

**:IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE**

**BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER**

ITA Nos. 1470 & 1941/PUN/2017

निर्धारण वर्ष / Assessment Years : 2013-14 & 2014-15

ACIT, Circle-11, Pune	Vs.	Indus Health Plus Private Limited, Indus House, Pride Port, Model Colony, Pune 411 016 PAN : AAACI9978A
Appellant		Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Sardar Singh Meena
Shri Piyush Kumar Singh Yadav

Date of hearing : 15-03-2022
Date of pronouncement : 21-03-2022

आदेश / ORDER

PER R.S.SYAL, VP :

These two appeals by the Revenue relate to the assessment years 2013-14 and 2014-15. We are proceeding to dispose them off by this consolidated order for the sake of convenience because of some common issue.

A.Y. 2013-14 :

2. The Revenue has filed revised grounds of appeal against which no objection has been raised by the Id. AR. The first issue in this appeal is against the deletion of addition of

Medical Check-up Provision (hereinafter also called 'the MCP') amounting to Rs.16,51,23,783/-. Succinctly, the facts of the case are that the assessee was set up with the objective of promoting Preventing Health Checkups/Health Diagnostics etc. in a network mode. The assessee created the MCP amounting to Rs.20,68,90,289/-, which was debited to the Profit & loss account under the head 'Operating expenses'. The opening balance of the MCP was Rs.16.49 crore. The assessee paid medical charges to the hospitals during the year amounting to Rs.18.14 crore, leaving balance at Rs.19.04 crore. Excess provision of Rs.2.53 crore, created in earlier years, was reversed, giving the closing balance of the MCP at Rs.16,51,23,783/-. The AO called upon the assessee to explain as to how the MCP was created for Rs.20.68 crore. The assessee submitted that it had four different health packages for sale to customers during the year and there was a fixed cost involved for the medical check-ups under such packages, which was to be paid to the empanelled hospitals at the time of their performing the medical check-ups, which facility could be availed by its customers within three years from the date of

sale of package. It was explained that for each Essential Care Health Checkup Package worth Rs.4,995/-, the cost of medical check-up payable to hospitals was Rs.830/-; for each Early Care Health Checkup Package worth Rs.7,950/-, the cost of medical tests payable to the concerned hospitals was Rs.2,000/-; for each Exclusive Health Checkup Page worth Rs.12,999/-, the cost of medical check-up tests was Rs.4,500/-; and for each Exclusive and Comprehensive Health Checkup Package worth Rs.16,999/-, the cost of medical check-ups payable to hospitals was Rs.6,400/-. Each of the four packages had different tests depending upon their value. The assessee submitted that it created the provision of Rs.20.68 crore for the year under consideration on the basis of number of health packages sold. The AO recorded on page 55 of his order that the assessee neither submitted any basis for making the MCP nor furnished any package-wise details in respect of the working of the amount of the MCP. He, therefore, made addition of Rs.16,51,23,783/-, being, the closing balance of the MCP as appearing in the assessee's balance sheet. The assessee submitted all such details before the CIT(A), who

concurrent with the assessee's point of view and deleted the addition. Aggrieved thereby, the Revenue has come up in appeal before the Tribunal.

3. Having heard both the sides and gone through the relevant material on record, it is seen that the assessee claimed to have created the MCP of Rs.20.68 crore towards medical check-up charges payable to the empanelled hospitals. The assessee was having different types of packages, namely, Essential Care Health Checkup package worth Rs.4995/-; Early Care Health Checkup package worth Rs.7950/-; Indus Exclusive Health Checkup package worth Rs.12,999/-; and Exclusive and Comprehensive Health Checkup package worth Rs.16,999/-. This provision was stated by the Id. AR to have been created on the basis of the number of the four packages sold during the year multiplied with the rate of medical tests payable to the hospitals at Rs.830/-, Rs.2,000/-, Rs.4,500/- and Rs.6,400/- under each package respectively. The MCP was created at the time of sale of the package w.r.t. the costs involved for medical check-ups under it. The assessee further submitted that the amount of the MCP was debited to the

