

EY PAS Alert

Supreme Court ruling and the EPFO circular on higher pension under the Employees' Pension Scheme, 1995

Executive summary

This Alert summarizes the Supreme Court of India ruling¹ on availing higher pension benefit by domestic employees contributing to the Employees' Provident Funds Scheme, 1952 (Provident Fund Scheme) and Employees' Pension Scheme, 1995 (Pension Scheme) in India and the circular issued by the Employees' Provident Fund Organisation (EPFO) dated 20 February 2023.

On 4 November 2022, the Supreme Court held that the amendment made to the Pension Scheme effective on 1 September 2014 was valid, subject to certain directions.

Subsequently, the EPFO vide circular dated 20 February 2023 acknowledged that the employees who satisfy the following conditions may, along with their employers, submit joint option application with the EPFO under the Pension Scheme to avail higher pension:

1. Employees and employers who had contributed to Provident Fund Scheme on salary exceeding the prevalent statutory ceiling
2. Who did not exercise the option for higher pension earlier
3. Who were members of the Pension Scheme prior to 1 September 2014 and continued to be members on or after 1 September 2014

As per the Supreme Court ruling, the applications need to be filed within 4 months from the date of the ruling (i.e., on or before 3 March 2023). EPFO is likely to issue further guidelines on the following aspects:

1. The form and manner of request to be made by the employee
2. Manner of deposit / reallocation of past corpus from the Provident Fund Scheme to Pension Scheme along with interest till the date of refund
3. Computation of pension for such employees

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¹ Special Leave Petition (C) Nos. 8658-8659 of 2019

Background

- ▶ The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) covers the following three schemes:

- ▶ Employees' Provident Funds Scheme, 1952 (Provident Fund Scheme)
- ▶ Employees' Pension Scheme, 1995 (Pension Scheme)
- ▶ Employees' Deposit-Linked Insurance Scheme, 1976 (EDLI)

The schemes are hereinafter collectively referred to as 'Provident Fund'

- ▶ Under the EPF Act, the employer and employee are required to contribute 12% each of employee's salary. The salary subject to Provident Fund contribution is hereinafter referred as 'monthly pay'
- ▶ The employee's share of contribution is fully allocated to the Provident Fund Scheme. The employer's share of contribution is allocated towards Provident Fund Scheme and Pension Scheme
- ▶ Through Notification No. GSR 609(E) dated 22 August 2014, the following amendment were made in Pension Scheme effective 1 September 2014:

- ▶ **Change in coverage and contribution under the Pension Scheme - as applicable effective 1 September 2014:**

Where an employee has become a member of the Provident Fund Scheme prior to 1 September 2014:

Scheme	Employer's contribution per month
Where employee's monthly pay is less than or equal to the statutory ceiling of INR 15,000:	
Pension Scheme	8.33% of monthly pay
Provident Fund Scheme	3.67% of monthly pay
Total	12% of monthly pay
Where employee's monthly pay is higher than the statutory ceiling of INR 15,000:	
Pension Scheme	8.33% of INR 15,000 = INR 1,250 [A]
Provident Fund Scheme	12% of monthly pay less INR 1,250 [B = 12% of monthly pay less A]
Total	12% of monthly pay

Where an employee has become a member of the Provident Fund Scheme on or after 1 September 2014:

Scheme	Employer's contribution per month
Where employee's monthly pay is less than or equal to the statutory ceiling of INR 15,000:	
Pension Scheme	8.33% of monthly pay
Provident Fund Scheme	3.67% of monthly pay
Total	12% of monthly pay
Where employee's monthly pay is higher than the statutory ceiling of INR 15,000:	
Pension Scheme	Not applicable*
Provident Fund Scheme	12% of monthly pay
Total	12% of monthly pay

*An employee who has become a member of the Provident Fund Scheme on or after 1 September 2014 and draws monthly pay exceeding INR 15,000 is not eligible to become member of the Pension Scheme. In such case, the employer's contribution is fully allocated to the Provident Fund Scheme.

- ▶ **Proviso to paragraph 11(3) of the Pension Scheme - deleted effective 1 September 2014**

Proviso to paragraph 11(3) of the Pension Scheme covers a situation where an employer and an employee have availed the option to contribute towards the Pension Scheme on higher salary (and not limit such contributions on the statutory ceiling) from the date of commencement of the Pension Scheme or on the date the monthly pay exceeds the statutory ceiling.

This proviso to paragraph 11(3) of the Pension Scheme was the basis for an employee to opt to contribute 8.33% of higher salary towards the Pension Scheme instead of limiting such contribution to 8.33% of statutory ceiling.

Through notification dated 22 August 2014, with effect from 1 September 2014:

- ▶ Proviso to paragraph 11(3) was deleted from the Pension Scheme
- ▶ Paragraph 11(4) was inserted in the Pension Scheme
- ▶ **Paragraph 11(4) of the Pension Scheme - as applicable effective 1 September 2014:**

As per paragraph 11(4), an existing member of the Pension Scheme as on 1 September 2014 who had been contributing towards the Pension Scheme on higher salary (and not limiting such contributions on the statutory ceiling), a fresh joint request was required to be made by the employer and the employee to the EPFO within 6 months from 1 September 2014, extendable to another 6 months, i.e. upto 31 August 2015.

