

## HR Law Hotline

January 14, 2023

### PENSION CONTRIBUTIONS FOR EMPLOYEES IN INDIA: RECENT DEVELOPMENTS

- The Supreme Court of India in its recent judgment dated November 4, 2022 upheld validity of the Employees' Pension (Amendment) Scheme, 2014, while reading down certain provisions
- The 2014 amendment to Employees' Pension Scheme, 1995 (EPS) had *inter alia* revised the wage ceiling for contributing to pension fund from INR 6500 to INR 15000, conditionally permitting employees to contribute to pension fund above such wage ceiling
- The judgment *inter alia* provides EPS members who had missed the deadline to opt for contributing to pension fund on salary exceeding INR 15000 another opportunity to exercise such option within 4 months from November 4, 2022.

### BACKGROUND OF EPS 2014 AMENDMENT

#### Employees' Pension Scheme, 1995

Employees' Pension Scheme, 1995 ("EPS") was notified by pursuant to section 6-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act"). Section 6-A of the EPF Act provides for creation of a pension scheme and establishment of a pension fund to receive *inter alia* contributions for employees who become members of the pension scheme- including employees who are exempted under section 17 of the EPF Act and are members of private provident funds. Such contributions will be on salaries not exceeding 8.33% of a member employee's basic wages, dearness allowance and retaining allowance.

The EPS also contains provisions on computation of pensionable salary for member employees contributing to the pension fund. Under EPS, as notified in 1995, the maximum pensionable salary was INR 5000 (approx. \$62) which was later revised to INR 6500 (approx. \$80) with effect from October 8, 2001<sup>1</sup>. Clause 11(3)<sup>2</sup> of the EPS permitted employers and employees to contribute to pension fund on salaries exceeding the maximum pensionable salary.

#### 2014 Amendment

Subsequently, through an amendment to EPS as per notification dated August 22, 2014 ("2014 Amendment") which was made effective from September 1, 2014, the maximum pensionable salary under EPS was revised to INR 15000 (approx. USD 185). The 2014 Amendment also limited the coverage of EPS wef September 1, 2014 to new members earning salaries below INR 15000 (approx. \$185) per month. Accordingly, post September 1, 2014, new membership of EPS was limited to employees who became members of the Employees' Provident Fund Scheme, 1952 ("EPF Scheme") or provident funds of establishments exempted under section 17 of EPF Act *and* whose monthly pay at the time of attaining membership was less than or equal to INR 15000 (approx. 185).

#### Contributing Over the Wage Ceiling

For individuals who were existing members of EPS on September 1, 2014 contributing to the pension fund on salaries higher than INR 6500 (by exercising a joint option along with their employers as per erstwhile section 11(3) of EPS), the 2014 Amendment provided a timeline of 6 months (extendable by another 6 months at the discretion of the PF authorities) w.e.f. September 1, 2014 to jointly exercise a further option to continue contributing to pension fund on higher salaries.

If a member failed to exercise the option within the prescribed timeline, as per 2014 Amendment, it was to be deemed that the member had not opted to continue such contributions. In such a case, the contributions of a member made to the pension fund on higher salaries prior to cut-off date would be diverted to their provident fund account with applicable interest.

#### Additional contribution

The employees exercising a joint option to contribute to pension fund on higher salaries are also required to contribute an additional 1.16 per cent of their salaries exceeding the wage ceiling.

#### Challenge to 2014 Amendment

The 2014 Amendment was challenged in several petitions filed across India. Before the matter reached Supreme Court of India ("SC") on an appeal, 44 writ petitions were filed across different High Courts (namely High Courts of Delhi, Rajasthan and Kerala) for striking down the 2014 Amendment. Prior to the SC ruling in November 2022, 2014 Amendment was struck down by the Kerala High Court in the matter *Sasikumar v. Union of India*<sup>3</sup>. Eventually, the Employees Provident Fund Organisation ("EPFO") moved an appeal before the SC.

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### Analysing SEBI's Consultation Paper

The SCI judgment in the matter *Employees' Provident Fund Organisation v. Sunil Kumar B<sup>4</sup>* ("Judgment") upheld validity of the 2014 Amendment to the extent it limits the membership of EPS and revises the computation method of pensionable salary. Simultaneously, SCI has read down some provisions of the 2014 Amendment which pertain to:

- i. the timeline for EPS members to opt for contribution on higher salaries (exceeding extant wage ceiling)
- ii. requirement to contribute to EPS an additional 1.16 per cent of salary exceeding the wage ceiling for employees opting to contribute on higher salaries

## KEY OBSERVATIONS OF SUPREME COURT

### Limitation of EPS membership

SCI considered the Central Government (of India) to be well within its rights to lay down eligibility conditions for participation in EPS by specifying a salary ceiling. Accordingly, restriction on EPS membership based on a wage ceiling of INR 15000, was considered valid by SCI.

### Contribution of an Additional 1.16% for Option Members

In the Judgment, SCI assessed legality of the proviso to paragraph 11(4) of EPS. In this context, the SCI considered the requirement to contribute an additional 1.16 per cent amount to pension fund on salary exceeding the pensionable salary unlawful. This is in absence of any enabling provision under EPF Act for collection of such additional amounts.

However, this portion of the judgment has been stayed for 6 months wef November 4, 2022. During such period, employees contributing to pension fund on higher salaries will continue to make an additional contribution of 1.16 per cent.