Profit and loss account of the year in which the concerned package was sold. Here, it is pertinent to mention that the assessee has no medical check-up infrastructure of its own for conducting the medical tests of the buyers of its packages. On the basis of its network of the Customer Distributors (CDs), it gets customers for its packages. When a customer purchases a health package, he gets option to undergo the specified tests under the respective package from any of the hospitals empanelled with the assessee. Bill is raised by the concerned hospital on the assessee, when the customer undergoes medical check-ups. On making the payment, the assessee reverses the provision and debits the MCP. Buyer of the package has a choice to undergo medical check-ups either in that year itself or within next two years. In case the package is not availed by the customer within the stipulated period of three years, the assessee reverses the MCP at that time. The MCP of Rs.20.68 crore was claimed to have been created by the assessee w.r.t. the number and type of packages sold during the year. The Id. AR explained that the actual medical check-up charges paid during the year amounted to Rs.18.14

crore, which pertained not only to the packages sold during the year but also in prior two years. The MCP created at the time of sale of such packages, in respect of the customers who could not avail the medical check-ups within a period of three years of the purchase, was reversed during the year amounting to Rs.2.53 crore and consequently offered to tax. Here, it is pertinent to note that the AO made the addition of the closing balance of the MCP amounting to Rs.16.51 crore, primarily, by recording that the assessee: *“In the course of the assessment proceedings has not given any basis for making provision for medical checkup charges. Further, no details have been furnished in respect of working of the provision on this count package wise”*. The ld. AR fairly admitted that such details of the creation of the MCP were not furnished to the AO as those were claimed not to have been requisitioned from the assessee. It was only before the ld. CIT(A) that the assessee furnished necessary details concerning the MCP. In view of the fact that the ld. CIT(A) deleted the addition made by the AO on this score without calling for the remand report of the AO and further knowing well that such details were not

available before the AO, we consider it expedient to set-aside the impugned order and remit the matter to the file of the AO. We order accordingly and direct him to decide this issue afresh by allowing deduction of the MCP created during the year on the basis of number of packages sold as reduced by the reversal of the amount of provision on the expiry of three years' period from the date of sale of package for non-availing the facility of medical check-ups. Needless to say, the assessee will place on record all the necessary details in this regard to facilitate the determination of the deductible amount.

4. The next issue raised in this appeal is against allowing deduction of Rs.18,82,70,667/- us.37(1) of the Income-tax Act, 1961 on account of "Escrow Disbursement Provision" (hereinafter also called 'the EDP').

5. On perusal of the return filed by the assessee, the Assessing Officer (AO) observed that the EDP was appearing in the balance sheet with closing balance at Rs.18,82,80,667/-, having two components viz., Long Term Provision – Escrow Disbursement at Rs.16,38,72,155/- and Short Term Provision – Escrow Disbursement amounting to Rs.2,43,98,512/-. The

assessee claimed deduction towards the EDP amounting to Rs.23,20,33,756/- in its Profit and loss account. On being called upon to justify the claim for the deduction, the assessee submitted that it was set up in the year 2000 for providing affordable comprehensive and qualitative preventive health checkups and diagnostics for asymptomatic Indians. The assessee enters into an arrangement with various delivery partners at different locations in India to help it deliver the abovementioned four types of packages through Multi Level Marketing Scheme. Under this scheme, the assessee company enters into agreement with Customer Distributors (CDs) who market its packages. The assessee pays Incentive to the CDs for selling its packages mainly under three types of business plans. The first is the Beginners plan with 100 IVPs (Indus Value Points) to whom incentive of Rs.10,000 is paid, which gives rate of Rs.100 per IVP. Once a Customer Distributor (CD) obtains 100 IVPs, he gets promoted to the Easy plan with 200 IVPs having Incentive payment of Rs.15,000, which gives rate of Rs.75 per IVP. Once a CD obtains 300 points, in total, he gets promoted to the next, viz., Leaders Plan with 400

