

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI JOGINDER SINGH, JUDICIAL MEMBER**

ITA NO. 3698/MUM/2013 : **(A.Y : 2008-09)**
DCIT-10(1), Vs. M/s. ICICI Lombard General
Mumbai (Appellant) Insurance Co. Ltd.,
414, Veer Savarkar Marg,
Prabhadevi, Mumbai 400 025.
PAN : AAACI7904G (Respondent)

ITA NO. 3712/MUM/2013 : **(A.Y : 2008-09)**
M/s. ICICI Lombard General Vs. Addl. CIT, Range-10(1),
Insurance Co. Ltd., Mumbai (Respondent)
414, Veer Savarkar Marg,
Prabhadevi, Mumbai 400 025.
PAN : AAACI7904G (Appellant)

Assessee by : Ms. Aarti Vissanji

Revenue by : Shri A.K. Kardam

Date of Hearing : 12/07/2016

Date of Pronouncement : 31/08/2016

ORDER

PER G.S. PANNU, AM :

These are cross-appeals filed by the assessee and the Revenue against the order of CIT(A)-21, Mumbai dated 05.03.2013, pertaining to the Assessment Year 2008-09, which in turn has arisen from the order

passed by the Assessing Officer dated 16.12.2011 under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. The captioned assessee is engaged in the business of General Insurance and for assessment year under consideration, it filed a return of income declaring an income of Rs.111,10,82,730/-. The Assessing Officer assessed the total income at Rs.224,99,28,526/- under the normal provisions of the Act. This income was deduced after disallowing the exemptions claimed by the assessee u/s 10(38), 10(15) and 10(34) of the Act on account of profit on sale of investments – Rs.54,18,03,880/-; interest – Rs.14,11,04,910/-; and, dividend – Rs.5,87,77,006/- respectively. Additionally, the Assessing Officer also disallowed Rs.39,71,60,000/- debited in the Profit & Loss Account on account of Provision for expenses on the ground that such expenses could not be said to have accrued as it was a mere provision. The sum and substance of the stand of Assessing Officer was that the income of assessee from the business of Insurance was required to be determined in terms of Sec. 44 of the Act read with First Schedule of the Act and accordingly, the exemptions under Sec. 10(38) or Sec. 10(15) or Sec. 10(34) of the Act were not applicable. The aforesaid action of the Assessing Officer was carried in appeal before the CIT(A) on various issues. On some issues, CIT(A) has allowed relief against which Revenue is in appeal before us, whereas on issues where the action of Assessing Officer has been upheld, assessee is in appeal before us.

3. In this background, we may now take up the appeal of Revenue, wherein the Grounds of appeal read as under :-

"On the facts and in the circumstances of the case and in law, the Ld CIT(A)'s erred in

1.
 - i) *allowing the deduction u/s.10(38) for gains/loss on sale of investment aggregating to Rs.54,18,03,880/-; thereby ignoring the fact that the assessee company is engaged in the insurance business and that Computation of its Income from insurance business is to be governed as per special section 44 of the Income Tax Act r.w.Rule 5 contained in the First Schedule.*
 - ii) *in not appreciating that the provisions of sec. 10(15), 10(34) and 10(38) were not applicable in the case of assessee company.*
2.
 - i) *Deleting the disallowance of AO made on account of interest Rs. 14,11,04,910/ - claimed by assessee company as exempt u/s. 10(15) and dividend Rs.5,87,77,006/- exempt u/s. 10(34/35) of the Act ignoring the fact that the assessee company is engaged in the insurance business and that Computation of its Income from insurance business is to be governed as per special section 44 of the Income Tax Act r.w.Rule 5 contained in the First Schedule.*
 - ii) *in not appreciating that the provisions of sec. 10(15), 10(34) and 10(38) were not applicable in the case of assessee company.*
3.
 - i) *misrepresenting that the AO disallowed of Rs.39,71,60,000/- towards non-deduction of TDS at source by the assessee, and instead ignoring the fact that the AO disallowed the said amount exclusively on account of non-justification of the claim of Provisions to the extent of Rs.8,85,52,000/- and on the balance amount disallowance is made u/s.40(a)(ia) of the Act for*

non-deduction of TDS.

