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EMPLOYEES PROVIDENT FUND OFFICERS' ASSOCIATION
(Recognised)
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To, Date: September 10, 2012
The Convener, Working Group Place: Guwahati
(for framing guidelines on quasi-judicial proceedings)
(By Name To Shri P K Udgata).

Subject: Suggestions to the Working Group for framing guidelines on quasi-judicial proceedings – reg.

Reference: H.O. letter bearing number 7(1)2012/RCs Review Meeting/__ dated August 29, 2012.

Sub: Suggestions to the Working Group constituted for formulating comprehensive guidelines on quasi-judicial proceedings – regarding.

Sir,
With reference to the captioned reference and subject, the E. P. F. Officers' Association has formulated its view in detail on the subject. Since the exercise stipulated "comprehensive" review, the suggestion too is made quite elaborate. Time allowed for sending the suggestion was very short compared to the gravity and expanse of the subject and therefore it took a bit longer to collect and collate the relevant materials and formulate the view comprehensively.

A total of fifteen suggestions, including simple ones like **uploading of 7A orders on the central website**, are

formulated after taking into account the suggestions received from officers across the nation. Each suggestion is followed by analysis of and the justification for it. The special issue of "lump-sum assessments, without identifying individual members" is dealt in detail under the last point. An annexure on the art of writing judgment is also enclosed. This communication consists of 36 pages.

1. Suggestion: Separate quasi-judicial function from compliance one.

Analysis & Justification: Principles of natural justice demand that no one should be a judge in his own cause. Vesting the compliance and quasi-judicial functions in the same person runs counter to this principle. It is also held so by the Hon'ble Delhi High Court in Escorts Tractor case. This fundamental principle of law can be complied with by separating the two functions and vesting them in different functionaries. Various models may be considered to this end. It may be considered that when an officer is given the charge of one compliance circle, the charge of quasi-judicial function in connection with establishments falling under that circle should be vested in other officer and the vice versa. Yet another alternative may be to designate separate Assistant/ Regional P F Commissioners (quasi-judicial), who will deal exclusively with quasi-judicial functions as distinct from compliance function. Functions like examining the Order passed under section 7A to decide whether (i) the Order is acceptable and to be implemented, or (ii) an application for review u/s 7B to be made against the order, or (iii) an application for redetermination u/s 7C to be made, or (iv) an appeal u/s 7I to be filed in the Tribunal. It is patent that no authority, irrespective of the fact whether he is officer-in-charge of an office, can examine the Order passed by himself and therefore there should be clear provision as to who will examine whose 7A Order for deciding which of the four options should be invoked. T this duty may be

vested in an officer who is coordinate in rank or higher by one grade than the officer who passed the order u/s 7A.

2. Suggestion: Mandatory review of each order u/s 7A to decide whether (i) the Order is acceptable and to be implemented, or (ii) an application for review u/s 7B to be made against the order, or (iii) an application for redetermination u/s 7C to be made, or (iv) an appeal u/s 7I to be filed in the Tribunal.

Analysis & Justification: At present the provision regarding the supervisory examination of Orders passed U/S 7A is to test check of such orders. The H.O. circular bearing number RRC.II/28(31)07/53677 to 53777 dated 17th October, 2007[H.O. circular bearing number RRC.II/28(31)07/53677 to 53777 dated 17th October, 2007 under the marginal note *"Administrative Scrutiny of Orders issued under Section 7A/14B:" prescribes: "...RPFC-II/RPFC-I should carry out supervisory test check of at least 10 assessment orders each month...Supervisory test check should be done in respect of the following cases every month:*

(i) All cases initiated based on complaints referred by VIPs/HO/Vig/Trade Unions etc.

(ii) All cases reviewed under Section 7B resulting in reduced assessment of dues.

(iii) All cases closed without actual assessment of dues

(iv) 10% of cases other than above.

...Similar exercise may be done by ACC (Zone) at random, in respect of assessment orders passed by APFC/RPFC-II/RPFC-I."

Thus the focus is on supervisory test check of orders with the principal objective to *"...to ensure/improve quality of the assessment order."*

This approach requires a shift in favour of examination of ALL Orders passed u/s 7A. Mere examination of a sub-group or sample of such orders is not enough. It is so because if only some of the 7A Orders are examined, it necessarily implies that

the Organisation shall accept those Orders which are not included in the sample, whether selected randomly or otherwise, and implement them without determining whether they are acceptable or in the organisational interest. This, obviously, cannot be accepted as a valid practice.

Further, the objective and approach, while examining the orders, need correction. In EPFO, we assess various orders passed by different tribunals and authorities including the EPF Appellate Tribunal, CAT, Consumer Fora and Commissions, High Courts and the Supreme Court. While assessing the orders or judgments passed by these tribunals we focus on their content and the decree with a view to take a decision whether the Organisational objective is protected or promoted by such orders or not and accordingly we decide whether to file appeal, writ petition or S.L.P. or to prefer review. We don't examine or focus on whether Presiding Officers committed mistakes or misconduct or indulged in any unfair practice or accepted any illegal gratification. The same approach is required while an officer examine the 7A Order passed by the other officer. It's the content of the Order that should be examined where the purpose should be to decide which of the four options viz. whether (i) the Order is acceptable and to be implemented, or (ii) the Order is not acceptable and application for review u/s 7B to be made against the order, or (iii) the order is not acceptable and an application for redetermination u/s 7C to be made, or (iv) the order is not acceptable and an appeal u/s 7I to be filed in the Tribunal, should be invoked.
It is usual in our Organisation not to examine the judgment but the judge i.e. the authority passing order u/s 7A. It is emphasised that focus should shift from the supervisory test check of orders to one where focus should rest in ascertaining which of the four options mentioned above is advisable and to be exercised. As per present practice the focus lies on the technique of reverse inferences whereby the process of 7A inquiry and the content of order are examined to ascertain whether any motive, misconduct, acceptance of illegal gratification or bribery may be imputed to the authority conducting the quasi-judicial

proceedings. Such authorities are viewed with suspicion and the focus lies in attaching possible liability or criminality to the officer passing the Order. As a result, time limits prescribed in the Act to exercise options under sections 7B, 7C or 7I elapses and the Order, even if not in the interest of the Organisation, becomes absolute. This practice is responsible for creating unhealthy fear among officers charged with the duty of conducting inquiry and passing order u/s 7A and they usually adopt inaction as the safest course of action. As a result the EPFO is losing billions of Rupees in unassessed statutory contributions, particularly from builders and infrastructure developers whereas the whole Organisation is busy in microscopic analysis as to how delinquencies may be read into 7A proceedings and Orders and officers punished for that. It is visible to everyone that in all metro and Tier- II cities other sub-cities are constructed by builders without any commensurate statutory contribution coming to the EPFO.

