

MANU/MH/2159/2012

Equivalent Citation: [2013(136)FLR545]

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 346 of 2012

Decided On: 17.09.2012

Appellants: **American Express Bakery**
Vs.

Respondent: **Regional Provident Fund Commissioner-II**

Hon'ble Judges/Coram:

R.P. Sondurbaldota, J.

Counsels:

For Appellant/Petitioner/Plaintiff: S.C. Naidu and Saurabha Kulkarni i/by C.R. Naidu and Company

For Respondents/Defendant: Ms. S.V. Bharucha and Ms. Pooja Singh

Case Note:

Direct Taxation - Refund of amount - Whether order of refund passed by provident Fund Commissioner was valid or not - Held, it was noticed that in present procedure of payment of dues and submission of returns, same was being done electronically through e-return tool - Establishment was required to feed data of salary/wages paid to employees every month and generate challan with unique identification number - State Bank of India accepted payment against unique identification number - Order passed.

JUDGMENT

R.P. Sondurbaldota, J.

1. By consent, the writ petition is disposed off in terms of the following order.

(i) The order dated 23rd March, 2011 passed by the Regional Provident Fund Commissioner under section 7-A of Employee's Provident Fund and Miscellaneous Provisions Act, 1952 in respect of the petitioner, the order dated 11th April, 2011 under section 8-B to 8-G, the order dated 6th July, 2011 under Rule 5 of the 2nd Schedule to the Income-Tax Act, 1961 read with section 220(2) of the Income-Tax and Rules 56 and 57 of the Income-Tax (Certificate Proceedings) Rule, 1962 and the order dated 15th December, 2011 filed under section 7-B of Employee's Provident Fund and Miscellaneous Provisions Act, 1952 are set aside.

(ii) The proceedings under section 7-A of Employee's Provident Fund and Miscellaneous Provisions Act, 1952 are remitted back to the Regional Provident Fund Commissioner, who shall hold enquiry afresh in the matter of rectification of accounts (1, 2, 10, 21 and 22) for the period April, 2004 to December, 2010. The learned Commissioner shall hold the enquiry in the light of paragraph 59 of the Employee's Provident Fund Scheme, 1952, which is for rectification of the discrepancy either relating to surplus payment or

deficit payment and complete it within a period of eight weeks from today.

(iii) As regards the amount already recovered pursuant to the order dated 11th April, 2011, though the order is set aside, the amount recovered shall remain with the Regional Provident Fund Commissioner, who shall on conclusion of the enquiry pass suitable order of refund or otherwise.

Employee's Provident Fund Organisation
Bhavishya Nidhi Bhavan, 341, Bandra [e] Mumbai-51

No. MH/PF/1552/Compl. Circle. III/286

Dated: 16.11.2012

Order of The Regional P.F. Commissioner [I] Under Section 7-A of The Employee's Provident Fund and Miscellaneous Provisions act, 1952, in Respect of M/s. American Express Bakery [MH/1552] Subsequent of Hon'ble High Court Order in WP No. 346 of 2012 dated 17.9.2012.

M/s. American Express Bakery [MH/1552] is an establishment [hereinafter referred to as "the establishment"] covered under the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 [hereinafter referred to as "the Act"]. The establishment was issued a notice under section 7-A of the Act on 11.6.2010. An order was issued on 23.3.2011 assessing an amount of ' 338374/- being short payment in account numbers 10 and 22 for the period from May, 2004 to December, 2010. The establishment filed review application under section 7-B of the Act which was rejected on 9.5.2011 on technical grounds. Establishment filed a Writ Petition No. 1012 of 2011 before the Honourable High Court at Bombay which has set aside the order under section 7-B on 2.9.2011. The operative part of the Order of Hon'ble High Court states "After hearing both sides, in my view, the objection to the maintainability on the ground of merger need not be considered in the facts and circumstances of this case. The rejection of the review application by a communication dated 9th March, 2011 is vitiated because the review application is rejected without it being considered on merits. The review application is rejected only because it does not comply with certain format or procedure prescribed by the department. This is not a satisfactory manner in which review application is dealt with. If as a result of the inquiry under section 7-A of the said Act, the assessment is made and the contribution has to be forwarded and if not forwarded by the establishment, recovered by resorting to coercive measures for the benefit of the workman/employee, then, the department will be well advised in not wasting of time over procedural and administrative matters. The delay works to the detriment of the ultimate beneficiary/or whom the enactment must be implemented.

