BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, ERNAKULAM

सत्यमेव जयते

Present: Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.

(Wednesday the 27th day of October,2021)

Appeal No. 399/2019
(Old No.ATA-1397(7)2015)

Appellant M/s. Sesame Software Solutions Pvt. Ltd
2nd floor, Meyon Building
Jail Road, Kozhikode
Kerala – 673 004.

By Adv. Jaimon Andrews

Respondent The Assistant PF Commissioner
EPFO, Sub Regional Office.
Eranhipalam
Calicut – 673006.

By Adv. (Dr.) Abraham P. Meachinkara

This case coming up for hearing on 26/07/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 27/10/2021 .

O R D E R

Present appeal is filed from order No. KR/ KK / 23856 / Enf-1 (4) / 2015-16 / 6951 dt. 28/09/2015 assessing dues U/s 7A of the Act of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') for evaded wages for the period from 11/2009 to 05/2015. Total dues assessed is Rs. 11,56,518/-.

2. The appellant establishment is covered under the provisions of the Act and is regular in compliance. An Enforcement Officer of the respondent inspected the appellant establishment and gave an inspection report. Copy of the report is produced and marked as Annexure A1 (Colly). The Enforcement Officer calculated dues on voluntary payment made by the management to employees under travel allowance and special allowance which will not attract provident fund contribution. On the basis of the report of the Enforcement Officer the respondent authority issued a notice U/s 7A of the Act directing the appellant to appear and produce records on

04/09/2015. A true copy of the notice dt. 12/08/2015 is produced and marked as Annexure A2. At the time of hearing the representative of the appellant submitted a written reply to the respondent authority. True copies of the reply dt. 04/09/2015 along with coverage letter dt. 09/09/2015 is produced and marked as Annexure A3 (Colly). Ignoring the contentions of the appellant in the written statement the respondent authority issued the impugned order. The order of the respondent authority is mechanical and without applying her mind taking to account the facts and circumstances of this case. The impugned order is based only on the report of the Enforcement Officer. The respondent authority ought to have seen that the travelling allowance and special allowance are paid voluntarily by the appellant which will not form part of basic wages. The Hon'ble High Court of Madras in **Ramnathan Chettiar Jewellers Vs RPFC,** 1999 (81) FLR 599 held that special allowances paid purely out of management's will is not covered by basic wages and hence no contribution is payable. The Hon'ble High Court of Delhi in **Group 4 Security Guarding Ltd Vs EPF Appellate Tribunal,** 2012 (132) FLR 921 held that HRA , overtime allowance, bonus, commission, washing allowances etc cannot fall within the ambit of Sec 2(b) or Sec 6 of the Act.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act. The appellant establishment failed to remit the contribution as required under the provisions of Act and Schemes. An Enforcement Officer of the respondent organization during the routine inspection found that the appellant establishment is violating the provisions of the Act and Schemes to the extent that they are splitting the wages into various allowances and contributions is not being paid on the same on the ground that travelling allowance & special allowance will not attract provident fund deduction. Hence the

respondent initiated an enquiry U/s 7A of the Act. A representative of the appellant attended the hearing and submitted that travelling allowance & special allowance will not attract provident fund deduction. The respondent authority issued the impugned order after affording adequate opportunity to the appellant and after following the procedure prescribed U/s 7A of the Act. The Enforcement Officer submitted his report dt. 06/07/2015 and revised report dt. 07/08/2015 after verifying the original records maintained by the appellant establishment. The appellant never disputed the correctness of the figures reported by the Enforcement Officer and never produced any documents disputing the quantification of dues by the Enforcement Officer. In the instant case the appellant camouflaged the wages bifurcating a major portion of the wages as special allowance and travelling allowance only to escape remittance of provident fund contribution. It is settled law that other than the excluded allowances under 2(b) (2) of the Act, all other allowance will attract provident fund deduction.

4. The impugned order is issued assessing dues on escaped wages. According to the learned Counsel for the respondent the appellant establishment is evading provident fund contribution by splitting the wages into travelling allowance and special allowance. According to the appellant the special allowance and travelling allowance are paid to the employees as per the will of the appellant establishment which will not form part of basic wages.

> **Section 2(b)** : "**basic wages**" means all emoluments which are earned by an employee while on duty or(on leave or holidays with wages in either case) in accordance with the terms of contract of employment and which are paid or payable in cash to him, but does not include :
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> 1. Cash value of any food concession.