IVPs and Incentive payment of Rs.29,000, which gives rate of Rs.50 per IVP. Once a CD enters into the Easy Plan by collecting 100 IVPs, he never goes back to the Beginners plan. On obtaining 300 IVPs under the second plan, the CD enters into the third plan, namely, Leaders Plan and never goes back to the earlier plans throughout his association with the assessee-company. The CDs who accept the terms and conditions of the concerned packages become eligible to sell the Indus packages through their own respective networks which they create downline. The assessee has multi-level marketing strategy in which the CDs sell the packages through their own network. The IVPs are also granted on prospecting fresh CDs by any of the downline CDs. On every sale made by such CD or his downline, certain number of IVPs are allocated at that time only, depending upon the package sold. For example, 2.5 IVPs for lowest value package of Rs.4,999, increasing to 5, 9 and 12 IVPs with the next packages in the line respectively. If CD-A prospects CD-B and B prospects C and C prospects D, so CD-A will have downlines of B, C and D. Each upline gets IVPs on sale of a package by any of the

downlines. When B, C or D sells the packages, CD-A also gets IVPs depending upon the package sold. This has been set out in the order passed by the CIT(A) wherein the assessee contended that whenever sale is effected under the Network Marketing Binary plan, i.e. Left Wing and Right Wing, all the uplines get IVPs. In fact, the company credits IVPs on every sale of package to each of the uplines of the sponsored CDs. However, in order to get commission, the concerned CD must get package for self every year in addition to bringing in new CDs. It is only when the above conditions are fulfilled that a CD becomes entitled to Escrow Incentive payment depending upon the number of IVPs on his left wing and right wing, which get accordingly redeemed on payment. The assessee explained to the AO that on sale of each package, it was making a fair and reasonable estimate of the liability to be incurred towards IVPs and likely encashment and thus creating the EDP. It was further submitted that around 40% of its Revenue from the sale of packages goes in the EDP. In order to show that the amount of the EDP created by the assessee was reasonable, it put forth the Actuarial valuation of

the unpaid IVPs as on 31.3.2013 obtained from Ranadey Professional Services. The AO took note, *inter alia*, of the facts that the assessee was creating the EDP at the time of sale of each package which was claimed as deduction in the computation of total income; such EDP was based on certain formula worked out by the assessee; every customer who purchases the assessee's package does not always go in for selling the assessee's packages; the assessee did not give any acceptable and cogent reasons that on what basis and at what percentage the provision of incentive payment was made; the assessee did not provide particulars about the EDP for different packages; the calculation given by the assessee of IVPs for incentive payments had also some lapsed IVPs; and the Actuarial Valuation Report was not reliable as it was based on presumptions and figures provided by the assessee only. He, therefore, held that the Escrow Disbursement Provision made by the assessee was an unscientific calculation, not supported by any acceptable data. He also found some inconsistencies in the Actuarial Valuation Report, which was based primarily on probability factors and assumptions based

on the data. The AO noticed that the assessee claimed deduction of the EDP for a sum of Rs.23.20 crore by means of debit to its Profit and loss account as against the actual Escrow Disbursement Payment of Rs.20.76 crore. Considering all these facts, he made an addition of Rs.18,82,70,512/-, i.e. the closing balance of the Escrow Disbursement Provision, which was made up by the opening balance of the provision at Rs.16.38 crore as increased by the fresh Escrow Disbursement Provision created for the year at Rs.23.20 crore as reduced by the Escrow Disbursement payments made at Rs.20.76 crore. The Id. CIT(A) deleted the addition, against which the Revenue has come up in appeal before the Tribunal.

6. We have heard the rival submissions and gone through the relevant material on record. The assessee is engaged in providing preventive health check-ups through certain hospitals, with which it has prior agreements. Its net-work of the CDs brings in new customers, to whom the packages are sold. Each buyer, depending upon the package purchased, becomes entitled to certain specific type of tests, which are got done from the hospitals empanelled with the assessee. The

major expenditure of the assessee against sale of each package is Escrow Disbursement incentive and Medical check-up charges payable to the hospitals against each package. The assessee has no medical check-up infrastructure of its own. We have discussed *supra* the MCP. Right now, we are concerned with the Escrow Disbursement Provision created by the assessee at Rs.23.20 crore, for which deduction was claimed by taking it to the Profit and Loss account. The AO made disallowance of Rs.18.82 crore out of such provision, which is the closing balance of the EDP. We have noted above that the Escrow Disbursement Provision is made on the basis of and simultaneously with the sale of the packages by the CDs. Each buyer of the package, in turn, also becomes a CD, eligible for Escrow Disbursement payment subject to the conditions discussed above.

