

PROVIDENT FUND UPDATE

Employees' Provident Funds & Misc. Provisions Act - contributions for pre-discovery period to be assessed again

The appellant in appeal, before the Employees' Provident Fund Appellate Tribunal, has put forth its grievance that initiation of proceedings under Section 7A of the Act for not deducting the employees share for the pre-discovery period and passing the impugned order directing the appellant to deposit the dues, is illegal.

The Ld. Tribunal observed that the appellant was allotted Code Number in 2003 and later on pre-poned the coverage to August 2001 whereas the notification number 11025 dated 18.02.1997 lays down that an establishment, when covered with retrospective effect, the employer shall not be liable for the payment of employees' share for the pre-discovery period. Hence, order of the PF authority cannot sustain and remanded the case back to the EPF authority to determine the liability of the appellant in light of the said circular and disposed of the appeal.

*ATA No.487(6)2006 decided on 7.4.2011
M/s. International Clothing House vs. RPFC, Bangalore*

Employees' Provident Funds & Misc. Provisions Act - allowances, if paid to avoid EPF contribution - not permitted

The appellant's grievance before the Employees' Provident Fund Appellate Tribunal was that initiation of proceedings under Section 7A of the Act considering the Dearness allowance, Conveyance allowance and other allowances as a part of 'Basic Wages' and passing the order directing the appellant to deposit the dues is illegal.

The Ld. Tribunal referred to the case of M/s. Bridge & Roof vs. Union of India 1962(II) LLJ 490 wherein the Supreme Court has observed that 'Dearness Allowance which is an exception in the definition of basic wage is included for the purposes of contribution by Section 6 of the Act and the real exception, therefore, in clause 2 or other exceptions besides Dearness Allowance which is to be included through Section 6' of the Act, held that no infirmity is notified in the order of the Authority and dismissed the appeal.

*ATA No.377(8) 2008 decided on 9.3.2011
M/s. U-Flex Ltd. vs. RPFC, Gwalior*

Employees' Provident Funds & Misc. Provisions Act - special allowance also wages for EPF contributions

The appellant submitted its grievance before the Employees' Provident Fund Appellate Tribunal that initiation of proceedings under Section 7A of the Act considering the Special Allowance and Washing Allowance as a part of 'Basic Wages' and passing the order directing the appellant to deposit the dues is illegal.

The Ld. Tribunal referred to so many cases including the case of *Regional Provident Fund Commissioner vs. M/s. Vivekananda Vidya Mandir*, 2005 LAB L.C. 1562 wherein the Delhi High Court has held that 'special allowance would be treated as part of basic wage or dearness allowance attracted PF contribution' and held that no infirmity is notified in the order of the Authority and dismissed the appeal.

*ATA No.414(8) 2008 decided on 9.3.2011
M/s. Surya Roshni Ltd. vs. RPFC, Gwalior*

Employees' Provident Funds & Misc. Provisions Act - allowances form part of 'basic wages' for EPF contribution

The appellant in appeal before the Employees' Provident Fund Appellate Tribunal has put forth its grievance that initiation of proceedings under Section 7A of the Act considering the variable Dearness Allowance, Conveyance Allowance and other allowances as a part of 'Basic Wages' and passing the order directing the appellant to deposit the dues is illegal.

The Ld. Tribunal referred to the case of *M/s. Bridge & Roof vs. Union of India*, 1962(II) LLJ 490 wherein the Supreme Court has observed that 'Dearness Allowance which is an exception in the definition of basic wage is included for the purposes of contribution by Section 6 of the Act and the real exception, therefore, in clause 2 or other exceptions besides Dearness Allowance which is to be included through Section 6' of the Act and referring to some other decided cases, held that no infirmity is notified in the order of the Authority and dismissed the appeal.

