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कर्मचारी भविष्य निधि संगठन
(श्रम एवं रोजगार मंत्रालय, भारत सरकार)

**EMPLOYEES' PROVIDENT FUND ORGANISATION**
(Ministry of Labour & Employment, Govt. of India)
मुख्य कार्यालय / Head Office
भविष्य निधि भवन, 14-भीकाजी कामा प्लेस, नई दिल्ली-110 066
Bhavishya Nidhi Bhawan, 14, Bhikaiji Cama Place, New Delhi - 110 066.

**LC-4(5)2013/Judgement** 5601 **Date:** 28 JUN 2017

To

All Addl. Central P.F. Commissioner, (Zone),
All Regional Provident Fund Commissioners/SROs.

**Subject:- Forwarding of important Judgement by Customs Excise & Service Tax Appellate Tribunal, Principal Bench, West Block No. 2, R.K. Puram, New Delhi-66 in the matter of Employees Provident Fund Organisation Vs C.S.T., Delhi - regarding.**

Sir,

Please find enclosed herewith the order dated 13.04.2017 in relation to Employees' Provident Fund Organisation Vs C.S.T., Delhi delivered by Customs Excise & Service Tax Appellate Tribunal, Principal Bench, West Block No. 2, R.K. Puram, New Delhi-66 wherein the Tribunal has ordered that:

**"Having examined the impugned orders, the submissions made by both the parties before us, closely", we find that the appellants are not liable to pay service tax on their statutory activities performed in terms of EPF & MP Act, 1952. The appellants are not providing any taxable service to the employers covered by the said Act. The relationship between the employers and the appellant is in discharge of statutory and compulsory obligations, coercively enforceable by the law. The considerations sought to be taxed are statutorily fixed, mandated fees and charges. No option exists with the appellants or contributor to vary such 'Fees' or 'charges'. As such, we find no taxable element in such transaction. This conclusion is supported by Board's clarification dated 18.12.2006 (supra). The impugned orders are without merit and are not legally sustainable. Accordingly, set aside the same and allow the appeals filed by the appellant".**

The order is in favour of EPFO and can be made use of, while defending cases of similar nature before Hon'ble, courts of law.

Yours faithfully,

**Encl**: As above

28-6-2017

**(Samarendra Kumar)**
**Regional P. F. Commissioner-I (Legal)**

Copy to: Regional P.F. Commissioner, NDC for web uploading please.

SB- 0962 - 94

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FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

To

Dated: 18/04/2017

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **ST/A/52858-52859/2017-CU[DB]** dated **13/04/2017**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the **Finance Act, 1994 relating to Service Tax Act, 1994.**

Deputy/Asstt. Registrar (CUSTOMS Appeal Branch)

| Application | Appeal | Name and Address of Appellant |
|---|---|---|
| | ST/1414/2010<br>ST/1415/2010 | **EMPLOYEE PROVIDENT FUND ORGANISATION**<br>BHAVISHYA NIDHI<br>BHAWAN, 14, BIKAJI CAMA<br>PLACE, NEW DELHI-110066. |

Name and Address of Respondent

-C.S.T. DELHI
17-B, I.P. Estate, IAEA House,
New Delhi.

Other Appellants and Respondents as per Annexure

Copy To
5Advocate(s) / Consultant(s):

**A. K. Batra & Associates**
**A-36, Ist Floor,Rajouri Garden,**
**New Delhi- 110027**
**Rajouri Garden, Ring Road,**
**New Delhi,**
**Delhi**

2 MAY 2017
3832

6 Additional Party's Name & Address :
7 Bar Association, CESTAT, Delhi
8 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence colony New Delhi-3
9 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
10 Director Publications, Customs, Excise, I.P. Estate, Delhi
11 LAWCROX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
13 MS Knowledge Processing Pvt. Ltd.(Taxmanagementindia.com),FF-19, 1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
14 TaxIndiaOnline.com Pvt. Ltd., B-XI/8183, Vasant Kunj, New Delhi – 110070
15 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
16 The ICFAI society , 52, Nagarjuna Hill,Punjagutta Hyderabad-500082
17 C.D.R. 18 Office Copy 19 Guard File

Deputy/Asstt. Registrar(CUSTOMS Appeal Branch)

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**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**West Block No. 2, R.K. Puram, New Delhi – 110 066.**
**Principal Bench, New Delhi**

**COURT NO. III**

**DATE OF HEARING : 09/03/2017.**
**DATE OF DECISION : 13/04/2017.**

**Service Tax Appeals No. 1414-1415 of 2010**

[Arising out of the Order-in-Original No. 32-33/RDN/2010 dated 01/07/2010 passed by The Commissioner of Service Tax, New Delhi.]