7. Having seen the *modus operandi* in which the multi-level marketing scheme operates, let us examine the manner in which the assessee created the Escrow Disbursement Provision for the year amounting to Rs.23.20 crore and claimed deduction for the same. The assessee explained that EDP of

Rs.23.20 crore was computed by considering the number of packages sold *vis-à-vis* the rate per IVP of Rs.650/- and IVP points under different packages. The assessee gave package-wise Revenue and provision working for the F.Y. 2012-13 as reproduced on page 58 of the impugned order:

Table- I

Package Name	Sale Count	Package Cost	Revenue	Sale IVP	Rate per IVP	Provision Rate	Provision Amount
	A	B	C=(AxB)	D	E	F (DxE)	G=(AxF)
EsCP	10,678	4,995	5,33,36,610	2.50	650	1,625	1,73,51,750
ECP	4,760	7,950	3,78,42,000	5.00	650	3,250	1,54,70,000
EHC	701	12,999	91,12,299	9.00	650	5,850	41,00,850
ECHC	24,961	16,999	42,43,12,039	12.00	650	7,800	19,46,95,800
ECP(Come Back)	134	8,000	10,72,000	1.00	650	650	87,100
EsCP (Come Back)	253	8,000	20,24,000	2.00	650	1,300	3,28,900
a. Total Escrow Revenue			52,76,98,948				23,20,34,400
b. Non Escrow Revenue			36,94,57,327				
c. Total Revenue (a +b)			89,71,56,275				
d. Revenue as per Balance Sheet			89,71,56,275				
e. Diff (c-d)			--				

8. It can be seen from the above Table- I that the first column contains package name, next column is number of such packages sold during the F.Y. 2012-13. Next column is

sale IVPs, namely, 2.5 IVPs for first package, 5.00 IVPs for second package, 9.00 IVPs for third package and 12.00 IVPs for fourth package. A uniform rate of Rs.650/- per IVP has been applied to all the packages for working out the amount of provision of Rs.23.20 crore. The key figure of Rs.650/- (Rs.65 into 10) in the calculation of the EDP, being, rate per IVP has been computed as demonstrated on page 57 of the impugned order with reference to the two Tables.

9. The first table computes average value per IVP at Rs.65/- as under:

Table- II

Business Plan	No. of IVPs	Amount
Beginners Plan	100 IVPs	10,000
Easy Plan	200 IVPs	15,000
Leaders Plan	400 IVPs	20,000
	700 IVPs	45,000

10. The average value of Rs.65 per IVP has been computed by determining the weighted average rate of Rs.100/- per package given under Beginner's Plan in respect of 100 IVPs, rate of Rs.75/- per package given under Easy Plan in respect of 200 IVPs and rate of Rs.50/- per package paid under Leader's

Plan in respect of 400 IVPs. The average value per IVP thus comes to Rs.65/-.

11. The next table computes the Average number of uplines to whom incentive would be actually paid, being, the figure of multiplier of 10, as under:

Table - III

Financial Year	Number of Sales count for the year	Average per sale IVP adopted during the year	Average Number of Upline CDs to whom IVPs are allocated	Average number of uplines to whom incentive actually paid
2006-07	9696	8	39	10
2007-08	14051	8	42	11
2008-09	27101	7	45	11
2009-10	43301	7	49	11
2010-11	50869	7	51	9
2011-12	52801	8	51	9
2012-13	40844	9	50	8
Average		8	47	10

12. The assessee has claimed through this Table that as against 47 average IVPs allocated, the payment was made only in respect of 10 IVPs.

13. We espouse the calculation of average value per IVP at Rs.65, which is computed vide Table-II, by taking weighted average of incentives of Rs.100 Rs.75 and Rs.50 given under the Beginners Plan, Easy Plan and Leaders Plan respectively.

