DIGEST OF EPF APPELLATE TRIBUNAL ORDERS

Minimum wages can be split into allowances for provident fund contributions

Employees' Provident Fund Appellate Tribunal, New Delhi

ATA No. 743 (8) 2010

Delight Services …… Appellant

vs.

RPFC, Indore ….. Respondent

ORDER
26.11.2015

Present: Sh. S.K. Gupta, Advocate for the Appellant
Sh. Shivnath Mehanta, Advocate for the Respondent

1. By the present appeal filed by the appellant under section 7- 1 of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (here-in-after referred to as "the Act"), appellant seeks quashing of order dated **24.09.2010** pass on 29.09.2010 by respondent under section 7A of the Act.

2. The brief facts as emerging from the appeal are that the appellant is a contractor engaged in the work of supplying labours to various industries. The provisions of EPF & MP Act, are applicable on the appellant establishment and is registered at **Code No. MP/17836** and it has been assiduously depositing the contribution of its employees. Respondent served the appellant with a notice **observing that the salary/ wages shown is negligible even lesser in comparison to the minimum basic wages as notified under the Minimum Wages** and further observed that PF contribution on the wages less than minimum wages is not justifiable and defeats the very purpose of the social welfare legislation aimed for providing old ages social security in the name of PF and Pension to the poor workers. Contribution has been assessed in tune of Rs. 1,37,599/- on basis of minimum wages of semi-skilled employee. Appellant provides labours to hospital and nursing homes, call centres which were not subjected to Minimum Wages Act at all. The provisions of the Minimum wages Act have not been made applicable to these class of establishments, hence this appeal.

Editor's Note :

Strenge of the ways of Employees' Provident Fund Organisation (EPFO). It shows swiftness in issuing those circulars, which have possibility to be misunderstood but it becomes slack and lethargic in conveying those decisions succinct and contain no ambiguity. It will, thus, be seen that as and when there is a favourable judgment for the EPFO, the circular or clarification is issued without any loss of time but if the position is otherwise, no such clarifications are circulated.

Keeping in view the space constrained and also obstinacy of the provident fund authorities determining of money due from employers etc. don't abide by the orders of the EPF Appellate Tribunal but keeping in view the significance of the landmark order in ATA No.743(8) 2010 decided on 30.11.2015, We have decided to publish the whole.

3. Shri S.K. Gupta, Counsel for appellant contended that the impugned order was passed without application of mind in a highly laconic manner as a matter of routine.

4. Counsel for appellant further contended that appellant establishment is depositing PF contribution according to law and respondent with mala-fide intention inflicted a notice to the appellant establishment, directing the appellant establishment to change policy regarding payment of salary to employees according to minimum basic wages. Whereas respondent was not supposed to direct the appellant establishment to

change the policy of employees of appellant establishment.

5. Counsel for appellant further contended that as per law appellant establishment is liable to deduct PF contribution on the basic wages defined under Section 2(b) of the Act, read with Section 6 of the Act but respondent without considering written objections and written representations, passed impugned order against the principals of naturals justice. Respondent was having no power under the Act to direct any employer that how and in what manner employee is to be paid. **In support of his argument counsel for appellant cited a case law titled Assistant PF Commissioner Vs G4s Security Services (India) Limited 2011 LLR 316 P & H HC.**

6. Per contra learned counsel for the respondent contended that the, EPF Act is meant to provide social and financial security to the downtrodden section of the society at the time of their retirement, death during service, medical treatment, etc. The EPF Act is a special welfare legislation which cannot be done away with and strict adherence to its provisions is mandatory. Under this Act, the employer is duty bound to pay the minimum wages to every employee and thereafter employer is also duty bound to pay the Provident Fund contributions on time.

7. Counsel for appellant further contended that a notice was served upon to appellant establishment for making contribution under section 7A of the Act and as appellant establishment was found paying the PF contribution on the wages lesser than the minimum wages prescribed for employees under the category of semi-skilled and appellant evaded amount of Rs. 5,37,072/- so respondent was having no option but to assess amount of Rs. 1,37,599/- under Section 7A of the Act. There is no illegality in the order of respondent hence appeal filed by appellant may be dismissed.

8. I have given my thoughtful consideration to the submissions made by learned counsels for the parties and have also perused the material on record.