- ii) ignoring the remarks of the Auditors in the Tax Audit Report at Clause 27(b)(iii) that the assessee company did not deduct the TDS since the Provisions for expenses made during the year are reversed in the consequent year.*
- iii) Erred in allowing the Provisions for expenses without verifying whether TDS has actually been deducted by the company on the Provisions for expenses to the extent of Rs.26,17,90,000/-.*
- iv) On the facts and in the circumstances it is praised the matter should be remanded to file of AO for practical verification on this issue.*
- v) allowing the ad-hoc Provision for expenses to the extent of Rs.8,85,52,000/-(being total of Communication Rs.3.89 crs., Interest & Bank Charges Rs.1,74 crs., Printing & Stationery Rs. 1.34 crs. and Travel & Conveyance Rs. 1.87 crs.) misrepresenting the ground that the TDS was not deductible thereon; instead ignoring the fact that the AO had disallowed this part of claim amounting to Rs.8,85,52,000/- exclusively on account of non-justification of the claim of Provision of these specific expenses.”*

4. The issue raised by the Revenue in Ground of appeal no. 1 arises from the action of CIT(A) in holding that assessee was eligible for claim of exemption u/s 10(38) of the Act with respect to gain/loss on sale of investments aggregating to Rs.54,18,03,880/-. On this aspect, it was a common point between the parties that such issue had come up before the Tribunal in earlier assessment years also and the claim of the assessee has been upheld. In this context, it is noticed that CIT(A) has

followed the decision of the Tribunal for Assessment Year 2003-04 vide order dated 10.10.2012 in ITA No. 2398/Mum/2009. The relevant discussion in the order of Tribunal dated 10.10.2012 (*supra*) reads as under :-

“5. We have considered the rival submissions as well as the relevant material on record. There is a special provision for computation of income chargeable under the head “profits and gain” inter-alia in the business of Insurance under section 44 of the I T Act and the same shall be computed in accordance with the Rule containing in first schedule of the Act. The profits and gains of business of insurance other than the life insurance shall be computed as per Rule 5 of First Schedule as under:

- 5. The profits and gains of any business of insurance other than life insurance shall be taken to be the profit before tax and appropriations as disclosed in the profit and loss account prepared in accordance with the provisions of the Insurance Act, 1938 (4 of 1938) or the rules made thereunder or the provisions of the Insurance Regulatory and Development Authority Act, 1999 (4 of 1999) or the regulations made thereunder, subject to the following adjustments;*
 - a. Subject to the other provisions of this rule, any expenditure or allowance including any amount debited to the profit and loss account either by way of a provision for any tax, dividend, reserve or any other provision as may be prescribed which is not admissible under the provisions of sections 30 to 43B in computing the profits and gains of a business shall be added back;*
 - b. (i) any gain or loss on realisation of investments shall be added or deducted, as the case may be, if such gain or loss is not credited or debited to the profit and loss account;*
 - (ii) any provision for diminution in the value of investment debited to the profit and loss account, shall be added back;*

- c. *such amount carried over to a reserve for unexpired risks as may be prescribed in this behalf shall be allowed as a deduction.”*

5.1 The bare reading of the amended provisions of Rule 5 of First Schedule makes it clear that the profits and gains shall be taken to be the profit before the tax and appropriately disclosed in the P&L Account prepared in accordance with the Insurance Act, 1938 or the Rule made there under or the provisions of IRDA Act. There is no dispute that the assessee before us has included the profit on sale of investments in the profit and gain as declared in the accounts prepared in accordance with the provisions of Insurance Act 1938. It is also not the case of the assessee that the profits/gains on sale of investments is not required to be included in the P&L Account prepared in accordance with the provisions of Insurance Act. Therefore, once the profit on sale of investment is required to be included in the P & L account in accordance with the provisions of Insurance Act, then as per the Rule 5 of First Schedule of the I T Act, no adjustment is required to be made on account of the amount of profits on sale of investment already included in the P&L Account. Thus, we find force and substance in the contention of the Id DR that once the assessee has included the gain on sale of investments in the P&L account prepared as per the provisions of the Insurance Act, 1938, then the said amount cannot be reduced while computing the income as per provisions of sec. 44 r.w First Schedule of the I T Act.

5.2 However, in the series of decisions of the Tribunal a view has been taken that the amendment vide Finance Act 1988 w.e.f 1.4.89, the sub rule (b) of Rule 5 of First Schedule was omitted with the purpose to grant exemption to the insurance companies with regard to the profit on sale of investments. The Tribunal has taken note of the fact that in the corollary, it has been provided in the circular no.528 dated 16.12.1988 that the loss incurred by the general insurance companies on realization of investment shall not be allowed as deduction in computing the profit chargeable to tax.

