Need to Examine Important Implications of Payment of Bonus (Amendment) Act, 2015 and Case to Review Certain Provisions of Act

The Payment of Bonus Act, 1965, recently amended to Payment of Bonus (Amendment) Act, 2015, is effectively applicable for organisations with ten or more employees. It is high time that this more-than-thirty-year-old effective floor of ten employees be raised to at least fifty employees, in order to exempt these deserving class of organisations and give them a much required boost. It requires to be examined whether there is really any case for exempting PSUs, insurance companies, dock workers, RBI and other financial institutions, since even a small enterprise with 10 people can be covered under this Act. Section 2(13) of the Act defines employee to be a person employed on a salary not exceeding the prescribed limit, i.e. increased from ₹10,000/- to ₹21,000 per month, as per the Amendment Act applicable from 1st April 2014. Section 12 of the Amendment Act also increases the basic from ₹3,500 to ₹7,000 or minimum wage for Scheduled Employment, as fixed by the appropriate (State) Government, whichever is higher. The article deals with practical difficulties, uncertainties and inconsistencies that organisations may face due to the linkage with minimum wages. Despite the fact that the current Central Government opines that it is against retrospective taxation, the retrospective burden imposed on employers by way of this Amendment Act will not be any different in terms of expense and burden. Read on…

Background

The Payment of Bonus (Amendment) Act, 2015 (Amendment Act) received the assent of the President of India on 31st December 2015 and was notified in the Official Gazette on 1st January 2016. As the Amendment has important implications for a large number of organisations, it is worthwhile to study and understand the same, to enable proper further implementation of the same, as well as to debate further on certain aspects regarding the same and other provisions of the Payment of Bonus Act, 1965, Act (hereinafter referred to as "the Act").

CA. Mohan Rajan

(The author is a member of the Institute who may be contacted at mohanrajan7@rediffmail.com.)

Applicability of Payment of Bonus Act and, Accordingly, Amendment Act

At the outset, it is necessary to refresh the understanding of the organisations, to whom the Act, is applicable. As per Section 1(3) of the Act, it is applicable to every factory and every other

establishment, employing twenty or more persons. However State Governments can make the Act applicable to any establishment, employing less than twenty persons, but not less than ten persons. For example, the Maharashtra Government has made the Act applicable to any establishment employing ten or more persons, with effect from 1983.

The effective floor of ten persons has been in existence for more than thirty years. All numerical limits need to be constantly reviewed with the passage of time. It has been the declared objective of Governments to encourage startups, micro, small and medium enterprises, as well as to promote growth in employment and to simplify existing laws and facilitate ease of doing business. There are already a plethora of multiple legislation and regulations, strangling the growth of startups, micro, small and medium enterprises. Keeping all these factors in mind, *is it not high time that this more than thirty years old effective floor of ten employees, be raised to at least fifty employees, to exempt these deserving class of SME/ startup organisations, remove onerous burden of cost & compliances for such organisations and give them a much needed boost ?*

Exempted Classes of Employers

Section 20 of the Act covers public-sector establishments (i.e. PSUs), if they are engaged in manufacturing of goods or rendering of services, in competition with the private sector and if income from such activities is not less than 20% of their total gross income. PSUs other than these PSUs are not covered by the Act.

Section 32 of the Act has exempted the following classes of employers from the Act (summarised briefly below):

i) General insurance companies and employees of Life Insurance Corporation (LIC) of India. It may be interesting to note here that while general insurance companies as a class have been exempted, the same is not done for life insurance companies, as a class and thus unfairly discriminates between the monolithic LIC and private sector life insurance. It is hoped that this discrimination will be removed soon, as surely the cash rich LIC does not need such exemptions anymore.
ii) Seamen as defined in Merchant Shipping Act.
iii) Employees registered or listed under the Dock Workers Act.
iv) Employees of establishments engaged in any industry carried on or under the authority of any department of Central or State Government or local authority.
v) Employees of Indian Red Cross Society, universities & other educational institutions and other institutions established not for purposes of profit.
vi) Employees of Reserve Bank of India, State Financial Corporations, Deposit Insurance Corporation, NABARD, UTI, SIDBI, National Housing Bank, and other notified financial institutions.
vii) Employees of inland water transportation establishments.

