आयकर अपीलीय अधिकरण,'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'C' BENCH, CHENNAI
श्री वी.दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI V.DURGA RAO, JUDICIAL MEMBER
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

S. No	ITA No. आयकरअपीलसं	Assessment Year	(अपीलार्थी/Appellant)	(प्रत्यर्थी/Respondent)
1	**2146/Chny/2008**	2005-06	M/s. Cholamandalam MS General Insurance Company Ltd. 2, Dare House, NSC Bose Road, Chennai-600 001. PAN: AABCC 6633K	The Deputy /Assistant Commissioner of Income Tax, Large Taxpayer Unit-2, Chennai-600 034.
2	**1620/Chny/2011**	2006-07	-do-	-do-
3	**1621/Chny/2011**	2007-08	-do-	-do-
4	**1350/Chny/2013**	2008-09	-do-	-do-
5	**2276/Chny/2014**	2009-10	-do-	-do-
6-8	**782 to 784 /Chny/2018**	2013-14 2010-11 2010-11	-do-	-do-
9	**711/Chny/2020**	2014-15	-do-	-do-

&

S. No	ITA No. आयकरअपीलसं	Assessment Year	(अपीलार्थी/Appellant)	(प्रत्यर्थी/Respondent)
10	**40/Chny/2009**	2005-06	The Assistant/Deputy Commissioner of Income Tax, Large Taxpayer Unit-2, Chennai-600 034.	M/s. Cholamandalam MS General Insurance Company Ltd. 2, Dare House, NSC Bose Road, Chennai-600 001. PAN: AABCC 6633K
11	**1759/Chny/2011**	2006-07	-do-	-do-
12	**1676/Chny/2011**	2007-08	-do-	-do-
13	**1366/Chny/2013**	2008-09	-do-	-do-
14 - 16	**949 to 951 /Chny/2018**	2010-11 2010-11 2013-14	-do-	-do-

अपीलार्थीकीओरसे/Assessee by	:	Mr. Percy J. Pardiwalla, Sr.Advocate & Mr. Sandeep Bagmar, Advocate
प्रत्यर्थीकीओरसे/Revenue by	:	Mr. M.Swaminathan, Sr.Standing Counsel & Ms.V.Pushpa, Jr.Standing Counsel

सुनवाईकीतारीख/Date of hearing	:	05.08.2022
घोषणाकीतारीख /Date of Pronouncement	:	26.08.2022

आदेश / O R D E R

PER G. MANJUNATHA, AM:

This bunch of 16 appeals filed by the assessee and the Revenue are directed against orders of the Commissioner of Income Tax (Appeals)-5 / CIT(A), Chennai dated 28.12.2017 /29.08.2008 / 28.07.2011 / 03.08.2011 / 26.03.2013 and pertain to relevant assessment years 2005-06 to 2010-11, 2013-14 and 2014-15. Since, facts are identical and issues are common, for the sake of convenience these appeals were heard together and are being disposed off, by this consolidated order.

2. The assessee has more or less raised common grounds for all assessment years and challenged various additions made by the Assessing Officer. The Revenue had also raised common grounds for all assessment years and challenged deletion of certain additions made by the Assessing Officer. Since, multiple issues need to be decided, we deem it appropriate not to reproduce grounds of appeal filed by the assessee as well as the Revenue.

3. The first issue that came up for consideration from assessee as well as revenue appeals for all assessment years is disallowance of reinsurance premium ceded to non-resident

re-insurance companies u/s.40(a)(i) of the Act for non-deduction of TDS u/s.195 of the Income Tax Act, 1961. The fact with regard to impugned dispute are that the assessee is engaged in business of general insurance business in India, is registered with Insurance Regulatory & Development Authority of India (IRDA) as per section 3(2a) of Insurance Act, 1938. The assessee is engaged in the business of General Insurance in India and as part of its business strategy had entered into reinsurance contract with non-resident reinsurance companies. The assessee has paid reinsurance premium to non-resident reinsurance companies without deduction of tax at source. The Assessing Officer has disallowed reinsurance paid to non-resident reinsurance companies u/s.40(a)(i) of the Income Tax Act, 1961 on the ground that payment made to non-resident reinsurers is liable to tax in India in terms of section 5 of Income Tax Act, 1961, because income of non-resident insurers is accrued or arose in India or received in India. The Assessing Officer had also discussed issue in light of provisions of section 5 & 9 of Income Tax Act, 1961 and observed that first and foremost the moment the assessee enters into reinsurance

contract with reinsurance companies income accrues to non-resident insurers, because reinsurance contract is not a separate contract, but linked to insurance contract between the assessee and insured. The Assessing Officer had also discussed the issue in light of DTTA between India and other contracting States and observed that re-insurance companies is having PE in India, because in some cases the assessee has made payment through insurance brokers which constitutes agency PE and thus, the reinsurance companies are liable to tax in India for their profits and consequently assessee is liable to deduct tax at source u/s.195 of the Income Tax Act, 1961. Since, the assessee is failed to deduct TDS on impugned payment to NRR's, disallowed reinsurance premium ceded to NRR's u/s 40(a)(i) of the Income Tax Act, 1961.

4. The learned senior counsel Mr. Percy J Pardiwalla appearing for the assessee submitted that contract of insurance and contract of reinsurance are two separate and distinct contracts. A reinsurance contract is completely independent of insurance between the insured and insurer. The term 'reinsurance' was not defined under the Insurance Act, 1938,

until 2015. However, by the Insurance laws (Amendment) Act, 2015, definition of term 'reinsurance' was inserted, as per which reinsurance means 'insurance of part of one insurer's risk by another insurer, who accepts risk for mutually acceptable premium'. The learned counsel for the assessee further submitted under the Insurance Act, 1938, there is no prohibition whatsoever to bar Indian General Insurance Companies from reinsuring their risk with a foreign insurers, which is evident from section 101A, which was introduced to set out objects that reinsurance is permissible and by introduction of section 101A, the legislature has only mandated obligatory cessation of reinsurance to be ceded to Indian insurance companies. The learned counsel of the assessee referring to various provisions of Insurance Act, 1938 and rules made there under submitted that except certain percentage of reinsurance business to be mandatorily insured with General Insurance Corporation of India, there is no bar on doing reinsurance business with any foreign insurance company. Further, as per IRDAI Regulations, all general insurance companies in India, should submit their reinsurance plan with the IRDAI and as per IRDAI Regulation,

2000 insurers can reinsure their risk outside India. But, the only condition to be complied with by the insurers is that non-resident insurers have over a period of past five years, enjoyed rating of at least BBB or equivalent rating of any other international rating agency. The learned counsel further submitted that assuming for a moment, non-resident insurance companies are not permitted to do business in India; however, there is no restriction for them to do business with India. In this case, the non-resident reinsurance companies are not doing business in India, but doing business with India by undertaking risk of general insurance companies in terms of IRDAI Regulations and thus, it cannot be held that Insurance Act, 1938 bars non-resident reinsurance companies to do their business in their jurisdiction.