M/s Employee Provident Fund Organization — Appellant

Versus

CST, Delhi — Respondent

**Appearance**

Shri A.K. Batra, C.A. and Ms. Vibha Narang, Advocate and Ms. Sakshi, C.A. – for the appellant.

Shri Govind Dixit, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
**Hon'ble Shri B. Ravichandran, Member (Technical)**

Final Order No. 52858-52859/2017 Dated : 13 /04/2017

**Per. B. Ravichandran :-**

These two appeals are against impugned orders, both dated 01/07/2010, passed by Commissioner of Service Tax, New Delhi. The appellant is an institution created by an Act of Parliament – The Employee's Provident Fund and Miscellaneous Provision Act, 1952 (EPMF & MP Act). The main function of the

appellant is to administer three schemes of the Government of India, Ministry of Labour, in terms of EPMF & MP Act, namely (a) Employee's Provident Fund Scheme (Section 5) (b) Employee's Pension Scheme (Section 6A) and (c) Employee's Deposit Link Insurance Scheme (Section 6 C). The appellant is involved in collection of contribution from the employers covered by the provision of the Act, collection of inspection charges and administrative charges, penal damages, penal interest from defaulters. They disburse accumulated provident fund to the Members alongwith interest, pay various kinds of pension benefits to members and to family members and incur expenses in administering the scheme as provided under the above-mentioned Act.

2. The Revenue entertained a view that the appellants are engaged in providing taxable service under the category of "Banking and Other Financial Services (BOFS)" in terms of Section 65 (105) (zm) readwith Section 65 (12) of the Finance Act, 1994. Considerations received under 7 headings were sought to be subjected to service tax. These are (1) administrative charges received from employers (2) inspection charges received from employers (3) penal damages (4) interest on delayed payments (5) interest on investments (6) receipts from pension fund and (7) miscellaneous receipts. The proceedings initiated against the appellant by way of issue of two show cause notices dated 18/05/2009 and 23/10/2009, were completed by adjudication by the Original Authority, vide the impugned orders

dated 01/07/2010. The first show cause notice covered period from 01/04/2004 to 31/03/2008 and the second notice covered the period 01/04/2008 to 31/03/2009. The Original Authority confirmed service tax demand of Rs. 461,60,87,786/- in respect of first show cause notice dated 18/05/2009. He imposed equal amount of penalty under Section 78 and further penalty of Rs. 5,000/- under Section 77 of the Finance Act, 1994. In respect of second show cause notice dated 23/10/2009 he confirmed a service tax demand of Rs. 226,02,13,066/- and imposed a penalty of equivalent amount under Section 78 and further penalty of Rs. 5,000/- under Section 77 of the Act. The Original Authority, in essence, held that the appellant provided taxable service as a corporate body/trust by managing funds and the activities carried out are not in the nature of statutory functions but are in the nature of services of social welfare as per the directive principles of state governance. He held that in such cases, service tax would be leviable as long as the activity undertaken falls within the scope of a taxable service as defined under Finance Act, 1994. It was further held that the appellant is neither a sovereign nor a public authority and is only a body corporate established under law and managed by a Trust.

3. The learned Consultant appearing on behalf of the appellant submitted on the following lines :-

(1) first of all various amounts received by the appellant under the name, administrative charges towards incidence of administrative expenses, inspection charges, penal

damages, interest on delayed payments/on investments, receipts from pension funds and miscellaneous receipts are not at all attributable to any service rendered by the appellant. It is well settled that interest income cannot be subjected to service tax ;

(2) the administrative charges collected from the employers are in terms of Rule 30 readwith Rule 54 of the EPF Scheme, 1952. This is a fixed charge levied as per law and the employers have no option but to pay the said charges to the appellant. Non-payment attracts penalty, imprisonment or both under Section 14 of EPMF & MP Act. Such charges paid by the employers are borne in their own account and cannot be passed on to the employees in any manner. The funds collected by the appellant are invested and managed in the manner stipulated by the Central Government as per the rules and notifications issued from time to time ;