The assessee, in its submission before the Id. CIT(A), as recorded on page 56 of the impugned order, stated that a CD shifts to the Easy Plan on collecting 100 IVPs and then to the Leader Plan on collecting 200 more IVPs. Once a CD enters into the second or third plan respectively, he never reverts to the first or the second plan. The net effect of this is that on collecting 300 IVPs, a CD becomes entitled to the rate incentive of Rs.50/- per package. Once a CD enters into Leader's Plan, he will continue to remain there in all the years to come. We have noticed above the number of IVPs allotted to CDs on sale of each package at 2.5, 5, 9 and 12 respectively. We have further noticed above that whenever a downline CD procures an order for a package, equal number of IVPs are allotted to all the upline CDs also and this chain continues eternally, meaning thereby that if 50th person CD downline line procures an order, all the 49 persons above him will get equal number of IVPs at 2.5 or 5 or 9 or 12 respectively depending upon the package sold. The assessee was set up in the year 2000. Most of the CDs entering into 12th year, namely, the F.Y. 2012-13 relevant to the assessment

year under consideration must have entered into Leader's Plan with incentive payment of Rs.50/- per package. As against that, the assessee has taken the figure of Rs.65 for claiming deduction of the Escrow Disbursement Provision by computing the weighted average value of all the plans, which is obviously excessive. Our view gets further fortified by the data submitted by the assessee itself for actuarial valuation of unpaid IVPs as on 31-03-2013 from Ranadey Professional Services, which has been referred to on pages 13 and 14 of the assessment order. This is the actual data given by the assessee to the Actuary for the purposes of actuarial valuation, which is as under:

Table-IV

I. Financial Information (All figures are in Crores) :

Year	Sales (in Rs.)	Escrow Account (in Rs.)	Incentive Paid (in Rs.)
2008-09	25.98	11.38	9.91
2009-10	46.27	20.41	17.18
2010-11	54.30	24.01	21.71
2011-12	63.88	28.08	24.06
2012-13	52.77	23.18	19.22

Table - V
II. IVPs Totals (All figures are in Lacs)

Year	Sales (in Rs.)	Escrow Account (in Rs.)	Incentive Paid (in Rs.)
2008-09	92.1	28.7	16.8
2009-10	157.4	21.9	29.5
2010-11	198.6	38	37.6
2011-12	226.8	70.3	42.3
2012-13	182.3	74.6	33.6

14. On going through the Table-IV, it can be seen that the assessee paid incentive of Rs.19.22 crore during the F.Y. 2012-13 under consideration and Rs.24.06 crore for the F.Y. 2011-12. In this way, total Escrow Incentive payment for the five years in the Table comes to Rs.92.08 crores, which gives the figure of average IVP payment at Rs.57.20. The Id. DR submitted the detailed calculation of the average value of IVPs at Rs.57.20 on extrapolation of the figures, whose correctness has not been disputed by the Id. AR. As against the ACTUAL figure of IVP payment at Rs.57.20 given by the assessee to the Actuary, it created the Escrow Disbursement Provision by taking average value per IVP at Rs.65/-. This shows that the assessee created excess provision per IVP amounting to Rs.7.80 (Rs.65 minus Rs.57.20).

15. The second component of the key figure of the average value of Rs.650/- per IVP is the average number of uplines to whom the incentive was actually paid by the assessee. The assessee, for creating the provision, has taken it as 10. This has been done by the assessee on the basis of the Table-III above. It can be seen from this Table that average number of upline CDs to whom IVPs were allotted were 47 for the F.Yrs. 2006-07 to F.Y. 2012-13 and the average number of uplines to whom incentive was actually paid was 10. It is this number of 10 which has been picked up by the assessee for the purpose of creation of the EDP. When we examine the data of ACTUAL figures given by the assessee to the Actuary for actuarial valuation at Table – V above, it turns out that the assessee actually paid 33.60 lakh IVPs as against allotted IVPs of 182.30 lakh, which gives 18.43% for the F.Y. 2012-13. If the figures from this Table for all the five years from the F.Yrs. 2008-09 to 2012-13 are added up, the actual figure which results is that the total IVPs were allotted at 857.20 lakh against which payment was made to 159 IVPs, which gives 18.64%. As against that, the assessee has taken the figure of

IVP points allotted at 47 and IVP points paid at 10, giving 21.27%. On a comparison of the above figures, it emerges that the assessee created provision at 21.27% of the IVPs allotted *vis-à-vis* actual paid, whereas the ACTUAL data submitted to the Actuary gives 18.62%. These calculations could not be controverted on behalf of the assessee except for putting forth that the actual figures given to the Actuary were for 5 years only, namely, F. Yrs. 2008-09 to F.Y. 2012-13, whereas the figures considered for the EDP also included F.Yrs. 2006-07 and F.Y.2007-08. Even if we remove the effect of first two years from the figures as given by the assessee in Table-III above for the purpose of computing the EDP, the percentage of payment of IVPs to IVPs allotted remains at 21.27%.