5. The learned counsel for the assessee Mr. Percy J. Pardiwalla further referring to the issue before the Tribunal submitted that moot issue before the Tribunal needs to be resolved is disallowance of reinsurance premium ceded to non-resident reinsurers u/s.40(a)(i) of the Act for alleged failure to deduct tax at source u/s.195 of the Income Tax Act, 1961. The

Assessing Officer has disallowed reinsurance premium ceded to non-resident reinsurers on the basic premises that the assessee has not taken certificate u/s.195(2) of the Income Tax Act, 1961, for not deducting tax at source on payment to non-residents. The learned CIT(A) has accepted assessee's contention on the issue of non-application of section 195(2), however, confirmed reasoning of the Assessing Officer, *qua*, other submissions on the issue of accrual of income to the non-resident insurance companies. The learned counsel further submitted that it was not a case of the Department that payments made to non-resident reinsurers are prohibited under insurance laws. The fact that the Department has not filed any appeal in respect of reinsurance premium ceded to foreign insurers located in Switzerland, Thailand, Malaysia and Qatar further amplifies that it is not case of the Revenue that payment of reinsurance premium is in any manner illegal or prohibited under insurance laws. Therefore, the issue of legality of payments now cannot be questioned by the Tribunal, when the same is not subject matter of dispute in appeal. The only dispute before the Tribunal is whether amount paid to non-

resident reinsurers is chargeable to tax under the Act and if so, then, the assessee is liable to deduct TDS u/s.195 of the Income Tax Act, 1961.

6. The learned counsel for the assessee further submitted that reinsurance premium ceded to non-resident reinsurers is not taxable under the Income Tax Act, 1961, or under DTAA. Further, it is not taxable u/s.5 of the Income Tax Act, 1961, because as per DTAA between India and other countries reinsurance premium is treated as business profit and thus, same needs to be examined in light of PE to tax in India. In this case, except for payments to Indian brokers in few cases, all other payments of reinsurance premium to NRRIs have been paid outside India. Insofar as payment made to Indian brokers, one can avail provisions of DTAA, which are more beneficial whereby premium would be taxed in India only in case PE of the foreign enterprise is situated in India. The learned counsel further submitted that income does not accrue or arise in India in the hands of NRRIs, because accrual of income has to take place in the country, where the revenue generating functions

are carried on. In this case, foreign reinsurers did not carry on business functions in India. Therefore, decision of the Assessing Officer regarding taxability of reinsurance premium paid to them in India is absolutely contrary to the facts of the case and well settled law. The learned counsel further submitted that income is not deemed to accrue or arise in India, because reinsurance premium ceded to foreign reinsurer can be deemed to accrue or arise in India, only where same arises out of its business connection in India or out of business operations carried out in India. In the present case, foreign reinsurers do not have any place of business in India, neither do they carry on business operations in India. Further, in cases where reinsurance premium is ceded to foreign reinsurers through brokers, the brokers are merely acting as a conduit or communication channel and practically do not negotiate or finalize percentage of reinsurance that can be taken up by foreign reinsurer. The brokers act in independent capacity as service providers and are neither agents of the assessee nor agents of NRRI. Therefore, in absence of any authority to conclude contracts on behalf of foreign reinsurer, the brokers

cannot constitute a business connection of foreign reinsurer in India in terms of Explanation 2 to section 9(1)(i) of the Act.

7. The learned counsel for the assessee Mr. Percy J.Pardiwalla further referring to various treaties between India and other countries submitted that it is well settled principles of law that provisions of the Act or provisions of DTAA, whichever is more favourable to the assessee can be invoked to determine tax liability of premium paid to reinsurance companies. As per relevant provisions of the Act, and considering facts of the instant case, reinsurance premium ceded can be taxable only as business profits. Further, business profits will be taxable in India only if foreign reinsurers have permanent establishment in India. The learned counsel further submitted that without prejudice to the contention that reinsurance premium received by the foreign reinsurers in India is not taxable under the Act, it is submitted that reinsurance premium paid to foreign reinsurers, who are resident of countries with which India has DTAA are not liable to tax in India, because specific exclusion of reinsurance premium paid to non-resident reinsurers from the scope of chargeability, as there is no permanent

establishment of non-resident reinsurer in India. Further, the learned CIT(A) has deleted disallowance in cases where there is a specific exclusion in the DTAA, and the Department has not appealed against same in any of the assessment years except assessment year 2009-10. In other cases, premium paid to foreign reinsurance companies can be taxed in India only if foreign insurance companies have a fixed place of PE or agency in India. The learned counsel further submitted that non-resident reinsurance companies do not have PE in India, because in most of the DTAA PE has been defined to mean a fixed place of business through which business of the enterprises is wholly or partly carried on and includes branch, office, factory, workshop etc. Thus, to constitute PE, there must be fixed place of business and business activity should be carried on through this place. In this case, foreign reinsurers to whom the assessee has remitted reinsurance premium during the subject assessment year do not have any fixed place of business in India and would therefore, not trigger fixed place PE in India.

8. The learned counsel further submitted that non-resident reinsurers does not have agency PE, because during the subject assessment years, the assessee has remitted reinsurance premium through brokers outside India. Further, these brokers are not dependent agents constituting PE in India of such foreign reinsurers. The reinsurance brokers act just as communication channel in the transaction and do not negotiate terms or finalize percentage of reinsurance that can be taken up by the NRRI. The reinsurance brokers act in their independent capacity as service providers and in the normal course of business does not exclusively perform activities for any one of specific reinsurers. Therefore, merely on the basis of remittance through reinsurance brokers, it cannot be said that there is agency PE of NRRI and income is taxable in India. The learned counsel further submitted that there is no service PE of non-resident reinsurers in India, as contended by the Assessing Officer on the basis of press release dated 08.01.2008, because the Assessing Officer has solely relied upon press release with regard assessee's business with Mitsui Sumitomo, Japan and observed that there is service PE for

Cholamandalam, because Japanese partner has dispatched representatives to India for liaising with Indian insurance companies. But, fact remains that Article 5 of the India-Japan tax treaty states that company which is resident of contracting State controls or is controlled by a company which is resident or other contracting State or which carries on business in that other contracting State shall not itself constitute either company PE or other. Accordingly, unless other conditions for triggering PE are satisfied, merely by virtue of being a joint venture partner, the assessee would not create a PE for Mitsui Sumitomo in India. Therefore, it cannot be said Mitsui Sumitomo constituted PE in India. Further, India-Japan treaty does not contain a service PE clause and therefore, joint partner cannot be said to constitute service PE in India. To sum up, the learned counsel submitted that foreign reinsurers do not have PE or business connection in India under relevant DTAA or the Act. Therefore, the assessee is not liable to deduct TDS u/s 195 of the Act, on payments towards reinsurance premium ceded to NRR's and thus, the Assessing Officer cannot disallow impugned sums u/s 40(a)(i) of the Income Tax Act, 1961. In this

regard, the learned counsel relied upon following judicial precedents:-

i) ITAT., Mumbai in the case of ADIT vs. M/s.AON Global Insurance Service Ltd.

ii) ITAT., Pune in the case of Bajaj Allianz General Insurance Co.Ltd. in ITA No.2560/PN/2012

iii) ITAT., Mumbai in the case of Swiss reinsurance Co.Ltd. Vs. DDIT and ICICI Lombard General Insurance Co.Ltd Vs ACIT (2014) 52 taxmann.com 471.