9. The primary contention on behalf of the appellant is that respondent is not empowered to direct the appellant establishment to pay minimum wages to its employees and further to pay PF contribution on the basis of minimum wages.

10. Admittedly, there is no dispute regarding applicability of the provisions of the Act to appellant establishment and that PF Code No. MP/17836 allotted to the appellant establishment.

11. As per Section 6 of the Act, employer is supposed to contribute/ pay in the Fund on the basis of the basic wages, dearness allowance and retaining allowance for the time being payable to each of the employees.

12. As per case of appellant, appellant is depositing PF contribution as per law i.e. on the basis of basic wages, dearness allowances and retaining allowances.

13. In case in hand, controversy is with regard to basic wages. 'Basic Wages' has also been defined in Section 2(b) of the Act which is reproduced here:-

> ***Section 2(b)*** *"basic wages" means all emoluments which are earned by an employer while on duty [on leave or on holidays with wages in either case] in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include:-*
>
> *(i) the cash value of any food concession;*
>
> *(ii) any dearness allowances (that is to say, all cash payment by whatever name called paid to an employee on account of a risen the cost of living) house rent allowance, overtime allowance, bonus commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;*

(iii) any present made by the employer;

14. Section 2(b) of the Act does not prescribe how much amount shall be considered as basic wages. So now this is to be seen by this Tribunal whether respondent is empowered to direct the appellant establishment to pay minimum wages to employees. During course of argument, no provision of the Act cited by counsel for respondent which could reveal that 'Commissioner' is empowered to direct the employer to pay minimum wages to the employee.

15. Bifurcation of wages below minimum wages or basic wages and DA etc. are the issue, completely out of the purview of PF Authorities. PF authorities have no jurisdiction to ensure the compliance of Minimum Wages Act or to issue any direction in this regard. Wages are to be determined is a decision between employee and employer and further authority appointed under the Minimum Wages Act is only empowered to raise issue regarding Minimum Wages, to be given to the employee.

16. Being quasi judicial authority respondent has statutory power to direct the appellant establishment to deduct PF contribution on the basis of Section 6 of the Act only.

17. Keeping in view all the circumstances, this Tribunal reached at a considered opinion that order dated 24.09.2010 passed by respondent under Section 7A of the Act is illegal, hence set aside. Copy of the order be sent to parties. File be consigned to record room after due compliance.

(HARISH GUPTA)
Presiding Officer, EPFAT

Less than 20 employees would not attract applicability of EPF&MP Act

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging the order dated 12.10.2010, passed by the EPF Authority, under section 7-A of the Act, determining the EPF dues, levying damages and interest on account of delayed remittance of PF dues and directing payment thereof.

The EPF Appellate Tribunal observed that the appellant has pleaded that it never engaged 20 or more employees and EPF Authority has made the Act applicable upon it, illegally and arbitrarily. EPF Authority has admitted that appellant was never found having 20 or more employees. Impugned order is based upon the recommendations of the squad of Enforcement Officers. EPF Authority is required to give reasonable opportunity to the employer before passing such orders. EPF Authority is not to decide abstract question of law but to determine actual concrete differences in payment of contributions by identifying the workmen. Enquiry under section 7-A of the Act is more or less a trial of a suit before a civil court. Ironically, the EPF Authority did not dare to do so and also failed to exercise its powers while confirming the recommendations of the squad of Enforcement Officers. Hence, impugned order is set aside. Appeal is allowed.

Shiv Processors vs. APFC, Rajkot
ATA No. 16(5) 2011, decided on 06.11.2015

An order passed merely on the basis of presumptions without any material on record is liable to be quashed

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging the orders dated 26.05.2009 and 20.12.2010, passed by the EPF Authority, under section 7-A of the Act.

