

IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND  
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER  
ITA No.3371 & 3372/Mum/2019  
(Assessment Years:2013-14 & 2014-15)

Tata AIG General Insurance Company Limited 15 <sup>th</sup> Floor, Tower-A, Peninsula Business Park, G.K.Marg, Lower Parel, Mumbai-400 013	Vs.	Pr.CIT-8, Room No. 611, Aayakar Bhawan, M.K.Road, Mumbai-400020.
<b>PAN/GIR No.AABCT3518Q</b>		
<b>Appellant)</b>	<b>..</b>	<b>Respondent)</b>

Assessee by	Sh. F.V.Irani Senior Advocate with Miss Pratiksha Advocate & Sh Ashish Thakar CA
Revenue by	Sh. Manjunatha Swamy CIT-DR And Sh Micheal Jarald Sr DR
<b>Date of Hearing</b>	<b>31/01/2020</b>
<b>Date of Pronouncement</b>	<b>05/02/2020</b>

**आदेश / O R D E R**

**PER PAWAN SINGH(JM):**

1. These two appeals filed by the assessee are directed against the separate orders of the Principal Commissioner of Income Tax (PCIT)-28, Mumbai, passed under section 263, dated 30/03/2019 for AY 2013-14 and 2014-15.
2. In both the appeals, the assessee has raised identical grounds of appeal; facts for both the years are identical except variation of certain figures of claim under different claims. Therefore, both the appeals were clubbed, heard and are decided by

consolidated order. For appreciation of facts, the appeal for AY 2014-15 is treated as lead case. The assessee has raised the following grounds of appeal:-

*1. The learned CIT has erred in*

- initiating proceedings under section 263 of the Act;*
- Treating the order dated 22 December 2016 issued under section 143(3) of the Act by the Assistant Commissioner of Income-tax, Range - 8(3)(1), Mumbai (hereinafter referred to as the learned AO) [hereinafter referred to as the 'Assessment Order'] for AY 2014-15 as erroneous and prejudicial to the interest of the revenue; and*
- setting aside the aforesaid Assessment Order with directions to the learned AO to re-examine and redo the assessment by examining the provision claimed towards claims incurred but not reported (IBNR) and claims incurred but not enough reported (IBNER), in light of the decision of the Hon'ble Chennai Income-tax Appellate Tribunal (ITAT) in the case of Deputy Commissioner of Income-tax vs. Cholamandalam MS General Insurance Co.Ltd.(Chola)*

*2. The learned CIT has erred in law in concluding that the claim of expenditure towards IBNR and IBNER is unascertainable and being a provision, should not be allowed.*

*3. The learned CIT has erred in solely following the view against the Appellant held by the Hon'ble Chennai ITAT in the case of Chola (supra) and in not considering the favorable jurisdictional ITAT decision in the case of DCIT vs Export Credit Guarantee Corporation of India Ltd. and the Kolkata ITAT decision in the case of DCIT vs National Insurance Co Ltd which are in Appellant's favour.*

*4. The learned CIT has erred in not appreciating the fact that the claims for IBNR and IBNER are normal claims for a general insurance company and to date have not been questioned in any assessment of the Appellant for any prior AY*

3. Facts in brief as extracted from the order of lower authorities are that assessee is a company engaged in the business of General Insurance, filed its return of income for relevant AY on 27/11/2014, declared total income of Rs. 263.53 crores. The case was selected for scrutiny. The assessing officer (Ld. AO), after serving notice u/s 143(2) and 142(1) along with detailed questionnaire and considering the reply thereon completed assessment u/s 143(3) on 22/12/2016. The Ld. AO, while passing the assessment made certain additions/ disallowances. The assessment was revised by learned Principal Commissioner of Income –Tax (Ld. PCIT) vide order dated 30/03/2019. The Ld. PCIT directed the AO to re-examine the expenditure claimed for incurred but not reported (IBNR) and incurred but not enough reported (IBNER) provisions in the light of decision of Chennai Tribunal in Cholamandalam Finance & General Insurance Company (1999 taxmann.com 302).
4. Before revising the assessment order the Ld. PCIT issued show-cause notice, dated 15/03/2019. The copy of contents of notice is extracted by Ld. PCIT in Para 3 of his order. In the show-cause notice, the Ld. PCIT identified the issue that the assessee has debited certain amount was provisions for claims incurred but not reported (IBNR) and claims incurred but not