9. Mr. M. Swaminathan, learned Sr. Standing Counsel for the Income Tax Department, on the other hand, explained concept of reinsurance and submitted that reinsurance is an arrangement, whereby an insurer having accepted risk transfers either fully or partly to another company called reinsurer, in order to reduce its own liability in the event of loss or damage to the risk. The reinsurer issues policies covering risk of its clients in their own name and not in the name of reinsurance companies. The reinsurance does not affect relationship between insured and direct insurer, in particular, liability of the

insurer to indemnify the insured. In the event of any insurer failing to honour reinsurance contract, the insurer cannot escape from his liability to the direct insured. Therefore, from the above, it appears that insurance and reinsurance are not separate contracts, but having one to one nexus and thus, moment the assessee issues policies covering risk of its clients reinsurance arrangement starts. Therefore, the moment reinsurance premium is paid to non-resident reinsurers; income has arisen and accrued for non-resident in India. In the instant case, entire insurance premium has been received by Indian insurer based on the rules and regulations of IRDAI in India. The insurer has passed on relevant percentage of reinsurance premium to non-resident insurer as per terms of agreement with the Indian reinsurer. The moment premium was apportioned and ceded to the non-resident, the entire premium belonged to Indian insurer and non-resident insurer did not have any control over it. It was only after ceding of premium, said income vests with the non-resident reinsurer and non-resident had control over it. Therefore, non-resident reinsurer effectively receives relevant percentage of reinsurance premium in India. From the

above, it is very clear that there is business connection in India, the moment insurer ceded some percentage of reinsurance premiums to non-resident reinsurers and thus, in terms of provisions of section 5, income accrues to the non-resident reinsurance companies. The learned Sr. Standing Counsel further submitted that non-resident reinsurer companies received income in India, because in many cases premium has been paid to reinsurance brokers in India, before it was transferred to non-resident reinsurers. Therefore, it is clear that under the provisions of Income Tax Act, 1961, receipt of income in India attracts tax, irrespective of whether income accrued or arose in India or outside India. The learned Sr. Standing Counsel further referring to decision of the Hon'ble Supreme Court in the case of Kanchenjunga Sea Foods Ltd Vs. CIT (2010) 325 ITR 540 (SC) submitted that Hon'ble Supreme Court reiterated that income is received at a place where recipient first controls it. In the facts of the present case, non-resident reinsurer was held to have gained control over specific percentage in insurance premium only when it was apportioned

by Indian insurer in India as part of IRDAI regulations and based on agreement entered with non-resident insurer.

10. The learned Sr. Standing Counsel for the Revenue submitted there is an agency PE of non-resident reinsurers in India, because they do business of reinsurance through brokers in India which is evident from the fact that reinsurance brokers do many activities on behalf of their principal, including signing of contract notes and receipt of premium in India. Therefore, such activities carried on by brokers constitute principal and agent relationship and thus, comes under agency PE as per DTAA between India and other countries and thus, income of non-resident reinsurer is liable to tax in India. The learned Sr. Standing Counsel further referring to Press note dated 08.01.2003 submitted that there is service PE of Mitsui Sumitomo Insurance Co. Ltd., because foreign joint venture partner has sent three representatives to New Delhi, Mumbai and Bangalore and even provided advisory activities, including rates and conditions to Japanese corporate clients, liaisoning with local insurance companies. From the above, it is

abundantly clear employees of the above company from Japan are being seconded to India for the purpose of business promotion of insurance of the Mitsui Sumitomo, Japan. Hence, presence of the above employees will time bound to service PE in India in terms of Article 5(3) of UN model convention and thus, income of non-resident is taxable in India and consequently, the assessee is liable to deduct TDS u/s.195 of the Act. Since, the assessee has failed to deduct TDS u/s.195 of the Income Tax Act, 1961, the Assessing Officer has rightly disallowed reinsurance premium ceded to NRRs u/s.40(a)(i) of the Income Tax Act, 1961. In this regard, the learned Sr. Standing Counsel relied upon following judicial precedents:-

(i) In the case of Cholamandalam MS general Insurance Co.Ltd. Vs. DCIT (2019) 102 taxmann.com 292 (Mad).

(ii) Hon’ble High Court of Andhra Pradesh in the case of CIT Vs. Superintending Engineer 152 ITR 753 (AP)

(iii) Hon'ble Supreme Court in the case of Transmission Corporation of A.P Ltd. Vs. CIT 239 ITR 587 (SC).

(iv) Hon'ble Supreme Court in the case of Kanchanganga Sea Foods Ltd. Vs. CIT (2010) 325 ITR 540(SC)

(v) Hon'ble Supreme Court in the case of PILCOM Vs.CIT (2010) 425 ITR 312 (SC)

11. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The assessee is an insurance company engaged in the business in General insurance in terms of IRDAI regulations and Insurance Act, 1938. The business of the assessee is regulated by IRDAI through various regulations. All the insurance companies which are carrying on insurance business in India have to necessarily comply with provisions of the Insurance Act, 1938 as amended and rules there under. The contract of insurance and contract of reinsurance are two separate and distinct contracts. The reinsurance contract is completely independent of contract of insurance between insured and insurer. The term 'reinsurance' was not defined under the Insurance Act, 1938 until 2015. However, by Insurance Laws (Amendment) Act, 2015, definition of term 'reinsurance' was inserted in the Insurance Act, 1938. As per which, the term 'reinsurance' means insurance of part of one

insurer's risk by another insurer, who accepts risk for mutually acceptable premium. Therefore, the assessee being in general insurance business as part of their strategy has taken reinsurance policy with reinsurance companies. Further, every insurance company in India has to place their reinsurance program 45 days prior to commencement of financial year before the IRDAI in terms of para 3.4 of IRDAI (General insurance, Reinsurance) Regulation, 2000, and within 30 days of commencement of the financial year, every insurance company has to file reinsurance treaty slips with IRDAI in terms of para 3.5 of IRDAI (General insurance, Reinsurance) Regulation, 2000. As per IRDAI Regulation, 2000, the insurance companies in India have to mandatorily reinsure with the Indian reinsurer being General Insurance Corporation (GIC). However, over and above specified percentage of reinsurance, general insurance companies in India can have their reinsurance arrangement with foreign reinsurer in terms of para 3.7 of said regulations. In this case, there is no dispute with regard to fact that the assessee has complied with provisions of Insurance Act, 1938 and regulations made there under by the

IRDAI. In fact, the Assessing Officer has accepted fact that the assessee has complied with reinsurance regulations by taking required percentage of reinsurance contract with General Insurance Corporation of India. But disputed reinsurance premium ceded to non-resident reinsurer companies. In the earlier round of litigation, the Tribunal had discussed the issue of payments made to non-resident reinsurer, in light of provisions of section Insurance Act, 1938 and IRDAI Regulations on reinsurance and concluded that the assessee has violated provisions of Insurance Act, 1938 and consequently, reinsurance premium ceded to NRRI is not deductible u/s.37(1) Of the Income Tax Act, 1961. The matter travelled to the Hon'ble High Court of Madras and the Hon'ble High Court has remanded the issue back to the Tribunal and directed the Tribunal to decide the issue on three points:-

i) Whether the Assessing Officer was right in disallowing reinsurance premium u/s.40(a)(i) of the Act;

ii) Whether the CIT(A) was right in rejecting partially the appeal filed by the assessee; &

iii) Whether the CIT(A) was justified in restricting claim of the assessee to 15% instead of confirming order passed by the Assessing Officer.

