PF on Leave Encashment Amount— A Hamlet's Dilemma for Employers

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In the matter of payment of PF contribution on Leave Encashment Amount there is a chequered history and the employer is in a fix as to what to do since this matter involves biting more than what an employer can chew.

The controversy over the Provident Fund (PF) on Leave Encashment amount arose over a point as to whether the amount payable on account of encashment of leave would form part of 'basic wages' under the Employees Provident Fund Act. Basic wages are ordinarily susceptible to PF deduction. The controversy went to the Bombay High Court and the Bombay High Court in the case of *Hindustan Lever Employees union V/s. RPFC & another 1995 LLR 416* held that the amount payable on account of encashment of leave formed 'basic wages' and therefore it was liable for PF deduction. Unfortunately this verdict did not send any shock waves and things remained standstill. So much so that a judgement having so much implication was not even challenged.

Now, chronologically it was probably on 8.1.99 that one Enforcement Office of Regional Provident Fund Commissioner – Karnataka directed Manipal Academy of Higher Education Manipal to pay PF contribution on the amount of encashment of leave. The Academy appealed before the PF Tribunal against the order of PF Commissioner Karnataka. The said Tribunal reversed the order of the RPFC Karnataka holding that leave encashment amount did not form part of basic wages. Then the Office of the PF Commissioner filed an appeal against the order of the Tribnal before a single Judge of Karnataka High Court, which upset the decision of the Tribunal by an order, dated 25.10.2000 and upheld the order of the RPFC – Karnataka. The Academy filed an appeal before the Division Bench of Karnataka High Court and one of the several contentions taken up by it was that if the encashment of earned leave is treated as part of basic wages, it would amount to compel the employer to contribute PF towards 13 months wages n a year. However, the Division Bench was not impressed by any of the contentions and finally upheld the decision of single judge. The Division Bench quoted from the judgement of Hon'ble Supreme Court in the case of *All India Reporter Karamchari Sang V/s. All India Reporter Ltd. 1988 (II) CLR 306*. The Hon'ble Supreme Court probably resorted to the beneficent rule of construction of provision of this Act. Initially the case went to Bombay High Court because of a letter dated 3.7.91, which was written by PF Commissioner Maharashtra & Goa to the Union informing it that Leave Encashment amount did not form part of basic wages. Curiously the Karnataka & Bombay High Court ignored the exact ratio decidendi of Hon'ble Supreme Court in the case of *Bridge & Roof Company V/s Union of India AIR 1963 SC 1474*.

Subsequent to the judgement of Bombay High Court the CPFC issued circulars dated. 4.2.2003, 16.5.2004, 16.5.2005, 9.9.2005 and finally required the employers to deposit the contribution on encashment of leave amount fixing cut-off date as 1.5.2005.

It is unfortunate that the judgement of Bombay High Court was not challenged but Manipal Academy of Higher Education has challenged the judgement of the Karnataka High Court before the Hon'ble Supreme Court where the matter is pending and some Employers Associations have filed application for intervention and for becoming parties to the proceedings. It is again very strange that no employer in any way challenged the incriminating circulars of the CPFC.

It is not possible to predict the outcome of proceedings before the Supreme Court. If the matter goes against the employers/managements and the Hon'ble Supreme Court upholds the High Court decision the financial implication on the employers would be immense and if the cut-off date were fixed earlier than 1.5.05 by the PF organization then the consequences would still be catastrophic.

The entire matter has become a cauldron of confusion and the employers are not in a position to adopt a particular action plan. However, before I make my humble suggestion in this regard, it is advised that the matter should be argued before the Hon'ble Supreme Court vehemently and on all fours the ratio decidendi of the Constitution Bench in the case of Bridge & Roof should be hammered out at length. In this case their Lordships have observed and laid down an acid test for determining as to what is basic wage. It was the opinion of the Lordships that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution. It is doubtful whether all concerns pay encashment of leave amount to all employees. In the premises, by no stretch of imagination — encashment of leave amount could be conceived as basic wages.

Then there would be a strong argument that the PF Act is a beneficial legislation and therefore its interpretation must go in favour of social objectives i.e. employees. It is humbly submitted that his may not always be true and it may be contested on the basis of certain observations of the Apex Court. The following observations of the Apex Court in the case of *Union of India V/s Devinandan Agarwal AIR 1992 SC 96* are pertinent and relevant for this case.

"… To invoke judicial activism, to set at naught legislative judgement is subversive of the Constitutional harmony and comity of instrumentalities. It is not the duty of the court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plane. The Court cannot rewrite the legislation for the reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it, which are not there. Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency. Courts have to decide what the law is and not what it should be. The Courts adopt a construction, which will carry out obvious interaction of the legislature but cannot set at naught legislative judgement because such course would be subversive to constitutional harmony. Modifying the scheme will not come under the principle of affirmative action adopted by Court sometimes in order to avoid discrimination…" This much about the legal aspect of the matter. Now I shall suggest that what are the alternate routes that an employer can take in the present fluid situation.

The employers may start paying PF contribution on Leave Encashment amount from 1.5.2005 for all classes of employees i.e. those in service or retired or separated and this should be done under protest that this tender of contribution could abide by the outcome of the decision of the Hon'ble Supreme Court but then there is a practical difficulty in this course of action. The PF Act does not provide for any payment to be made under protest and further that the amount as tendered would be susceptible to disbursement to the members concerned in certain given contingencies. So tendering the amount under protest may not be of much consequence. In the alternative it is also suggested that while making payment of contribution, the employer should also follow the appeal procedure as provided under the Act. It is also suggested that it is not late if some employers even now choose to challenge the circulars issued by the CPFC in the respective High Court or Supreme Court as may be advised because the CPFC is just legislating through circulars which is prohibited under law. The circulars can bind the department but not the subjects.

In this course of action, the Central Provident Fund Commissioner would be made party and therefore a stay application may be filed which, if granted, would have a universal application else in Manipal's Academy case stay order if any would operate in Karnataka only. It is also to be kept in mind that if employers lose in Supreme Court the PF organization may even go to the extent of demanding PF contribution on this amount from 1.10.94 retrospectively and this may attract damages and interest also. All the courses as aforesaid bristle with difficulties and have put the employers in a quandary, even then an employer shall wisely pick and choose such a course of action which suits him the best in the circumstances and which takes care of the rationale as spelled out. Ostensibly the rationale of Bombay and Karnataka High Court are inconsistent with that of Hon'ble Supreme Court. ❐