

(2012) 11 P&H CK 0108

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No"s. 9047 and 21325 of 2011 (O and M)

Regional Provident Fund Commissioner

APPELLANT

Vs

M/s. Ropar Thermal Plant (GGSTP) PSEB, Ropar and Another

RESPONDENT

Date of Decision : 20-11-2012

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 15, 17, 7Q

Citation : (2013) 137 FLR 401 : (2013) 2 LLJ 403 : (2013) LLR 243 : (2013) 169 PLR 395

Hon'ble Judges : Rajesh Bindal, J

Bench : Single Bench

Advocate : Kamal Sehgal in CWP No. 9047 of 2011 and Mr. Rajesh Bhardwaj in CWP No. 21325 of 2011, for the Appellant; Kamal Sehgal for Respondent No. 1 in CWP No. 21325 of 2011 and Mr. Rajesh Bhardwaj for Respondent No. 1 in CWP No. 9047 of 2011, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh Bindal, J.—This order will dispose of two writ petitions bearing CWP Nos. 9047 and 21325 of 2011. CWP No. 9047 of 2011 has been filed by the Regional Provident Fund Commissioner impugning the order dated 19.05.2010 passed by the Employees' Provident Fund Appellate Tribunal, New Delhi (for short "the Tribunal"), whereby while remanding the case back to the authority it has been directed that the damages be calculated @ 37% per annum including the interest whereas in CWP No. 21325 of 2011 filed by the employer the prayer is for setting aside the order levying damages in totality on the plea that it is too harsh. The proceedings in the present case were initiated for levy of penalty on the respondent establishment u/s 14-B of the Employees' Provident Funds and Misc. Provisions Act, 1952 (for short "the Act"). Vide order dated 12.01.2005 on account of delay in deposit of provident fund for the period (9/90 to 7/97 Supplementary), 1/92, 1/97, 9/90 to 10/97, 11/97, 5/2000, 2/98 to 5/98, 2/2000, 4/2000, 9/2000, 11/2000 and other dues under the Act, a penalty of Rs.

38,77,724/- was levied.

2. Aggrieved against the order, the respondent establishment filed an appeal before the Tribunal. Vide order dated 19.05.2010, the Tribunal, while upholding the penalty in principle, remanded the matter back to the authority for recalculation thereof by directing that a penalty @ 37% per annum shall be including the interest. The grievance of the petitioner (EPF Organisation) is that the amendment made in the table contained in para No. 32-A of the Employees Provident Fund Scheme, 1952 (for short "the Scheme") was made vide circular dated 26.09.2008 whereby the maximum rate of penalty was reduced from 37% to 25% per annum. As in the present case, the period to which the penalty relates and also the order passed by the authority was prior in time, the aforesaid rate could not be made applicable in the case of respondent establishment.

3. On the other hand, learned counsel for the respondent-establishment submitted that in the case in hand the delay in deposit of provident fund dues at the relevant time was not on account of lapse on the part of the respondent rather the petitioner had delayed issuance of code number to the contractors employed by the respondent. The penalty imposed is too harsh. There was no mens rea. He further submitted that Para 32-A was added in the Scheme vide amendment made w.e.f. 01.09.1991 where the maximum rate of penalty for delay of more than six months in deposit of provident fund dues was provided as 37% per annum. The aforesaid percentage of penalty was reduced to 25%, considering the fact that the petitioner started charging interest separately at the rate of 12% per annum on the delayed payment of provident fund dues u/s 7-Q of the Act. He further submitted that the rates at which the damages were being levied as have been described in Para 32-A of the Scheme, included the amount of interest. It is even evident from the circular issued by the Central Provident Commissioner on 29.05.1990 (Annexure P-4 annexed with CWP No. 21325 of 2011) from which it is clearly evident that the rates of damages as prescribed in Para 32-A of the Scheme prior to the amendment carried out on September 26, 2008 included interest chargeable u/s 7-Q of the Act @ 12% per annum. Hence, to state that the amount chargeable from the respondent on account of damages would be @ 37% per annum and in addition thereto the respondent is liable to pay interest u/s 7-Q of the Act is not tenable. The respondent-establishment has charged the interest separately for the same period.