The EPF Appellate Tribunal observed that the appellant was covered under the Act and was making compliance of the same since June, 2007. Some payments and returns were filed late due to unavoidable reasons. EPF Authority, without giving any opportunity to the appellant, passed ex-parte order dated 26.05.2009. Appellant challenged the same before the High Court of Gujarat and as per directions of the High Court, the required documents and returns were submitted to the EPF Authority stating that it employed only 4 to 7 employees but the EPF Authority, on the basis of report of Enforcement Officer which was never supplied to the Appellant, passed impugned order dated 20.12.2010. Appellant, thus, challenged both the orders in appeal. Copy of Form No.12A (Revised) dated 12.06.2010, received by EPF Department on 23.08.2010 shows 5 employees and the 7-A Authority was supposed to consider it but failed to do so. It is an admitted fact that the appellant had submitted records as mentioned in the summons letter dated 13.08.2010. EPF Authority has not recorded statement of any employee of the appellant in support of its presumption. EPF Authority passed the impugned order only on the basis of presumptions and assumptions since it has not exercised its powers which is failure to exercise the jurisdiction as well as against the principles of natural justice. EPF Authority had not disclosed the material on the basis of which it passed the impugned order. Hence, impugned order must go. Appeal is allowed. EPF Authority is directed to refund the amount, if any, recovered from the appellant, within 60 days of this order, after deducting the dues of actual employees as stated by the appellant in Form 12A.

M/s BS Engineering vs. APFC, Ahmedabad
ATA No. 23(5) 2011, decided on 06.11.2015

Damages are leviable if amount of EPF contributions is deposited belatedly

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging the order dated 04.01.2010, passed by the EPF Authority, under sections 14-B and 7-Q of the Act, levying damages on account of delayed remittance of PF dues.

The EPF Appellate Tribunal observed that the damages under section 14-B of the Act are leviable in respect of delayed deposit of EPF contribution and it is no ground for waiver of damages that on the date of levy of damages, no EPF dues were in arrear. There is no prescribed limitation of period for service of notice and/or commencement of the proceedings under the Act. Circular dated 28.11.1990 is just a guideline for the officials of the department. Since statute does not prescribe any time limit, the circular being contrary to statute is not effective and even till today EPFO has not implemented the alleged circular. On the basis of departmental circular, the defaulter cannot be allowed for waiver of penalty, damages or interest since the Act is a beneficial piece of legislation. As soon as any default in payment of statutory dues arises and the same are paid belatedly, provisions of section 14-B of the Act came into motion. Ignorance of non depositing of PF dues by the employer on time, cannot be allowed to escape him from its statutorily liability and the same will attract damages and interest. Hence, appeal in respect of damages, as assessed under section 14-B of the Act, is not allowed.

Chanana Brothers vs. APFC, Delhi
ATA No. 159(4) 2010, decided on 12.11.2015

Merely because company has been referred to BIFR is not an impediment for recovering the EPF dues

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging the orders dated 24.05.2006 and 12.02.2007, passed by the EPF Authority, under section 7-A of the Act.

The EPF Appellate Tribunal observed that the appellant establishment was smoothly functioning prior to 1995-96. Thereafter due to recession in the industry, it was badly affected. It approached Board for Industrial and Financial Reconstruction (BIFR) in 2001 under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 for rehabilitation scheme. BIFR declared it a sick industrial company. It was called upon to pay damages and interest under sections 14B and 7Q respectively of the Act for the period from April, 2004 to June, 2004 and October, 2004. Appellant submitted its reply/ representation making a request to drop the proceedings till final decision by the BIFR. EPF Authority passed order to cease the Bank Account of the appellant. The EPF Appellate Tribunal *inter alia* observed that despite notice, none appeared on behalf of appellant before the EPF Authority nor any justified reason has been given for its non-appearance. Even the appellant did not produce any mitigating evidence, claiming waiver of damages and interest on delayed remittance of EPF dues. Merely because the company is a sick company and it has been referred to BIFR is not an impediment for recovering the dues of the provident fund contributions. As per appellant weak financial condition was after 1996 but the EPF dues relate to 06/2004 and 10/2004 so appellant cannot be allowed to claim waiver of such damages on account of belated remittance of statutory dues. Hence, appeal devoid merits and dismissed.

Parasrampuria International vs. APFC, Indore
ATA No. 200(8) 2007, decided on 27.11.2015

Levy of damages and interest - not only for arrears but for belated payments also

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging the order dated February, 2003, passed by the EPF Authority, under sections 14-B and 7-Q of the Act, levying damages and interest on account of delayed remittance of PF dues.

