

## Applicability Of Provident Fund Act And Pension Scheme On International Workers ( post amendment)

The history of development of highly industrialized and economically advanced countries bear eloquent testimony to the fact that effective social security measures adopted by the State for toiling workers were mainly responsible for bringing about their phenomenal prosperity. Needless to mention, if the worker has to be inspired to devote himself whole heartedly to his work, he must be given adequate remuneration, and secondly, there must be provisions to save him from distress and destitution in his old age and his family from utter ruin in case of his premature death or disablement. Keeping in view the Social Security of the workers and his family the framers of our Constitution inserted provisions to this effect viz. Article 38 and 43.

Imbibing the spirit of these provisions of the Constitution the **Employee Provident Fund & Miscellaneous Provisions Act, 1952** was enacted by Parliament which came into force with effect from 14 March, 1952. Presently, the following three schemes are in operation:

1. *Employees' Provident Fund Scheme, 1952*
2. *Employees' Deposit Linked Insurance Scheme, 1976*
3. *Employees' Pension Scheme, 1995 (replacing the Employees' Family Pension Scheme, 1971).*

Originally these Acts were applicable only to Indian workers. The Government of India vide its notification dated 1st October, 2008 has broadened the scope of the Employees Provident Fund Scheme, 1952 and Employees Pension Scheme, 1995 to include specific category of Indian employees working outside India and employees other than Indian employees, holding other than Indian Passport, and working for an establishment in India. The notification was published in the Official Gazette dated October 1, 2008 and becomes effective from that date.

A new category of "**International Worker**" has been introduced under the provisions of the Amended Provident Fund Scheme. Now after this amendment every International Worker employed with an establishment in India to whom the Provident Fund Act applies, would be

required to become a member of the Provident Fund, unless he/she qualifies as an “Excluded Employee”<sup>1</sup>

### **Salient features of the Employees Pension (Third Amendment) Scheme, 2008 (“Pension Scheme”)**

After the amended Employees Provident Fund Scheme, 1952 and Employees Pension Scheme, 1995 the position is as follows:-

**International workman defined:** An International worker may be an Indian worker or a foreign national. This means an Indian worker who has divided his/her career between India and another country with whom India has entered into a bilateral Social Security agreement<sup>2</sup> or a foreign national working in India.

If there is a Social Security Agreement Between two countries then the rules regarding Provident Fund will be determined in accordance with the provisions of that Agreement.<sup>3</sup> In regard to those countries with which India has not entered into any Social Security Agreement, the Provident Fund/pension rules will be governed by the Indian law on Provident Fund/pension i.e., Employees’ Provident Funds and Miscellaneous Provisions Act, 1952; Employees Pension Scheme, 1995.

There is no cap on the monthly pay up to which the Provident Fund contribution has to be made by both the employer as well as an employee. Thus if an International workers has the

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1 In relation to the International Worker, the term “Excluded Employee” has been defined to mean an International Worker who is contributing to a social security programme of his /her country of origin, either as a citizen or as a resident, with which India has entered into a Social Security Agreement on reciprocity basis and enjoying the status of detached worker for the period and terms, as specified in such an agreement.

<sup>2</sup> A social security agreement is a bi-lateral instrument to protect the interests of the workers in the host country. It being a reciprocal arrangement generally provides for avoidance of no coverage or double coverage and equality of treatment with the host country workers.

<sup>3</sup> As of today, Social security agreements have been signed with Belgium, France and Germany. But the date of entry into force is yet to be notified. Negotiations are at various stages with The Netherlands, Czech Republic, Hungary, Norway, Switzerland, Sweden, Luxembourg, USA and Australia. Government level talks are on with many other countries where sizable numbers of Indian workers are employed. Although not a formal agreement, there is a reciprocal arrangement between India and Korea to settle the claims of the employees on completion of employment in the host country

basic wage of Rs.1,00,000, then the employer as well as the international worker, both will have to contribute on entire basic wage at the rate of 12%.