enough reported (IBNER). The assessee created provision in anticipation of settlement of claims that were not ascertained, the assessee had yet to assess the loss and determine the amount to be compensated. Therefore, it was an unascertainable liability. And that under the Income tax Act, the ascertainable liability is allowable and the unascertainable liability is not allowable. The assessee at the best may claim that there is liability for compensation, but amount of compensation is not qualified and ascertain on the last day of financial year. The expenditure can be allowed only in the year in which liability was quantified. No details of the account have been made available to establish the allowability of expenditure. It needs to be ascertain, when the actual compensation of loss were quantified by the insurance company. The year in which actual loss or compensation was quantified is the year in which assessee is liable to make the payment and the expenditure accrued to the assessee. Until, it is contingent liability and therefore cannot be subject to the deduction under the mercantile system of accounting. The claim incurred, but not reported or incurred, but not enough reported, the year in which the actual damage or loss were determined and crystallized is the year in which the assessee is liable to claim the damage. The

Ld. PCIT, on the above issues took the view that the AO made no enquiry on these issues and allowed the provisions towards IBNR and IBNER in *toto*, thus the order is erroneous insofar as, it is prejudicial to the interest of the revenue.

5. The assessee filed its reply to the show cause notice under section 263; vide its reply dated 25/03/2019. In the reply the assessee stated that assessee is a general insurance company restored with Insurance Regulatory and Development Authority of India (IRDAI). The computation of business income of assessee is governed by the provision of section 44 read with Rule 5 of First Schedule of the Income -tax Act. The assessee further stated that during the scrutiny assessment, the assessing officer raised questions regarding various claims and justifications thereof, the assessee furnished all documentary evidences. The Ld. AO after making various adjustments passed the assessment order. The Ld. AO passed the assessment order in accordance with the provisions of I.T.Act, under which the assessee is assessable. The assessee also stated that insurance companies are governed by the provisions of Insurance Act and Insurance Regulatory and Development Authority Act 1999 (IRDA Act). The Insurance Regulatory and Development Authority (IRDA) is the governing body of

insurance companies in India had notified Insurance Regulatory and Development Authority Regulations 2002 to be followed by insurance companies while preparing its financial statements. The said regulations provides for recognizing the IBNR and IBNER and the manner of quantifying the amount. The liability to settle the claims arises on the occurrence of loss which is subject matter of insurance coverage. The Insurance companies are required to account for claims accrued during the year through, which such claim could be at various stage of processing. The accounting of claims is thus done in accordance with IRDAI regulations and in line with establishes general accounting practice. The settlement of insurance claim may not happen in the year in which loss has been incurred by the insured and may get deferred due to various reasons. The assessee has required to account for the claim in the year in which it has been incurred and such outstanding claim would be utilized, when the amount of claim is crystallized as required by section 64 V(1)(ii)(c) of Insurance Act. The assessee also stated that IBNR and IBNER claims are determined on actuarial principle by the appointed certified actuary. The methodology and the assumption on the basis of which the liability is

determined and also certified by the actuary to be appropriate, in accordance with guidelines and norms issued by the IRDAI.

6. The assessee also claimed that issue raised in the show-cause notice is covered by the decision of Kolkata Tribunal in DCIT vs National Insurance Company, dated 05/08/2016 and Mumbai Tribunal in DCIT vs Export Credit Guarantee Corporation in ITA No.7657/Mum/2014 and DCIT vs National Insurance Company Ltd. 2016 72 taxmann.com 116 (Kolkata Trib.)
7. The reply furnished by the assessee was not accepted by Ld. PCIT. The Ld.CIT concluded that that query raised by him remain unanswered. The AO had accepted the accounts, which are subject to tax audit and accepted the account without raising proper queries and that on identical issue, Chennai Tribunal in Cholamandalam Finance and General Insurance Company (supra) as taken other view. The Assessing Officer should have called for details and examined the matter because only ascertained expenditure and not provisions are to be allowed. If the Assessing Officer examined the matter and raised appropriate queries, the Assessing Officer could have disallowed and assessed the income correctly. The allowance of an item of expenditure which is provisional and unascertainable was an act which is erroneous as well as

