

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

FAO 328/2022

Date of Decision: 10.01.2023

IN THE MATTER OF:

**EMPLOYEE STATE INSURANCE
CORPORATION & ANR.**

..... Appellants

Through: Mr. K.P. Mavi, Advocate alongwith
Sh. Arvind Bansal, SSO, ESIC in
person.

versus

M/S NXP INDIA PVT. LTD.

..... Respondent

Through: Mr. Jitender Kumar, Advocate

AND

FAO 326/2022

**EMPLOYEE STATE INSURANCE
CORPORATION & ANR.**

..... Appellants

Through: Mr. K.P. Mavi, Advocate alongwith
Sh. Arvind Bansal, SSO, ESIC in
person.

versus

M/S NXP INDIA PVT. LTD.

..... Respondent

Through: Mr. Jitender Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J. (ORAL)

CM.APPL. 55191/2022 in FAO 328/2022,
CM.APPL. 55048/2022 in FAO 326/2022

1. Allowed, subject to all just exceptions.
2. The applications stand disposed of.

CM.APPL. 55190/2022 in FAO 328/2022 (Delay),
CM.APPL. 55047/2022 in FAO 326/2022 (Delay)

1. The present applications have been filed under Section 5 of the Limitation Act on behalf of the appellants seeking condonation of delay of 45 days in filing the present appeals.
2. Issue notice.
3. Mr. Jitender Kumar, learned counsel for the respondent, accepts notice and fairly does not oppose the grant of the prayer made in the present applications.
4. For the reasons stated in the applications as well as no-objection given on behalf of the respondent, the applications are allowed and the delay of 45 days in filing the present appeals is condoned.
5. The applications stand disposed of.

FAO 328/2022 and
FAO 326/2022

1. The present appeals have been filed under Section 82 of the Employees' State Insurance Act, 1948 (hereinafter, referred to as the '*ESI Act*') on behalf of the appellants (respondents below) seeking setting aside of the separate judgments dated 27.08.2022 passed by the learned Senior Civil Judge-cum-Rent Controller, New Delhi District, Patiala House Courts, New Delhi in ESIC Case Nos.1-2/2017, whereby the respondent's challenge to assessment orders passed in its respect under Section 45-A of the ESI Act for different periods was allowed. As the present appeals involve common facts, they are being disposed of by way of a common judgment.
2. Brief facts, in nutshell, are that the respondent had received *ex-parte* assessment order dated 31.03.2016 passed under Section 45-A of the ESI

Act, wherein it was stated that it had failed to reply to an earlier notice. Reportedly, the said assessment order was for the period May, 2011 to June, 2012. The respondent assailed it before the Appellate Authority, which upheld the same vide order dated 15.09.2017 passed under Section 45-AA of the ESI Act, and enhanced the amount determined by way of order dated 31.03.2016.

While proceedings before the Appellate Authority were still pending, a second *ex-parte* assessment order dated 01.09.2017 was received by the respondent for the period July, 2012 to October, 2013. Subsequently, recovery notices dated 13.11.2017 and 07.12.2017 were also issued by the appellant.

The proceedings in relation to both the assessment orders, and the recovery notices, were challenged before the Trial Court, which vide separate judgments dated 27.08.2022, set aside the same as well as the order dated 15.09.2017 of the Appellate Authority while granting liberty to the appellants to re-assess the respondent's contribution after affording an opportunity of personal hearing to it.

3. Mr. K.P. Mavi, learned counsel for the appellants, assailed the impugned orders by contending that *ad-hoc* notices were issued to the respondent at the e-mail address provided by it. It was further contended that the Trial Court failed to appreciate that a mere assertion regarding violation of principles of natural justice, without any prejudice being shown to have been caused to the respondent, was not sufficient to set aside the assessment orders.

4. Per contra, the respondent's case is that prior to passing of the assessment orders, no such notices were received by it.

5. I have heard learned counsels for the parties and also perused the material placed on record.

6. A perusal of the case records would show that in the alleged Show Cause Notices, it was claimed that the respondent being the principal employer of the factory/establishment had failed to pay contribution in terms of the ESI Act.

