the reason of any particular law ceases, so does the law itself". The Ld. Counsel for the appellant further argued relying upon the judgments of the Hon'ble Supreme Court in the case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri & Others reported in (2014)15 S.C.C 263** and **DCW Employees Co-operative Canteen Pvt. Ltd vs. P.O.EPFAT,2018 LLR 672**, decided by the Hon'ble High Court of Madras, that mensrea is the factor to be considered for levy of damage. Unless existence of the mensrea is pleaded and established against the employer the levy of damage u/s 14B cannot be done automatically as every delay cannot be termed as willful or intentional delay and it depends on the facts and circumstances of each case. The adjudicating authority has to give a specific finding as to why the damage will be levied. He thereby argued that the impugned order which is not only a non speaking order also lacks the finding on mensrea. The Ld. Counsel for the appellant besides relying upon the judgments of Mcleod Russel and DCW Employees referred supra has also placed reliance in the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337.**

To counter this argument the Ld. Counsel for the respondent strenuously argued that the finding on mensrea is no more the required condition for levy of damage as has been held by the Hon'ble Supreme Court very recently in the case of **Horticulture Experiment Station Gonikoppal, Coorg vs. RPFC decided in Civil Appeal No.2136 of 2012 by order dated 23.02.2022.** He argued that in the case of Horticulture Experiment referred supra the Hon'ble Supreme Court have discussed and distinguished all the earlier judgments including **Organo Chemical Industries vs. UOI, ESI vs. HMT, Mcleod Russel vs. RPFC, APFC vs. the management of RSL Textile** and came to hold that the liability being for the breach of a civil obligation and the liability committed by the employer is a sine qua non for imposition of penalty/ damage the element of mensrea is not required. He thus, argued that the impugned order cannot be found with fault for want of finding on mensrea. He emphasized that the judgment of the Hon'ble Supreme Court in the case of Horticulture Experiment, referred supra being the latest judgment has the overriding effect on the earlier judgment of the bench of similar strength.

The argument advanced by the counsel for both the parties on the necessity of a finding on the mensrea before assessing penal damage and for the reliance placed by them on judgments of the Hon'ble SC having contradictory views, it is felt expedient to arrive at a decision as to which judgment, earlier or the later, is to be followed for reaching at a decision on the necessity of the finding on mensrea.

The admitted facts are that in the impugned order the commissioner has not rendered any finding on the mensrea. The learned counsel for the Respondent argued that the later judgment in this regard is to be followed and the Hon'ble SC in the latest judgment i.e Horticulture Experiment referred supra, have clearly held that mensrea or actus reus is not an essential element for imposing penalty or damage for breach of civil obligation and liability, and that the Hon'ble SC while passing the judgment in Horticulture Experiment have considered and distinguished the earlier judgments passed in **Mcleod Russel and RSL Textiles**. Not only that, the Hon'ble SC in the case of Horticulture Experiment have also observed that the Judgment of **ESI vs. HMT Ltd (2008)3SCC,35**, which was relied in the judgment of **Mcleod Russel and RSL Textiles** is not binding as the said judgment were passed considering the judgment of the division bench of the Hon'ble SC in the case of Dillip N Shroff and the judgment of Dillip N Shroff has been overruled by the Hon'ble SC in the case of **UOI vs. Dharmendra Textile Processors(2008)13, SCC 369**. The learned counsel for the Respondent Shri Rajesh Kumar, thus emphasized in his argument that all the earlier judgments governing the field being discussed and distinguished in Horticulture experiment, and the case of Dharmender Textile referred supra and relied in the judgment of Horticulture Experiment being the judgment delivered by a larger bench of three judges, is binding on the courts and Tribunals for deciding the necessity of a finding on mensrea while levying damage on breach of a civil obligation.

