BEFORE THE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE AVENUE, DISTRICT COURT COMPLEX, DELHI.

Present:

Smt. PranitaMohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

ATANo. 670(14) 2016

M/s Kriti Metform Ltd. Appellant

VS.

APFC,Noida Respondent

ORDER DATED –14/02/2023

Present:- Shri S.K.Khana, Ld. Counsel for the Appellant.
Shri Narender Kumar, Ld. Counsel for the Respondent.

This appeal challenges the orders passed by the APFC Noida on 28/10/2015, 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 1,34,568/- and Rs 69,939/-respectively, on the appellant/establishment for the period 04/2013 to 07/2015.

The plea of the appellant taken in this appeal is that it is an establishment engaged in the business of manufacturing of dyes and tools. Since the date of it's coverage , the establishment was diligent in deposit of PF dues of it's employees including compliance of different provisions of the Act. Notice dt30/09/2015was issued by the Respondent to show cause as to why damage and interest for belated deposit of PF dueswould not be assessed. Having come to know about the issue of notice from e mail, the AR of the establishment appeared and apprised that the notice has not been received. On 30/09/2015, for

the first time he received the copy of the notice. On verification of the notice and the calculation sheet attached, it could be noticed that the inquiry has been proposed for the period 01/04/1996 to 30/09/2015, though the appellant had already paid the damage and interest for the period 05/2010 to 03/2013. A written submission was also filed on 06/10/2015 was also filed. On the basis of the said submission, the respondent revised the period of inquiry to 04/2013 to 07/2015 On the next date of inquiry 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 including the fact that the calculation has been made taking into consideration the date of encashment of the cheque instead of the date of the date of presentation of the same. Not only that, during the inquiry various legal objections including the mitigating circumstances behind the delay was pointed out. Oral submissions were made with regard to the loss in business. But the commissioner without considering the mitigating circumstances and without giving proper opportunity to the appellant for proving its bonafides for the default, abruptly closed the inquiry and passed the impugned order without application of mind. The impugned order was passed in contravention of the principle of law pronounced by the Hon'ble SC in the case of McleodRussel India Ltd vs RPFC, Jalpaiguri that money due from an employer would have to be calculated under sec 7A, and in the event of default or neglect of the employer is contumacious and contains the requisite mensrea and actus reus, yet another exercise of computation has to be under taken u/s 14B of the Act. Not only that the Principle of Natural Justice were flaunted and the inquiry was hurriedly concluded. While pointing out various legal aspects and the position of law settled by the Apex Court and different High Courts, the appellant has pleaded that the impugned order is liable to be set aside on various legal grounds as has been stated in the appeal memo.

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 e Appex Court and other High Courts, he

submitted that the EPF Act and the EPF Scheme is meant to take care of a situation where default caused by the employer is disadvantageous to the employee. The provision also aims at deterring the employer from causing the delay in future.

He also submitted that several adjournments were allowed to the appellant during the inquiry who was arguing for waiver of the damage on the ground that there was no intentional delay in remittance of the PF dues. Not only that the establishment also did not produce any document supporting the mitigating circumstances pleaded orally. Thus, the commissioner has passed a well reasoned and speaking order on the basis of the materials available during the inquiry. The learned counsel for the respondent thus argued that the impugned order does not entail interference.

On hearing the argument advanced by the counsel for both the parties, it is found that the appellant by filing a written submission during the inquiry, had taken a stand that the calculation sheet attached with the notice is wrong as there is a overlapping in respect of the period of inquiry. Another objection was taken with regard to the date of payment as calculated by the respondent. It is the admitted position of both the parties and evident from the impugned order that that the said objection of the appellant establishment was considered and the period of inquiry was revised to exclude the period which was overlapping. Accordingly a revised calculation was supplied to the establishment during the inquiry. During course of argument of this appeal, the learned counsel pointed out that the commissioner, while passing the impugned order, in para 8 has observed that the calculation is made in respect of the period 04/2010 to 07/2015, which shows non application of mind by the adjudicating officer while passing the order as the period was revised to 04/2013 to 07/2015 during the inquiry, he also pointed out that 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. Thus the impugned order passed u/s14B suffers from patent illegality in as much as for not assigning reason for imposing interest at the highest rate and not giving a finding on mensrea.

