IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F', NEW DELHI

Before Sh. N. K. Saini, AM And Smt. Beena A. Pillai, JM
ITA No. 4493/Del./2009 : A.Y. : 2006-07
ITA No. 1826/Del/2011 : A.Y. : 2007-08
ITA No. 4254/Del/2011 : A.Y. : 2008-09

The Chief Manager Punjab National Bank, HO Accounts & Taxation Deptt. HO : 5-Sansad Marg New Delhi	Vs	Addl. CIT Circle-14(1) New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACP0165G		

ITA No. 3869/Del/2009 A.Y. : 2006-07
ITA No. 1363/Del/2011 A.Y. : 2007-08
ITA No. 6379/Del/2012 A.Y. : 2008-09
ITA No. 2981/Del/2013 A .Y. : 2009-10

Punjab & Sind Bank HO. Accounts & Audit Department, 21, Rajendra Place, New Delhi	Vs	Addl. CIT Circle-14, C.R.Building, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACP1206G		

Assessee by : Sh. K. Sampath Adv. Raj Kumar, Adv.
Revenue by : Sh. Ramesh Chand, C.I.T, DR

Date of Hearing : 18.03.2016		**Date of Pronouncement : 15.06.2016**

ORDER

PER BENCH :

The appeals by the assessee i.e. Punjab National Bank for the Assessment Years 2006-07, 2007-08 and 2008-09 are directed against the separate orders of the ld. CIT(A)-XVII, New Delhi dated 15.09.2009, 31.01.2011 and 25.07.2011 respectively. While in the case of Punjab & Sind Bank the appeals for the assessment years 2006-07, 2007-08, 2008-09 and 2009-10 are directed against the orders of the CIT(A)- XVII, New Delhi dated 30.06.2009, 27.12.2010, 25.10.2012 and 18.03.2013 respectively.

2. Common issues are involved in these appeals which were heard together so these are being disposed off by consolidated order for the sake of convenience and brevity. At the first instance, we will deal with the appeal of Punjab National Bank in ITA No. 4493/Del/2009 for the assessment year 2006-07. Only effective ground raised in this appeal reads as under :

" 2. That on facts and in the circumstances of the case and in law the authorities below erred in holding that statutory contribution to Pension Fund in a sum of Rs. 471,43,65,330/- is a fringe benefit provided by the company to the employees in terms of section 115WB(1) of the Income Tax Act, 1961 and thereby determining the value of

fringe benefits at Rs. 502,01,03,796/- as against the returned value of Rs. 30,58,38,466/-. The action being most arbitrary, palpably erroneous and grossly unlawful, must be quashed with directions for appropriate relief to the appellant."

3. From the above ground, it is clear that the only grievance of the assessee relates to the contribution to the pension fund which was considered by the AO as a fringe benefit provided by the assessee to its employees in terms of section 115WB(1) of the Income-tax Act, 1961 (hereinafter referred to as the ñActò in short).

4. Facts of the case in brief are that the assessee e-filed its return of fringe benefit along with the return of income u/s 139(1) / 115WB(1) of the Act on 28.11.2006 declaring total fringe benefit at Rs. 30,58,38,466/-. The assessee although revised the return of income on 28.02.2007 but did not revise the return of fringe benefit. The AO issued notice u/s 115WE(2) to the assessee on 27.09.2007 and ask to furnish details. In response the assessee furnished the tax audit report giving month wise details of its contribution towards pension received by the trust as per following details :-

Month	Amt. debited to reveue code no. 10428	Banks contribution recd. By trust from	Banks contribution recd.ByTrustwithin