The counter argument advanced by Mr. Arora the learned counsel for the appellant is that the judgments passed in the cases of Mcleod Russel and Rsl Textiles are directly on the law relating to the provisions of EPF&MP Act and governing the field for a pretty long period. Those judgments were passed in the year 2014 and 2017 respectively by the division Bench of the Hon'ble SC comprising of two judges. A bench of similar strength cannot overrule the earlier judgment of the co ordinate bench. He also argued that over ruling of the judgment of Dillip N Shroff , relied in the case of Mecloed Russel ,shall not have the effect of automatically over ruling the later judgment unless the same is so done by a larger bench. He thus argued that the judgment and principle decided in the case of Mecloed Russel and RSL Textile still governs the field and the judgment of

Horticulture Experiment being the later judgment of the co ordinate bench, the earlier judgment in Mecloed Russel shall prevail.

To support his argument he has relied upon the judgments of the Hon'ble SC in the case of **Sandeep ku Bafna vs. State of Maharastra & others, AIR 2014 SC 1745** and submitted that the statement of law pronounced by a division bench is considered binding on the subsequent division bench of same strength or lesser no of Judges. If any contrary view is expressed by the said later bench, the same would fall in the category of per incuriam and the earlier judgment of the co ordinate bench shall prevail. He thereby argued that the view taken in **Mecloed Russel and RSL Textiles**, in respect of the finding on mensrea still governs the field being the earlier judgment of the coordinate bench. He has also placed reliance in the judgments of the Hon'ble SC in the case of **Union of India vs. Raghubir Singh(1989(2) SCC 754 Const Bench)**, **Chandra Prakash vs. State of UP (AIR2002 SC 1652 Const Bench)** and **Saha Faesal & others vs. Union of India(AIR 2020 SC 3601)** to argue that the constitution bench of the Hon'ble Apex Court have time again ruled that in order to promote consistency in the development of law and it's contemporary status, the statement of law by an earlier division bench is binding on the subsequent division bench of same or lesser no. of judges.

For the argument advanced by the counsel for both the parties with regard to the effect of the judgment passed by the Hon'ble SC in the case of Horticulture Experiment referred supra, the short and important question before this Tribunal is which judgment is to be accepted. At the cost of repetition, be it stated here that this Tribunal is not competent to examine the correctness of the judgments referred supra and is only required to take a decision as to which judgment is to be followed.

In the case of Raghubir Singh referred supra, the Hon'ble Constitution Bench of the Apex Court have held

Para 27-

> "There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India. It is in order to guard against the possibility of inconsistent decisions on point of law by different Division Benches, the rule has been evolved in order to promote consistency and certainty in the development of law and it's contemporary status, that the statement of law by a division bench is considered binding on the division Bench of similar strength or of lesser no of judges."

The same view was again taken by the Hon'ble SC in the case of **Chandra Prakash vs. State of UP (AIR 2002 SC 1652)** which has been relied by the learned counsel for both the parties. In the case of Chandra Prakash the view taken by the Apex court in the case of **Pradeep Candra Parija vs Pramod ku Patnaik h(2002 1 SCC 1)** has been followed.

Not only that, in the case of **Saha Faesal & others vs. Union of India (AIR 2020 SC 3601)**the Hon'ble bench of Five judges have held that

> **Para 23** "it is now a settled principle of law that the decision rendered by a co ordinate bench is binding on the subsequent bench of equal or lesser strength.
>
> **Para 31"** therefore the pertinent question before us is regarding the application of the "Rule of Per in curiam". This court while deciding Pranay Sethi case referred to an earlier decision rendered by a two judge bench in the case of **Sundeep Bafna vs. State of Maharastra (2014)16 SCC 623**,where in the application of the Rule of Per in curium was emphasized.