(3) 'banking and other financial services' are liable to tax only when the provider is falling in any one of the category mentioned therein. The Revenue asserted that the appellants are "a body corporate" and, hence, can be considered as provider of service under BOFS. The appellant, *per-se*, is not a body corporate. In terms of Section 5C of the Act it is the Board of Trustees who are considered to be body corporate not the appellant, as an institution. The funds belong to the appellant and not trustees who are entrusted to manage it. The financial statements and annual accounts are signed by the Central Provident Fund Commissioner and Financial Advisor who are employees of the appellant. It will show that the appellant, as an organization is distinct from the Board of Trustees who are managing the funds and supervising the functions of the appellant. Even if the appellant is considered as a body corporate, during the period

01/04/2004 to 09/09/2004 the term "body corporate" was not included in the tax entry for BOFS.

(4) During the disputed period from 01/04/2004 to 15/05/2008 the tax entry states as "services provided to a customer". The employers/employees contributing to various funds and paying charges in connection thereto cannot be considered as customer of the appellant. They only fulfill a statutory requirement and not as a customer of the appellant.

(5) The Revenue insisted on the role of the appellant as a fund manager. It is submitted that appellant is not governed by any regulations of RBI or SEBI or any other authority in the management of any fund collected by them. It is only the Labour Ministry of the Government of India who lay down the various regulations to manage the affairs of the appellant. The asset management of funds done by the appellant in terms of the Government regulations is not a service to any identified person. Such service is certainly not to the employers who contribute the funds. After the said contribution, the employers are no-way interested/connected in further management of the funds and in any case the funds are ultimately disbursed to the employees or to their families in terms of the schemes, not to the employers.

(6) The employers/employees who are covered by the EPMF & MP Act are only complying their statutory obligations and remit funds to the appellant, who invest the funds in specified securities in order to meet its own statutory obligations. The objective of the appellant is towards social welfare activity in terms of Directive Principles of State Policy enshrined in the Constitution. It is a compulsory extraction of money from the employers who are covered by the said Act with no choice given.

(7) The appellant is a statutory public authority engaged in social welfare activity for betterment of employees/workman. There is no ground to attribute malafide intention in not complying with provisions of Finance Act, 1994 or not paying service tax, if any, payable. The appellant is a Government of India organization and, as such, no malafide motive can be attributed. The demand for extended period as well as penalties are not legally sustainable. The best judgment assessment for the year 2010-2011 is without any basis and is invalid.

(8) Reliance is also placed on certain decided case laws; wherever relevant, discussed later in this order.

4. The learned AR defended the findings of the Original Authority. It is submitted that he appellant is falling under the category of 'body corporate' and are involved in asset management, fund management, all forms of fund management including pension fund management, custodial, depository and trust services. These services are specifically included under tax entry BOFS. The learned AR submitted that under BOFS, specific exemptions are available in respect of services provided to Central or State Governments, interest or discount, interest on financial leasing and a few other services. From the provisons of relevant tax entry for BOFS, it is evident that the appellant is providing service in relation to management of various funds as a trustee or a body corporate, and as such liable to service tax. Even though the appellant is an organization that provides services for the welfare of the people of the country, this by itself

does not mean they are not providing taxable service. They are not sovereign/public authority and are not discharging such function. The fee or amount collected for managing funds cannot be considered as a fee for statutory activity. In terms of Section 3 (23) of General Clauses Act, 1897 Government includes both Central Government and any State Government. The Central Government means the President and the officers subordinate to him, while exercising the executive powers of the Union vested in the President or in the name of the President of India. The appellant, though a statutory authority, cannot automatically become a Government entity subordinate to the President under Article 53 (1) of the Constitution. The appellant, being a statutory body, is a juristic entity separate from the state and cannot be regarded as a Government or part of Government. When a clarification was sought from the Finance Ministry, the CBEC vide letter dated 15/01/2009 clarified that the services provided by the appellant, prima facie, appears to be taxable under BOFS. The learned AR concluded, stating that the impugned orders are legal and proper and the appeals are devoid of merit.

