IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI

BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI C.M. GARG : JUDICIAL MEMBER

ITA nos. 4214/Del/2015 (A.Y. 2011-12)
4215/Del/2015 (AY 2012-13)
4216/Del/2015 (AY 2013-14)

Employees Provident Fund Organization Unit no. 416, 4th Floor, World Trade Centre, Connaught Place, New Delhi. PAN: AAATE 3890 L	Vs.	DCIT (TDS) A-2D, Sector 24, Noida.

ITA nos. 2415/Del/2015 (A.Y. 2008-09)
2416/Del/2015 (AY 2009-10)
2417/Del/2015 (AY 2010-11)

Employees Provident Fund Organization Regional Office Delhi (North), World Trade Centre, Connaught Place, New Delhi. PAN: AAATE 3890 L	Vs.	ACIT, Circle 51(1), New Delhi.

ITA nos. 2655/Del/2015 (A.Y. 2008-09)
2656/Del/2015 (AY 2009-10)
2657/Del/2015 (AY 2010-11)
2658/Del/2015 (AY: 2011-12)

Employees Provident Fund Organization Regional Office Delhi (South), EPFO Complex, Sector-23, Plot no. 23, Dwarka, New Delhi. PAN: AAATE 3890 L	Vs.	ACIT, Circle 51(1), New Delhi.

ITA no. 481/Del/2015 (AY: 2011-12)

Employees Provident Fund Organization Regional Office Delhi (North), 28, Wazirpur Industrial Area, Delhi. PAN: AAATE 3890 L (Appellant)	Vs.	ACIT, Circle 51(1), New Delhi. (Respondent)

Appellant by : Shri R.S. Singhvi &
Sh. Satyajeet Goel CA &
(ITA nos. 2415 to 2417/Del/2015,
2655 to 2658/Del/2015 & 481/Del/2015)

Sh. Pankaj Garg Adv.
(ITA nos. 4214 to 4216/Del/2015)

Respondent by : Shri A.K. Saroha CIT(DR)

Date of hearing : 20/07/2016.
Date of order : 03/08/2016.

O R D E R

PER BENCH:

These are assessee's appeals against separate orders passed by the ld. CIT(A)-X, New Delhi. Since common issues are involved for adjudication, all these appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. In all the appeals under consideration, the main issue is of TDS being not made in respect of settlement or withdrawals of accumulated balances by the Principal Officer, Employees Provident Fund Organization.

3. For the sake of brevity, we are referring to the facts as obtaining in ITA no. 4216/Del/2015 in the case of Principal Officer, Employees Provident Fund Organization, A-2C, Sector-24, Noida.

4. Brief facts, as obtaining from the order passed u/s 201(1)/201(1A), passed by the DCIT, TDS, Noida dated 31.3.2014 are that:

4.1. It came to the notice of the department that various officers of the Employees Provident Fund (hereinafter referred to as EPF), had been allowing settlement as also withdrawal of accumulated balances due to various employees/ subscribers without making deduction of tax thereon as per provisions of the Income-tax Act, 1961. He observed that taxable income accruing to an employee on account of settlement or withdrawal of accumulated balance was governed by various variables laid down in Rule 8 & 9 of Part A of the ivTH Schedule to the Income Tax Act.

4.2. After referring to rules 8,9 & 10 of Part A of Schedule IV, the AO pointed out that the trustees of a recognized provident fund (hereinafter referred to as "RPF"), or any person authorized by the regulation of the fund to make payment of accumulated balances due to employees, should have, in cases where sub-rule(1) of Rule 8 applied at the time of accumulated balances due to an employee was paid, should have deducted therefrom the amount payable under that Rule and all the provisions of Chapter XVII-B

would apply as if the accumulated balances were income chargeable under the head "salary". He sought information from the tax deductor viz. The Principal Officer, Employees Provident Fund Organization, A-2C, Sector-24, Noida vide letter dated 9.1.2014, as regards the settlement done and withdrawal of accumulated balances allowed to subscribers who had rendered continuous service of less than 5 years with the employer in the following format:

S. No.	Name of the employer	Name of the employee	Contribution of employer	Contribution employee	Interest on the contribution of employer	Interest on the contribution of employee.