		Regions/divisions	prescribed time
APRILâ05	23042238.26	23479593.64	23042238.26
MAYâ05	23620830.58	23905533.59	23620830.58
JUNEâ05	23647586.62	24006906.71	23647586.62
JULYâ05	30682150.73	35766611.73	30682150.73
AUGâ05	34209192.17	36797197.73	34209192.17
SEPTâ05	35298849.27	37492173.16	35298849.27
OCTâ05	33600042.27	36779212.67	33600042.27
NOVâ05	37157773.72	37297586.33	37157773.72
DECâ05	37282375.08	37822542.80	37282375.08
JANâ06	35987241.43	37716772.17	35987241.43
FEBâ06	35903843.77	36897560.17	35903843.77
MARCHâ06	43460767.59	36303638.83	43460767.59
Addl.Contb. Madeby bank during the year			4310000000.00
YEAR	393892891.49	404265329.53	4703892891.49

5. The claim of the assessee was that the contributions to approved Pension Fund of Rs. 431 crore were not liable to fringe benefit tax

(FBT) and accordingly no provision for FBT on such contribution was considered necessary. The AO also found that the assessee had not paid FBT u/s 115 WB(1)(C) on any contribution by the employer to any approved superannuation fund for employees.

6. The AO asked the assessee to explain the nature and reason or not paying FBT on the payment related to contribution to approved pension fund of Rs. 470.39 crores. The assessee submitted to the AO as under :

> *" A Question was put up for clarification regarding taxability of an expenditure which has been disallowed u/s 37 of the Income Tax Act. The Department has clarified this question at point no. 35 and 36 of Circular no. 8/2005 dated 29.8.2005, the relevant extract is reproduced herewith :*
>
> *" Question No. 35 : Whether expenses disallowed under section 37 of the Income Tax Act on the plea that the expenses are personal in nature, would also be liable to Fringe Benefit Tax ?*
>
> *Section 37 of the Income Tax Act provides that any expenditure laid out or expended wholly and exclusively for the purpose of the business or profession shall be allowed in computing the income chargeable under the head 'profits and gains of business or profession'. Accordingly, any expenditure that is incurred for personal purposes is not allowable as deduction. Sub-section (2) of section 115WB provides for a levy on Fringe Benefit estimated on a presumptive basis using certain expenses as a measure. To the extent the expense incurred by the employer are personal in nature and have, therefore, been disallowed under section 37 of the Income Tax Act, such disallowance would not be liable to Fringe Benefit Tax. For example, let us assume a firm being an employer, has incurred an expenditure of Rs. 100 towards tour and travel, of which Rs. 40 is personal in nature. Therefore, the amount of Rs. 40, being personal in nature, will be disaloowed under section 37 of the Income Tax Act, and Fringe Benefit Tax will be levied on 20 per cent of the amount of Rs. 60 (Rs. 100-Rs.40).*

Question No. 36 : Whether expenditure identified as bogus expenditure in Income Tax Assessment will be liable to Fringe Bendit Tax.

Sub-section (2) of section 115WB provides that fringe benefits shall be deemed to have been provided by the employer to his employees if the employer incurs any expense on or makes any payment for the purposes referred to in clauses (A) to (P) of the said sub-section.

If an expenditure is found to be 'bogus' on the plea that it has not been actually incurred, the same is not allowed as a deduction under section 37 of the Income Tax Act. Accordingly, FBT will be levied only on such expenditure as is actually incurred for the purposes referred to in sub section 2 of section 115 WB. For example, if an employer has incurred Rs. 1000 towards travel, of which Rs. 200 is disallowed under section 37 of the Income Tax Act on the plea that it is 'bogus', Fringe Benefit Tax will be payable on 20 per cent of Rs. 800 (Rs. 1000-Rs.200)."

11. Assuming that Fringe Benefit Tax is levied on contribution made to superannuation fund, the inferences which can be drawn out of this is that employer-employee relationship exists in respect of such constitution but this relation ship has not been accepted while making order u/s 143(3). Thus, on one hand it is accepted that contribution towards superannuation fund is not an alalowable expenditure and on the contrary it is proposed to be treated as allowable expenditure for the purpose of Fringe Benefit Tax because then only Fringe Benefit Tax can be levied. This ambiguity in treatment of an expenditure should not be made.