5. We have heard both the sides extensively. We have also perused the written submissions made by both the sides and also the appeal records. First of all, it is necessary to reproduce the statutory provision under which the appellant is sought to be taxed, for their activities. The statutory definition of banking and other financial services in terms of Section 65 (105) (zm) of Finance Act, 1994, is as below :-

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65 (105) (zm) "Taxable service" means any service provided or to be provided *to any person, by a banking company or a financial institution including a non-banking financial company, or any other body corporate or commercial concern, in relation to banking and other financial services*;

As per the above definition, a service becomes a taxable service as 'Banking & Financial' (B&F) service, when:-

i. the service is provided in respect of Banking and other Financial services and

ii. the service is provided (or to be provided) by a banking company, financial institution, non-banking financial institution, any other body corporate, or commercial concern and

iii. the service is provided to any person

Further, the Finance Act, 1994 has specified certain services as "Banking and Financial services" which are subject to Service Tax in Section 65 (12) as follows :

"Banking and other Financial services" means –

*(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate [or commercial concern], namely :-*

*(i) financial leasing services including equipment leasing and hire-purchase ;*

***Explanation*** *– For the purposes of this item, "financial leasing" means a lease transaction where -*

(a) contract for lease is entered into between two parties for leasing of a specific asset ;

(b) such contract is for use and occupation of the asset by the lessee ;

(c) the lease payment is calculated so as to cover the full cost of the asset together with the interest charges ; and

(d) the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment ;

(ii) * * * *

(iii) merchant banking services ;

(iv) securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing ;

(v) asset management including portfolio management, all forms of fund management, pension fund management, [custodial, depository and trust services];

(vi) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy ;

(vii) provision and transfer of information and data processing ; and

(viii) banker to an issue services ; and

(ix) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank

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workers took part. Initially a non-official Bill on the subject was introduced in the Central Legislature in 1948 and was withdrawn with the assurance that the Government would consider the introduction of a comprehensive Bill. Finally, the proposed legislation was endorsed by the conference of Provincial Labour Ministers in January, 1952 and later on the same was introduced in 1952. This Court had occasion to expressly hold that the said Act is a beneficial social welfare legislation to ensure benefits to the employees. In the case of Regional Provident Fund Commissioner v. S.D.

College, Hoshiarpur and others reported in (1997) 1 SCC 241, this Court while interpreting Section 14B of the Act held that the Act envisages the imposition of damages for delayed payment (paragraph 10 at page 244 of the report). This Court also held that the Act is a beneficial social legislation to ensure health and other benefits of the employees and the employer under the Act is under a statutory obligation to make the deposit. In paragraph 11, it has also been held that in the event of any default committed in this behalf Section 14B steps in and calls upon the employer to pay damages.

23. If we look at the modern legislative trend we will discern that there is a large volume of legislation enacted with the purpose of introducing social reform by improving the conditions of certain class of persons who might not have been fairly treated in the past. These statutes are normally called remedial statutes or social welfare legislation, whereas penal statutes are sometime enacted providing for penalties for disobedience of laws making those who disobey, liable to imprisonment, fine, forfeiture or other penalty.

*guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults; operation of bank accounts;*

6. The crucial and relevant terms, to examine the dispute in the present case, are "body corporate", "asset management" including portfolio management, all forms of "fund management", pension fund management, custodial, depositary, trust services.

7. It is necessary to examine and understand the legal status and the organizational function of the appellant. The appellant is a statutory body created by an Act of Parliament. They administer three schemes as mentioned hereinabove. The legal status and scope of functions of the appellant are captured in the narrative of the Hon'ble Supreme Court in the judgment dated 18/01/2012 in Civil appeal No. 655/2012 in the case of **Regional Provident Fund Commissioner vs. The Hoogly Mils Company Ltd. and ors.**, reported in **(2012) 2 SCC 489**. The Hon'ble Supreme Court examined provisions of EPM & MP Act, 1952 and role of the appellant and observed as below :-

"22. From the aforesaid discussion it is clear that this case calls for interpretation of certain statutory provisions. It is not disputed, and possibly cannot be disputed, that the Act is a social welfare legislation. The Act is one of the earliest Acts after the Constitution came into existence. Prior to its enactment, the requirement of having a suitable legislation for compulsory institutional and contributory provident fund in industrial undertakings was discussed several times at various tripartite meetings in which representatives of the Central and State Governments and employees and

24. The normal canon of interpretation is that a remedial statute receives liberal construction whereas a penal statute calls for strict construction. In the cases of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted, but in cases of penal statutes if there is any doubt the same is normally resolved in favour of the alleged offender.