5.3 In the latest decision dated 22.10.2010, this Tribunal in the case of Tata AIG General Insurance Co Ltd vs ACIT in ITA No.2597/Mum/2009 after considering the earlier decisions of the Tribunal has held in paras 18 to 20 as under:

“18. We have carefully considered the rival contentions. There is no dispute that under the guidelines issued by the IRDA (Auditors Report) Regulations of 2002, for preparation of financial statements, the profit on sale of investments is to be credited to the Profit and Loss Account of the insurance company. There is also no dispute that the assessee has credited the Profit and Loss Account with such profit the question is whether such profit can be excluded and exemption can be claimed. Rule 5(b), as it stood before being omitted from 01.04.1989, was as follows: -

‘any amount either written off or reserved in the accounts to meet depreciation of or loss on the realization of investments shall be allowed as a deduction, and any sums taken credit for in the accounts on account of appreciation of or gains on the realization of investments shall be treated as part of the profits and gains;

Provided that the Assessing Officer is satisfied about the reasonableness of the amount written off or reserved in the accounts, as the case may be, to meet depreciation of or loss on the realization of investment.

The argument on behalf of the assessee primarily is that when the rules for preparation of the final accounts provide that the profit on sale of investments, should be shown in the credit side of the Profit and Loss Account, then there was no question of rule 5(b) being applicable and that was the reason why the said rule was omitted with effect from 01.04.1989 and the effect of the omission is that where the Profit and Loss Account already includes the profit on sale of investments, the same shall stand excluded. The effect of the omission of the rule was considered by the Pune

Bench of the Tribunal in its order dated 31 August 2009, in the case of Bajaj Allianz General Insurance Company, in ITA No: 1447/PN/2007 and CO No:521PN12007 (assessment year 2003-04). A copy of the said order has been filed before us. The Tribunal has also considered the Circular No.528 dated 16.12.1988. After analyzing the impact of the omission of rule 5(b) and the Circular, the Tribunal held as under. –

‘8. A conclusion can be drawn on the basis of the above elaborate discussion that the deletion of sub rule (b) from Rule 5 of the First Schedule was with a specific purpose. This Schedule not only prescribes the method of computation of income of Insurance Business in part (A) but also prescribe the method of computation of other Insurance Business in Part (B). Rule 5 is within Part (B) and earlier it has prescribed the method of taxation of profit on sale of investments which was later on scraped. Even by applying a reverse logic we must arrive at the same conclusion that had the impugned income’ was earlier taxable under one specific clause but even on its deletion no clause was Introduced or replaced to prescribe the method of taxation of such income;. Therefore the Revenue Department has no right to tax such an income in the absence of any enabling provision. Naturally, such a deletion cannot be treated a superfluous action but this change had to give a definite judicial meaning. We have to ascribe a logical conclusion to the said deletion of sub rule (b) from Rule 5 and the natural meaning is that after the deletion the income described therein is out of the purview of computation of Insurance Business from the First schedule therefore consequently cannot be taxed u/s 44 of I T Act. After expressing this view we hereby dismiss the cross objection of the revenue’.

19: The aforesaid order of the Pune Bench, which was in the case of a company carrying on general insurance

business, was followed by the Mumbai Bench Of the Tribunal in its order dated 17.09.2010, in the case :of HDFC ERGO General Insurance Company Ltd., in ITA No: 338/Mum/2009 (assessment year 2004- 05) as also in its Order dated 30.04.2010, in the case of Reliance General Insurance Co. Ltd., in :ITA No. 781/Mum/2007 (and other appeals).Copies of these orders have also been filed before us. In these orders it has been held that the profit on sale of investment in the case of an assessee carrying on general insurance business cannot be brought to tax after the omission of rule 5(b) and as per the Circular cited above. Since the controversy before us is identical, respectfully following the orders of the Pune and Mumbai Benches of the Tribunal cited above, we direct the Assessing Officer to exclude the profit of Z47,45,699/- on the sale of investments from the assessment • V

20. The learned CIT DR, however, argued that the effect of the omission of rule 5(b) is just the opposite of what the assessee has contended. According to him, after 01.04.1989 the exemption was taken away. He submitted further that the profit on sale of the investment has already been included in the Profit and Loss Account and there is no authority to take it out even under rule 5(b) as it existed before 01.04.1989. According to him, there was no scope for applying the rules of interpretation when the statutory provisions are clear. Since the matter is concluded by the orders of the Tribunal cited supra, where all these aspects have been considered, we are unable to take a different view of the matter. Thus Ground No.4 is allowed.”

5.4 Since the Tribunal has been taking a consistent view on this issue in a series of decisions as relied upon by the Id AR of the assessee; therefore, to maintain the rule of consistency and uniformity on this aspect, we decide this issue in favour of the assessee and against the revenue.”