Section 20 of the Act covers public-sector establishments (i.e. PSUs), if they are engaged in manufacturing of goods or rendering of services, in competition with the private sector and if income from such activities is not less than 20% of their total gross income.

The above exemptions were framed in 1965, in an era of dominance of public sector organisations. Today, one needs to examine, whether there is really any case for exempting PSUs, insurance companies, Dock Workers, RBI & other financial institutions. If a small enterprise with ten persons can be covered under the Act, then surely all these large organisations, can be covered under the Act and thus benefit millions of employees not covered by the Act.

There may still be case for exempting Not for Profit organisations, to avoid imposing burden on them. However, there is definitely no case for exempting all other categories of exempted establishments and it is hoped that the Central Government considers modification of the Act, to cover all these establishments also, in the interests of large number of employees in these organisations.

It may be noted that the Central or State Government still retain the power to exempt other establishments under the Section 36, if it is in the public interest to do so and may also impose conditions or restrictions on the same.

Entitlement to Bonus and Important Definition of Salary or Wages under the Act

Every employee of covered establishments (to whom the Act applies), drawing salary or wage up to the prescribed limit and who has worked for minimum thirty working days in a year, is entitled to be paid bonus.

Mistakes are commonly made in understanding

the definition of salary, which result in significant unrecognised expenses or liabilities, which can also accumulate over number of financial years. It is important to note that Section 2(21) of the Act provides, that salary or wage means all remuneration, other than for overtime, and includes Dearness Allowance (DA) or Special Allowance as it is called in certain states, (cost of living allowance in whatever way it is called), but excludes the following:

a) any other allowance which the employee is for the time entitled to
b) value of any housing accommodation or of supply of amenities or utilities or articles
c) any travelling concession
d) any bonus
e) any contribution to any pension fund or provident fund or for benefit of employee under any law
f) any retrenchment compensation or gratuity or other retirement benefit or any ex gratia payment
g) any commission payable to the employee.

Thus, basically and effectively, salary for the purpose of the Act, consists of Basic Salary + Dearness Allowance only. A number of employers consider gross normal salary to be the basis and thus consider employees above the prescribed limit to be exempt. However, they would be surprised to know that if this definition is properly applied, then large number of employees who would have been considered exempt on gross salary basis, would now be coverable under the Act and eligible to minimum bonus under the Act, if their Basic + DA is less than the prescribed limit.

Prescribed Limit of Salary to Determine Eligibility to Bonus and Amendment in Same

Section 2(13) of the Act, defines employee to be any person employed on a salary or wage not exceeding the prescribed limit. It is this limit, which was earlier ₹10,000/- per month, which is now increased to ₹21,000/- per month, as per the 2015 Amendment Act. Thus, all those employees of covered establishments, who draw basic salary and dearness allowance less than or equal to ₹21,000/- per month, will now be eligible for the bonus.

This amendment is fairly simple to understand and does not cause practical problems in implementation, unlike the other two problems, though of course it significantly increases financial costs to all covered organisations, as a large number of employees, who were hitherto exempt from the provisions of the Act, are now covered by the same.

Section 2(13) of the Act, defines employee to be any person employed on a salary or wage not exceeding the prescribed limit. It is this limit, which was earlier Rs.10,000/- per month, which is now increased to Rs.21,000/- per month, as per the 2015 Amendment Act.

