PF CONTRIBUTIONS ON ALLOWANCES

MUST BE CONTESTED BY EMPLOYERS

The proverbial saying 'every dark cloud has a silver lining' is used to convey the notion that, no matter how bad a situation might seem, there is always some good aspect to it. This is a positive way to look forward. It is equally true in the case of the Employees' Provident Funds & MP Act. It is reasonably believed that the determining authority under the Act will take up the cudgel to address the real problem that the employer cannot be saddled with payment of provident fund dues if the beneficiaries are not identified by the concerned Asstt./Regional Commissioner. So much so it has been held by the higher Courts that no determination of dues can be made till the beneficiaries are identified. Besides that the authorities under the Act have been demanding contributions from the principal employers even for those contractors who have been allotted independent code numbers. Additionally, despite its internal instructions the provident fund contributions are being claimed on total minimum wages as a whole and not allowing splitting into house rent allowance which is categorically excluded from the definition of 'basic wages'.

WHAT you did not learn this at B-School or Law College

The judgment of Supreme Court in ***Regional Provident Fund Commissioner (II) West Bengal vs. Vivekananda Vidyamandir & Ors.,*** 2019 LLR 339 holding that all allowances except house rent and overtime will be treated as 'basic wages' for provident fund contributions has cast a gloom upon more than 10 lakh employers. The establishments as coveted under the Employees' Provident Funds & MP Act, 1952 are under an obligation to deduct and deposit every month the EPF contribution upon the remuneration paid to the employees as covered under the Act and the Scheme. Hardly there will be any employer who, while splitting the 'basic wages' into allowances would be paying EPF contributions on such allowances for which he will now be liable to pay contributions, damages and interest for delayed deposit.

The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The employer, under the Act, has a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and make a matching contribution.

The entire amount is then required to be deposited in the fund within 15 days from the preceding month. The aforesaid provisions fell for detailed consideration by the Supreme Court in Bridge & Roof case when it was observed as follows: "The main question, therefore, that falls for decision is as to which of these two rival contentions is in consonance with s. 2(b). There is no doubt that "basic wages" as defined therein means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature

would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses. The first clause mentions the cash.

The judgment has been delivered after about nine years of its filing of appeals in the Supreme Court and at this point of time, the industry and establishment are facing heavy recession and steep fall in trade. Many employers are finding it difficult even to pay wages to their employees in time hence a crisis-like situation is prevailing. The provident fund authorities have started proceedings by assessments to be made by the Inspectors and to determine the dues payable by the employers by the Asstt./Regional Provident Fund Commissioners under section 7A of the Act. The employers have not been finding out any favourable solution particularly when the judgment of the Supreme Court is not from prospective effect. Even the review petitions filed by the appellants have not been accepted by the Supreme Court. The representations from the Associations of Employers/Chamber of Commerce as made to the Ministry of Labour and Employment have not been favourably accepted. A common question arises as to what steps be taken to reduce or ward off the liability for the past period since not only contributions of the provident fund but damages will be levied and also interest will be 12% claimed.

Procedure for determination of money due from employers

As a general practice and procedure in such like matters are that first of all, the Enforcement Officer (called as Inspector also) after advance notice, will visit the establishment and its records. Afterwards, he will file his report before the concerned Assistant/Regional Provident Fund Commissioner. On receipt of the report, the Regional Provident Fund Commissioner will initiate enquiry under section 7-A of the Act for determination of money due from an employer and/or by a show cause notice ask the employer to pay the money as due from the establishment on the basis of the report by the Enforcement Officer. Generally, the copy of the inspection report by the Enforcement Officer is not provided hence the employer can demand the same for comments. In ***Authorised Officer, Indian Overseas Bank vs. The Employee's Provident Fund Organisation and others,*** 2020 LLR 90 the Madras High Court has held that section 7-A of the Act provides that no order can be passed without conducting a full-fledged inquiry as if the matter is decided in a civil suit in respect of coverability as well as the determination of the amount. Sub-section (3) of section 7-A of the Act shows that no order shall be made under sub-section (1) of section 7-A of the Act unless the employer concerned is given a reasonable opportunity of representing his case. Such Officers are vested with powers of a Civil Court while holding the proceedings. The employer will have to file its reply to the show-cause notice whereby all possible and permissible objections be taken since it will lay the foundation of the future fight in the EPF Appellate Tribunal or the higher Courts.

Any employer cannot solely be blamed for this lapse

It is pertinent to state that neither the employees nor any of the unions ever raised any objection or demanded for non-deducting of provident fund contributions on allowances since it has been beneficial for the lower-paid employees to take home higher wages because they need immediate even lesser money instead of higher on retirement maybe after decades. The visiting inspectors (Enforcement Officers) rarely raised any objection for non-payment of EPF contributions payable by the employers. The agony of the employers is further increased since under para 32 of the EPF Scheme the employer cannot recover employees' share of contribution for the past period. Also, no limitation has been prescribed for recovery of dues from the employers.

