

IN THE INCOME TAX APPELLATE TRIBUNAL 'A' BENCH, PUNE

**SHRI PARTHA SARATHI CHAUDHURY, JM
AND
DR. DIPAK P. RIPOTE, AM**

**ITA No. 1645/PUN/2015
Assessment Year : 2007-08**

The Dy. CIT Circle 1(1) Pune : Appellant

Vs.

Bajaj Allianz General Insurance Co.
1st floor, GE Plaza, Airport Road
Pune-411 006
PAN ; AABCB5730G : Respondent

**C.O. No. 112/PUN/2017
Arising out of ITA No. 1645/PUN/2015
Assessment Year : 2007-08**

Bajaj Allianz General Insurance Co.
1st floor, GE Plaza, Airport Road
Pune-411 006
PAN ; AABCB5730G Cross Objector

Vs.

The dy. CIT Circle 1(1) Pune : Appellant in appeal.

**ITA No. 1655/PUN/2015
Assessment Year : 2007-08**

Bajaj Allianz General Insurance Co.
1st floor, GE Plaza, Airport Road
Pune-411 006
PAN ; AABCB5730G Appellant

Vs.

Addl. C.I.T. Range 1, Pune. Respondent

Assessee by : Shri Percy J. Pardiwalla &
Ms. Vasanti Patel
Department by : Ms. Divya Bajpai, CIT

Date of Hearing : 25-03-2022
Date of Pronouncement 19-04-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

These cross appeals preferred by the Revenue and the assessee and the Cross Objection by the assessee emanates from the common order of the Id. CIT(A)-1, Pune dated 3-9-2015 for A.Y. 2007-08 as per the following Grounds of appeals.

I.T.A. No. 1645/PUN/2015 for A.Y. 2007-08 : The Revenue has raised the following grounds of appeal.

1. *The order of the Ld. Commissioner of Income-tax(Appeals) is contrary to the law and on facts and in the circumstances of the case.*
2. *The Ld. Commissioner of Income-tax(Appeals) erred on the facts and the circumstances of the case and in law in deleting the addition of Rs.9,93,95,544/- on account of disallowance of claim of exemption of profit on sale/redemption of investment.*
3. *The Ld. Commissioner of Income-tax(Appeals) erred on the facts and in the circumstances of the case and in law in deleting the disallowance u/s 14A of the Income tax Act 1961, amounting Rs 4,45,94,697/-.*
4. *The Ld. Commissioner of Income-tax(Appeals) erred on the facts and in the circumstances of the case and in law in holding that holding that section 14A contemplates an exception for deductions allowable under the Act as contained u/s 28 to 43B of the Act and that Section 44 creates special application of these provisions in the cases of insurance companies which prohibits the Assessing Officer to travel beyond section 44 and First Schedule of the Income-tax Act.*
5. *The Ld. Commissioner of Income-tax(Appeals) erred on the facts and circumstances of the case and in law in not considering that section 44 of the Income-tax Act, 1961 nowhere restricts the applicability. of section 14A of the Income-tax Act 1961*
6. *The Ld. Commissioner of Income-tax(Appeals) erred on the facts and the circumstances of the case and in law in restricting the disallowance at Rs.1,63, 70,017/- in place of Rs. 5 crores made in the assessment order on account of Risk Inspection Charges.*
7. *For these and such other grounds as may be urged at the time of hearing, the order of the learned CIT(A) may be vacated and that of Assessing officer be restored.*
8. *The appellant craves to add, alter or amend any or all the grounds of appeal during the course of appellate proceedings before the Hon'ble Tribunal."*

2. **In ITA No. 1655/PUN/2015 for A.Y. 2007-08** the assessee has raised the following grounds of appeal:

"Bajaj Allianz General Insurance Company Limited [the Appellant] respectfully submits that the learned CIT(A) erred in disposing the appeal of the Appellant, on the following grounds which are independent of and without prejudice to each other.

Ground No 1: Addition on account of profits on sale/redemption of investments

1.1 *Erred in upholding the action of the Assessing Officer ('AO') in treating profits on sale/redemption of investments of Rs.1,93,96,515 as taxable.*

1.2 *Erred in not following the binding decision of the Hon'ble Pune Tribunal in appellant's own case for AY 2002-03 to AY 2006-07.*

Ground No 2: Disallowance of Contribution to Environmental Relief Fund

2.1 *Erred in upholding the action of the AO in disallowing the provision of contribution towards Environmental Relief Fund of Rs.94,07,003 under provisions of section 43B of the Act.*

Ground No 3: Disallowance of Risk Inspection Charges

3.1 *Erred in upholding the action of the AO in disallowing Risk Inspection Charges of Rs.3,35,80,000.*

The Appellant craves leave to add, alter, vary; omit, substitute, amend or delete one or more of the above grounds of appeal on or before or at the time of hearing of the appeal, so as to enable the Honorable Income Tax Appellate Tribunal to dispose off the appeal according to law."

3. In Cross Objection No. 112/PUN/2017 arising out of Revenue's appeal No. 1645/PUN/2015 for A.Y. 2007-08 the assessee has raised on the following grounds of appeal:

"On the facts and in the circumstances of the case, the Respondent wishes to raise the following grounds of cross objection, which are independent of and without prejudice to one another:

1. Cross Objection No.1: Challenging the disallowance under section 14A in respect of non-taxable Profits on sale! redemption of investments and exempt dividend income:

1.1 *The action of the learned CIT(A) in concluding that the provisions of section 14A is not applicable in respect of non-taxable profits on sale/ redemption of investments and exempt dividend income is justifiable under the law and in accordance with the Hon'ble Tribunal's ruling for earlier years in the Respondent's own case.*

2. Cross Objection No.2: Without prejudice to Cross Objection No.1 above, challenging the computation of disallowance under section 14A

2.1 *Without prejudice to above, in case if section 14A is held to be applicable, the disallowance in relation to non-taxable profits on sale! Redemption of investments and exempt dividend income should be restricted to Rs 11,56,172 as determined by the Assessee based on 'Net Income Method'.*

The Respondent craves leave to add, alter, delete or modify all or any of the above grounds of cross objections on or before or at the time of hearing of the appeal, so as to enable the Hon'ble Income Tax Appellate Tribunal to dispose off the appeal

according to law.”

4. At the very outset, the Id. Sr. Counsel submitted that these cross appeals and the Cross Objection pertains to similar facts and circumstances and issues are in common. The Id. D.R accepted the said submissions. Having heard the parties herein, these cross appeals and the Cross Objection are heard together and are being disposed of by this consolidated order.

5. First we would adjudicate the issues in the cross appeals in **ITA No. 1645/PUN/2015 by the Revenue and ITA No. 1655/PUN/2015 by the assessee.**

6. **Ground No. 1 of the assessee's appeal and Ground No. 2 of the department's appeal** is with respect to the issue of disallowance made on account of profits on sale/redemption of investments. The relevant facts are that as a part of General Insurance business, the assessee is mandated by the Insurance Act, 1951 and IRDA to make investments in specified securities. During the A.Y. 2007-08, the assessee has earned profits on sale/redemption of investments of Rs. 11,87,92,059/- and incurred loss of Rs. 9,93,95,544/- on amortization of securities held as investment. The assessee has been consistently claiming profits on sale/redemption of investments (including amortization of profit/loss) as non-taxable in view of deletion of clause (b) to Rule 5 of the First Schedule to the Income-tax Act, 1961 (hereinafter referred to as "the Act") (with effect from 1989-90) with a specific legislative intent of not treating such profits as taxable as clarified by the Central Board of Direct Taxes (CBDT) vide its Circular No. 528 dated 16-12-1988. Accordingly, while computing the taxable income for A.Y. 2007-08, net profits of Rs. 1,93,96,515/- (profits on sale/redemption of investments of Rs.

11,87,92,059/- - loss on amortization of securities of Rs. 93,93,95,544/-) was claimed as non-taxable.

