

To

Central P.F. Commissioner

EPFO Head Office

Bhavishya Nidhi Bhawan,

14, Bhikaiji Cama Place,

New Delhi - 110 066.

**Sub:** Applicability of Circular No. 7(1) 2012/RCs Review Meeting/345 dated 30<sup>th</sup> November, 2012

Dear Sir,

Ours is a Private/Public Limited Company namely \_\_\_\_\_ registered under the provisions of Companies Act, 1956, having its registered office at \_\_\_\_\_ . We are writing to you to place on record certain legal aspects in respect of Circular No. 7(1) 2012/RCs Review Meeting/345 dated 30<sup>th</sup> November, 2012 released by your office laying down guidelines for Quasi-judicial proceedings u/s 7A of EPF Act.

Clause 12 of the said Circular titled 'Splitting of Wage's states that basic wages "encompasses all the payments except the specified exclusions. All such allowances which are **ordinarily, necessarily and uniformly** paid to the employees are to be treated as part of the basic wages."

As per the Circular all 'Allowances' paid to employees across the board as a part of their wages should be included while ascertaining 'Basic Wages' for calculating PF contribution. However if any 'commission like allowance' is paid to an employee, then that can be excluded while ascertaining 'Basic Wages' for calculating PF contribution.

However, the circular does not define what constitutes as 'commission or 'commission like allowance' nor does it specify any criterion for identifying those allowances which are to be excluded while determining PF contribution. Without this necessary clarification we are unable to determine as to the criteria for exclusion/inclusion of a particular allowance while calculating PF Contribution.

### **Subjudice matters**

We would like to bring it to your kind attention following matters that are currently subjudice before the Supreme Court of India;

- Special Leave Petition (Civil) 11438-11439 of 2012, Montage Enterprises Pvt. Ltd. v/s Employees Provident Fund Indore & Anr., against the orders of the Gwalior Bench of the M.P. High Court in the WP/1857/2011 & RP 82/2011.
- Special Leave Petition (Civil) Nos. 8781-8782 of 2012, Surya Roshni Ltd. v/s EPFO & Anr., has been instituted against the order dated 24/03/2011 in WPC No.1891/2011 and dated 22/11/2011 in RP No.117/2011 of the same Gwalior Bench of the M.P. High Court.
- Special Leave Petition (Civil) Nos. 11440-11441 of 2012, Uflex Ltd. v/s EPFO & Ors.

All these three matters are being heard together at the Supreme Court. We have observed that the judgments by the Gwalior Bench of the M.P. High Court were in respect of the same subject matter as contemplated by the Circular dated 30<sup>th</sup> Nov, 2012. Your office vide inter-office circular No. Coord. /4(6)2003/Clarification/Vol.II/ dated 21.06.2011 had forwarded the entire text of the judgment of Gwalior Bench of the M.P. High Court in WP/1857/2011 against which the petitioners therein have gone in appeal to the Supreme Court.

In SLP (C) 8781-8782 of 2012, Surya Roshni Ltd. v/s EPFO, the Supreme Court vide an order dated 13/07/2012 directed the petitioners to deposit 60% of the amount

demanded by EPFO and has granted stay on the judgments of Gwalior Bench of the M.P. High Court. In the same matter Supreme Court vide its latest order dated 01/11/2012 has directed the EPFO to file counter affidavit latest by 07/12/12, failing which the court would pass appropriate orders. The next date of the matter is 04/01/2013.

We would also like to bring to your notice judgment dated 01.02.2011 by the Punjab & Haryana High Court in Asstt. Provident Fund Commissioner (APFC) v/s G4S Security Services (India) Pvt. Ltd. & Anr., CWP 15443 of 2009 (O & M), 2011 LLR 316. The said judgment refuted the claim of Asstt. Provident Fund Commissioner regarding essentiality of consideration of rates of minimum wages for calculation of the PF Contribution.

The APFC had claimed that it is the minimum wage, the definition of which is provided under the Minimum Wages Act which is to be taken into consideration for determining the PF contribution (*as contemplated by your organisation in the under the Circular No. Coord/4(6)2003/Clarification/Vol-II/7394 dated 23.05.2011, which was passed in continuation of a previous circular no. Coord./4(6)2003/Clarification/13633 dated 06.06.2008*). However, the Court opined that definition of 'basic wages' under EPF Act has an appended exclusion clause in which the various allowances which are quite broad in nature have been provided so as to enable the employer to determine its liability to make the PF contribution. The Minimum Wages Act on the other hand provides for a definition of wage which is distinct from that of the 'basic wage' as per PF Act and that definition of wage includes within its ambit House Rent Allowance but excludes certain other allowances which are being detailed therein. The APFC filed an Letters Patent Appeal before the Punjab & Haryana High Court registered under LPA No. 1139 of 2011 (O & M), wherein the judgment of the Single Judge was upheld by a Division Bench. As per the latest information available on the website of the Supreme Court it appears that APFC has gone in for an appeal to the Supreme Court under Diary No. 31676/2011.

However, as per information available the Supreme Court has not stayed the orders of the Punjab & Haryana High Court. In the judgment of the Punjab & Haryana High Court in CWP 15443 of 2009 (O & M) at Para 9 & 12 the Court has clearly opined that certain allowances such HRA, Washing Allowance and Conveyance Allowance etc. are not to be considered while calculating contribution to PF. Hence, the judgment of the Punjab & Haryana High Court has practically negated the contention raised by the EPFO through Circular No. Coord/4(6)2003/Clarification/Vol-II/7394 dated 23.05.2011, which was passed in continuation of a previous circular no. Coord./4(6)2003/Clarification/13633 dated 06.06.2008. The current circular dated 30 Nov, 2012 is nothing but another attempt by the EPFO to cover all allowances for calculation of PF Contributions and in the light of the subsistence of the judgment by the Punjab & Haryana High Court in CWP 15443 of 2009 (O & M) & LPA No. 1139 of 20111 (O & M), grossly erroneous.

Under the circumstances we are requesting you to keep the Circular dated 30<sup>th</sup> Nov, 2012 in abeyance. It will not be appropriate for EPFO to proceed with the Circular dated 30<sup>th</sup> Nov, 2012 as the court orders on the basis of which the said Circular as well as the previous Circulars, which are primarily on the same subject matter, have been issued are all subjudice before Apex Court. And in case of the subject matter of the Circular dated 30<sup>th</sup> Nov, 2012 the Apex Court has specifically stayed the order of the High Court.

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Authorized Signatory