

A.F.R.

ORDER

OD – 1

IN THE HIGH COURT AT CALCUTTA  
SPECIAL JURISDICTION (INCOME TAX)  
ORIGINAL SIDE

ITA/161/2009

ASSAM FRONTIER EMPLOYEES PENSION FUND  
VERSUS  
COMMISSIONER OF INCOME TAX-XI, KOLKATA & ANR.

BEFORE:

The Hon'ble Justice SURYA PRAKASH KESARWANI  
The Hon'ble Justice RAJARSHI BHARADWAJ

Date : 5<sup>th</sup> December 2023.

Appearance:

Mr. Abhrotosh Majumdar, Advocate  
Ms. Nilanjana Banerjee Pal, Advocate  
... for appellant.

Ms. Smita Das De, Advocate  
... for respondents.

1. Heard Sri Abhrotosh Majumdar, learned counsel for the appellant/assessee and Ms. Smita Das De, learned senior standing counsel for the respondents / Income Tax Department.
2. This appeal has been admitted by order dated 08.07.2009, on the following substantial question of law:-

“In view of the admitted position that there was no formal order of withdrawal of approval in respect of the pension fund of the assessee by the Commissioner of Income Tax, whether the Tribunal below substantially erred in law in holding that the assessee is not entitled

to the exemption under Section 10(25)(iii) of the Income Tax Act, 1961?

**Facts:-**

3. Briefly stated, facts of the present case are that the assess is a pension fund which was accorded recognition/approval by the Commissioner of Income Tax, Central-I, Kolkata vide order dated 29.09.1985 under Rule 2(1) of Part-B of the Fourth Schedule to the Income Tax Act, 1961 [hereinafter referred to as “the Act 1961”]. Thus, the fund of the assessee was approved under the Rules as contained in Part-B of the Fourth Schedule [hereinafter referred to as “the Rules”]. The **order of approval** is reproduced below:-

“Under Rule 2(1) of the Part-B of the Fourth Schedule to the Income Tax Act, 1961 approval is hereby accorded to Assam Frontier Employee’s Pension Fund constituted under the Trust Deed 12-07-1994.

The approval of the Fund maintained by the above-named employer will take effect from 30-01-1995.

The approval of the Fund will be subject to the condition that the Trustee shall file before the Commissioner every year within three months from the date of the closing of the annual accounts of the Fund the following statements:-

- (a) Statement of accounts of the Fund.
- (b) A statement showing date-wise contributions made to the fund and details of date-wise investment of such contributions by the Trustees.
- (c) Statement showing the details of payment made to the beneficiaries/employees during the year.

- (d) Statement showing the details of tax deducted at source and date of payment of the same by the Trustees to the credit of the Central Government as required under Rule 6 of Part-B of the Fourth Schedule to the Income-tax Act.

And any other conditions that may be imposed in future in the light of changes in the Income-tax Law and Rules and other circumstances.”

4. The assessing officer passed an order dated 24.12.2007 under Section 143(3) of the Act 1961, denying exemption to the assessee under Section 10(25)(iii) of the Act 1961. **Relevant portion of the aforesaid assessment order is reproduced below:-**

“The approval order of the Fund was subject to condition that the Trustee should file various statements as mentioned in the order, **before the Commissioner every year** within date of the closing of the annual accounts of the Fund. During the course of hearing on 14.08.07, the A/R was asked to produce evidence of submission of requisite documents/statement before the Commissioner accordingly. **In view of non-submission of evidence, a show cause letter dated 29-11-2007 was issued to the assessee and the relevant portion of the show cause is as follows:-**

...

In response to show cause dated 29.11.07, the assessee fund reiterated as “we have already confirmed you vide our letter dated 10<sup>th</sup> October, 2007 that **we are searching the file containing the said submission letter but still we are unable to find the same**”.