7. The Id. A.O did not accept the aforesaid claim of the assessee and held the profits on sale/redemption of investments Rs. 11,10,98,149/- as taxable. Further, the Id. A.O did not allow the loss on amortization of securities of Rs. 9,93,95,544/- as deductible expenditure. The Id. A.O has dealt with this issue from para 4.4 to 4.7 of his order. The contentions of the Id. A.O are summarized as follows:

- i) The assessee is Public Financial Institution ('PFI') so far its investment activity is concerned and hence, as per RBI Guidelines the income from non-banking activity of financial institution has to be recognized as income. Accordingly, the assessee is also entitled to the benefit of provisions of section 43D of the Act with regard to income recognition and also section 36(1)(2ia) of the Act with regard to provision for doubtful debts.
- ii. Investments in securities of shares being non-obligatory, cannot be considered as a part of legitimate insurance business.
- iii. There is no specific provision excluding the profits on sale/redemption of investments under Rule 5 of the First Schedule to the Act.
- iv. The department has preferred an appeal against the favourable order of the Pune Tribunal for A.Y. 2003-04.
- v. The loss on account of amortization of securities is rightly added back to its computation of income, though it is charged

to profit and loss account as there is no specific provision under Rule 5 of the First Schedule to allow amortization debited to the profit and loss account.

8. The Id. CIT(A) has upheld the addition by placing reliance on the order of the erstwhile CIT(A) passed for A.Y. 2009-10 which was passed relying on the decision of the **Hon'ble Bombay High Court decision in the case of Oriental Fire and General Insurance Co. Ltd. (143 ITR 378) (Bom)** and hence, the assessee is in appeal before us.

9. The Id. CIT(A) has dealt with this issue from para 7 to 8 of his order. However, the Id. CIT(A) allowed the deduction of amortization of securities of Rs. 9,93,95,544/- while deciding the appeal. Against the same, the Department is in appeal before us on this issue.

10. The Id. Sr. Counsel submitted that the ground raised by the assessee and the department are covered in favour of the assessee in view of Pune Tribunal decision in assessee's own case for the following assessment years.

- i) A.Y. 2003-04—ITA No. 1447/PN/2007 and C.O no. 52/PN/2007 arising out of ITA No. 1447/PN/2007) decided on 31-8-2009 (being the lead year);
- ii) A.Y. 2008-09 (ITA No. 2560/PN/2012 decided on 3-2-2016);
- iii) A.Y. 2009-10 and 2010-11 (ITA No. 1071 and 1072/PUN/2015 – assessee's appeal, ITA No. 1269 and 1270/PUN/2015 – Revenue's appeal) and C.O No. 31 and 32/PUN/2017 arising out of ITA No. 1269 and 1270/PUN/2015, decided on 29-9-2017.

11. The Id. Sr. Counsel further submitted that this issue also stands squarely covered in favour of the assessee in the light of the Hon'ble Calcutta High Court decision for A.Y. 2005-06 in the case of **National Insurance Co. Ltd.**

(2017) 393 ITR 52 (Cal) wherein it has been held that in view of the deletion of Rule 5(b) and having regard to the legislative intent specified in the CBDT circular No. 528/1988 (being binding on the Tax Department), the profits on sale of investments should not be taxed. The Pune Bench of the Tribunal has taken cognizance of the said decision while passing order for A.Y. 2009-10 and 2010-11.

12. We find that for the lead year i.e. 2003-04 in ITA No. 1447/PN/2007, the Tribunal has very exhaustively observed and dealt with this issue and has given a categorical finding. The relevant part of the decision is extracted as follows:

5. On this issue we have heard both the sides at length, As is evident from the above discussion that there was no dispute as far as the facts in respect of claim was concerned. Also there was no contradiction about the applicability of the aforesaid provisions of the Act. On the basis of the aforementioned discussion and on due appreciation of factual aspect it is undisputed that there was profit on sale/redemption of certain investments and there was also loss on account of amortization of securities as debited to profit and loss account. There is no dispute that the provisions of sec 44 of the Act applies for computation of income of Insurance Business and the Rules for such computation are contained in First Schedule of the Act. It was also not in dispute that prior to amendment as a rule 5 sub rule (b) which stood deleted from 01-04-1989. In view of this, the short and straight question before us can be frame that - whether on deletion of sub rule (b) the taxability of a particular income still survive particularly when the law do not specifically grant n exemption to that income?' Before its deletion, the sub rule was drafted in the manner already reproduced ante. Whether its deletion had automatically granted an exemption or taxability of that particular income still existed which was earlier taxed in the hands of the Insurance Company due to the presence of Rule 5(b) of the Act

51. To answer this problem we can take the shelter of -he legislative history and this approach has duly been recognized by the Hon'ble Supreme Court as held in the case of Imperial Chit Funds (P) Ltd. vs. ITO (1996) 219 ITR 498 that due importance can be given to legislative history and the background of a fiscal statute that had led to its enactment. The Hon'ble Kerala High Court in the case of Bhagavathy Tea Estates Ltd. and others v State of Ker la and others (1988) 179 ITR 508 has also made an observation that the history of an enactment and the reasons which led to its implementation may be used as aids to its construction. In the like manner an amendment Of an omission in the statute has also to be seen in a holistic manner and a logical interpretation should be given in conjunction with tile object of amendment. The Hon'ble Orissa High Court in the case of CIT v Pyarilal Kasam Manji and Co.198 ITR 110 has made an observation that whenever an amendment is made, to arrive at the real meaning it is always necessary to get an exact conception of the aim, scope and object of the whole Act, to consider the defect which was sought to be remedied and the reasons given for such redressal.

5.2 In the light of the above legal background we have gone through the explanatory notes as described by CSDT in circular no. 528 dated 16th December 1988. Applying the principle as enunciated by the Hon'ble Courts we can draw conclusion that the said amendment was sought to remedy the taxation of gain on sale of certain investments. Up to this extent revenue should also not have any objection that the intent of the legislature was not to tax the gain on sale of investments and primarily because of this reason sub rule (b) from Rule 5 was omitted. The grievance of the revenue and the strong Objection of the A.O was that ~cause of the omission of sub rule it cannot be presumed automatically that the taxation laws have granted exemption to profit on sale of investment. Now the question is that, if the amendment has not taxed a particular income then whether a logical conclusion can be drawn that it was exempted from taxation or even after the amendment still could be taxed in the hands of the Insurance Company, while computing the taxable income based upon the profit and loss accounts of the assessee. Even to answer this question we have to take the shelter and the support from the view expressed by Hon'ble Court and that is the only guidance available to solve such nature of dispute.

5.3 The Hon'ble Courts have pronounced a theory of reasonable construction in a situation of change in the law. In the case of Keshavji Ravji and Co, v. CIT 183 ITR 1. The Hon'ble Supreme Court has said an interpretation should lead to a result intended by the legislation. likewise in the case of CIT v S. Teja Singh 35 ITR 408 it was viewed that construction which defeats the very object sought to be achieved by the legislature must be avoided. likewise in a landmark decision of K.P. Varghese VS. ITO 131 ITR 597 the Hon'ble Court has expressed that there must not be an absurd or unjust interpretation. In an appeal propounding the theory of equity the Hon'ble Supreme Court in the case of CIT v. J.H. Golta 156 ITR 323 has said that the statutory construction should result in equity rather than injustice. On the basis of a plethora ~f judgment of several Hon'ble Courts we can draw a conclusion that even a literal interpretation in the present case should also result into the exemption in respect of profit on sale of investment. There was no conflicting intention in the cited amendment as expressed by Finance Act 1998. Also there is no dispute that even in case of contraries or conflicts an interpretation should go in favor of the assessee as propounded in the case of CIT v Kulu Valley Transport Co. P. Ltd. 77 ITR 518 and CIT v. Vegetable Products ltd. BB ITR 192.