7. When the matter reached the Trial Court, the appellants argued that in spite of the Show Cause Notices issued to the respondent calling it to provide details of employer's as well as employees' contribution, no explanation/reply was filed by it.

Both the parties led their respective evidence before the Court and issues were framed, including as to whether the assessments orders were passed without complying with principles of natural justice and in violation of the proviso to Section 45-A of the ESI Act.

8. As the analysis required to be done by this Court pertains to Section 45-A of the ESI Act, the same is extracted below:

“45-A. Determination of contributions in certain cases.—(1)
Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Social Security Officer or other official of the Corporation referred to in sub-section (2) of Section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under Section 45, the Corporation may, on the basis of information available to it, by order determine the amount of contributions payable in respect of the employees of that factory or establishment:

Provided that no such order shall be passed by the Corporation

unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard :

Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as an arrear of land revenue under Section 45-B or the recovery under Section 45-C to Section 45-I.”

9. A plain reading of the above provision would show that an order under it must be preceded by grant of an opportunity of hearing to the principal/immediate employer or the person in charge of the factory/establishment.

10. In the present case, it has come in the evidence of the respondent that it had updated its e-mail ID in the year 2016 and provided the same (to the appellants) as “pf@cquel.co.in”. The appellants in their evidence had admitted receipt of the aforesaid information by way of *Ex.RW-1/P1*.

The respondent had also placed on record information received through RTI that no independent notice was ever dispatched by the appellants. On the other hand, the appellants failed to substantiate their claim of having sent Show Cause Notice(s) to the respondent prior to the passing of the assessment order(s).

11. In the considered opinion of this Court, not only the mandate of Section 45-A of the ESI Act but even the principles of natural justice require that the appellants ought to have issued Show Cause Notice(s) to the

respondent, *inter-alia*, granting opportunity of hearing to it, before passing of the assessment orders. It is deemed apposite to refer in this regard to the decision rendered by a Co-ordinate Bench of this Court in Optical Instrument Company v. Employees State Insurance Corporation and Others reported as **1986 SCC OnLine Del 205**, where it was held as under:

“7. Before any action is taken under 45(A), or 73(A), it is necessary to ascertain with the help of proper evidence the exact number of workers working in the establishment at the relevant time. In the plaint, the appellant has alleged that no notice under Section 44 was served on them. This was also a specific ground taken by them in reply to the show cause notice. The fact that no show cause notice was issued under Section 44 has not been denied by the respondent Corporation in their written statement. However, it is simply asserted that since the requirement pf Section 44 was not complied with by the appellant, action under Section 45A was taken. In other words, the respondent Corporation subscribed to the position that action under section 45(A) can be followed only after compliance of Section 44, Section 44 of the Act states, “Where in respect of any factory or establishment the Corporation has reason to believe that a return should have been submitted under sub-section (1) but has not been so submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies.” Section 45(A) enables the corporation to proceed on the basis of the “information available to it”, when the information as required by section 44 is not furnished. If an establishment is not called upon to produce the records and particulars as envisaged by Section 44(2) by a notice, no action can be taken under section 45(A) of the Act. This is so on a plain reading of Section 45(a) where Section 44 is specifically mentioned. Sections 44 and 45(a) together incorporate the sound principle of natural justice that no adverse or pre-judicial action should be taken unless the

person has been given an opportunity and is heard. Breach of these provisions is another reason why the impugned orders are invalid in law.”

12. It is also worthwhile to note that vide the impugned judgments, while allowing the respondent's challenge to the assessment orders by setting aside the same, the Trial Court has granted liberty to the appellants to re-assess the entire case after affording an opportunity of hearing to the respondent in terms of the ESI Act. On a specific query, it has been informed that no such steps have been taken till date.

13. On an overall consideration of the facts of the present cases, this Court finds no ground to interfere with the impugned judgments. Accordingly, the appeals are dismissed. Pending application, if any, is disposed of as having become infructuous.

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 10, 2023/v

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