

The Employees' State Insurance Act, 1948

By Hiren Chheda

¹**[4SA. Determination of contributions in certain cases.-** (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any ² [Social Security Officer] or other official of the Corporation referred to in sub-section (2) of section 45 is ³ [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment:

⁴[Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard:]

⁵[Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.]

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B ⁶[or the recovery under sections 45C to 45-I].

COMMENTS

(i) The plea of the employer that he was not allowed to produce all documents and the registers to attract the applicability of the E.S.I. Act will not be tenable when these have been found to be bogus; Srinidhi Bars and Restaurant, Bangalore v. Regional Director, E.S.I. Corporation, Bangalore, 2006 LLR 41.

(ii) Assessment is ad hoc with record; R.S. Ganesh Das Dhomi Mal v. Employees' State Insurance Corporation, (1988) 56 FLR 111 (Del).

(iii) Amount determined under section 45A can be recovered from the employer as arrears of land revenue; Modi Steels v. Employees' State Insurance Corporation, (1989) 59 FLR 176 (All).

(iv) Regional Director and not the ESI Inspector is empowered to determine the contributions by giving opportunity to the employer; Employees' State Insurance Corporation, Jaipur v. Bharat Motors, Sri Ganganagar, 2001 LLR 49 (Raj HC).

(v) In the absence of an order determining the amount payable under section 45A of the Employees' State Insurance Act, 1948, recovery proceedings under section 45B of the Act could not be initiated; Employees' State Insurance Corporation v. Depot Manager, M.P.S.R.T.C., (2003) 2 LLJ 351 (MP).

¹**[45AA. Appellate authority.-**If an employer is not satisfied with the order referred to in section 45A, he may prefer an appeal to an appellate authority as may be provided by regulation, within sixty days of the date of such order after depositing twenty-five per cent. of the

contribution so ordered or the contribution as per his own calculation, whichever is higher, with the corporation:

Provided that if the employer finally succeeds in the appeal, the Corporation shall refund such deposit to the employer together with such interest as may be specified in the regulation.]

²**[45B. Recovery of contributions.-**Any contribution payable under this Act may be recovered as an arrear of land revenue.]

³**[45C. Issue of certificate to the Recovery Officer.-**(1) Where any amount is in arrears under this Act, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the factory or establishment or, as the case may be, the principal or immediate employer by one or more of the modes mentioned below:

- (a) attachment and sale of the movable or immovable property of the factory or establishment or, as the case may be, the principal, or immediate employer;
- (b) arrest of the employer and his detention in prison;
- (c) appointing a receiver for the management of the movable or immovable properties of the factory or establishment or, as the case may be, the employer:

Provided that the attachment and sale of any property under this section shall first be effected against the properties of the factory or establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under sub-section (1) notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.]

COMMENTS

Attachment of Bank account of the defaulter can be undertaken for recovery of dues, notwithstanding issuance of certificate under section 45C; Ranchi Refractories v. Regional Director, Employee State Insurance Corporation, Patna, 2005 LLR 620.

³**[45D. Recovery Officer to whom certificate is to be forwarded.-**(1) The authorised officer may forward the certificate referred to in section 45C to the Recovery Officer within whose jurisdiction the employer__

- (a) carries on his business or profession or within whose jurisdiction the principal place of his factory or establishment is situate; or
- (b) resides or any movable or immovable property of the factory or establishment or the principal or immediate employer is situate.

EMPLOYEES' STATE INSURANCE CORPORATION
Panchdeep Bhawan, C.I.G. Road, New Delhi - 110002

No.T -11 /13/3 /2008-Rev.I

Dated:01.05.2008

(Instruction No.2/08)

All the Regional Directors/Directors/Joint Directors I/c

ESI Corporation

Regional Offices/Sub-Regional Offices

Subject: Hearing under section 45A - giving adequate opportunity of hearing regarding.

Sir,

Of late it has been observed that Speaking Orders under section 45A are being issued by a few Regional Offices/Sub-Regional Offices in a mechanical manner. In a few cases it has come to the notice that Speaking Orders have been issued after giving a single opportunity of personal hearing. Although, in occasions, a single opportunity of personal hearing may suffice to satisfy the legal requirement under section 45A but in all fairness, issuing Speaking Order after giving a single opportunity of personal hearing may not always stand the test of reasonableness on the part of ESIC Corporation.

It has also come to the notice that in a few cases, action for issuing Speaking orders under section 45A has been taken after a long time and of non-action without following the prescribed drills in respect of defaulting employer including inspection of the unit, after giving a single opportunity of personal hearing defeats the purpose. Some cases have also come to the notice where without ensuring servicing of the Show Cause Notice in C-18, the officer issuing the Speaking Order has proceeded with action under section 45A. This action has not only put the Corporation in uncomfortable situations, it has become very difficult sometimes to explain the Corporation's action at various forums and in the Court.