6. The Id. CIT(A) has called for a remand report from the A.O. When the same was handed over to this assessee the point-wise contention were as follows :-

a) The appellant is not a public financial institution prescribed u/s 4(A) of the Companies Act hence, it was wrong on the part of the A.O to allege that in addition to, the Insurance Business the assessee company has also acted as a Public Financial institution u/s 4(A) of Companies Act. It was pleaded that as per

the definition of an Insurance company under the Insurance Act the whole and sole purpose of a General Insurance Company is to carry on General Insurance Business.

b). The allegation of the A.O that transaction in shares and securities was one of the normal business activity of the assessee hence liable for taxation. The contention was that though it was one of the activity to earn profit on sale on investment but the respected Parliament in his wisdom has decided not to tax

the same. In support it was cited that the Insurance Company are governed by Rule 5 of a schedule. Reliance was placed on the decision of [Supreme Court in the case of General Company of India 240 ITR 139 and Pandyne [Insurance Company 551TR 716.

c) The allegation of the A.O was that any part of the profits and gains not attributable to the Insurance Business could qualify for exemption and liable to be taxed. The contention of the assessee was that firstly the financial

statements of an Insurance Company has to be finalized in accordance with the insurance regulatory and development authority. As per the said regulation profits earned by a General Insurance Company on sale of redemption of investment has to be credited to the profit and loss account and not to be shifted to the balance sheet directly, It was wrong on the part of the A.O through a suggestion that had the assessee ever intended to claim the exemption then he could have reflected the profit on sale of investment in the balance sheet directly instead of crediting in P & L account. The contention of the assessee was that such a method has not been prescribed by the designated regulatory authority,

d) The applicability of provisions of sec 43(0) and section 36(1)(vii a) have also been denied. The contention of the assessee was that these provisions are applicable to Public Financial Institutions (PFI) and the assessee company do not fall under that category.

7, In addition to the above contentions there was no dispute that the independent code is enacted by the introduction of sec. 44 in I. T. Act which independently prescribed the mode and manner for assessment of Insurance Business. This section since contains non-obstante clause therefore notwithstanding anything contained in any of the sections of the Act, the profits and gains of Insurance Business including any such business carried on by a Mutual Insurance Company or by an Co-operative Society shall be computed in accordance with the rules contained in First Schedule. Accordingly, there could not be 'any other income taxable other than Insurance Business because sec. 44 over-rules all other provisions of the I.T. Act.

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 prescribe 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"

13. That similarly for A.Y. 2008-09 in ITA No. 2560/PN/2012 dated 3-2-2016, the Tribunal has held as follows:

"17. We have heard the rival contentions and perused the record. The first issue raised vide ground of appeal No.1 before us is in relation to the taxability of profits arising on sale and redemption of investments claimed as exempt by the assessee totalling Rs.50,00,81,160/- and amortization of securities charges totalling Rs.3,10,26,441/-. The assessee before us is a joint venture between Bajaj Auto Ltd., and Allianz SE, Germany. The assessee was granted approval to carry on general insurance business as per IRDA authority. The assessee was engaged in the business of general insurance for the year under consideration. In addition to its income from insurance, the assessee had shown profit on sale / redemption of securities at Rs.50,00,81,160/- and also amortization of securities of Rs.3,10,26,441/-. The said claim of the assessee was rejected by the Assessing Officer observing that the functions of the assessee company were distinct i.e. it was engaged in the activity of insurance business and the second activity was public finance institution. The Assessing Officer was also of the view

that the income from non-banking activity of financial institution had to be recognized as income in view of the RBI guidelines. The case of the assessee on the other hand, was that under Rule 5 of First Schedule, the manner was prescribed, under which profits and gains of insurance business, other than the life insurance business, had to be computed. The assessee further pointed out that in view of the amendment in Rule 5 of First Schedule, by which the said Rule was omitted, the profit earned in respect of the investments is not taxable in the hands of assessee. The assessee thus, did not include/reduce the profit on sale / redemption of investment of about Rs.50 crores and net loss on amortization of Rs.3.10 crores in the computation of income filed for the year under consideration. The said Rule 5(b) of First Schedule has been re-inserted by the Finance (No.2) Act, 2009 w.e.f. 01.04.2011, which was further substituted by the Finance Act, 2010 w.e.f. 01.04.2011. Prior to its substitution, clause (b) was omitted by the Finance Act, 1988 w.e.f. 01.04.1989. The year under appeal before us is assessment year 2008-09 i.e. the year in which the said provisions of Rule 5 of First Schedule were not on Statute. Similar claim was made by the assessee that the profit / loss arising on sale / redemption of securities, investment was not taxable and even the loss on account of amortization of securities was to be reduced from the taxable income of the year, arose before the Tribunal in assessee's own case in assessment year 2003-04. The Tribunal in ITA No.144 7/PN/2007 relating to assessment year 2003-04 along with CO No.52/PN/2007, reported in 130 TTJ (Pune) 398 had considered the aforesaid issue and had 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 prescribe 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 scrapped. 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."

18. Following the same parity of reasoning, we hold that while computing the income from insurance business under section 44 and First Schedule of the Act, there is no merit in holding the profit / loss on sale / redemption of securities / investments amounting to about Rs.50 crores as taxable and the loss on amortization of securities of Rs.3.10 crores is to be reduced from the taxable income of the assessee. The order of Tribunal in assessment year 2003-04 has been subsequently followed by the Tribunal in assessment year 2004-05 in ITA No.600/PN/2008, order dated 10.12.2010, in assessment year 2002-03 in ITA No.1579/PN/2008, order dated 31.01.2011, in assessment year 2005-06 in ITA No.1508/PN/2012, ITA No.1406/PN/2012 and CO No.42/PN/2013, order dated 23.10.2013 and in assessment year 2006-07 in ITA No.119/PN/2011, order dated 06.05.2013. In view of the issue being decided in favour of the assessee in various assessment years and following the same parity of reasoning, we allow the ground of appeal No.1 raised by the assessee."

14. Here, the Tribunal has given relief by following the decision for A.Y.

2003-04 (supra) and thereafter has observed that even for other assessment years also for A.Y. 2004-05 and for A.Y. 2002-03, A.Y. 2005-06 and 2006-07, this issue has been consistently decided in favour of the assessee. Similarly we also find that for A.Y. 2009-10 and 2011-12 in ITA No. 1071 and 1072/PUN/2015 the Tribunal vide paras 15 and 16 of its order had followed the decision in assessee's own case for A.Y. 2008-09 dated 3-2-2016 and has provided relief to the assessee.

15. The ***Hon'ble Calcutta High Court in the case of Pr. C.I.T. Vs. National Insurance Co. Ltd. (2017) 393 ITR 52 (Cal)*** has observed and held as follows:

"14. As we have already indicated, the Revenue's stand is that there is no specific provision in the statute which allows a general insurance company's profits from sale of investments to be exempted from total income for the purpose of taxation under the 1961 Act. Mr. Poddar, sought to repel the Revenue argument on three grounds. His first submission is that upon omission of clause (b) from Rule 5 of the First Schedule, the Assessing Officer was denuded of the power to make any adjustment by way of adding back the said sum to total income of the assessee for the purpose of Income Tax assessment, which power the Assessing Officer sought to exercise in the case of the assessee. His second submission is that the Circular of 1988 clearly stipulated that profit on sale of investments was not taxable in the case of a general insurance company. Thirdly, he has argued that the consistent stand of the income tax authorities between the assessment years 1991-92 and 2004-05 as also 2007-08 till 2010-11 reflects that the mandate of the circular was accepted by the tax authorities and followed. There was consistent practice of not making adjustment by way of adding back in similar fashion and this practice ought not to be deviated for the relevant assessment year. He has also pointed out that such adjustment is permissible from the assessment years 2011-12 onwards by reason of reinsertion of clause (b) in Rule 5 to the said schedule.