**In spite of having reasonable time to produce the evidence of submission of documents (submission of documents within**

**specified time as mentioned in the approval order is the boundary condition of the approval of the Fund), the assessee failed to produce the same. It is evident from the facts and circumstances of the case that the assessee Fund did not comply to the conditions of approval and therefore the Fund loses its recognition. Hence exemptions u/s 10(25)(iii) claimed by the Fund is rejected.”**

5. The assessing officer, thus, assessed the liability to tax of the assessee to Rs.6,41,011/- and interest under Section 234B of Rs.2,11,530/-, totaling Rs.8,52,541/-.
6. Aggrieved with the assessment order, the appellant assessee filed an appeal under Section 246A of the Act 1961, which was allowed by the CIT (A) by a detailed and well discussed order dated 24.04.2008. Relevant portion of the aforesaid **order of CIT (A)** is reproduced below:-

“(5.3) I have quite carefully considered the submissions made by the A.R. of the appellant in respect of the issues raised in Ground Nos. 2 and 3. I have also given thoughtful consideration to the reasoning of the A.O., as recorded in the impugned order. The order dated 29.9.1995 under Rule 2(1) of Part-B of Fourth Schedule to the Act passed by then C.I.T., Central-1, Kolkata is also perused. Finding substantial force in the arguments put forth by the A.R. of the appellant, it is observed at the outset that **the action of the A.O. amounting to treating the appellant as an unapproved fund and thereafter denying the exemption u/s. 10(25)(iii) of the Act, is not legally sustainable. The provisions contained in Rule 2 of Part-B of Fourth Schedule are found to be quite unambiguous and I see no doubt in interpreting the same. The power to**

**accord approval to any Superannuation Fund as well as to withdraw such approval**, besides the power to prescribe the date of commencement of the fund as well the conditions subject to which the approval is granted, **has been conferred upon the Chief Commissioner or Commissioner of Income Tax**. It goes without saying that none of the powers as referred above, can be exercised by any authority below the rank of Chief Commissioner or Commissioner. The referred Rule further lays down that the Chief Commissioner or Commissioner shall withdraw the approval with the reasons for such withdrawal and also the date on which the withdrawal has to take effect. The said Rule also provides that refusal or withdrawal of approval has to be made only after reasonable opportunity of being heard in the matter has been given to the trustees by the Chief Commissioner or Commissioner. In this view of the matter, I have no hesitation in observing that the A.O. seems to have exceeded his mandate in treating the appellant-fund as an unapproved one, despite the fact that the approval accorded by the competent authority has not so far been withdrawn or refused by him. There is no stipulation in the order dated 29<sup>th</sup> September, 1995 of the competent authority giving the approval that if the conditions listed therein are not met by the appellant, such approval would be deemed to have been withdrawn.

(5.3.1) It is further observed that the documents/statements etc. were to be furnished by the appellant before the C.I.T. and not before the A.O. If the A.O. had noticed that the conditions prescribed in the approval were not being fulfilled by the appellant, he could have brought this fact into the notice of the competent authority suggesting for withdrawal of the approval granted to the appellant-fund. Nothing of this sort has been done by the A.O. **It may be clarified at this stage that the deemed withdrawal has been**

**provided in Rule 4(2), in a case where there is any alteration in the rules, constitution, objects or conditions of the fund after the date of application for approval has been made before the A.O. Here also, the deemed withdrawal is subject to the order of the Chief Commissioner or Commissioner and not automatic at the end of the A.O. The power with the A.O. to call for returns, statements, particulars or information through a notice has been given only in Rule 10 and there also, there is no provision empowering the A.O. to withdraw or undo the approval accorded by a superior authority.** The A.O. was not prevented to call for such documents/statements etc. by virtue of powers conferred upon him in Rule 10 and thereafter put the matter before the competent authority for withdrawal of the approval, in case he found any discrepancy or non-compliance of the conditions. The fact that the appeal against withdrawal of approval lies with the Board further points out unequivocally that the A.O. is not vested with any power to withdraw/refuse the approval granted by the competent authority. Be that so; A.O.'s subsequent action in denying the exemption u/s. 10(25)(iii) on the purported ground is not sustainable in the eyes of law. The contention of the appellant that so long as the approval under Rule 2(1) is not withdrawn by the competent authority who granted it, the A.O. has no choice but to allow the exemption under Section 10(25)(iii) is not inappropriate and I am inclined to agree with it. It is further observed that the A.O. is not precluded at any point of time to bring the fact of non-compliance of the prescribed conditions by the appellant-fund, to the notice of the competent authority granting the approval with the suggestion for withdrawal of the same with effect from the date, which the A.O. thinks appropriate based on facts gathered from detailed verification.

(5.3.2) In view of above discussion, it is held that the action of the A.O. in denying the exemption u/s. 10(25)(iii) is not in order. The A.O. is directed to allow the requisite exemption in accordance with the provisions of law accordingly.”

7. Aggrieved with the aforesaid order of the CIT (A), the Income Tax Officer, Ward 32(1), Kolkata filed an appeal before the Income Tax Appellate Tribunal ‘C’ Bench, Kolkata being ITA No.1345/Kol/2008 [AY 2005-06], which was allowed by the ITAT by order dated 13.03.2009 and the order of the CIT (A) was set aside by recording the findings as under:-

“Since the assessee failed to comply with the conditions as laid down by the CIT for claiming deduction u/s. 10(25)(iii) we are of the considered opinion that the **A.O. was justified in denying such exemption to the assessee and the Ld. CIT(A)** was not justified in granting the same. The order of the Ld. CIT(A) is, therefore, set aside and that of the A.O. is restored.”

8. Along with the paper book, the appellant/assessee has also filed copy of a **letter dated 28.05.2009** submitted before the Commissioner of Income Tax-XI, Kolkata bearing acknowledgement, which is reproduced below:-

“Reference to the order of C.I.T-1 dtd. 29.09.1995 (a photocopy of the same is enclosed for your ready reference), we are accordingly attaching herewith the following documents:

- a) Statement of accounts of the fund as on 31.03.2005.
- b) Statement showing date-wise contributions made to the fund and details of date-wise investment of such contributions during the F.Y. 2004-05.

- c) Statement showing the detail of payment made to the beneficiaries/employees during the F.Y. 2004-05.
- d) Statement showing the detail of tax deducted at source during the F.Y. 2004-05.

Since our file has been transferred from C.I.T-I, to C.I.T-XI, we are submitting the documents here.”

9. The aforesaid letter has not been disputed before us by learned counsel for the respondents. It has also not been disputed before us by learned counsel for the respondents that the afore-quoted approval order dated 29.09.1995 has neither been withdrawn nor rescinded, rather it continued for the relevant assessment year 2005-06.
10. Aggrieved with the order of the ITAT dated 13.03.2009 in ITA No.1345/Kol/2008, the assessee has filed the present appeal, which was admitted by this Court by order dated 08.07.2009 on the afore-quoted substantial question of law.

**Submission on behalf of the Appellant/Assessee**

11. Learned counsel for the appellant submits that the prescribed authority to issue approval order under Section 10(25)(iii) of the Act 1961 read with Rule 2(1) of the Rules is the Commissioner of Income Tax who had granted approval of the fund by the afore-quoted order dated 29.09.1995 and that order has neither been withdrawn nor cancelled. Under the circumstances, the Income Tax Officer / assessing officer had no jurisdiction to pass the assessment order denying exemption and to assess the assessee to tax with

respect to the fund in question. Reliance is placed upon two judgments of Hon'ble Supreme Court in Gestetner Duplicators Pvt. Ltd. v. Commissioner of Income Tax, West Bengal reported in (1979) 2 SCC 354 [Para 3 and 12] and Industrial Infrastructure Development Corporation (Gwalior) Madhya Pradesh Limited v. Commissioner of Income Tax (Gwalior), Madhya Pradesh reported in (2018) 4 SCC 494 [Para 16-21].

12. Learned counsel for the appellant has carried us to the afore-quoted approval order, the assessment order, the order of the CIT (A) and the impugned order of the ITAT as well as the Rules and more particularly Rules 2, 3, 4, 8 and 10 of the Rules.

#### **Submission on behalf of the Respondents / Income Tax Department**

13. Learned counsel for the respondents submits that since the assessee could not submit any proof despite show-cause notice that he has complied with the conditions attached to the approval order, therefore, the assessing officer was justified to deny exemption to the assessee under Section 10(25) of the Act 1961 read with the Rules. Reliance is placed upon a judgment of Karnataka High Court in Commissioner of Income Tax, Mangalore v. M/s. Manipal Academy of Higher Education reported in (2013) 357 ITR 114 (Gujarat).

#### **Decision and Finding**

14. We have carefully considered the submissions of learned counsel for the parties and perused the record of the appeal.

15. Before we may proceed to consider rival submissions of learned counsel for the parties, it would be appropriate to reproduce Section 10(25)(iii) of the Act 1961 and Part-B of the Fourth Schedule to the Act, as under:-

**Section 10(25)(iii)**

“**10.** In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-

. . .

(25) (i) . . .

(ii) . . .

