IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.10730 of 2011

Viswanethra Agencies
No.21/1, Avvai Nagar Main Road,
Thiruvanmiyur,
Chennai-600 041.
Rep.by K.Venkateshwar Rao,
Proprietor. ...Petitioner

vs.

1. The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
New Delhi.

2. The Regional Provident Fund Commissioner,
Employees Provident Fund Organisation,
Regional Office, Royapettah High Road,
Chennai-14. ... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records connected with ATA.No.843(13) of 2009 and quash the order dated 28/01/2011 passed in ATA.No.843(13) of 2009 by the 1st respondent, Employees PF Appellate Tribunal, New Delhi, by the 1st respondent and thereby render justice.

For Petitioner : Mr.Gupta
for M/s.Gupta and Ravi

For Respondents : R1-Tribunal
Mr.T.R.Sundaram for R2.

O R D E R

The order dated 28.01.2011 passed in ATA.No.843(13) of 2009 by the EPFAT, New Delhi, is under challenge in the present writ petition.

2. The learned counsel appearing on behalf of the writ petitioner mainly contended that as per Section 2(b) of the EPF&MP Act, 1952, the cash value of any food concession is not included in the backwages. Therefore, the full allowances granted to the employees, cannot be taken into account for the purpose of calculating the contributions under the EPF Act.

Urging this Court mainly for basic wages, ie., all emoluments which are earned by an employee while on duty [or 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 the cash value of any food concession. The learned counsel for the writ petitioner reiterated that the very order passed by the original authority as well as the Tribunal is in violation of the said Section 2(b)(i) of the EPF Act.

3. The learned counsel for the writ petitioner is of the opinion that in view of the fact that the canteen facility is not provided to the employee inside the premises of the writ petitioner/Agency, if the allowances was paid, the same will not fall within the ambit of the provisions of the Act itself. Thus, the said amount calculated for the purpose of deriving the contributions is erroneous one. The tribunal has also not considered the exemption granted in the Act itself.

4. The learned counsel appearing on behalf of the second respondent/The Regional Provident Fund Commissioner disputed the contention by stating that Section 2 of the Act is a definition to the basic wages and regarding the contributions as well as matters which may be provided for in schemes, Section 6 is to be referred. Section 6 [Explanation 1] enumerates that "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. Thus, the food allowance is to be calculated for the purpose of arriving at the contributions to be paid. Therefore, there is no error in respect of the assessment made in this regard by the authorities competent. Section 2 is a definition for basic wages and for the purpose of deciding the issues in relation to the contributions, Section 6 is to be followed and accordingly, there is no infirmity in respect of assessment made as well as in the findings of the tribunal in this regard.

6. The learned counsel for the second respondent relied on the recent judgment of the Hon'ble Supreme Court of India in the case of REGIONAL PROVIDENT FUND COMMISSIONER(II) WEST BENGAL vs. VIVEKANANDA VIDYAMANDIR reported in 2019SCC ONLINE SC 291, wherein the Supreme Court held that such allowances are also to be taken into account for the purpose of deciding the basic wages and the relevant paragraphs are extracted hereunder:

> 12. The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in Kichha Sugar Company Limited through General Manager v. Tarai Chini Mill Majdoor Union, Uttarakhand, (2014) 4SCC 37, it was observed as follows:
>
> "9.

According to http://www.merriam-webster.com(Merriam Webster Dictionary) the word 'basic wage' means as follows:

1. A wage or salary based on the cost of living and used as a standard for calculating rates of pay.

2. A rate of pay for a standard work period exclusive of such additional payments as bonuses and overtime.

10. 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. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance".

13. That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in The Daily Partap v. The Regional Provident Fund Commissioner, Punjab, Harayana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8SCC 90.

14. Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the Board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed

for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. 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 wage camouflaged 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 th concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

7. Applying the principles laid down by the Apex Court of India cited supra, the writ petitioner is also liable to pay the contributions by calculating the allowances paid to their employee along with wages.

8. This Court is of the opinion that Section 2 of the Act cannot be read in isolation and it is to be read along with Section 6 for the purpose of deciding the contributions. Thus, as far as the facts and circumstances of the present case is concerned, Section 6 [Explanation 1] is adopted and accordingly, "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". Accordingly, the contributions arrived by the authorities are in consonance with Section 6 [Explanation 1] of the Act and there is no infirmity. The Tribunal also rightly rejected the appeal filed by the writ petitioner and there is no perversity. Accordingly, the order dated 28.01.2011 passed in ATA.No.843(13) of 2009 is confirmed and the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Presiding Officer,
    Employees Provident Fund Appellate Tribunal,
    New Delhi.

2. The Regional Provident Fund Commissioner,
    Employees Provident Fund Organisation,
    Regional Office, Royapettah High Road,
    Chennai-14.

+1cc to M/s.Gupta and Ravi, Advocate Sr.91697
+1cc to M/s.T.R.Sundaram, Advocate Sr.92224

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kj[co]
srg 17/12/2019