While considering the argument advanced, it is necessary to say that in the case of **Sundeep ku Bafna** referred supra the Hon'ble SC have clearly observed that

> "A decision or judgment can be per incuriam to any provision in a statute ,Rule or Regulation which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger bench, or if the decision of a high court is not in consonance with the views of this court. It must immediately be clarified that per-incuriam rule is strictly and correctly applicable to the ratio decidendi and not to the obiter dicta. It is often encountered in High Court orders that two or more mutually irreconcilable decisions of Supreme Court are cited at the bar. With him that the inviolable recourse is to apply the earlier view as the succeeding one would fall in the category of per incuriam.

On a careful reading of the judgments cited by the Ld. Counsel for both the parties it is found that when there are two judgments of coordinate bench where two contrary views have been taken, the earlier judgment shall be followed as the later judgment falls in the category of per incuriam. The argument of Mr. Rajesh Kumar Ld. Counsel for the respondent, that Horticulture Experiment judgment though has been delivered by a Division Bench having two judges, infact the case of Dharmender Textile referred supra delivered by a division bench of Hon'ble three judges have been discussed therein

and thus, it has a overruling effect on the earlier judgments in the case of Macleod Russel and R. S L Textile, does not sound convincing for the reason that the judgment of Dharmender Textile was not with relation to the EPF Act and the judgment of horticulture experiment has not overruled the judgment of Macleod Russel and RSL Textile. Thus applying the ratio in the case of Sandeep Kumar Bafna referred supra this tribunal is of the view that the earlier judgment of Macleod Russel and RSL Textile are to be followed for deciding the correctness of the order passed u/s 14B.

Now coming to the facts of the present appeal the forceful argument of the appellant is that the commissioner while deciding the liability for damage has not given any finding at all on the mensrea of the establishment behind the delayed remittance. He repeated his submission that the establishment came under the cover of the Act retrospectively from August 1992. Soon after the coverage an inquiry u/s 7A was initiated for the period August 1992l to March 2004. This created a huge financial burden on the establishment. But somehow or other the establishment made deposit of the deficit dues. When those dues pursuant to the inquiry were deposited the establishment should not have initiated an inquiry u/s 14B for that period for the reason that the delayed remittance was not for any fault of the appellant but for the assessment made by the department. This aspect was highlighted in the written submission filed during the inquiry, but the same was not answered by the commissioner. He thereby argued that the impugned order was passed without any reason and without any finding on mensrea and moreover no reason has been assigned for imposition of the interest at the highest rate.

It is also argued that the commissioner was neither aware of the discretion vested on him nor has assigned any reason for arriving at such a decision. In this regard reliance can be placed in the judgment of **APFC vs. Ashram Madhyamik, 2007LLR1249** wherein the Hon'ble High Court of Madhya Pradesh have held that imposition of full damage is not compulsory and it is discretionary as understood from the word "May" used. Not only that the Hon'ble Supreme Court in the case of **ESIC vs. HMT Limited (2008ILLJ814SC)** have clearly pronounced after considering the **Hindustan Times** case that, when a discretion was conferred on the statutory authority to levy penal damage, the provision could not be construed as imperative. While pointing towards the written objection filed by the establishment before the commissioner during the impugned inquiry, he argued that the said representation was containing all the pleas of the appellant in detail including miscalculation by the department with regard to the days of delay on account of the fact that the date of encashment of cheque was taken as the date of remittance. He also submitted that the grace period allowed by circular dated 13th January

1964 was not considered. This submission of the appellant was countered by the Respondent on the ground that the said circular stands withdrawn by the circular dated 08/12/2016. The learned counsel for the appellant challenged the applicability of the circular dated 08/12/2016 on the ground that the CPFC is not authorized to with draw a circular issued with the approval of the Govt. of India. In view of the said submission it appears that the commissioner made a mistake in calculating the days of delay by denying the grace period and by considering the date of encashment of the cheque as the actual date of deposit, instead of accepting the date of presentation of the cheque as the date of deposit.