(iii) any income received by the trustees on behalf of **an approved superannuation fund;**”

**“PART – B**

**APPROVED SUPERANNUATION FUNDS**

**Definitions.**

1. In this Part, unless the context otherwise requires, "employer", "employee", "contribution" and "salary" have, in relation to superannuation funds, the meanings assigned to those expressions in rule 2 of Part A in relation to provide funds.

**Approval and withdrawal of approval.**

2 (1) The Chief Commissioner or Commissioner] may accord approval any superannuation fund or any part of a superannuation fund which, in his opinion, complies with the requirements of rule 3, and may at any time **withdraw such approval, if, in his opinion, the circumstances of the fund or part cease to warrant the continuance of the approval.**

(2) The "[Chief Commissioner or Commissioner] shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect, and, where the approval is granted subject to conditions, those conditions.

(3) The "[Chief Commissioner or Commissioner] shall communicate in writing to the trustees of the fund any withdrawal of approval with the reasons for such withdrawal and the date on which the withdrawal is to take effect.

(4) The "[Chief Commissioner or Commissioner] shall neither refuse nor withdraw approval to any superannuation fund or any part of a superannuation fund unless he has given the trustees of that fund a reasonable opportunity of being heard in the matter.

**Conditions for approval.**

3. In order that a superannuation fund may receive and retain approval, it shall satisfy the conditions set out below and any other conditions which the Board may, by rules, prescribe-

- (a) the fund shall be a fund established under an irrevocable trust in connection with a trade or undertaking carried on in India, and not less than ninety per cent of the employees shall be employed in India;
- (b) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a specified age or on their becoming incapacitated prior to such retirement, or for the widows, children or dependants of persons who are or have been such employees on the death of those persons;
- (c) the employer in the trade or undertaking shall be a contributor to the fund; and

- (d) all annuities, pensions and other benefits granted from the fund shall be payable only in India.

**Application for approval.**

4. (1) An application for approval of a superannuation fund or part of a superannuation fund shall be made in writing by the trustees of the fund to the [Assessing] Officer by whom the employer is assessable, and shall be accompanied by a copy of the instrument under which the fund is established and by two copies of the rules [and, where the fund has been in existence during any year or years prior to the financial year in which the application for approval is made, also two copies of the accounts of the fund relating to such prior year or years (not being more than three years immediately preceding the year in which the said application is made)] for which such accounts have been made up, but the [Chief Commissioner or Commissioner] may require such further information to be supplied as he thinks proper.

(2) If any alteration in the rules, constitution, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the fund shall forthwith communicate such alteration to the [Assessing] Officer mentioned in sub-rule (1), and in default of such communication any approval given shall, unless the [Chief Commissioner or Commissioner] otherwise orders, be **deemed to have been withdrawn** from the date on which the alteration took effect.

**Contributions by employer when deemed to be income of employer.**

5. Where any contributions by an employer (including the interest thereon, if any) are repaid to the employer, the amount so repaid shall be deemed for the purpose of income-tax [\*\*\*] to be the income of the employer of the previous year in which it is so repaid.

**Deduction of tax on contributions paid to an employee.**

6. Where any contributions made by an employer, including interest on contributions, if any, are paid to an employee during his lifetime [in circumstances other than those referred to in clause (13) of section 10], [tax] on the amounts so paid shall be deducted at the average rate of [tax] at which the employee was liable to [tax] during the preceding three years or during the period, if less than three years, when he was a member of the fund, and shall be paid by the trustees to the credit of the Central Government within the prescribed time and in such manner as the Board may direct.

**Deduction from pay of and contributions on behalf of employee to be included in return.**

7. Where an employer deducts from the emoluments paid to an employee or pays on his behalf any contributions of that employee to an approved superannuation fund, he shall include all such deductions or payments in the return which he is required to furnish under [\*\*\*] section 206.

**Appeals.**

8. (1) An employer objecting to an order of the [Chief Commissioner or Commissioner] refusing to accord approval to a superannuation fund or **an order withdrawing such approval may appeal, within sixty days of such order, to the Board.**

(2) The appeal shall be in such form and shall be verified in such manner and shall be subject to the payment of such fee as may be prescribed.

**Liability of trustees on cessation of approval.**

9. If a fund or a part of a fund for any reason ceases to be an approved superannuation fund, the trustees of the fund shall nevertheless remain liable to tax on any sum paid on account of returned contributions (including interest on contributions, if any), in

so far as the sum so paid is in respect of contributions made before the fund or part of the fund ceased to be an approved superannuation fund under the provisions of this Part.