Suppose,

Contribution of Rs. 100 crores to Pension Fund disallowed under Income Tax Act	*Tax @ 33.66%*
If disallowed under fringe benefit tax	*Tax @ 33.66%*
Total Tax	*67.32%*

The objective of the Fringe Benefit Tax is to tax those benefits which are not taxed in the hands of employees as perquisite. However, if contribution to Pension Fund is taxed as Fringe Benefit and also as pension when the employee retires, this results in Double taxation, which defeats the purpose of the abvoe legislation.

> *12. We request your honour to accept our submissions and do not subject the contribution made to supearannuation fund to Fringe Benefit Tax."*

7. The AO after considering the submissions of the assessee observed that the FBT applies to expenses incurred or the payment made for the purpose of business. He further observed that from the scheme of the FBT and CBDTôs Circular, the following possibilities can arise :-

a. Disallowance as well as no FBT

b. Disallowance and FBT-both

c. Disallowance but no FBT

d. No. disallowance and no FBT

8. The AO elaborated the aforesaid four facilities and observed that if an expense is covered by clauses (A) to (Q) of section 115WB(2) is disallowed as personal expenses u/s 37(1) of the Act then FBT can not be imposed on it and if the expense is actually incurred then FBT can be imposed and there is nothing in law which deems that bogus expenses booked are expenses liable to FBT. Therefore, bogus expenses have to be disallowed and there can be no FBT on those expenses. The AO referred to CBDTôs Circular no. 8/2005 dated 29.08.2005 which states that no FBT can be charged on the capital expenditure resulting in acquisition of an asset eligible for depreciation and in case capital expenditure is not resulting in

acquisition of assets eligible for depreciation u/s 32 of the Act the same will be disallowed u/s 37(1) of the Act and FBT will also be payable thereon. He also observed that in case of voilation of section 40A/ 43B/36(1) (iv)/(v), there will be disallowance but no FBT. He also observed that if the various expenses excluded from the purview of FBT are compliant with the relevant provisions for allowance and disallowance, these will be cases of no disallowance and no FBT. According to him the assesseeȇs case fit into aforesaid situation (b) i.e. disallowance and FBT both. The AO held that the contribution to approve pension fund by the assessee was liable for tax under the provisions of fringe benefit tax (FBT). Accordingly the amount of Rs. 471,42,65,330/- was added to the value of fringe benefit of the assessee.

9. Being aggrieved the assessee carried the matter to the ld. CIT(A) and submitted as under :-

"1. Section 19 of Banking Companies (Acquisition and Transfer of undertaking) Act, 1980 gives power to board of the bank to make regulations on various matters including on the following :

" the establishment and maintenance of superannuation, pension, provident or other funds for the benefit of officers or other employees of the corresponding new bank or of the dependents of such officers or other employees and the granting of superannuation allowances, annuities and pensions payable out of such funds."

The aforesaid powers of the board are exercisable in the following manner:

" The Board of Directors of a corresponding new bank may, after consultation with Reserve Bank of India and with the previous sanction of the Central

Government, [by notification in the official gazette] make regulations, not inconsistent with the provisions of this Act or any scheme made thereunder, to provide for all matters for which provision is expedient for the purpose of giving effect to the provisions fo this Act."

Relevant extracts of section 19 of Banking Companies (Acquisition and Transfer of undertaking) Act, 1980 is enclosed [Refer paper book page no. 1 to 3]

a) Bank, accordingly, formed a Pension Fund namely PNB (Employees) Pension fund trust based on its " Pension Regulations 1995" . The same was duly notified by the Central Government vide its Notification dated 29.09.1995 [Refer paper book page no. 4 to 5]

It may be noticed that the notification is being issued by the Central Government and applies to all public sector banks. The Public Sector Banks are therefore bound to comply with the above notification. Further, at the time of origin of this notification the person who participated are no less than the Central Government, RBI, and also the Apex Body of the Bank namely Indian Bank Association who have come to above understanding resulting in the above notification. Therefore, it has statutory value based on the notification issued referred above on 29.09.1995 by the Central Government. It is reiterated that it is not a non-statutory payment. It is a statutory payment backed by a notification by Central Government.