4.3. The AO has reproduced the information furnished by assessee at pages 3 & 4 of his order. The AO treated the assessee in default, inter alia, observing as under:

> "*8. The fourth schedule of Income Tax, 1961 applies on Employees Provident Fund Act, 1952, as rule I of part A of fourth schedule of Income Tax Act, 1961 excludes its applicability on Provident Fund Act of 1925. Therefore, the rule of taxability on premature withdrawal of EPF before five years applies on EPF Act, 1952 as fourth schedule of I.T Act, 1961 applies on EPF Act, 1952 and fourth schedule of I.T Act does not apply on PF Act, 1925.*

Further, any payment from a provident fund to which the Provident Funds Act, 1925 (19 of 1925), applies IO[or from any other provident fund set up by the Central Government and notified by it in this behalf in the Official Gazette] is exempt from income Tax under the provisions of section 10 Sub section 11 of the Income Tax, 1961 under the category of exempted incomes. In the instant case, the assessee is in default of not abiding by the duty as laid down u/s 206 of the Income Tax Act as the withdrawal under the Employee's Provident Fund 1952 are not covered under provisions of section 10 sub section 11 of 1. T Act. and are covered under fourth schedule of I.T Act, 1961. Therefore, these disbursements are taxable under the head salaries and liable for the deduction of tax at source under the provisions of section 192 of the Income Tax Act, 1961".

4.4. He, accordingly, determined the total tax liability for non-deduction of tax and interest payable by the assessee u/s 201(1)/201(1A) of the Income-tax Act, as under:

Financial year	Assessment year	Short/ non deduction of TDS u/s 201(Rs.)	Interest u/s 201(1A)(Rs.)	Total tax liability
2010-11	2011-12	33,70,09,802	14,52,25,049	48,22,34,851
2011-12	2012-13	20,87,17,439	6,60,62,332	27,47,79,771
2012-13	2013-14	7,81,35,967	1,56,36,475	9,37,72,442

4.5. Before ld. CIT(A) the assessee raised following contentions:

(1) The assessee was not provided adequate opportunity and the order passed by DCIT was in gross violation of principles of natural justice.

(2) On correct interpretation of Section 2(38) it is clear that every statutorily recognized provided fund is recognized provided fund, but every recognized provided fund is not statutorily recognized.

(3) The assessee's EPF was governed by the provisions of section 10(11) of the I.T. Act and thus, such payments to the employee were exempt from income-tax, having no liability for TDS. To bring home this point it was submitted that section 10(11) of the I.T. Act provides for income, which do not form part of the total income and were exempt under Income-tax Act, 1961, "any payment from a provident fund to which the Provident Fund Act, 1925 (19 of 1925) applies [or from any other provident fund set up by the Central Government and notified by it in this behalf in the official Gazette]. It was submitted that the EPF Act, 1952 was notified by the Central Government by Official Gazette Notification no. S.R.O. 1509 dated 2.9.1952, New Delhi and hence the same was within the purview of application of I.T. Act.

(4) The payment given under the statutory Provident Fund (hereinafter referred as Employee's Provident Fund Act, 1952), was not liable to tax deduction at source even under the purview of section 192(4) of the I.T. Act, 1961.

(5) The EPF Act and the scheme framed there under was special legislation enacted for governing the institution, operation, disbursement etc. of the provident fund of the employees of covered establishment under the provisions of the Act could not over ride the provisions of the EPF Act.

(6) The provisions of the Income-tax Act, including 4th Schedule, shall have to yield to the extent of repugnancy vis a vis EPF. It was pointed out that as per the provisions of the EPF Act and the scheme framed

there under, the assessee was mandatorily required to repay the accumulated balance to the respective eligible members in full without any diversion of the deduction what-so-ever.