16. This shows that the figure of Rs.650 per IVP taken by the assessee for computing the amount of the EDP is excessive not only in terms of average value per IVP but also as per the average number of uplines to whom incentive was actually paid. Both the components of Rs.650/- considered by the assessee for the EDP, are nowhere close to the ACTUAL data

given to the Actuary for the purpose of actuarial valuation. If the actual figures given to the Actuary are considered in the manner of the assessee's computation of the EDP, the figure of Rs.65 gets substituted with Rs.57.62 and the figure of 10 gets substituted with 8.76 giving rate per IVP at Rs.505 ($\text{Rs.}57.62 \times 8.76$) instead of Rs.650 ($\text{Rs.}65 \times 10$) taken by the assessee for computing the amount of the Escrow Disbursement Provision. On this score alone, the amount of excess provision claimed as deduction turns out to be Rs.5.18 crore, being the difference between the EDP created at Rs.23.20 crore minus Rs.18.20 crore (the amount derived on the basis of the actual data given to the Actuary).

17. It is further relevant to note that for creating the EDP, the assessee took the 'Number of sales count' for the Financial year 2012-13 at 40844 as per the Table – III above. However, while calculating the actual amount of the EDP, the assessee adopted the higher figure of 41487, which is sum total of the 'Sale Count' as per column A of Table- I above. Thus, it is evident that the assessee created excess EDP for the year by taking higher figure of 'Sale count'.

18. It will be seen now that the manner of creating the Escrow Disbursement Provision by the assessee and its further adjustment/non-adjustment/partial-adjustment in the later year(s) belies the basic concept of provisioning. It is just elementary that a provision is created for an ascertained liability. It is for a known liability existing at a particular point of time but of unknown precise amount. A provision is always subject to modifications in subsequent years on the basis of actual happenings. For example, if a provision for any expenditure is created at Rs.100/- for which deduction is claimed in year one and in the year two, the actual expenditure happens to be Rs.105/-, the assessee can claim deduction of Rs.5/- in the second year for the short provision created in the year one. Similarly, there may be a situation that actual amount of expenditure against the provision in the year two falls short to Rs.95/-. In that scenario, the excess provision of Rs.5/- created in the year one needs to be reversed in the year two. It cannot be a situation that the amount of a provision excess created in the year one for which deduction is also claimed, remains as such without any corresponding reversal

in the later years on incurring less actual expenditure. While discussing the MCP above, we have noted that the provision is created by the assessee for the known liability of medical check-ups payable to the empanelled hospitals at the specified rate(s). If a customer does not avail the facility either in the same year or in next two years, he loses his right and the consequential unutilized MCP at the end of the third year is reversed by the assessee by offering such amount for taxation. That is the *raison d'être* for our allowing the in-principle deduction at the time of creation of the Medical Check-up Provision, albeit the quantification part has been restored to the AO. Adverting to the facts of the extant EDP, it is seen that the assessee is creating the same at the time of sale of packages by estimating the amount of incentive to be paid in the year of sale or later years. We have noted above that the actual payment of Incentive depends upon several factors, such as, a CD continuing his distributorship by purchasing a package every year and by obtaining IVPs both from Left wing as well as Right wing. It is only subject to the fulfillment of these conditions that Incentive is actually paid. If a CD