The Supreme Court reiterated that "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. "The quantum when an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, **those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage**. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to the workman."

Fastening liability of the contractors on principal employers

Most of the employers have been engaging contractors who have their independent code number under the Act. The provident fund authorities, while relying upon para 30 of the Employees' Provident Fund Scheme inter alia provides that "the employer shall, in the first instance pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also on behalf of the member employed by him directly or by or through a contractor.....". Many such determination of money under section 7A of the Act hold the principal employer to pay the arrears of dues by the contractors. Many of such determinations have been set aside by the EPF Appellate Tribunals holding that the contractor having independent code number under the Act has to deposit the arrears of contributions. The High Courts have also upheld the orders of the EPF Appellate Tribunals.

In ***M/s. Calcutta Constructions Company vs. Regional Provident Fund Commissioner and others,*** 2015 LLR 1023 it has been held by Punjab & Haryana High Court that 'when code number is allotted to a contractor under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, it becomes an 'establishment' under section 2(e) of the Contract Labour (Regulation and Abolition) Act, 1970 making it liable to pay EPF contributions of its employees. Hence, the Contractor having an independent code number under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, is liable to pay EPF contributions in respect of employees whose salary is paid by it. As such principal employer is not liable to pay EPF contributions in respect of employees engaged through an independent contractor who has been having an independent code No. under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.' Earlier similar view has been taken by Madras High Court in ***Brakes India Ltd. vs. Employees' Provident Fund Organisation***, 2015 LLR 635.

Determining contributions on minimum wages without splitting into house rent allowance

While determination of money due from emmployers, the provident fund authorities have not been allowing the splitting of wages into house rent allowance for PF contributions. The EPF Tribunals have set aside such orders since the Division Bench of Punjab & Haryana High Court has categorically held in ***Assistant Provident Fund Commissioner vs. M/s. G4S Security Services (India) Ltd. & another***, 2011 LLR 943 that the minimum wages can be split into house rent allowance hence the determination by the Regional Provident Fund Commissioners have been quashed. More so when the Act itself excludes house rent allowance in the definition of 'basic wages' under section 2(b) of the Act.

Necessity for identification of beneficiaries

In the absence of prescribed limitation period the provident fund authorities while determination of money go back at least for seven years for production of record. Since many employees have either left their jobs or retired, it become difficult to trace them. Even if the employer is required to pay arrears or contributions on the allowances, the question arises as to who will be getting the same. Hence the High Courts have repeatedly held that determination of EPF dues without identification of beneficiaries by the Employees' Provident Fund Authorities will not be tenable. In ***Himachal Pradesh State Forest Corporation vs. Regional Provident Fund Commissioner***, 2008 LLR 980 the Supreme Court has also held that when the determination of money sought to be recovered from the employer as dues under Employees Provident Funds & MP Act pertains to old and stale period and due to pendency of the proceedings before the Appellate Tribunal and the High Court, the re-determination, as directed, will be only when the employees for whom the contributions are payable are identifiable and only record of that duration should be insisted by the Authorities under the Employees' Provident Fund which is required to be maintained and has not been destroyed by the employer. Most of the High Courts have taken the same view.

In ***Regional Provident Fund Commissioner vs. Faridabad Thermal Power Station & Anr.***, 2015 LLR 269 the Punjab & Haryana High Court has held that:

(a) An order passed under section 7A of the Employees' Provident Funds and MP Act, 1952, is not sustainable if the EPF contributions etc. have been determined without identification of actual beneficiaries.

(b) In case the EPF authority under section 7A of the Act passes an order, determining the EPF contributions to be remitted by the employer without identification of beneficiaries, it would not be appropriate.

(c) In case the EPF authority under section 7A of the Act while passing an order fails to exercise the modes as prescribed by law to identify the actual beneficiaries, it would be construed that the order passed is without application of mind and not sustainable.

The High Court has gone to this extent that EPF authority can take help of concerned police authorities for identification of employees/actual beneficiaries to secure them the monetary benefits.

In ***Builders Association of India vs. Union of India and Ors.,*** CCNo.8035/20616 dt. 2.5.2016 the Supreme Court has categorically held that the identification of the employees who have left their jobs being beneficiaries is imperative.

It will not be an easy task to take up all such objections before the authorities under the Act by the employers themselves, more so, when the competent and conversant advocate will be reluctant to appear before such authorities vested with the power of the Civil Court to hold the proceedings in their offices and not in the Court complexes. Hence the employers can rely upon about pleas which will help to reduce the financial liability.

In ***Car Scanner vs. The Employees' Provident Fund Organisation***, 2020 LLR 77 it has been held by Patna High Court that the object of the Act is welfare of the weaker section and not for welfare of nameless and faceless persons thereby enriching the EPF organization. Hence assessment of EPF dues without identification of beneficiaries is not sustainable. If the EPF Authority cannot identify individuals, it cannot compel compliance merely on numbers.

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