(7) The methodology of calculation of tax sought to be applied to the EPFO, necessitates the existence of an employee/employer relationship. Employer is in possession of complete details of income of the employee for deduction of the income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment relates to/ are made.

(8) In view of various decisions of Hon'ble Supreme Court and High Courts, EPF could not be equated with other provident funds maintained by an employer.

4.6. Ld. CIT(A) has also reproduced statement of fact filed before him along with form no. 35 in which assessee, inter alia, pointed out as under:

(a) Interest paid by the assessee on contribution made by employees and covered establishment was not taxable as per the provisions of the Income-tax Act, 1961. Further, there was no provision for deduction of tax in the schemes framed under the EPF act, 1952. The assessee had not deducted tax at any point of time right from the enactment of the statute.

(b) The assessee's objections filed before AO were not disposed of.

4.7. Ld. CIT(A) after considewring the assessee's detailed submissions recorded following findings:

(i) Assessee organization (EPFO) is a recognized provident Fund (RPF), as defined in section 2(38) of the I.T. Act.

(ii) As per the provisions contained in section 10(12) of the Income-tax act, the taxability of accumulated balance due and becoming payable to an employee participating in a recognized provident fund to be governed by Rule 8 of Part A of Schedule IV.

(iii) The assessee's contention that it is a statutory provident fund covered by exemption allowed u/s 10(11), factually and legally not tenable. He pointed out that the statutory provident funds are those which are set up under the provisions of the Provident Fund Act, 1925 and the fund is maintained by the government and Semi-government organization, local authorities, Railway, Universities and recognized educational institutions. Therefore, the assessee EPFO is not a statutory provident fund as the same had not been set up under the provisions of the Provident Fund Act, 1925. Further, he pointed out that there is no dispute that the assessee has been established under a scheme framed under the Employees Provident fund and Miscellaneous Provisions Act, 1952 and, therefore, there was no doubt that it was a recognized provident fund to which Part A of IVth Schedule of Income-tax Act, was applicable.

5. Ld. counsel Shri Pankaj Garg representing the batch of assessees in ITA nos. 4214 to 4216/Del/2015, reiterated the submissions advanced before lower revenue authorities. He submitted that Employees Provident Fund Act, 1952 is statutory fund. He further submitted that the

present Employees Provident Fund, 1952 is a fund established by the Central Government and also notified by it in the official gazette relying on section of EP & MP Act, 1952 and, therefore, Employees Provident Fund Act, 1952 is a notified fund within the terms of the provisions of section 10(11) of the Income-tax Act, 1962. He, therefore, submitted that any payment received under the Scheme of EPF Act, 1952 is covered u/s 10(11) of the Income-tax Act. To further buttress his contention, ld. counsel referred to section 2(38) of the Income-tax act, wherein the recognized provident fund is defined and under those provisions, Employees Provident Fund Act, 1952 is recognized provident fund and besides that, provisions of section 9 of the Employees Provident Fund Act, 1952 also recognizes the Employees Provident Fund Act, 1952 as recognized provident fund under the provisions of Income-tax act, 1922.

5.1. Ld. counsel pointed out that at the time of enactment of Employees Provident Fund Act, 1952, Income-tax Act, 1961 was not in force. Therefore, the applicability of section 2(38) of the Income-tax Act, 1961 was not available. He, therefore, submitted that the intention of the Parliament can be very well inferred from section 9 of EPF & MP Act, 1952 which mandated for overriding effect of EPF & MP Act, 1952 over

Income-tax Act, 1922 in case of repugnancy. He submitted that inadvertently amendment in section 9 of Employees Provident Fund Act, 1952 could not be made replacing 1922 by 1961. Ld. counsel further referred to para 69 of the Employees Provident Fund Act, 1952 and pointed out that all the conditions of para 69 of the Employees Provident Fund Act, 1952 was to be fulfilled in regard to withdrawal of sums by the persons. He submitted that no TDS could be made from withdrawals as Principal Officer was obliged to make full payment.

5.2. Ld. counsel further referred to section 10(11) of the Income-tax Act, 1961, which was not in force when Employees Provident Fund Act, 1952 was enacted. He submitted that after enactment of Income-tax Act, 1961, section 10(11) applied even upon Employees Provident Fund Act, 1952, because provisions of section 10(11) specifically mentioned the Provident Fund Act, 1925 or any other provident fund, notified by the Central Government. He submitted that since the Employees Provident Fund Act, 1952 is a fund, which was set up by the Central Government in 1952, therefore, it was notified in 1952 itself and its further notification under the Income-tax Act, 1961 was not warranted. He further pointed out that the Public Provident Fund was set up by the Central Government through Public Provident Fund, which was notified by the Central

Government on 2.7.1968. The Public Provident Fund was set up by the Central Government in 1968. Therefore, it was notified separately. Further, Employees Provident Fund Act, 1952 was notified prior to the enactment of Income-tax Act, 1961, resultantly no separate notification was warranted. He, therefore, submitted that Employees Provident Fund Act, 1952 is a statutory provident fund within the provisions of section 10(11) of the Income-tax Act. He further submitted that no where u/s 10(11) it is mentioned that the notification is to be issued by the Central Government after the enactment of Income-tax act, 1961. Ld. counsel submitted that in any view of the matter interpretation beneficial to the assessee is to prevail. Further, drawing analogy from the provisions of section 80C, ld. counsel pointed out that the contribution of a person to the Employees Provident Fund Act, 1952 is covered u/s 80C whereas the Contribution to Public Provident Fund Act are also covered u/s 80C. Therefore, since PPF is covered u/s 10(11), then automatically on the same footing Employees Provident Fund Act, 1952 is also covered under the provisions of section 10(11).

5.3. Ld. counsel further submitted that section 192A has specifically been inserted w.e.f. 1.6.2015 for the purpose of TDS on the withdrawal under Employees Provident Fund Act, 1952. Therefore, intention of the

Parliament is very clear that section 192A is specifically inserted parallel to section 10(11) to the effect of only Employees Provident Fund Act, 1952.

5.4. Ld. counsel further pointed out that in any view of the matter the AO was not justified solely relying on the figures submitted by assessee without examining the applicability of Rule 8 on Part A of IVth schedule.

5.5. In second batch of appeals viz. ITA nos. 2415 to 417/Del/2015, 2655 to 2658/Del/2015 & 481/Del/2015, ld. counsel Shri R.S. Singhvi appeared and submitted that prior to insertion of section 192A w.e.f. 1.6.2015, Rule 9 & 10 part A of IVth Schedule could not be implemented. He submitted that section 192(4) is applicable only to provide funds which are recognized under the Income-tax act and not to statutory provident fund.

5.6. Ld. counsel pointed out that since it was impossible to implement Rule 9 of Part A of IVth Schedule, therefore, AO worked out short deduction of tax @ 33% whereas u/s 192A, now it has been clarified that the TDS has to be made @ 10%.

5.7. In the alternative ld. counsel submitted that the matter may be restored back to the file of AO to apply the provisions of Rule 8 of Part A

of IVth schedule, wherever the withdrawal has been made before 5 years of rendering of continuous service. He further submitted that if the payees had paid the tax then assessee cannot be treated as assessee in default.

6. Per contra ld. CIT(DR) submitted that scheme of the Income-tax Act, 1961 deals with two types of provident funds, namely – (1) Provident fund to which provisions of PF Act 1925 are applicable or any other provident fund set up by the Central Government and notified for the purpose of section 10(11) of the Income-tax Act; and (2) recognized provident fund which includes provident fund established under a scheme framed under the Employees Provident Fund Act, 1952.