does not fulfill any of the requisite conditions, he loses his right of the Incentive even though he was allocated IVPs and a corresponding provision was created for payment to such CD at the time of sale of package. On a specific query, as to how the EDP has been reversed in the same or later years on a CD not qualifying for the Incentive payment on non-fulfillment of the requisite condition(s), the Id. AR candidly admitted that the EDP once created by the assessee is never reversed due to non-utilization. Even though he harped on the fact that the provision is created for a limited number of IVPs for payment as against full IVPs allotted, but there is no denial that some CDs lose their Incentive payment despite the creation of EDP for them. This shows that the EDP once created, for which deduction is also claimed in the Profit and Loss account, will continue to remain as such even in the case of the CD(s) not qualifying for the payment, which implies that the excess deduction allowed at the time of creation of the EDP will never be reversed. Unlike a 3 years cut-off period in the MCP, there is no cut-off period when a CD will lose his right to the Incentive under the EDP against the allotted IVPs if the

requisite conditions are not fulfilled. How such a mechanism can be misutilized may be understood with the help of a simple example. If an assessee creates provision for Rs.110, knowing fully well that the actual Incentive payment is not going to be more than Rs.100, he will get deduction of Rs.110 at the time of creation of the provision and the excess unpaid of Rs.10 will never get offered for taxation in the later years. Such a *modus operandi* of creating the EDP by the assessee and claiming deduction for the full amount of provision without their being any corresponding reversal of the excess provision in the subsequent years is totally flawed and against the accounting norms. With this mechanism of creating the Escrow Disbursement Provision and not writing back the excess provision, the amount of outstanding provision at the end of each year is swelling like anything, as is rightly found from the following chart placed on record by the assessee showing year-wise details of turnover and the incentive provision:

Table - VI

Sr. No.	F.Y.	Sales Revenue	Opening Balance	Escrow Disbursement Provision (in Rs.)	Escrow Disbursement Payment (in Rs.)	Closing Balance	Incremental Provision
7	2006-07	111,302,400	(1,521,592)	54,287,550	38,702,625	14,063,333	15,584,925
8	2007-08	163,517,900	14,063,333	74,209,500	51,910,677	36,362,156	22,298,823
1	2008-09	259,844,700	36,362,156	114,610,737	90,577,188	60,395,705	24,033,549
2	2009-10	462,793,175	60,395,705	205,168,955	168,162,414	97,402,246	37,006,541
3	2010-11	543,022,865	97,402,246	241,498,924	212,449,232	126,451,938	29,049,692
4	2011-12	638,802,331	126,451,938	287,148,074	249,727,857	163,872,155	37,420,217
5	2012-13	527,697,108	163,872,155	232,033,756	207,635,244	188,270,667	24,398,512
6	2013-14	393,575,393	188,270,667	163,409,427	143,492,415	208,187,679	19,917,012
G. Total		3,100,555,872	685,296,608	1,372,366,923	1,162,657,652	895,005,879	209,709,271

19. On a perusal of the Table-VI above, it can be seen that the closing balance of the EDP for the F.Y. 2006-07 was Rs.1.40 crore, which increased in the next year to Rs.3.63 crore and gradually, it has come up to Rs.18.82 crore as the end of the year under consideration and Rs.20.81 crore at the end of the subsequent year, which is part of this batch of appeals. This pattern of increase in the closing balance of the provision is a clear indicator of the fact that the assessee is creating excess provision every year for gaining higher deduction whereas the actual amount of payment over the years is less. Obviously, such a practice of creating artificial provision and claiming deduction on that basis without making full payment cannot be allowed to continue. Considering the entirety of the facts and circumstances of the instant case, we

hold that the Id. CIT(A) was not justified in accepting the assessee's claim of deduction towards creation of the EDP without examining all the relevant facts which speak volumes for themselves.

20. At the same time, the AO made an addition of Rs.18.82 crore on this count for the year under consideration, which is closing balance of the EDP account. Obviously, disallowance cannot be made of the closing balance in the provision account coming over the years. We have seen above that the assessee undertakes to pay Incentive to the CDs on fulfillment of the requisite conditions, which is not confined to a particular number of years as there is no cut-off. In the peculiar facts and circumstances as obtaining in the extant case and the further fact that no scientific manner has been adopted by the assessee for the creation and maintaining the EDP, we are of the considered opinion that the deduction for the Incentive commission should be allowed on actual payment basis in the concerned year irrespective of the year in which the package was sold. In other words, whatever amount of Incentive is paid by the assessee during the year, notwithstanding the year of