5. It is pointed out that in Assessment Year 2004-05 also the Tribunal vide its order dated 18.09.2013 in ITA No. 4287/Mum/2009 followed its earlier decision dated 10.10.2012 (*supra*) and allowed the claim of the assessee. Similarly, in Assessment Years 2005-06 and 2006-07, the Tribunal has upheld its earlier decisions vide order dated 05.06.2014 in ITA Nos. 1714 & 1715/Mum/2011. It has also been pointed out that in Assessment Year 2007-08 also, the Tribunal vide its order dated 12.02.2015 in ITA Nos. 7844 & 7619/Mum/2011 has decided the issue in favour of the assessee. Apart therefrom, the learned representative for the assessee pointed out that the view of the Tribunal is also in consonance with the clarification issued by CBDT vide Circular dated 21.02.2006, which has indeed been referred by the CIT(A) in the impugned order.

6. For all the above reasons, and in the absence of any contrary decision brought to our notice, the action of CIT(A) is hereby affirmed. Thus, Revenue fails in Ground of appeal no. 1.

7. Insofar as Ground of appeal no. 2 is concerned, same relates to the decision of CIT(A) in holding that assessee is eligible for claiming exemption u/s 10(15) and 10(34/35) of the Act of Rs.14,11,04,910/- and Rs.5,87,77,006/- respectively. On this aspect, it is seen that the CIT(A) allowed the plea of assessee by referring to the clarification issued by CBDT dated 21.02.2006 whereby it is clarified that exemption available to any other assessee under any of the clauses of Sec. 10 of the Act shall also be made available to a person carrying on non-life insurance

business. Apart therefrom, at the time of hearing the learned representative for the assessee has referred to the decision of Tribunal in the case of assessee for Assessment Year 2007-08 (*supra*), wherein similar issue has been decided in favour of the assessee following precedents in the case of ICICI Prudential Insurance Co. Ltd. (*supra*) and New India Assurance Co. Ltd. (*supra*). The relevant discussion in the order of Tribunal dated 12.02.2015 reads as under :-

“3. The issues raised vide Ground No. 2 have been considered by the Tribunal in the case of ICICI Prudential Insurance Company Ltd. in ITA No. 6854, 6855, 6856 & 6859/Mum/2010. The Tribunal has considered the issue at page 59 of its order and at page 60 the Tribunal has considered the decision of Life Insurance Corporation of India vs. CIT (Bom) and at page 62 the Tribunal has considered the decision in the case of New India Assurance Company Ltd. and finally at para 49 of this order the Tribunal concluded that the assessee is entitled to get exemption under section 10 of Act, 1961. A similar issue was considered by the Hon'ble Jurisdictional High Court in Writ Petition No. 2560 of 2011 dated 1/12/2011, wherein Hon'ble High Court has quashed and set aside the notice issued for reopening of the assessment when the Revenue sought to reopen the completed assessment for disallowing the claim of deduction allowed under section 10 of the Act. In the original assessment order. Respectfully following the aforesaid judicial decision we confirm the findings of the Ld. CIT(A) on this issue and dismiss ground No. 2 of the appeal.”

Following the aforesaid precedent, and the basis on which CIT(A) has allowed the relief, we find no reason to interfere with his ultimate decision, which is hereby affirmed. Thus, Ground of appeal no. 2 raised by the Revenue is also dismissed.

8. Insofar as Ground of appeal no. 3 is concerned, the same arises out of disallowance of Rs.39,71,60,000/- made by the Assessing Officer. In this context, it is noticed that the Assessing Officer disallowed the expenses on two grounds. Firstly, according to the Assessing Officer, such amount represented expenses incurred on performance linked incentive for employees, operating expenses like advertisement, legal and professional fees, courier charges, repairs and maintenance, etc. According to the Assessing Officer, assessee was following mercantile system of accounting and since the impugned claim was merely a provision for expenses, the same was not allowable. Secondly, the Assessing Officer also noticed that out of the aforesaid total expenditure, tax has not been deducted at source with respect to expenditure of Rs.23,92,90,000/- and, therefore, the said amount was also hit by Sec. 40(a)(ia) of the Act. Before the CIT(A), assessee has made varied submissions, which have been reproduced by CIT(A) in para 6.2 of his order. On this aspect, CIT(A) has allowed partial relief. The CIT(A) has allowed relief to the extent where, according to him, either the TDS was deducted or in cases where there was no requirement to deduct tax at source. The CIT(A) confirmed the disallowance with respect to a sum of Rs.6,27,01,000/- representing Miscellaneous expenses and Rent, Rates & Taxes where, according to him, tax was required to be deducted but has not been deducted by the assessee. For the balance of expenditure of Rs.33,45,59,000/-, CIT(A) has deleted the disallowance. Revenue is in appeal by way of Ground of appeal no. 3 above whereas in its cross-appeal, assessee has raised