*ATA No.378(8) 2008 decided on 9.3.2011
M/s. Montage Enterprises Ltd. vs. RPFC, Gwalior*

No damages for pre-discovery period

M/s. Progressive Technical Works filed an appeal before the Employees' Provident Fund Appellate Tribunal against the Order passed by the EPF Authority under section 14B of the Act. The appellant was covered under the Act in 2001 with retrospective effect from 1997. The EPF Authority initiated proceedings under section 14B of the Act without giving the appellant the benefit of pre-discovery period levied the damage and interest which is illegal.

The Appellate Tribunal observed that the delay, if any, was due to non allotment of Code No. The circular No.15921 dated 15.06.2004 shows that no damage can be levied for the pre-discovery period. Hence, the order of the EPF authority cannot sustain and set aside.

*ATA No. 315(5)2006 decided on 24.3.2011
M/s. Progressive Technical Works vs. APFC - Vadodara*

Staff strength for coverage to be re-examined

An appeal was filed by *M/s. Siddhartha Engg. Works* challenging the order passed by the EPF authority under section 7A of the Act putting forth its grievance that its staff strength never reached 20 and the establishment was closed and the EPF authority has covered the establishment under the Act without conducting any enquiry, assessed the dues and directed to deposit the same which is illegal.

The Appellate Tribunal observed that the appellant has not filed any document to show its staff strength whereas the burden is upon the appellant but at the same time the order of the EPF does not reveal the staff strength of the appellant nor any list of staff was furnished and no finding was recorded whether the

appellant is still in existence or not. Hence, the order of EPF authority cannot sustain and is remanded back with direction to ascertain the staff strength at the relevant period.

ATA No. 158(9)2008 decided 4.3.2011
M/s. Siddhartha Engg. Works vs. APFC, Goa

Damages for delayed payment reduced

M/s. Nugen Machineries Ltd. filed an appeal before the Employees Provident Fund Appellate Tribunal against the order passed by the PF authority under section 14B of the Act putting forth its grievance that due to financial problems, the establishment became a sick unit and payment of PF contributions could not be made in time. PF authority has levied the damages and interest without considering the circumstances.

The Tribunal observed that financial problem is no ground to delay the payment of PF contributions as held in *M/s. Sky Machinery Ltd. vs. RPFC, 1998 LLR 925* wherein the High Court of Orissa has held that 'financial crunch will not be sufficient for waiving penal damages for delay in depositing the PF contribution'. The establishment becoming sick and being referred to BIFR is also not justifiable ground in delaying the PF contribution. However, the calculation for assessing the damage and interest is not according to the circular passed by the department. Hence, held that order of the EPF Authority cannot sustain and remanded the matter to EPF authority with direction to assess the liability at the rate of 22 per cent inclusive of interest.

ATA No. 328(5) 2008 decided on 11.3.2011
M/s. Nugen Machineries Ltd. vs. APFC, Ahmedabad

Damages for delayed payment reduced

M/s. Farmers Coop. Spinning Mills filed an appeal before the Employees Provident Fund Appellate Tribunal against the order passed by the PF Authority under section 14B of the Act putting forth its grievance that the PF Authority has levied damage and interest without considering the facts that appellant has suffered losses and become a sick unit and delay in payment was not intentional.

The Tribunal observed that the financial problem is not a justifiable ground. However, the documents reveal that before financial problems, the appellant was making contributions regularly and delay does not seem to be intentional and documents also show regular losses to the appellant. Relying on the case of *M/s. Shanti Garments vs. Regional PF Commissioner, 2003(1) CLR 228* wherein Madras High Court has held that "where the default is found but no apparent fault, the quantum of damage should be compensatory rather than penal in nature", the Tribunal remanded the case back to EPF Authority to assess the liability at the rate of 22% inclusive of interest.

ATA No. 90(6)2007 decided on 8.4.2011
M/s. Farmers Coop. Spinning Mills vs. RPFC, Hubli

Penalty & interest for delayed deposit of contribution not to be waived

M/s. Mann Industries Ltd . filed an appeal before the Employees Provident Fund Appellate Tribunal against the order passed by the PF Authority under section 14B of the Act putting forth its grievance that the appellant is not liable to pay penalty and interest for delayed payment of contribution as the Code Number was allotted in 2001 covering the establishment from 1998 and the order of the PF Authority is illegal.

