* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 377 OF 2010**

Judgment Delivered On: 17.3.2011

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COMMISSIONER OF INCOME TAX . . . APPELLANT
Through : Ms. Rashmi Chopra, Advocate

VERSUS

RANBAXY LABORATORIES LTD. . . .RESPONDENT
Through: Mr. M.S. Syali, Sr. Advcoate with Ms. Mahua Kalra, Ms. Madhavi Swarooop and Ms. Husnal Syali, Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. In this appeal following questions of law are proposed by the Revenue:-

(a) Whether the Ld. ITAT erred in law and on merits in holding that duty drawback relating to new industrial undertaking is eligible for deduction while computing book profit u/s 115 JA of the Income Tax Act, 1961?

(b) Whether the Ld. ITAT erred in law and on merits in holding that duty drawback is to be included while computing deduction u/s 80IA of the Income Tax Act, 1961?

(c) Whether the Ld. ITAT erred in law and on merits in deleting the addition on account of provision for pension?

(d) Whether the Ld. ITAT erred in law and on merits by holding that disallowance of provision for

2. In so far as question no. (a) is concerned, after reading t order of the CIT (A) as well as the ITAT, we found that it does not arise for consideration in this appeal. The Tribunal vide impugned order has decided the appeals of the respondent assessee pertaining to assessment year 1999-2000 and 2001-02. In this appeal we are concerned with assessment year 2001-02. From the order of the CIT (A) as well as ITAT, we find that this question of law pertains to assessment year 1999-2000 and not this year.

3. In so far as question no.(b) is concerned, Mr. Syali, learned Senior Counsel appearing for the respondent/assessee fairly concedes that this issue has to be decided in favour of the Revenue in view of the judgment of Supreme Court in the case of ***Liberty India*** *Vs.* ***Commissioner of Income Tax,*** 317 ITR 218.

4. Questions no. (c) and (d) relate to the provision for pension made by the assessee. The assessee is following mercantile system of accounting. It is having Superannuation Scheme for its employees. As per the assessee, in order to retain managerial employees it also introduced pension scheme for such managerial employees which is over and above the benefits available under the superannuation scheme of the company. This scheme was non-funded and applicable to all management employees. The liability on this account for the year in question amounting to ₹ 3,61,63,024/- was provided following AS-15 based on actuarial valuation. For making this provision, the assessee sought deduction thereof. The Assessing Officer disallowed the same by invoking the provisions of Section 43B (b) of the Act on the ground that even if it was an

absence of contribution to the pension fund. The CIT (A), howeve reversed the aforesaid decision of the Assessing Officer. Section 43B (b) of the Act reads as under:-

> "43B. Notwitstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of
>
> (a)……………………
>
> (b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees."

5. Section 43 B (b) is inserted with a view not to allow certain deduction unless actual payments are made in that behalf. The question for consideration is as to whether provisions of clause (b) of Section 43 B of the Act are applicable in the instant case. As stated above, the assessee had created the provision for pension by introducing pension Scheme over and above the benefits available under the superannuation scheme. Whether such a provision would be covered by any of the funds stipulated in clause (b), would be the causal. Admittedly, the creation of the aforesaid provision for pension can neither be treated as contribution to any provident fund or superannuation fund or gratuity fund.

6. Ms. Rashmi Chopra, learned counsel for the Revenue, however, argued that it would fall within the expression "any other fund for the welfare of employees" which is specifically stipulated in clause (b). We are unable to accept this submission of the learned counsel for the Revenue. It cannot be denied that Section 43 B (b) was inserted with a view to disallow certain statutory liabilities which

deduction under the garb of mercantile system of accounting. It was for this reason that Section 43B of the Act provides that these deductions would be admissible on actual payment. We are concerned here with clause (b) of Section 43B of the Act. This clause deals with certain funds available for the benefit of the employees and, therefore, unless the payments are actually made to those employees, the same would not be entitled for deduction. Clause (b) of Section 43 B of the Act mentions about provident fund, superannuation fund, gratuity fund and is followed by "any other fund for the welfare of the employees". This last clause thus has to take its colour from the previous clauses and has to be read *ejusdem generis.*

7. It is stated at the cost of repetition that the intention of the legislature behind enacting Section 43 (b) of the Act was to disallow the statutory liabilities. The CIT (A), under these circumstances, was right in its opinion that the legislature never intended to disallow a claim for ascertained liability which is computed scientifically in respect of the retiral benefits of its employees and which is not to be contributed to a fund. The CIT (A) has supported its view by referring to clause (f) of Section 43 B of the Act which was inserted w.e.f. 1st April, 2002. Thus, by adding this clause, the legislature made it clear that any such provision for leave encashment would *ipso facto* not be eligible for deduction unless the actual payment is made. For disqualifying a provision for leave encashment, a specific clause had to be inserted by the legislature as the legislature was conscious of the fact that this clause would not be covered by the

8. We are in agreement with the view of the CIT (A) that t pension scheme of the assessee does not envisage any regular contribution to any fund or trust or any other entity. The pension scheme provides that pension would be paid by the appellant to its employee on attaining the retirement age or resigning after having rendered services for specified years. Thus, where the liability on this account accrues from year to year, the same is payable on retirement/resignation of the eligible employees. In view thereof, the ratio of the judgment of the Supreme Court in ***Metal Box Company of India Ltd.*** *Vs.* ***Their Workmen*** 73 ITR 53 and ***Bharat Earthmovers*** *Vs.****CIT,*** 245 ITR 428 would clearly get attracted.

9. We, thus, decide these questions of law against the Revenue and in favour of the assessee. As a result, this appeal is allowed in respect of question no. (c) & (d).

10. This appeal stands disposed of in terms of the above.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MARCH 17, 2011
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