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**EMPLOYEES' PROVIDENT FUND -
AFTERMATH OF VIDYAMANDIR CASE
AND EPFO'S CAUTION**

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EMPLOYEES' PROVIDENT FUND - AFTERMATH OF VIDYAMANDIR CASE AND EPFO'S CAUTION

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

The question of law raised in the Vidyamandir Case was whether 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 Hon'ble Supreme Court reiterated and observed that the test for determining whether any payment would form part of 'basic wages' was one of 'universality' and whether such payment was given to all employees or was variable or performance/incentive based. In our earlier article¹, we have discussed in detail the observations made by the Hon'ble Supreme Court in the Vidyamandir Case.

Post-Vidyamandir Actions:

Pursuant to the decision of the Vidyamandir Case, the Employees' Provident Fund Organization ("**EPFO**") issued a notice dated March 14, 2019 wherein it circulated the judgement of the Vidyamandir Case and stated that "*Thereafter, this order of Hon'ble Apex Court is circulated to all concerned for information, utilizing this judgment while defending similar cases and **taking necessary action** keeping the aforesaid judgment of the Hon'ble Supreme Court*".



Subsequently given the lack of clarity concerning the retrospective or prospective effect of the judgement of the Vidyamandir Case (possibly due to the reiteration of the established principles), several field offices launched a fishing expedition and issued inquiry/inspection notices to employers proposing inspection of records of the previous years for ascertaining the wage structure as well as the allowances which may have been excluded from 'basic wages'.

Thereafter, a review petition was also filed against the judgement of the Vidyamandir Case which was dismissed by the Hon'ble Supreme Court on August 28, 2019.

EPFO's Clarification:

Considering the massive confusion caused post the Vidyamandir Case, the EPFO on August 28, 2019, published a circular ("**EPFO Circular**") wherein it took note of the notices issued by several field offices against employers proposing inspection of the records of the previous 3-5 years, primarily for the purpose of determining allowances which may have been a part of the 'basic wage' of the employees and had been excluded. EPFO categorically stated that there is no reason or justification to initiate such roving inquiries into the wage structure of compliant establishments.

Furthermore, EPFO also directed that all notices issued without any prima facie evidence to avoid EPF liability should not be pursued any further. Any investigation/inspection required to be initiated will require prior permission of the Central Analysis & International Unit ("**CAIU**") and such inspection will be for cases having credible basis that the employer has prima facie engaged in avoidance of liability under the EPF Act.

The EPFO Circular also prescribed that in ongoing cases under section 7A of the EPF Act, no coercive steps be taken in case of recovery of dues concerning special allowances not forming part of the 'basic wages' and having nexus with the principles reiterated in the Vidyamandir Case till the review petition against the judgement of the Vidyamandir Case has been disposed of by the Supreme Court. Given that the review petition has been dismissed, the aforesaid conditions have no further bearing on the ongoing cases.

Introduction of EPF Amendment Bill for amending the EPF Act:

Interestingly, amidst the confusion caused by the Vidyamandir Case and the notices for inspection issued by several field offices asking for records for the previous years, the Ministry of Labour and Employment on August 23, 2019 also published a draft of the Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 2019 ("**EPF Amendment Bill**") for comments from the public and stakeholders.

Some of the key features of the EPF Amendment Bill are:

- Deletion of the term "basic wages" as specified in the EPF Act and introduction of the term "wages". The term "wages" specifies a list of payments which will not be included under the definition of "wages". There is however no reference

to exclusion of 'allowances' (other than house rent allowance and overtime allowance) from the exempted category of the definition of "wages". However, in the event that certain payments made under such exempted list exceeds 50 per cent or such other percentage which may be notified, then such excessive amount shall be deemed as remuneration and will be included within the "wages". This proposed definition is also in tandem with the definition of "wages" provided under the Code of Wages, 2019.

Also, the term "wages" under the EPF Bill includes the dearness allowance as well as retaining allowance, which were originally excluded from or otherwise not included under the definition of "basic wages" under the EPF Act but made inclusive under section 6 of the EPF Act for the purposes of determining the provident fund contribution payable under the EPF Act.

- Prescription of a limitation period of 5 years for initiation of inquiry from the date on which dispute has arisen for (a) determination of the applicability of EPF Act on an establishment; or (b) determination of amounts due from an employer under the EPF Act.

Conclusion:

The EPFO Circular comes as a big relief to *bona fide* establishments and employers who may have received such notices, without any prima facie cause for such inspection, and may be saved from the unnecessary burden of explaining and justifying their records to the EPFO. Given the mayhem created in the aftermath of the Vidyamandir Case, directions contained in the EPFO Circular concerning cessation of baseless inquiries and requiring prior permission from the CAIU for initiating investigation/inspection only for credible cases are a welcome step for the harassed employers.

Meanwhile, providing a limitation period for initiation of inquiry is beneficial given the lack of limitation period for inspection of records under the EPF Act and syncing the concept of "wages" in conformity with the Code of Wages, 2019 under the EPF Amendment Bill will hopefully reduce the disputes and confusion arising from interpretation of special allowances under the current definition of 'basic wages' under the EPF Act.

Endnotes:

[1]<http://www.mondaq.com/india/x/788888/employee+rights+labour+relations/Supreme+Court+ReAffirms+The+Inclusion+Of+Allowances+For+Determining+Provident+Fund+Contributions>

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