sale of package, would qualify for deduction. There is a caveat to it. The assessee has been allowed deduction at the time of creation of the Escrow Disbursement Provision up to the A.Y. 2012-13. Such deduction of the provision allowed in the earlier years includes the Incentive payable to CDs during the years to come. Once deduction has been allowed at the time of creation of the EDP, allowing another deduction at the time of payment in the regime of allowing deduction on payment basis, will amount to double deduction, which is impermissible. It has been brought to our notice that the assessee maintains a complete Incentive payment record for each year indicating the respective year of the sale of packages in respect of which the Incentive is paid during the year. Thus, the amount of deduction for Incentive payment to be allowed in the year under consideration will be determined by finding out the total payments made during the F.Y. 2012-13 on this score, as reduced by the payments made in respect of packages sold up to the F.Y. 2011-12. To put it simply, the AO will bifurcate total Escrow Disbursement payment of Rs.20,76,35,244/- made during the year into the amount of

Escrow Incentive in respect of packages sold during the year itself and incentive for the packages sold in earlier years. Deduction of Escrow incentive for the year will be allowed only in respect of the packages sold during the year because for the packages sold in earlier years, the assessee has already availed deduction at the time of creation of the EDP in such earlier years. We, therefore, set-aside the impugned order on this count and remit the matter to the file of the AO for re-determining the amount of deduction accordingly, of course, after allowing opportunity of hearing to the assessee.

A.Y. 2014-15:

21. The only issue raised by the Revenue in this appeal is against the deletion of the addition of Rs.1,99,17,012/- in respect of the EDP created by the assessee for the year in question. Both the rival sides are *consensus ad idem* that the facts and circumstances for this year are similar to the preceding year, namely, that the provision was made by the assessee in the same manner as done for the earlier years and no part of the same was reversed. The only exception brought to our notice was the amount of disallowance made by the AO

on this count. Whereas for the preceding year, the AO disallowed the closing balance of the EDP, for the year under consideration, the AO made disallowance of the difference between the Escrow Disbursement Provision at Rs.16,34,09,427/- and Escrow Disbursement Payment at Rs.14,34,92,415/-. The Id. CIT(A) deleted the addition.

22. We have heard both the sides and scanned through the relevant material on record. It is found as an admitted position that the assessee created provision of Rs.16.34 crore and claimed deduction for it in the same manner in which it was done for the preceding year. Thus, it is established that the facts and circumstances for the A.Y. 2014-15 under consideration are *mutatis mutandis* similar to those for the A.Y. 2013-14. In view of our decision rendered *supra* for the A.Y. 2013-14, we set-aside the impugned order and remit the matter to the file of the AO for allowing deduction of Escrow incentive on the basis of payment made during the year for a sum of Rs.14.34 crore, as reduced by the payments pertaining to the packages sold in the years prior to and including the financial year relevant to the A.Ys. 2012-13. The reason for

such a reduction is that the assessee got deduction up to the A.Y. 2012-13 on the basis of creation of the EDP and hence payments made during the year under consideration out of such provisioned amounts cannot again qualify for deduction. However, for the A.Y. 2013-14, we have directed to grant deduction on payment basis, the consequence of which is that the Incentive paid during the year under consideration pertaining to the sale of packages during the financial year relevant to the A.Y. 2013-14, will also qualify for deduction on payment basis. However, it is clarified that in case the total disallowable amount of Escrow Disbursement for the year under consideration exceeds Rs.1.99 crore, as disallowed by the AO in the assessment order, the disallowance will be restricted to such a level because the Tribunal has no power to order enhancement. We, therefore, set-aside the impugned order and remit the matter to the file of the AO for doing the exercise of allowing deduction of Escrow Incentive. Needless to say, the assessee will be allowed adequate opportunity of hearing in this regard.

23. In the result, both the appeals are allowed for statistical purposes.

Order pronounced in the Open Court on 21st March, 2022.

Sd/-
(S.S.VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 21st March, 2022
Satish

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-1, Pune
4. The Pr.CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "B" /
DR 'B', ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	15/16-03-2022	Sr.PS
2.	Draft placed before author	21-03-2022	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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