In a recent case of significance - **E.S. Sanjeeva Rao vs. The CBI and Others** (WP 2637 of 2010) - this aspect has attracted the attention of the Hon'ble Bombay High Court that observed in these terms *"It is surprising that though the said order was passed on 20/3/2009, no appeal has been preferred against the said order to the Tribunal till today. No application for review has been filed, though the review is maintainable under section 7B nor an application is filed for redetermination of the amount under section 7C. This clearly shows the malafide intention of EPFO as well as the CBI because if the EPFO had come to the conclusion that the order under Section 7A was not proper, it would have filed an appeal."*

3. Suggestion: Basis for division of compliance and quasi-judicial work among officers of various levels should be the nature of the legal personality or status of the establishment and not its employee strength.

Analysis & Justification: At present the division of compliance and quasi-judicial functions among officers of different grades are *"... decided based on the member strength..., reckoned with reference to the subscriber strength for the month immediately preceding the commencement of default (i.e. the latest information available on records)..."* [H.O. circular bearing number RRC.II/28(31)07/53677 to 53777 dated 17th October, 2007]. The problem with this system is that the question of jurisdiction (whether the officer of one rank or the other is competent to conduct inquiry) should be decided first before 7A may commence.

Instead it is proposed that the question of 7A jurisdiction may be decided on the basis of the nature i.e. legal personality of the establishment. For example jurisdiction regarding all public limited companies, private limited companies, societies, partnership firms or proprietary concerns may be vested in functionaries of different levels irrespective of the employee strength of the establishment. This will be an improvement over the present system and will address the confusion surrounding the jurisdictional domain in the matters of compliance or quasi-judicial functions.

4. Suggestion: May clarify that money due under Section 7Q and Section 14B of the Act falls under the scope and jurisdiction of Section 7A and therefore all provisions under Section 7A, including sub-section (2), are applicable while assessing the amount due under SS. 7Q or 14B.

Analysis & Justification: Clause (a) of sub-section (1) of Section 7A of the Act writes "*determine the amount due from any employer **under any provision of this Act**...*". There is no doubt that Sections 7Q and 14B are provisions of the Act under which amounts may be due from an employer.

5. Suggestion: Mandatory publication of all orders u/ss. 7A, 7B or 7C and those passed by the EPF Appellate Tribunal u/s 7I and arrangement for open chamber hearing in all 7A, 7B & 7C cases.

Analysis & Justification: Unlike the assessment of Income Tax, the issue of privacy is not involved in assessment of statutory dues under our Act. As a common practice prevailing in our Organisation, proceedings under 7A are conducted under secrecy; in closed chambers of the officers. During such proceedings entry in the chamber is restricted. The outcome of the inquiry viz. the order passed on the conclusion of the inquiry is not available to members of public nor are they shared among the officers within the Organisation. Any proceeding/inquiry conducted under secrecy whose outcome is not freely available are likely to be unfair and bound to be viewed so. Such practice may well give rise to corruption and misuse of official authority.

Probity and transparency may be ensured by implementing two simple steps. Firstly making it mandatory to conduct all inquiries u/s 7A that is open to public (by conducting such hearing in existing halls within office premises like conference hall or courtrooms may be constructed especially for this purpose). Secondly **all orders passed u/s 7A must be published on the central website of the Organisation**. To avoid any laxity in publishing the Order on website a provision may be made that the Order shall be deemed to be passed on the day it is uploaded on the website and is available for public viewing. Similarly cause list may be prepared and uploaded on the website. It will have many beneficial effects which are summarised below:

a. It will confirm to the principle that every action of a public authority particularly functions of a judicial/quasi-judicial nature should be conducted in open court i.e. open to public view.

b. It will reduce the possibility or practice of passing orders for extraneous considerations as the same will be open for unrestricted public access and scrutiny.

c. It will increate a resource pool as the order passed by one, will be available for other assessing authorities who can learn from other orders and thus the quality of order will improve in general.

d. Vigilance by superiors and vigilance authorities shall be supplanted by vigilance by members of public.

e. It will improve faith of all concerned into fairness of the order.

f. By publishing cause list on the website dates of hearing or any change thereof may be communicated speedily and dates at shorter intervals may be fixed reducing the average time in completion of inquiry.

g. It will help authorities to choose as to who is more suited to discharge quasi-judicial functions.

It's surprising that the Orders passed by EPF Tribunals are not uploaded on its website for public access. There can be no justification for such secrecy.

For these reasons, in its letter dated January 11, 2012, the EPF Officers' Association under the head "Transparency Improvement" included this proposal as an agenda item for the meeting between the Central P F Commissioner and the Association held in the Head Office in the month of April 2012. It was immediately agreed to implement this proposal. Though its implementation requires nothing more than an administrative order from the Head Office, the same is not yet done despite lapse of almost six months since then.

6. Suggestion: Special training on awareness regarding relevant provisions of the Civil Procedure Code, 1908, Indian Penal Code, 1860, Indian Evidence Act, 1872, The Oaths Act, 1969, The Notaries Act, 1952 and exercise of those provisions.