The mistake evident in para 8 of the impugned order describing the period of inquiry as 04/2010 to07/2015 is a typographical error as in other part of the order the description of the period of inquiry and the calculation is in respect of 04/2013 to 07/2015.

In the written submission filed by the appellant during the inquiry, no stand was taken about the mitigating circumstances. The only dispute was about the period of inquiry and the dates of presentation of cheque. The period of inquiry as observed was modified. The appellant has filed a chart showing the months for which delayed remittance was considered along with the date of payment as per the SCN and the date of presentation of the cheque. The argument advanced by the appellant is that the date of presentation of the cheque if considered to be the date of payment, the calculation made for levy of damage and interest is wrong. This calculation of the appellant has not been disputed by the Respondent.

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 calculation sheet supplied along with the notice during the impugned inquiry,(annexture-A-2) he argued that the document contains in detail the miscalculation by the department with regard to the days of delay and the damage leviable. To pin point his argument he submitted that the day of presentation of the cheque should have been taken in to consideration and not the date of encashment. He thus argued that the mechanical approach of the commissioner in calculating and levying damage stands contrary to the discreation vested with him and the judgment of the Hon'ble Full bench of High Court of Delhi in the case of **Roma Henny Security Services Pvt. Ltd vs CBT, EPFO,2012(135)FLR799.**

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 **McleodRussel 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. But this argument of the learned counsel with regard to the mensrea is not accepted since from the impugned order it is clearly evident that the mitigating circumstances were not pleaded or canvased before the commissioner at all during the inquiry.

But it is evident from the order passed by the commissioner that in a mechanical manner he made the calculation of damage applying a mathematical method which makes the order illegal.In this regard ,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, nor gave a finding for arriving at a different conclusion. 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 rate of damage proposed. 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 closed the inquiry abruptly.

In a catena of decisions, the Hon'ble High Courts of different States and the Hon'ble Apex Court, it has been held that the Adjudicating Authority is not supposed to issue mechanical order and obliged to find out the real cause of delayed remittance before assessing the damage the damage.

In this context, the observation held by the High Court of Kerala in the case of ***Regional Provident Fund Commissioner Vs. Harrisons Malayalam Ltd. 2013 LLR 1083*** is relied upon, where in it has been held that para32Aof the scheme of the EPF&MP Act is only a guideline and not a rigid formula to be applied uniformly in all cases of delay in payment of contributions .But shall be applied objectively taking into account the reasons for delay pleaded by the defaulter and in appropriate cases lesser amount than what has been prescribed in para32A shall be imposed. The Hon'ble High Court of Madras was of the same view in the case of ***Terrace Estates, Unit of United Plantation Ltd. Vs. APFC, Coimbatore 2010 LAB IC 252***. It has been again observed that para32A of the EPF Scheme can be termed only as guideline and it cannot be stated that the authority can pass the order mechanically applying the regulations. As such, the statute

when says that the Statutory Authority "**may recover**" the same necessarily means that there is an expressed discretion vested with the Adjudicating Authority (Respondent) to consider the matter in issue from every possible aspect before assessing the damage. Undoubtedly, here the Respondent- the Adjudicating Authority none else the Assistant P.F. Commissioner had failed to appreciate the miscalculation pointed out and proceeded to pass the order.

In this context, the Respondent though not found wrong in assessing damage on belated remittance, could have exercised his discretion, taking into consideration the date of presentation of the cheque instead of the date of the date of credit of the amount. But it is found that the Adjudicating Authority had not considered the objection taken by the appellant establishment during the inquiry and without exercising his discretion, mechanically assessed the damage at the upper limit as prescribed in the scheme.

In view of the facts discussed it is felt proper to reduce the assessed amount under 14B and to modify the impugned order accordingly. But the assessment for recovery under sec 7Q needs no interference

Hence, ordered.

ORDER

The appeal be and the same is allowed in part The impugned order passed u/s 14B of the EPF and MP Act is hereby modified to the extent that for the in accuracy of the calculation made by the commissioner the appellant shall pay 50% of the damage assessed along with the interest calculated in the impugned composite order. Any amount deposited by the appellant as a part of the assessed

amount u/s 14B shall be considered and adjusted towards the amount as payable, pursuant to this order.

Consign the record as per rules.

Presiding Officer
14th February, 2023