b) The above pension fund is an approved superannuation fund created in consultation with RBI and previous sanction of the Central Government. The said fund was approved under Rule 2(1) of Part-B of the Fourth Schedule [Refer paper book page no. 42] to the Income Tax Act, 1961.

c) The above Pension Fund set up by the Bank is not voluntary in the sense that while opting for the Fund may be voluntarily; the employee has to elect either the Provident Fund or the Pension Fund. Thus, there is a compulsion on the employee to accept one of the two funds. The expression "voluntarily used by the Finance Minsiter in his speech obviously refers to a situation where the employer and employee contractually agreed to establish a fund even though it is not required by law and is either over and above the statutory fund which is not a case with the Pension Fund of our bank as it is backed by notification by the Central Government.

As such, the fund is created under a statute and contributions to the abvoe funds are in the nature of statutory liability of the bank.

II. Employees can either opt for Provident fund or for Pension Fund and not for both Funds. Further, option once exercised is final and can not be changed. On opting for pension fund by employee, his balance in provident fund (employer's contribution) is transferred to pension fund. Accordingly, the bank's contributions to Pension Fund are in lieu of bank's contributions towards the provident fund. (Refer Paper Book page no. 6 for CBDT letter dated 03.01.1996)

III. As held by Hon'ble Supreme Court in the case K.P.Varghese v/s ITO (1981) 131 ITR 597 (SC) [Refer paper book page no. 7-23]. The speech made by the mover of Finance Bill explaining the reasons for introduction of the bill can certainly be referred to for the purpsoe of ascertaining the mischief sought to be remedied by the legislation and the object and the purpose for which the legislation was enacted."

10. The assessee also referred to the extract of the Budget Speech of the Finance Minister relating to the Fringe Benefit Tax introduced in the Finance Bill, 2005, which has been reproduced at page no. 5 and 6 of the impugned order for the cost of repetition, the same is not reproduced herein. It was further stated that contribution to pension fund of the bank was not voluntary but statutory and it was not for high-end employees / high-end managers but was applicable even for peon and that the assessee bank made contribution to pension fund @ 10% per month of the pay of employees who opted for pension fund made matching contribution @ 10% which was credited to their Pension Fund Accoun. However, shortfall, if any, on actuary valuation was being met out by the Bank. It was further stated that the objective of the fringe benefit tax was to tax those benefits which

were not taxed in the hands of employees as perquisites. However, if contribution to Pension Fund was taxed as fringe benefit and also as pension when the employee retires, that results in double taxation which defeats the purpose of the legislation. It was contended that there was no comparison of pension fund of the nationalised bank like the assessee with any other body corporate as compared by the AO. It was accordingly submitted that the contribution to Pension Fund by the assessee being statutory and in lieu of Provident Fund was subjected to same provisions of law as applicable to provident fund and since the contribution of Provident Fund was not subject to fringe benefit tax, the contribution to pension fund too could not be subjected to fringe benefit tax.

11. The ld. CIT(A), however, did not find merit in the submissions of the assessee and upheld the view taken by the AO by observing in para 4.2 of the impugned order as under :-

> *" 4.2 I have carefully considered the facts of the case, order of the AO and submissions made by the ld. AR. The only issue of the dispute in this appeal is regarding the taxability of the fringe benefits in respect of contribution to the superannuation fund/pension fund by the appellant. The AO is of the view that there is no exception available to the appellant as far as contribution made by it to the superannuation fund/pension fund are concerned because there is no ambiguity in the provisions of section115WB(1)(c), wherein any contribution by way of employer to an approved superannuation fund (for employees) is taxable as fringe benefits. The ld. AR in his submissions and arguments has primarily emphasized that in the finance minister's speech, at the time of bringing fringe benefits tax to the statute, it was intended that FBT applies where benefits are passed on by the employer to their high end employees, whereas the appellant bank has made contribution to*

all the employees. It is also emphasized by the ld. AR that in the case of the appellant contributions in the pension fund have been made in lieu of PF. I do not find any force in the argumetns of the Ld. AR and inclined to agree with the finding of the AO because when the provisions of the statute are straight, then it is settled principle of law that in such a scenario different interpretation in the lgiht of circumstantial facts and evidences are not requried. It is noted that the provisions of section 115WB(1)(c) clearly covers the contributions made to superannuation fund. Therefore, it is held that the AO has correctly made the addition on account of contributions made in pension fund by the appellant. Accoridngly, the addition made by him on this account is justified, hence, the same is confirmed."

