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SUPREME COURT ON EMPLOYEES' PROVIDENT FUND CONTRIBUTIONS: UNIVERSALITY IS THE TEST TO CONSIDER ALLOWANCES AS 'BASIC WAGES'

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A Bench of Hon'ble Justices Arun Mishra and Navin Sinha of the Hon'ble Supreme Court vide judgement dated 28 February 2019 in the case of *The Regional Provident Fund Commissioner (II) West Bengal Vs Vivekananda Vidyamandir & Ors.* has reiterated the principle that the crucial test to be applied for inclusion of allowances as part of "Basic Wages" is that of universality ie all allowances which are universally, uniformly, necessarily and ordinarily paid to all employees would form part of "Basic Wages" for the purpose of computing provident fund contributions under the Employees' Provident Fund and Miscellaneous Provision Act, 1952 (Act)

BACKGROUND

This judgment of the Hon'ble Supreme Court has been long awaited and is a welcome clarification given the ambiguities that prevailed in determining the scope of "Basic Wages" as defined under the Act in proceedings before competent authorities under the Act. Employers have been structuring wages/ remuneration payable to their employees by inclusion of allowances under various heads and nomenclature to minimise their liability to contribute under the Act.

In this context, the Hon'ble Supreme Court jointly heard five appeals arising from various High Courts on the common question of law ie, whether allowances including special allowances could fall within the ambit of "basic wages" under the Act for the purposes of determining provident fund liability of an employer.

In *RPFC (II) West Bengal v. Vivekananda Vidyamandir and Others*, an unaided school paid special allowance by way of incentive to teaching and nonteaching staff pursuant to an agreement between them. The incentive was reviewed from time to time upon enhancement of the tuition fees of the students and its determination within the scope of basic wages was in question. In the matters of *Surya Roshni Limited v. EPF and Others, U-Flex v. EPF and Another, Montage Enterprises v. EPF and Another* and *The Management of Saint-Gobain Glass India Ltd. v. RPFC, EPFO,* the appellants had excluded from the perspective of determining provident fund liability all allowances such as house rent allowance, special allowance, management allowance, conveyance allowance, education allowance, food concession, medical allowance, not specifically included as basic wages under the Act.

It was argued in remaining appeals that only those emoluments that are earned by an employee in accordance with the terms of employment, would qualify as basic wage and discretionary allowances not earned in accordance with the terms of employment would not be deemed basic wage.

The Supreme Court, while deciding these appeals, has reiterated the principle laid down in *Bridge and Roof Co. (India) Ltd. vs. Union of India, (1963) 3 SCR 978* and held that only such allowances not payable uniformly by all concerns and which may not be earned by all employees of the concern would stand excluded from the definition of "Basic Wages". There were divergent views that had emerged resulting in ambiguity amongst stakeholders including the employers, employees and the provident fund authorities alike. The provident fund authorities tried to bring in clarity and consistency by issuing various Circulars particularly aimed at clarifying the expression "*commission or any other allowance payable to the employee*" under the Act but owing to challenge before the courts, such circulars were not implemented or kept in abeyance.

FINDINGS AND CONCLUSIONS BY THE COURT

The Supreme Court observed that the Act is a beneficial social welfare legislation and must be interpreted as such.

To exclude an allowance from the ambit of basic wages, it must be demonstrated that the same is either (a) variable; or (b) linked to any incentive for production resulting in greater output by an employee; or (c) paid especially to those who avail the opportunity; and (d) that the allowance in question is not paid across the board to all employees, in a particular category. Therefore, it must be demonstrated that the employee concerned had become eligible to get this additional amount beyond the regular work which he was otherwise required to put in.

COMMENTS

The judgement has reinforced and reiterated the principle of universality originally propounded in the *Bridge and Roof* judgement.

To conclude, while employers may structure the wages and pay certain components of the wages as allowances, it is advisable to ensure that such allowances are not being paid with a view to subterfuge and reduce provident fund liability.

The judgment is indeed a welcome clarification, specifically in the context of the ongoing proceedings against employers under Section 7A of the Act that have either been in limbo given the pendency of these appeals before the Hon'ble Supreme Court or have been determined in a manner contrary to what has been laid down by the Hon'ble Supreme Court.

Employers may consider revisiting / reviewing wage structures for their workforce generally or for a specific employee category. This would ensure that such structure withstands the test laid down as above to avoid scrutiny by the provident fund authorities whose position has been further reinforced by the judgment.

- *Anshul Prakash (Partner), Jeevan Ballav Panda (Partner), Meher Tandon (Associate) & Abhisek Choudhury (Associate)*

For any queries please contact: editors@khaitanco.com

Mumbai
One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi
Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru
Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata
Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com