The Tribunal observed that under section 1 Rule 4 of the Act, the PF Commissioner has power to cover an establishment with retrospective effect and even the appellant had not objected the same during the proceedings under section 7A and it can not be challenged under section 14B and when the Act has become applicable, liability of the appellant does not depend upon the demand. Hence, the appeal is dismissed.

*ATA No.633(12)2004 decided 24.1.2011
M/s. Mann Industries vs. APFC, Kota*

PF UPDATE

Incentive - not wages to attract contributions

The appellant challenged the order passed by the PF Authority under Section 7A of the Act directing the appellant to deposit the dues putting forth its grievance that appellant was appointed by M/s. Reliance Petro Marketing Private Ltd.

The EPF authority has wrongly treated the service, advertisement, house keeping charges and payment made to consultants as basic wages. Hence, the proceedings initiated under Section 7A are illegal and the order of the EPF Authority is untenable.

While accepting the arguments as advanced by Advocate S.K. Gupta, the Ld. Tribunal observed that the perusal of definition of "basic wages" as provided under Section 2(b) of the Act, reveals that the payment to be considered as wages should be made to all the employees while they are on duty. The payments towards service, advertisement, house keeping charges and consultant, do not show that the same were made to the employees working exclusively for the appellant. Hence, the order of the EPF authority cannot sustain and appeal is allowed.

ATA NO.794(3) 2008 decided on 23.3.2011
M/s. Rohini Enterprises vs. APFC, Muzaffarpur

Alleging that employees were not enrolled - untenable

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging the order of the EPF Authority passed under section 7A of the Act, putting forth its grievance that the establishment of the appellant was covered under the Act and the appellant was depositing contribution regularly. Hence, the order passed by the EPF Authority, directing the appellant to deposit the dues in respect of alleged employees who were not enrolled, is illegal.

The Tribunal observed that the order of the EPF Authority does not reveal which employee of the appellant was not enrolled nor there is any report of the Enforcement Officer and the assessment seems to have been made on assumption.

Hence, the Tribunal held that the order of EPF Authority is set aside and appeal is allowed.

ATA No.738(5)2007 decided on 21.3.2011
M/s Sharp Eye Detective & Security Service Vs RPFC - Vadodara

No damages for late deposit when the order is mechanical

The appellant challenged the order passed by the PF Authority under Section 14B of the Act directing the appellant to deposit the damage and interest putting forth its grievance that the EPF Authority has levied the damage and interest without considering the facts of the case of the appellant.

The Ld. Tribunal observed that the order of the EPF Authority is in cyclostyled format filled in by some subordinate staff which shows that the same has been passed mechanically without application of mind.

Relying upon the case of Haryana State Corporation of Supply and Marketing Federation Ltd. Vs Regional PF Commissioner reported in Vol.63 FJR page 54 wherein it has been held that "as already indicated, this order is in a cyclostyled form which had been placed before him by subordinate staff for signature after duly filling in the blanks therein, the Appellate Tribunal held that the order being in cyclostyled format does not give indication of any consideration or application of mind by the EPF Authority. Hence, I do not feel the necessity of going into the other contentions raised by the petitioner.

For the reason recorded above, the order of the EPF Authority cannot sustain and the petition is allowed.

ATA NO.757 (12) 2007 decided on 22.3.2011
M/s. Sikar Kendriya Shahkari Bank Ltd. vs. APFC, Jaipur

Act not applicable for want of prescribed number of employees

The appellant challenged the order passed by the PF Authority under Section 7A of the Act directing the appellant to deposit dues putting forth its grievance that its staff strength never exceeded 11 and the trainees were casual in nature.