Entitlement to Minimum Bonus and Amendment in Same, Linking it with Minimum Wages can Cause a Lot of Difficulties, Discontent and Disputes

Section 10 of the Act provides that every employer (of covered establishments) shall be bound to pay to every (covered) employee, a minimum bonus, which shall be 8.33% of the salary or wages earned by the employee during the accounting year. Section 12 of the Act provides that where the salary or wage of an employee, exceeds ₹3,500/- per month, then the minimum bonus under Section 10 or maximum bonus under Section 11, shall be calculated, as if the salary or wages were ₹3,500/- per month.

Section 12 is now amended by the 2015 Amendment Act to increase the basis from ₹3,500/- to ₹7,000/- or the minimum wage for the Scheduled Employment, as fixed by the appropriate (State) Government, whichever is higher. This is where the real difficulty starts. While a fixed monetary amount is easy to understand and implement and is also consistent across all states, the linkage with Minimum Wages, creates the following practical difficulties –

a) As per Section 2(w) of the Minimum Wages Act, 1948, wages is defined to include virtually all monthly remuneration components, except perks like provision of accommodation & utilities, contribution to provident & other funds, reimbursement of official expenses. Thus, this gives the impression that Minimum Wages must be one monthly gross wage amount in total. However, the Minimum Wages notifications of most State Governments mention only components of Basic + DA/ Cost of Living Allowance. In consonance with the letter and spirit of Minimum Wages Act, 1948, State Governments must be required to mention only monthly total gross minimum wages and should not be specifying separate components of Basic + DA/ Cost of Living Allowance.
b) In addition, many states have Minimum House Rent allowance (HRA) enactments. However, this HRA is not specified in the notifications of

minimum wages issued by the State Government, which can be cause for confusion, to determine the true minimum wages, whether including this HRA or excluding this HRA. Thus effectively, actual minimum Wages can be much higher than what is mentioned in the State Government notifications, but under cloud of uncertainty and opening up interpretational differences and disputes.

c) Information on Minimum Wages is still difficult to obtain for number of States, even in todays digital era. Any employer who has employees in multiple states can testify to the difficulty in ascertaining the actual prevalent rate of minimum wages, in a number of states. It also seems difficult to expect improvement in this vital disclosure, by State Governments, who are currently not disclosing the required updated information and employers may continue to face difficulties in ascertaining Minimum wages across different states.

d) State Government notifications of Minimum wages are frequently in local language of the state – For example tech savvy Karnataka – which makes it difficult for Corporate Managers based at other states to quickly determine applicable Minimum wages in other states.

e) State Government notifications of Minimum wages have different zones based on geographical areas, different categories of industries, different categories of workmen, all of which make it practically very difficult to determine the actual applicable Minimum wages, for each workman.

f) Minimum wages is usually revised twice in a year. Revisions in same are at times delayed by more than a year by certain Governments and if there is a delayed revision, it practically results in retrospective burden on employers, besides significantly increasing efforts in doing computations, payments, filing of revised returns and statutory disclosures in same, duplicating all these for the same period for which bonus is payable.

g) When minimum wages are revised mid way during the year, question may arise on whether minimum bonus can be calculated separately for two different periods, having two different rates of Minimum Wages ?Or should the higher or lower of the two prevalent rates of Minimum wages during a year, be held to be the valid basis to determine Minimum Bonus? Lack of clarity in this important basis can cause lot of difficulties by employers in determining the minimum bonus and any interpretation done in this regard cannot be free from doubt, thus keeping a sword of Damocles hanging over the heads of employers. This issue is also likely to create discontent among employees, who may have a different point of view, on same, in their interest.

h) Minimum wages usually have three different categories of Skilled, Semi Skilled and Unskilled employees, with different minimum wages applicable to each category. In the typical tradition of divergence among State Governments, some states have also introduced Super Skilled category and one is left to wonder whether super skilled persons really need Minimum wages prescription. Can it actually be lower than skilled category? In the absence of clear definitions of these categories, the actual applicable Minimum Wages and consequently actual applicable Minimum Bonus can vary significantly, due to the treatment of an employee, as either Skilled or Semi Skilled or Unskilled employee. If the appropriate (State) Government takes a different view on this treatment, then this matter has potential to create a lot of disputes and highly avoidable litigation.