### EPS Benefits to Members of Exempted Establishment

EPS contemplates keeping within its fold employees of organisations exempted under section 17 of EPF Act. As per SCI, such employees are also integrated into EPS and entitled to continue membership of the EPS while drawing salaries above the wage ceiling. Accordingly, to derive pension benefits under EPS on higher salaries, exempted employees alongwith their employers will need to exercise the option to make contributions to EPS above the wage ceiling. Additionally, an undertaking will need to be submitted for transferring the employer's contribution to the pension fund at the rate stipulated under the employer's trust deed. As per SCI, transfer of such amounts should take place immediately on exercise of the option to contribute to pension fund on higher salaries.

### Deadline to Opt for Coverage of EPS on Higher Salaries

SCI considered that eligibility for contributing to EPS on higher salaries cannot be restricted to employees who had exercised the option to continue their contributions as per section 11(3) of EPS (once their salaries exceeded the wage ceiling of INR 6500). To clarify, while SCI agreed that an option had to be exercised by employees under erstwhile paragraph 11(3) of EPS<sup>5</sup>, exercising of such option was not be subject to any time limit.

In this context, SCI referred to its holding in the matter *RC Gupta v. Regional Provident Fund Commissioner*<sup>6</sup>. In the *RC Gupta judgment*, it was held that time-limit specified under paragraph 11(3) of EPS for continuing contribution to EPS on higher salaries was not tenable.

Reading the *RC Gupta judgment* into EPS and the 2014 Amendment, SCI stated that if employers and employees jointly opt for coverage of EPS beyond the wage ceiling of INR 15000 without exercising such option earlier, they will not be automatically disabled from exercising such option. The period for exercising such an option has been extended until a period of 4 months from the date of the Judgment. Once such option is exercised by the employee and employer jointly, the PF authorities will transfer the appropriate fund from the provident fund corpus to the employee's pension fund.

*Obviously, this does not impact employees who are not eligible to become members of EPS wef September 1, 2014 owing to 2014 Amendment.*

## EPFO NOTIFICATION ON JUDGMENT

The EPFO has issued a notification dated December 29, 2022 ("Notification")<sup>7</sup> pursuant to the SCI judgment. The Notification provides the compliance requirements for certain pensioners who are beneficiaries of the Judgment and are able avail higher pension benefits. These pensioners are:

- i. pensioners who as employees had contributed to EPF Scheme on salary exceeding the extant wage ceiling
- ii. pensioners who exercised a joint option under paragraph 11(3) of pre-amendment EPS
- iii. pensioners whose exercise of such option was declined by PF authorities.

It is unclear whether such compliances will apply to employees who were members of EPS on September 1, 2014 and who had not exercised their option to contribute to pension fund on higher salaries. *We understand that as on date, the EPFO web portal is yet to enable the aforesaid pensioners to apply for higher pensions pursuant to the Notification.*

The Notification was followed by a corrigendum dated January 05, 2023<sup>8</sup>. It contained certain clarificatory revisions to the Notification.

## NDA VIEWS

The Judgment provides much needed clarity on the 2014 Amendment. However, the Notification is not above criticism. A letter dated December 30, 2022 by National Legal Advisor, Employees Pension (1995) Coordination

## Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996

Committee<sup>9</sup> has pointed out various legal infirmities in the Notification. It indicates that the Notification only covers certain paragraphs<sup>10</sup> of the Judgment without dealing with its holistic impact. The letter further calls out non-alignment with *inter alia* the RC Gupta judgment. Recent news reports suggest PF authorities and employees may seek further clarity from EPFO on the Notification.<sup>11</sup>

Despite the confusion, the Judgment may finally allow employees who paid contributions to EPS on higher salaries to receive proportionate benefits. Clarity is required from PF authorities on the compliance requirements to achieve this, especially for individuals who have not exercised their option to contribute on higher salaries prior to September 1, 2014 and for employees of exempted establishments. *Whether all beneficiaries of the Judgment can complete the procedural requirements by March 4, 2022 - it remains to be seen.*

– Nitish Raj, Nipasha Mahanta & Sayantani Saha

You can direct your queries or comments to the authors

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<sup>1</sup> This got later amended in 2014.

<sup>2</sup> *Subs.* for "Rupees six thousand and five hundred" by G.S.R. 609(E), dt. 22-8-2014 (w.e.f. 1-9-2014).

<sup>3</sup> *Sasikumar & ors. v. Union of India* (WP (C) No. 13120 of 2015).

<sup>4</sup> *The Employees Provident Fund Organisation & Anr. v. Sunil Kumar B. and Ors.* (C.A. No.-008143-008144 / 2022, pronounced on 04.11.2022).

<sup>5</sup> This paragraph has been amended through 2014 Amendment.

<sup>6</sup> *R.C. Gupta & Ors. v. Regional Provident Fund Commissioner, Employees Fund Organisation & Ors.* (C.A. No. 10013-10014 of 2016).

<sup>7</sup> [https://www.epfindia.gov.in/site\\_docs/PDFs/Circulars/Y2022-2023/Pension-2022-54877-15149.pdf](https://www.epfindia.gov.in/site_docs/PDFs/Circulars/Y2022-2023/Pension-2022-54877-15149.pdf).

<sup>8</sup> [https://www.epfindia.gov.in/site\\_docs/PDFs/Circulars/Y2022-2023/Pension202254877-15238.pdf](https://www.epfindia.gov.in/site_docs/PDFs/Circulars/Y2022-2023/Pension202254877-15238.pdf).

<sup>9</sup> <https://labourlawreporter.net/opencontent.asp?id=10018029&uid=2262&atype=Article>.

<sup>10</sup> Para 44(ix) of the Judgment.

<sup>11</sup> <https://www.thehindu.com/news/national/epfo-staff-pensioners-seek-clarity-on-circular-to-implement-supreme-court-verdict/article66327575.ece>.

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