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Recent amendment to the Payment of Bonus Act, 1965 and its effect

Payment of Bonus Act, 1965 ("**PBA**") as we know stipulates the obligation on the employer to pay statutory bonus to its employees in accordance with the provisions of PBA. The key element in respect of this statutory obligation on the employer to pay statutory bonus under the PBA to its employees include - employee's (who has worked for not less than 30 days in an accounting year) salary/wage limit having earned per month.

The PBA also prescribes for minimum and maximum bonus payable by an employer. In terms of Section 10 of the PBA, the minimum bonus payable by an employer in respect of an accounting year is 8.33% of the salary or wage earned by the employee during an accounting year and the in terms of Section 11 of PBA, the maximum bonus payable by an employer in an accounting year is 20% of the salary or wage.

Recent amendment to the PBA

Earlier this year, an amendment to the PBA vide Payment of Bonus (Amendment) Act, 2015 (Act No.6 of 2016) which received the assent of the President on December 31, 2015 was published in the Gazette of India on January 1, 2016 ("**PBA Amendment 2015**"), wherein, said threshold salary/wage limit was increased to INR 21,000/- (from INR 10,000/-). The PBA Amendment 2015 also increased the calculation ceiling limit to INR 7,000 (from INR 3,500).

Therefore, pursuant to said PBA Amendment 2015, every employee who draws a salary of INR 21,000/- or below per month and has worked with the respective employer for not less than 30 days in an accounting year, is eligible for statutory bonus as per the provisions of PBA.

Effectiveness/Applicability of PBA Amendment 2015

In terms of the PBA Amendment 2015, the said amendment was made effective from the Financial Year ("**FY**") 2014-15. However subsequently various employers' association across India filed Writ Petitions in respective High Courts seeking to challenge the constitutional validity of PBA Amendment 2015 due to the myriad concerns this raised.

The respective High Courts (such being, *inter-alia*, Karnataka, Allahabad, Kerala, Rajasthan, Gujarat) while entertaining the said Writ Petitions respectively passed interim orders (all similar and to the same effect) stating that the PBA Amendment 2015 would take effect only from the FY 2015-16 and that no coercive steps to enforce the PBA Amendment 2015 shall be taken in respect of any period prior to March 31, 2015. Thus, in terms of said interim orders stay on applicability of PBA Amendment 2015 for the FY 14-15 has been granted until further orders.

Applicability of interim orders

While off-course High Courts of various jurisdiction have passed the above stated similar interim stay orders, many employers are concerned over its applicability in respect of a jurisdiction not having passed above stated similar interim stay orders.

In this regard, reliance can be placed on a Supreme Court ruling, in the case of*Kusum Ingots & Alloys Ltd. v. Union of India, (2004) 6 SCC 254* which clearly dictates that irrespective of the State in which an order is passed in a Writ Petition (in respect of questioning the constitutionality of a parliamentary act), whether interim or final, the said order will have effect throughout the territory of India, subject of course to the applicability of the relevant act.

However, a specific order in this regard, be it above stated similar interim stay order, will definitely be of much assurance for any employer.

Concerns over increased liability

Despite the relief being granted vide stay orders passed by various High Courts across India in respect of FY 14-15, many employers are still trying to manage their increased liability pursuant to the PBA Amendment 2015.

Their key concern revolve around the fact that by the time the PBA Amendment 2015 came into effect, they had already paid or agreed to pay bonuses to their employees (earning within the bracket INR 10,001 to 20,000/-) otherwise as per their internal incentive programmes (not being linked with PBA though) and now with the PBA Amendment 2015 coming into effect, the employers are statutorily bound to pay bonus in terms of the PBA and thus leading to an increased liability onto them as regards payment of bonus with respect to employees earning within the bracket INR 10,001 to 20,000/-.

Scope of some adjustment

Certainly, in the interest of said employers, any respite in this regard is all they would wish to explore. As regards the aspect of adjustment of bonus against statutory bonus payable under the PBA, it is pertinent to take note of Section 17 of the PBA, which states as follows:

"Section 17 of PBA: Adjustment of customary or interim bonus against bonus payable under the Act — Whether in any accounting year –

(a) an employer has paid any puja bonus or other customary bonus to an employee; or

(b) an employer has paid a part of the bonus payable under this Act to an employee before the date on which such bonus becomes payable, then,

the employer shall be entitled to deduct the amount of bonus so paid from the amount of bonus payable by him to the employee under this Act in respect of that accounting year and the employee shall be entitled to receive only the balance."

The key aspects for the purposes of adjustment under section 17 include bonus being - puja bonus, customary bonus, bonus payable under the PBA and been paid before being liable to be paid. It is felt that, of all the above stated key aspects, 'customary bonus' requires to be addressed.

Customary Bonus

In this regard, it would be useful to refer to the decision of the Supreme Court of India in the case of *Vegetable Products Ltd. v. Their Workmen [1965 (11) FLR 30 (SC)],* wherein the Apex Court laid down

the test to determine what exactly customary bonus or festival bonus mean. The test laid down therein is as follows:

- *that the payment has been made over an unbroken series of years;*
- *that it has been for a sufficiently long period-the period has to be longer than in the case of an implied term of employment;*
- *that it has been paid even in years of loss and did not depend on the earning of profits; and*
- *that the payment has been made at a uniform rate throughout.*

Therefore, in light of the above, for any component already paid to the employees and to be adjusted against the statutory liability under Section 17 (a) of the PBA, it is pertinent for an employer to take into account the aforesaid test laid down by the Apex Court.