Keeping the above broadly in view, it has been desired that adequate care should be taken to ensure that the following action has been completed before issuing Speaking Order under section 45A.

- (i) To ensure proper service of the Notice (C-18) to the Employer.
- (ii) When the Employer attends the Personal Hearing, the attendance of the Employer as well as the proceedings of hearing should be recorded in the file and signature of the Employer be obtained in token of Employer having attended hearing and submissions made.

(iii) The Officer should clearly record in hearing the records produced by the employer with his submission.

(iv) Before passing an Ex-parte order for determination of contribution over Rs.1 lakh, a release in local vernacular paper may be issued atleast one week advance.

(v) Where it becomes imperative to issue order Ex-parte, adequate care should be taken in The Speaking Order to explain/dwell on the position as available on record. In this connection the detailed procedure laid down in the Hqrs. letter No.T-11/13/3/95-Ins. III dated 16.02.2001 and No.T-11/13/3/2002-Ins.III dated 27th November, 2002 may be referred.

These instructions should be adhered to sincerely.

This issues with the approval of Insurance Commissioner.

Yours faithfully,
(K. MISHRA)
ADDL.COMMISSIONER (REV.)

EMPLOYEES' STATE INSURANCE CORPORATION

Panchdeep Bhawan, C.I.G. Road, New Delhi

No.T -11/13/3 /2008-Rev.II

December 31, 2008

To

All the Regional Directors/Jt. Director (I/c)

ESI Corporation

Regional/Sub-Regional Office

Sub: Re-opening of Cases where contribution has been determined under Section 45A of the ESI Act.

Sir,

I am directed to draw your attention to the instructions issued by this office vide No.T-11/13/7/90-Ins.III, dated 14-1-91, No.T-11/13/3/95-Ins.III, dated 4-6-1996, T-11/13/3/95-Ins.III, dated 23-7-1999, dated T-11/13/3/2001-Ins.III, dated 16-1-2002 and No.T-11/13/3/2002-Ins.III, dated 18-7-2002 relating to re-opening of cases where contribution has been determined under Section 45A of the ESI Act.

The instruction dated 18-7-2002 clearly stipulates that Regional Directors should not hesitate to re-open ex-parte order under section 45A by exercising their discretion and after recording justification for re-opening of such cases.

In spite of all these instructions, it is observed that cases which would have been re-opened at RO/SRO level itself are being referred to Hqrs. Office on the one ground or the other. The matter is being discussed repeatedly in all the Regional Directors' Conferences, including the last one held on 27th - 28th November, 2008 at Bhubaneshwar, where many of the RDs/JDs (I/c) had expressed that subsequent interference by vigilance is the real deterrent in re-opening and settling of such cases. The matter has been reviewed once again and it is reiterated that apprehension of possible Vigilance/Administrative action should not be a deterrent in re-opening of 45A orders. Accordingly, following guidelines are being issued in the matter____

- (i) In the cases where dues have been assessed under section 45A of the Act either ex-parte or after affording personal hearing and if the employer comes forward with a request to re-open the case for assessment on actual basis and deposits at least 50% of the amount assessed under section 45A or the contribution due as per his own calculation, whichever is higher, the case may be re-opened after recording this reason. The dues

payable/ refundable after re-assessment may be realized or refunded as per the existing instructions.

- (ii) Reassessment in the cases so re-opened must be completed by the Branch Officer authorized for affording personal hearing within two months of such re-opening under his personal supervision. Under no circumstances this period of two months will be relaxed.
- (iii) Past cases, where the recovery action is already complete, shall not be reopened. However, where there is part recovery but actual recovery has not been effected, the cases can be re-opened as per the aforementioned guidelines.
- (iv) A report of all such cases be sent to Hqrs. Office on month to month basis, as per the extant instructions on this subject.
- (v) Vigilance should step-in for scrutiny of such action only where there is some prima facie evidence of colourable exercise of power and after prior approval of Director General. In such case, at first, a clarification of the concerned officer shall be called for and the same shall be examined and put up before the Director General for taking a view in the case. If it is found that there is a prima facie evidence of colourable exercise of power, only then further action can be initiated after approval of Director General.

After the above instructions/ guidelines, the plea of RDs/JDs(I/ c) that the fear of subsequent Vigilance/ Administrative action deter them from re-opening genuine cases will no more be acceptable. Re-opening of genuine cases as per above guidelines is no irregularity. What must be ensured is that the case is positively finalized within two months of the date of re-opening. Any delay beyond two months in finalization will be viewed seriously.

This order will be effective from 1-1-2009.

This issues with the approval of the Insurance Commissioner /Director General.

Yours faithfully,

(K.MISHRA),ADDL. COMMISSIONER (REV.)