prejudicial to the interest of revenue. The ld. PCIT, directed the Assessing Officer for examining the provisions for expenditure claimed for IBNR and IBNER in the light of decision of Chennai Tribunal in case of Cholamandalam Finance & General Insurance Company Ltd. (supra). Aggrieved by the order of Ld. PCIT, the assessee has filed this appeal before this Tribunal.

8. We have heard submission of learned authorised representative (Ld. AR) of the assessee and learned departmental (Ld. DR) for revenue and perused the order of Ld. AO, as well as of Ld. PCIT. The Ld. AR of the assessee submits that the claim of deduction of IBNR and IBNER is in consonance with the principle of several decisions of Superior Court; this establishes that at the very least, the issue is debatable and two views are possible, which rules out the exercise of revisional powers. The Ld. AR of the assessee submits that the assessee placed before the Ld. AO a specific reply pursuant to his queries, the assessee furnish the claim of IBNR and IBNER as reported in schedule -16 of profit and loss account for year ended 31/03/2014. Further, in Auditor's report the liability for claims IBNR and IBNER are duly certified by the Auditors. The copy of Auditor's report is at page No.34 and relevant Schedule-16 of statement of accounts is filed at page

No.27 of paper book. The AO considered a statement/report of auditor and pass the assessment order, merely because there is no elaborate discussion, the order cannot be said to be erroneous. The Ld. AR of the assessee also invited our attention on IRDAI regulations and schedule-II-B, which deals with violation of liabilities (general insurance) defining the IBNR and IBNER. The Ld.AR, further submits that the issue involved in the present appeal is in fact directly covered by the decision of Mumbai Tribunal in DCIT vs Export Credit Guarantee Corporation of India [ITA No. 7657/Mum/2014] and Kolkata Tribunal in DCIT vs National Insurance Company in ITA No. 674/Kol/2012 (A.Y. 2005-06) reported vide (2016) 72 taxmann.com 116 .

9. The Id AR for assessee further submits that against the decision of Kolkata Tribunal the revenue filed appeal before High Court of Calcutta vide ITA No. 76 of 2019 and raised the question of law “whether on the facts and circumstances of the case, the Id. Tribunal has erred in law in upholding the order of CIT(A) by holding that the provision for “Liabilities Incurred But not Reported” (IBNR) amounting to Rs. 12,77,00,000/- as ascertained liability and should be deducted while computing the book profit under section 115JB of the Income- tax Act,

1961 while the same is inadmissible in terms of explanation given below Section 115JB of the said Act?” During the hearing of appeal before Hon’ble High Court, it was disclosed that the department has accepted claim of assessee on the aforesaid issue in A.Ys. 2000-01 to 2004-05 and 2006-07. The Hon’ble High Court held that revenue could not show exceptional reason for departure of their stand in the present Assessment Year (2005-06) and dismissed the appeal of revenue. The Id. AR of the assessee thus submitted that the order of Kolkata Tribunal in National Insurance Company (supra) has been approved by Hon’ble Calcutta High Court. The Id. AR of the assessee also filed the decision of Calcutta High Court in ITA No. 76 of 2019. The Id. AR for the assessee further submits that decision of jurisdictional tribunal is binding on the lower authority.

10. In support of his other submissions the Id AR for the assessee also relied on the following decisions;

- Bank of Baroda Vs H.C. Shrivastava[2002] 256ITR 385 (Bom),
- Union of India Vs Kamalaxmi Finance Corporation Ltd AIR 1992 SC 711,
- CIT Vs Gabriel India [2003] 203 ITR 108 (Bom).

11. On the other hand the Id. DR for the revenue supported the order of Id. PCIT. The Id. DR further submits that the assessment order is silent on the issue of IBNR & IBNER. No

issue was raised by the Assessing Officer before passing the assessment order. There is no application of mind by Assessing Officer on the issue at the time of passing the assessment order. The Id. DR submits that in para-7 & 8 of the order of Id. PCIT, which is impugned before this Tribunal, the Id. PCIT has clearly spelt out that provision is merely based on estimation basis in Profit & Loss Account.

