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Implementation of “The Payment of Bonus (Amendment) Act, 2015”

Tushar Devidas Talware

Research Scholar

Dhanwate National College, Nagpur, Maharashtra

tushar.talware@aol.in

Dr. Shobha B. Jambhulkar

Research Guide

Dhanwate National College, Nagpur, Maharashtra

tushar.talware@aol.in

Abstract: As per the payment of Bonus at 1965, 1st five years, Bonus is paid based on profit earned by the company during the financial year. Post 5 year i.e financial years of every organization having more than 10 employees required to pay a minimum bonus of 8.33% was assured irrespective of profit earned or not. If the profitability of the organization is substantially high & more than allocable surpluses in that case organisation have to pay maximum bonus is fixed at 20% and the balance is carried forward as “set-on” to cater the emergency for next years. As per the Bonus act amendment 2015, the bonus increase was declared retrospectively. Once the bonus is paid based on profit, after negotiation with employee’s representative, making it retrospective will make the additional burden on the employer. Therefore, the same is not fair and stay on retrospective effect is granted by Karnataka, Madras and few other High Courts. In addition, the bonus calculation is linked to Minimum wage. Since the minimum wage differs from state-to-state; within the state zone-to-zone and industry-to-industry, bonus payment based on minimum wage will not be uniform within the state, region, and industry. Therefore, linking of minimum wage act with bonus act will lead to disputes in the industry.

Keywords: Bonus, Set On, Setoff, Minimum Wages, Rupees Seven Thousand, Minimum Bonus and Maximum Bonus.

INTRODUCTION

At present bonus is paid to many categories of employees both in public and private sectors. It is cash payment made to employees in addition to wages. It is not an ex gratia payment. The bonus was first paid in India in the year 1917 by the textile industry, which is known as war bonus. It was an increase in wages allowed owing to war conditions. Though bonus would mean a gift or gratuitous payment over and above the normal remuneration, it has acquired a right in industrial law and it can be claimed either by an agreement with the employer or by adjudication. After the payment of Bonus Act 1965, it has become a statutory right.

Two conditions were laid down for justifying the demand for bonus (1) Wages fall short of the living wage and (2) the industry has made huge profits part of which are due to the contribution of the workmen. If either or both the conditions are satisfied the demand for bonus would become an industrial claim,

Discrimination in the payment of bonus only to some Sections of the workmen has been disapproved by tribunals. However in *Burnah Shell Refineries Ltd. Vs. Their Workmen* 1961 L.A.C the Supreme Court, held that if a tribunal being of opinion that payment of bonus at the same rate will not be fair and may cause discontent amongst the worker's awards bonus at a lower rate to the clerical staff than to Labour staff there would be no reason for disturbing, the award. Where the workmen accepted an ex gratia bonus, it will not deter or stop them from claiming additional bonus.

The Labour Appellate Tribunal in *Mill Owners Association vs. Rashtriya Mill Mazdoor Sangh*, 1952 L. A. C. 423 observed that bonus could no longer be considered as an ex gratia payment and laid down a formula known as "Full Bench Formula".

Full Bench formula:

The Formula provided that the following charges shall be deducted from the gross profit:

1. Return on paid up capital at the rate of 6%
2. Return on working capital varying from 2% to 4%
3. Depreciation on a notional basis
4. Rehabilitation
5. Income tax.

If there is any surplus after deducting these charges the workmen would be entitled to a bonus in the surplus on an equitable basis. If there is no surplus no bonus need be paid on notions of social justice. On the Suggestion of the Supreme Court in Associated Cement Company's case, the Bonus Commission was appointed by the Government of India for fixing the method of computation of bonus. Based on the recommendations of the commission the Payment of Bonus Ordinance was promulgated in May 1965. The Parliament later adopted the ordinance and later it became the Payment of Bonus Act. 1965.(SP Jain page 7, 401, Khan and Khan)

OBJECTIVE

The objective of the Act is to provide payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected there-with. The scheme of the Act is fourfold.

1. to impose a liability on an employer to pay a bonus to employees in an establishment
2. to define the principle of payment of bonus according to the prescribed formula
3. to provide payment of minimum and maximum bonus, linking it with the scheme of set-off and set on
4. To provide machinery for the enforcement of liability for payment of bonus.
5. The Act is not retrospective in operation. So where a workman demands a bonus for the year 1963-64, it will have to be calculated on the basis of the Full Bench Formula mentioned above.