Analysis & Justifications: The gist of inquiry *"as...deem necessary"* conducted under Section 7A of the Act is provisioned under sub-section (2) of the Act which gives same powers to the officer conducting the inquiry under sub-section (1) as are vested in a court under the CPC for trying a suit in respect of (i) enforcing the attendance of any person or examining him on oath (ii) requiring the discovery and production of documents (iii) receiving evidence on affidavit and (iv) issuing commissions for the examination of witnesses. This sub-section provides further that *"...such inquiry shall be deemed to be judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code, 1860."*

It is these provisions which give real efficacy to quasi-judicial inquiry u/s 7A, and makes it different from an administrative measure. Despite the vitality of these provisions, the awareness among our officers about the various Sections, Rules and Orders of the CPC, Evidence Act, Oaths Act and Notaries Act which deal with enforcing attendance, examining one on oath, recovery or production of records, receiving evidence on affidavit and issuing commissions for examining witnesses, are quite modest. It is essential to know the content, meaning, purpose, import, intricacies and usefulness of these provisions and the manner and processes to administer or exercise them. If a sample test is conducted regarding forms of oaths or affirmations, power to administer them and its effects, it is anyone's guess that our officers will perform poorly on these fundamental aspects. Most of the officers who issue warrant of arrest in exercise of the powers vested in them are not aware as to what to do next if the person is indeed arrested and produced before him. In the absence of any grasp of these

aspects, the process and outcome of quasi-judicial inquiry are bound to be vitiated with infirmities and illegalities for which our officers are victimized day in and day out. I cite an example to illustrate this point. In a case where the inquiry u/s 7A was held in relation to a school affiliated with CBSE, the school declared that only 20 odd employees were entitled to be member of the Fund. To verify the same information was demanded from the CBSE Head Quarters at Delhi, to whom the said school had furnished the relevant information as required under recognition rules. The CBSE furnished a list of 100 odd employees engaged by that school all of whom were entitled to become the member of the Fund. Accordingly assessment was made for 100 odd employees whose list was submitted by the CBSE. The assessment order was challenged by the establishment in the Tribunal which quashed the same on the ground that the person from the CBSE who provided the documents regarding employees was not examined on oath nor the evidence was received on affidavit. The EPFO challenged the order of the Tribunal in the High Court which refused to interfere as nothing wrong was found in the order passed by the Tribunal. No further action was taken due to inadequate skill on these matters and the workers continue to be denied their entitlements. This example is cited here with a view to signify the importance of awareness and training on those aspects which are ignored by the Organisation.

It is patent that our officers can't be blamed for this state of affairs as they are never trained into these aspects. Quasi-judicial functions have never been the focus of the Organisational objectives.

Further, various forms available under these Acts and Rules framed thereunder may be modified on *mutatis mutandis* basis to confirm to EPFO terminologies and then compiled as a ready tool to be used during quasi-judicial proceedings.

7. <u>Suggestion:</u> Industry wise investigation technique including the techniques to examine critically the Financial Statements like Profit and Loss A/C or Income and Expenditure A/C, may be compiled by the Head Office

and be made available to officers and EOs for use for compliance purposes and during quasi-judicial proceedings.

Analysis and Justification: Every industry has its own specific ways of conducting its business and the unscrupulous employer of each category of industry follow a particular pattern to avoid statutory liabilities by fudging financial statements manipulations.
Income Tax department has in place such compilations and made them available to its field functionaries for improved investigation of tax evasions and frauds. Our Head Office is best suited for compiling industry-wise investigation techniques and to make them available to the field functionaries. Better investigation shall enable accurate inputs to the officials representing the Central Board during quasi-judicial proceedings.

8. Suggestion: Complete separation between Section 7A of the Act and Para 26 B of the EPF Scheme, 1952. S.7A finding must prevail over Para 26B order.

Analysis & Justification: Para 26 B of the Scheme reads *"If any question arises whether an employee is entitled or required to become or continue as a member, or as regards the date from which he is so entitled or required to become a member, the decision thereon of the Regional Commissioner shall be final.*
Provided that no decision shall be given unless both the employer and the employee have been heard."
Section 7A provides that Commissioner of any description *"...may, by order, determine the amount due from any employer under any provision of this Act"* or any of the three Schemes... and for the said purpose *"may conduct such inquiry as he may deem necessary"*.
It is probable that while determining the amount due from an employer u/s 7A of the Act, a question may arise whether an employee is entitled or required to become a member of the Fund or the date from which he is so entitled or

required to become a member. In such a situation, the question arises whether this issue should be decided u/s 7A or Para 26B.

Section 7A gives the sweeping jurisdiction to the Commissioner conducting the inquiry - "*may conduct such inquiry as he may deem necessary*" – and therefore it is in the fitness of things that **any question regarding date or entitlement of membership that may arise in the course of 7A inquiry must be dealt with under the provisions of Section 7A without any reference to Para 26B. Any provision to the contrary shall run counter to the supremacy of the provision of the Act vis-à-vis the provision of any rule or scheme framed under the Act.**

A situation, where the question mentioned under Para 26B of the Scheme arises beyond and without the sphere of inquiry u/s 7A the Act, it presents no difficulty as in such a case mandate of the Para 26B is clear and unambiguous.

It may be clarified that in any case where the same question as visualized under Para 26B is ascertained differently at different point in time through separate proceedings or inquiry, one under the Para 26B and the other U/s 7A, the latter shall prevail over the former irrespective of the rank of the officers who pass orders under these proceedings or inquiry. It is so because an Order passed after a quasi-judicial inquiry must prevail over an administrative finding.

Another aspect of Para 26B is dealt with on page 30 of this letter which may also be referred to.

9. <u>Suggestion</u>: Nature of guidelines should be different for the authority conducting the quasi-judicial proceeding and the person representing the CBT (E.O.) during the inquiry. No interference by administrative superior.

<u>Analysis & Justification</u>: In a catena of judgments it was held by the Apex Court that the administrative superiors can give no instruction to his subordinate officer in the course of discharge of quasi-judicial functions nor the quasi-judicial functionary can seek or receive any direction, guidelines or suggestion from his administrative superior in discharge of such functions. Any "guidelines" issued or

proposed to be issued by the Head Office – which, in essence, are standing instructions – mat therefore be formulated keeping the these ratio and law laid down by the Apex Court in this regard.