2. Any Dearness Allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living) HRA, overtime allowance, bonus, commission or any other similar allowances payable to the employee in respect of his employment or of work done in such employment.

3. Any present made by the employer.

Section 6: Contributions and matters which may be provided for in Schemes. The contribution which shall be paid by the employer to the funds shall be 10% of the basic wages, Dearness Allowance and retaining allowances if any, for the time being payable to each of the employee whether employed by him directly or by or through a contractor and the employees contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding 10% of his basic wages, Dearness Allowance, and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Section.

Provided that in its application to any establishment or class of establishment which the Central Government, after making such enquiry as it deems fit, may, by notification in the official gazette specified, this Section shall be subject to the modification that for the words 10%, at both the places where they occur, the word 12% shall be substituted.

Provided further that there where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding of such fraction to the nearest rupee half of a rupee , or quarter of a rupee.

Explanation 1– For the purpose of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

5. It can be seen that some of the allowances such as DA are excluded U/s 2b (ii) of the Act are included in Sec 6 of the Act. The confusion created by the above two Sections was a subject matter of litigation before various High Courts in the country. The Hon'ble Supreme Court of India in **Bridge & Roof Company Ltd Vs Union of India,** 1963 (3) SCR 978 considered the conflicting provisions in detail and finally evolved the tests to decide which are the components of wages which will form part of basic wages. According to the Hon'ble Supreme Court of India,

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages.

The Hon'ble Supreme Court of India ratified the above position in **Manipal Academy of Higher Education Vs PF Commission,** 2008(5)SCC 428. The above tests was against reiterated by the Hon'ble Supreme Court in **Kichha Sugar Company Limited Vs. Tarai Chini Mill Majzoor Union** 2014 (4) SCC 37. The Hon'ble Supreme Court of India examined all the above cases **in RPFC Vs Vivekananda Vidya Mandir and Others,** 2019 KHC 6257. In this case the Hon'ble Supreme Court considered whether travel allowance, canteen allowance, lunch incentive, special allowance, washing allowance, management allowance etc will form part of basic wages attracting PF deduction. After examining all the earlier decisions and also the facts of these cases the Hon'ble Supreme Court held that " the wage structure and the components of salary have been examined on facts, both by the authority and the Appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wages camouflage as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusion of the facts. The appeals by the establishments therefore merit no interference." The Hon'ble High Court of Kerala in a recent decision rendered on 15/10/2020 in the case of **EPF Organization Vs MS Raven Beck Solutions (India)**

Ltd, WPC No. 1750/2016, examined Sec 2(b) and 6 of the Act and also the decisions of the Hon'ble Supreme Court to conclude that

> " this makes it clear that uniform allowance, washing allowance, food allowance and travelling allowance, forms an integral part of basic wages and as such the amount paid by way of these allowance to the employees by the respondent establishment were liable to be included in basic wages for the purpose of assessment and deduction towards contribution to the provident fund. Splitting of the pay of its employees by the respondent establishment by classifying it as payable for uniform allowance, washing allowance, food allowance and travelling allowance certainly amounts to subterfuge

intended to avoid payment of provident fund contribution by the respondent establishment".

6. From the above discussion, it is clear that the appellant is liable to pay contribution on Conveyance allowance. In **Montage Enterprises Pvt. Ltd Vs EPFO,** 2011 LLR 867 (MP.DB) the Division Bench of the Hon'ble High Court of Madhya Pradesh held that conveyance and special allowance will form part of basic wages. In **RPFC West Bengal Vs. Vivekananda Vidya Mandir,** 2005 LLR 399 (Calcutta DB) the Division Bench of the Hon'ble High Court of Calcutta held that special allowance paid to the employees will form part of basic wages . This decision of the Hon'ble High Court of Calcutta was later approved by the Hon'ble Supreme Court in **RPFC Vs Vivekananda Vidya Mandir** (supra). In **Mangalore Ganesh Beedi Workers Vs APFC,** 2002 LIC 1578 (Kart.HC) the Hon'ble High Court of Karnataka held that special allowance paid to the employees

will form part of basic wages as it has no nexus with the extra work produced by the workers. In **Damodar Valley Corporation Bokaro Vs. Union of India,** 2015 LIC 3524 (Jharkhand HC) the Hon'ble High Court of Jharkhand held that special allowance paid to the employees will form part of basic wages.

From the above discussion it is very clear that travelling allowance and special allowance being paid to the employees by the appellant will form part of basic wages and therefore will attract provident fund deduction.

7. Considering the facts, circumstances pleadings and evidence in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer