



**HAMMURABI
& SOLOMON**
Advocates & Corporate Law Advisors

LEGAL OPINION
ON
COMPUTATION OF BASIC WAGES

I. Background

That our client had sought our opinion to ascertain and understand the effect and operation of the recent judgment of Supreme Court dated 28.02.2019 in *The Regional Provident Fund Commissioner (II) West Bengal Vs Vivekananda Vidyamandir & Ors* whereby the ambit of Basic Wages was distinguished to include and exclude certain additional amounts, in view whereof the applicability of the law whether prospective or retrospective was analyzed.

II. Queries

- a) Whether the accounts closed prior to the applicability of the Hon'ble Supreme Court judgment for wage determination of employees specifically related to those who were no longer with the organization could be reopened?
- b) Whether the judgment of Hon'ble Supreme Court applies in those other than where the Regional Provident Fund Officers contested their position before the Hon'ble Supreme Court?

III. Analysis

1. In responding to the above queries, the circular dated 30.11.2012 issued by the Employees Provident Fund Office was examined; whereby the guidelines for quasi-judicial proceedings under section 7(a) of the Income Tax Act, 1961 ('Act') clarified that the expression 'commission' or 'commission any other allowance payable' was to be read as a continuous term and the blanket inclusion of allowances into the definition of 'basic wages' was proposed to be read carefully.
2. However, this circular was kept in abeyance vide another order by the Central Provident Fund Commissioner vide circular dated 18.12.2012.
3. The aforementioned judgment of the Hon'ble Supreme Court ruled that 'special allowances' were categorically brought under the definition of 'basic wage' if they were disbursed in the ordinary course of the same category of employees and so long as it wasn't a remuneration for specific work given to only a select number of employees.
4. The Supreme Court in adjudging this matter applied the tests of universality and opined that since '*...no material was placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in particular category or were being paid especially to those who avail the opportunity...that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance as to avoid deduction and contribution accordingly to the provident fund account of employees.*'
5. The claims of the RPFOS were therefore upheld by the Supreme Court. In light of the above set legal precedent we noted that the Addl. Central Provident Fund Commissioner vide circular dated 14.03.2019 circulated a copy of the aforesaid judgement to all Addl. Central Provident Fund Commissioners and all RPFCs of regional offices/district officers for intimation and taking necessary action keeping the aforesaid judgement of the Supreme Court. This judgement was further also circulated by the RPFC I (Compliance) to all ACC (Zones) and Regional Commissioners (OICs) to take prompt action.
6. On appreciation of the above legal principles and facts, we further analyzed the judgments of *Zile Singh v. State of Haryana* AIR 2004 SC 5100, *Commissioner of Income Tax v. Vatika Township Pvt. Ltd* (2014) 271 CTR SC and *Jay Mahakali Rolling Mills v. Union of India and Ors* 2007 (12) SCC 198.

7. In conclusion, since retrospective operation ought not to be given to a statute so as to take away or impair the existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure, the Supreme Court Judgement of 28.02.2019 was to be applicable prospectively and therefore no liability would accrue on the employer to reopen the accounts of employees in order to recalculate the applicable Provident Fund.

IV. Legal Advice

In light of the above we advised as below –

1. Since there is no specific date or direction for implementation of the order from a particular date of the judgment of the Supreme Court dated 28.02.2019, it is to be treated as effective from the date of passing of the judgment. Hence, the effect and operation of the judgment of Supreme Court dated 28.02.2019 would be applicable for deduction of Provident Fund contribution of the employees of the Company from 01.03.2019, which is correct and tenable in law.
2. That since the concerned authorities of EPFO have already taken action for compliance of the judgment of the Supreme Court dated 28.02.2019, it is implied that the effect and operation of the judgment of Supreme Court would be effective from 28.02.2019. Therefore, the justifications stated by the Company can be treated as cogent and valid reasons for treating the effective date of judgment of the Supreme Court as 01.03.2019 i.e. as prospective and not as retrospective.
3. That since the EPFO has not issued any circular mentioning the effective date for implementing the judgment of the Supreme Court dated 28.02.2019, the judgment of the Supreme Court is to be treated as effective from the date of passing of the judgment of the Supreme Court.
4. That since EPFO vide its letter 20.03.2019, the RPFC-I (Compliance) has requested all Additional Central PF Commissioners, all the RPFC-Is & IIs (OIC), Regional Offices to take prompt action in all the cases involving the issues as per the judgment of the Supreme Court in their respective filed officers. Thus, in view of the aforesaid communication from EPFO to all its Regional/Additional offices to take prompt action in terms of the Hon'ble Supreme Court judgement, the RPFC's are precluded from raising or demand the re-computation of the payment of Provident Fund dues of the employees of the Company retrospectively.