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.

ATA No. 1065(4) 2015

M/s. Prime Services — Appellant

VS.

APFC, Delhi (N) — Respondent

ORDER DATED :-13/1/2022

Present:- Shri S. P Arora & Rajiv Arora, Ld. Counsel for the Appellant.
Shri. Rikesh Singh, Ld. Counsel for the Respondent.

This appeal challenges the orders passed by the APFC Delhi North on 20/8/ 2015 u/s 14B of the EPF and MP Act 1952 (herein after referred to as the Act) levying damage of Rs. 22,89,101/-on the appellant/establishment for the period4/2006 to 3/2014. The plea of the appellant taken in this appeal is that it is an establishment engaged in the business of house keeping on behalf of it's clients. Since the date of it's coverage, the establishment is diligent in deposit of PF dues of it's employees including compliance of different provisions of the Act. Notice dated 12.05.2014 along with statement showing deposit of PF dues proposing levy of damage and interest was served on the appellant for the above said period. In the said showcause notice the appellant was directed to appear before the respondent on2.06.2014. On the said day 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. Not only that during the inquiry on 02.06.2014 submitted a written representation raising various legal objections including the fact that the Respondent has taken the date of encashment of the Cheque as the date of payment where as law is well settled that the date of presentation of the Cheque should be taken as the date of payment. The authorized representative had also pointed out that the proceeding cannot be taken separately for damage and interest as the Hon'ble High court of Delhi in the case of System and Stamping vs. EPF Appellate Tribunal and Others have held that the interest prescribed u/s 7Q being in-built under Para 32A in the quantum of damage, there can not be a separate calculation of damage. Amongst other grounds it was also pointed out that in view of Departmental circular dated 29th May 1990, the levy of damage should be as per the rate prescribed under the circular and nothing more towards separate interest. The validity of the circular has also

been upheld by the Hon'ble High Court. The Representative of the Respondent had also filed rejoinder to the written submission of the appellant establishment. The appellant had categorically prayed for production of evidence in respect of the deposits made to deny the proposed damage. The said written submission was never considered and 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 and without giving any finding on the mensrea of the appellant behind the delay in deposit of the PF contribution. The Principle of Natural Justice was 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 High Courts and the Apex Court he submitted that when the EPF Act and the EPF Scheme do not prescribe explicitly that the interest and damage are in built under Para 32 A of the EPF scheme.Thus the plea of the appellant is baseless and cannot be accepted. He also pleaded that the order u/s 7Q was passed separately and the same cannot be understood as a composite order. 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 delay in remittance of the PF dues. Despite direction the appellant establishment could not produce the original Challans showing deposit of the PF dues in time. Thus, the commissioner has passed a reasoned and speaking order.

The Ld. Counsel for the appellant during course of argument submitted that the APFC at the first instance initiated the inquiry after lapse of 3 years which stands contrary to the circular issued by the EPFO. The mitigating circumstance explained in the written objection was not at all considered and 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. He also submitted that the date of encashment of the cheque has been considered as the date of remittance instead of the date of deposit of the cheque. More over the grace period of five days was not taken into consideration

while computing the period of delay.. The impugned order passed u/s14B also suffers patent illegality in as much as not providing the opportunity to the appellant of explaining the mitigating circumstances, for not considering the written objection and for want of finding on the mensrea. The Ld. Counsel for the appellant submitted that the statute doesn't provide any time limit for initiating an inquiry u/s 14B of the Act. But the EPFO by its circular dated 15.10.1990 have issued guideline for initiating the inquiry u/s 14B within a period of 3years from the date when it falls due. In reply the Ld. Counsel for the respondent citing various judgments of the Hon'ble High Court of Gujarat submitted that when the legislature has made no provision for limitation it would not be open to the court to introduce any such limitation on the grounds of fairness or justice. He placed reliance in the case of Hon'ble High court of Gujarat in **Gandhi Dham Spinning and manufacturing company limited vs. RPFC and another (1987LabI.C 659GUJ)**to argue on the principles that causes prejudice on account of delay in initiation of a proceeding. In the said judgment it has been held that prejudice on account of delay could arise if it was proved that it was irretrievable. In the said judgment it has also been held that for the purpose of section 14B there is no period of limitation prescribed and that for any negligence on the part of the department in taking the proceeding the employees who are 3rd parties cannot suffer. The only question that would really survive is the one whether on the facts and circumstances of a given case the showcause notice issued after lapse of time can be said to be issued beyond reasonable time. The test whether lapse of time is reasonable or not will depend upon the further facts whether the employer in the mean time has changed his position to his detriment and his likely to be irretrievably prejudiced by the belated issuance of such a show cause notice.

Considering the facts of the present appeal in the light of the principle decided in the above mentioned case the stand of the appellant that the impugned inquiry was barred by limitation seems not acceptable as there is absolutely no material to presume that belated issue of showcause notice has caused prejudice to the appellant.

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 written objection dated filed by the establishment before the commissioner during the impugned inquiry, he argued that the said representation was containing all the pleas of the appellant in detail including miscalculation by the department with regard to the days of delay on account of the fact that the date of encashment of cheque was taken as the date of remittance.

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 **Mcleod Russel 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. He also argued that the establishment in its objection before the commissioner had clearly indicated about the mitigating circumstances but the commissioner while passing the impugned order failed to consider the same. Non consideration of the same makes the order again illegal. To support his contention 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 orderpassed 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, gave no finding at all on the mensrea behind the delay in remittance nor considered the written objection filed by the establishment with regard to the miscalculation of days of default. On behalf of the appellant alongwith the appeal the office copy of the written submission submitted to the APFC has been filed wherein 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 number of days of default. 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 and without considering the objection taken by the establishment and with out answering the objection and

without giving a finding on the mensrea of the establishment behind the delayed remittance, passed the impugned order.

Thus, from the totality of the circumstances and the pleas canvassed in this appeal it clearly appears that the commissioner had passed the impugned order u/s 14B without application of mind and without giving due consideration to the various legal objection taken by the appellant.

Thus it is held that the commissioner has committed patent illegality while passing the order u/s 14B of the Act and the said order cannot sustain in the eye of law. Hence, ordered.

ORDER

The appeal be and the same is allowed.The impugned order passed u/s 14B of the EPF and MP Act is hereby set aside. Any amount deposited by the appellant as a part of the assessed amount u/s 14B shall be refunded to the appellant within 60days from the date of communication of this order.

Presiding Officer