The Hon'ble High Court of Madras also observed that the Tribunal shall decide above questions alone and nothing more and decision shall be taken based on the available material and the assessee & the Revenue are not entitled to place any fresh materials before the Tribunal so as to enable the Tribunal to take decision. Therefore, from the above, it is very clear that controversy with regard non-compliance with provisions of Insurance Act, 1938 and regulations made there under by the IRDA is put to rest by the Hon'ble High Court and the Tribunal does not have power to examine legality or otherwise of payment made by the assessee to non-resident reinsurance companies. Therefore, issue on hand should be decided only in the context of payment made by the assessee to NRRI in light of provisions of Income Tax Act, 1961, and relevant DTAA between India and other contracting States.

12. The Assessing Officer has disallowed reinsurance premium ceded to non-residents on the sole premise of non-deduction of tax at source u/s.195 of the Income Tax Act, 1961. According to the Assessing Officer, income of NRRI are accrued or arose in India and or deemed to have accrued or arose in India, because they have business connection in India in respect of reinsurance business. Therefore, the Assessing Officer held that wherever there is no DTAA between India and other contracting States, to whom the assessee has ceded reinsurance premium, question of examining case with reference to DTAA and more particularly, concept of PE does not arise. Therefore, the Assessing Officer held that in respect of reinsurance premium ceded to NRRI, where there is no DTAA between India and other contracting States, sum paid by the assessee to NRRI is taxable in India in terms of section 5 read with section 9(1) of the Income Tax Act, 1961, and consequently, the assessee is liable to deduct TDS u/s.195 of the Income Tax Act, 1961. As regards REINSURANCE PREMIUM ceded to NRRI where there is DTAA between India and other contracting States, the Assessing Officer was of the

opinion that there is agency PE of NRRI in India, because of availing services of insurers brokers by the non-resident insurer companies in India. The Assessing Officer had also imputed concept of service PE on the basis of press release dated 08.01.2003 with reference to joint venture partnership between Mitsui Sumitomo, Japan and the assessee and argued that Japanese joint venture partners has dispatched three representatives to India to assist and liaisoning reinsurance business in India. Therefore, opined that there is service PE and income of NRRI is liable to be taxed in India and consequently, the assessee is liable to deduct TDS u/s.195 of the Income Tax Act, 1961. The Assessing Officer had also taken support from the decision of the Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Vs CIT (1999) 239 ITR 587 and observed that a person making payment to non-resident is duty bound under section 195(2) of the Income Tax Act, 1961 to file an application to the income-tax authority, if payment is not chargeable to tax or smaller amount is chargeable to tax. If no such application is filed, then tax has to be withheld on whole of such sum. The sum and

substance of observations of the Assessing Officer is that income of NRRI is taxable in India and thus, the assessee is liable to deduct tax at source u/s.195 of the Act. Since, the assessee has failed to deduct TDS u/s.195 of the Income Tax Act, 1961, the Assessing Officer has disallowed reinsurance premium ceded to NRRI u/s.40(a)(i) of the Income Tax Act, 1961.

13. We have given our thoughtful consideration to the reasons given by the Assessing Officer in light of arguments advanced by the learned counsel for the assessee as well as ld. Sr. standing counsel for the department and we ourselves do not subscribe to the reasons given by the Assessing Officer for simple reason that provisions of section 195 of the Act will be applicable only in a case where income is actually chargeable to tax in India. In order that there is obligation to deduct TDS, the revenue must establish that income was chargeable to tax in India both in terms of Act as well as in terms of relevant DTAA. If the recipients are non-residents, income was chargeable u/s.5 r.w.s. 9(1) of the Act, only if income is received or deemed to have been received or income accrues or is

deemed to accrue in India. Further, wherever DTAA applies, income chargeable to tax has to be additionally considered under terms of relevant DTAA. In the present case, reinsurance premium ceded to non-resident reinsurers is not chargeable to tax in India under the Income Tax Act, 1961, because income is not received in India, which is evident from fact that except for payment to Indian brokers in few cases, all other payments of reinsurance premium to NRRI have been paid outside India to non-resident brokers or NRRI bank account. Further, payment to brokers in India would not tantamount to receipt in India, having regard to ratio of the judgement of the Hon'ble Supreme Court in the case of Toshoku Ltd. Vs. CIT (1980) 125 ITR 525 (SC), where it was held that amounts credited in favour of non-resident were not at the disposal or control of statutory agent and therefore, cannot be charged to tax on the basis of receipt of income, actual or constructive in the taxable countries. Further, even assuming for a moment, payment to resident brokers is treated as received in India, but one can avail provisions of the DTAA which are more beneficial whereby premium would be taxed in India only in case PE to foreign

enterprise is situated in India. Further, income of NRRI does not accrue or arise in India, because accrual of income is said to take place in country, where revenue generating functions are carried on. Thus, in respect of sale, it is place where sale takes place, and in case of rendering service, place where service is rendered and in case of interest, where the money is lent etc. In this case, foreign reinsurers do not carry out their business functions in India, in fact, during the relevant assessment years they were statutorily prohibited from doing so. The reinsurance premium they receive is recompensated for risk there may be exposed in which event insurer makes a claim on them, in which event assets of the reinsurer that are situated outside India that were utilized to make good the claim and thus premium accrues where their funds and assets are situated, which is outside India. The source of income of NRRI is also outside India. Therefore, in our considered view observations of the Assessing Officer regarding taxability of reinsurance premium ceded to NRRI in India is absolutely contrary to facts and also well settled law. Further, only activity in reinsurance contract is bearing of risk and activity of indemnifying an Indian

insurance company by foreign reinsurer takes place overseas and hence, foreign re-insurers bears risk abroad. Therefore, reinsurance premium paid to NRRI cannot be said to accrue or arise in India. Insofar as observations of the Assessing Officer with regard to reinsurance contracts were signed in India is not relevant as held by the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. Vs. DIT (2007) 288 ITR 408 (SC), where it was observed that contract signed in India is of no material consequence, since all activities in connection with off shore supply were outside India and therefore, cannot be deemed to have accrued or arose in India. Further, income may accrue not at place where asset or property is located or where insurer is resident, but where risk is borne. In the present case, the risk is borne where the non-resident reinsurer resides or where he has funds to make good loss. Therefore, insurance premium cannot be said to accrue in India.

14. We further noted that income of NRRI are not deemed to accrue or arise in India, because reinsurance premium ceded to non-resident foreign insurers are raising in India only where

the same arises out of business connection in India and even if, exists business connection, the business operations are carried out in India. In the present case, nor do foreign insurers have any fixed place of business in India, neither do they carry on any business operations in India. The term 'business connection' is defined in Explanation 2 below section 9(1)(i) of the Act. None of the conditions that are required to be fulfilled before existence of business connection can be established or complied with. Although, the Assessing Officer has heavily based his finding in light of reinsurance brokers insofar as with NRRI, but fact remains that brokers are merely acting as facilitator or communication channel and do not engage themselves in negotiation of terms or finalize percentage of reinsurance contract. The brokers act in their independent capacity as service provider and are neither agents of the assessee nor agents of the NRRI. The Revenue has not brought any material on record to show that brokers are agents of the NRRI. Although, allegations were made that brokers sign treaty, settle accounts and verify claim, but nothing was brought on record by way of evidence before us to justify their stand.