6.1. Ld. CIT(DR) submitted that there is no provision under the scheme of GPF or PPF, which is under 1925 Act, for premature withdrawal. Therefore, any payment from GPF or PPF is exempt from applicability of Income-tax as per provisions of section 10(11). However, premature withdrawals are allowed from recognized provident fund. Certain categories of such withdrawals, from recognized provident funds, are exempt by virtue of provisions of section 10(12) but certain premature withdrawals are not covered therein, accordingly taxable.

6.2. Ld. CIT(DR) submitted that EPFO governed by Employees Provident Fund Act, 1952 under Employees Provident Fund and Miscellaneous Provisions Act, 1952 cannot be compared with PPF or GPF, which are governed by the Provident Fund Act, 1925.

6.3. Ld. CIT(DR) further submitted that as per Rule 10 of Part A of IVth Schedule, withdrawals from recognized provident fund (RPF) in contravention of Rule 8 are subject to deduction of tax at source as if the same was income chargeable under the head "salary". He, therefore, submitted that it is not correct to say that no mechanism has been prescribed under Part A of Fourth schedule for deduction of TDS.

6.4. Ld. CIT(DR) further submitted that as far as the introduction of section 192A w.e.f. 1.6.2015 is concerned, in the explanatory note to the Finance Act, 2015, the following heading is there "Simplification of tax deduction at source mechanism for Employees Provident Fund Scheme". Therefore, Employees Provident Fund was liable to tax deduction at source earlier also.

6.5. Ld. CIT(DR) further pointed out that as far as the tax rate of 33% applied by AO is concerned, second proviso to the newly introduced section 192A provides that in case of the persons who are entitled to receive any amount on which tax is deductible under the said section and

who did not furnish their PAN, tax shall be deducted at the maximum marginal rate.

6.6. It was precisely for this reason that the tax was deducted @ 33%. As regards the assessee's plea that calculation of liability was based on maximum marginal rate, ld. CIT(DR) submitted that AO provided sufficient opportunity to the assessee to provide the details. However, the assessee did not avail those opportunities. As regards the assessee's claim that since deductees are likely to have paid their taxes, therefore, liability cannot be enforced on the deductor in view of Judgment in the case of Hindustan Coca Cola Vs. CIT. Ld. DR submitted that the onus is cast on assessee to prove that deductees have paid their taxes by filing of their income tax returns. He referred to proviso to section 201 which prescribes following conditions for availing this benefit:

(i) Deductee has furnished his return of income u/s 139;
(ii) Deductee has taken into account such sum for computing income in such return of income;
(iii) Deductee has paid the tax due on the income declared by him in such return of income; and
(iv) The deductor furnishes a certificate from CA in form 26A to the effect of fulfillment of preceding three conditions.

6.7. As regards the assessee's plea that it was impossible for them to comply with the provisions, ld. CIT(DR) submitted that law contemplates

that whenever there is doubt, the deductor can deduct tax at maximum marginal rate and issue TDS certificate. The deductee has option to get a certificate from the AO to the effect of deducting TDS at lower rate or claiming the return by filing return of income. In this regard ld. DR placed reliance on the decision of ITAT Guwahati Bench in the case of Arihant Invest Vs. ITO 61 Taxmnn.com 16.

7. We have considered rival submissions and have perused the record of the case. Admittedly the AO determined the liability u/s 201(1) and 201(1A) on the basis of information furnished by assessee in regard to the payments made out of accumulated balances in the EPF a/c. In the absence of complete information the AO estimated that 50% of the withdrawals were made before rendering five years of continuous service and, therefore, in view of Rule 8(1) the said withdrawals were liable to TDS in terms of Rule 10 of Part A of Fourth Schedule to the Income-tax Act. The main contention of Shri Pankaj Garg Advocate is that withdrawals from EPF a/c under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 are covered u/s 10(11) of the Income-tax Act and not under the Fourth Schedule to the Income-tax Act. In order to properly appreciate this submission, we reproduce hereunder the relevant provisions applicable for adjudication of this aspect.

