

**ATA No 03(9)2017 –EPFA80/2017**

**BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL NO.1,**

**MUMBAI**

**PRESENT**

**SMT.PRANITA MOHANTY**

**EPFA-80/2017**

**Parties:**

Pahwa & Pahwa Press Ltd : Appellant

Vs.

Asstt. Provident Fund Commissioner

Bandra : Respondent

**Appearance:**

For the Respondent : Ms.Ranjana Todankar, Adv

For the Appellant : Mr.Manoj Gujar, Adv.

Mumbai, dated the 22nd day of July 2022.

**ORDER**

This appeal challenges the composite order passed by the APFC, Bandra (east) on 11th Nov 2016,

communicated to the appellant on the same day u/s 14 B and 7Q of the EPF and MP Act 1952 (herein after referred to as The Act) levying Rs 67,383/- and Rs 34,459/- as damage and interest respectively u/s 14B and 7Q of The Act, on the appellant establishment for the period between 01/04/2013 to 30/09/2013.

The plea of the appellant taken in this appeal is that, it is a private Ltd Company engaged in the business of advertising and duly registered under the companies Act. Since October 1997 it is in to the business, at no point of time the employee strength was more than 10. However, with a view of safeguarding the interest of the low paid employees the appellant by letter dt 1<sup>st</sup> April 2012, had applied for voluntary coverage in terms of sec 1(4) of the EPF & MP Act. The EPFO after 15 months i.e on 2<sup>nd</sup> August 2013 allotted the code u/s 2A of the Act, but not u/s 1(4) as applied for. Before the said allotment the enforcement officer had visited the appellant establishment and convinced the appellant that for grant of the code no u/s 1(4) of the Act a

complicated and time taking procedure is to be taken up and a separate code no can be allotted under the original code no Pioneer Book Company Pvt Ltd, where Mr Rajib Pahwa , the director of the appellant establishment is also a director. On good faith the appellant agreed and the code no was allotted on 2<sup>nd</sup> AUG i.e.1<sup>st</sup> July 2111. The establishment along with it's application for voluntary coverage had submitted all the relevant documents including Balance sheet for preceding years to prove that it never had employed more than 10 employees at any point of time. How ever on 8<sup>th</sup> January2014, the enforcement officer visited the establishment and verified the records. Necessary co operation was rendered for verification of records by him. A copy of his visit note has been Annexed as A 6. The said visit of the enforcement officer was followed by the summon dt 26<sup>th</sup> August 2016, calling upon the appellant to participate in the inquiry proposed u/s 14B of the Act and justify as to why damage and interest shall not be levied for delayed remittance of the PF dues made between 1/04/2013 to 30/09/2013 in respect of

the employees. The appellant establishment though was not liable to be allotted a separate code no under the existing code no of the establishment The Pioneer Books, which has no functional integrity with the appellant establishment, as advised by the enforcement officer had to deposit the PF dues of it's employees from the date of coverage as mentioned in the coverage letter. It is the stand of the appellant that the delayed remittance between 1/04/2013 to 30/09/2013 was not for any ulterior intention but for the delay in allotment of the code no. the bonafide of the appellant establishment is evident from it's application for voluntary coverage , when it had employees less than 10 in no and the same was within the knowledge as the balance sheet for the preceding years were submitted along with the application for voluntary coverage. The appellant has taken the further stand that the establishment in response to the summon 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 as per his whim and fancy, passed the impugned order. 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 can not be fastened on the appellant. Describing the impugned orders passed by the APFC as a composite

order, 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 made its submission. But it could not justify the delay in remittance. 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 2011 by making deposits after allotment of code no, but intentionally applied for the code in 2013. 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. By placing reliance in the case of **Horticulture Experiment Station, Gonikoppal, Coorg vs RPF (civil Appeal No**

**2136/2012).** decided by the Hon'ble SC he submitted that finding on mensrea is no more sine qua non for assessing the damage.

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, admitting it's eligibility w.e.f April 2012 and the same was examined by the Department and allotted w.e.f 1.07. 2011. 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. He also submitted that the commissioner has also given a clear finding on the liability of the appellant for the damage and interest.

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 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 bonafides and submitted an application for allotment of EPF Code disclosing that it intends to extend the benefit to it's employees. Along with the application all documents and were 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 Office copy of the reminders on 1<sup>st</sup> December 2012 and 14<sup>th</sup> December 2012. Office copies of the same have been placed on record. It is also submitted that the respondent took no action on the said reminders and no communication was received until 2<sup>nd</sup> August 2013. Soon after the allotment of code no and without making further delay, the establishment made deposit of the EPF dues. Thereby the learned counsel for the appellant urged that had the code no been allotted in time, 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 it would have deposited or remitted the provident fund contribution to the scheme in time . Having not done so, the provident fund authorities can not levy damages for their own negligence”

In the present case no explanation has been offered by the respondent as to why delay occurred in allotment of code no. On the contrary the establishment has placed on record several documents like reminder 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 01.07.2011.

In this case the order passed by the APFC has nowhere dealt the objection raised by the establishment during inquiry. There is no finding as to why the objection taken is not worthy of acceptance or how the action of the establishment depicts its intention to avoid remittance of contribution making itself liable for the penal damage and interest. There being no reason assigned in the impugned order by the APFC, the same does not appeal to the conscience to hold the appellant liable for the penal damage, 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, nowhere has mentioned about the period in respect of which there was delay in remittance. The order only reads that the establishment is liable for damage on account of the deposit made between April 2013 to September 2013. But surprisingly, he made no

observation about the period of default which is the sole consideration for imposition of damage following the rate prescribed under the scheme. Instead , he passed the order concluding that 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. Thus this order of

the commissioner imposing damage and interest for the pre discovery period and at the highest rate prescribed under the scheme clearly depicts the non application of mind by him.

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 . More over, there is no finding in the impugned order about the period in respect of which delay in remittance occurred. The finding of the commissioner has the focus on the date of remittance only.

Before parting with this order, it is necessary to deal with the submission of the appellant with regard to the composite nature of the impugned order. The learned counsel placed reliance in the case of **M/S Arcot Textile Mills Ltd VS The RPFC and others** decided by the

Hon'ble SC , to submit that when a common order has been passed this Tribunal in exercise of it's appellate power can set aside both the orders for the illegality apparent. The order on a bare perusal appear to be a composite order. In the case of **M/S Ever Green Engineering Company Pvt Ltd vs EPFO(WPC No 12257/2015 decided on 09/08/2016) the Hon'ble High Court of Bombay** have held that “ when the appeal against the order u/s 14B is allowed in totality, the interest amount deposited u/s 7Q will have to be returned, since the same was in fact , out come of the order passed u/s 14B 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 judgements 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 without

mentioning the period of delay and default, 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 also held liable to be set aside for the reasons mentioned in the preceding paragraphs. Hence ordered.

### **ORDER**

The Appeal be and the same is allowed on contest and the impugned order passed u/s 14 B and 7Q of the Act levying damage and interest is hereby set aside. The appellant is at liberty of taking steps for refund of the amount if any, deposited pursuant to the passing of the order, set aside in this appeal.

PRESIDING OFFICER

CGIT-1, MUMBAI