Therefore, in our considered view, findings of the learned CIT(A) and Assessing Officer that brokers are agents of NRRI is sans any evidence. Further, brokers have also declared that they merely act as facilitator and do not have any authority to conclude contract. Even the IRDAI (Insurance Brokers) Regulations, 2002, makes it clear that reinsurance agent / broker merely acts as facilitator and do not have authority to conclude contracts on behalf of the NRRI. This apart, amount collected by reinsurance broker in India is only as trustee of insurance money and same is to be held in separate bank account. Therefore, in our considered view, in absence of any authority to conclude contracts on behalf of foreign reinsurer, brokers cannot constitute business connection of foreign reinsurer in India in terms of Explanation 2 to section 9(1)(i) of the Income Tax Act, 1961.

15. At this point, we would like to take support from decision of the co-ordinate Bench of Mumbai Tribunal in the case of ADIT Vs.AON Global Insurance Service Ltd. in ITA Nos.5184 to 5186/Mum/2009 dated 30.11.2015, where it has been held

that insurance broker is an independent broker and not an agent. Therefore, in our considered view reinsurance premium paid to NRRI, where India is having DTAA with other countries without specific exclusion and reinsurance premium paid to NRRI where there is no DTAA with other countries through resident brokers, no income is chargeable to tax in India in the hands of nonresident reinsurers and consequently, no disallowance can be made u/s.40 (a)(i) of the Income Tax Act, 1961. Further, the NRR do not have any business connection in India in any form whatsoever, irrespective of fact whether reinsurance payments are made directly or through resident brokers or non-resident brokers. The NRR being non-resident reinsurance company is expressly prohibited to carry on business in India under the Insurance Act, 1938. Therefore, NRR cannot be said to have any business in India. The reinsurance arrangements between Indian insurer and NRRI are on principal to principal basis and in such scenario; there is no question of any business connection in India. Although, the Assessing Officer observed that place of signing of agreement is material to decide business connection, but it was

categorically held by the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. Vs. DIT, 288 ITR 408 (SC) that contract signed in India is of no material consequence. In the present case, signing of reinsurance treaty is either in India or outside India cannot be a ground that income has deemed to accrue or arise in India.

16. Let us now come to chargeability of reinsurance premium ceded to NRRI under DTAA. It is an admitted fact that provisions of Act or provisions of DTAA, whichever is more favourable to the assessee, can be invoked to determine taxability of premium paid to reinsurance companies. It is an undisputed position that reinsurance premium is business profits for reinsurer and therefore, taxability thereof will have to be tested in terms of Article 7 of the respective DTAAs. As per Article 7, business profits are taxable in India only if, foreign reinsurers have PE in India. The assessee has paid reinsurance premium to various NRR. In some cases, NRR are resident of countries where India is having DTAA and in some cases, NRR are resident of country, where India does not have DTAA with other countries. In case of DTAA with Switzerland,

Thailand, Malaysia, Qatar and Kuwait, it excludes reinsurance premium paid to non-resident insurer from the scope of chargeability, as there is no permanent establishment (PE) of non-resident insurer in India. In fact, the learned CIT(A) has deleted disallowance in cases, where there is specific exclusion in the DTAA and the Department has not appealed against order of the learned CIT(A) for all assessment years, except assessment year 2009-10. In our considered view the view taken by the CIT(A) is perfectly in order, because, in those DTAAs there is specific exclusion of reinsurance premium from the ambit of business profits and thus, reinsurance premium ceded to NRRs where there is specific exclusion, same cannot be taxed in India and thus, provisions of section 195 is not applicable while making payments and consequently, the assessee is not required to deduct TDS. In other cases, where there is no specific exclusion of reinsurance premium, said amount can be taxed in India only if foreign reinsurance companies have PE in India. It is the allegation of the Assessing Officer that reinsurer had fixed place of PE or an agency PE or service PE in India. Most of the DTAAs define

PE to mean fixed place of business, through which business of the enterprises is wholly and partly carried on and includes branch, office, factory, workshop etc. In the case of foreign reinsurers to whom the assessee has remitted reinsurance premium during the subject assessment years do not have any fixed place of PE in India and thus, question of fixed place of PE in India within the meaning of Article 5 of the DTAA does not arise. In fact, the assessee has obtained declaration from foreign reinsurers which are part of paper book filed by the assessee. Thus, in our considered view there is not fixed place of PE of NRRs.

17. The Assessing Officer alleged that there is agency PE of NRRI in India on the basis of availing services of reinsurance brokers. During the subject assessment years, the assessee has remitted reinsurance premium through non-resident brokers outside India. In order to attract agency PE, the Revenue has to establish that person act on behalf of NRRI in India and such person is economically and legally dependent on the NRRI. In the present case, reinsurance brokers act in their independent capacity and they are not dependent agency of the assessee as

well as non-resident insurers. They do not conclude any contract for NRRI and thus, we are of the considered view that there cannot be said to constitute business connection for agency PE for foreign reinsurers in India. The Revenue has also not placed any material on record to demonstrate that reinsurance brokers constitute agency PE for NRRI under DTAA.

18. As regards service PE as considered by the Assessing Officer in light of press release dated 08.01.2003, we find that there is no concept of service PE in DTAA between India and Japan and hence, conclusion of the Assessing Officer is fundamentally flawed. Further, Mitsui Sumitomo Corporation, Japan has seconded three employees to the assessee in India to familiarize the assessee with Japanese companies operating in India and to enable the assessee to pitch for business of Japanese companies. From the above, it is abundantly clear that personnel were not engaged for business of Mitsui Sumitomo, but were only deputed for advancing business of the assessee by developing contact with the India entities of Japan

Multinational Corporation. Therefore, on that basis it cannot be said that Mitsui Sumitomo, Japan had service PE in India. Therefore, in our considered view, foreign reinsurers do not have PE or business connection in India under relevant DTAA or the I.T. Act, 1961. Therefore, payments are not chargeable to tax in India and are not liable to deduct tax at source u/s.195 of the Act. Consequently, disallowance u/s.40(a)(i) of the Act is wholly unwarranted. Further, the IRDAI which is regulatory authority of Insurance companies has also written letter dated 07.05.2008 to CBDT stating that NRR having reinsurance arrangements with Indian insurers do not have PE or branch in India. In respect of reinsurance arrangements with brokers, IRDAI has stated that brokers are not agents of NRR and carry out transaction on principal to principal basis. Therefore, even as per understanding of the regulator, reinsurance arrangements with NRR are not chargeable to tax in India. Since, payments made to NRR are not chargeable to tax in India, question of application u/s.195(2) of the Income Tax Act, 1961, does not arise and this principle is explained by the Hon'ble Supreme Court in the case of M/s. G.E.India

Technology Centre Pvt.Ltd., 327 ITR 456 (SC), where it was held that application to deduct TDS arises only if income of non-resident is chargeable to tax in India. The Hon'ble Supreme Court has held that expression 'chargeable' under the provisions u/s.195(1) of the Act says that remittance has got to be treated as receipt, whole or part of which is liable to tax in India, if tax is not assessable there is no question of tax at source being deducted. In our considered view, the basis for the Assessing Officer to take support from section 195(2) on the issue of non filing of application to income tax authority to allege that the assessee is liable to deduct TDS on impugned payment is incorrect.

