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MCCIA

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Ref: Circular No. 7(1) 2012/RCS Review Meeting/345 dated 30th November, 2012
relased by the Employees Provident Fund Organisation ('EPFO')

Sub: Challenging the validity of the Circular dated 30th Nov, 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 bring
it to your notice the apparent anomaly caused due to the Circular No. 7(1) 2012/RCS
Review Meeting/345 dated 30th November, 2012 released by EPFO laying down
guidelines for Quasi-judicial proceedings u/s 7A of EPF Act.

Among the various issues addressed therein, the circular addresses the rampant
practice of splitting basic wages by employers to reduce the amount payable under PF.
So basic wages are split to numerable other allowances on which PF need not be paid.

The clarification at Clause 12 of the said Circular titled 'Splitting of Wage's says 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.

Previous Circulars on similar subject matter

- The Circular dated 30th Nov, 2012 doesn't come as a surprise since the EPFO through an inter-office circular No. Coord. /4(6)2003/Clarification/Vol.II/ dated 21.06.2011 addressed to all Addl. CPFCs, Zones and all RPFC, In-charge RO/SRO had forwarded the entire text of the judgment given by a Division bench of the M.P. High Court bench at Gwalior in Montage Enterprises Pvt. Ltd. v/s Employees Provident Fund Indore & Anr., WP/1857/2011.
- The judgment laid down a principle for treatment of certain allowances like Conveyance/Transportation allowance, Special Allowance etc. as "Basic Wages" for the purpose of Provident Fund liabilities if the same are being paid **uniformly, necessarily and ordinarily** to all employees. The Circular directed all concerned to take cognizance of the judgment and use the ratio of the judgment to ascertain PF liabilities of the employer.

Present status of the aforesaid M.P. High Court judgment in Montage Enterprises Pvt. Ltd. v/s Employees Provident Fund Indore & Anr., WP/1857/2011

- Petitioner in the aforesaid matter, Montage Enterprises Pvt. Ltd., went in for a Review Petition before the Gwalior bench of the M.P. High Court, against the previous order by the Division bench, vide RP 82/2011, which was dismissed by an order dated 22/11/2011.
- Montage Enterprises Pvt. Ltd. has now approached the Supreme Court vide Special Leave Petition (Civil) 11438-11439 of 2012 against the orders of the Gwalior Bench of the M.P. High Court in the Writ Petition & Review Petition.
- Supreme Court vide an order dated 02/04/2012 ordered the said matter to be joined with Special Leave Petition (Civil) Nos. 8781-8782 of 2012, Surya Roshni Ltd. v/s EPFO.

KINDLY NOTE: The matter Special Leave Petition (Civil) Nos. 8781-8782 of 2012, Surya Roshni Ltd. v/s EPFO, 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.

Further another matter Special Leave Petition (Civil) Nos. 11440-11441 of 2012, Uflex Ltd. v/s EPFO & Ors has also been joined to the SLP (C) 8781-8782 of 2012, Surya Roshni Ltd. v/s EPFO & Ors. All the three matters are being jointly heard by 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 High Court judgment. In the same

matter Supreme Court vide its latest order dated 01/11/2012 has directed the Respondents 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.

Madras High Court Judgment

- EPFO on 29th June, 2011 came out with another inter-office circular No. Coord./4(6)2003/clarification/Vol. II/ wherein the entire text of the judgment given by a single judge of the Madras High Court was forwarded to all Addl. CPFCs, Zones and all RPFC, In-charge RO/SRO.
- The judgment was a combined judgment in respect of W.P Nos 15823, 22480, 25442 & 25443 of 2010, 3427/2010, 19751/2010; 970, 3986, 1853 and 2098 of 2011 in the matter of Reynolds Pens India Pvt. Ltd., Hinduja Foundaries Ltd., Saint-Gobain Glass India Pvt. Ltd. & other petitioners Vs. RPFCs & others.
- The High Court dealt with a common question in the above petitions that various allowances paid by the petitioners to their employees under different heads such as Conveyance, Educational Allowances, Food concession, Medical, Special Holidays, Night Shift Incentives, City Compensatory Allowances etc. were amounting to wages within the meaning of the terms 'Basic Wages' as per Section 2(b) of the PF Act covered for deduction towards the Provident Fund.

Present status of the matters before the Madras High Court

Most of the Petitioners in the above mentioned judgment have preferred Writ Appeals before Division bench in the Madras High Court against the order of the Single Judge. All the said Writ Appeals are currently pending. On search carried out at the website of the Madras High Court we have not been able to locate any stay order on the judgment of the Single Judge.

Punjab & Haryana High Court

We would also like to bring it 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 EPFO in its 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 20111 (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 as 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.

Effect of the said previous inter-office circulars vis-à-vis the Judgments and the present Circular

- PF Officials may start compelling employers to pay PF contribution on not only Basic + VDA but also allowances such as conveyance allowance, special allowance any other allowance which is **universally, necessarily and ordinarily** paid to all across the board, failing which proceedings u/s 7A of the EPF Act may be initiated.

Our Expectations

If the Circular has to be followed in letter and spirit, companies like ours will have to bear an immediate substantial additional burden, which especially in the current recessionary scenario will certainly make a huge impact on our financials. Moreover,

there is a complete lack of clarity on the interpretation of the Act. If the Company decides to adhere to the Circular dated 30th Nov, 2012 and starts paying contributions on all allowances, then the Company shall be prevented from going back to the earlier provision of calculating PF Contribution only on Basic+DA, even if the said Circular is later held invalid by the Courts.

We therefore request you take up this matter with the EPFO on an urgent basis and seek clarification on the applicability of the Circular dated 30th Nov, 2012 and also join in as an intervener in the matters subjudice before the Supreme Court as stated earlier.

Authorized Signatory