Bonus linked with productivity

It is indeed very common for employers to have bonus linked with productivity. While as regards the payment of bonus linked with productivity, being in lieu of bonus based on profits payable has been provided for under the PBA vide Section 31A, however, it is extremely pertinent to take note of its key requirements as stated under Section 31A of PBA, which are stated as below:

(i) that there must be an agreement/settlement between the employer and the employee,

(ii) said agreement/settlement was one for payment of annual bonus,

(iii) said payment of bonus was linked with the production or productivity, and

(iv) said payment was in lieu of bonus based on profits.

Section 31A further requires that the bonus under the agreement/settlement, linked with the production or productivity must have been paid out between the prescribed minimum and maximum bonus rates i.e. 8.33% to 20%.

Conclusion

To conclude, though as of now we can only wait and watch the final orders/disposal of above mentioned Writ Petitions in question, to have clarity on actual position in respect of the subject matter, however, given the present circumstances and certain concerns addressed above, a well-structured incentive programme, in light of the provisions of PBA and key precedents thereunder (whether involving puja bonus, customary bonus or even bonus linked with productivity) is what an employer must address.

SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST (CENTRAL REGISTRY) AMENDMENT RULES, 2016

The Central Government introduced the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Central Registry) Amendment Rules, 2016* (hereinafter referred as 'Amendment Rules, 2016') on January 22, 2016.
The aforementioned Amendment Rules, 2016 make the registration of Registered Mortgage mandatory with Central Registry of Securitisation Assets and Reconstruction and Security India (hereinafter referred as 'CERSAI').

Requirement of Registration before the date of Amendment Rules, 2016

Banks and financial institutions were required to register equitable mortgages with CERSAI pursuant to *Section 23, 24 and 25 of the SARFAESI Act* read with *Rule 4(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (Central Registry) Rules, 2011* (hereinafter referred to as 'Rules, 2011'). It is pertinent to note that as per the Rules, 2011, the secured creditors were required to file particulars of only equitable mortgages with CERSAI and filing of registered mortgage was exempted.

Amendment Rules, 2016 w.e.f. January 22, 2016:

Amendment Rules, 2016 made it mandatory to register the particulars of registered mortgages under Rule 4 Sub Rule 2(A). The amendment has been enforced with an aim of preventing frauds relating to multiple lending against the security of the same property as well as the fraudulent sale of property without disclosing the security interest created over such property.
Post the enforcement of these Amendment Rules, 2016, the following provisions shall be applicable to the banks and financial institutions in respect of registration of mortgage created over immovable properties and movable properties:

"Sub Rule 2(A)- Particulars of creation, modification or satisfaction of security interest in immovable property by mortgage other than mortgage by deposit of title deeds shall be filed in Form I or Form II, as the case may be, and shall be authenticated by a person specified in the Form for such purpose by use of a valid digital signature.

Sub Rule 2(B)- Particulars of creation, modification or satisfaction of security interest in hypothecation of plant and machinery, stocks, debt including book debt or receivables, whether existing or future shall be filed in Form I or Form II, as the case may be, and shall be authenticated by a person specified in the Form for such purpose by use of a valid digital signature.

Sub Rule 2(C)- Particulars of creation, modification or satisfaction of security interest in intangible assets, being knowhow, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature, shall be filed in Form I or Form II, as the case may be, and shall be authenticated by a person specified in the Form for such purpose by use of a valid digital signature.

Sub Rule 2(D)- Particulars of creation, modification or satisfaction of security interest in any under construction residential or commercial building or a part thereof by an agreement or instrument other than by mortgage, shall be filed in Form I or Form II, as the case may be, and shall be authenticated by a person specified in the Form for such purpose by use of a valid digital signature."

Rule 5 provides that the time limit for registration of such securities, shall be 30 days from the date of transaction wherein no fee shall be payable on such filing.
In cases where there is a delay, the Central Registrar shall allow the filing for registration but with payment of an additional fee upon an application being made in this regard.

Retrospective Effect

According to the Amendment Rules, 2016, a third proviso has been added to Rule 5, sub rule (1) stating

"*Provided also that particulars of all subsisting transactions under sub-rule (2A) to (2D) of rule 4 shall be filed by the secured creditors with the Central Registry on or before such date as may be specified by the Central Government and no fee shall be payable on such filing till the said date.*
Provided also that particulars of all subsisting transactions filed with the Central registry after the date so specified shall be chargeable with such fee, specified in the Table under rule 7.
Explanation- For the purpose of the third & fourth provisos, the term, "subsisting transactions" shall mean all those transactions which subsisted before the coming into force of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Central Registry) Amendment Rules, 2016."

The registration of subsisting transactions has been enforced from January 22, 2016 and it is to be understood that no final date has been provided for the registration of such transactions.