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Supreme Court Re-Affirms the Inclusion of Allowances for Determining Provident Fund

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Supreme Court Re-Affirms the Inclusion of Allowances for Determining Provident Fund Contributions

The Hon'ble Supreme Court of India vide its judgment passed on February 28, 2019 in the case of *The Regional Provident Fund Commissioner (II) West Bengal vs. Vivekananda Vidyamandir and Others* (clubbed with certain other civil appeals) has re-affirmed the position concerning treatment of allowances for determining the provident fund contribution.

The common question of law which was raised by the appeals for determination by the Hon'ble Supreme Court was whether the special allowances paid by an establishment to its employees would fall within the ambit of the expression 'basic wages' under section 2(b)(ii) read with section 6 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ("**EPF Act**"), for computation of deduction towards provident fund contribution.

The nature of allowances which were under contention under different appeals included:

- special allowance being paid as an incentive to the teaching and non-teaching staff of an educational institution;
- variable dearness allowance, house rent allowance, travel allowance, canteen allowance and lunch incentive being paid by the establishment to its employees;
- house rent allowance, special allowance, management allowance and conveyance allowance being paid to the employees;
- conveyance allowance, education allowance, food concession, medical allowance, special holidays, night shift incentives and city compensatory allowance being paid to the employees.

Recommended by:

The Hon'ble Supreme Court for determining the raised question of law, considered the definition of 'basic wages' under section 2(b)(ii) and section 6 of the EPF Act and observed that 'basic wage' has been defined as all emoluments paid in cash to an employee in accordance with the employment contract and carves out certain exceptions which would not be included within the definition of 'basic wage' which exceptions include dearness allowances. However, in terms of section 6 of the EPF Act, dearness allowance has been included for the purposes of determining the provident fund contribution.

It was held that the crucial test is one of 'universality'. The test adopted to determine if any payment would be excluded from 'basic wage' is that such payment must have direct access and linkage to the payment of special allowance as not being common to all employees.

The Hon'ble Supreme Court also referred to and reiterated the principles laid down in its earlier landmark judgement of *Bridge and Roof Co. (India) Ltd. vs. Union of India* [(1963) 3 SCR 978] where Court while discussing the exclusion of dearness allowance from the definition of "basic wages" under the EPF Act and its inclusion under section 6 of the EPF Act (which relates to contributions to be made by an employer), it has been held that "*whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under s. 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 principles of Bridge and Roof case were reiterated in the case of *Manipal Academy of Higher Education vs. Provident Fund Commissioner* [(2008) 5 SCC 428].

Reference was also made to the case of *Muir Mills Co. Ltd., Kanpur Vs. Its Workmen* [AIR 1960 SC 985], wherein while determining the scope of 'basic wages', it was held that any variable earning which may be earned by different individuals on the basis of their efficiency and diligence will not be included under 'basic wages'.

Reference was also made by the Hon'ble Supreme Court to its earlier decision in the case of *Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand* [(2014) 4 SCC 37], wherein it was *inter alia* observed that "*wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance"*.

Upon taking into consideration the above-mentioned principles laid down in its earlier decisions, the Hon'ble Supreme Court observed that the establishments did not have any evidence to show that the allowances under contention were either variable or were linked to any incentive for production resulting in greater output by an employee and that the

	said allowances were not paid across the board to all employees in a particular category or were being paid essentially to those who avail the opportunity. It was further stated that for an amount to go beyond the basic wages, it has to be shown that the concerned employees had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. Thus, it was not possible to ascertain whether the extra amounts paid to the employees were in fact paid for extra work which has exceeded the normal output prescribed for the employees. Accordingly, the Hon'ble Supreme Court upheld the factual findings of the provident fund authorities that the allowances in question were essentially a part of the basic wages which were camouflaged as part of an allowance to avoid the said allowances being included for the purposes of determining and deducting the provident fund contributions. Conclusion: The re-affirmation concerning inclusion of allowances for determining the provident fund contribution definitely favours the authorities under the EPF Act and enables them to direct various establishments covered under the EPF Act to include these allowances in the aggregate amount for determining contribution by employers. In order for an employer to exclude any allowance from the aggregate of the amount for determining its provident fund contributions, the employer will have to show that such amount is a variable amount which may vary from employee to employee based on their efficiency and diligence and is not paid to other employees of the same category or is linked to the performance of such employee. **Feedback**