As per proviso to paragraph 11(4), an existing member who has exercised the option to contribute on higher salary will be required to

make additional contributions towards Pension Scheme at the rate of 1.16% of salary exceeding INR 15,000 per month out of the employee's share of contribution towards Provident Fund Scheme.

This paragraph 11(4) of the Pension Scheme, inserted with effect from 1 September 2014 as a substitution to proviso to paragraph 11(3) of the Pension Scheme, was the basis for an employee (who is an existing member of the Provident Fund Scheme as on 1 September 2014) to continue to contribute 8.33% of higher salary towards the Pension Scheme.

► **Calculation of pensionable salary for determining monthly pension benefit under the Pension Scheme - as applicable effective 1 September 2014**

The maximum pensionable salary for determining monthly pension benefit was limited to INR 15,000 per month. However, vide Notification dated 1 July 2016, another amendment was made to the Pension Scheme stating that for employees who have exercised option to contribute on higher salary towards Pension Scheme, the pensionable salary will be based on such higher salary.

Pensionable salary was required to be calculated on average salary of 60 months (instead of 12 months) prior to the date of exit from the Pension Scheme.

Supreme Court ruling on higher pension

- There have been multiple High Court / Supreme Court rulings on the issue of higher pension as per the option available under paragraph 11(3) and newly inserted paragraph 11(4). Consequently, on 4 November 2022, the Supreme Court of India provided clarity on the following aspects related to the higher pension benefit:
- **Validity of provisions of notification G.S.R 609(E) dated 22 August 2014** - The amendment to the Pension Scheme brought by the notification dated 22 August 2014 effective 1 September 2014 was held to be legal and valid, subject to certain directions.
 - **Eligibility of higher pension for employees who did not exercise the option under erstwhile provision to paragraph 11(3)** - The employees who did not exercise the option for higher pension as contemplated in the proviso to paragraph 11(3) of the Pension Scheme (as it was before the 2014 Amendment) would be entitled to exercise option under paragraph 11(4) of the post amendment scheme. The Supreme Court granted additional time to members to exercise such option under paragraph 11(4) of the scheme for a period of four months from the date of the ruling.

- **Eligibility of higher pension for employees who had exercised the option under erstwhile provision to paragraph 11(3)** - The employees who had exercised option under the proviso to paragraph 11(3) of the pre-amendment scheme and continued to be in service as on 1 September 2014, will be guided by the amended provisions of paragraph 11(4) of the amended Pension Scheme.
- **Eligibility of higher pension for employees retired before 1 September 2014** - The employees who had retired prior to 1 September 2014 without exercising the option under the proviso to paragraph 11(3) of the pre-amendment scheme would not be entitled to the higher pension benefit.
- **Applicability of higher pension benefit for members of exempted establishments** - The Supreme Court held that the employees of an exempted establishment which maintain Private Provident Fund Trust should not be deprived of the benefit of getting the option to remain in the pension scheme while drawing salary beyond the statutory ceiling. Thus, it was held that the Pension Scheme should apply to the employees of exempted establishments in the same manner as it applies to unexempted or regular establishments.
- **Additional contribution of 1.16% on salary exceeding the statutory ceiling** - The requirement under proviso to paragraph 11(4) for additional employee's contribution to the extent of 1.16% for members who have opted for higher pension was held to be illegal. The Supreme Court held that since the EPF Act did not contemplate any contribution to be made by an employee to remain in the Pension Scheme, the Central Government under the scheme itself cannot mandate such a stipulation. Thus, the provision of the scheme requiring additional contribution was held to be ultra-vires of the EPF Act. However, the Supreme Court held that such additional contribution from employee's share of contribution will continue until 6 months from the date of ruling or till such time any amendment is made to the Pension Scheme by the Government, whichever is earlier.

EPFO circular dated 20 February 2023

- The EPFO vide circular dated 20 February 2023 acknowledged that the employees who satisfy the following conditions along with their employers may submit joint option application with the EPFO under the Pension Scheme to avail higher pension:

- ▶ Employees and employers who had contributed under Provident Fund Scheme on salary exceeding the prevalent statutory ceiling; and
 - ▶ Who did not exercise the option for higher pension under the proviso to paragraph 11(3) of the erstwhile Pension Scheme; and
 - ▶ Who were members of the Pension Scheme prior to 1 September 2014 and continued to be members on or after 1 September 2014.
- ▶ Accordingly, employees who did not exercise the option as contemplated in the proviso to paragraph 11(3) of the Pension Scheme (as it was before the 2014 amendment) would be entitled to exercise joint option under erstwhile paragraph 11(3) and existing paragraph 11(4) within 4 months from the date of ruling (i.e. on or before 3 March 2023).
- ▶ The EPFO also prescribed certain guidelines / clarifications on the manner of making the application for the option. However, further clarity on the procedural aspects is awaited from the EPFO, including:
- ▶ The form and manner of request to be made by the employee
 - ▶ The method of deposit / reallocation of corpus from Provident Fund Scheme to Pension Scheme along with interest
 - ▶ Computation of pension
- ▶ The EPFO circular also clarified that the employees who had exercised the option under paragraph 11(3) of the erstwhile Pension Scheme, continued to be in service on 1 September 2014 and had not exercised the option within the time specified under paragraph 11(4), will not be eligible for the higher pension benefit.