The Ld. Tribunal has referred to the case titled M/s. Saraswati Construction Company vs. Central Board of Trustees, 2010 LLR 684 wherein the Hon'ble High Court of Delhi has held that " *it is a settled legal position that if any establishment or employer is not covered under the said Act, then it is for the employer to place sufficient cogent and convincing materials before the designated Authority under an enquiry under Section 7A of the Act so as to satisfy the authority with regard to inapplicability of the Act and on failure to place any such material, the onus cannot be shifted on the Authority to prove applicability of the Act*".

In this case the appellant has filed the attendance register duly signed by the Enforcement Officer show that staff strength of the appellant never exceeded 11.

The Ld. Tribunal held that as the attendance record is a genuine one, the order of EPF Authority cannot sustain and appeal is allowed.

ATA No.194(3) 2006 decided on 22.3.2011
M/s. Sri Sathya Saividya Vihar vs. APFC, Patna

Non payment of contributions pending exemption - not to attract damages

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal, challenging order of the EPF authority passed under section 14B of the Act, putting forth its grievance that the establishment of the appellant was an exempted one. When the Pension Scheme was introduced, the appellant had applied for the exemption under the said Scheme and the application is still pending with the Competent Authority but the EPF Authority has imposed the damages and interest which is illegal.

The Tribunal observed that as per para 39 of the Pension Scheme, the application for exemption has to be disposed of within 6 months failing which, it will be deemed that the application is allowed. But the application of the appellant is still pending so the appellant is not liable to pay the dues as held by the courts in various cases including the case titled 'RPFC vs. Sree Visalam Chit Funds Ltd. and Tirunelveli Central Coop. Bank Ltd. 2010(4) LLN 706 and M/s. Brook Bond India Ltd. vs. RPFC decided by the Tribunal on 11.03.2005 in ATA No.586(1)2000. In the case of Regional PF Commissioner Vs EPF Appellate Tribunal 2006 (III) LLJ 192, the High Court of Kolkata has held that "it seems to me that the tribunal correctly held that till the pendency of the application seeking exemption from protection of the Scheme the second respondent was not under any obligation to remit the contribution and he has not hence deposited the dues during the period in question. It cannot be said that it committed any default".

Hence, the Tribunal held that the order of EPF Authority cannot sustain and appeal is allowed.

ATA No.962(13)2005 decided on 14.3.2011
Hindustan Lever Ltd. vs. APFC, Coimbatore

Damages not to be levied for delayed deposit of contributions during pendency of exemption application

The appellant challenged the order passed by the PF authority under Section 14B of the Act directing the appellant to deposit damage and interest putting forth its grievance that the appellant was an exempted establishment and when the Pension Scheme was introduced, the appellant applied for the exemption under the said Scheme but the application is still pending with the PF authority, hence the impugned order is illegal as per para 39 of the Pension Scheme.

The Ld. Tribunal observed that the application of the appellant for exemption is still pending. Relying upon the case of Regional PF Commissioner vs. EPF Appellate Tribunal 2006 (III) LLJ 192 wherein the Calcutta High Court has held that "it seems to me that the Tribunal correctly held that till the pendency of application seeking exemption from protection of the Scheme, the second respondent was not under obligation to remit the contribution and he has, hence, not deposited the dues during the period in question and it cannot be said that it committed any default", the Tribunal held that the order of the EPF authority cannot sustain. Hence, appeal is allowed.

ATA No. 962(13) 2005 decided on 14.3.2011
M/s. Hindustan Lever Ltd. vs. APFC, Coimbatore

Penal damages be reduced when delay in deposit of contribution is justified

M/s. Regency Ceramics Ltd. filed an appeal before the Employees' Provident Fund Appellate Tribunal putting forth its grievance that the appellant had sustained heavy loss and was not able to deposit the provident fund contributions and the default was not intentional.

The Appellate Tribunal observed that documents filed by the appellant show that it sustained huge loss and it was facing financial problems. The order of the EPF Authority does not reveal that the calculation was made as per circular dated 20 th May, 1990. Relying upon the case of Shanti Garments vs. Regional PF Commissioner 2003(1) CLR 228 wherein the High Court of Madras has held that "where default is found but no apparent fault, the quantum of damage should be compensatory rather than penal in nature", the Appellate Tribunal has ordered that the matter is remanded back to the Authority with direction to assess the liability @ 22% (inclusive of interest).

