

\$~40

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision :- 01.11.2019

+ W.P.(C) 11497/2019 & CM No.47240/2019

PROWIZ MANSYSTEMS PVT LTD Petitioner

Through: Mr. S.K. Gupta, Adv.

versus

ASSISTANT PROVIDENT FUND COMMISSIONER

..... Respondent

Through: Mr. Keshav Mohan and Mr. Piyush Choudhary and Mr. Piyush Vatsa, Advs.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The present writ petition filed by the employer assails the order dated 22.07.2019 passed by the Central Government Industrial Tribunal exercising the power of the Employees Provident Fund Tribunal, in Appeal No.333 (14)/16 rejecting the petitioner's challenge to the assessment order dated 05.10.2015 passed by the respondent under Sections 14B and 7Q of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('the Act'). The petitioner is an establishment which is duly covered under the Act. The respondent, on finding that the petitioner had defaulted in depositing the requisite provident fund amount for the period between 01.04.1996 and 31.12.2014, had issued a show cause notice to the petitioner on 10.01.2015.

2. After providing the petitioner with an opportunity to submit its reply and make oral submissions, the respondent passed the assessment order on 05.10.2015, holding the petitioner liable to pay a sum of Rs.35,30,472/- as damages and a sum of Rs.24,17,995/- as interest.

3. Being aggrieved by this assessment, the petitioner approached the Industrial Tribunal by way of a statutory appeal under Section 7-I of the Act, which came to be dismissed under the impugned order after the Tribunal found that the petitioner had wilfully failed to deposit the amount deducted from the incentives payable to its employees for a certain period. Before the Tribunal, the petitioner had contended that it had not been supplied with a detailed calculation for arriving at this amount, which ground was also rejected after it became evident that the show cause notice issued to the petitioner had clearly set out these details.

4. Today, learned counsel for the petitioner has raised the same contentions, as were raised on the petitioner's behalf before the Tribunal. Firstly, he submits that the imposition of damages was wholly unwarranted in the present case as the petitioner's default in depositing the provident fund dues was not wilful. He submits that the petitioner was under the *bona fide* impression that incentives and bonuses do not form a part of the basic wages for the purpose of calculating provident fund dues. Therefore, there was no wilful refusal to deposit the said amount. For this purpose, he places reliance on the decision of Madras High Court in ***National Co-op. Sugar Mills Ltd. Vs. Presiding Officer, Employees Provident Fund Appellate***

Tribunal, Delhi and Ors. 2012 (3) LLJ 83. He further submits, by placing reliance on the decision of the Supreme Court in *Assistant Provident Fund Commissioner, EPFO & Anr. Vs. The Management of RSL Textiles India Pvt. Ltd. through its Director, 2017 LLR 337*, that there was no *mens rea* on the part of the petitioner/employer to withhold the provident fund dues and, therefore, the imposition of penalty by way of damages is not warranted. Mr. Gupta finally submits that it was the duty of the respondent to keep reminding the petitioner to deposit the provident fund dues and that, as the respondent had failed to send these monthly reminders, the assessment order was unsustainable.

5. On the other hand, Mr. Keshav Mohan, learned counsel appearing for the respondent, on advance notice, supports the impugned order and contends that the petitioner having wilfully defaulted to comply with the provisions of the Act was rightly held liable to pay damages and interest. He, therefore, prays that the writ petition be dismissed.

6. Having considered the submissions of the learned counsel for the parties and perused the record, I find no merit in any of the contentions raised by the learned counsel for the petitioner. The very fact that the petitioner had made deductions from the incentives payable to its employees in itself shows that the petitioner was well aware that provident fund was payable on the said amount as well, yet it had wilfully failed to deposit the same within the prescribed time. This very fact is sufficient to show *mens rea* on the petitioner's part to deliberately delay depositing the provident fund dues. The petitioner

has, by placing reliance on *National Co-op. Sugar Mills Ltd. (supra)*, sought to contend that since incentives are not a part of basic pay, the petitioner cannot be held guilty of any wilful delay in depositing the provident fund dues, so as to warrant levy of damages and interest. In the light of the admitted position that the petitioner was paying incentives to all its employees and was also making deductions on the said amount, it cannot be said that the petitioner was unaware that provident fund was payable on the incentives also and therefore the plea that there was no wilful default on the petitioner's part cannot be accepted. The reliance placed by the petitioner on *National Co-op. Sugar Mills Ltd. (supra)* is wholly misplaced as in the said case the Madras High Court was dealing with a situation where a demand for provident fund dues were sought to be raised on the wages paid as lay off compensation to some of the employees, which fact situation is entirely different from the present case. The decision of the Supreme Court in *The Management of RSL Textiles India (supra)* also does not in any manner forward the case of the petitioner as the said decision merely reiterates the legal position that the presence of *mens rea* would be a determinative factor in imposing damages under Section 14B of the Act. In the present case the *mens rea* on the part of the petitioner is writ large and therefore the respondent was fully justified in claiming damages and interest from the petitioner.

7. I also do not find any merit in the petitioner's contention that it was incumbent on the respondent to send monthly reminders to the petitioner in case there was any delay on its part in depositing the provident fund dues. The petitioner's plea that the respondent, having

failed to send monthly reminders, is estopped from claiming any damages or interest from it cannot be accepted. Neither is there any statutory basis for such a plea, nor can the respondent be expected to send monthly reminders to every defaulting employer in the country. In fact once an establishment is allotted a code under the Act, it is expected to ensure strict adherence to the provisions thereof and is under a statutory duty to make timely deposits of the provident fund dues in accordance with the timelines prescribed in the Act.

7. The writ petition along with pending application is disposed of in the aforesaid terms.

NOVEMBER 01, 2019
'SDP'

REKHA PALLI, J.