**Particulars to be furnished in respect of superannuation funds.**

10. The trustees of an approved superannuation fund and any employer who contributes to an approved superannuation fund **shall, when required by notice from the [Assessing] Officer**, within such period, not being less than twenty-one days from the date of the notice, as **may be specified in the notice, furnish such return, statement, particulars or information, as the [Assessing] Officer may require.**

**Provisions relating to rules.**

11. (1) In addition to any power conferred by this Part, the Board may make rules-

- (a) prescribing the statements and other information to be submitted along with an application for approval;
- (b) prescribing the returns, statements, particulars, or information which the [Assessing] Officer may require from the trustees of an approved superannuation fund or from the employer;
- (c) limiting the ordinary annual contribution and any other contributions to an approved superannuation fund by an employer;
- [(cc) regulating the investment or deposit of the moneys of an approved superannuation fund:

**Provided** that no rule made under this clause shall require the investment of more than fifty per cent of the moneys of such fund in Government securities as defined in section 2 of the Public Debt Act, 1944 (18 of 1944);]

- (d) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of, or creation of a charge upon, his beneficial interest in an approved superannuation fund;
- (e) determining the extent to, and the manner in, which exemption from payment of [tax] may be granted in respect of any payment made from a superannuation fund from which approval has been withdrawn;
- (f) providing for the withdrawal of approval in the case of a fund which ceases to satisfy the requirements of this Part or of the rules made thereunder; and
- (g) generally, to carry out the purposes of this Part and to secure such further control over the approval of the superannuation funds and the administration of approved superannuation funds as it may deem requisite.

(2) All rules made under this Part shall be subject to the provisions of section 296.”

16. Perusal of the assessment order and more particularly the relevant portion afore-quoted, leaves no manner of doubt that the assessing officer has denied exemption to the assessee fund on the finding that **“the Fund loses its recognition. Hence exemption u/s 10(25)(iii) claimed by the Fund is rejected.”** The CIT (A) well considered the relevant provisions of the Rules and recorded a finding with reference to the statutory provision that the powers conferred under the Rules upon the Chief Commissioner or Commissioner cannot be exercised by any authority below the rank of the Chief Commissioner or Commissioner. It was further observed that the

Rule provides that the Chief Commissioner or Commissioner may withdraw the approval with reasons for such withdrawal and also the date on which the withdrawal has taken effect. Refusal or withdrawal of approval has to be made only after reasonable opportunity of being heard in the matter has been given to the Trustee by the Chief Commissioner or Commissioner. The CIT (A) in paragraph 5.3.1 of its order has also considered the provision of Rule 4(2) – deemed withdrawal, and held that the deemed withdrawal is subject to the order of the Chief Commissioner or Commissioner and not automatic at the end of the assessing officer. He also found that there is no provision empowering the assessing officer to withdraw or undo an approval accorded by a superior authority.

17. We find that the findings recorded by the CIT (A), based on relevant provisions of the Rules, were neither considered nor set aside by the ITAT. By the impugned order, the ITAT has set aside the order of the CIT (A), on the ground that since the assessee has failed to comply with the conditions laid down by the CIT for claiming deduction under Section 10(25)(iii) of the Act 1961, therefore, the assessing officer was justified in denying such exemption to the assessee. We find that the conclusion reached by the Tribunal is totally erroneous, contrary to the statutory provisions and the settled position of law. The Tribunal being a creation of statute is bound by the statutory provisions and it cannot travel beyond it so as to uphold withdrawal of approval by the Assessing Officer who has not been conferred power to stop continuance of approval and consequently deny exemption

18. Section 10(25)(iii) of the Act 1961 provides for exemption of any income received by the Trustee on behalf of an **approved superannuation fund**. Approval is granted in accordance with the provisions of the Rules afore-quoted. Rule 2(1) confers power upon the Chief Commissioner or Commissioner of Income Tax to withdraw such approval, if, in his opinion, the circumstance of the fund or part ceases to warrant continuance of the approval. It is an admitted fact of the case that the approval of the assessee fund granted by the competent authority i.e. Commissioner of Income Tax vide order dated 29.09.1995 has continued for the assessment year in question i.e. AY 2005-06 and it has neither been withdrawn nor cancelled.
  
