



E.S.I., P.F., & OTHER INDUSTRIAL LAW PRACTITIONERS' ASSOCIATION

Regd Off. A-501.' Shiv Hara.'Kasturba Road No.2 Borivali (East), Mumbai-400 066. Tel.C/o.2870 0850	The Societies Registration Act, 1860. Registration No.Maharashtra State, Mumbai 671 / 1995 GBBSD. the Bombay Public Trust Act, 1950 Regd.No. F. 17772 of 27-11-95	Admin.Off.: Shop No.1, Dimple Arcade, Behind Sai Dham Temple, Thakur Complex, Kandivali, Mumbai 400101.
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Note/clarification on Basic wages

By Vivek Mangaonkar

The Ministry of Labour & Employment has issued notification dated 28th August, 2014 and clarification letters dated 29th August, 2014 amending the provisions of the Employees' Provident Funds Scheme, 1952, the Employees' Pension Scheme, 1995 and Employees Deposit Linked Insurance Scheme, 1976, which have come into force with effect from 1st September, 2014. Under the said Schemes, the statutory limit of Rs.6,500/- has been increased to Rs.15,000/-

However, the definition of 'Basic Wages' has been untouched. The definition of 'Basic wages' defined under Section 2(b), reads as under;

Section 2(b) *basic wages* *means all emoluments which are earned by an employee while on duty or [on leave or on holidays 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 payments 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,

On the plain reading of the aforesaid definition, it clearly indicates that various allowances such as dearness allowance, house rent allowance, overtime allowance **or any other similar allowance payable to the employees in respect of his employment or of work done in such employment are excluded** from the definition of 'basic wages'.



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Further we need to go through Section 6 of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 & Para 29 of the Employees' Provident Funds Scheme, 1952, which is re-produced below;

Section 6:

The Contribution which shall be paid by the employer shall be (12%) of the basic wages, [(dearness allowances and retaining allowances (if any))] for the time being payable to each of the employees [(whether employed by him directly or by or through a contractor)] and the employees contribution shall be equal to the contribution payable by the employer in respect of him and may, [if any employee so desires, be an amount exceeding (12%) of his basic wages, dearness allowances and retaining allowances (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section]

Para 29:

Contribution

- (1) *The contribution payable by the employer under the Scheme shall be at the rate of [10%] of the [basic wages, dearness allowance (including the cash value of any food concessions) and retaining allowance (if any)] payable to each employee whom the Scheme applies.*
.....
- (2)
- (3) *The contribution shall be calculated on the basis of the [basic wages, dearness allowance (including the cash value of any food concession and retaining allowance (if any) actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis]*
- (4)



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On going through the above provisions u/s. 2(b)(ii), Section 6 of the Act and Para 29 of the EPF Scheme, it is very clear that **the allowances except the dearness and retaining allowance, are not part of basic wages, hence not liable for the contribution under the Act.**

Further, in the case of Bridge & Roof (supra), the Hon'ble Apex Court has, inter alia, clearly held that various allowances are made as exceptions to the definition of 'basic wages'. The relevant portion of the judgment of the Apex Court is reproduced as under:

- "7. The main question therefore that falls for decision is as to which of these two rival contentions is in consonance with section 2(b). There is no doubt that "basic wages" as defined therein means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses.***
- 8. Then we come to clause (ii). It excludes dearness allowance, 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. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of contract of employment are excluded from the main part of the definition of "basic***



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wages". Having excluded "dearness allowance" from the definition of "basic wages", section 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in section 6 which lays down that contribution shall be 10 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (if any) in section 6. It seems that the basis of inclusion in section 6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution under section 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution....."

The said underlined portion of the exclusion part, i. e. **any other similar allowance payable to the employees**, is very determinative and decisive as to whether all kinds of allowances are to be covered within the meaning of 'basic wages' as defined in section 2(b).

The basic principles as laid down in Bridge Roof's case on a combined reading of Sections 2(b) and 6 are as follows;

- a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.
- b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.



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- c) Conversely, any payment by way of a special incentive or work is not basic wages.

In view of the above facts and judgements, it is very clear that the other allowances do not form part of Basic Wages [Section 2(b)] of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 and no Provident Fund contribution is payable on the allowances **except the dearness and retaining allowance**.