19. Coming back to various case laws relied upon by the assessee. The assessee has relied upon various decisions of co-ordinate Bench of the Tribunal in the case of Insurance companies in support of their arguments. The relevant cases laws relied upon by the assessee are reproduced as under:-

(i) Swiss Re-Insurance Company Ltd vs DDIT – ITA No.1667/Mum/2014 dt .13.02.2015.

Summary: In the case of NRRI (Swiss

Reinsurance Co. Ltd., Switzerland) the AO sought to tax the NRRI on the ground that it had business connection in India as it received income from providing reinsurance to various insurers in India. The Mumbai Bench of the Tribunal reversing the decision of the AO held as follows:-

(a)The subsidiary of the NRRI in India does not constitute a PE of its holding company

b) Conditions specified in cl (a) to (c) of Explanation 2 to section 9(1)(i) of the Act are not satisfied, therefore, the NRRI does not have any business connection in India.

(c) Reinsurance is specifically excluded from the ambit of PE in India-Switzerland DTAA, therefore, there is no PE in India.

(d) The services rendered by the subsidiary of NRRI does not constitute a Service PE or Agency PE of the NRRI in India.

Thus, *the* Tribunal held that the reinsurance premium received by the NRRI from Indian reinsurer is not taxable in India both under the Act and the DTAA.

(ii) DCIT ICICI Lombard General Insurance Co. Ltd. - ITA No. 2769 Mum, 2011 dt. 30/08/20133

Summary: :In the case of the Indian insurer (ICICI Lombard General Insurance Co. Ltd) the AO disallowed a sum of Rs. 5.84 crores paid to the NRRI in respect of reinsurance premium as no tax was deducted under section 195 and the same could not be considered as business expenditure. The CIT(A) held that the payment made to the NRRI was not taxable in India. On appeal by the Revenue, the Mumbai Tribunal, confirmed the order of the CIT(A) and held that the NRRI did not have any PE in India and, therefore, the reinsurance premium was not taxable in India.

(iii) ICICI Lombard General Insurance Co. Ltd. v ACIT- ITA No. 5777/Mum/2011 dt. 14/11/201414

Summary: In the case of Indian insurer (ICICI Lombard General Insurance Co. Ltd) the CIT invoked provisions of section 263 to disallow a sum of Rs. 16.85 crores under section 40(a)(i) in respect of reinsurance premium paid to NRRI. The Mumbai Bench of the Tribunal following the order of the co-ordinate bench in assessee's own case held that

the action of the CIT under section 263 was unwarranted.

(iv) Bajaj Allianz General Insurance Co. Ltd. v DCIT - ITA No. 2560/PN/2012 dt. 03/02/20165

Summary: In the case of Indian insurer (Bajaj Allianz General Insurance Co. Ltd.) the AO disallowed a sum of Rs. 62.67 crores under section 40(a)(i) in respect of reinsurance premium paid to ***NRRI.*** *The Pune Bench of the Tribunal reversing the disallowance held as follows:*

(a) Under re-insurance arrangements, the re-insurer enters into a reinsurance arrangement for a specific reason and the same is an independent contract

(b) Following the decision in Swiss Reinsurance and ICICI Lombard General Insurance Co. Ltd., it was held that the NRRI does not have a PE in India

(c)The Tribunal also took into consideration that the NRRI who is JV partner of the assessee, therein, the assessee was not held to be a FE of the NRRI.

(v) ADIT vs **AON** Global Insurance Service Ltd. - ITA No. 5184- 5186 **Mum 2009** dt. 30/11/2015

Summary: In the case of resident broker (AON Global Insurance Service Ltd), the Mumbai Bench of the Tribunal held that insurance broker is an independent broker and not an agent. It also held that insurance broker does not carry out any activity on behalf of anyone in India and has no authority to enter into any contract in India . The Tribunal examined the scope of section 9(l)(i) and the DTAA and held that the insurance agent has no business activity on behalf of the NRRI.

(vi) General Reinsurance AG v DCIT - ITA No. 7433/Mum/2018

Summary: In the case of NRRI (General Reinsurance AG, Germany) the AO sought to tax the NRRI on the ground that it had a business connection and PE in India. The AO in this case held that the reinsurance proposals are procured from the insurance companies or brokers in India, which is a regular and continuous activity, therefore there is business connection. The Mumbai Bench of the

Tribunal reversing the decision of the AO held as follows:

(a) The onus is on the AO to establish that the foreign company has a business connection or PE in India.

(b) Subsidiary of a foreign company would not be conclusive to say that there exists a PE in India.

(c) Activities of Liaison Office which are in nature of preparatory and auxiliary cannot be construed to be the existence of business connection in India within the meaning of section 9(1)(i) or PE under the DTAA.

(d) The Tribunal rejected the argument of the AO that there is business connection on account of regular and continuous activity.

(e) Activities of subsidiary which are merely in nature of support services do not constitute PE of the NRRI. It also found that the subsidiary had no authority to conclude contract or settle claims on its own or on behalf of the NRRI.

(f) The Tribunal also found that in reinsurance arrangements the privity of contract is between the Indian Insurer and the NRRI

(g) The Tribunal also held that the manner and mode of carrying on of the transaction is not the proper test to determine whether there exists a fixed place of business or not.

(h) The Tribunal concurred with views expressed by co-ordinate benches in the case of Swiss Reinsurance Co. Ltd., Bajaj Allianz General Insurance Co. Ltd. and Bharati AXA Life Insurance Co. Ltd.

Therefore, on all counts the foreign reinsurance company earning reinsurance premium from Indian Insurance companies was not liable for tax in India.

(vii) ITO v Bharti AXA Life Insurance Co. Ltd. - ITA No. 4805 -4808/Mum/2015 dt. 5/07/2017.

Summary: In the case of Indian insurer (Bharti AXA Life Insurance Co. Ltd.) the AO treated the assessee as assessee in default under section 201 for not withholding tax under section 195 for remittance of

reinsurance premium made NRRI. The CIT(A) relying on the decision of the co-ordinate Bench of the Tribunal in case of Swiss Reinsurance Co. Ltd. decided in favour of assessee. On appeal before the Tribunal by the Department, the same was dismissed by following the decision in Swiss Reinsurance Co. Ltd.

14.2. The above decisions of various benches of the Tribunal unequivocally hold that the reinsurance premium paid by Indian insurers to NRRI is not taxable under the Act as well as the DTAA. Therefore, in respect of all categories of reinsurance premium paid to NRRI, income is not chargeable to tax under the Act.