15. Main stand of the assessee is on binding nature of the circular, so far as income tax authorities are concerned. Even if a circular appears to go against statutory provisions, Mr. Poddar has submitted, referring to the judgment of the Supreme Court in the case of *Paper Products Ltd. v. Commissioner of Central Excise (supra)*, the circular would prevail. In this judgment it has been held that:-

"The question for our consideration in these appeals is : What is the true nature and effect of the circulars issued by the Board in exercise of its power under section 37B of the Central Excise Act, 1944 ? This question is no more res integra in view of the various judgments of this court. This court in a catena of decisions has held that the circulars issued under section 37B of the said Act are binding on the Department and the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

These judgments have also held that the position may be different with regard to an assessee who can contest the validity or legality of such instructions but so far as the Department is concerned, such right is not available. (see Collector of Central Excise v. Usha Martin Industries [1997] 7 SCC 47; [1997] 94 ELT 460 (SC). In the case of Ranadey Micronutrients v. Collector of Central Excise [1996] 10 SCC 387; [1996] 87 ELT 19, this court held that the whole objective of such circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of excise duty. The court also held that it does not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision (emphasis supplied). Consistency and discipline are, according to this court, of far greater importance than the winning or losing of court proceedings. In the case of Collector of Central Excise v. Jayant Dalal Pvt. Ltd. [1997] 10 SCC 402; [1998] 100 ELT 10, this court has held that it is not open to the Revenue to advance an argument or even file an appeal against the correctness or the binding nature of the circulars issued by the Board. Similar is the view taken by this court in the case of Collector of Central Excise v. Kores (India) Ltd. [1997] 10 SCC 338; [1997] 89 ELT 441 (SC)."

16. *We do not find any reason to accept the argument of the Revenue which goes contrary to the consistent stand taken by them on similar point in earlier assessment years on the same point of law. The Circular of 16th December, 1988 clearly stipulated the object behind deletion of aforesaid sub-clause (b). The manner in which profits from investments of a general insurance company is to be treated for income tax purpose also can be construed from the Notes on Clauses extracted from the Finance Bill, 1988. We have reproduced the relevant portion thereof earlier in this judgment. Having regard to the provisions of Section 44 of the Act read with First Schedule thereto, in our opinion the Assessing Officer for the applicable assessment year did not have power to add back the profit of Rs.245.09 crores arising out of sale of investments to the total income of the assessee."*

16. Before us, the Id. D.R also fairly accepted that this issue has been consistently held in favour of the assessee by its own order and that the view stipulated in the judgment of the Hon'ble Calcutta High court is also in support of the assessee. Respectfully following the aforesaid judicial pronouncements **Ground No. 1 of the assessee's appeal is allowed while ground No. 2 of the Department's appeal is dismissed.**

17. **Ground No. 2 of assessee's appeal** is with regard to the disallowance of contribution to environment relief fund. The assessee is aggrieved by the decision of the Id. CIT(A) in upholding the action of the Id. A.O in disallowing the provisions of contribution towards Environmental Relief Fund of Rs.

94,07,003/- u/s 43B of the Act. The relevant facts are that the assessee is mandated by the Public Liability Fund Act, 1999 to collect contribution equivalent to the amount of premium on public liability policies issued for being credited to the Environmental Relief Fund. In the return of income for A.Y. 2007-08, the assessee had erroneously considered a sum of Rs.94,07,003/- relating to contribution to the Environmental Fund Liability collected under the Public Liability Fund Act, 1999 as disallowable u/s 43B of the Act. Subsequently, the assessee had revised its return of income, considering the contribution to Environment Fund Liability as allowable expenditure. The Id. A.O did not accept the aforesaid claim of the assessee and disallowed the contribution made towards Environment Relief Fund u/s 43B of the Act based on the following contentions.

- i) *The Contribution being received in the course of its Insurance business, the receipt of contribution does not lose the character of 'Income';*
- ii) *If these were no rules for remittance and no remittance was made, the liability is not established; and*
- iii) *The amount of contribution so collected remained in the common pool of funds and hence, the assessee had control over such funds.*

18. The Id. A.O has given his findings at para 6.2 of his order as under:

“6.2: The submission of the assessee is not accepted as the facts in the assessee’s case are different. The assessee has not indicated as to when and how the amount collected was ultimately paid out. If the amount collected was to remain with the assessee, and was received in the course of its insurance business, merely because the amount has been credited to a specific fund as per law, the receipt does not lose the character of income. If there were no rules for remittance and no remittance was made, the liability is not established. The liability to pay out of the earmarked fund in case of an event does not mean that the assessee has no control over the funds. In fact the amount collected shall remain in the common pool of funds used for the assessee’s business. In view of this the claim of the assessee cannot be entertained.”

19. The Id. CIT(A) did not accept the submissions of the assessee and decided the issue against the assessee. The operative part of his decision is at para 17 of his order which is extracted as follows:

17. I have carefully considered the facts of the case as well as reply of the appellant. In this case, the appellant had collected Rs. 94,07,003/- being liability towards Environmental Relief Fund. The amount was disallowed u/s 438 of the I T.Act, 1961 by the appellant itself in the original Return of income. However, in

the revised Return of income, the amount was claimed on the ground that there was no mechanism to pay the amount. The main plank of the argument of the appellant is that the above amount was collected under Public Liability Insurance Act 1991. As per sec. 23 of the PLI Act, Central Govt. was required to formulate Rules for the manner in which and the period within which the amount received was required to be remitted by the insurer u/s 4(2D) of the PLI Act. The manner in which the contribution so collected is required to be remitted was prescribed in December, 2008 and the appellant made the payment of accumulated balance on 2/01/2009. Till then the amount in question was shown as current liability. Considering the above provision it can well be seen that there was impossibility of paying the amount as no mechanism for the same was put in place. However, there is no provision in the Act to exclude such cases from ambit of the provisions sec. 43B of the I T Act, 1961. The appellant can claim the same in the year of payment. The appellant also admitted that such claim was rejected by DRP in the A.Y. 2008-09. Accordingly, I do not find any merit in the ground and the same is dismissed."

20. At the time of hearing, the Id. Sr. Counsel submitted that the ground raised by the assessee is covered in favour of the assessee in view of the decision by the Coordinate Bench Pune in assessee's own case, the lead year being A.Y. 2006-07 in ITA No. 1653/PUN/2015 dated 21-1-2019. The said appeal was filed by the assessee in the second round of proceedings before the Tribunal, wherein in earlier round vide order dated 6-5-2013 the matter was set aside to the file of the A.O. In the second round of assessment proceedings, the Id. A.O continued with disallowance u/s 43B of the Act. The CIT(A) upheld the order of the A.O. However, the Tribunal decided this issue in favour of the assessee vide its order dated 21-1-2019 and held as follows:

"10. We have heard the rival contentions and perused the record. The assessee was a joint venture between Bajaj Allianz General Insurance Company Limited, India and Allianz SE, Germany, incorporated on 31.03.2007. The assessee received the registration certificate and approval on 02.05.2001 from Insurance Regulatory and Development Authority (IRDA) to carry on general insurance business in India. The assessee was engaged in Fire, Marine, Motor and Miscellaneous (Workmen Compensation Employers Liability, Public Product Liability, Engineering, Aviation, Health, Personal Accident, etc. insurance business. For the year under consideration, the assessee had in the return of income suo motu made a disallowance of ₹ 70,31,561/- relating to contribution to the Environment Fund Liability under section 43B of the Act. However, during the course of assessment proceedings, the assessee filed revised computation of income and claimed the said amount as deductible. The plea of the assessee was that the Environment Relief Fund Liability is a contribution collected under Public Liability Fund Act, 1999 equivalent to the amount of premium on public liability policies issued and disclosed under the head „Current Liabilities“. The amount collected towards contribution to Environment Relief Fund was to be remitted in a manner as prescribed by the Central Government. However, the Government had not notified the manner of remitting the funds so collected till December, 2008. Accordingly, the entire liability towards the contribution received towards Environment Fund Liability remained unpaid as on 31st March, 2006. The issue which arises before us is that the contribution so collected by the assessee which had to be remitted to the fund created under Public Liability Fund Act, in the

absence of any such fund being created till the due date of filing of the return of income and, hence, not being contributed, whether can be added as income of the assessee under section 43B of the Act?