25. It is no doubt true that the said Act effectuates the economic message of the Constitution as articulated in the Directive Principles of State Policy.

26. Under the Directive Principles the State has the obligation for securing just and humane conditions of work which includes a living wage and decent standard of life. The said Act obviously seeks to promote those goals. Therefore, interpretation of the said Act must not only be liberal but it must be informed by the values of Directive Principles. Therefore, an awareness of the social perspective of the Act must guide the interpretative process of the legislative device.

27. Keeping those broad principles in mind, if we look at the Objects and Reasons in respect of the relevant Section it will be easier for this court to appreciate the statutory intent. The opening words of Section 14B are, "where an employer makes a default in the payment of contribution to the fund".

This was incorporated by way of an amendment, vide Amending Act 37 of 1953. In this connection, the excerpts from the Statement of Objects and Reasons of Act 37 of 1953 are very pertinent. Relevant excerpts are:-

"There are also certain administrative difficulties to be set right. There is no provision for inspection of exempted

factories; nor is there any provision for the recovery of dues from such factories. An employer can delay payment of provident fund dues without any additional financial liability. No punishment has been laid down for contravention of some of the provisions of the Act.
This Bill seeks primarily to remedy these defects'. - S.O.R., Gazette of India, 1953, Extra, Pt.II, Sec.2, p.910."

28. Similarly, in respect of Section 17(1A), clause (a) which makes Section 14B applicable to an exempted establishment also came by way of an amendment, namely, by Act 33 of 1988. Here also if we look at the relevant portion of the Statement of Objects and Reasons of Act 33 of 1988 we will find that they are based on certain recommendations of the High level committee to review the working of the Act. Various recommendations were incorporated in the Objects and Reasons and one of the objects of such amendment is as follows:-

"(viii) the existing legal and penal provisions, as applicable to un-exempted establishments, are being made applicable to exempted establishments, so as to check the defaults on their part;"

.....

58. We hold that in a case of default by the employer by an exempted establishment, in making its contribution to the Provident Fund Section 14B of the Act will be applicable".

8. It is clear from the above, that the appellant is a statutory authority created for a specified welfare function. Section 1 (3) of EPMF & MP Act stipulates that it applies to establishments of

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specified categories, mainly employing 20 or more persons. The schemes framed under the Act are to be laid in the Parliament as mentioned in Section 6D. Section 7A talks about determination of moneys due from employers. Such determination, in case of dispute, will be resolved by the officers mentioned therein. The officers conducting enquiry are vested with same powers of a court under Code of Civil Procedure 1908. The proceedings of the officers are judicial proceedings within the meaning of Sections 193, 228 and 196 of IPC. Section 8 of the Act stipulates the modes of recovery of money due from the employers. Section 14 provides for penalties for non-payment of dues, which can be either fine or imprisonment or both.

9. Having examined the legal status and scope of functions of the appellant, now we can determine whether the appellant is discharging a mandatory, statutory function as stipulated by an Act of Parliament or can be considered as providing a taxable service.

10. The Original Authority based his conclusion on tax liability of the appellant, mainly on the ground that the appellant is not a sovereign/public authority providing services. The services being provided by the appellant as a body corporate/trust by way of managing funds is not in the nature of statutory activity, but are in the nature of service of social welfare as per the provisions of relevant Act. The Original Authority relied on circulars issued by the Board. The Board vide Circular dated 23/08/2007 clarified

that activities assigned to and performed by sovereign/public authorities under the provisions of any law are statutory duties. The fee or amount collected as per the provision of relevant statute for performing such functions is in the nature of compulsory levy and are deposited into Government account. It was clarified that such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not to be treated as services provided for a consideration. Therefore, such activities assigned to and performed by a sovereign/public authority under the provisions of any law, do not constitute taxable service. Any amount/fee collected in such cases are not to be treated as consideration for the purpose of levy of service tax. The Original Authority relied on the clarification of the Board, where it further stated, that if a sovereign/public authority provides service which is not in the nature of statutory activity and the same is undertaken for a consideration (not a statutory fee), then in such cases, service tax would be leviable, as the activity undertaken falls within the scope of a taxable services, as defined.