(vii) M/s. Tata AIG General Insurance Company Ltd. Vs. DCIT in ITA No.1718/Mum/2020 dated 25.04.2022:

> *3.17. Let us now examine the applicability of provisions of Section 40(a)(i) of the Act in respect of reinsurance premium paid to foreign reinsurers. We find that the ld. CIT(A) had placed reliance on the decision of Chennai Tribunal in the case of Cholamandalam MS General Insurance Co. Ltd to drive home the point that the said payment shall be liable for deduction of tax at source in terms of Section 40(a)(i) of the Act. We find that though the Hon"ble Madras High Court in para 26 had held that Chennai Tribunal decision in confirming the action of the*

ld. AO in invoking provisions of Section 40(a)(i) of the Income Tax Act was not supported with any reasons, finally in para 28, the Hon"ble Madras High Court had remanded this question to the Tribunal to decide whether the ld. AO was right in disallowing the reinsurance premium u/s. 40(a)(i) of the Act. Hence, that question needs to be decided by the Tribunal. Accordingly, the issue of applicability of provisions of section 40(a)(i) of the Act is adjudicated by us independently. We find that the Co-ordinate Bench of this Mumbai Tribunal in the case of DCIT vs. ICICI Lombard General Insurance Co. Pvt. Ltd., in ITA Nos. 6837 & 6832/Mum/2014 for A.Y. 2005-06 and 2009-10 vide order dated 04/10/2016 had adjudicated the very same issue in respect of payments made to M/s. Odyssey America Reinsurance Corporation, Singapore for providing reinsurance business, without deduction of tax at source and applicability of provisions of Section 40(a)(i) of the Act. We find that the Tribunal in the aforesaid case placed reliance in assessee"s own case for A.Y.2004-05 reported in 152 ITD 855 and also in yet another case rendered in the context of revision proceedings u/s.263 of the Act in ITA No.5777/Mum/2011, had quashed the revision proceedings u/s.263 of the Act by observing as under:-

> *2.3. Thus, the Tribunal by the aforesaid order held that invocation of revisional jurisdiction was not valid. In*

view of this uncontroverted factual matrix, the appeal of the Revenue is dismissed as infructuous.

3.18. We further find that the Co-ordinate Bench of this Tribunal in the case of General Reinsurance AG, General Reinsurance AG India Branch vs. DCIT in ITA No.7433/Mum/2018 for A.Y.2015-16 dated 14/06/2019 had an occasion to address the same issue from the perspective of the recipient foreign company. In the said Tribunal order dated 14/06/2019, in para 5, this Tribunal had categorically stated that assessee company in that case had challenged the decision of the income tax authorities in treating the receipt of reinsurance premium as taxable in India. Hence, the question that was raised before Mumbai Tribunal in that said case was from the perspective of foreign reinsurance company. The decision rendered thereon could be made applicable to the assessee's case before us also by drawing the same analogy. The relevant operative portion of the judgement is reproduced herein below:-

11. We have carefully considered the rival submissions and perused the relevant material and record. As our discussion in the earlier paras show, the substantive dispute in this appeal relates to the taxability or otherwise in India of the reinsurance premium earned by the non- resident foreign assessee by underwriting the risks of various Indian insurance

companies. It is not in dispute that the appellant before us is an entity incorporated in Germany and is a tax resident of Germany. The manner in which the reinsurance premium is earned by the assessee is also not in dispute. But to recapitulate, we may note that the appellant is a global re-insurance company which has entered into re-insurance contracts with various Indian insurance companies. For underwriting the risks of the Indian insurance companies, assessee earns reinsurance premiums, which is the subject-matter of dispute before us. So far as the nature of receipts in question is concerned, there is a convergence between the assessee and the Revenue that the same are in the nature of business receipts. It is quite well understood that in such like cases where the foreign company earns business income, the same can be taxed in India only if it has a PE in India or 'business connection' so as to fall within the scope of Indian tax laws. At the outset, it has been asserted by the appellant before us that in such situations, the onus is on the Revenue to establish that the foreign company has a 'business connection' or a PE in India so as to invite any tax liability under the Indian tax laws. Ostensibly, the aforesaid is supported by the judgment of the Hon'ble Supreme Court in the case of E funds IT Solution Inc vs ADIT, (2017) 86 taxmann.com 240. Therefore, in this background, we

may now examine the facts of the instant case as to whether such an onus has been discharged by the Revenue or not."

17. It has been asserted before us that the instant year is the first year when the assessee has filed a return of income as it had some taxable income, while in the past years there was no taxable income. In the past, there was no income other than premium on reinsurance business, yet the existence of LO since 2007 is in the knowledge of the assessing authority and no steps have been taken in any of the earlier years to construe the activities of the LO as constituting a 'business connection' or a PE of assessee in India. The learned representative asserted that it is only in this year that the function of the LO (for part of the year) has been understood by the Assessing Officer to be giving rise to a 'business connection' or existence of PE in India so as to hold that the income from the premium on reinsurance earned by the assessee is taxable in India. In our considered opinion, factually as well as on point of law, we do not find any merit in the stand of the Revenue that the activities of the LO of assessee generate any scope for treating it as a PE of assessee in India or a 'business connection' in India. We say so for the reason that the conditions under which the LO has been allowed to operate clearly bring out that the activities were

preparatory or auxiliary in nature and the same cannot lead to determination of a PE in India, considering the provisions of Article 5(4)(e) of the India-Germany Tax Treaty. As per the statement made by the learned representative at the Bar, the LO has complied with the conditions imposed by IRDA and there is no adverse view determined by IRDA. Thus, on facts we do not find any force in the plea of the Revenue; and, even on the point of law, as has been brought out by the Hon'ble Delhi High Court in the case of National Petroleum Construction Co. (supra), the LO merely acts as a channel of communication between the Head office and the parties in India and cannot undertake any commercial, trading or industrial activity, and thus, the activities of the LO cannot give rise to a 'business connection' within the meaning of Sec. 9(1)(i) of the Act or a PE of the assessee in India, considering that the activities are compliant with the approval granted by IRDA.

18. We may now address the point as to whether the operations of the Indian subsidiary, which have indeed been carried out from India, can be construed as enabling invoking of 'business connection' of the assessee as envisaged under Section 9(1)(i) of the Act or whether the Indian subsidiary constitutes a PE of assessee in India. Article 5(1) of the India- Germany Tax

