

## WAGES UNDER EMPLOYEES' PROVIDENT FUNDS & MISCELLANEOUS PROVISIONS ACT

In the recent past there has been constant conflict between the employers and the Employees Provident Fund Organisation enforcement authorities on the issue of 'basic wages' on which contributions are required to be made. In this paper an attempt is made to collate the information on the subject based on the various judgements of the High Courts and Supreme Court to create a perspective on the subject for future guidance and to initiate corrective measures to avoid possible litigation with the EPFO. Para 29 of the Employees' Provident Funds Scheme, 1952 deals with the contributions payable by the employer. In accordance with the said para, the employer shall contribute twelve per cent of the basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) payable to each employee to whom the Scheme applies. The Act has defined 'Basic Wages' as all emoluments which are earned by an employee while on duty or on leave or on holiday 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 –

- (i) The cash value of any food concession;
- (ii) Any dearness allowance (that is to say, all cash payment by whatever name called paid to an employee on account of a rise in the cost of living ), house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;
- (iii) Any presents made by the employer.

Most of the new economy establishments are devising a salary structure with Basic Salary, HRA and other allowances without the component of Dearness Allowance and contributions towards provident fund are being paid on the basic salary only on the assumption that all other allowances fall under the exclusion category as per the above definition. There has been conflict between the employers and EPFO and hence these matters reached various Hon'ble High Courts in the country and some of the matters are pending before the Apex Court for its final verdict.

Reviews of some important judgements are mentioned hereunder to understand the views of the judiciary in the matter.

The Hon'ble Madhya Pradesh High Court Division Bench in the matter of Montage Enterprises Pvt Ltd Vs EPFO, Indore [2011 LLR 867] held that the conveyance allowance and Special Allowance will fall within the definition of 'Basic Wages'. The rationale taken by the Hon'ble bench is that the Conveyance Allowance and Special Allowance is paid to all non-executive categories of employees and it is not a case that some of the employees are not getting the same. It is a settled law that if such wages are paid universally, necessarily and ordinarily to all across the board, the same will fall under the definition of basic wages.

In the year 2005, the Hon'ble Calcutta High Court Division Bench in the matter of RPF (II), WB Vs. Vivekananda Vidya Mandir [2005 LLR 339] held that contributions are payable on Special Allowance when it is revised from time to time and the company has not adopted the system of payment of Dearness Allowance. The detailed view of the court in the matter is as under:

In order to exclude any allowance from the purview of Section 6 which provides for liability to pay contribution based on basic wages, such allowance should fall under Clause (i), (ii) and (iii) of Section 2 (b) which enumerate allowances which are not included in the definition of 'basic wages'. In the instant case the special allowance paid by the employer was not a retaining allowance, neither cash payment for food concession, nor over time allowance, house rent, bonus, commission, nor a present by employer and it did not satisfy any of the ingredients of Clauses (i) to (iii). Considering that the said allowance was paid in terms of contract of employment and was upwardly revised every 2 years and there is no system of payment of dearness allowance, it was held to be dearness allowance though described differently (Special Allowance) and therefore has to be treated as a part of pay and hence order passed by PF Authority that special allowance was subject to liability of contributions under section 6 of the Act is upheld.

In the year 2004, the Hon'ble High Court of Gujarat in the matter of Gujarat Cypromet Ltd Vs APFC [2004 III CLR 485] also held that the contribution to Provident Fund made on basic wages includes all emoluments earned by the employee and allowances like lunch allowance, medical allowance, conveyance allowance etc., except those which are specifically excluded by the legislature, such as house rent allowance which is clearly excluded from the definition of basic wages by virtue of Section 2(b). It could be seen from the above the judiciary has interpreted the term 'basic wages' to include all allowances which are not specifically excluded. This interpretation has major cost implications to industry. The establishments have been engaging employees through contractors and agencies to meet the noncore activities of the industry such as Security, House Keeping etc., In addition to this, during the last one decade, the establishments started engaging manpower through outsourcing agencies to meet the work requirements without having long term liability. The number of such employees has increased substantially in the recent past. Most of these employees are paid applicable minimum wages. The outsourcing agencies in general bifurcate the minimum wages as basic wages, house rent allowance and conveyance allowance etc.,