11. Now, we can examine the activities of the appellant to determine whether they are coming under the scope of mandatory, statutory functions discharged by a public authority in terms of law. The term 'public authority' has to be examined and understood. 'Public' includes a section of the public (**Shri Venkataraman Devaru vs. State of Mysore – 1958 S.C.R. 895**). The word 'public' is ordinarily used with reference to a joint

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body of citizens. The term 'authority' is defined as "a public administrative agency or corporation having quasi governmental powers and authorized to administer a revenue producing public enterprise", (Webseter's Third New International Dictionary); authority is a body having jurisdiction in certain matters of "public nature". Therefore, the "ability" conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations either of himself or of other persons must be present *ab-extra* to make a person "authority". (**Som Prakash Rekky vs. Union of India – 1981 (1) SCC 449**). When the person is an agent or instrument of function of the state, the power is 'public'. The true test is functional. Not how the legal person is born, but why it is created. There are various factors which will suggest a body could be "a public authority" these are (a) it is linked to the Government or its function could be described as governmental (b) it provides a public service (c) the state regulates, supervises and controls us performance (d) it is subject to judicial review or is publicly accountable for its action (e) performs charitable objectives (f) vested with statutory powers, with powers to enforce its order by punitive consequences, (g) the legislature specifically intended by an Act to cover its functions and responsibilities. In general, without any possible dispute, it can be stated that a public authority is one which has a legal mandate to govern, or administer a part some aspect of public life.

12. The Hon'ble Supreme Court in **Balmer Lawrie & Co. Ltd. vs. Partha Sarathi Sen Roy** reported in **(2013) 8 SCC 345** examined the scope of terms "State"/ "other authorities" under Article 12 of the Constitution. The observations of the Apex Court are :

> "21. A public authority is a body which has public or statutory duties to perform, and which performs such duties and carries out its transactions for the benefit of the public, and not for private profit. Article 298 of the Constitution provides that the executive power of the Union and the State extends to the carrying on of any business or trade. A public authority is not restricted to the Government and the legislature alone, and it includes within its ambit, various other instrumentalities of State action. The law may bestow upon such organisation the power of eminent domain. The State in this context, may be granted tax exemption, or given monopolistic status for certain purposes. The "State" being an abstract entity, can only act through an instrumentality or an agency of natural or juridical persons. The concept of an instrumentality or agency of the Government is not limited to a corporation created by a statute, but is equally applicable to a company, or to a society. In a given case, the court must decide, whether such a company or society is an instrumentality or agency of the Government, so as to determine whether the same falls within the meaning of the expression "authority", as mentioned in Article 12 of the Constitution, upon consideration of all relevant factors.
>
> .....
>
> 24. When we discuss "pervasive control", the term "control" is taken to mean check, restraint or influence.

> Control is intended to regulate, and to hold in check, or to restrain from action. The word "regulate", would mean to control or to adjust by rule, or to subject to governing principles. "

The appellant is concerned with 'Public' – namely the employers who are governed by the EPMF & MP Act. The employers are governed by the said Act for delivery of welfare benefits to the employees (members of the Fund). The appellant is an "authority" having vested with statutory powers to enforce the due contribution of fund, administration charges, penal charges etc. The appellant has power to impose penal consequence on employers for violation of any provisions of EPMF & MP Act, and also for coercive recovery of dues.

13. Having examined the scope of 'public authority' and applying the general principles to the functions and responsibilities of the appellant we have no hesitation to hold that the appellant is a public authority performing statutory functions as mandated by an Act of Parliament.