Guidelines to be issued to the quasi-judicial functionary by the Head Office should be a compilation of statutory provisions and relevant judgments of precedent value and *ratio decidendi* of such judgments. Matters preceding or leading to the quasi-judicial inquiry and other matters succeeding the passing of Order after conclusion of such inquiry like the mode or manner or entry into registers or the like, may well form part of it.

Guidelines on other subjects may be meant for the officials who represent the Central Board in the quasi-judicial proceeding.

It may also be considered to sensitise the authority who is administratively superior to one conducting quasi-judicial inquiry, not to interfere in the inquiry or control or guide the discretion during such inquiry.

10. Suggestion: Awareness regarding essentials of a speaking judicial order.

Analysis: It is a common experience in EPFO that a vast majority of Orders passed u/s 7A are not upto mark and leaves a lot to be desired. It records those details which are of little significance and important aspects are usually missing. For example various adjournments and their dates, name and other details of those who represented the parties to dispute in each hearing and such other details which are not meaningful are usual but avoidable features of the Order. In the name of reason, phrases like "relevant facts and provisions are considered" and "all material facts and submissions are taken into account" are used liberally without recording what exactly those material facts or relevant records were and why such facts or materials were considered relevant or otherwise. One reason for writing such order may be lack of skill for writing a speaking order.

Any judgment or quasi-judicial order essentially involves the determination of disputed questions of fact, finding the applicable laws and to decide the dispute

by applying these laws on the ascertained facts. There are numerous existing judgments as to what are the essentials of a speaking order. An article on the topic "ART OF WRITING JUDGEMENTS" written by the District Judge Shri B. G. Harindranath, that elaborates the structure and essentials of a judgment with reference to various judgments of the Constitutional Courts, is enclosed as **Annexure I**.

11. Suggestion: Quasi-judicial function may be removed from the list of "Sensitive Posts".

Analysis & Justification: Office orders are issued periodically by the Head Office not to assign sensitive posts to listed officers. A large number of such officers find place in the list because the process and product of quasi-judicial inquiry conducted by them were examined in microscopic detail by administrative or vigilance functionaries to read impropriety or mala fide into the process or the Order. As a result the affected officer is not assigned the charge of conducting quasi-judicial inquiry u/s 7A. To avoid the stigma of being corrupt that invariably associates to such administrative direction, officers usually avoid passing any order u/ 7A. This strategy works as no one has ever been advised for non-assignment of sensitive post on account of not doing his duty to conduct inquiry u/s 7A or for passing very few or no order u/s 7A.

Once the suggestions regarding (i) separation of compliance and quasi-judicial functions (ii) probity measures like posting of all 7A/7B/7C orders on website and mandatory examination of each order with a view to ascertain whether the same is acceptable or not and (iii) open court hearings during such inquiry are implemented the possibility of favouring an establishment in lieu of illegal gratification during inquiry will reduce substantially. Once these measure are implemented, the quasi-judicial function may be taken away from the list of sensitive post. It will improve the pace of disposal of disputes under the Act.

12. Suggestion: Mandatory application of Section 18 of the Act before any departmental or criminal action or investigation is proposed or recommended against a quasi-judicial functionary.

Analysis & Justification: Section 18 of our Act under the marginal note "*Protection of Action taken in good faith*" provides as follows: "*No suit, prosecution or other legal proceeding shall lie against the Central Government, a State Government, the Presiding Officer of a tribunal, any authority referred to in section 7A, an Inspector or any other person for anything which is in good faith done or intended to be done in pursuance of this Act, the Scheme, the Pension Scheme or the Insurance Scheme.*"

The intent and content of this provision is manifest. Despite such clear legislative protection, one or the other quasi-judicial officer of the Central Board is either chargesheeted departmentally or recommended for criminal investigation every passing day. It is noteworthy that the protection available under this section is same to "***any authority*** *referred to in Section 7A*". It does not make any distinction between the higher authority or the lower authority referred to in Section 7A. Further, the protection to "***any authority*** *referred to in Section 7A*" is also same as one available to the Presiding Officer of the EPF Appellate Tribunal. However, in practice, this protection is made available only to the latter and it has become the dead word and the vanishing point of the legislation when it comes to extending protection to lowly authorities u/s 7A like AC or RC.

It is therefore suggested that to ensure this statutory protection it should be made a must for every vigilance, disciplinary or criminal investigation authority to record a certificate that provision of this section is accounted for before any departmental or criminal action or investigation is proposed or recommended against a quasi-judicial functionary. As almost everyone in government works to save his skin, this suggestion if implemented will go a long way in dispelling the culture of inaction and reviving quasi-judicial function in the Organisation.

13. Suggestion: Work norm for quasi-judicial function may be reassessed and whatever is considered appropriate may be strictly implemented.

Analysis & Justification: At present the norm for passing the orders u/s 7A is fifty per month per officer. In fact if all India average is taken, hardly five such orders are being passed against target of 50. It is being tolerated by the management also as it recognises the situation where an officer passing order u/s 7A is vulnerable to vigilance action and therefore the strategy of inaction is resorted to. **It is suggested that a sincere effort may be made to assess the requirement of Enforcement Officers and officers for conducting quasi-judicial functions and such number may be recruited, trained well and put in place to ensure benefit of the Act to every eligible worker**. Till such assessment is made and officers are recruited, trained and deployed, the work target may be revised to match the current level of skill and support system available for such function. Whatever target is fixed the same may be implemented strictly.

14. Suggestion: All previous circulars on quasi-judicial functions may be withdrawn and a consolidated manual should be issued after the instant exercise.