19. No power has been conferred upon the assessing officer under the Rules to hold that the fund loses its recognition to deny exemption under Section 10(25)(iii) of the Act 1961 claimed by the assessee. Even the order of withdrawal of exemption has been made appealable under Rule 8 of the Rules, which goes to show that the power conferred upon the Chief Commissioner or Commissioner of Income Tax for withdrawal of exemption under Rule 4(2) of the Rules is a quasi judicial function. Undisputedly, the approval granted to the appellant/assessee has not been withdrawn or cancelled. Therefore, the assessing officer cannot look behind the approval and cannot hold that the approval loses its effect on account of alleged non-submission of certain financial statements by the assessee.

20. The question whether the Tribunal erred in law in holding that the assessee is not entitled to exemption under Section 10(25)(iii) of the Act 1961 in the absence of withdrawal of the order approving the fund of the assessee, stands answered from bare perusal of the provisions of the Rules afore-quoted and Section 10(25)(iii) of the Act 1961. Section 10(25)(iii) of the Act 1961 clearly mandates that any income received by the Trustees on behalf of **an approved superannuation fund** shall not be included in computing the total income of a previous year of any person. The approval has been granted under the Rules afore-quoted. It is admitted case of the respondents that the approval continued during the assessment year in question. No power has been conferred upon the assessing officer to interfere with the order of approval granted by the Chief Commissioner or Commissioner of Income Tax. Therefore, the assessment order as upheld by the ITAT, holding that the fund loses its recognition and hence exemption under Section 10(25)(iii) of the Act 1961 claimed by the Fund is rejected; is without jurisdiction.
  
21. In *Gestetner Duplicators Pvt. Ltd. (supra)* the Hon'ble Supreme Court considered the question as to whether the Tribunal was right in holding that the provident fund maintained by the assessee satisfies the conditions laid down in Rule 4(c) of the Fourth Schedule to Part-A of the Income Tax Act, 1961. The question was answered by the Hon'ble Supreme Court as under :

“12. Dealing next with the second question it seems to us clear that having regard to our view on the proper construction of the expression ‘salary’ occurring in Rule 2(h) of Part A of the Fourth Schedule to the Act it must be held that the Tribunal was right in holding that the Provident Fund maintained by the assessee satisfied the condition laid down in Rule 4(c) of Part A of the Fourth Schedule and that question also must be answered in favour of the assessee and against the Revenue. However, we would like to make some observations with regard to the true impact of the recognition granted by the Commissioner of Income Tax to a Provident Fund maintained by an assessee. The facts in the present case that need be stressed in this behalf are that it was as far back as 1937 that the Commissioner of Income Tax had granted recognition to the Provident Fund maintained by the assessee under the relevant rules under 1922 Act, that such recognition had been granted after the true nature of the commission payable by the assessee to its salesmen under their contracts of employment had been brought to the notice of the Commissioner and that said recognition had continued to remain in operation during the relevant assessment years in question; the last fact in particular clearly implied that the Provident fund of the assessee did satisfy all the condition laid down in Rule 4 of Part A of the Fourth Schedule to the Act even during the relevant assessment years. In that situation we do not think that it was open to the taxing authorities to question the recognition in any of the relevant years on the ground that the assessee’s Provident Fund did not satisfy any particular condition mentioned in Rule 4.

**It would be conducive to judicial discipline and the maintaining of certainty and uniformity in administering the law that the taxing authorities should proceed on the basis that the recognition granted and available for any particular**

**assessment year implies that the Provident Fund satisfies all the conditions under Rule 4 of Part A of the Fourth Schedule to the Act and not sit in judgment over it. There is ample power conferred upon the Commissioner under Rule 3 of Part A of the Fourth Schedule to withdraw at any time the recognition already granted if, in his opinion, the Provident Fund contravenes any of the conditions required to be satisfied for its recognition and if during assessment proceedings for any particular assessment year the taxing authority finds that the Provident Fund maintained by an assessee has contravened any of the conditions of recognition he may refer the question of withdrawal of recognition to the Commissioner but until the Commissioner acting under the powers reserved to him withdraws such recognition the taxing authority must proceed on the basis that the Provident Fund has satisfied all the requisite conditions for its recognition for that year, any other course is bound to result in chaos and uncertainty which has to be avoided.”**

21. In Industrial Infrastructure Development Corporation (Gwalior) Madhya Pradesh Limited (*supra*) the Hon’ble Supreme Court again considered the power to cancel/withdraw/recall the registration certificate under Section 12A of the Act of 1961 by an authority who has not been conferred with such power and held as under:

**“17. In our considered opinion, the CIT had no express power of cancellation of the registration certificate once granted by him to the assessee under Section 12-A till 1-10-2004. It is for the reasons that, first, there was no express**

provision in the Act vesting the CIT with the power to cancel the registration certificate granted under Section 12-A of the Act, **Second the order passed under Section 12-A by the CIT is a quasi-judicial order and being quasi-judicial in nature, it could be withdrawn/recalled by the CIT only when there was express power vested in him under the Act to do so.** In this case there was no such express power.