14. The 'administrative charges' received from the employers forms the basis for more than 95% of the demand of service tax, now being contested. These administrative charges are received from the employers at the fixed rate of emoluments in order to meet the administrative expenses of the appellant in terms of Rule 30 readwith Rule 54 of Employees Provident Fund Scheme. Rule 30 stipulates that the employer shall, in the first instance,

pay both the contribution payable by himself (in this scheme referred to as the employer's contribution) and also, on behalf of the members employed by him directly or through a contractor, the contribution payable by such member (in the scheme referred to as the member's contribution). Sub-rule (3) stipulates that apart from the said contribution the employer is also responsible for payment of administrative charges. The explanation appended thereto defines 'administrative charges'. The same shall be percentage of pay as fixed by the Central Government in consultation of the Central Board. We note that the said administrative charges are a mandatory payment to be compulsorily paid by the employers, who are covered by the provisions of EPMF & MP Act. Non-payment of the contribution or administrative charges will invite penal consequences in terms of Section 14 of the said Act. The said section mandates that whoever defaults various payments under the said Act shall be punishable with imprisonment for a term which may extend upto one year or with fine of Rs. 5,000/- or with both. The said section provides for penal consequences in respect of various violations of the provisions of the Act. It is clear from the legal provisions, as narrated above, that the charges paid by the employers to the appellant are mandated statutory payments and are not towards any consideration for receiving taxable service.

15. The Hon'ble Kerala High Court examined a similar dispute regarding service tax liability, in **Union of India vs. Kerala**

**State Insurance Department** reported in **2016 (43) S.T.R. 173 (Ker.)**. The Hon'ble High Court held as below :-

> "4. Rule 22A of Part-I KSR provides that any person who enters Government service on or after 19th August, 1976 and has not crossed the age of 50 years shall, within a period of one year from the date of such entry in service, subscribe to a policy in the official branch of the State Life Insurance at such rate as may be determined by the Government from time-to-time and shall continue to subscribe till he ceases to be in Government service. The period of one year has now been reduced to one month by G.O(P). 229/12/Fin, dated 19-4-2012. Rule 22B also provides that such employee shall enroll as a member of General Insurance Scheme. Though, at the relevant point of time, taxable service included insurance service as well, the Central Board of Customs and Excise issued Circular No. 89/7/2006-Service Tax, dated 18-12-2006 and the relevant part of this circular reads thus :
>
> *"A number of sovereign/public authorities (i.e., an agency constituted/set up by government) Perform certain functions/duties, which are statutory in nature. These functions are performed in terms of specific responsibility assigned to them under the law in force. For examples, the Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments; the Regional Transport Officer (RTO) issues fitness certificate to the vehicles; the Directorate of Boilers inspects and issues certificate for boilers; or Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Fee as prescribed is charged and the same is ultimately deposited into the Government Treasury. A doubt has arisen whether such*

*activities provided by a sovereign/public authority required to be provided under a statute can be considered as 'provision of service' for the purpose of levy of Service Tax.*

*2. The issue has been examined. The Board is of the view that the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for preforming such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on such activities.*

*3. However, if such authority performs a service, which is not in the nature of statutory activity and the same is undertaken for a consideration not in the nature of statutory fee/levy, then in such cases, service tax would be leviable, if the activity undertaken falls within the ambit of a taxable service."*

5. Reading of the above Circular shows that it has been clarified by the CBEC that activities performed by sovereign/public authorities under the provisions of law are in the nature of statutory obligations which are fulfilled in accordance with law, as the functions, according to the Board, are mandatory and statutory functions and are not in the nature of service to any particular individual for any consideration. On this basis, it is clarified that such

activities performed under the provisions of law do not constitute taxable service and that no Service Tax is leviable on such activities.

6. As we have already seen, the respondent department is providing personal insurance and group insurance in pursuance of the statutory mandate as contained in Rules 22A and 22B of Part-I KSR. In other words, the insurance provided is a mandatory statutory function discharged by a State Government Department. Such an activity is not a taxable service for the purpose of Service Tax in the light of the Circular issued by the Central Board of Customs and Excise referred to above. This, therefore, means that the view taken by the learned single judge does not merit interference".

16. The Hon'ble Supreme Court in **Calcutta Municipal Corporation vs. Shrey Mercantile (P) Ltd.** reported in **(2005) 4 SCC 245** examined the meaning and scope of terms "Fee" and "tax". It was held that :-

"14. According to *Words and Phrases*, Permanent Edn., Vol. 41, p. 230, a charge or fee, if levied for the purpose of raising revenue under the taxing power is a "tax". Similarly, imposition of fees for the primary purpose of "regulation and control" may be classified as fees as it is in the exercise of "police power", but if revenue is the primary purpose and regulation is merely incidental, then the imposition is a "tax". A tax is an enforced contribution expected pursuant to a legislative authority for the purpose of raising revenue to be used for public or governmental purposes and not as payment for a special privilege or service rendered by a public officer, in which case it is a "fee". Generally speaking, "taxes" are burdens of a

pecuniary nature imposed for defraying the cost of governmental functions, whereas charges are "fees" where they are imposed upon a person to defray the cost of particular services rendered to his account".