ALLOCABLE SURPLUS

Section 2(4) of the Act defines the term "allocable surplus" it means in relation to, in employer, being a company. (Other than a banking company) which has not made the arrangements prescribed under the Income-tax Act for the. Declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of Section. 194 of that Act, sixty-seven percent of the available surplus in an accounting year and in any other case sixty percent of such available surplus

COMPUTATION OF GROSS PROFITS

Sec. 4. The gross profits derived by an employer from an establishment in respect of any accounting year shall (a) in the case of a banking company, be calculated in the manner specified in the first schedule, (b) in any other case, be calculated in the manner specified in the second schedule.

COMPUTATION OF AVAILABLE SURPLUS

Section 4 to 7 of the Act, have to be read along with the first second and third schedule. For computing the available surplus. The first schedule to the Act deals with the method of computation of gross profits of banking companies and in any other case, the Calculation will have to be made in the manner specified in the second schedule. The third schedule deals with the deductions to be made in addition to those specified under Section 6.

Section 5. The available surplus in respect of any accounting year shall be the gross profits for that year after deducting there from the sums referred to in Section 6.

Provided that the available surplus in respect of the accounting year commencing on any day in the year 1968 and in respect of every subsequent accounting year shall be the aggregate of (a) the gross profits of that accounting; year after deducting there from the sums referred in Section 6, and (b) an amount equal to the difference between: -

In *Indian Oxygen Ltd. vs. Their Workmen* 1972. A. S.C 472 it was held in calculating the allocable surplus the tax concession by way of the rebate that employers will get under the Income tax Act need not be taken into consideration. In *Binny Ltd. vs. Their Workmen* 1973. A.S.C. 353, it was held that the working capital cannot include fixed assets, not the capital work in progress as it represents the fund required for the day-to-day running of the company.

In *Gannon Dunkery and Co vs. Workmen.* 1971. A.S.C. 2567 it was held that advances made in the course of the business transaction, as would form part of the working capital, have to be treated as part of capital assets in the calculation of available surplus. It was further held that interest earned by the company on loans advanced on personal security being an extraneous income in which workmen made no contribution is deductible from gross income, but only after setting off the interest paid on loans by the company". In the absence of any clause that income accruing from trade investment is extraneous income earned from activities in which workmen made no contribution, the income is not deductible from gross profit.

The available surplus shall be the gross profit after deducting therefrom the sums referred to in Section 6. The sum to be deductible from gross profits shall be depreciation: development rebate, any direct tax, which the employer is liable to pay, in respect of his income, profit, and gain and such further sums as are specified in the third schedule. In *Workmen of National and*

Grindlays Bank Ltd. Vs_ The National and Grindlays Bank Ltd. 1976 (1) L.L.J. 463 the bank claimed a deduction of depreciation at a higher figure than that appearing in the profit and loss account. It was held that the burden of proving the depreciation was on the bank and that burden has to be discharged by the bank by producing proper and satisfactory evidence. It was further held that the depreciation in accordance with the method specified in Section 32(I) of the Income Tax Act has to be done by the Tribunal in the exercise of the quasi-judicial duty. The determination of depreciation under'

Section 32 (1) of the Income Tax Act can be taken into account as evidence only if there is some provision of law which provides for that effect. "it is clear on a plain and natural reading of the language of Section 6(a), that what is deductible under that clause is depreciation admissible in accordance with the provisions of sec 32(1) of the Income-tax Act and not depreciation allowed by the Income-tax officer in making assessment on the employer. The Industrial Tribunal has to calculate the amount of depreciation by adopting the method set out in sub-sec (1) of sec 32. There is nothing in the Income Tax Act or in the Payment of Bonus Act or in any other provisions of law which attaches a presumption of accuracy to the determination of the Income-tax officer in this matter or invests it with probative or evidentiary value in the proceeding before the Industrial Tribunal. The workers who are sought to be bound by the determination of the Income tax officer. The possibility cannot be ruled out that the determination made by the Income-tax officer may be wrong and he might have made a bonafide mistake in arriving at the figure of depreciation. Therefore the certificate issued by the Income-tax officer is not admissible in evidence to prove the depreciation admissible under Sec. 32(1).