7.1. Section 2(38) and other relevant sections of the Income-tax Act, 1961 reads as under:

> *"2(38) "recognised provident fund"" means a provident fund which has been and continues to be recognised by the [Principal Chief Commissioner or] Chief Commissioner or 2°[Principal Commissioner or] Commissioner] in accordance with the rules contained in Part A of the Fourth Schedule, and includes a provident fund established under a scheme framed under the Employees' Provident Funds Act, 1952 (19 of 1952)*"
>
> *"10(11) any payment from a provident fund to which the Provident Funds Act, 1925 (19 of 1925), applies [or from any other provident fund set up by the Central Government and notified"? by it in this behalf in the Official Gazette];*
>
> *(12) the accumulated balance due and becoming payable to an employee participating in a recognised provident fund, to the extent provided in rule 8 of Part A of the Fourth Schedule*;

7.2. Section 9 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 reads as under:

> *"9. Fund to be recognised under Act 11 of 1922.For the purposes of the Indian Income-tax Act, 1922, the Fund shall be deemed to be a recognised provident fund within the meaning of Chapter IXA of that Act:*
>
> *[Provided that nothing contained in the said Chapter shall operate to render ineffective any provision of the Scheme (under which the Fund is established) which is*

repugnant to any of the provisions of that Chapter or of the rules made thereunder.]

7.3. Entry 69 of the Employees Provident Funds Scheme, 1952, reads as under:

[69. Circumstances in which accumulations in the Fund are payable to a, member.-(l) A member may withdraw the full amount standing to his credit in the Fund-
(a) on retirement from serv,ice after attaining the age of 55 years:
[Provided that a member, who has not attained the age of 55 years at the time of termination of his service, shall also be entitled to withdraw the full amount standing to his credit in the Fund if he attains the age of 55 years before the payment is authorised;]
[(b) on retirement on account of permanent and total incapacity for work due to bodily or mental infirmity duly certified by the medical officer of the establishment or where an establishment has no regular medical officer, by a registered medical practitioner designated by the establishment;]
(c) immediately before migration from India for permanent settlement abroad [or for taking employment abroad];
[(d) on termination of service in the case of mass or individual retrenchment:
[(dd) on termination of service under a voluntary scheme of retirement framed by the employer and the employees under a mutual agreement specifying, inter alia, that notwithstanding the provisions contained in sub-clause (a) of clause (00) of section 2 of the Industrial Disputes Act, 1947, excluding voluntary retirement from the scope of definition of "retrenchment" such voluntary

retirements shall for the purpose be treated as retrenchments by mutual consent of the parties;]
(e) in any of the following contingencies, provided the actual payment shall be made only after completing a continuous period of not less than [two months] immediately preceding the date on which a member makes the application for withdrawal:-
(i) where a factory or other establishment is closed but certain employees who are not retrenched, are transferred by the employer to other factory or establishment, not covered under the Act;
(ii) where a member is transferred from a covered factory or other establishment to another factory or other establishment not covered under the Act, but is under the same employer; and
(iii) where a member is discharged and is given retrenchment compensation under the Industrial Disputes Act, 1947 (14 of 1947);]

[(lA) For the purpose of clause (b) of sub-paragraph (1)-
(i) where an establishment has been closed, the certificate of any registered medical practitioner may be accepted;
(ii) where there is no medical officer in the establishment, the employer shall designate a registered medical practitioner stationed in the vicinity of the establishment; or
(iii) where the establishment is covered by the Employees' State Insurance Scheme, medical certificate from a medical officer of the Employees' State Insurance Dispensary with which or from the Insurance Medical Practitioner with whom, the employee is registered under that Scheme, shall be produced:
Provided that where by mutual agreement of employers and employees, a Medical Board exists for any