The cap on the monthly pay up to which the employer's share of contribution has to be diverted to EPS<sup>4</sup> remains at Rs.6500.

There is not any minimum period of employment in India required to be eligible for membership. Every eligible International worker has to be enrolled from the first date of his employment in India.

Employers would be required to file a consolidated return with respect to the International Workers within 15 days of the commencement of the Amended Provident Fund Scheme, specifying the International Workers entitled to become members of the fund. The employer would also be required to file monthly returns with the Provident Fund Commissioner.

Contribution is calculated on the monthly pay of the employee. The monthly pay shall be the pay as specified under Para 29 of the EPF Scheme, 1952, which covers:

- Basic wages (all emoluments paid or payable in cash while on duty or on leave/holiday except Dearness allowance, House rent allowance, overtime allowance, bonus, commission or any other similar allowance payable in respect of employment and any presents made by the employer)
- Dearness allowance (all cash payments by whatever name called paid to an employee on account of a rise in the cost of living)
- Retaining allowance
- Cash value of any food concession

In regard to the rate at which Provident Fund and Pension would be deducted and contributed, there are following two positions:

**A. If the Monthly Pay is upto Rs.6500, then-**

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<sup>4</sup> Employee's Pension Scheme, 1995.

1. Contribution by the Employee shall be 12% of the monthly pay; and
2. Contribution by the Employer shall be 12% of the monthly pay. Out of this, 8.33% has to be remitted to the Employees' Pension Fund and rest 3.67% shall be remitted to the Provident Fund.

**B. If the Monthly Pay is more than 6500, then-**

1. The Employee shall contribute at 12% of the monthly pay; and
2. The employer shall contribute 12% of Rs. 6500 (8.33% will be remitted towards Pension Fund and 3.67% shall be remitted towards Provident Fund). The employer shall also contribute 12% of the amount exceeding Rs. 6500/- and that whole amount shall be remitted towards Provident Fund.

Upon termination/cessation of the employment, employee will claim his pension or Provident Fund in the following manner:

**Pension**

- If the employee works for more than 10 years before cessation of employment then he will be eligible for monthly pension.
- If the employee has worked for more than 6 months and less than 10 years then on the date of cessation/termination of service or on attaining 58 years<sup>5</sup> of age whichever is earlier, he shall be entitled to withdrawal benefits.
- In case of permanent and total disablement during the service he/she shall be entitled to pension subject to a minimum of Rs. 250 per month. The monthly member's pension in such cases shall be payable from the date following the date of permanent total disablement and shall be tenable for the lifetime of the member.
- In case of death of a member of the scheme, pension to the family<sup>6</sup> shall be admissible from the date of the death of the member.

**Provident Fund**

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<sup>5</sup> 58 years is the retirement age.

<sup>6</sup> Family means employees' spouse and children below 25 years of age.

- In case of cessation /termination of employment the employee may withdraw the entire Provident Fund.
- In case of his death Provident Fund will be payable to his nominees. In case no nomination subsists, or if the nomination relates only to a part of the amount standing to his credit in the Fund, the whole amount or the part thereof to which the nomination does not relate, as the case may be, shall become payable to the members of his family in equal shares.
- On permanent and total incapacity for work due to bodily or mental infirmity, a member may withdraw the full amount standing to his credit.

## **A CRITIQUE**

There has been a concerted attempt by the Employee's Provident Fund Organization to simplify the ambiguities which have arisen as a result of the amendment<sup>7</sup>, but there are still few open issues.

An area of doubt which remains unaddressed is the disparity in the application of the provisions of the Act on Indian worker and International worker which is proving to be of great disadvantage to the Indian workers working in India. For International worker there is compulsory contribution to be made on the total basic wage by the employer as well as the International worker but in case of Indian workers the contribution which has to be compulsorily paid by the Employee is on the basic wage upto Rs. 6500 and any excess in the wage above Rs. 6500 is optional. Even if the Indian employee desires to contribute towards his Provident Fund on his total salary, he cannot bind the employer to contribute above the threshold limit of Rs. 6500<sup>8</sup>. Thus it is clear that for International workers social security is more than the Indian workers working in India.