The fee and other charges collected by the appellant from the employers in the present dispute are fixed by the law with no discretion or option vested with appellant or the employers. As such these cannot be considered as amounts received for providing any taxable service of BOFS.

17. One more aspect can be examined to decide the tax liability of the appellant. For levy of service tax on any transaction, there should be a service provider and a service recipient, apart from identifying a transaction under a specific taxable category. In the present case, the appellant is identified as a service provider. However, the Original Authority did not specifically identify the service recipient. The employers are the only persons who pay the consideration, now sought to be taxed, at the hand of appellants. We have to examine what type of services the employers received from the appellant. On close scrutiny, it is plain and clear that they are not in receipt of any service, least of all BOFS, from the appellant. The Original Authority held that the appellants performed the service of fund management. One crucial aspect, missed by the Original Authority, is fund which is managed by the appellant is to the benefit of employees whose welfare is entrusted to the appellant, by law. The employers do not get any benefit out of such fund management. The

administrative charges and other charges paid by the employers, therefore cannot be attributed to any service received by them from the appellant. As already noted, the employers have no choice and are compulsorily mandated by law to contribute to the fund and also pay the administrative charges/inspection charges etc. in terms of the EPMF & MP Act. The employees who ultimately benefit, have not paid any consideration to the appellant. They only contributed their part of fund, through the employer, to the appellant. The contribution to the fund is not the subject matter of disputed tax liability. The other charges like administrative charges, inspection charges paid by the employers, are being subjected to service tax. We find that in the absence of a service provider and service recipient relation between the appellant and the employers, no service tax liability can arise in the transaction.

18. The appellants also contested the findings of the Original Authority on the service tax liability of penal charges, interest and delayed payments, interest on investment, receipts from pension fund and other miscellaneous receipts. It is clear that penal damages received in terms of Section 14 of EPMF & MP Act, 1952 cannot be considered as a consideration for a taxable service. Similarly, interest on delayed payment, interest received on investment, from pension funds cannot be subjected to service tax as there is no service related activity at all in such income. We are in agreement with the appellant on these issues.

19. Our attention is also drawn to Notification No. 09/2016-ST dated 01/03/2016 which inserted Sl. No. 49 in the Notification No. 25/2012-ST dated 20/06/2012. The said entry covers "services provided by Employees' Provident Fund Organization (EPFO) to persons governed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952" service tax exemption is granted by the parent Notification No. 25/2012-ST to different services/service providers.

We find, the exemption now granted vide Notification No. 9/2010-ST to EPFO (appellant) has no relevance to decide their tax liability during the present disputed period which is under pre-negative list based tax regime. We note that the service tax liability on various services rendered by Government or statutory /public authorities under went statutory changes after the new tax system (based on negative list) was introduced with effect from 01/07/2012. In fact, the Circulars dated 18/12/2006 and 23/08/2007 (code 999.01) issued in the pre-negative list regime are no longer applicable, as clarified by Board vide Circular No. 192/02/2016 – ST dated 13/04/2016.

20. Having examined the impugned orders, the submissions made by both the parties before us, closely, we find that the appellants are not liable to pay service tax on their statutory activities performed in terms of EPMF & MP Act, 1952. The appellants are not providing any taxable service to the employers covered by the said Act. The relationship and transaction

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between the employers and the appellant is in discharge of statutory and compulsory obligations, coercively enforceable by the law. The considerations sought to be taxed are statutorily fixed, mandated fees and charges. No option exists with the appellant or contributor to vary such 'Fees' or 'charges'. As such, we find no taxable element in such transaction. This conclusion is supported by Board's clarification dated 18/12/2006 (supra). The impugned orders are without merit and are not legally sustainable. Accordingly, we set aside the same and allow the appeals filed by the appellant.

(Order pronounced in open court on 13/04/2017.)

Sd-

**(B. RAVICHANDRAN)**
**MEMBER (TECHNICAL)**

Sd-

**(S.K. MOHANTY)**
**MEMBER (JUDICIAL)**

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