2. In these circumstances, such hyper-technical approach defeats the purpose of the Act itself. For all these reasons, the order dated 9th May, 2011 is quashed and set aside. The review application stands restored to the file of the authorities and it shall now be dealt with by the Regional Provident Fund Commissioner of the concerned region. The petitioner shall appear either in person or through his representative before the Regional Provident Fund Commissioner, Mumbai on 14th September, 2011 at 11.00 a.m. and the Commissioner shall hear the petitioner and after perusing the memo of the review application and considering the oral arguments so also scrutinizing the documents produced, shall pass a reasoned order as expeditiously possible and within period of four weeks from the conclusion of hearing. All contentions in relation to the assessment, including on the point of adjustment are

kept open.

3. In compliance of the above order of Hon'ble High Court, Regional Provident Fund Commissioner reconsidered the renew application on merit and passed an order on 15.12.2011. Aggrieved by this order, the establishment again approached Hon'ble High Court at Bombay through Writ Petition No. 346 of 2012 on 23.1.2012. The petition has been disposed off by Hon'ble High Court on 17.9.2012 in terms of following order.

(i) The order dated 23rd March, 2011 passed by the Regional Provident Fund Commissioner under section 7-A of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952 in respect of the petitioner, the order dated 11th April, 2011 under section 8-B to 8-G, the order dated 6th July, 2011 under Rule 5 of the 2nd Schedule to the Income-Tax Act, 1961 read with section 220(2) of the Income-Tax and Rules 56 and 57 of the Income-Tax [Certificate Proceedings] Rule, 1962 and the order dated 15th December, 2011 filed under section 7-B of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952 are set aside.

(ii) The proceedings under section 7-A of Employee's Provident Fund and Miscellaneous Provisions Act, 1952 are remitted back to the Regional Provident Fund Commissioner, who shall hold enquiry afresh in the matter of rectification of accounts [1, 2, 10, 21 and 22] for the period April, 2004 to December 2010. the learned Commissioner shall hold the enquiry in the light of paragraph 59 of the Employee's Provident Fund Scheme, 1952 which is for rectification of the discrepancy either relating to surplus payment or deficit payment and complete it within a period of eight weeks from today.

(iii) As regards the amount already recovered pursuant to the order dated 11th April, 2011, though the order is set aside, the amount recovered shall remain with the Regional Provident Fund Commissioner, who shall on conclusion of the enquiry pass suitable order of refund or otherwise.

Hence the present proceeding.

4. The proceeding was conducted on 19.10.2012 on which date the establishment filed their written deposition. Department side had nothing to add further except the deposition already filed during earlier inquiry. Hence proceeding was closed.

5. I have gone through the documents on record, deposition of department as well as reply of the establishment and other contentions put forth by both the parties during inquiries [both present and earlier] under section 7-A and under section 78 of the Act. Following facts have emerged.

[i] There has not been any dispute regarding payable dues as deposed by area enforcement officer through report dated 21.2.2011 which has become base for assessment of dues of ' 338374/- for the period from 5/2004 to 12/2010.

[ii] This is also admitted fact that establishment has paid amount in excess of dues in account numbers 1, 2 and 21 and has paid short amount in account numbers 10 and 22 in certain months.

[iii] The establishment has pleaded that amount paid in excess in account

No. 1, 2 and 21 be adjusted against short payment in account numbers 10 and 22.

[iv] The request of the establishment for adjustment as above has not been considered by authorities under section 7-A and section 7-B of the Act and amount of short payment in account numbers 10 and 22 has been assessed as default for the period 5/4 to 12/10.

[v] The Recovery Officer appointed under the Act has also recovered the assessed amount of ' 3383747- by attaching Bank Account of the establishment by invoking powers under section 8-B to 8-G of the Act.

[vi] While setting aside the assessment orders passed under section 7-A and review order under section 7-B as also order of Recovery Officer for Recovery of assessed amount, Hon'ble High Court has ordered Regional Provident Fund Commissioner to hold inquiry afresh in the matter of rectification of accounts for the period April, 2004 to December, 2010 in the light of paragraph 59 of the Employee's Provident Fund Scheme, 1952.