i) The amount of bonus can vary across an organisation, from state to state, based on different Minimum wages prevailing in different states, which can be additional cause for discontent among employees, who draw less than their privileged colleagues in other locations.

j) At the time of appointment of an employee, it is important for employer to fix the total Fixed Cost to Company, keeping in view budgets of the employer. If future Minimum wages is not known, it would be very difficult for the employer to determine the fixed Cost to company, in accordance with corporate budgets.

k) With recent notification by Central Government of increased Central Minimum wages, there is

All foreign investors, would now become doubly wary of the fact, that other than taxation, there can still be a number of retrospective changes in other laws and rules, which would significantly increase cost of doing business, and actually make doing business much more difficult and complicated, rather than easing it in any way and open up an entirely new and totally avoidable new range of controversial matters.

Loss making organisations will also be required to pay the increased amount of minimum bonus, which can be a tremendous challenge, considering the financial difficulties, which such organisations are already facing. Micro and small organisations will have their own challenges, firstly in becoming aware of and understanding the changes done by the Amendment Act, as well as in subsequent interpretation and implementation of same and meeting costs of same.

added confusion on whether Central Minimum wages should apply or whether State Minimum Wages should apply. Do we need to have two legislations on the same subject matter?

Linkage with Minimum wages thus is totally against the Central Governments declared vow of "ease of doing business" and instead makes bonus extremely complicated.

l) The linkage with different State Minimum Wages, also goes againt the very essence of philosophy of "One Nation, One Market, One tax" which GST is promising. In the interest of this philosophy & in the interest of simplicity & ease of doing business, it is essential that there should be only one nationally uniform minimum bonus, as was prevailing earlier also.

Thus there are a number of practical difficulties in ascertaining the proper applicable Minimum wages as mentioned above. It also creates a lot of uncertainties and inconsistencies in treatment of fixed minimum wages, which are best avoided. It is suggested that the linkage of Minimum bonus with Minimum wages be removed immediately. A simple, straight, fixed minimum bonus as existing till date would greatly simplify ease of doing business and avoid controversies, discontent, disputes and litigation in determining the actual Minimum wages applicable to any particular employee.

While an increase in the minimum bonus, which was last revised with effect from 1st April, 2006 was needed due to inflation over the years, the increase to ₹7,000 still represents a decent increase by itself and there was no need to complicate it further, by linking it with Minimum Wages.

Retrospective Amendment with effect from 1st April 2014 against Declared Policy of Not Doing Retrospective Amendments and Causing Immense Practical Difficulties

The present Central Government has repeatedly been extremely vocal in declaring, that it is against any kind of retrospective taxation. The above amendments have been made applicable from 1st April, 2014. The retrospective burden imposed on employers by way of 2015 Amendment Act being applicable from 1st April, 2014, is in no way different in terms of expense and burden, than taxation, though the beneficiaries may be different.

All foreign investors, would now become doubly wary of the fact, that other than taxation, there can still be a number of retrospective changes in other laws and rules, which would significantly increase cost of doing business, and actually make doing business much more difficult and complicated, rather than easing it in any way and open up an entirely new and totally avoidable new range of controversial matters. These matters will cause difficulties in interpretation, implementation, practical implementation challenges and substantially add to the current load of compliances, with no productive benefits in same.

The due date for payment of bonus for a financial year is 30th November of the succeeding financial year, as per Section 19 of the Act. Most employers would have already paid the bonus due for financial year 2014-15 and filed returns due in respect of same. Now they would need to open it up entirely and do complex calculations on past additional costs and liabilities on retrospective basis. A number of employees may have stopped working during FY 2014-15 and during FY 2015-16 till date. If these employees have also closed their bank accounts and their address & contact details have changed, employers may need to make massive efforts in attempting to contact them & make past payments to such ex employees, which may also not be fruitful in all cases, rendering it next to impossible to actually make arrears of bonus payment to all ex employees. Thus a lot of extremely unproductive efforts may need to be made by employers, due to retrospective additional bonus payable now.