Now the assessee is in appeal.

12. The ld. Counsel for the assessee reiterated to the submissions made before the authorities below and further submitted that the amount paid towards Pension Fund in lieu of Provident Fund was a statutory liability of the assessee and the provisions of Section 115WB (1)(c) of the Act were not applicable because it was not a fringe benefits by way of any contribution by the employer to approved superannuation fund for employees. It was further submitted that the issue under consideration is squarely covered by the decision of the ITAT, Hyderabad Bench ñAò , Hyderabad in the case of Andhra Bank, Hyderabad vs. DCIT, Circle 1 (1), Hyderabad in ITA no.601 / Hyderabad / 2012 for the assessment year 2006-07 vide order dated 16.7.2014, reliance was also placed on the following case law :-

1. Yoshio Kubo vs. CIT, 357 ITR 452 (Del) [2013]

2. The Royal Bank of Scotland, M.V., In Re (2014) 364 ITR 373 (AAR)

13. In his rival submissions, the ld. DR strongly supported the orders of the authorities below and reiterated observations made by the AO and the Ld. CIT(A) in their respective orders.

14. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the assessee is a schedule bank governed by the provisions of the Banking Regulation Act, 1949 and made the contribution towards Pension Funds of the employees. The said contribution by the assessee as an employer was brought to tax as eligible fringe benefit tax value during the year by the AO. The contention of the assessee before the ld. CIT(A) was that the contribution to Pension Fund was made in lieu of Provident Fund, it was statutory liability and since the contribution of provident fund was not considered for valuation of Fringe Benefit Tax, the contribution to pension fund also did not attract the provisions of fringe benefit tax. The said contention of the assessee was not accepted by the ld. CIT(A) who upheld the action of the AO. To resolve of present controversy it is relevant to discuss the provisions contained in section 115WB(1)(c) of the Act which reads as under :-

> *"115WB (1) – For the purpose of this Chapter "fringe benefits" means any consideration for employment provided by way of –*
> *(a) –*
> *(b) –*
> *(c) Any contribution by the employer to an approved superannuation fund for employees."*

15. On a similar issue, a co-ordinate bench of the I.T.A.T i.e. Hyderabad Benches ñAò, Hyderabad, analysed the various amendments and definitions relevant for the aforesaid section, in the case of Andhra Bank, Hyderabad vs. DCIT 1(1) Hyderabad (Supra) which read as under :-

" 9.1. As amended by Finance Act, 2006 –
"115WC.(1) For the purpose of this Chapter, the value of fringe benefits shall be the aggregate of the following namely : --
(a) -- ---- --
(b) The amount of contribution referred to in clause (c) of sub-section(1) of section 115WB which exceeds one lakh rupees in respect of each employee;
Extract of Section 17(2) as amended by Finance (No.2) Act, 2009.

"Salary", "perquisite" and "profits in lieu of salary" defined.

17. For the purposes of sections 15 and 16 and of this section, -

(1) "salary" includes –
. . . .
(2) "perquisite" includes –

(vii) the amount of any contribution to an approved superannuation fund by the employer in respect of the assessee, to the extent it exceeds one lakh rupees; and

9.2. Contribution as defined in Part-A of Fourth Schedule in Cluase-2 is as under :

"2. In this Part, unless the context otherwise requires,-

(i) "employer" means………;
(a) "employee" means………;
(b) "contribution" means any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own moneys, to the individual account of an employee, but does not include any sum credited as interest;