In Jayna Time Industries (P) Ltd. Vs. Industrial Tribunal and others. 1975 (2) L.L.J 436 it was laid down that while computing the surplus of a particular year an employer is entitled to deduct depreciation as also development rebate of that year and deduct further the arrears of depreciation and business losses of earlier years. But the development rebate of earlier years is not admissible.

ELIGIBILITY

On the principle, that bonus is paid on the profit of a particular year, the bonus can be claimed only for workers who have had a hand in earning the profit of that year. So all workmen who have in work during the whole or part of the year would be entitled to the bonus. Under Section 8 every employee who has not worked at least thirty days in the accounting year is not entitled to the bonus.

DISQUALIFICATION

Under Section 9 of this Act an employee is disqualified from receiving the bonus, if he is dismissed from service for fraud or riotous or violent behavior inside (he premises or for theft, misappropriation or sabotage of any property of the establishment.

QUANTUM OF BONUS

Section 10 of the Act dealing with minimum bonus is extracted below. "Subject to the other provision of this Act every employer shall be bound to pay to every employee in respect of the accounting year commencing on any day in the year 1965 and in respect of every subsequent accounting year.

MINIMUM BONUS

A minimum bonus which shall be 8.33 percent of the salary or wage earned by the employee during the accounting year or one hundred rupees whichever is higher whether or not the employer has any allocable surplus in the accounting year.

Provided that, where an employee has not completed fifteen years of age at the beginning of the accounting year, the provisions of this Section shall have effect in a relation such employee as if for the words "one hundred rupee's" the words sixty rupees" were substituted.

As the quantum of bonus payable under Act and under the L.A.T. formula it was left to a large extent to the discretion of the tribunal: after taking into consideration as to what part of the available surplus was to be distributed as bonus is defined under sec.2 (4) as 60% of the available surplus in the case of foreign companies. Whereas under the L.A.T formula no bonus was payable if there was no available surplus under Sec. 10 of the Act a minimum bonus of 8.33% of the annual salary or wages earned by the employee or Rs.100 in the case of adults or Rs.60 in the case of persons below 15 years age is payable 'whether there are profits in the accounting year or not.

In Jalan Trading co. (P) Ltd. vs. D. M. Aney and another 1979 (1) L.L.J. 162 the constitutional validity of Sec. 10 was unsuccessfully challenged. The restriction imposed by the Bonus Act in compelling the employer to pay the statutory minimum bonus even in years where there has been a loss sustained by the management is reasonable or in public interest within the meaning of Articles 19(6) and 302. The payment of bonus is in the implementation of Articles 39 and 43 of the Constitution is reasonable. The payment of the minimum bonus is subject to the provisions of Sections 8 and 13 which means that only employees who have worked for not less than 30 days in the accounting year would alone be entitled to the minimum bonus. The statutory minimum bonus of 8.33 shall be payable whether there are profits in the accounting year or not. After the Act coming into force, the bonus has become an implied term of employment not dependent upon the profits. The employee is entitled to festival bonus only if there is an implied agreement or it is, paid as customary bonus.

MAXIMUM BONUS

Section 11 of the Act dealing with the maximum bonus is extracted below. Where in respect of any accounting year referred to in Section 10, the allocable surplus exceeds the amount of minimum bonus payable to the employee under that Section, the employer shall in lieu of such minimum, be bound to pay to every employee in respect of that accounting year bonus which shall be an amount in proportion to the accounting year subject to a maximum of 20% of such salary or wage.

In computing the allocable surplus under this Section the amount set on or the amount set off under the provision of Section 15 shall be taken into account in accordance with the provision of that Section.

When he is paid over and above this bonus any ex gratia amount to make up for the loss occasioned by the ceiling introduced by the Act. The amount paid as ex gratia cannot be considered to be an expenditure debited directly to reserve such amount can, therefore, be added back to the gross profits of the employer for purposes of working out the available surplus.

Section 13 provides for proportionate deduction in bonus, where an employer has not worked for all the working days in any accounting year, in respect of seasonal employees "the words" working days in any accounting year in Sec 13 means only those days of the year during which seasonal employee is actually allowed to work. P does not mean all the days of the year except holidays.

Set On and Set Off of Allocable Surplus: Section -2 sub-Section (4) defines the words allocable surplus. Allocable surplus means in relation to an employer, being a company other than a banking company which has not made the arrangement prescribed under the Income-tax Act, for the declaration and payment within India of the dividends payable out of its profit in accordance with the provisions of Section 4 of that Act, 67 percent of such available surplus in any other case 60% of such available surplus.