Basis the Supreme Court ruling, a view may be taken that the above category of employees may be eligible to exercise the option. However, the EPFO Circular states that such employees are not entitled to exercise the option now.

For further details, please contact:

Sonu Iyer

People Advisory Services

Partner & Leader - India Region

Email: Sonu.Iyer@in.ey.com

Puneet Gupta

People Advisory Services

Partner

Email: Puneet1.Gupta@in.ey.com

Comments

Basis the Supreme Court ruling dated 4 November 2022 read with the EPFO circular dated 20 February 2023, employees may be eligible for higher pension provided contributions to the Pension Scheme are made on higher salary from the date Provident Fund contributions are made on salary exceeding the statutory ceiling. The applicability of the Supreme Court ruling and EPFO circular can be analyzed in the following situations:

Situation 1: Employee who has joined employment after 1 September 2014

If the monthly pay of the employee exceeds INR 15,000, the employee is not covered under the Pension Scheme. Thus, the question of making a higher contribution to the Pension Scheme does not arise.

Situation 2: Employee who has retired from employment prior to 1 September 2014 without exercising the option under the scheme:

As per the Supreme Court ruling dated 4 November 2022, such employee would not be entitled to the benefit of higher pension.

Situation 3: Employee who had not exercised the option under erstwhile proviso to paragraph 11(3) of the Pension Scheme as on 1 September 2014:

The employee would be entitled to exercise an option for higher pension under paragraph 11(4) of the post amendment Pension Scheme if such employee has contributed under Provident Fund on salary exceeding the statutory ceiling. Time limit for exercise of such option is for a period of four months from the date of the Supreme Court ruling (i.e., on or before 3 March 2023).

Situation 4: Employee who had exercised the option under erstwhile proviso to paragraph 11(3) of the Pension Scheme as on 1 September 2014:

The employee would continue to be guided by the amended provisions of paragraph 11(4) of the Pension Scheme. As per the EPFO circular, if such employees did not exercise the option under paragraph 11(4) within the specified timeline, they will not be eligible for a higher pension.

This discussion does not apply to International Workers. International Workers who have joined prior to 1 September 2014 are subject to the Pension contribution on full monthly pay.

Our offices

Ahmedabad

22nd Floor, B Wing, Privilon
Ambli BRT Road, Behind Iskcon
Temple, Off SG Highway
Ahmedabad - 380 059
Tel: + 91 79 6608 3800

Bengaluru

12th & 13th floor
"UB City", Canberra Block
No. 24, Vittal Mallya Road
Bengaluru - 560 001
Tel: + 91 80 6727 5000

Ground Floor, 'A' wing
Divyasree Chambers
11, O'Shaughnessy Road
Langford Gardens
Bengaluru - 560 025
Tel: + 91 80 6727 5000

Chandigarh

Elante offices, Unit No. B-613 & 614
6th Floor, Plot No- 178-178A
Industrial & Business Park, Phase-I
Chandigarh - 160 002
Tel: + 91 172 6717800

Chennai

Tidel Park, 6th & 7th Floor
A Block, No.4, Rajiv Gandhi Salai
Taramani, Chennai - 600 113
Tel: + 91 44 6654 8100

Delhi NCR

Golf View Corporate Tower B
Sector 42, Sector Road
Gurugram - 122 002
Tel: + 91 124 443 4000

3rd & 6th Floor, Worldmark-1
IGI Airport Hospitality District
Aerocity, New Delhi - 110 037
Tel: + 91 11 4731 8000

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
Gautam Budh Nagar, U.P.
Noida - 201 304
Tel: + 91 120 671 7000

Hyderabad

THE SKYVIEW 10
18th Floor, "SOUTH LOBBY"
Survey No 83/1, Raidurgam
Hyderabad - 500 032
Tel: + 91 40 6736 2000

Jamshedpur

1st Floor, Shantiniketan Building,
Holding No. 1
SB Shop Area, Bistupur
Jamshedpur - 831 001
Tel: + 91 657 663 1000

Kochi

9th Floor, ABAD Nucleus
NH-49, Maradu PO
Kochi - 682 304
Tel: + 91 484 433 4000

Kolkata

22 Camac Street
3rd Floor, Block 'C'
Kolkata - 700 016
Tel: + 91 33 6615 3400

Mumbai

14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (W), Mumbai - 400 028
Tel: + 91 22 6192 0000

5th Floor, Block B-2
Nirlon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: + 91 22 6192 0000

Pune

C-401, 4th floor
Panchshil Tech Park, Yerwada
(Near Don Bosco School)
Pune - 411 006
Tel: + 91 20 4912 6000

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