The EPFO authorities have come to the view that the employers are bifurcating the minimum wages with a view to avoid payment of provident fund contributions and this led to litigation across India. The High Court of Andhra Pradesh issued a stay order on the circular issued by the PF Department on this issue. The Division Bench of Punjab & Haryana Court held that the definition of wages under Minimum Wages Act is inapplicable to that of basic wages under EPF Act. The decisions of the Hon'ble High Courts, which are discussed above and similar other matters are pending before the Hon'ble Supreme Court of India for disposal. We have to await the decision of the Apex Court on these matters. The courts have also held that certain category of payments does not fall under the ambit of basic wages and does not attract provident fund contributions. They are:-

The Supreme Court held that the Production Bonus / Incentive when paid in a sliding scale with due regard to the production made by each workman then no contribution is payable. Similarly if the production bonus is paid on an average to all workmen on the basis of extra production made by them, then also, no contribution need be paid. [Daily Pratap Vs RPFC 1999 I LLJ 1]

The Madras, Delhi and Gujarat High Courts held in various matters that the ad-hoc allowance and ad-hoc payments made to employees does not form part of 'basic wages' and hence no contributions are payable.

The High Court of Bombay held that payment made in lieu of notice for terminating the contract of employment of a permanent employee does not constitute 'basic wages' and hence no contributions are payable.

The Gujarat High Court in the matter of Swastik Textile Engineers Vs V M Rathod [2008 II LLJ 533] held that the back wages awarded by Court cannot be regarded as 'basic wages' payable to the employee and it is in the form of damages or compensation and hence provident fund contributions are not required to be paid.

The Supreme Court held that Leave Encashment should not be taken as part of 'basic wages' and hence no provident fund contributions are payable.

The High Court of Madras in the matter of Wipro Ltd Vs PO Employees PFAT [[2007 LLR 624] held that the canteen subsidy is not equivalent to cash value of food concession and hence provident fund contributions are not payable on canteen subsidy.

With effect from 01.09.2014, employees drawing basic wages, dearness allowance and retaining allowance of Rs. 15,000/- or below are liable to be covered under the provident fund scheme. Once covered employee will continue to get covered even though his wages exceed Rs. 15,000/- per month. The Supreme Court in the matter of Marathwada Gramin Bank Karamchari Sanghatana Vs Management of Bank [2011 LLR 1130] held that employers need not pay provident fund contributions higher than the prescribed limited under the Act and Scheme that is now Rs. 15,000/-.

Most of the new generation organisations are following the concept of cost to the company of the employee and the compensation package is decided on annualised basis. As the organisations are deciding the cost to the company, it has all the freedom to bifurcate the mutually agreed compensation package. Say for example the annual CTC is Rs. 2.90 Lacs, the monthly wages can be defined as Basic: Rs. 15,000/-, HRA 40% of the Basic Salary ie Rs. 6000/- and the employer Provident Fund contribution as Rs. 1800/-. Thus the monthly cost to the company is Rs. 22,800/- and annual cost is Rs. 2,73,600/-.

In view of the recent amendment to the Payment of Bonus Act, the employee with basic wages of Rs. 15,000/- will also be covered under the Act. Hence the employee will be entitled to at least 8.33% of the basic wages earned in the financial year which translates to one month basic wage of Rs. 15,000/-. Thus the annual cost to the company will be Rs. 2,88,600/-. When the CTC offered to an employee is higher than the Rs. 2.9 lacs per annum, other allowances such as conveyance allowance, medical reimbursement etc., may be introduced.

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