Moreover the amendment is not clear on the application of the Act on the International workers who are working in Managerial capacity in India.

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<sup>7</sup> EPFO has posted clarifications on the amendment relating to International Workers in the form of FAQ which deals on various issues.

<sup>8</sup> However if the employer wishes then he can contribute on the wage of his employee above Rs. 6500.

The EPF Act doesn't defines "workers", whether Indian or international. It is required to be understood in the sense of "worker" as exhibited in "international workers" from settled law. Though the EPF scheme, in the case of "international worker" has deleted the upper limit of pay of Rs 6500.00, but it doesn't mean that by deleting the upper limit of pay of Rs 6500.00 in case of "international worker" it has crossed the threshold limit of the concept beyond "worker" or "workmen class" in case of foreign employees coming to India on job.

The definition of "employee"<sup>9</sup> what EPF scheme explains is a person employed on wages. (See very clearly the word used wage). The wage always denotes workmen class. So this EPF scheme covers in mandatory zone wage class people only. In this background the intention of the legislature on "worker" either coming from India or international class is required to be understood in EPF scheme which are employed on wages. So the word "worker" in EPF Scheme as read in "international worker" is a person on "wage" coming from foreign country having "workmen" class status in India.

Though EPF scheme has not defined "worker" but, it is a well settled law that in the absence of any definition of the word "worker" in any Act., the word "worker" as defined in the Factories Act, 1948<sup>10</sup> can usefully be adopted for purposes of determining the definition of "worker" within the meaning of any Act<sup>11</sup>.

In *Aloysius Nunes Vis Thomas Cook India Ltd*<sup>12</sup>, it was held by the apex court that several tests are required to be applied to find out if an employee is a "worker" or not. Among them one test is also to find out whether the person employed is in a managerial or administrative capacity or not. If so, he is not a "worker".

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9 Section 2(f) of Employees' Provident Fund and Misc Provisions Act, 1952

10 Section 2(l)- "worker" means a person employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process but does not include any member of the armed forces of the union.

11 Rajasthan Transmission Wires (P.) Ltd. v. ITO [1985] 22 TTJ (Jp.) 343

12 2000 II CLR 649

This test is further strengthened by the settled law in the case of *Dharangdhra Chemical Works Vs State of Sorashtra*<sup>13</sup>. The Managing Director of a company is in a *managerial and administrative capacity* so he is not a “worker” either in national or international class.

The Apex Court has laid down well settled law in order to identify “workmen”. It says in *A. Sundarambal Vs Govt. of Goa*<sup>14</sup> that “A person not engaged in skilled or unskilled manual, supervisory, technical, or clerical work even though employed in an industry is not a workman.” So the Managing Director either coming from India or international class is not a “workmen” under the law, so he can’t be covered under the ambit of “worker” or “international worker”

In view of the aforesaid it is submitted that the term International worker cannot include those International workers who are working in India in managerial capacity. However in the absence of any clarification to this issue the confusion prevails.

## **Conclusion**

Since most countries do not allow export of social security benefit, the amended scheme may have positive impact on the Indian nationals working abroad, as they may no longer be required to contribute to the social security scheme of the countries with which India has entered into Social Security Agreement.

This amendment may also entail various countries looking to enter into Social Security Agreements with India, especially since such an amendment triggers contribution to provident fund for expatriates working in India, thereby resulting in an increase in the expatriate related costs.

The amendment is a welcome change. However the disparities and confusions that have come hand in hand with the amendment must be given a serious thought and attempts must be made at the earliest to cure such confusions.

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13 AIR 1957, SC 264

<sup>14</sup> 1980 4 SCC 42