Under Section 15, if in an accounting year the allocable surplus exceeds the amount of bonus payable to the employee under Section 10 the excess shall subject to a limit of 20 per cent of the total salary or wage of the employees be carried forward for being set on in the succeeding accounting year. It will be utilized for paying the bonus as illustrated in the fourth schedule to this Act. If there is no allocable surplus in a year or the allocable surplus in respect of that year falls short of the amount of bonus payable under, Section 10 and there on sufficient amount carded forward and set on under sub-Section (1) which could be utilized for paying the bonus then the amount necessary for paying the bonus shall be carried forward for being set off in the next accounting year.

In *Workmen, N. G. Bank Vs N. G. Bank A.I.R, 1976.S.C.611* it was held that it is clear from the scheme of the Act and the context in which Section .15 (1) occurs. Following closely upon Section 4 to that the basic condition for the applicability of Section 15 (1) is that bonus is computed in accordance with the formula provided in the Act. As a result of such computation, if it is found that the allocable surplus is more than sufficient to cover the in axdrnum bonus payable under the Act and where such is the case the sub-Section provides that the excess, over the amount of maximum bonus shall to the extent of 20 percent of the total wage or salary be carried forward and set on in the succeeding year. The sub-Section can have no application where no computation is made under the Act and bonus is paid not in accordance with the statutory formula, but on an adhoc basis.

Section 16, provides that the employees of a new establishment shall be paid bonus in accordance with the provisions of sub-Section 1-A, 1-B, and 1-C. In the first five years in which the employer sells the goods produced by him or renders service bonus shall be payable in respect of the accounting year in which the employers derive profit such bonus shall be calculated without applying the provisions of Section 15. For the sixth accounting year set on and set off shall be made taking into account excess or deficiency if any of the allocable surpluses set on and set off in respect of the fifth and sixth accounting years. For the seventh accounting year set on or set off shall be made taking into account the excess or deficiency of the allocable surplus, set on or set off in respect of the fifth. Sixth and seventh accounting years. From the eighth year following the accounting year in which the employer sells the goods manufactured by him. Section 15 shall apply in relation to such establishment.

As establishment not may be newly set up. It may be an existing establishment of which merely the ownership has changed. But the new owner may not necessarily be the successor in interest of the old in respect of the business carried on in the establishment. One may acquire the ownership of an establishment without taking over the business as growing concern and becoming a successor-ininterest in respect of it. An establishment which is used for the purpose of carrying on trade, business or undertaking may change hands and pass from one owner to another. The workers operating this apparatus and working in it may change; new workers may take the place of old or come as additional workers. When the ownership of the establishment which is nothing but another name for this apparatus is transferred from one person to another, the establishment in the hands of the transferee. Now though the transferee may become the owner of the establishment he would not necessarily be a successor in interest of the transferor in respect of the business carried on in the establishment. The question as to whether he can be held to be a successor-in -interest of the transferor would depend on considerIt ion of several relevant facts.

AMENDMENT

The Payment of Bonus, 1965 was amended by the Central Govt. The amendment is made effective 1st April 2014. The amendments to the Act are as follows:

SECTION

1. **2(13) Eligibility for Bonus:** Employees whose salary or wages is up to Rs. Twenty one thousand per month are eligible to receive the Bonus.
2. **12 Calculation of Bonus:** salary or wage of an employee exceeds Rs. Seven thousand per month, while calculating bonus payable to such employee, the bonus shall be calculated as if his salary or wages are Rs. Seven thousand per month or the minimum wage notified by the appropriate Government for the Scheduled employment under the Minimum Wages Act, 1948 (whichever is higher).

In view of the above amendment employers have to take following steps to comply with the amendment:

1. To Find out eligible employees who are drawing salary wage from 10001/- P.M. to Twenty one
2. Thousand P.M. during the F.Y. 2014-15. (As they were not eligible for bonus earlier).and to compute and pay the Bonus to them as per above amendment.
3. To compute differential Bonus in respect of the employees to whom Bonus for the F.Y. 2014-15 was already paid and pay the differential amount to them. While computing Bonus in above two categories consider the salary or wage of these employees as
4. Rs. Seven thousand p.m. or minimum wage for the scheduled employment as notified by the appropriate govt during the period April 2014 to March 2015 whichever is higher.
 - i. To Prepare 'Form C' Register for these payments.
 - ii. To File Revised Return in 'Form D 'for the year 2014-15.