Justification: The current exercise is to "*submit a **comprehensive report** on guidelines for conducting quasi-judicial enquiries under Section 7A of the EPF&. MP Act 1952 and para268 of the EPF Scheme 1952*." It is therefore suggested that the exercise may be undertaken to examine all existing circulars on the subject, irrelevant one may be weeded out. By consolidating the existing and the proposed guidelines a comprehensive manual may be prepared. It will improve the ease of reference and chances that in the conduct of quasi-judicial proceeding, provisions of some circulars are not taken into account under ignorance regarding existence of such circulars, may be avoided.

Issue of special focus - "lump-sum assessments, without identifying individual members."

15. Suggestion: **No fetter on making lump-sum assessment for those members who could not be identified.**

Every order u/s 7A should bear two parts:

Part A: To assess the amount due from employer on account of employees who are identified individually.

Part B: To record the amount due from employer on account of employees who could not be identified individually.

Analysis & Justification: This topic of special focus may be started with setting out the legislative provisions of various labour laws relevant for the issue at hand.

A. **Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.**

Section 7. Registration of establishments:

"(1) Every employer shall,-

(a) in relation to an establishment to which this Act applies on its commencement, within a period of sixty days from such commencement; and

(b) in relation to any other establishment to which this Act may be applicable at any time after such commencement, within a period of sixty days from the date on which this Act becomes applicable to such establishment,

make an application to the registering officer for the registration of such establishment..."

Section 12. Registration of building workers as beneficiaries:

(1) Every building worker who has completed eighteen years of age, but has not completed sixty years of age, and who has been engaged in any building or other construction work for not less than ninety days during the preceding twelve months shall be eligible for registration as beneficiary under this Act.

(4) If the officer authorized by the Board under sub-section (2) is satisfied ...he shall **register the name of the building workers as a beneficiary** under this Act;

Section13. Identity cards:

(1) The Board shall give to every beneficiary **an identity card with his photograph duly affixed thereon**...

(2) Every employer shall enter in the identity card the details of the building or other construction work done by the beneficiary and authenticate the same and return it to be beneficiary.

(3) A beneficiary who has been issued an identity card under this Act shall produce the same whenever demanded by any officer of Government or the Board, any inspector or any other authority for inspection.

Section15. Register of beneficiaries:

Every employer shall maintain a register in such form as may be prescribed **showing the details of employment of beneficiaries employed** in the building or other construction work undertaken by him...

Section30. Maintenance of registers and records:

(1) Every employer shall maintain such registers and records giving such particulars of building workers employed by him, the work performed by them, the number of hours of work...as may be prescribed.

(2) Every employer shall keep exhibited, in such manner as may be prescribed, in the place where such workers may be employed, notices in the prescribed form containing the prescribed particulars.

(3) The appropriate Government may, by rules, provide for the **issue of wage books of wage slips to building workers** employed in an establishment...

B. THE INTER-STATE MIGRANT WORKMEN (REGULATION OF EMPLOYMENT AND CONDITIONS OF SERVICE) ACT, 1979.

Section 4. Registration of certain establishments:

(1) Every **principal employer** of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix...make an application to the registering officer... for the registration of the establishment:

Section 6. Prohibition against employment of inter-State migrant workmen without registration:

No **principal employer** of an establishment to which this Act applied shall employ inter-State migrant workmen in the establishment unless a certificate of registration in respect of such establishment issued under this Act is in force.

Section 8. Licensing of contractors:

(1) With effect from such date as the appropriate Government may, by notification in the Official Gazette, appoint, **no contractor...shall...recruit any**

person in a State for the purpose of employing him in any establishment situated in another State, **except under and in accordance with a license issued in that behalf**...

Section12. Duties of contractors:

(1) It shall be the **duty of every contractor**

(a) to furnish such particulars and in such form as may be prescribed, by the specified authority in the State from which an inter-State migrant workman is recruited and in the State in which such workman is employed, within fifteen days from the date of recruitment, or, as the case may be, the date of employment...

(b) **to issue to every inter-State migrant workmen, a pass book** affixed with a passport size photograph of the workman and indicating ...

(i) the name and place of the establishment wherein the workman is employed;

(ii) the period of employment;

(iii) the proposed rates and modes of payment of wages;

(iv) ...

(vi) deductions made; and

(vii) such other particulars as may be prescribed;

(c) to furnish in respect of every inter-State migrant workman who ceases to be employed, a return in such form and in such manner as may be prescribed, to the specified authority in the State from which he is recruited and in the State in which he is employed, which shall include a declaration that all the wages and

other dues payable to the workman and the fare for the return journey back to his State have been paid.

(2) The contractor shall maintain the pass book referred to in sub-section (1) up-to-date and cause it to be retained with the inter-State migrant workman concerned.

Section17. Responsibility for payment of wages:

(1) A **contractor shall be responsible** for payment of wages to each inter-State migrant workman employed by him and such wages shall be paid before the expiry of such period as may be prescribed.

(2) Every **principal employer** shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages in such manner as may be prescribed.

(3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorised representative of the principal employer.

(4) **In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable** to make payment of the wages in fu ll or the unpaid balance due, as the case may be, to the inter-State migrant workman employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

Section18. Liability of principal employer in certain cases:

(1) If any allowance required to be paid under section 14 or section 15 to an inter-State migrant workman employed in an establishment to which this Act

applies is not paid by the contractor or if any facility specified in section 16 is not provided for the benefit of such workman, such allowance shall be paid, or, as the case may be, the facility shall be provided, by the **principal employer** within such time as may be prescribed.

(2) All the allowances paid by the principal employer or all the expenses incurred by him in providing the facility referred to in sub-section (1) may be recovered by him from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

Section 21. Inter-State migrant workmen to be deemed to be in employment from date of recruitment for the purposes of certain enactments:

For the purposes of the enactments specified in the Schedule, an inter-State migrant workman shall, on and from the date of his recruitment, be deemed to be employed and actually worked in the establishment or, as the case may be, the first establishment in connection with the work of which he is employed.

THESCHEDULE
(See section 21)

1. The Workmen's Compensation Act, 1923 (8 of 1923).

2. The Payment of Wages Act, 1936 (4 of 1936).

3. The Industrial Disputes Act, 1947 (14 of 1947).

4. The Employees' State Insurance Act,1948 (34 of 1948).

5. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952).