**18.** Indeed, the functions exercisable by the CIT under Section 12-A are neither legislative and nor executive but as mentioned above they are essentially quasi-judicial in nature.

**19.** Third, an order of the CIT passed under Section 12-A does not fall in the category of “orders” mentioned in Section 21 of the General Clauses Act. The expression “order” employed in Section 21 would show that such “order” must be in the nature of a “notification”, “rules” and “bye laws”, etc. [See Indian National Congress (I) v. Institute of Social Welfare.]

**20.** In other words, the order, which can be modified or rescinded by applying Section 21, has to be either executive or legislative in nature whereas the order, which the CIT is required to pass under Section 12-A of the Act, is neither legislative nor an executive order but it is a “quasi-judicial order.” It is for this reason, Section 21 has no application in this case.”

22. Learned counsel for the respondent has heavily relied upon the judgment of Karnataka High Court in the case of Commissioner of Income Tax, Mangalore vs. M/s. Manipal Academy of Higher Education. We find that the judgment relied by the learned counsel for the respondent is of no help

to the respondents, rather it is against them. Relevant portion of the aforesaid judgment is reproduced below:

**“11. A reading of the aforesaid provisions makes it very clear that if an assessee invests its funds in immovable property as aforesaid and satisfies one of the requirements of law, then he is entitled to the exemption as per the notification issued. Whether the assessee has complied with the conditions stipulated in the exemption order, before it could claim exemption is a matter, which has to be investigated by the Assessing Authority. It is only on the Assessee satisfying the conditions stipulated in the exemption order, it would be entitled to exemption. In the event there is a violation of the terms and conditions of the exemption order, the Assessing Authority would be justified in not extending the benefit of exemption but at the same time the Assessing Authority cannot ignore the order of exemption. Therefore, on enquiry if he is satisfied that the assessee is not entitled to exemption as he has violated the terms and conditions of exemption order, he has to bring the said fact to the notice of the prescribed authority. Thereafter, the prescribed authority is under an obligation to issue a show cause notice to the assessee to show-cause, why the order of exemption should not be rescinded. After hearing the assessee, if the prescribed authority decides to rescind the exemption granted, they are at liberty to pass such an order and a copy of the said order is to be communicated both to the assessee as well as the Assessing Authority. It is on receipt of such an order rescinding the exemption order, the Assessing Authority could proceed to assess the assessee and raise a demand for payment of tax. This is the procedure prescribed under the scheme of the Act. Therefore, merely because there is**

an exemption order, the assessee is not entitled to exemption unless he satisfies the conditions subject to which the said exemption is granted. The question whether such conditions are fulfilled or not is a matter to be investigated by the Assessing Authority.”

23. Thus, we are of the view that so long as the approval order under Section 10(25)(iii) of the Act read with rules continues, the Assessing Officer is bound to accord exemption. The action of the Assessing Officer to deny exemption and to hold that the funds loses its recognition is without jurisdiction. It is conducive to judicial discipline, propriety and to maintain certainty and uniformity in administering the law that the taxing authorities should proceed on the basis that approval granted by the competent authority under Section 10(25)(iii) of the Act of 1961 read with rules available for a particular assessment year satisfies all the conditions and cannot sit in judgment over it. The power to withdraw approval as conferred under the rules, can be exercised only by the competent authority and in accordance with the provisions of the rules. Until the approval order continues, the Assessing Officer cannot take a different view or deny exemption.
24. Thus, we find that the impugned order of the ITAT is legally unsustainable and is, therefore, set aside. The substantial question of law as quoted above is answered in favour of the assessee and against the revenue.

25. The appeal (ITA/161/2009) is allowed. However, there shall be no order as to costs.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)

S. Kumar/As.

(A.F.R.)