(vii) Para 59 states as below;

Member's Accounts.

[1] All account shall be opened in the office of the Fund in the name of each member in which it shall be credited:--

(a) his contributions,

(b) the contributions made by the employer in respect of him, and

(c) Interest as provided in paragraph 60.

[2] All items of account shall be calculated to [the nearest rupee, 50 paise or more to be counted as the next higher rupee and fraction of a rupee less than 50 paise to be ignored].

[3] On receipt of the contribution card or cards of a member from his employer or employers at the end of the period of currency of the contribution card, the Commissioner shall compare the entries made in the contribution card or cards with those made in the member's individual account in the office of the Fund and shall rectify any discrepancy found in these entries.

(viii) Clearly Para 59 deals with rectification of discrepancy of a member. The onus to rectify and discrepancy between contribution card and payment received in respect of member's individual account lies on Commissioner. This is required to be done at the end of currency of contribution card. Now point to be considered is whether the above provision can be expanded to cover all members by the Commissioner to rectify the discrepancy.

(ix) To seek the answer to above question, reference has been made to para No. 6.12.2 of the Manual of Accounting Procedure. Relevant part of the Para 6.12.2 is reproduced below.

On the advice of the authorised officer, transfer to other accounts only towards rectification of error due to erroneous deposit of other dues in this account should be made.

Clearly, the answer to the point in consideration is in affirmative.

(x) Having arrived at the conclusion that excess amount paid in one account erroneously can be transferred to other accounts, it becomes imperative to see dues as deposed by Enforcement Officer for the period from May, 2004 to December, 2010 and payment made by the Establishment against these dues and whether even after transfer of excess amount paid in one account to other account, any amount remain to be paid for the above period.

(xi) Account wise dues and payment position for the period from May, 2004 to December, 2010 is summarised as follows:--

A/c No.	I	II	X	XXI	XXII	Total
Dues	965259	70128	530987	31886	646	1598906
Deposits	1194565	141151	192956	68479*	303	1597454
Short/Excess	229306(+)	71023(+)	338031(-)	36593(+)	343(-)	1452(-)

*includes two challans totalling to ₹ 10,7467- not considered in earlier 7-A order.

From the above, it is clear that even after adjustment of excess paid in the accounts with short payments in other accounts, there remains ' 14527/- still payable by the establishment.

(xii) Hon'ble High Court has further directed Regional Provident Fund Commissioner to decide on refund or otherwise of the money recovered by Recovery Officer i.e. ' 3383747/-. Since during period from May, 2004 to December, 2010 an amount of ' 14527/- is short paid, after adjustment of this amount, ' 3,36,922/- remains in excess with the fund.

(xiii) The question, whether to adjust excess amount of ' 336922/- with the fund against future dues of the establishment or refund it, has been examined. It is noticed that in the present procedure of payment of dues and submission of returns, the same is being done electronically through e-return tool. Establishment is required to feed data of salary/wages paid to employees every month and generate a challan with unique identification number. State Bank of India accepts the payment against this unique identification number. As soon as payment is confirmed by Bank for a challan (through unique identification number), the corresponding member (employees) wise payment details are transferred to Department's server from where each member's account is updated. That is to say that after creation of member wise payment details by the establishment, if the corresponding payment is not actually received in Bank account, member's account cannot be updated.

In view of what has been stated earlier, I pass the following order.

ORDER

1. Total dues of the establishment is assessed as ' 15,98,9067- (Rupees Fifteen Lakh

Ninety-eight Thousand Nine Hundred and Six) for the period May, 2004 to December, 2010 for the employees employed by it.

2. An amount of Rs. 2,29,306/- paid in excess in account No. I be refunded to establishment.

3. An amount of ' 71,023/- paid in excess in account No. II be refunded to establishment.

4. An amount of ' 36,5937- be refunded from account No. XXI to establishment.

5. The amount of ' 338374/- has already been adjusted by Recovery Officer against short payment in A/c. No. X & XII. Since amount being refunded are erroneous credits, no interest is payable on refund amount.

Given under my hand at Mumbai on 16th day of November, 2012.

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