Ground of appeal no. 3, which reads as under, assailing the sustenance of addition to the extent of Rs.6,27,01,000/- :-

“3. Re: Disallowance of provision for expenses u/s 40(a)(ia) of Rs.6,27,01,000

On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the disallowance of provision for expenses in respect of miscellaneous expenses & rent, rates & taxes on the ground that TDS has not been deducted on the said payments without appreciating the fact that TDS on the same has been deducted by the Appellant & paid to the government.”

9. Since the aforesaid two cross-grounds relate to the same issue, they are being taken up together.

10. On this aspect, Id. DR submitted that the CIT(A) has only recorded a finding with regard to one aspect of the controversy, namely disallowance u/s 40(a)(ia) of the Act and not addressed the other point raised by the Assessing Officer to the effect that said claim was merely a provision as the expenses could not be said to have been accrued.

11. On this aspect, learned representative for the assessee pointed out that the details of such expenses were very much before the lower authorities and were examined by the CIT(A). In this connection, our attention has been drawn to a copy of the written submissions dated 17.12.2012 addressed to the CIT(A), a copy of which has been placed in the Paper Book at pages 35 to 41. On that basis, it is sought to be made out that the justification for creating such provision for expenses was

detailed before CIT(A) and in this regard reliance was also placed on the judgment of Hon'ble Bombay High Court in the case of *American Express International Banking, 258 ITR 601 (Bom)*. The learned representative has pointed out that it was clearly brought out that it was being done as per regular method of accounting followed by the assessee and which had been accepted by the Department in the past years also. In this context, the learned representative for the assessee has also referred to the written communication dated 5.12.2011 addressed to Assessing Officer, a copy of which is placed at pages 42 to 44 of the Paper Book, to show that justification for allowability of expenditure represented by the provision for expenses was explained during the assessment proceedings. On that basis, it was sought to be canvassed that there was no justification to say that the said provision for expenses was not an allowable expenditure. Insofar as the issue raised by the assessee in its appeal is concerned, the learned representative referred to para 6.2 of the order of CIT(A) and pointed out that the items of Miscellaneous expenses and Rent, Rates & Taxes amounting to Rs.6,27,01,000/- have been disallowed. In this context, it was pointed out that there was no justification for any disallowance as wherever required, the requisite tax has been deducted and deposited to the State exchequer. The learned representative pointed out by referring to page 32 of Paper Book, wherein is placed copy of clause 27 of Form 3CD of the Auditors report, to say that even for the provision for expenses created at the year-end, requisite tax has been deducted. It was, therefore, contended that even partial disallowance made by the CIT(A) was unsustainable.

12. We have carefully considered the rival submissions. In this context, it is noticed that the Assessing Officer in para 31 of the order has simply gone by the nomenclature, i.e., Provision for expenses, and disallowed the same considering that the sum does not reflect any accrued expenses. On the contrary, the plea of the assessee before him as well as before the CIT(A) was to the effect that making of the said provision is a practice followed of identifying the expenses at the year-end for the expenses incurred, which was a regular method of accounting followed by it and has been accepted by the Department in the earlier years also. In fact, CIT(A) has reproduced the submissions put forth by the assessee in this regard wherein reliance has also been placed on the judgment of Hon'ble Bombay High Court in the case of *American Express International Banking (supra)*. We find that there is no negation of the aforesaid plea set-up by assessee, and even before us the Ld. DR has not made any controversion on merits. Be that as it may, we may now examine as to whether the provisions of Sec. 40(a)(ia) of the Act have been properly invoked by Assessing Officer in the context of expenditure of Rs.23,92,90,000/- out of total disallowance of Rs. 39,71,60,000/-. In this context, we find that before the CIT(A), assessee pointed out that expenses amounting to Rs.23,92,90,000/- representing items of communication expenses, employees remuneration & welfare benefits, interest and bank charges, printing & stationery and travel & conveyance expenses are not liable for deduction of tax at source except employee's remuneration & welfare benefits, which have been duly subjected to deduction of tax at

source. Additionally, it was pointed out that on the balance of expenditure of Rs.15,78,70,000/-, assessee had deducted tax at source and paid by the due date, i.e., 31.5.2008. In this manner, assessee sought to point out that there was no justification for invoking Sec. 40(a)(ia) of the Act with respect to the entirety of expenditure of Rs.39,71,60,000/-. In this context, we find that the CIT(A) has confirmed the disallowance with respect to Miscellaneous expenses and Rent, Rates & Taxes amounting to Rs. 6,27,01,000/-. We find that the said finding of CIT(A) is quite contrary to the plea of assessee that the requisite tax has been deducted and paid by 31.5.2008. At the time of hearing, the learned representative pointed out that the expenses which were required to be subjected to tax at source, the aforesaid plea of the assessee holds good and that even if the dates of deposit of TDS are required to be verified by the Assessing Officer, it may be so directed.