PART-B

***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 provident funds."*

9.3 Accordingly, the 'contribution' as defined in the provision means any sum credited to the individual account. Rationalizing the provision of fringe benefit tax the memorandum explaining the Finance Bill 2006 has clarified as under :

"It is proposed to amend the said clause (b) so as to provide that contribution by an employer to an approved superannuation fund to the extent it does not exceed rupees one lakh per employee in respect of whom contribution is made, shall not be liable to fringe benefit tax. For example, consider an employer who has three employees: A, B and C and he makes contribution to their account in the approved superannuation fund in the following manner :

Employee	Contribution to approved superannuation fund by the employer.
A	*Rs. 50,000*
B	*Rs. 90,000*
C	*Rs. 2,00,000*

In case of employees A and B, the value of fringe benefits shall be taken to be nil since contributions by the employer in respect of these employees does not exceed Rs. 1,00,000/- in each case. However, in the case of employee C the value of fringe benefit shall be Rs. 1,00,000/- (Rs. 2,00,000-1,00,000/-) for the purposes of levy of fringe benefit tax" .

9.4. There was another amendment in Finance (No.2) Bill 2009 wherein it was clarified as under :

"It is proposed to insert a new section 115WM to abolish the fringe benefit tax. Consequently, it is also proposed to restore the taxation of the fringe benefits as perquisites in the hands of the employees. Therefore, it is also proposed to amend clause (2) of section 17, -

(a) By substituting sub-clause (vi) so as to provide that perquisite shall include the value of any specified security or

sweat equity shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee. For this purpose, the value of any specified security or sweat equity shares, as the case may be, on the date on which the option is exercised by the assessee as reduced by the amount actually paid by, or recovered from, the assessee in respect of such security or shares. The "fair market value" will mean the value determined in accordance with the method as may be prescribed by the Board.

(b) By inserting sub-clause (vii) to provide that perquisite shall also include the amount of any contribution to an approved superannuation fund by the employer in respect of the assessee, to the extent it exceeds one lakh rupees.

(c) By inserting sub-clause (vii) to provide that perquisite shall also include the value of any other fringe benefit or amenity as may be prescribed".

16. From the aforesaid series of amendments and clarification it can be said that any amount which is contributed to an individual account of an employee to the extent of Rs. One lakh is excluded from the purview of Fringe Benefit Tax from assessment year 2007-08.

17. On a similar issue, the coordinate bench of the ITAT Hyderabad vide order dated 16.7.2014, in the case of Andra Bank Hyderabad vs. DCIT Circle 1 (1) Hyderabad (Supra) referred to the decision of the coordinate bench dated 27.11.2009 in the case of Rajasthan Rajya Vidyut Prasaran Nigam Ltd., which analysed this issue and held as under :-

"The above principle of interpretation laid down in various judgments of Hon'ble Supreme Court when read in context

with the purpose and intention for which the amendment was made u/s 115WB(1)(c) leaves no scope of debate that the said amendment was to remedy the unintended consequences and therefore, it is required to be considered as retrospective in operation so that a reasonable interpretation can be given to the scheme of levy of fringe benefit tax on contribution to superannuation fund as a whole. We, therefore, hold that the contribution to superannuation fund in present case being less than Rs.1.00 lac per employee, is not liable for fringe benefit tax. In the result, this ground of assessee is allowed."

18. From the above said discussion, it is clear that the provisions u/s 115WB(1)(c) are held to be applicable for the assessment year under consideration i.e. the assessment year 2006-07. It is also not in dispute that ñBank Employees Pension Schemesò was introduced in lieu of ñcontributory provident fundò at the option of employees and accordingly a settlement was signed between Indian Banks Associations represented by 52 member banks which included the assessee bank and representatives of workmen unions introducing a pension scheme in the Banking Industry and in terms of the settlement, an employee in service as on 1.11.1993 was to exercise his option to switch over to the ñPension Schemeò from the ñProvident Fund Schemeò, upon which the amount of CPF (banksô contribution) outstanding in his Provident Fund account would be transferred to the Pension Fund of the bank. Thus, the ñPension Schemeò introduced by banks was in lieu of the statutory ñProvident Fund Schemeò. The aforesaid settlement dated 1.11.1993 was later on made into scheme