6. The Maternity Benefit Act, 1961 (53 of 1961)

Section 23. Registers and other records to be maintained:

(1) Every principal employer and every contractor shall maintain such registers and records giving such particulars of the inter-State migrant workmen

employed, the nature of work performed by such workmen, the rates of wages paid to the workmen and such other particulars in such form as may be prescribed.

(2) Every principal employer and every contractor shall keep exhibited in such manner as may be prescribed within the premises of the establishment where the inter-State migrant workmen are employed, notices in the prescribed form containing particulars about the hours of work, nature of duty and such other information as may be prescribed.

C. Contract Labor (Regulation and Abolition) Act, 1970.

Section 7. Registration of certain establishments:

(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate government may...fix... make an application to the registering officer in the prescribed manner for registration of the establishment:

(2) If the application for registration is complete in all respects, the registering officer shall register the establishment and **issue to the principal employer of the establishment a certificate of registration** containing such particulars as may be prescribed.

Section 29. Registers and other records to be maintained:

(1) Every principal employer and every contractor shall maintain such register and records giving such particulars of contract labour employed, the nature of work performed by the contract labour, the rate of wages paid to the contract labour and such other particulars in such form as may be prescribed.

The Contract Labour (Regulation & Abolition) Central Rules, 1971 [Notified by the Central Government under Section 35 of the Contract Labour (Regulation & Abolition) Act, 1970].

Rule 72. The **principal employer** shall ensure the presence of his authorized representative at the place and time of disbursement of wages by the contractor to workmen and it shall be the duty of the contractor to ensure the disbursement of wages in the presence of such authorized representative

Rule 73. The authorized representative of the principal employer shall record under his signature a certificate at the end of the entries in the Register of Wages or the Register of Wages-cum-Muster Roll, as the case may be, in the following form:
"Certified that the amount shown in column No.... has been paid to the workman concerned in my presence on.....at....."

Rule 74. Register of contractors:

Every principal employer shall maintain in respect of each registered establishment a register of contractor in Form XII.

Rule 75. Register of persons employed:

Every contractor shall maintain in respect of each registered establishment where he employs contract labour a register in Form XIII.

Rule 76. Employment Card:

(i) Every contractor shall issue an employment card in Form XIV to each worker within three days of the employment of the worker.

(ii) The card shall be maintained up to date and any change in the particulars shall be entered therein.

Rule 77. Service Certificate:

On termination of employment for any reason whatsoever the contractor shall issue to the workman whose services have been terminated a Service Certificate in Form XV.

Rule 78. Master Roll, Wages Registers, Deduction Register and Overtime Register:

(1)(a) Every Contractor shall in respect of each work on which he engages contractor labour,-

(i) **Maintain a Muster Roll and a Register of Wages** in FormXVI and Form XVII respectively:

Provided that a combined Register of Wages-cum-Muster Roll in Form XVIII shall be maintained by the contractor where the wage period is a fortnight or less;

(ii) ...

(iii) **Maintain a Register of Overtime** in Form XXIII recording therein the number of hours of, and wages paid for, overtime work, if any;

(b) Every contractor shall, where the wage period is one week or more, issue wage slips in Form XIX, to the workmen at least a day prior to the disbursement of wages;

(c) **Every contractor shall obtain the signature or thumb-impression of the worker concerned against the entries relating to him on the Register of wages or Muster Roll-cum–Wages Register as the case maybe, and the entries shall be authenticated by the initials of the contractor or his authorized**

representatives and shall also be duly certified by the authorized representative of the principal employer in the manner provided in rule 73.

(d) In respect of establishments which are governed by the Payment of Wages Act, 1936 (4 of 1936) and the rules made there under, or the Minimum Wages Act, 1948 (11 of 1948) or the rules made there under, the following registers and records required to be maintained by a contractor as employer under those Acts and the rules made there under shall be deemed to be registered and records to be maintained by the contractor under these rules, namely:;-

(a) Muster Roll;
(b) Register of Wages;
(c) Register of Deductions;
(d) Register of Overtime;
(e) Register of Fines;
(f) Register of Advances;
(g) Wage slip.

Rule 80: (1) All registers and other records, required to be maintained under the Act and rules, shall be maintained complete and uptodate, and, unless otherwise provided for, shall be kept at an office or the nearest convenient building within the precincts of the workplace or at a place within a radius of three kilometers.

(2) All the registers and other records shall be preserved in original for a period of three calendar years from the date of last entry therein.

(3) All the registers, records and notices maintained under the Act or rules shall be produced on demand before the Inspector or any other authority under the Act or any person authorized in that behalf by the Central Government

Rule 81(3): Every principal employer shall, within fifteen days of the commencement or completion of each contract work under each contractor, submit a return to the Inspector, appointed under Section 28 of the Act, intimating the actual dates. Of the commencement or, as the case may be, completion of such contract work, in Form VI B.

Rule 82(3): The returns to be submitted under this rule by contractor/or principal employer shall be correct complete and uptodate in all respects.

Rule 83(2): Any person called upon to furnish the information under sub-rule (1) shall be legal bound to do so.

D. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952

Section 6. The contribution which shall be paid by the employer to the Fund shall ten per cent of basic wages, dearness allowance... and the employee's contribution shall be equal to the contribution payable by the employer...

The Employees' Provident Funds Scheme, 1952

Para 30. Payment of contribution:

(1) The employer shall, in the first instance, pay both the contribution payable by himself and also on behalf of the member employed by him directly or by or through a contractor...

Para 36. Duties of employers:

(1)Every employer shall send to the Commissioner...a consolidated return...of the employees required or entitled to become a member of the Fund...

(2) Every employer shall send to the Commissioner within fifteen days of the close of each month a return...in Form 5, of the employees qualifying to become members of the Fund for the first time during the preceding month together with the declaration...