ATA No.358(1)2009 decided on 24.3.2011
M/s. Regency Ceramics Ltd. vs. RPFC - Rajahmundry

Payment of service, advertisements & house keeping charges & payment to consultants - not wages

The appellant challenged the order passed by the PF authority under Section 7A of the Act directing the appellant to deposit the dues putting forth its grievance that the EPF Authority has wrongly treated the service, advertisement, house keeping charges and payment made to consultants as basic wages. Hence, the proceedings initiated under Section 7A are illegal and the order of the EPF Authority is untenable.

The Ld. Tribunal observed that the perusal of definition of "basic wages" as provided under Section 2(b) of the Act, reveals that the payment to be considered as wages should be made to all the employees while they are on duty. The payments towards service, advertisement, house keeping charges and consultants do not show that the same were made to the employees working exclusively for the appellant. Hence, order of EPF Authority cannot sustain and appeal is allowed.

ATA NO.463(15) 2008 decided 18.3.2011
M/s. Samcon Ressor Hotel (P) Ltd. vs. APFC, Kolkata

Separate identities could not be clubbed for coverage

The appellant challenged the order passed by the PF Authority under Section 7A of the Act directing the appellant to deposit the dues putting forth its grievance that its staff strength never reached 16 and the clubbing of its establishment with two other establishments for coverage under the Act is illegal.

The Ld. Tribunal observed that two establishments can be treated as one if their exists financial, functional and managerial integrality between them. In the case of Associate Cement Company Ltd. vs. Workmen 1960 Supreme Court page 56, it is held that "in one case unity of ownership management and control may be an important test, in another case financial integrity or general unity may be competent test and still in another case the important test may be the unity of employment". Hence, no single test is sufficient to

determine whether two units can be treated as one or separate and each case has to be determined on the basis of its own facts.

In the case of the appellant, the order of the EPF Authority reveals that all the establishments are run by one family and except this there is nothing common. There is no finding that all the establishments are dependent on each other or there was financial, functional and managerial integrality between them. The Ld. Tribunal referred to the case of RPF Commissioner vs. Rajesh Continental Export Pvt. Ltd. 2007 (4) SCC 239 wherein it is held that "unless there is a clear evidence to show that there was any supervisory, financial or managerial control, it cannot be said that it is the branch of the other". In the case of Debash Sandip Associates vs. RPFC 1997(I) LLJ 1167, it is held that "mere fact of common ownership of the two units and mere location of the two units in common premises by itself is not sufficient to satisfy the test of financial integrality".

The Tribunal held that the order of the PF Authority cannot sustain because mere common owner is not sufficient to club the establishments. Appeal is allowed.

ATA No.688(13) 2002 decided on 28.1.2011
Iswarya Rep. by its Partner vs. The RPF Commissioner

Levy of damages for delay in depositing the contribution due to non-allotment of code number not justified

The appellant filed an appeal before the Employees' Provident Fund Appellate Tribunal against the order passed by the EPF Authority under Section 14B of the Act putting forth its grievance that code number was allotted in the year 1999 covering the establishment from 1998. The appellant deposited the contribution and interest. Hence, the order in proceedings under Section 14B of the Act is illegal.

The Tribunal observed that the code number was allowed in 1999 effective from 1998. The challan filed by the appellant shows that the appellant deposited the interest also. All these facts show that the appellant had no intention to commit the default. As per circular No.15921 dated 15.06.2004, no damage has to be levied for pre-discover and only a simple interest has to be imposed. Hence, appeal is allowed and order of the EPF Authority is set aside.

ATA No.548(8)2003 decided on 31.3.2011
M/s. Trinetra Services Pvt. Ltd. vs. RPFC, Indirapuram