and notified on 29th September, 1995 as ñBank Employeeôs Pension Regulationsò, which is a subordinate regulation having been framed by the Banks Boards under sectiuon 19(1) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980. The Pension Fund Scheme, therefore, has a statutory character and after obtaining the necessary ónoobjectionô from the Income-tax Authorities, the banks which were parties to the settlement dated 29.1.1993 had set up pension funds and the contribution made into such funds are as laid down in the scheme and constitutes among other things the following :

> *" (i)the contribution by the bank at the rate of 10% per month on the pay of the employee, which contribution was hitherto being made to the PF account.*
> *(ii) The accumulated contributions of the bank to the Provident Fund and interestaccrued thereon up to the date of such transfer in respect of the employee ;*
> *(iii) Additional annual contribution to the Fund as required to secure payment of pensionary benefits to the members of the Fund, based on actuarial investigation of the Fund as at 31st March of every financial year."*

19. In the present case, nothing is brought on record to substantiate that the contribution in the Pension Fund of the assessee bank was over and above the contributions to gratuity and provident fund. Moreover, in the absence of the Pension Scheme, the assessee would have continued to contribute the stipulate amount to the Provident Fund account of the employees and such stipulated contributions

would not have attracted fringe benefit tax. In our opinion, the contributions made by the assessee bank to the ñPension Fund Schemeò is only to secure pension payments which is its statutory obligation. Therefore, the assessee bank has established a superannuation Scheme for the purpose of providing pension to its eligible employees. In the present case, the assessee bank made a contribution of Rs. 471.42 crores to the Pension Fund for all its employees who were governed by the ñPension Fund Schemeò taken together based on the acturial valuation provided by the Actuarial Valuer appointed by the bank.

20. An identical issue has been adjudicated by the ITAT Hyderabad Benches A, Hyderabad in ITA no. 601/Hyderabad/2012 for the assessment year 2006-07 in the case of Andhra Bank Hyderabad vs. DCIT Circle 1 (1) Hyderabad and the relevant findings have been given in para 11.1 to 13 of the order dated 16th July 2014 which read as under :-

11.1. In the present case, assessee made a single contribution during the year to the superannuation fund for all its employees who were governed by this scheme taken together based on the actuarial valuation provided by the Actuarial Valuer. There is no dispute with reference to the fact that the amount of Rs.75,25,49,000/- was provided as short fall to the fund from making pension payable to eligible employees and this amount was arrived at on the basis of valuation of Actuarial Valuer appointed by the Bank. In respect of such single contribution made under defined benefit scheme, the details of contribution pertaining to each employee are not available in the Actuarial Valuation Report, since the amount is lump sum amount calculated based on the Actuarial Valuation having several underlying assumptions. The same is evident from the Actuarial Valuation Report issued.

11.2. It was explained that there could be a scenario where the assets of the Scheme may be in surplus over its obligations, as per the actuarial valuation, due to various factors viz. reduction in the number of employees on the payroll of the assessee on the last day of the financial year visa- vis first day of that year, etc. Accordingly, the assessee may not be required to contribute for that particular year. Likewise, in subsequent year, there could be a scenario where the obligations/liabilities of the Scheme as per the actuarial valuation are higher than its assets and hence, assessee bank would be required to contribute to the Scheme in that particular year.

11.3. The actuarial risk (that benefits will cost more than expected) and investment risk fall, in substance, on the enterprise. If actuarial or investment experiences are worse than expected, the employer's obligation may increase. In view of the above, it is apparent that the contribution paid by the assessee bank is mainly made up of two components, firstly to meet the cost of the accruing benefits during the year and secondly, an adjustment for any deficit or surplus in the scheme at the time for the past year(s). Accordingly, in view of the above arguments and given the nature of the 'Defined Benefit Scheme', it is not possible to derive the contribution on a per employees basis which may be used for income tax purposes.

