

BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-2, MUMBAI

M/S. ACME HOUSING IND. PVT. LTD.,

MUMBAI

- APPELLANT

V/s.

ASSISTANT PROVIDENT FUND COMMISSIONER

MUMBAI.

- RESPONDENT

ORDER

Dated : 31st JANUARY 2020

Present: Mr. H.L. Chheda A/R for the Appellant.

Shri V.K. Wasnik, Advocate for the Respondent.

1. The present appeal is filed by the appellant to challenge the order dated 29.12.17 passed by Assistant Provident Fund Commissioner, EPFO, Mumbai – I levying the damages under section 14B of the EPF & MP Act, 1952 [hereinafter referred to as 'Act'] on account of the delayed remittances of EPF dues.

2. The respondent issued the summons jointly u/s. 7Q & 14B of the act to the estt. who is into the business of activities of building & construction. The enquiry was conducted and after thorough verification of entire records it has come to the conclusion that the act and scheme provisions shall be eligible to the estt. w.e.f. 1.4.02 in view of the fact that the employees employed by the appellant and the employees deployed by the contractors were exceeding 20 and above.

3. According to the appellant the respondent has issued corrigendum to coverage memorandum dt. 4.10.06 w.e.f. 1.4.02. As such the date of coverage of the appellant estt. is preponed from 1.4.06 to 1.4.02 u/s. 1 (3) (b) of the act under schedule head "building & construction". The appellant made compliance as per the calculations made by the squad of E.Os but then the impugned order as regards the levy of damages is not legal.

4. It is thus case of the appellant that the appellant has been denied first reasonable opportunity to show cause in mitigation specifically for pre-discovery period since the appellant was covered w.e.f. 1.4.02 by preponing the date of application of the act from 1.4.06 vide corrigendum order dt. 26.6.14 since no show cause notice was given to him.

5. It is then case of the appellant that the respondent Commissioner has ignored the circular issued by EPFO vide No. C-II Misc. Estt./4/15921 dt. 17.6.04 which provides that no damages shall be levied for the pre-discovery period where code number was allotted by the EPFO belatedly and estt. was prevented from making remittances in the absence of code number allotted to it by EPFO.

6. It is thus case of the appellant that the respondent has passed the impugned order without considering the presence or absence of mens-rea and / or actus-reus which are determinative factors while determining the damages u/s. 14B.

7. It is then case of the appellant that the respondent Commissioner has been functioning in dwell capacity as prosecutor as well as quasi judicial authority since there was no representation or appearance from

EPFO dept. which is against the principles of natural justice. As such the order is non-speaking nor reasoned and without application of mind.

8. Learned Counsel appearing on behalf of the respondent opposed the appeal and stated that reasons assigned for delayed remittances are not sustainable and damages have been levied as per the rates prescribed under para 32 of EPF Scheme. It is stated that the estt. has belatedly deposited the contribution for the period 1.4.14 to 30.6.14 [default period 4/02 to 5/14]. Opportunity for personal hearing was given to the estt. However, no submission was made by the estt. despite sufficient opportunity given to the estt. The estt. is habitual defaulter as it has defaulted payment of contributions for several months after allocation of code number. As such the orders have been issued to the estt. to remit the dues of 14B & 7Q.

9. Learned Counsel for the respondent submitted that infact it is the employer's duty to put the scheme in operation immediately after the act becomes applicable to the estt. and as such the respondent after considering all the facts has passed the impugned order because the circular of the Head office has been withdrawn by subsequent circular dt. 13.2.09 and the damages are to be levied on pre-discovery period. Therefore the appellant is liable to pay damages and interest especially when it has been revealed that the estt. has already crossed its required employment strength above 19 i.e. 28 employees, 13 of company and 15 of contractors as on 1.4.02 to attract the provisions of act.

10. Heard counsels for the parties.

11. Main thrust of the appellant's submission is that in view of circular dt. 17.6.04 no damages shall be levied for the pre-discovery period where the code no. is allotted by the EPFO belatedly and estt. was prevented from making remittances in the absence of code no. allotted to it by EPFO. Therefore it is necessary to consider the effect of the circular dt. 17.6.04 and its withdrawal by another circular dt. 13.2.09. It is because as per circular dt. 13.2.09 the circular dt. 17.6.04 has been withdrawn prospectively. Relevant portion of the circular dt. 17.6.04 is as follows.

“The matter was discussed in detail by the CBT in its 165th procedure held on 3.12.2003. It has been decided that no damages shall be levied for the pre-discovery period where the code number was allotted belated by the EPFO and the establishment was prevented from remitting the contributions in the absence of a code number allotted to a by the EPFO. In order to have uniformity of approach by different filed offices and with a view to alleviate the difficulties experienced by the establishments, the following guidelines are issued in the matter of levy of damages in respect of establishment covered belatedly:

1. Levy of damages or workers share for pre-discovery period.	No damages shall be levied if the workers share for pre-discovery period has been waived.
2. Establishment which paid	No damages shall be

<p>dues within the time prescribed in the coverage notice.</p>	<p>levied, however, to compensate the interest loss to the EPFO only simple interest @ 12% p.a. shall be levied.</p>
<p>3. Establishment which paid PF dues beyond the date fixed in the coverage notice.</p>	<p>No damages shall be levied till the date of payment fixed in the coverage notice. Only simple interest @ 12% upto the date mentioned in the coverage letter and damages at appropriate rates for the period of delay beyond the date fixed in the coverage letter be levied.</p>
<p>4. Establishments which were having their own private PF system before coverage and who deposited the PF in banks or finance establishments.</p>	<p>Only difference of interest amount between 12% simple interest p.a. and the actual interest earned by the private PF shall be levied if the latter is less than 12% p.a. Beyond the date fixed in the coverage</p>

	notice. Damages shall be levied at the appropriate dates.
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However, the past cases already decided may not be reopened. To avoid confusion and inconvenience in the matter of remittance of PF dues where the establishments are covered belatedly, the coverage notices shall henceforth contained instructions that payments of P.F. contributions and allied dues shall be made within 15 days from the date of receipt of the coverage notice.”