Provisions of various labour laws, quoted above liberally, make it abundantly clear that both principal employer and contractor are under multiple statutory obligations to maintain full details of each worker, employed by them directly or by or through a (sub)contractor. Nature of inquiry u/s 7A is "*such inquiry as...deem necessary*". It may, therefore, be deemed necessary by the Inquiring Authority to examine the financial books to ascertain the wage expenditure. During such inquiry it's not unusual that large mismatch is noticed between the number of employees and contributions paid for them as shown in various returns and the wage bill reflected in financial books. Wage bill as recorded in financial statements indicates to employment of larger or far larger number of workers. It is also noticed that wages paid are under recorded or booked under wrong heads between wages, salary, directors' pay, payment made to contractors, job work expenses, miscellaneous expenditure, maintenance expenses or office expenses in the Profit & Loss Account. Payment to contractors and job work expenses may be closely scrutinized in the course of such inquiry as there are other items like material besides wages in the total amount. It may be found that, to minimize the statutory liability, the employer has booked higher wages and salary as paid to excluded employees than actual.

In this exercise what may be ascertained with certainty or high probability that the number of employees in question is larger or far larger than what may be shown by the employer in the statutory returns. In fact a situation like this arises frequently in the course of statutory inquiry where though the number of employees is tentatively estimated (through wage entries in financial statements) but individual workers couldn't be identified. For example, there may be evidence to the effect that 900 odd employees are employed in an establishment but the indivisual identity – through statutory returns and with the help of other efforts

taken during the inquiry - could be ascertained for 100 employees only. Remaining 800 odd employees could not be identified individually despite taking all reasonable efforts and invoking all applicable provisions, though the evidence to the effect that such additional number of employees is indeed engaged. Such a situation arises when the employer did not register the employees who he engaged, in breach of multiple statutory provisions cited above or when the employer did maintain such record but secreted or destroyed the same to avoid them being detected or seized during the inquiry and he did not cooperate in or misled the course of the statutory inquiry with a view to avoid payment of dues.

The question is what to do with the money of those 800 odd workers – whether to make lump-sum assessment for them or not. The dilemma that presents itself is that when the owners of money (800 odd worker-employees) are not available to stake claim over their money, whether the money should vest in the Central Board or allowed to be retained by the owners of the establishments. In the absence of real owners of the money (workers), who has the **next best claim** over that money - the Central Board or the private employer?

To resolve this conundrum let us consider the alternatives available. One option is that the impugned money is not assessed and allowed to stay in the pocket of the employer. The effect of this practice will mean that the non-observance of the requirement of registration of employers or maintenance of records of their identity and employment, in breach of multiple statutory provisions cited above, is sure to result into financial gain, including pocketing of the employees' share that might have been deducted from their salary. Those unscrupulous employers or industrialists who do all within their power to create this situation to deny workers their identity and entitlement shall gain at the expense of those very workers. In other words, law-breaking, non-cooperation with public authorities in statutory inquiry and other sharp practices will be incentivised with assured pecuniary return. This will run counter to the timeless jurisprudential principle that no one should be allowed to reap the benefit of his own wrong. The

Principle of Jurisprudence - *Commodum ex injuria sua non habere debet* - demands that a defaulter/criminal must be prevented from retaining the known profits of their crimes. Similarly the Roman Jurisprudential Principle *Commodum Ex Injuria Sua Non Habere Debet* signifies variously that:

- No person ought to take advantage from his own wrong;
- Nobody ought to derive advantage from his injurious behaviour; and
- No one ought to profit from his own tort.

As the principle that a defaulter must be prevented from retaining the known profits of his crime is a compelling one, it leads to the other available option that the assessment regarding unidentified workers must be done. This option, however, is not free from hazard. It presents the difficulty that if the assessment is made for 800 odd employees whose indivisual identity could not be ascertained and the amount is recovered from the employer, it will amount to accrual to the Central Board of those moneys which do not belong to it. It will be difficult for us to identify such workers in future and transfer them their entitlement. This problem is surmounted easily by the fact that the Central Board is a trust who is the custodian of workers' moneys and there is no possibility of any private enrichment in this case. A portion of the sum realised on account of non-identified workers, let's say, a hundred crore of Rupees, may be apportioned for meeting the demands made by those workers who come forward and claim his entitlements. In such cases provisions of **Para 26B** of the Scheme may be invoked to ascertain the veracity of such claim. For the balance amount, a model may be devised whereby such amount shall be transferred in a common pool to be utilised either for enhancing the interest rate payable to workers or to augment the Pension Fund or for the same purpose as the damages realised under Section 14B of the Act is utilised. It will have a positive correlation in as much as that the workers' money will be used for the welfare or benefit of the same class. **Our suggestion in this regard is that a direction may be issued from the Head Office that in all 7A inquiries assessment made with respect to unidentified workers should be calculated and recorded separately in the body of the Order.**

We may now examine some judicial pronouncements which emphasise the utility of lump-sum assessment when workers can't be identified individually.

I. Hon'ble Supreme Court in Employees' State Insurance ... vs. M/S. Harrison Malayalam Pvt. Ltd. [30 August, 1993, AIR 1993 SC 2655]

"*Since the respondent-Company failed in its obligation, it cannot be heard to say that the workers are unidentifiable. It was within the exclusive knowledge of the respondent-Company as to how many workers were employed by its contractor. If the respondent-Company failed to get the details of the workmen employed by the contractor, it has only itself to thank for its default. Since the workmen in fact were engaged by the contractor to execute the work in question and the respondent-Company had failed to pay the contribution, the appellant-Corporation was entitled to demand the contribution although both the contribution period and the corresponding benefit period had expired.*"

II. Hon'ble Supreme Court in Employees State Insurance Corporation vs. Hotel Kalpaka International [15 January, 1993, 1993 AIR 1530]

"The Insurance Court as well as the High Court have correctly upheld the demand for contribution. But it is rather strange to conclude that the demand could not be enforced against a closed business. ***If this finding were to be accepted it would not promote the scheme and avoid the mischief. On the contrary, it would perpetrate the mischief.*** *Any employer can easily avoid his statutory liability and deny the beneficial piece of social security legislation to the employees, by closing down the business before recovery. That certainly is not the intendment of the Act.* ***It is equally fallacious to conclude that because the employees had gone away there is no liability to contribute."***

III. Hon`ble Supreme Court in M/s S. K. Nasiruddin Beedi Merchant Limited vs. Central Provident Fund Commissioner [January 30, 2001, Special Leave Petitions (C) Nos. 15312-13 of 1992 and Appeal (civil) 4285 of 1998]

"The establishment cannot rely upon its own latches in not submitting the details of contractual employees engaged through contractors for the work of the establishment. The establishment has failed in its duties as a Principle Employer as per para 30 of EPF Scheme."