12. In the case of Royal Bank of Scotland Inre, 45 Taxman.com 283, the Authority for Advanced Rulings has analysed the defined benefit scheme and held that in the defined benefit scheme employer's contribution to the superannuation fund assures only future benefit to employees and they did not get any vested right at the time of making contribution to the fund. In the context of analyzing the tax deducted at source provisions, it was held that such contribution need not be treated as chargeable perquisite in the hands of employee until they are entitled to receive it. The Hon'ble AAR followed the principles laid down by Hon'ble Delhi Court in the case of Yoshio Kubo vs. CIT (2013) 36 taxmann.com 1 (Del.) wherein it was held out that when an amount does not result in a direct present benefit to the employee who does not enjoy it but assures him a future benefit in the event of contingency, the payment made by the employer does not vest in the employee. In view of the above principles laid down by the Hon'ble Delhi Court as well as the advise given by Authority for Advanced Rulings which, in turn, followed the Hon'ble Supreme Court decision in the case of CIT vs. L.W. Russel (1964) 53 ITR 91 (SC), the amount paid during the year cannot be considered as a contribution to superannuation fund as contemplated under the provisions of section 115WB(1)(c).

12.1. In view of the above, since the amount is not paid to the benefit of any individual employee, the lump sum contribution made under the defined benefit scheme, in our opinion, does not attract provisions of 115WB(1)(c). As per the definition of 'contribution', no individual employee had any benefit earmarked, the payment cannot be considered as covered by the provisions of 115WB(1)(c).

13. As briefly stated earlier, the Ld. CIT(A) followed the Coordinate Bench decision in giving benefit of amendment brought in later year to the year under consideration. It was submitted that the order of the Ld. CIT(A) could not be implemented as benefit of employee could not be ascertained in view of the scheme of the benefit fund and accordingly, even though average contribution to each of the employees covered by the scheme is less than Rs. 1 lakh, A.O./assessee could not furnish any information about individual employee's benefit. However, this issue becomes academic in nature as we have already held that contribution made to the fund under this benefit scheme cannot be considered as the amount to be considered under the provisions of section 115WB(1)(c) for the purpose of FBT. In view of this, assessee's grounds are allowed."

21. Since the facts of the present case are similar to the facts involved in the aforesaid referred to case of Andhra Bank, Hyderabad vs. DCIT Circle 1, (1) Hyderabad in ITA no. 601/Hyderabad/2012 for the assessment year 2006-07. We, therefore, by respectfully following the aforesaid order of the Coordinate Bench on an identical issue, set aside the impugned order and direct the AO to allow the claim of the assessee and not to consider the impugned contribution of the assessee to the ñPension Fundò as a Fringe Benefit provided by the assessee to its employees. During the course of hearing, no other decision was brought to our notice. Similar issue is involved in ITA Nos. 1826 and 4254/Del/2011 for the assessment years 2007-08 and 2008-09, therefore, our findings given in the former part of this order in respect of ITA No. 4493/Del/2009 for the assessment year 2006-07 shall apply mutatis mutandis.

22. In the appeals relating to Punjab and Sind Bank, New Delhi in ITA Nos. 3869/Del/2015, 1363/Del/2011, 6379/Del/2012 and 2981/Del/2013 for the assessment years 2006-07, 2007-08, 2008-09, 2009-10 respectively, the issue involved is identical as was involved in the case of Punjab National Bank in ITA no. 4493/Del/2009 for the assessment year 2006-07 (Supra), therefore, the findings given in former part of this order shall apply with the same force.

23. One another issue relating to charging of interest u/s 115WJ and 234 D has been raised in the appeals of Punjab and Sind Bank, New

Delhi. As regards to this issue, it was a common contention of both the parties that it is consequential in nature. We order accordingly.

24. In the result, appeals of the assessees are allowed.

(Order Pronounced in the Court on 15/06/2016.)

Sd/- Sd/-

(Beena A Pillai) **(N. K. Saini)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated: 15/06/2016
Binita
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

By order

Asstt. Register