

**BEFORE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM
LABOUR COURT, DELHI**

194 (4) 2011

M/s Dolphin International Ltd. Vs. APFC, Delhi East.

Present: Sh. S.K. Gupta, Ld. Counsel for the Appellant
 Sh. S.N. Mahanta, Ld. Counsel for Respondent.

Order Dated-02.07.2025

1. A very short question involved in the present appeal is whether the professional retainers engaged by the appellant are eligible employees of the establishment, and the appellant establishment is liable to pay contribution to the PF.
2. The appellant has assailed the order passed by the Ld. RPFC dated 31.01.2010, wherein RPFC directed the appellant to deposit the assessed amount of Rs.1,60,868/- of PF dues. Ld. counsel for the appellant submitted that he was not given reasonable opportunity to represent his case before the respondent, which is mandatory u/s **7A (3) of the EPF & MP Act, 1952 (hereinafter referred as the Act)**. The Authority has been functioning in a "Dual Capacity" which is against the principles of natural justice and law. The proceedings against the respondent were wholly without jurisdiction and suffered from an error and there is misuse of jurisdiction, power and authority on part of the respondent. He further assailed the said order stating that under para **26B of the EPF Scheme, 1952 (hereinafter referred as the Scheme)**, the Assistant Provident Fund Commissioner has no jurisdiction to decide the issue of these Retainers u/s 7A of the Act. It can only be decided by the Regional Provident Fund Commissioner under paragraph 26 B of the scheme.
3. The appellant establishment also clearly stated before the respondent that the eligibility of the membership of the disputed retainers can only be examined by the RPFC under paragraph 26 B of the scheme, which is

explicitly clear by reading the legislation wording of 26 B of the scheme. He further stated that Enforcement officer has kept the report in his custody for more than three months and therefore, on the instruction of the APFC, has started bargaining with the employer and the EO report was submitted on 13.09.2010 which is unfounded. The order passed by the APFC be set aside.

4. Ld. Counsel for the respondent filed a reply of the said appeal stating that EPF Act is a legislation for providing social security work in any establishment engaging 20 or more persons. He submits that the appellant was found to be in default of complying the provisions of EPF & MP Act for the period of 11/05 to 03/06, 07/07, 04/08, 11/08 to 03/09, and proceedings u/s 7A of the Act were initiated.

5. The Enforcement officer, vide his report dated 06.09.2010, confirm that payment had been made. However, he found from the verification of the records produced by the establishment that the payments had been made to the persons on monthly basis, and the appellant is liable to pay the PF deduction. He submits that the appeal be dismissed. The Ld. APFC has rightly passed the order after considering all the pleas taken by the respondent herein.

6. I have heard the arguments at par and gone through the records. Before proceeding further, definition of “employees” as per section 2 (f) of the Act and Para 26 (B) of the Scheme are required to be reproduced herein.

Section 2 (f) “employee” means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of [an establishment], and who gets his wages directly or indirectly from the employer, [and includes any person—

(i) employed by or through a contractor in or in connection with the work of the establishment;

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(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;]

26-B.Resolution of doubts- If any question arises whether an employee is entitled or required to become or continue as a member, or as regards the date from which he is so entitled or required to become a member, the same shall be referred to the Regional Provident Fund Commissioner who shall decide the same.

Provided that both the employer and the employee shall be heard before passing any order in the matter.

7. In the present appeal, the proceeding was started by issuing of the notice dated 17.09.2010 mentioning therein that the establishment was in default for depositing the dues of 11/05 to 03/06, 07/07, 04/08, 11/08 to 03/09. The Enquiry officer, in his report, had already mentioned that the establishment had deposited the dues in time for all the periods. However, Enquiry Officer has started a new enquiry stating that from the verification of the record certain employees who were paid less than the prescribed limit has been designated as retainers and the appellant has not deducted the PF contribution. Representation has been made by the appellant in response to the enquiry wherein he has stated that these are the retainer which is not exclusively working in their establishment though they have been paid monthly payment. Moreover, TDS has been deducted as source u/s 194 J of the Income Tax Act because they have been doing their duty as professional who has not come with the definition of employee. However, APFC did not consider the above said fact and considered them eligible to become the member of the fund.

8. In this regard para 26B of the EPF scheme is important. It has empowered the Regional Provident Fund Commissioner only to decide the question whether an employee is entitled to, or required to become, or continue as a member or as to the date from which he is so entitled. The Assistant Provident Fund Commissioner himself has taken the view these are the employees who are getting the monthly payment prescribed under the PF limit, and as such they are eligible to become the member and the appellant establishment is liable to pay the PF on the said amount.

8. It is important to mention here that once there is a lot of evidence in regard to the three employees, namely Sh. Nihar Sharma, Ms. Lalita Sharma & Sh. Prakash Dave i.e. the Audited Balance sheet, Contract letter, and form 16 (where the Income tax has been deducted u/s 194 J) before concluding the proceedings, particularly when there is no complaint from any side, it was incumbent upon the respondent to call those persons and take statements regarding their professional qualifications and whether they served only with the appellant establishment or other establishment etc., however, it has not been done.

9. This tribunal vide order dated 27.03.2017, had called for the entire departmental case file pertaining to the appellant establishment because from the case file it has not been cleared whether the professional/retainers as claimed by the appellant were exclusively working for appellant establishment or not. Further, it has not been cleared whether employee share was ever deducted by the appellant establishment from the amount given to such retainers. The record at the time has also not been produced.

10. Trial court record has been produced by the order of this tribunal. Entire record does not speak anything regarding the fact about the professional qualification of the retainer or whether any contribution has ever been deducted by the employee.

11. Though, there is a pronouncement by the Apex Court that a retainer can be included within the definition of “employee” as per the Act, however, the facts are different therein. The retired employee for corporation has

been kept as retainer there and they have been labelled as professional only for the purpose of evading the PF contribution but here it has not been done so. The entire record is silent whether any EPF deduction has been made by the establishment ever to these three employees whose contribution has been sought by the respondent department. Respondent has not initiated any enquiry about their qualification or they have worked in other company by calling these person. Contract of appointment as well as TDS certificate where the Income Tax has been deducted towards professional fees along with the audited balance sheet establish that they have been professional and they cannot be labelled 'employee' as per the Act.

12. Further, provisions of Para 26 B of the Scheme empowers the Regional P.F. Commissioner only who shall decide the question whether an employee is entitled to or required to become or continue as a member. Here the documents suggest that there is a doubt about the professional retainer to be treated as 'employee' whose contribution has been sought. However, Id. Assistant PF Commissioner has himself decided the above issue which is not legal per-se.

13. In these circumstances, order passed by the Id. RPFC cannot be sustained. Appeal is allowed. Consequent thereto, the impugned order passed u/s 7A of the Act is set aside and recalled. 40% of the amount deposited by the appellant during the course of the appeal shall stand refunded by the Regional Provident Fund Commissioner within four weeks from passing of the order. Record of this file is consigned to the record room.

Sd/-

Atul Kumar Garg
(Presiding Officer)