11. The relevant provisions of the Public Liability Fund Act, 1991 are as under:-

"4(1) Every owner shall take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of insurance thereby he is insured against liability to give relief under sub-section (1) of section 3;

xxxxxx

4(2C) Every owner shall also, together with the amount of premium, pay to the insurer, for being credited to the Relief Fund established under section 7A, such further amount, not exceeding the amount of premium, as may be prescribed.;"

12. The case of the assessee before us is that the amounts collected towards ERF were specifically identified in the policy schedule issued by it. The assessee collects the said amount from the owner (insured) of the insurance policy but it was acting only as a channel between proposed insured and the Government. The liability to contribute to the said fund arises when the owner (insured) pays the additional remuneration to the insurer. As per clause 4(2D) of PLI Act, the liability of insurer was to remit the amount received from the owner under sub-section (2C) to the Relief Fund, in such manner and within such period as may be prescribed; and where the insurer fails to so remit the amount, such amount shall be recoverable from insurer as arrears of land revenue or of public demand. In other words, the liability of assessee (insurer) is to deposit the said sum collected from the owner (insured), to the relief fund. However, the manner to deposit and the period within which the same is to be deposited, is to be prescribed by the Government of India. The assessee though collects the amount from the owner (insured) but it is not the income of the assessee. The assessee at best is a conduit for depositing the amount to the relief fund on behalf of the owner (insured). In such circumstances, the collection of the contribution to ERF account cannot be regarded as income of the assessee. At best it is governed by the principle of diversion of Income by overriding title. In this regard, we find support from the ratio laid down by the Hon^{ble} Supreme Court in the case of *Siddheshwar Sahakari Sakhar Karkhana Limited*, 270 ITR 1(SC), wherein it has been laid down that in case the assessee acted as an agent in collecting the amounts and remitting the same to the Government and trustees, then the money collected by the assessee was not reaching the assessee as part of its income, but the collection was made "for and on behalf of the person to whom it is payable". We further find support from the decision of Hon^{ble} Supreme Court in the case of *New Horizon Sugar Mills (P) Ltd.* [2004] 141 Taxman 254 (SC) and the decision of Hon^{ble} Bombay High Court in the case of *Somaiya Orgeno-Chemicals Ltd.* [1994] 74 Taxman 206 (Bombay) for the aforesaid proposition. In such circumstances, where the assessee has collected the contribution to the ERF from the owner (insured) then he is only acting as a custodian of the said fund and the said amount cannot be regarded as income of the assessee. In case the amount is not the receipt of the assessee, not routed through Profit and Loss Account, then there is no question of applicability of provisions of section 43B of the Act.

13. Another aspect which needs to be kept in mind is the absence of a mechanism of making contribution to ERF; though under the Act, the assessee has collected the amount from the owner (insured), but in the absence of the fund being created, the assessee was handicapped in transferring the amount so collected to the fund. The manner of remittance was prescribed in December 2008 and the assessee has paid the accumulated balance on 2.9.2009. In the absence of the creation of fund, the assessee had no means of depositing the said amount and the assessee in such circumstances cannot be held responsible for non-depositing the contribution to ERF. In any case, we have already held in the above paras that the assessee was only the collector of funds of the amount

which was to be deposited on behalf of the owner (insured), when the mechanism was provided for such deposit.

14. Before parting, we may also point out that there is no merit in the order of CIT(A) in holding the said payment to be in the nature of cess. The Hon'ble Supreme Court in the case of M/s Guruswamy & Co. Etc. (supra) has decided the said issue at para 21 of its judgment and has held that the word „cess“ means tax and generally used when the levy is for such specifically administrative expenses which the name indicates i.e. health cess, education cess, road cess, etc. The said levy (i.e. cess) is an additional levy with tax and is within the powers of State Legislature to levy the same. Applying the said principle to the facts of the case, where the levy is prescribed under the PLI Act, cannot be said to be a State levy of “cess”. Thus, we find no merit in the order of the CIT(A) in this regard. Allowing the claim of the assessee, we hold that the fund collected by the assessee was neither fee, tax or cess and, hence, do not come within the ambit of section 43B of the Act.

15. The last point for the adjudication is the special manner of determination of income of the insurance companies as prescribed under rule 5 of Schedule 1 of the Act. The Profit and Loss Account disclosed by the assessee i.e. its annual accounts are sacrosanct. The said rule provides that the income to be determined is subject to clause 8 i.e. if any expenditure is debited to the Profit and Loss Account, then the same can be added back. As pointed out in the paras above, the assessee had not debited the aforesaid amount to the Profit and Loss Account, but shown as Current Liabilities and consequently, the same cannot be added back to the profits of the business for the year of Insurance Business. Accordingly, the disallowance made by the Assessing Officer of ₹ 70,31,561/- is hereby deleted. The ground of appeal raised by assessee is thus, allowed.”

21. Similarly for A.Y. 2008-09 in ITA No. 1515/PUN/2017 dated 21-1-2020 vide para 4 of its order the Tribunal observed and held that identical issue was decided in favour of the assessee for A.Y. 2006-07 in ITA No. 1653/PUN/2015 (supra) and placing reliance on the same, relief was provided to the assessee by observing as follows:

5. Before us, no material has been placed by Revenue to demonstrate that the order of Tribunal in assessee's own case for A.Y. 2006-07 (supra) has been set aside / stayed by higher Judicial Forum. Revenue has also not pointed out any distinguishing feature in the facts of the present case and in the case of assessee's own case in A.Y. 2006-07. We therefore, relying on the decision of the Tribunal in assessee's own case in A.Y. 2006-07 (supra) and for similar reasons hold that the disallowance made by the AO of Rs.74,03,321/- u/s 43B of the Act is uncalled for and therefore direct its deletion. Thus, the ground of the assessee is allowed.”

22. The Id. D.R before us accepted the issue being covered in favour of the assessee. Respectfully following the aforestated decisions on the same facts and circumstances and on the same parity of reasoning, **ground No. 2 of assessee's appeal is allowed.**

23. **Ground No. 3 of the assessee's appeal and Ground No. 6 of the**

Department's appeal is with regard to the issue of disallowance of Risk Inspection Charges. So far as ground No. 3 in the assessee's appeal is concerned, the assessee is aggrieved that the Id. CIT(A) has upheld the action of the Id. A.O in disallowing Risk Inspection Charges of Rs. 3,35,80,000. In Ground No. 6 of the Departmental appeal, the Revenue is aggrieved that the Id. CIT(A) had restricted the disallowance at Rs. 1,63,70,017/- in place of Rs. 5 crores as made by the Id. A.O on account of Risk Inspection Charges. The relevant facts are that during the A.Y. 2007-08 the assessee has incurred expenses towards risk inspection charges paid for obtaining risk inspection report. The risk inspection report is obtained before entering into an insurance contract with the insured to analyse the risk involved and form a preliminary opinion as to whether it makes commercial sense to bear the risk. The risk inspection charges are paid to surveyors and their services typically includes visit to the relevant sites, analysis of various hazards and evaluation of risks, etc. and providing a final assessment report for taking an informed underwriting decision. Inputs received from such assessment reports are general guides which help the assessee to analyse risk from a company and portfolio level as to the type of risks and accounts that are acceptable (or not acceptable); to understand operational and occupational hazards in different industries; to decide on what types of risks and companies that it could possibly underwrite and what risks are likely to fit within its portfolio. The process of risk selection and customer prospecting in the general insurance industry depends on collection of substantial amount of data on the market trends as well as specific risk factors related to the companies and the industries in which they operate. Inputs from these assessment reports are an important part of this process. Good underwriting in general insurance depends as much on rejecting certain companies and risks as much as accepting companies and risks with a good

risk profile. Such reports also help the assessee in prospecting for clients who are likely to meet with its risk acceptance guidelines. Certain parties to whom risk inspection charges were paid during the previous year relevant to A.Y. 2007-08 were subject to search proceedings u/s 132 of the Act by the Dy. Director of Income-tax ('DDIT') (Investigation), Mumbai. During the course of investigation, substantive documents were filed by the assessee to demonstrate that the expenses incurred by it are for the purpose of receipt of the above mentioned services and are genuine.

24. The assessee reiterated the submissions filed in the course of investigation proceedings which are enclosed at pages 241 to 292 of the paper book. In the aforesaid submissions following details have been submitted before the DDIT.