There are also no guidelines yet issued on, by when the additional bonus needs to be paid. There is also no clear provision in the Act for revised annual returns.

Considering the avowed objective of facilitating ease of doing business, encouragement of Small, Micro & Medium Enterprises as well as promotion of growth and employment, it is hoped that the Central Government and Parliament can reconsider the retrospective amendment and make the amendments applicable from the current financial

year. Or at the very least, the amendment should be made applicable, only for those employees, who are actually employed with a particular employer, as of the date of the amendment coming into force and should not apply to all past and ex employees, who are no longer employees with the organisation, as on date of the amendment coming into force.

Loss-Making Organisations and MSME will Face Lot of Difficulties and Challenges of 2015 Amendment Act

Loss making organisations will also be required to pay the increased amount of minimum bonus, which can be a tremendous challenge, considering the financial difficulties, which such organisations are already facing. Micro and small organisations will have their own challenges, firstly in becoming aware of and understanding the changes done by the Amendment Act, as well as in subsequent interpretation and implementation of same and meeting costs of same. There can definitely be case to exclude loss making, Micro & Small organisations having up to 50 employees, from being applicable to the changes as per the 2015 Amendment Act.

Other Aspects of Payment of Bonus Act Needing Review

It may be a bit surprising to note that there is no clear definition of bonus itself in the Act and it is important to have a clear definition of same. Whether the bonus can be paid every month/ quarter or does it need to be paid annually, is another issue related to same. Whether ex-gratia payments, made in addition to the fixed amounts due under employment agreements, can also be considered as bonus or not, is another issue, which needs clarity. The computation of allocable surplus and available surplus, set on, set off, *etc.* has a lot of scope to be simplified and made easier to follow.

The register of bonus paid to employees, needs physical signature of each employee. In today's digital era, this is an anachronism, which can definitely be removed, while keeping onus on the employee to maintain proper records to prove the payment of bonus. In large organisations, having multiple locations and keeping in view need to keep confidential, the amount of bonus paid to each employee, there are practical difficulties in enforcing physical signatures of employees in the register of bonus paid. With the objective of facilitating ease of doing business, it is hoped that that these outdated physical record keeping aspects, can be done away with, in the interest of "Digital India".

Though all those who actually suffer through retrospective tax amendments, may not agree with validity of same, practically it is advisable not to expect Courts to finally decide and give relief against retrospective amendments to the Amendment Act.

Recent Stays given by different Courts on Retrospective Applicability of the Amendment Act

During 2016, at least seven different High Courts have granted a stay on the retrospective applicability of the Amendment Act. Opinions are divided on whether these stays are applicable only for those who have petitioned for it or whether it applies to all others, including those who have not applied for it.

However, if the history of retrospective tax amendments is studied, it is quite evident, that in most cases of retrospective tax amendments, Courts have upheld validity of same. Though all those who actually suffer through retrospective tax amendments, may not agree with validity of same, practically it is advisable not to expect Courts to finally decide and give relief against retrospective amendments to the Amendment Act.

The only practical course of action, is to actually make policy makers, bureaucrats, Members of Parliament & other Central Government officials, to do a holistic review of the entire Act, understand the hardships & difficulties caused not only by the Amendment Act but due to all other aspects of the Act, causing inequities, hardhips, difficulties & which are also against interest of workers, consult with stakeholders and professionals, then pass orders and further amendment, to make operation of the Act equitable, easier & simpler to implement,

Conclusion

Implementation of the Bonus Amendment Act will definitely prove to be a challenge for all organisations, whether small or big. It is hoped that the Government would understand the difficulties involved and pro actively make it easier and simpler for establishments to comply with same, as well as do a comprehensive review and changes in other archaic provisions of the Act.■