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India: Post Vivekananda: EPFO Cautions PF Commissioners Against Roving Inquiries

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Article by Anshul Prakash, Deeksha Malik and Kosheel Gupta
Khaitan & Co



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On 28 August 2019, the Employees' Provident Fund Organization (EPFO) issued a notice (EPF Notice) in relation to inquiries initiated / sought to be initiated by authorities under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) pursuant to the judgment of the Supreme Court of India (Supreme Court) in *Regional Provident Fund Commissioner (II) West Bengal v Vivekananda Vidyamandir and Others [Civil Appeal Number 6221 of 2011]* (*Vivekananda*). The notice, addressed to all Additional Central Provident Fund Commissioners and Regional Provident Fund Commissioners, aims to regulate any unwarranted / ill-founded inquiries in this regard.

Background

As per Section 6 of the EPF Act, the employees' provident fund contribution shall be calculated on the basic wages, dearness allowance and retaining allowance, if any, payable to the employee. The term 'basic wages' has been defined under Section 2(b) of EPF Act to mean all emoluments which are earned by an employee in accordance with the terms of the employment contract and which are paid or payable in cash to him / her, barring certain specific exclusions.

On 28 February 2019, the Supreme Court in *Vivekananda* clarified that the ambit of such 'basic wages' extends to all allowances which are uniformly, necessarily and ordinarily paid to all employees generally or all employees in a particular category (*for more information, please see our detailed analysis of the judgment as available* here). The judgment triggered widespread inquiry notices issued by field officers, requiring establishments to produce past records for a period of 3-5 years or even since inception of operations to evaluate wage structures and determine any shortfall in contributions.

EPFO's Direction

At the outset, the EPFO Notice observes that the widespread initiation of inquiries into wage structures of establishments is unwarranted. Accordingly, the EPFO has directed that any notice issued without any *prima facie* evidence of non-compliance / arbitrary bifurcation of wages to avoid liability under the EPF Act should not be pursued further. Also, any inspection to be carried out in an establishment shall be subject to prior permission from the Central Analysis Intelligence Unit (CAIU) constituted by the EPFO and shall adhere to the administrative guidelines pertaining to initiation of proceedings upon a prima facie and credible evidence of arbitrary splitting of basic wages.

It has been further provided that where any proceedings under Section 7A of the EPF Act (determination of moneys due from employers) have already been commenced, no coercive action for recovery shall be taken pending the disposal of the review petition filed against *Vivekananda*. However, it may be noted that the Supreme Court through its order dated 28 August 2019 dismissed the said review petition, therefore diluting the EPFO's direction to some extent.

Comment

The EPFO Notice brings some respite to employers who have been apprehensive about the implications of *Vivekananda* on the past contributions made by them under the EPF Act. It may be noted that the Limitation Act 1963 does not apply to inquiries under the said legislation, thereby allowing the authorities to proceed against employers for any period of time.

Although the EPFO Notice does not delve into the issue of retrospective or prospective operation of *Vivekananda*, it brings out the intention of the EPFO to not undertake roving inquiries into the wage structures of establishments when there is no credible basis for proceeding against them.

The EPFO Notice may be read with the EPFO's circular dated 26 June 2014 (EPFO Circular), wherein it provided for certain guidelines to be considered for conducting any optional inspection. As per the EPFO Circular, the cases which warrant an optional inspection by the authorities should be ones that indicate a drop in remittance / membership as compared to the last quarter. Further, any such inspection should not be repeated in the same year as far as possible.

It is noteworthy that the EPFO Notice comes after the Ministry of Labour and Employment, Government of India, released a draft bill on 23 August 2019 to amend the EPF Act and *inter alia* introduce a limitation period for initiating inquiries of 5 years from the date the alleged amount is due.

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