- i) description of the services provided by the risk inspection surveyors and its usefulness for the business of the assessee.
- ii) risk inspection reports provided by the surveyors;
- iii) modus operandi of transactions entered with risk inspection surveyors;
- iv) name, address, PAN ad details of payments made to the surveyors along-with copies of invoices.
- v) chart enumerating amount of premium earned from the customers/insured which were inspected by the surveyors;
- vi) confirmation from the specified parties regarding receipt of the payment without any remittance back to the assessee; and
- vii) details regarding appropriate taxes being withheld for payments made to surveyors.

25. The assessee further submitted that even on filing the aforesaid details, which were sufficient to prove the genuineness of the payments made to specified surveyors, the DDIT insisted to produce the surveyors for the purpose of cross-examination. The assessee took efforts to produce these surveyors but because of discontinuance of business with these parties, the whereabouts of the surveyors could not be traced. Moreover, appropriate details like latest available address, contact details, PAN, service tax registration number, etc. of

such surveyors were provided to the DDIT to independently trace these parties by issuing summons. The DDIT still insisted that the assessee should produce the surveyors for cross-examination. The assessee, in the absence of any authority, was not able to enforce physical attendance of the surveyors. Without prejudice to the bonafide deductibility of these expenses, having regard to materiality of the amount involved and to buy peace of mind, the assessee decided to forgo its claim of deduction for the risk inspection charges paid to the specified parties for the A.Y. 2007-08 amounting to Rs. 84,27,955/-. In this regard, the assessee thereafter had filed a letter with the Id. A.O explaining the aforesaid background on 19-8-2009. In the assessment order, the A.O referred to the statements of third parties [Mr. Sitani and Mr. Gupta] to allege that the risk inspection charges paid to specified parties is non-genuine expenditure in the nature of accommodation entries. Accordingly, the A.O disallowed an amount of Rs. 1,72,09,983/- which was in relation to such specified parties. Moreover, the Id. A.O questioned the entire risk inspection charges of Rs. 33,58,00,000/- and sought various party-wise details. The same was provided on time to time basis in the course of assessment proceedings. However, the Id. A.O drew certain alleged inferences from the documentation provided and imputed a further adhoc disallowance of Rs. 5 crores. The Id. A.O has discussed this issue at para 7.8 to 7.10 of his order. That before the Id. A.O the assessee had filed detailed written submissions which are also annexed at pages 293 to 826 in the paper book filed before us. In the said submissions following illustrative details were submitted before the Id. A.O.

- i) Details with respect to transaction with 2 risk inspection parties i.e. Olympia Sales Agency and Nupur Management Consultancy;
- ii) multiple copies of risk inspection reports and corresponding invoices;
- iii) explanation regarding the procedure of obtaining the risk inspection report;

- iv) Details of net premium earned from certain parties inspected by the specified risk inspecting parties.
- v) Party wise details extracted from books of accounts for all risk inspection parties;
- vi) Copies of insurance policies issued to customers inspected by risk inspection parties.
- vii) Copies of sample invoices and list of parties to whom the payment is made for more than INR 1,00,000/-
- viii) Additional invoice copies of 46 risk inspection surveyors out of the 71 parties wherein payment towards risk inspection was more than Rs. 1,00,000/-
- ix) Details of Address, PAN, TDS etc. in connection with two parties i.e. Bharavi Undhad and Mohanlal Totla as specifically required by the A.O.

26. That on appeal before the Id. CIT(A), the assessee rebutted all the observations of the Id. A.O on facts and on law and sought complete relief from the Id. CIT(A). Copy of submissions made before the CIT(A) have been placed at pages 202 to 222 of the paper book. However, the Id. CIT(A) upheld the disallowance in relation to the specified parties but restricted the overall disallowance to 10% of the total risk inspection charges. Thus, against the total disallowance of Rs. 6,72,09,983/- the assessee got relief of Rs. 3,36,29,983/- at the first appellate level. The Id. CIT(A) has discussed this issue at paras 23 to 25 of his order. Now, the assessee is in appeal before us challenging the disallowance of Rs. 3,35,80,000/- sustained by the Id. CIT(A) and the department is in appeal before us on the relief of Rs. 3,36,29,983/- granted by the Id. CIT(A) in relation to the aforesaid issue.

27. Before us, the Id. Senior Counsel for the assessee submitted in a tabular form, the findings of the Tribunal while adjudicating on the issue in other assessment years which is as follows:

Sr.No.	A.Y.	ITA No.	Held by Tribunal
1.	2006-07	119/PUN/2011	<i>The ITAT held that the disallowance made in respect of payments made to the specified parties be sustained, however, the assessee will not be precluded from agitating this issue in the penalty proceedings [refer para 7.3; page 28 of the ITAT order]</i>
2.	2008-09	2560/PN/2012	<i>Absence of a purchase order cannot form the basis of disallowance. However, in view of the evidence collected, an adhoc disallowance of 25% was sustained after giving credit of the amount covered by the purchase orders [Refer para 49; page 70 to 74 of the paper book of the ITAT order.</i>
3.	2009-10	1071/PUN/2015	<i>Mere absence of purchase orders would not disentitle the assessee from the claim of risk inspection charges. The Hon'ble ITAT found merit in the plea that in absence of any adverse evidences collected during the year, no disallowance is to be made. [Refer para 39: page 103 of the paper book] – ITAT order passed for A.Y. 2009-10 and A.Y 2010-11 [Refer para 18; page 10 to 14] – ITAT order passed for A.Y 2011-12.</i>

28. The Id. Sr. Counsel in reference to the above mentioned table submitted that the Hon'ble Tribunal has adjudicated the subject ground in the orders passed for A.Y. 2006-07 to A,Y 2011-12 (except A.Y 2007-08). The findings of the Hon'ble Tribunal are two fold and the same is summarized below.

- i) *In the year i.e. A.Y 2006-07 – The Hon'ble ITAT upheld specific disallowances but noted that the assessee cannot be precluded from agitating this issue in penalty proceedings.*
- ii) *In the year i.e. A.Y. 2008-09 – The Hon'ble ITAT has upheld the disallowance to the extent of 25% risk inspection charges in cases where there are no purchase orders submitted by the assessee.*

- iii) *In the years i.e. A.Y. 2009-10 to A.Y 2011-12 – the Hon'ble Tribunal has deleted the addition/disallowance in its entirety after reconsidering the decision of A.Y 2008-09 and basis the ample evidences being submitted substantiating the genuineness of the transactions, no such disallowances have been made while passing the order. In these years there was no payment to the specified parties.*

Against the order passed by the Tribunal for A.Y 2008-09, both the department and assessee (by way of cross objections) preferred appeals before the Hon'ble High Court. The Hon'ble High Court while adjudicating the appeals at the admission stage dismissed both the appeals as being factual in nature and no question of law arose from the same. Subsequently, the department and assessee (by way of cross objection) preferred **Special Leave Petitions (SLP) before the Hon'ble Supreme Court** and the same are pending at admission stage. The assessee's decision of accepting the disallowance which pertains to specified parties despite submitting substantive documents to demonstrate that the expenses are for the purpose of receipt of the above mentioned services should not be considered as otherwise while adjudicating the penalty proceedings. Thus, the assessee submitted that this issue may be adjudicated in line with the findings at para 7.3 of the Tribunal order passed for A.Y. 2006-07 so that the assessee is protected to substantiate its claim in the penalty proceedings, if any, that may be levied. Hence, the assessee submits that the A.Y. 2007-08 being the last pending year on the impugned issue wishes to put an end to this litigation and hence requests the Tribunal to consider the conjoint reading of the orders passed for A.Y. 2008-09 and 2009-10 to A.Y. 2011-12 and sustain the disallowance of Rs. 1,72,09,983/- which pertains to specified parties and delete the disallowance of Rs. 5.00 crores made on adhoc basis since the assessee has submitted ample evidences to substantiate the genuineness of the transactions and considering the same no such disallowances have been made in future years.

29. The Id. D.R before us did not raise any specific objection to the submissions of the assessee. The Id. D.R fairly also conceded that the disallowance which the assessee wants to be sustained i.e. Rs. 1,72,09,983/- which pertains to specific parties and the disallowance of Rs. 5.00 crores which was made on adhoc basis by the A.O it was restricted to Rs. 1.63 crores by the CIT(A) and the very purpose of reduction by the Id. CIT(A) was that in the very first place, the addition was made on an adhoc basis only by the A.O.