12. In support of his submission, the Id. DR for the revenue relied upon the decision of Hon'ble Supreme Court in Denial Merchants P. Ltd. vs. ITO in SLP No. 23976/2017 dated 29.11.2017, wherein the Hon'ble Apex Court held when Assessing Officer did not made any proper enquiry and accepted the explanation of assessee related to the share application money. The Id. Commissioner of Income-tax had, after setting aside the order of Assessing Officer, simply directed the Assessing Officer to carry out detailed enquiry in the order passed under section 263 which was upheld by the High Court, the Hon'ble Supreme Court find no reason to interfere with the High Court order.

13. The decision of Hon'ble Bombay High Court in CIT vs. Ballarpur Industries Ltd. (2017) 85 taxmann.com 10 (Mum) on the ratio that where the Assessing Officer allowed claim for deduction

under section 80HHC without examining the said claim with reference to unabsorbed depreciation and investment allowance as referred to in section 32 & 32A respectively, the Commissioner was justified in invoking revision under section 263.

14. The decision of Mumbai Tribunal in Arvee International vs. ACIT (ITA No. 3543/Mum/2003 dated 13.01.2016 on the ratio that order passed by on the ratio became erroneous and prejudicial to the interest of revenue under section 263; (i) the order sought to be revised contains errors of reasoning or of law or of fact on the face of it and (ii) the order sought to be revised proceeds on incorrect assumption of fact or incorrect application of law. In the same category fall orders passed without applying the principle of natural justice or without application of mind and (iii) the order passed by Assessing Officer is stereo type order which simply accept what the assessee has stated in its return of income or where he fails to made any requisite enquiry or examined the genuineness of claim which is called for in the circumstances of this case. The decision of Hon'ble Bombay High Court in Horizon Investment Company vs. CIT in ITA No. 1593/Mum/2013 dated 27.06.2014, on the ratio that in absence

of enquiry on account of deduction of expenditure, the revision order was justified.

15. We have considered the rival submissions of both the parties and have gone through the assessment order and the order impugned before us. Perusal of assessment order shows that the issue on which Id. PCIT revised the assessment order has not been discussed by Assessing Officer. We have noted that during the scrutiny assessment, the assessee furnish the details of provisions of IBNR and IBNER as reported in schedule -16 of profit and loss account for year ended 31/03/2014 in pursuance to the queries of the AO. Further, in Auditor's report the liability for claims IBNR and IBNER are duly certified by the Auditors. The copy of Auditor's report is also filed at page No.34 and relevant Schedule-16 of statement of accounts is also filed at page No.27 of paper book. Thus, once the AO required the details, he may have considered report of auditor and pass the assessment order, merely because there is no elaborate discussion, in our view, the order cannot be said to be erroneous. In our view the AO has taken one of the possible views.
16. The Id. AR of the assessee before us also stated that insurance companies are governed by the provisions of Insurance Act and

Insurance Regulatory and Development Authority Act 1999

(IRDA Act). It was further explained that the Insurance Regulatory and Development Authority (IRDA) is the governing body of insurance companies in India had notified Insurance Regulatory and Development Authority Regulations 2002 to be followed by insurance companies while preparing its financial statements. The said regulations provides for recognizing the IBNR and IBNER and the manner of quantifying the amount.

17. In reply to the show-cause issued under section 263, the assessee further contended that IRDA Regulation provides that IBNR and IBNER provision shall be determined using actuarial principles. The provisions made by assessee for IBNR and INBER in its books of account are as per actuarial valuation and IRDAI Regulation. We have also noted that in the reply to the show cause notice under section 263, the assessee referred the decision of Kolkata Tribunal in DCIT vs. National Insurance Co. Ltd. (supra) and decision of Mumbai Tribunal in DCIT vs. Export Credit Guarantee Corporation of India Ltd. (supra), favoring the assessee. However, the Id. PCIT after referring the decision of Chennai Tribunal in Cholamandalam MS General Insurance Co. Ltd (supra) directed the AO to examine the expenditure claimed

for provisions of IBNR and IBNER and passed the assessment order afresh.