However the combined reading of the below three Judgements gives rise to one legal proposition, whether several allowances paid by an employer to his employees constitute "basic wages" as defined in section 2(b) of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952;

- 1) Judgements of the Madhya Pradesh High Court (Division Bench) in the cases of
 - a) Montage Enterprises Pvt. Ltd. vs. EPFO & Anr.
 - b) Surya Roshni Ltd. vs. EPFO & Anr. (2011 LLR 568) and
- 2) Judgement of the Single Judge of the Madras High Court in the case of Reynolds Pens India Pvt. Ltd. & other Petitioners vs. RPFC.

In the case of Surya Roshni, the management is paying to its employees basic wages, variable dearness allowance, house rent allowance, transport allowance (conveyance allowance), attendance incentive, special allowance, washing allowance, canteen allowance and lunch allowance. However, the company has been deducting PF contributions only on two components of salary, i. e. basic wages and variable dearness allowance. **Lunch allowance is paid to its operators who are required to remain on machines during lunch period so that time is saved.** The Division Bench has held that except lunch allowance, all other allowances form part of 'basic wages' and hence attract PF contributions.



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In the case of Montage Enterprises, the management is paying basic wages, variable dearness allowance, conveyance allowance, special allowance, house rent allowance and management allowance to its employees. The Division Bench has held that conveyance allowance form part of 'basic wages' and hence attracts PF contributions.

In the case of Reynolds Pens India Pvt. Ltd., the management is paying various allowances like conveyance allowance, special allowance, medical allowance, etc. to its employees. The Single Bench has held that all the allowances are covered by the term Basic Wages as defined in Sec.2(b) of the PF Act and hence attracts PF contribution.

The Hon'ble Division Bench of the Madhya Pradesh High Court in the aforementioned two cases has not fully considered the landmark judgment of the ***Hon'ble Apex Court in the case of Bridge & Roof Co. Ltd., (AIR 1963 SC 1474)***, and has held that almost all kinds of allowances would also form part of the basic wages and hence attract PF contributions.

In the case of the Judgement given by single judge in the matter of Reynolds Pens India Pvt. Ltd. & other Petitioners vs. RPFC, the learned single Judge has merely re-produced certain portion from several Judgements relied upon by the parties. It is not out of place to state that the Single Judge has not given his own independent Judgement on the definition of Basic Wages i.e. whether the aforementioned allowances form part of the "basic wages" as defined in section 2(b) of the said Act. Similarly, no independent judgement is given by him as to how the reproduced portions of the several judgements were applicable to the cases before him.

In the contrary, the relevant Judgement was delivered by the Hon'ble High Court of Punjab & Haryana in the matter of Assistant PF Commissioner Vs. G4S Security Services (India) Ltd. and another, wherein it has been observed as under;

6. We are unable to accept the submission. The statute having defined the term 'basic wage' which for the purposes of the Act could not be less than the minimum wage, there was no



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compulsion to hold that the definition of 'basic wage' should be equated to the definition of 'minimum wage' under the Minimum Wages Act, 1948. No doubt wage less than minimum wage in violation of law cannot be paid but it does not imply that for calculation of contribution for EPF Act, the employer could not follow statutory provisions of the said Act which permits contribution to be computed with reference to 'basic wage' as defined thereunder.

Furtherto, EPFO vide its Circular dated 02.12.2011 informed that the Circular dated 23.05.2011 regarding the splitting of minimum wages for the purpose of PF contribution has been kept in abeyance in view of the verdict of Hon'ble High Court of Punjab & Haryana in the matter of Assistant PF Commissioner Vs. G4S Security Services (India) Ltd. and another till the outcome of the Special Leave Petition filed by EPFO against the decision of High Court of Punjab & Haryana.

Furthermore, against the Judgement of the Hon'ble High Court of Madhya Pradesh (Division Bench) in the case of Surya Roshni Ltd. vs. EPFO & Anr. (2011 LLR 568) a Special Leave Petition was filed in the Supreme Court of India and stay was granted in the said case.

In view of the factual and legal position explained above, it may be concluded that the definition of "Basic Wages" has not been amended or altered. Hence the definition of "Basic Wages" remains as it is.

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