30. Having heard the parties herein and on perusal of the documents on record and considering the submissions of the parties, we find that in this issue of risk inspection charges, the disallowance made by the Id. A.O. in respect of specified parties was Rs. 1,72,09,983/- and there was an adhoc disallowance made of Rs. 5.00 crores. Thus, the total disallowance made by the Id. A.O is of Rs. 6,72,09,983/-. That at the level of Id. CIT(A) he sustained the disallowance in respect of specified parties of Rs. 1,72,09,983/- but reduced the adhoc disallowance of Rs. 5.00 crores to Rs. 1,63,70,017/-. Therefore, the total disallowance by the Id. CIT(A) is Rs. 3,35,80,000/-. The Id. CIT(A) has given a relief of Rs. 3,36,29,983/- (Rs. 5,00,00,000/- - Rs. 1,63,70,017/-). That there are direct evidences in respect of addition of Rs. 1,72,09,983/- which pertains to specified parties. That at page 7.8 of the assessment order, the fact is that Mr. Sandeep Sitani controlled these companies which were providing bogus accommodation entries to the assessee and no surveys were conducted by them as companies were merely shell companies for providing entries. It was also admitted by Mr. Sandeep Sitani that no bills were issued by the bogus companies. In this regard, expenditure claimed of Rs. 1,08,31,171/- on account of risk inspection surveys was disallowed. Similarly, at para 7.93 of the A.O's order, the assessee had claimed risk inspection survey expenses on account of payment of Rs. 63,78,812/- made to one M/s. Accord Insurance

Services which is a bogus concern and a mere link in the chain of fictitious transactions orchestrated by one Mr. S.K. Gupta. Therefore, the risk inspection survey expenses of Rs. 63,78,812/- was disallowed. Therefore, total of Rs. 1,08,31,171/- + Rs. 63,78,812/- = Rs. 1.72,09,983/- was disallowed by the A.O. having direct evidences of transaction with specified parties. The assessee has also conceded to this disallowance. The assessee further submitted that the decision of accepting the said disallowance which pertains to specified parties despite submitting substantive documents to demonstrate that the expenses were for the purposes of receipt of the above mentioned services should not be considered as otherwise while adjudicating the penalty proceedings.

31. After hearing both the sides and in view of the submissions of the Id. Sr. Counsel for the assessee conceding to the disallowance of Rs. 1,72,09,983/- which pertains to the specified parties, the same is hereby confirmed. However, this will not preclude the assessee to agitate the issue in the penalty proceedings. We also find that the A.O had made a disallowance of Rs. 5.00 crores on adhoc basis which was restricted to Rs. 1.63 crores by the Id. CIT(A). In this regard, the Id. Sr. Counsel submitted that on a conjoint reading of the orders of the Tribunal for A.Y. 2008-09, 2009-10, 2010-11 and 2011-12 there were no evidences of payments to Mr. S.K. Gupta and Mr. Sandeep Sitani and thus no disallowance was made and that further no disallowance can be made on an adhoc basis by the revenue authorities. That in the Tribunal's order for A.Y. 2009-10 at para 39, the Tribunal gives a categorical finding that there is merit in the plea of the assessee that in the absence of any adverse evidences collected during the year no disallowance can be made in the hands of the assessee in the instant assessment year. This signifies that there cannot be any disallowance on adhoc basis. Taking totality of the facts and

circumstances and the rationale imbibed in the decision of the Tribunal in assessee's own case for other assessment years, we hold that no disallowance on adhoc basis is permissible in the realm of direct tax statutes. Hence, the disallowance of Rs. 5.00 crores made on adhoc basis by the A.O which was restricted at Rs. 1,63,00,000/- by the Id. CIT(A) is hereby deleted. **Hence, ground No. 3 of assessee's appeal is partly allowed and the ground No. 6 of the Department's appeal is dismissed.**

32. **Grounds No. 3 to 5 of Department's appeal** is with regard to the disallowance made u/s 14A of the Act. Per contra, the **assessee has raised ground No. 1 in Cross Objection** challenging the disallowance u/s 14A in respect of non-taxable profits on sale/redemption of investments and exempt dividend income. **In Ground No.2 of the Cross Objection raised by the assessee, without prejudice to cross objection Ground No. 1, the assessee is also challenging the computation of disallowance u/s 14A of the Act.** In the grounds of appeal by the Revenue on this issue they have agitated that the Id. CIT(A) erred on the facts and in the circumstances of the case and in law in deleting the disallowance u/s 14A of the Act amounting to Rs. 4,45,697/-. That the Id. CIT(A) erred on the facts and circumstances of the case and in law in holding that section 14A of the Act contemplates an exception for deductions allowable under the Act as contained u/s 28 to 43B of the Act and that sec. 44 of the Act creates special application of these provisions in the cases of insurance companies which prohibits the Id. A.O to travel beyond sec. 44 of the Act and First Schedule of the Act and that the Id. CIT(A) erred on the facts and circumstances of the case and in law in not considering that sec. 44 of the Act nowhere restricts the applicability of sec. 14A of the Act. Similarly, the assessee vide ground No. 1 in its Cross Objection has stated that the action of the Id. CIT(A) in concluding that the provisions of

sec. 14A of the Act is not applicable in respect of non-taxable profits on sale/redemption of investments and exempt dividend income is justifiable under the law and in accordance with the Tribunal's ruling for earlier years in assessee's own case. In Ground No. 2 of the assessee's Cross Objection, the assessee submits that without prejudice to above, in case if sec. 14A of the Act is held to be applicable, the disallowance in relation to non-taxable profits on sale/redemption of investments and exempt dividend income should be restricted to Rs. 11,56,172/- as determined by the assessee based on 'Net Income Method'.

33. The relevant facts on the issue are that the taxability of the assessee is governed by the special and non-obstante provisions of sec.44 of the Act read with Rule 5 of the First Schedule which provides for specified adjustments. The said provisions do not specify adjustment u/s 14A of the Act and hence, the assessee claims that disallowance under the said section is not applicable. That while computing the taxable income for A.Y. 2007-08, the assessee had conservatively considered disallowance u/s 14A of the Act of Rs. 11,56,172/- in respect of expenses attributable to profits on sale/redemption of investments and dividend income as the lead order of the Tribunal for A.Y. 2003-04 was awaited as on the date of filing the return of income. The assessee had reserved its right to claim the non-applicability of sec. 14A of the Act in the facts of the present case and hence, sought during the course of assessment proceedings that the decision of the Tribunal should be applied and the disallowance conservatively offered to tax should be withdrawn. The said disallowance was computed based on "Net Income method" wherein, all direct expenses incurred in earning investment income have been apportioned on a net income basis between taxable interest income and non-taxable profit on sale/redemption of investments income and dividend income. Further, other

operative expenses which are common in nature have also been apportioned between insurance income and investment income in the ratio of net income or number of employees or on actual basis as appropriate. The Id. A.O did not accept the aforesaid claim of the assessee and continued with the following disallowances.

- i) *Without prejudice to the finding that the profits on sale/redemption of the investments are taxable, disallowance Rs. 4,26,97,532/- made u/s 14A of the Act against the profits on sale/redemption of investments treated as non-taxable by the assessee on a protective basis.*
- ii) *Disallowance of Rs. 18,97,165/- made u/s 14A of the Act against exempt dividend income.*

The Id. A.O has discussed this issue from para 5.2.5 to 5.2.7 of his order.

34. The Id. CIT(A) accepted the submission of the assessee and allowed relief on the disallowance made u/s 14A of the Act by placing reliance on the decision of the Tribunal passed in assessee's own case for A.Y. 2003-04 in respect of income from sale/redemption of investments and in A.Y. 2006-07 in respect of dividend income. The Id. CIT(A) has discussed this issue in para 13 to 14 of his order.