18. We have noted that against the decision of Kolkata Tribunal in DCIT vs. National Insurance Co. Ltd. (supra) the revenue filed before Hon'ble Calcutta High Court and the same is not admitted for hearing before High Court as the revenue has accepted the similar claim of that assessee on the aforesaid issue in A.Ys. 2000-01 to 2004-05 and 2006-07. In our view the decision of Kolkata Tribunal in DCIT vs. National Insurance Co. Ltd. (supra) has been upheld by Hon'ble Calcutta High Court.
19. Now, advertng to the scope of section 263 of the Act. The prerequisite of the exercise of jurisdiction of section 263 by PCIT or CIT is that order of AO is erroneous in so far as prejudicial to the interest of revenue. The twin condition that order is erroneous and it is prejudicial to the interest of revenue must be fulfilled together. If anyone of them is absent- the recourse cannot be had to section 263. Further, if the Assessing Officer has adopted one of the courses permissible under the law and pass the assessment order, the same cannot be branded as erroneous unless the order passed by Assessing Officer is unsustainable in law. Thus, the twin conditions of section 263 are not fulfilled in the present case.

20. We may reiterate here that though there is no reference in the assessment order about the examination of issues related with provisions for IBNR and IBNER. The assessee during the assessment furnished the relevant extract of IBNR and IBNER report for the year ended 31<sup>st</sup> March 2014 duly certified by the appointed actuary and copy of which was again furnished to the Id. PCIT. The Id. PCIT has not commented on the detailed reply furnished by assessee.

21. The Id. AR of the assessee while making submission has vehemently submitted that issue is debatable and when two views are possible, the revision of assessment order is not permissible. The Hon'ble Supreme Court in *Max India Ltd.'s* case [2008] 166 Taxman 188 (SC) held that when two views are inherently possible, the provision of section 263 would not attract. Considering the fact that the issue on which the Id. PCIT directed the Assessing Officer is a debatable issue, due to divergent view of Kolkata and Mumbai Tribunal on one side and the Chennai Tribunal on the other side. Thus, in view of the decision of Hon'ble Supreme Court in *Max India Ltd. (supra)* when two views are possible, the exercise of power revision under the provision of section 263 would not apply.

22. The case law relied by Id. DR for the revenue is not helpful to the revenue as the facts of those cases are different. In Denial Merchants P. Ltd. vs. ITO (supra) AO accepted the explanation of assessee related to the share application money and in CIT vs. Ballarpur Industries Ltd (supra) the AO did not made any enquiry about the deduction of 80HHC and without examining the said claim with reference to unabsorbed depreciation and investment allowance allowed it in favour of assessee. In Arvee International vs. ACIT (supra) order passed by Assessing Officer is stereo type order which simply accept what the assessee has stated in its return of income. Further in Horizon Investment Company vs. CIT (supra) there was no enquiry on account of deduction of expenditure and the revision order held as justified. However, the facts of the present case is that the AO required details on the issues but not discussed and allowed, though there is elaborate discussions on other issues.

23. In view of the aforesaid discussions, the order passed by Id. PCIT under section 263 dated 30.03.2019 is set-aside.

24. In the result, the appeal for A.Y. 2014-15 is allowed.

**ITA No. 3371/Mum/2019 for A.Y. 2013-14**

25. The assessee has raised the identical grounds of appeal as raised in appeal for AY 2014-15 which we have already allowed.

The facts for this assessment year is also identical, except variation of figure of provisions for IBNR and IBNER, thus, considering the principle of consistency, the ground of appeal raised by assessee is also allowed with similar direction.

26. In the result, appeal for A.Y. 2013-14 is also allowed.

Order pronounced in the open court on this 05/02/2020.

Sd/-  
(G. MANJUNATHA)  
ACCOUNTANT MEMBER

Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER

Mumbai; Dated 05/02/2020

Thirumlesh / SK

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,  
(Assistant Registrar)

ITAT, Mumbai