IV. The Hon'ble Delhi High Court, Division Bench in Food Corporation Of India vs. Regional Provident Fund Commissioner [4 September, 2002, (2003) IILLJ 376 Del]

"An examination of Commissioner's order passed under Section 7-A shows that he had dealt with petitioner's request for summoning the contractors and had repeatedly asked it to submit the relevant record to facilitate the determination of this liability. But petitioner had failed to comply with this raising the interference that it had either with held the record or avoided to produce it for some reason. It was in that context that Commissioner had fallen back upon other sources to collect the requisite data for determination of the liability. It is not that he had made this determination without any basis or evidence or that he had proceeded in the matter without affording the Corporation a reasonable opportunity of presenting its case. His order, therefore, could not be faulted..."

On the other hand, there are judgments to the opposite effect also e.g. Sandeep Dwellers Pvt. Ltd. vs. Union Of India (UoI) [28 February, 2006, 2007 (3) Bom CR 898] by Bombay High Court, which require that workers should be identified before assessment could be made with respect to them. The question that arises in the context of such restricting judgments is whether they make a binding precedent to be followed in deciding future cases. Law of precedent with specific

reference to the **rule of sub-silento** as laid down by the Apex Court through various judgments may be examined to find answer to it. These judgments are as follows:

I. The Apex Court in *Zee Telefilms Ltd. and another vs. Union of India* and others in Para 254 & 256:

"***Precedent***

254. *Are we bound hands and feet by Pradeep Kumar Biswas (2002) 5 SCC 111? The answer to the question must be found in the law of precedent. A decision, it is trite, should not be read as a statute. A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. (See Punjab National Bank v. R.L. Vaid (2004) 7 SCC 698)."*

"256. It is further well settled that a decision is not an authority for a proposition which did not fall for its consideration. It is also a trite law that a point not raised before a court would not be an authority on the said question. In A-One Granites v. State of U.P. (2001) 3 SCC 537 it is stated as follows: (SCC p. 543, para 11)

"11. This question was considered by the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremith Ltd. (1941) 1 KB 675 and it was laid down that when non consideration was given to the question, the decision cannot be said to be binding and precedents sub silentio and without arguments are of no moment"

II. The Apex Court in State of Uttar Pradesh Vs. Synthetics and Chemicals Limited in para 41

"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here, again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as ***rule of sub-silentio.*** *"A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153.) ...It was approved by this court in Municipal Corporation of Delhi vs. Gurnam Kaur (WP2637.2010). The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for reliving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. .... Restraint in dissenting or overruling is for sake of stability arid uniformity but rigidity beyond reasonable limits is inimical to the growth of law."*

III. The Apex Court in Punjab National Bank vs. R. L. Vaid and others in para 5

"5. There is always peril in treating the words of a judgment as though they are words in a Legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a difference between conclusions in two cases. Disposal of cases by merely placing reliance on a decision is not proper. Precedent should be followed only so far as it marks the path of justice, but you must cut out the dead wood and trim off the side branches else you will find yourself lost in thickets and branches, said Lord Denning, while speaking in the matter of applying precedents. The impugned order is certainly vague."

Reasonable effort is made on our part to peruse those judgments which restrict the assessment with respect to identified workers only. It is found that in no such judgment rules of **"next best claim" theory** or ***Commodum ex injuria sua non habere debet*** - **a defaulter/criminal must be prevented from retaining the known profits of their crimes** (pp. 19-21 above) were argued and these principles were NOT present on the mind of judges while delivering the judgment, as inferred from the content of those judgments. These facts read in conjunction with the principle that *"a decision is not an authority for a proposition which did not fall for its consideration"* and that *"It is also a trite law that a point not raised before a court would not be an authority on the said question"* [the Apex Court in Zee Telefilms Ltd. case (cited above)] leads to the conclusion that these restricting judgments are hit by the rule of sub-silento and they have no precedent value to bind the discretion of the authority conducting inquiry u/s 7A of the Act. It is suggested on our part that as and when the occasion arise and this question falls for consideration before a High Court or the Apex Court, an advocate of eminence may be engaged by the Central Board and these aspects may be brought to the knowledge of the Hon'ble Judges so that the judgment may be passed after accounting for these principles and the erroneous notion created by some judgments that lump-sum assessment with respect to workers who could not identified individually is not permissible may be removed once and for all.

Before this communication may be wound up, it is pertinent to point out that total membership under our Act taking all 200 odd industries and activities are less than 40 million whereas in the construction work alone more than 40 million workers are engaged (as per plan paper released by the Planning Commission). This shows the extent to which we fail in the sacred duty bequeathed upon us by our Parliament by keeping the growth of the EPFO under check.

You are requested, Sir, to take these suggestions into account while submitting the comprehensive report on quasi-judicial proceeding. It is an area of vital importance and should get the attention it deserves. It is requested further that the Officers' Association may also be allowed to present its viewpoint on the subject to the Working Group in person and any date between September 10 to 13 or any other convenient date may be intimated for this purpose.

It is hoped that the comprehensive guidelines that shall be formulated by the Working Group, consisting of most experienced officers of our Organisation, will go a long way in improving the efficacy of this vital area of Organisational function.

Thanking you.

Yours faithfully

Sudarshan Kumar
Secretary General
EPF Officers' Association