Major Points of Amendment of act 2015

1. Effective date: i.e retrospective w.e.f 1st April 2014

Normally the bonus is calculated based on Profit & Loss of the company. Therefore, for the financial year 2014-2015 based on Profit and loss, as per act organizations has processed the bonus % paid to their eligible employees in Oct/Nov 2015. As per the bonus act 2015, the effective date mentioned is 1st April 2014.

Since the bonus percentages for the year 2014-15 was fixed and paid in the month of Oct/Nov 2015, making it effective retrospectively, will create an issue which created a financial impact to the organization and it may lead to being as an Industrial Dispute issue. Hence the effective date (retrospective) needs to re-consider.

2. Rupees seven thousand or minimum wages prescribed by the appropriate government, whichever is higher :

It has two parts i.e.

a. linking the minimum wage with bonus

In the recent amendment, the Minimum Wages act is considered. By mentioning or by giving the reference of Minimum wages act, the bonus act is expected to lose its originality in the long run, because the minimum wage is fixed based on Consumer Price Index and revised annually. Since the minimum wage is increasing annually, this will exceed the amount fixed by bonus act under sec 12 and there will be no need to amend or to look at sec 12 of the payment of bonus act 1965 in future, alternately, sec 12 will have no meaning and likely to become obsolete.

Minimum wage includes Basic, Dearness Allowance and House Rent Allowances and ratio of bifurcation of minimum wage among the three components are not defined anywhere in the law. Therefore, the employer can split minimum wage as per his convenience, which may result in industrial conflict. Recent judgement / Tribunal orders clearly state that employer has all right to split the minimum wage for the purpose of Employee Provident Fund Normally an employer has uniform Basic, DA, HRA etc, cannot have different Basic, DA, HRA for Provident Fund and different for Bonus act. In addition Basic and DA will affect other related laws like Gratuity Act, Employee Compensation Act, and Maternity Benefit Act etc. Therefore, insertion of Minimum wages acts in the amendment will invite litigation.

b. Whichever is higher- Rupees seven thousand or minimum wages prescribed by appropriate government

Present minimum wage of Maharashtra is given below

SR NO.	PARTICULARS	BASIC	D.A.	TOTAL
	<u>SHOPS & EST.</u>	BASIC	D.A.	TOTAL
1	SKILLED	5800	3256.2	9056.2
2	SM-SKILLED	5400	3256.2	8656.2
3	UN-SKILLED	5000	3256.2	8256.2

and crossing Rs 17,000 plus in certain northern states of India. Certainly in another few years, even after bifurcation, the Basic + DA under minimum wage will cross Rs. 7000/- set by the Bonus (amendment) act for calculation purposes. Once the minimum wage crosses Rs. 7000 set by bonus act u/s 12, will over ride section 12 of the bonus act. Under the above said circumstances, the minimum wage is not uniform among the states or among the industry within the state or among the zones within the state or among the cadre. Therefore, there will be no uniformity of bonus among the state/industry/zone/cadre, which will again lead to unrest. Multi-National Companies or the Industries having branches in different states of India will have no uniformity in payment of Bonus among its employees across the country; certainly will lead to heavy heart burns among employees of the same employer.

CONCLUSION

Most of the employers represented their stand in high courts, forums & discussion panels that bonus for the financial year based on P&L is calculated and paid in Oct/Nov 2015. Therefore, the effective date of 1st April 2014 as mentioned in the amended of Bonus act should be rethought and it should be made effective 1st April 2015. Employees and their unions feel that Minimum wage is revised annually, there is no standardized minimum wage among the states/zones within the state/industries of the same locality, and there will be no uniformity of bonus. Therefore, insertion of minimum wages act in bonus (amendment) act, 2015 may be reviewed. HR professionals opine that bifurcation of the minimum wage is allowed but their proportion/percentage is not defined anywhere in the law. In absence of such guideline, employers may bifurcate as per their convenience, in order to get the maximum benefit; employees may approach their unions, which will lead to more and more disputes.

Therefore, under the amendment of payment of bonus act, 2015 “whichever is higher” term may be reconsidered. Paying 8.33% of actual Basic +DA, ignoring minimum wage may solve the issues. But, paying 8.33% on actual will cause a heavy financial burden to employers and also sec 12 of payment of bonus act will lose its presence in the long run.

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