4. Heard learned counsel for the parties and perused the paper book.

5. One of the issue involved in the present petition is as to at what rate the damages are to be levied on an establishment on account of delay in deposit of provident fund and the other dues under the Act.

6. Section 14-B of the Act provides that where an employer makes any default in payment of various contributions under the Act, the penalty by way of damages not exceeding the amount of arrears, as may be specified in the Scheme, can be

levied. Para No. 32-A was added in the Scheme vide amendment carried out on 16.08.1991 w.e.f. 01.09.1991, which is extracted below:

Para 32-A: Where an employer makes default in the payment of any contribution to the fund, or in the transfer of accumulations required to be transferred by him under sub-Section (2) of Section 15 or sub-section (5) of Section 17 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified u/s 17 of the Act, the Central Provident Fund Commissioner or such officer as may be authorized by the Central Government, by notification in the Official Gazette in this behalf, may recover from the employer by way of penalty, damages at the rates given below:

The damages shall be calculated to the nearest rupees, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored.

7. In fact, prior thereto, the Central Provident Fund Commissioner had issued a circular providing for rates at which damages were to be levied on 29.05.1990 (Annexure P-4 in CWP No. 21325 of 2011) which clearly provided that after the enforcement of Section 7-Q of the Act providing for payment of interest on delayed payment @ 12% per annum new rates for levy of damages were provided. This, in fact, clarified that the earlier rates prescribed would be inclusive of the interest. The relevant part of the circular is extracted below:

Levy of damages for belated payments:- with the amendment to the Act providing for payment of simple interest at 12% per annum (Section 7-Q) payable from the date the amount has become due till the date it is actually paid, the Central Board of Trustees has approved the following revised rates of damages with condition that the position with regard to the incidence of default following the revision of the rates of damages would be analysed after six months from the date the new rates come into force:-

8. As per the footnote in the Act published by Universal Law Publishing Co. Pvt. Ltd. it is provided that Section 7-Q was enforced from 01.07.1997. In the present case, the rate at which the damages were levied on the respondent establishment are @ 37% per annum as delay in deposit of provided fund and other dues was more than six months. In addition thereto interest u/s 7-Q was also charged for the same period. Once that is so, in terms of the circular issued by the Central Provident Fund Commissioner dated 29.05.1990, the damages which can be levied on the establishment could be @ 25% per annum in case of delay in deposit of provident fund and other dues for more than six months. As the petitioner in the present case calculated the damages at the rate of 37% per annum, no illegality has been committed by the Tribunal in directing that it shall be treated as including interest chargeable u/s 7-Q of the Act. Accordingly, to that extent the order passed by the Tribunal cannot be faulted with.

9. As far as the contention raised by learned counsel for respondent establishment regarding the mens rea and harshness of penalty levied in my

view the same is misconceived and deserves to be rejected. The plea that the respondent establishment had filed an application for issuance of code numbers for its contractors may not be a valid plea. A plea that the amount of provident fund on account of employees employed through contractors was not the responsibility of the establishment, is not tenable. Para 30(3) of the Scheme provides that it shall be the responsibility of the principal employer to pay both the contributions payable by himself in respect of employees employed directly by him and also in respect of the employees employed by or through a contractor and also administrative charges. The respondent establishment could not deny the liability for deposit of provident fund dues till such time code number was allotted to the contractors. Once there was default in payment of contributions under the Scheme and the damages had been levied in terms of the provisions provided under the Act as per rates prescribed in the Scheme, plea of harshness cannot be permitted to be raised. For the reasons mentioned, both the writ petitions are dismissed.