The other argument of the appellant is with regard to mensrea. He strenuously argued that after the amendment of the EPF and MP Act since the word penal has been added before the damage u/s 14B, it has become obligatory for the inquiring authority to give a finding in respect of the mensrea of the establishment attracting imposition of penal damage. He 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 the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR** 337 to submit that the Hon'ble Apex Court held that absence of finding on mensrea makes the impugned order illegal and not sustainable in the eye of law. He also argued that the establishment in its objection before the commissioner had clearly indicated about the mitigating circumstances but the commissioner while passing the impugned order failed to consider the same. Non consideration of the same makes the order again illegal. To support his contention reliance was placed in the case of M/s **Prestolite of India Ltd. vs. the Regional Director and other, AIR1994 Supreme Court, 521.**

On hearing the argument and on perusal of the impugned order passed u/s 14B of the Act, it appears that the commissioner never accepted the objection with regard to the calculation of the damage and interest, gave no finding at all on the mensrea behind the delay in remittance nor considered the written objection filed by the establishment with regard to the miscalculation of days of default. On behalf of the appellant along with the appeal the office copy of the written submission submitted to the APFC has been filed wherein the establishment has stated in clear terms that after going through the statement attached to the notice they found some miscalculation with the regard to the number of days of default. But the impugned order nowhere reveals that a revised calculation was made or the said plea of the establishment was answered. On the contrary the commissioner observed that the establishment since could not produce the verified Bank statements, no revised calculation sheet could be prepared.

While observing so the commissioner had omitted to perform the authority vested in him as a quasi judicial authority to summon the relevant documents from the Bank. He rather closed the inquiry abruptly and without considering the objection taken by the establishment and without answering the same passed the cryptic order.

Thus, from the totality of the circumstances and the pleas canvassed in this appeal it clearly appears that the commissioner had passed the impugned order u/s 14B without application of mind and without giving due consideration to the various legal objection taken by the appellant and also failed to give a finding on mensrea which is sine qua non for imposition of penal damage. Thus it is held that the commissioner has committed patent illegality while passing the order u/s 14B of the Act and the said order cannot sustain in the eye of law. Hence, ordered.

ORDER

The appeal be and the same is allowed. The impugned order passed u/s 14B and 7Q of the EPF and MP Act is hereby set aside. Consign the record as per Rules.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/32/2019

M/s. Viraj Exports Pvt. Ltd. Appellant
Through None for the Appellant

Vs.

CBT, APFC, Noida Respondent
Through Sh. Narender Kumar, Ld. Counsel for the Respondent

ORDER DATED :- 28/09/2022

The Ld. Counsel for the Respondent filed the to the appeal. Taken on record. Accordingly, list the matter on 10.11.2022 for filing the Rejoinder the Ld. Counsel for the Appellant.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/18/2020

M/s. Bata India Ltd. Appellant
Through Sh.GyanPrakash,ProxyCounsel for the Appellant

Vs.

RPFC, Faridabad Respondent
Through None for the Respondent

ORDER DATED :- 28/09/2022

Due to paucity of time the matter could not be taken. List the matter on 06.12.2022 for final arguments.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/09/2021

M/s. Durable Doors & Windows Appellant
Through Sh. S.P. Arora & Sh. Rajiv Arora, Ld. Counsels for the Appellant

Vs.

APFC, Gurgaon Respondent
Through Sh. B.B. Pradhan, Ld. Counsel for the Respondent

ORDER DATED :- 28/09/2022

Due to paucity of time the matter could not be taken. List the matter on 06.12.2022 for final arguments.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/15/2021

M/s. BharosaTechnoserve Pvt. Ltd. Appellant
Through Sh. Deepak Grover, Ld. Counsel for the Appellant

Vs.

APFC, Gurugram(E) Respondent
Through Sh. B.B. Pradhan,Ld. Counsel for the Respondent

ORDER DATED :- 28/09/2022

Due to paucity of time the matter could not be taken. List the matter on 06.12.2022 for final arguments.

Presiding Officer