13. Considering the aforesaid plea as also the findings of CIT(A), we find no reason to interfere with the decision of CIT(A) so far as it involves the deletion of the addition to the extent of Rs.33,45,59,000/-. Insofar as the sustenance of disallowance of Rs.6,27,01,000/- is concerned, we deem it fit and proper to direct the Assessing Officer to verify the plea of assessee that the corresponding tax deductible on such expenses have been deducted and paid by 31.5.2008, as contended by the assessee. For the limited purpose of verifying the aforesaid aspect, the matter is being remanded back to the file of Assessing Officer. The Assessing Officer shall examine the details put

forth by assessee in this regard and thereafter re-determine the disallowance u/s 40(a)(ia) of the Act, if any, in the context of claim of expenses of Rs.6,27,01,000/- as per law.

14. Resultantly, Ground of appeal no. 3 of Revenue is dismissed and Ground of appeal no. 3 of assessee is allowed, as above.

15. Now, we may take up the appeal of assessee, wherein the only Ground remaining is by way of Ground of appeal no. 2, which reads as under :-

“2. Re : Disallowance under Section 14A

2(a) On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the disallowance in respect of Section 14A of the Act following the orders of the preceding assessment years on the ground that the provisions of Section 14A, being in the nature of special provisions override the provisions of Section 44 of the Act.

2(b) The CIT(A) erred in concluding that once the provisions of Section 10 and Chapter VI-A are applicable, other related provisions including section 14A will automatically be applicable.”

16. The issue raised by assessee is with regard to applicability of Sec.14A of the Act. As per assessee, the disallowance envisaged u/s 14A of the Act is not applicable in the case of an assessee carrying on insurance business. On this aspect, it was pointed out that similar issue had come up in the case of assessee for Assessment Year 2004-05 and vide order dated 18.9.2013 (*supra*), the Tribunal decided the issue in favour of assessee following the decision in the case of ICICI Prudential

Insurance Co. Ltd. (*supra*). The relevant discussion in the order of Tribunal dated 18.9.2013 (*supra*) is as under :-

"5. Ground No. 2 regarding disallowance u/s 14A. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. The Ld. AR of the assessee has submitted that Rule 14A is not applicable in the case of Insurance Company. She has relied upon the decision of this Tribunal in case of ICICI Prudential Insurance Co. Ltd. Vs ACIT 140 ITD 41. On the other hand, the Ld. DR has submitted that when the income is non-assessable to tax being exempt then the provisions of section 14A shall be applied. This issue has been considered and decided by the Tribunal in case of ICICI Prudential Insurance Co. Ltd. Vs ACIT (supra) in para 46 as under:

"46. This issue is already decided by the Coordinate Benches in various cases. For the sake of record, the order in the case of General Insurance Corporation of India (supra) vide Para 9 is as under:

9. "Issue No.6 Non applicability of provisions of section 14A. (Modified Ground of Appeal No.3.1 to 3.4 – Original Ground of Appeal No.3.1 to 3.5). The issue is with reference to the applicability of section 14A and disallowance of expenditure in respect of sale of investment which are not taxed. We have heard the rival contentions. We also note that this issue is also considered by the Coordinate Bench in assessee's own case for 2006-07 vide Para 7 to 9:

7. Grounds of appeal no.4 regarding the expenditure under section 14A.

8. We have heard the rival contentions and perused the relevant record. We note that this issue has been considered and decided by the Pune Bench of this Tribunal in the case of Bajaj Allianz General Insurance Company limited v. Addl. CIT ITA No.1447/PN/2007 for the assessment year 2003-04 order dated 31.08.2009. This Tribunal in the case of JCIT v. M/s Reliance

General Insurance Co. in ITA No.3085/Mum/2008 for the assessment year 2005-06 vide order dated 26.2.2010 has considered this issue and decided in favour of the assessee. This order was followed by this Tribunal while deciding the issue in ITA No.781/Mum/2007 vide order dated 30.4.2010. Thus, this issue has been consistently decided in favour of the assessee and against the revenue by this Tribunal. The Pune Bench of this Tribunal in the case of Bajaj Allianz General Insurance Company limited v. Addl. CIT(supra) has decided this issue in paragraphs 17 to 20 as under:

“17. Finally the question to be answered is about the applicability of s. 14A in respect of sale of investment which is not taxed under the special circumstances of deletion of a sub-rule from the statute. It is not questioned that the impugned profit was non-taxable per se rather the accepted legal position is that the impugned profit was very much taxable in the past. Now it has been informed that this controversy in respect of insurance company set at rest by a decision of Tribunal, Delhi Bench verdict in the case of Oriental Insurance Co. Ltd. (ITA Nos. 5462 & 5463/Del/2003) asst. yrs. 2000-01 and 2001-02 order dt. 27th Feb.2009 [reported as Oriental Insurance Co. Ltd. v. Asstt. CIT[2010] 130 TTJ (Delhi)388 : [2010] 38 DTR (Delhi) 225-Ed.]. Therefore considering the vehement reliance of learned Authorized Representative it is worth to mention at the outset itself that the issue now stood resolved by this latest decision of Delhi, Tribunal in the case of Oriental Insurance Co. Ltd. (supra), the relevant portion reproduced below:

“17. We have heard rival submissions of the parties and have gone through the material available on record. Identical issue arose in assessee’s own case for asst. yr. 1985-86. The Tribunal accepted the plea of the assessee and in fact the issue went up to the Hon’ble Delhi High Court in asst. yrs. 1986-87 to 1988-89, which is reported as CIT v. Oriental Insurance Co. Ltd. [2003] 179 CTR (Delhi) 85 : [2002] 125 Taxman 1094 (Delhi), decided the issue in favour of the assessee by holding that s. 44 of the Act is a

special provision dealing with the computation of profits and gifts of business of insurance. It being a non obstante provision has to prevail over other provisions in the Act. It clearly provides that income from insurance business has to be computed in accordance with the rule contained in the First Schedule. It is not the case of the Revenue that the assessee has not computed the profits and gains of its insurance business in accordance with the said rules. Reliance was placed on the scope of s. 144, as held in the case of General Insurance Corporation of India v. CIT [1999] 156 CTR (SC) 425: [1999] 240 ITR 139 (SC), wherein their Lordships of the Apex Court have categorically held that the provisions of s. 44 being a special provision govern computation of taxable income earned from business of insurance. It mandates the tax authorities to compute the taxable income in respect of insurance business in accordance with the provisions of the First Schedule to the Act. In the light of these, their Lordships of Delhi High Court have held that no question of law, much less a substantial question of law survives for their consideration. In other words, order of the Tribunal has been affirmed. Following the same reasoning, addition made by the AO is deleted.

22. *We have considered the rival contentions and gone through the records. The provisions of s. 44 read as under:*

“44. Insurance business.-Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head ‘Interest on securities’. ‘Income from house property’, ‘Capital gains’ or ‘Income from other sources’, or in s. 199 or in ss. 28 to 43B, the profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or by a cooperative society, shall be computed in accordance with the rules contained in the First Schedule”.

23. *The above provision makes it very clear that s.44 applies notwithstanding anything to the contrary contained within the provisions of the IT Act relating to computation of income*

chargeable under different heads. We agree with the learned counsel that there is no requirement of head-wise bifurcation called for while computing the income under s. 44 of the Act in the case of an insurance company. The income of the business of insurance is essentially to be at the amount of the balance of profits disclosed by the annual accounts as furnished in the Controller of Insurance. The actual computation of profits and gains of insurance business will have to be computed in accordance with r. 5 of the First Schedule. In the light of these special provisions coupled with non obstante clause the AO is not permitted to travel beyond these provisions,

24. *Sec. 14A contemplates an exception for deductions as allowable under the Act are those contained under ss. 28 to 43B of the Act, Sec. 44 creates special application of these provisions in the cases of insurance companies. We therefore, agree with the assessee and delete the Act as according to us, it is not permissible to the AO to travel beyond s. 44 and First Schedule of the IT Act.”*

18. *It may not be out of place to mention that the respected Co-ordinate Bench has duly taken the note of an earlier decision of that very Bench decided in the case of that very assessee vide order dt. 29th Sept. 2004 bearing ITA Nos.7815/Del/1989, 3607 to 3609/Del/1990; 5035/Del/1998 and 3910/Del/2000 named as Dy. CIT v. Oriental General Insurance Co. Ltd. [2005]92 TTJ (Delhi) 300. As seen from the Paras reproduced above on due consideration of the relevant provisions as applicable to resolve this issue a conclusion was drawn that since the Courts have held, s. 44 creates a special provision in the cases of assessment of insurance companies therefore it was not permissible to the AO to travel beyond s. 44 of First Schedule of IT Act.*