establishment or a group of establishments, certificate issued by such Medical Board may also be accepted for the purpose of this paragraph:
Provided further that it shall be open to the Regional Commissioner to demand from the member a fresh certificate from a Civil Surgeon or any doctor acting on his behalf where the original certificate produced by him gives rise to suspicion regarding its genuineness:
Provided further the entire fee of the Civil Surgeon or any doctor acting in his behalf shall be paid from the Fund in case the findings of the Civil Surgeon or any doctor acting on his behalf agree with the original certificate and that where such findings do not agree with the original certificate, only half of the fee shall be paid from the Fund and the remaining half shall be debited to the member's account;
(iv) A member suffering from tuberculosis or leprosy 3[or cancer ,even if contracted after leaving the service of an establishment on grounds of illness but before payment has been authorised, shall be deemed to have been permanently and totally incapacitated for work.]

[(2) In cases other than those specified in sub-paragraph (I), the Central Board, or where so authorised by the Central Board, the Commissioner or where so authorised by the Commissioner, any officer subordinate to him, may permit a member to withdraw the full amount standing to his credit in the fund on ceasing to be an employee in any establishment to which the Act applies provided that he has not been employed in any factory or other establishment to which the Act applies for a continuous period of not less than two months immediately preceding the date on which he makes an application for withdrawal. The requirement of two months waiting period shall not, however, apply in cases

of female members resigning from the service of the establishment for the purpose of getting married.]

(5) Any member who withdraws the amount due to him under sub- paragraph (2) shall, on obtaining re-employment in a 4[factory or other establishment] to which the scheme applies, be required to qualify or again for the membership of the Fund and on qualifying for membership shall be treated as a fresh member thereof.

7.4. A bare perusal of section 2(38) clearly shows that recognized provident fund includes a provident fund established under a scheme framed under the Employees Provident Fund Act, 1952. Rule 1 of this Schedule specifically excludes the applicability of this Schedule to any provident fund to which the Provident Fund Act, 1925 applies. This leads to the irresistible conclusion that Employees Provident Fund and Miscellaneous Provisions Act, 1952 is covered under the Fourth Schedule to the Income Tax Act being a recognized Provident Fund. This being the very clear position of law, detailed arguments advanced by ld. counsel for the assessee cannot detain us for long to deliberate on the same. It is well settled law that the courts are not supposed to legislate the law and fill the gaps in the legislation. The entire endeavor of ld. counsel for the assessee is that the Provident Fund Act, 1925 should be equated with the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and, accordingly, the withdrawals from

the accumulated balances should be covered u/s 10(11). We are unable to accept this contention because of the specific provision contained in the Act.

7.5. Ld. counsel referred to section 9 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, as per which the EPF was deemed to be a recognized provident fund for the purpose of Income-tax Act, 1922. Ld. counsel's submission is that since EPF Act was notified in 1952 itself, therefore, there was no necessity for separate legislation in 1961. In this regard ld. CIT(DR) has filed before us an order from Rashtrapati Bhawan, New Delhi dated 14.1.1961, The Government of India (Allocation of Business), Rules, wherein distribution of subjects among the department is given As per Rule 3 given in second Schedule, Central Board of Direct Taxes was under Department of Revenue, whereas the notification under Employees Provident Fund and Miscellaneous Provisions Act, 1952 was passed by Labour Ministry. He, therefore, submitted that this cannot be considered as a notification issued under the Income Tax Act. We find considerable force in the submission of ld. CIT(DR) on this count.

7.6. In course of his submissions ld. counsel, inter alia, submitted that when section 2(38) came into force Employees Provident Fund and Miscellaneous Provisions Act, 1952 was recognized as recognized Provident Fund. Inadvertently amendment in section 9 of Employees Provident Fund

and Miscellaneous Provisions Act, 1952 could not be made replacing '1922' by '1961'. From this plea it is evident that ld. counsel wants the Tribunal to read something in the Act which is not there. Be that as it may, when Fourth Schedule has been incorporated in the Income-tax Act, 1961, dealing with cases of recognized provident fund, the Tribunal cannot go beyond that. The submission of ld. counsel primarily revolves around a case of casus omisus but the court cannot fill the gap and read '1961' instead of '1922' in the Employees Provident Fund and Miscellaneous Provisions Act, 1952, particularly when the said provision is not under consideration before us. Be that as it may, Tribunal is not empowered with such powers. Therefore, we hold that the provisions of section 10(11) are not applicable to the present proceedings but Schedule IV to the Income-tax Act is applicable, this being a case of recognized provident fund.

7.7. We are also in agreement with ld. CIT(DR) that Rule 69 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 dealing with circumstances in which accumulation in the funds are payable to a member are much broader than Rule 8 of Part A of Fourth Schedule of the Income Tax Act and in no way repugnant to Rule 8,9 and 10 of Part A of Schedule IV. Rule 69 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 only specifies the circumstances in which the

accumulation in the funds are payable to a member but that does not impinge upon the deduction of tax as per Rule 10 of Part A of Schedule IV to Income Tax Act. Rule 69 of the Employees Provident Fund scheme nowhere prohibits deduction of TDS from the accumulated balances to the members of the scheme. Therefore, there is no repugnancy between Rule 69 of EPF Scheme and Rules 8,9 and 10 of part A of Schedule IV.

7.8. Now coming to the second limb of argument regarding there being no mechanism for deduction of TDS being prescribed in the Act and only after the introduction of section 192A w.e.f. 1.6.2015, tax deduction scheme has been prescribed. The submission of ld. counsel is that as far as section 192(4) is concerned, the same deals only with specifically recognized provident funds which are private in nature and for Employees Provident Fund Scheme 1952, the provisions for the first time have been made in section 192A. We do not find much substance in this plea of ld. counsel because as per Rule 10 of the Part A of Schedule IV, deduction is required to be made from the amount payable under Rule 9 as per provisions of Chapter XVII B by treating accumulated balance being income chargeable under the head "salary". Whenever assessee fails to furnish the necessary information as required by deductor then the TDS is to be made at the maximum marginal rate and that is how the AO had made the TDS at maximum

marginal rate. Therefore, it cannot be said that there was no mechanism prescribed for deduction of TDS in respect of payment of accumulated balance due to employees. However, it is true that with the insertion of section 192A from 1.6.2015, the position has become more clear in respect of Employees Provident Fund Scheme, 1952.

7.9. Now coming to the third limb of argument regarding computation of amount deduction of tax. In this regard we find considerable force in the submission of ld. counsel for the assessee that AO was not justified in estimating 50% of the withdrawals as being of employees who had rendered less than five years of continuous service thereby coming within the ambit of Rule 9 & 10 of Part A of Schedule IV of the Income-tax Act. We, therefore, set aside the order of ld. CIT(A) and restore the matter to the file of AO with a direction that assessee will furnish the required details before the AO in respect of withdrawals made by employees within 5 years of rendering continuous service with his employer. The AO will also take into consideration the effect of decision of Hon'ble Supreme court in the case of Hindustan Coca Cola. Accordingly, if employee has included the accumulated balance in its total income, then the same is to be excluded while making the computation. Further, he will take guidance from the provisions of section 192A and, accordingly, no deduction should be made

where the amount of such payment or, as the case may be, the aggregate amount of such payment to the payee is less than Rs. 30,000/-. The short deduction is to be computed @ 10% in all the cases where the PAN number is furnished by assessee in respect of the employees from whose income tax was to be deducted.

8. In view of our discussion, assessee's appeals are allowed for statistical purposes.

Order pronouncement in open court on 03/08/2016.

Sd/-	Sd/-
(C.M. GARG)	(S.V. MEHROTRA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 03/08/2016.

MP

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.