35. At the time of hearing, the Id. Sr. Counsel submitted before us that the ground raised by the Department and the cross objection raised by the assessee are covered in favour of the assessee in view of the decision of Pune Bench of the Tribunal in assessee's own case for the following assessment years:

- i) *I.T.A. No. 1447/PN/2007 and C.O No. 52/PN/2007 for the A.Y. 2003-04 (being the lead year) order dated 31-8-2009;*
- ii) *I.T.A. No. 2560/PN/2012 for A.Y. 2008-09 order dt. 3-2-2016*
- iii) *I.T.A No. 1071 & 1072/PN/2015 for A.Y. 2009-10 & 2010-11 and ITA No. 1269 & 1270/PUN/2015 for A.Y. 2009-10 & 2010-11, order dt. 29-9-2017.*
- iv) *I.T.A no. 2907/PUN/2016 for A.Y. 2011-12, order dt. 19-9-2018*
- v) *I.T.A No. 286/PUN/2017 for A.Y. 2012-13 order dt. 18-9-2019*

vi) *I.T.A No. 1111/PUN/2017 for A.Y. 2013-14 order dt. 25-7-2019*

vii) *ITA No. 1112/PUN/2017 for A.Y. 2014-15 order dt. 25-7-2019.*

The Id. Sr. Counsel also submitted that the issue stands squarely covered in favour of the assessee in the light of the decision by the Hon'ble Delhi High Court in the case of Pr. CIT New Delhi Vs. Oriental Insurance Co. Ltd. (2020) 118 Taxmann.com. 248) (Del). In this case, there was a categorical finding that sec. 44A of the Act over-rides sec. 14A of the Act and hence, no disallowance can be made in the hands of the assessee. Further, the Id. Sr. Counsel brought to our notice that for A.Y. 2008-09 the Tribunal had sustained the disallowance to the extent suo moto disallowed by the assessee in its return of income as per the net income method which in fact relates to without prejudice to ground raised by the assessee in case sec. 14A is held to be applicable. Thus, for A.Y. 2007-08 the assessee submits that disallowance of Rs. 11,56,172/- suo moto made by the assessee while filing its return of income should be deleted in this regard and placed strong reliance on the decision of the Hon'ble Madras High Court in the case of Marg Ltd. Vs. CIT Chennai (2020) 120 taxmann.com 84 (Mad) which stipulates the principles that the Tribunal is bound to follow the law and provide relief even if it results in reduction of suo moto disallowance calculated by the assessee. In other words, even if the assessee had made a suo moto disallowance that itself should not preclude the said assessee to make a prayer before the judicial forum that no disallowance be made. Before us, the Id. D.R accepted that the issue is covered in favour of the assessee by its own order of the Tribunal in earlier assessment years.

36. We find that the *Hon'ble Delhi High Court in the case of Principal CIT Vs. Oriental Insurance Co. Ltd. (supra)* has observed and held as follows:

"7. The submission of Mr. Ajit Sharma, learned Senior Standing Counsel for the Appellant is that the applicability of Section 14A of the Income Tax Act, 1961 does not stand excluded upon reading of Section 44 read with the first schedule of the

Act. He submits that the object of Section 14A is to prevent a double benefit being claimed by the assessee, by claiming deduction of expenditure incurred in deriving income which does not constitute part of the total income i.e. the taxable income.

8. He further submits that in any event, if in view of the tribunal, Section 14A was not attracted, the Tribunal should have at least remanded the matter back to the Assessing Officer to ensure that the computation of income had been done in terms of the first schedule of the Act in relation to the Respondent-assessee, who is carrying on a business of insurance other than life insurance.

9. We have heard learned counsels and are of the view that no substantial question of law arises for our consideration. The Tribunal has interpreted Section 44 read with the first schedule and concluded that applicability of Section 14A is excluded in relation to computation of income of an insurance company. We have examined the relevant provisions. Section 44 begins with a non-obstante clause and overrides the other provisions of the Act as mentioned therein including Section 14A. We are not convinced with the submission of Mr. Ajit Sharma that Section 14A would be applicable in respect of the Respondent. Section 14A does not have independent legs to stand on. Section 14A inter alia begins with the words "for the purposes of computing the total income under this chapter, no deduction shall be allowed in respect of expenditure incurred.....". The chapter in question is chapter IV. This chapter also contains the provisions relating to computation of profits and gains of business or profession. Section 44 specifically excludes the provisions of the Act relating to computation of income, inter alia, those contained in "Section 28 to 43B". Thus, the exclusion would take within its sweep Section 14A which is an exemption for deductions as allowable under the Act, as provided under Section 28 to 43B. Further, Section 44 is a special provision applicable in the cases of insurance companies and applies, notwithstanding anything to the contrary contained in the provisions of the Income Tax Act relating to the computation of income chargeable under different heads. For computing the profits and gains of the business of insurance company, the AO had to resort to Section 44 and the prescribed rules, and could not have applied Section 28 to 43B, since the same were excluded from the purview of Section 44. This necessarily includes the exception provision enshrined under Section 14A of the Act. Therefore, in our view, the AO could not have travelled beyond Section 44 in the first schedule of the Act. Besides, the tribunal has also invoked the rule of consistency since the same view of the Tribunal has prevailed in respect of the earlier assessment years i.e. 2000-01, 2001-02 and 2005-06."

In this decision the Hon'ble Delhi High Court upheld the view of the Tribunal wherein it was interpreted that sec. 44 of the Act read with First Schedule, in respect thereof the applicability of sec. 14A of the Act is excluded in relation to the computation of income of an Insurance Company. The Hon'ble High Court further held that sec. 44 of the Act begins with a non-obstante clause and overrides the other provisions of the Act as mentioned therein including sec. 14A of the Act. Therefore, the Id. A.O could not have travelled beyond sec. 44A of the Act in the First Schedule of the Act. Respectfully following the principles laid down by the Hon'ble Delhi High Court (supra), **Ground No. 3 to 5 of the Department's appeal are dismissed.** Therefore, the corresponding **cross**

objection filed by the assessee and the issues raised therein are also dismissed as infructuous.

37. **The assessee has also raised an additional ground** regarding the deduction in respect of Education Cess. In this regard, Id. Sr. Counsel submitted that this ground may be restored to the Id. A.O to decide it as per the amendment proposed in the Finance Bill 2022. The Id. D.R conceded to this proposition.

38. We find that the Finance Bill 2022 was presented in Lok Sabha on 01-02-2022 and passed on 25-03-2022 with 39 amendments thereto proposed by the Hon'ble Finance Minister subsequently. After obtaining assent on 30-03-2022 from the Hon'ble President of India, the Finance Bill 2022 has now turned as the Finance Act, 2022. As per Finance Act 2022, Education Cess is included as a tax component and is chargeable to income-tax. Health and Education Cess is to be levied at the rate of four percent on the amount of income tax so computed, inclusive of surcharge wherever applicable, in all cases. Thus, the previous position of claiming deduction on education cess now no longer holds good. In fact, as per clause 13 of the Finance Bill 2022, an amendment to sec. 40 of the Act has taken place, as effected now, by inserting new Explanation (3) to sub-clause (ii) of clause (a) of the said section to clarify that for purposes of sub-clause (ii) the term "tax" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax. This amendment shall take effect retrospectively from 1st April 2005 and will, accordingly apply in relation to the assessment years 2005-06 and subsequent assessment years. In view thereof, we hold education cess is not allowed as deduction and it has to be charged to income-tax. The additional ground raised by the assessee is dismissed.

39. In the combined result, the **grounds raised by the revenue and the assessee in the cross appeals as well as the grounds in the cross objection of the assessee are decided as hereinabove.**

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, the 19th April 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT- 2, Pune
4. The CIT(A)- 3, Pune.
5. D.R. ITAT 'A' Bench
5. Guard File

BY ORDER,

/// TRUE COPY ///

Sr. Private Secretary
ITAT, Pune.

		Date	
1	Draft dictated on	04-04-2022	Sr.PS
2	Draft placed before author	11-04-2022	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS
6	Kept for pronouncement on	19-04-2022	Sr.PS
7	Date of uploading of order	19-04-2022	Sr.PS
8	File sent to Bench Clerk	19-04-2022	Sr.PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		