18.1 *The next common dispute relates to the order of the CIT(A) in sustaining the action of AO in allowing only 50 per cent of the management expenses by invoking the provisions of s. 14A of the Act. The addition is made by the AO on the plea that the*

provisions of s. 14A was inserted by Finance Act, 2001 w.e.f. 1st April, 1962. It is stated that the investments made by the assessee are both taxable as well as tax free. An estimated disallowance of 50 per cent out of the management expenses incurred and as claimed in the P&L a/c is treated as expenses incurred in connection with the looking after tax-free investment.

19. *The learned counsel for the assessee vehemently argued that the income of the assessee is to be computed under s. 44 r w r. 5 of Sch. I of the IT Act, Sec. 44 is a non obstante clause and applies notwithstanding anything to the contrary contained within the provisions of the IT Act relating to computation of income chargeable under different heads, other than the income to be computed under the head Profit and gains of business or profession'. For computation of profits and gains of business or profession the mandate to the AO is to compute the said income in accordance with the provisions of ss. 28 to 43B of the Act. In the case of the computation of profits and gains of any business of insurance, the same shall be done in accordance with the rules prescribed in First Schedule of the Act, meaning thereby ss. 28 to 43B shall not apply. No other provision pertaining to computation of income will become relevant. According to the learned counsel, two presumptions that follow on a combined reading of ss. 14, 14A, 44 and r. 5 of the First Schedule are:*

(a) That no head-wise bifurcation is called for. The income, inter alia, of the business of insurance is essentially to be at the amount of the balance of profits disclosed by the annual accounts as furnished to the Controller of Insurance under the Insurance Act, 1938. The said balance of profits is subject only to adjustments thereunder. The adjustments do not refer to disallowance under s. 14A of the Act. (b) Profits and gains of business as referred to in (a) above have only to be computed in accordance with r. 5 of the First Schedule.

22. *Sec. 44 creates a specific exception to the applicability of ss. 28 to 43B. Therefore, the purpose, object and purview of s.*

14A has no applicability to the profits and gains of an insurance business.

23. The learned Departmental Representative strongly justified the action of the AO and that of the CIT(A) in the light of the clear provisions of s. 14A of the Act. Since the view has already been expressed by respected Co-ordinate Bench therefore, we have no reason to take any other view except to follow the same. With the result we hereby accept the argument of learned Authorized Representative to the extent that in the present situation the provisions of s. 14A need not to apply while granting exemption to an income earned on sale of investment primarily because of the reason of the withdrawal or deletion of sub-r. 5(b) to First Schedule of s. 44 of IT Act. Once we have taken this view therefore the enhancement as proposed by learned CIT(A) is reversed and the directions in this regard are set aside. Resultantly ground No. 1 is allowed consequent thereupon ground No. 2 automatically goes in favour of the assessee”.

Accordingly, by following the orders of this Tribunal, we decide this issue in favour of the assessee. Therefore, the ground is allowed”.

Respectfully following the same, we modify the order of the CIT (A) and delete the addition made by AO. The ground and additional grounds are considered as allowed.”

Following the earlier order of this Tribunal we decide this issue in favour of the assessee.”

17. At the time of hearing, no decision to the contrary has been brought to our notice. It is also brought on record that the decision of Tribunal of Assessment Year 2004-05 (*supra*) has been further followed by the Tribunal in the case of assessee for Assessment Years 2005-06 and 2006-07 vide order dated 5.6.2014 (*supra*). Subsequently, in

Assessment Year 2007-08 also, vide order dated 12.2.2015 (*supra*) similar view has been affirmed by the Tribunal. Following the aforesaid precedents, we approve stand of the assessee that provisions of Sec. 14A of the Act are not applicable to an assessment made in terms of Sec. 44 of the Act read with First Schedule of the Act in relation to income of non-life insurance business. Thus, on this aspect, assessee succeeds.

18. The only other Ground in the appeal of assessee is with regard to charging of interest u/s 234B and 234D of the Act, which is consequential in nature.

19. Resultantly, whereas appeal of assessee is allowed, that of the Revenue is dismissed.

Order pronounced in the open court on 31st August, 2016.

Sd/-

(JOGINDER SINGH)
JUDICIAL MEMBER

Mumbai, Date : 31st August, 2016

SSL

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "I" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai