

**BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT
INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI-1; ROOM NO 208,
ROUSE AVENUE DISTRICT COURT COMPLEX, NEW DELHI-110002.**

APPEAL NO. D-1/28/2020

M/s. GAPL Automotive Ltd.

Appellant

Through:- Sh. S.K. Gupta, Ld. Counsel for the Appellant

Vs.

APFC, Delhi(East)

Respondent

Through:- Sh. S.N. Mahanta, Ld. Counsel for the Respondent

ORDER DATED 09.11.2020

This appeal challenges the composite order passed by the APFC, Delhi on 13.12.2019, communicated to the appellant on 06.02.2020 u/s 14 B and 7Q of the EPF and MP Act 1952 (herein after referred to as The Act) levying damage of Rs 1,39,309/- u/s 14B and interest of Rs. 66,869/- u/s 7Q of The Act, on the appellant establishment for the period between 04 /96 to 03 /14. The plea of the appellant taken in this appeal is that it is a private Ltd Company in the name and style of GAPL Automotives Pvt Ltd. On 20.3.14, a notice was received from the APF Commissioner Delhi, proposing an inquiry for the alleged delay in remittance of PF dues of its employees for the above mentioned period. In response to the same, the representative of the appellant establishment appeared before the APFC and made submissions in defence. It was explained by placing documents that the delay had occurred due to delay in allotment of EPF code by the department. It was also explained that the delay was never intentional. But the respondent never took into consideration the stand taken by the establishment and the authority, as per his whim and fancy, passed the impugned order without taking into consideration the plea advanced by the establishment. The impugned order is neither based upon good reasoning nor the APFC has given his finding on the mens rea of the appellant for the alleged delay in remittance. Not only that the assessment of the damage and interest has been made for the pre-discovery period. Placing reliance on several judicial pronouncements, the appellant has taken a plea that the impugned order not being a speaking order, there being no discussion about mens rea and maximum amount of damage being imposed in a mechanical manner; the same is not sustainable and liable to be set aside. The other limb of the argument is that the delay in remittance is wholly attributable to the respondent and for the said delay the penal damage and interest cannot be fastened on the appellant. Describing the impugned orders passed by the APFC, the appellant has prayed for setting aside of the same.

The counsel appearing on behalf of the respondent, filed written reply taking a stand that on receipt of notice, though the representative of the establishment had appeared and took time to produce evidence and on the said prayer several adjournments were allowed, on later date the establishment could not justify the stand taken. On the contrary the proceeding was prolonged for about six years. While supporting the impugned order, he submitted that the provisions of sec 14B has been incorporated in the Act with the object of using the

same as a deterrent for the employer in making delay in deposit of PF dues. In this case the appellant establishment has admitted about its eligibility for coverage since 2010, but intentionally applied for the code in 2011. This clearly exhibits the mensrea of the establishment for the delay in remittance and the commissioner has passed a reasoned and speaking order which needs no interference by this Tribunal.

While replying the plea taken by the appellant regarding delay in allotment of code no he explained that the appellant establishment had made application for EPF Code on 28.02.2011, admitting its eligibility w.e.f. 01.10.2010 and the same was examined by the Department and allotted w.e.f. 01.10.2010. This is a matter on record and within the knowledge of the establishment. But it defaulted in remittance and filing of monthly return. Thus an inquiry proceeding u/s 14 b and 7Q of the Act was initiated and the order was appropriately passed. Denying the stand of the appellant about the composite order passed, he submitted that the commissioner has passed two separate and distinct orders u/s 14 B and 7 Q of the Act. The order passed u/s 7Q not being appealable the appeal is not maintainable and liable to be dismissed. He also submitted that the commissioner has also given a clear finding on the mensrea of the appellant in the impugned order and the appellant is liable to pay the damage and interest as ordered.

Learned counsel for the appellant during course of argument submitted that APFC for imposing the damage, is required to take into consideration the mitigating circumstances shown by the appellant and give a finding about the mens rea of the establishment for a willful delay in payment. Impugned order is silent about these aspects and submission to that effect made by the appellant. To support his contention he placed Reliance in the case of McLeod Russel India Limited versus regional provident fund commissioner, Jalpaiguri and others reported in in 2014SCC263, which was again discussed by the Honorable Supreme Court in the case of Assistant Provident Fund Commissioner versus Management of RSL Textiles India Pvt Ltd, reported in in 2017 LLR337, where Honorable Supreme Court have held that when there is no finding with regard to mensrea or actus reus, the order is not sustainable

The learned counsel for the appellant elaborated his argument by submitting that the establishment in this case had acted with all bonafide and submitted an application for allotment of EPF Code disclosing that it became eligible for enrollment w.e.f. 01.10.2010. Along with the application all documents and a cheque for Rs.50,000/- was submitted. Though, as per Rules and prevailing practice, the EPFO is required to provide the code No. within three working days, the respondent department omitted to take any action in this regard leading to filing of reminders by the establishment on 02.04.2011, 15.07.2011 and 17.12.2011. Office copies of the reminders have been placed on record. It is also submitted that the respondent took no action on the said reminders and no communication was received. On 25.02.2013 when the advocate of the appellant visited the office of the respondent could know about the allotment of the code no. Thus, making no further delay, the establishment made deposit of the EPF dues on 27.02.2013, 28.02.2013 and 25.03.2013. Thereby the learned counsel for the appellant urged that had the code no been allotted in time and the cheque of Rs.50,000/- been deposited towards the EPF contribution, it would not have been held liable for penal interest and damage. The delay being attributable to the respondent the levy of damage and penal interest is illegal and both the orders are liable to be set aside. To support his contention the learned counsel for the appellant has placed reliance in the case of **Poona Shims Pvt Ltd VS**

B.P.Ramaiah, RPFC,2007(112)FLR,1196,decided by the Hon'ble High Court of Bombay, wherein it has been held that

“Provident fund authorities can not seek to levy damages for the default which have occurred for their own lapses. Had the code no been allotted to the petitioner immediately after the infancy period was complete, the petitioner would have deposited or remitted the provident fund contribution to the scheme. Not having done so,the provident fund authorities can not levy damages for their own negligence”

In the present case no evidence has been shown by the respondent as to when the code no. was allotted to the establishment, though it has been stated in the written reply of the respondent that the code was allotted w.e.f. 01.10.2010. On the contrary the establishment has placed on record several documents like RTI Application submitted to get information regarding the date of allotment of the code No. and how the delay in providing the code number was instrumental for delayed remittance. It is a matter on record that the code number was allotted to the establishment after the establishment volunteered for the same and it was made applicable with effect from 01.10.2010. In this case the order passed by the APFC has dealt with the objection raised by the representative of the establishment and came to a conclusion that the plea taken by the establishment is not worthy of acceptance as the establishment had the knowledge of its eligibility since 2010, but applied for the code in 2011 only. This action of the appellant depicts its intention to avoid remittance of contribution and makes it liable for the penal damage and interest. The reason assigned in the impugned order by the APFC does not appeal to, the conscience since the fault if any committed by the establishment has been overlapped by the respondent department by not providing the code no immediately. It is also noticed from the impugned order that the APFC at one point of time has observed that the establishment is liable to penal damage from 1.10.2010 i.e. from the date of allotment of the code no. But surprisingly, he passed the order concluding that the establishment is liable to pay damage and interest for the period 04/96 to 03/14. This order of the commissioner imposing damage and interest for the pre discovery period clearly depicts the non application of mind by him making the order passed in a quasi judicial proceeding illegal.

As seen from the record, appellant is a private limited company dealing with several employees. It voluntarily came under the fold of EPF and MP Act. It is worth mentioning that neither the order of the APFC, nor the reply given by the respondent in the appeal shows the date when the code was allotted to the establishment. It is also noticed from the documents placed on record that the appellant had made all possible effort to know the date of allotment of the code no. it is a fact noticeable that without the code no the establishment can not effectively make deposit of the statutory contributions. The record shows that the proceeding was adjourned several times, thereby giving opportunity to the respondent to place evidence regarding allotment of code no for proper appreciation of the mitigating circumstances as pleaded by the appellant. But the respondent never availed the same.

Hence, considering the argument advanced and for reasons indicated in the preceding paragraphs this tribunal comes to a conclusion that the delay in remittance of EPF dues by the appellant is attributable to the respondent on account of non allotment of code no in time and non deposit of the cheque deposited by the appellant.

Before parting it is pertinent to mention that the appellant had approached the Hon'ble High Court of Delhi in WPC no 5864/2020, challenging the order dated 30th July 2020, passed by this Tribunal. The Hon'ble Court in the order dated 01.09.2020 have directed this Tribunal to pass a comprehensive order on merit and on the grievance in respect of the order dated 30th July passed in this appeal and on the leviability of damage and interest. The learned counsel Mr Mahanta representing the respondent took serious objection and submitted that the order passed u/s 7Q of the Act is not appealable before this Tribunal and any order passed in respect of the same would be without jurisdiction and illegal. He has relied upon the judgment of the Apex court and Hon'ble High Court of Gauhati in the case of **ShriLhousakhotou Vimero VS The state of Nagaland in WPC no30(k) 2016**. Denying the stand taken by the appellant that a composite order was passed by the commissioner he pointed out that two separate orders have been passed by the commissioner and the appellant has challenged the order imposing damage only as stated by it in para 2 of the appeal memo. He has also places reliance in the case of **M/S Arcot Textile Mills Ltd VS The RPFC and others** decided by the Hon'ble Supreme Court to submit that when two separate orders have been passed, those cannot be construed as a composite order and the Tribunal in its appellate power cannot adjudicate the legality of the order passed u/s 7Q of the Act.

On considering the submissions made by the counsel for both the parties and on a careful perusal of the materials placed on record and on a mindful reading of the judgments cited by both the parties it is concluded that the commissioner had passed the impugned order without considering the mitigating circumstance i.e. delay in allotment of code no and levied damage for the pre discovery period which makes the impugned order passed u/s 14B illegal and liable to be set aside. The order passed u/s 7Q imposing penal interest is not appealable before this Tribunal under the provisions of sec 7 I of the Act. Hence, ordered:-

ORDER

The Appeal be and the same is allowed on contest and the impugned order passed u/s 14 B of the Act levying damage is hereby set aside. The appellant is at liberty of challenging the order passed u/s 7Q of the Act in the appropriate forum. Consign the record as per rule and procedure.


(Pranita Mohanty)
Presiding Officer