12. It appears that in the first circular of exemption it was specifically observed that the PF authorities had received representations from many estts. against the levy of damages for the pre-discovery period that they were prevented from making remittance in the absence of code no. allotted to them and various H.Cs also had taken strong exception to this and more particularly after introduction of section 7Q of the act. Circular records that CBT had decided that no damages should be levied for the pre-discovery period when the code no. was allotted belatedly and when the estt. was prevented from remitting the contributions in the absence of code no. and thus to bring out the uniformity of approach by field offices and to alleviate the difficulties experienced by the estts. certain guidelines were issued in the levy of damages in respect of estts. covered belatedly.

13. It appears that the case of the appellant falls in the category of cases covered in this circular especially when the respondent has issued

corrigendum to coverage memorandum dt. 4.10.06 conveying that the office has come to the conclusion that the appellant is coverable under the EPF & MP Act, 1952 w.e.f. 1.4.02. Thus the date of coverage of the appellant is pre-poned from 1.4.06 to 1.4.02 u/s. 1 (3) (b) of EPF & MP Act, 1952 under schedule head "Building & Construction".

14. However, the Learned Counsel for the respondent have tried to interpret the circular as applicable only to such cases where the code no. has been allotted belatedly by the EPFO. Submission is to the effect that the relevant notification dt. 17.6.04 has been withdrawn only w.e.f. 16.2.09 by the official notification dt. 13.2.09 and therefore the appellant cannot take any recourse of the same. Submission is to the effect that the damages may not be in the nature of imposing any punishment but that the proceedings initiated by the adjudicating officers entitled them to award damages and the obligation is caused upon the employer in making timely deposit of the PF contribution. In the context reliance is placed on the decision in case of HMT Ltd. reported in AIR – 2008 – SC – 132.

15. However, it is clear that the exemption given by circular dt. 17.6.04 was withdrawn prospectively by notification dt. 13.2.09. It has been specifically mentioned in the notification dt. 13.2.09 that the circular dt. 17.6.04 has been withdrawn prospectively w.e.f. 16.2.09. The word 'prospectively' appears to have been consciously used in the subsequent notification. If the PF authorities had mean to levy the damages in respect of pre-discovery period as well he authorities could make it very clear or atleast would not have mentioned the word 'prospectively'. Withdrawal of

earlier notification prospectively clearly means that the estt. would be required to pay damages only w.e.f. the date of withdrawal of earlier notification. So the benefit covered upon the estt. by the notification could not be taken away by subsequent notification that to in respect of period which was covered by earlier notification. These are the observations which I borrow from the decision of Hon'ble Kolkata H.C. in case of Kanchrapara, Harnett English medium School represented by its Chairman V/s. RPFC & Ors. – WP No. 21454 / 2010.

16. So far the facts of present case are concerned it clearly appears that the respondent has levied the damages for the period from 4/02 to 5/14 without giving any such benefit of exemption from paying damages as was conferred by the circular dt. 17.6.04 and the subsequent circular withdrawing the earlier circular prospectively w.e.f. 16.2.09. In my considered view the appellant is entitled to benefit of exemption of these circulars since the subsequent circular withdrawing the earlier circular prospectively w.e.f. 16.2.09 cannot take away the benefit which was granted earlier.

17. Learned Counsel for the respondent has placed reliance on the decision in case of Elegant Garments V/s. RPFC – 2007 – II – CLR – 20 – Division Bench Madras in which it has been held that law is supposed to be complied on its own by the employers irrespective of allotment of code no. and if required under the separate a/c. In that case the appellant estt. requested the respondent to allot PF code no. so as to enable the appellant to deduct the PF subscription from its employees but there was no reply.

In spite of best efforts taken by the appellant estt. the respondent failed to allot the code no. and after the exemption period eligible u/s. 16 (1) (b) of the act the appellant deducted the subscription from the employees who were eligible to become members under the act and kept money in the bank. So it was the case of the appellant and due to delay in allotment of code no. the appellant has not remitted EPF contributions and respondent having delayed the allotment of code no. is not justified in imposing the levy of damages on the appellant. In the circumstances it was considered that the delay in allotment of code no. will not ground for non-remittance as other alternate mode of payments are available particularly the appellant could have remitted the PF contributions amount in separate a/c. As such the facts in the present case are quite distinct & distinguishable since there is no issue as regards the benefits of exemption from paying damages as was conferred by the circular dt. 16.6.04.

18. As against the Learned Counsel for the appellant submitted that the respondent while passing the impugned order has not considered the mitigating circumstances such as presence or absence of mens-rea / and or actus-reus which are determinative factors in imposing damages u/s. 14B. In the context reliance is placed on the decision in case of APFC, EPFO & Ors. V/s. Management of RSL Textile India P. Ltd. – MANU / SC / 0028 / 2017.

19. Considering all these facts I find that the impugned order is not legal and proper especially when the appellant is entitled to the benefit of exemption from paying damages as was conferred by the circular dt.

17.6.04 and subsequent circular withdrawing the earlier circular prospectively w.e.f. 16.2.09 cannot take away the benefit which was granted earlier. Hence the impugned order is liable to be set aside. Thus order.

- The appeal is allowed with no order as to costs.
- The impugned order is set aside.

20. The copy of order be sent to both the parties. File be consigned to the Record Room after due compliance.

Date: 31.01.2020

(M.V. Deshpande)
Presiding Officer
CGIT -2, Mumbai