The EPF Appellate Tribunal observed that appellant employed 20 persons in July, 2005. Vide letter dated 22.09.2005, the EPF Authority allotted the code No.17064 to the appellant, directing it to deposit EPF dues from 01.07.2005 - Appellant did not make compliance of instruction dated 22.09.2005 - Appellant was served a notice dated 31.03.2014 under sections 14B and 7Q of the Act demanding damages and interest from December, 2008 to February 2014 - Appellant represented vide communication dated 05.05.2014, explaining the delay was neither intentional nor willful but being cooperative society having less than 50 employees, is exempted from the provisions of the Act. It was not in a position even to disburse salary and wages to its employees and delay in payment was beyond its control and on the date of imposition of damages, there was no default or arrears of EPF dues. EPF Authority imposed damages and interest upon the appellant. EPF Act is a beneficial legislation. Act does not prescribe that proceedings cannot be commenced if there was no arrears on the date of levying damages even if remittance of EPF dues was made belatedly. Appellant never challenged the applicability of the Act after allotment of code No. So, at this stage the appellant cannot be allowed to say that the Act is not applicable to it. An employer, who is at fault, cannot be allowed to take benefits of inactiveness of officials of the EPF Organisation in initiating action against the defaulter. Ignorance of non-depositing of PF dues on time, cannot be allowed to escape from statutory liabilities which attracts damages and interest. Hence, appeal is dismissed.

Bhutpurv SSTSS Ltd. vs. APFC, Jodhpur
ATA No. 506(12) 2015, decided on 13.11.2015

An order passed on the basis of physical verification of beneficiaries – cannot be challenged on account of non-compliance of technicalities of law

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging the order dated 15.12.2009, passed by the EPF Authority, under section 7-A of the Act.

The EPF Appellate Tribunal observed that the premises of the appellant was visited by the Enforcement Officer, name of 40 persons were recorded working there and the report was signed by one Shri Suresh Ganpath, Kotwdekar, Plant Incharge. Appellant failed to produce the relevant records of employees either before the 7-A Authority under the Act or before the EPF Appellate Tribunal. It has not been denied by the appellant that said Shri Suresh Ganpath Kotwdekar was not Plant Incharge. Appellant has not averred that a false report was prepared by the Enforcement Officer in collusion with the said Plant Incharge. Objection of the appellant was only that reports and other documents relied upon by the Enforcement Officer were not supplied to it but since the EPF Authority passed the impugned order on the basis of physical verification report which was duly signed and certified by the Plant Incharge of the Appellant, benefits of any kind of technicalities, committed by the EPF Authority, cannot be taken sufficient to reject the order under challenge. During the course of argument, contention submitted on behalf of the appellant that Enforcement Officer prepared a false memo showing 40 workers because there was lunch time in the appellant establishment and workers of other establishments of the surrounding areas were there whose names were noted by the Enforcement Officer, is not sustainable in the eyes of law since the verification memo signed by the Plant Incharge, cannot be ignored. Hence, appeal is dismissed.

Tavoy Workwear vs. APFC, Vapi
ATA No. 110(5) 2010, decided on 27.11.2015

Determination of money by RPFC on the basis of balance sheet – liable to be quashed

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging the order dated 30.04.2012, passed by the EPF Authority, under section 7-A of the Act.

The EPF Appellate Tribunal observed that the appellant is a Sugar Factory in Maharashtra State. It was allotted code number. It is scrupulously and diligently complying with the provisions of the Act. Respondent initiated enquiry under section 7A of the Act on the basis of a complaint. Appellant informed the respondent that the complainants have no connection with it. Besides it, the appellant supplied to the respondent a copy of order of the Industrial Court in support of their version. However, authority passed the impugned order without considering the submissions of the appellant. Complainants were never employees of the respondent. Respondent passed the impugned order without verification of records, examination of contractor and identification of beneficiaries. The stand taken by the respondent is that despite due notice, the appellant did not produce the relevant records. Complainants failed to produce any authentic document to show that they were employees of the Management. The 7-A Authority under the Act is having power similar to the Civil Court for trying a suit. EPF Authority is empowered to determine actual concrete differences in payment of contributions and other dues by identifying workers and not to decide abstract question of law. Merely granting opportunity of hearing is not sufficient to uphold the finding of EPF Authority. Contractors were not summoned for ascertaining the real facts of employment of casual labour. Assessment took place on the basis of balance sheet and squad's report. Identification of beneficiaries has not been done. Hence, impugned order cannot sustain. Matter is remanded back to the respondent for deciding it afresh in light of observations as made above. Appeal is disposed of.

Chatrapati Sahakari Sakhar Karkhana Ltd. vs. RPFC, Pune
ATA No. 529(9) 2012, decided on 26.11.2015