Treaty provides that PE means a fixed place of business through which the business or enterprise is wholly or partially carried on. On this aspect, the case set-up by the Revenue is that the key functions of reinsurance business, namely, actuarial services and underwriting services are provided by the Indian subsidiary. Such discussion is contained in paras 9.7.2 to 9.8 of the final order of the Assessing Officer. On this aspect, we have carefully examined the contentions put forth by the Revenue as well as the material on record, namely, the Master Service Agreement and the Addendum to the Master Service agreement between assessee and the Indian subsidiary and find that the approach of the Assessing Officer is quite misdirected. In fact, the services that have been provided by the Indian subsidiary are support services in the field of actuarial and underwriting functions undertaken by the assessee and not services of actuarial or underwriting of insurance risks per se. We have already quite succinctly noted the nature and scope of the services rendered by the Indian subsidiary in the earlier paras 12 and 13 above. In fact, the Assessing Officer is grossly wrong in holding in para 9.7.8 of his order that all the functions with respect to the claim settlement are carried out by the Indian subsidiary itself; rather, it is a case where the Indian subsidiary provides support functions and assists the assessee in such matters. The privity of contract is between the

assessee and the Indian insurance companies and, it is abundantly clear from the terms of engagement between the assessee and the Indian subsidiary that the Indian subsidiary is not authorised to execute any contract or settle claims on its own or on behalf of the assessee. In fact, there is no factual support for the stand of the Assessing Officer, as there is nothing either as per the Service agreement or any material to say that the Indian subsidiary has provided actuarial and risk underwriting services, which are core and crucial activities of the reinsurance business. Even the use of 'Electronic Underwriting Software' by the Indian subsidiary is a misnomer. The software is a standard tool which is used by global entities of the group for entering the data in respect of the reinsurance transactions of the assessee. The software is owned by the assessee and not the Indian subsidiary, and the software is used by the Indian subsidiary to enter the data of the Indian insurance companies, but no further recommendations are made by the Indian subsidiary. It is only the assessee through its own personnel who examines the proposal and negotiates the terms and conditions of the reinsurance contracts. There is nothing to dispute the assertions of the assessee that the infrastructure, personnel and approvals to carry out reinsurance activities are from outside India. Thus, there is nothing to suggest that the core activities of the reinsurance

business of the assessee are carried out in or from India by the Indian subsidiary.

19. Moreover, in the context of Article 5(1) of the India-Germany Tax Treaty, what is essential is to examine whether there exists an assessee's fixed place of business in India or not. Factually or legally speaking, the place of business of Indian subsidiary per-se can in no way be equated to mean the fixed place of business of the assessee in India. In fact, in this connection, the observations of the Hon'ble Supreme Court in the case of E funds IT Solution Inc (supra) are very apt. In para 12 of its order, the Hon'ble Supreme Court has dealt with in detail, by making reference to the findings of the Hon'ble High Court, and concluded that there was no fixed place PE of the assessee before it on the facts of the case before it. One of the points noted by the Hon'ble High Court was that the foreign company was dependent on the Indian subsidiary for earning its income. This aspect was specifically negated and held not to be a relevant criteria to determine whether there existed a fixed place PE or not. Similarly, the manner and mode of carrying on of transaction was also not found to be a proper test to determine as to whether there existed a fixed place of business or not. Taking a cue from the reasoning approved by the Hon'ble Supreme Court, in the present case too, the mere rendering of support services in

connection with actuarial or underwriting services cannot be a ground to say that there exists a fixed place or a PE of the assessee in India. Therefore, on parity of reasoning which prevailed with the Hon'ble Supreme Court in the case of E funds IT Solution Inc (supra), in the present case too, the arguments of the Revenue do not deserve any indulgence. Accordingly, the same are rejected.

20. So far as the case of the Revenue that there is a dependent PE in India is concerned, herein also, the Revenue has merely brushed aside the claim of the assessee that the Indian subsidiary does not have any authority to secure contracts or solicit business on its behalf in India independent of the assessee. According to the Revenue, the Indian subsidiary uses brand name of the assessee while carrying out its activities in India. In our view, the same cannot be a ground to say that there existed a dependent PE in India. In fact, a point which has been emphasised before us is that the assertions of the Revenue that the Indian subsidiary has a decision making authority is a mere bald assertion and is devoid of any factual support. We have perused the order of the Assessing Officer as well as of the DRP and find that the assertions of the assessee in this regard have been completely brushed aside. The income- tax authorities have not referred to any particular

arrangement or agreement or any other piece of evidence to show that the Indian subsidiary could enter into contracts or was authorised to enter into any business in India on behalf of the assessee. Considering that it was imperative for the Revenue to bring out instances where the Indian subsidiary had concluded contract or secured orders on behalf of the assessee, we find that such burden has not been discharged by the Revenue. In fact, at the time of hearing, the learned representative for the assessee referred to an illustrative agreement placed at pages 28 to 102 of the Paper Book, which is a reinsurance arrangement with SBI Group Life, which has been entered into by assessee and the Indian insurance company, i.e. SBI Group Life directly. Therefore, factually also, we find no support for the case of the Revenue that the Indian subsidiary constitutes a dependent PE of assessee in India.

21. Before we conclude, we may also refer to some of the precedents which have been cited before us in order to establish that in somewhat similar situations, foreign companies engaged in reinsurance business have not been found to be having a fixed PE or an agency PE in India in the form of an Indian subsidiary. In this context, reference has been invited to the decision of the Mumbai Bench of the Tribunal in the case of Swiss reInsurance Co. Ltd. vs DDIT(IT), [2015] 55 taxmann.com 520

(Mumbai - Trib.), which according to the learned representative, is directly on the point. We have perused the said decision and find that the factual matrix which prevails in the instant case before us is similar to what has been considered in the case of Swiss re-Insurance Co. Ltd. (supra). In para 2.1 of the order, the relevant facts have been noted and the discussion reveals that the facts before us are quite similar to the case before our co-ordinate Bench. It was the case of a reinsurance company based in Switzerland which was receiving income for providing reinsurance to various insurance companies in India. Swiss re-Insurance company had a wholly owned subsidiary in India which was rendering administrative, market intelligence and other risk assessment services, which is quite similar to the services being rendered to assessee before us by its Indian subsidiary. Therein also, the appellant was remunerating its Indian subsidiary on the basis of cost plus mark-up. Therein also, the Assessing Officer had sought to tax the income by invoking 'business connection' in terms of Sec. 9(1)(i) of the Act as well as treating the Indian subsidiary as a PE in India. In nutshell, the facts as well as the dispute before our co-ordinate Bench in the case of Swiss re-Insurance Co. Ltd. (supra) stood on a similar footing as is the case before us. Our co- ordinate Bench considered the provisions of Explanation-2 to Sec. 9(1) of the Act as well

as the provisions of India-Switzerland DTAA, which was the subject matter before it, and concluded that the foreign company therein did not have any 'business connection' in India or a PE in India. The aforesaid precedent fully supports the inference which has been drawn by us in the earlier paras. Similarly, in the context of Sections 201/201(1A) of the Act proceedings in the ITA Nos. 4805 to 4808/Mum/2015 dated 05.07.2017 in the case of M/s. Bharti-AXA Life Insurance Co. Ltd., the foreign company in India was held not to be liable for tax in India on its reinsurance premium earned from the Indian insurance companies. In fact, our co-ordinate Bench in the case of M/s. Bharti-AXA Life Insurance Co. Ltd. (supra) followed the earlier decision in the case of Swiss re-Insurance Co. Ltd. (supra). Similar was the situation in the case of Bajaj Allianz General Insurance Co. Ltd., ITA No. 2560/PN/2012 dated 03.02.2016 wherein also, payments by Indian concerns to the foreign reinsurance company was disallowed on the ground of failure to deduct the requisite tax at source. Our co-ordinate Bench held that the foreign reinsurance company earning reinsurance premium from the Indian concerns was not liable for tax in India and, therefore, the action of the Assessing Officer was set aside.

22. All these decisions as well as our discussion aforesaid enables us to come to a conclusion that the

income-tax authorities have erred in holding that there exists a 'business connection' in India under Section 9(1)(i) of the Act and also that there exists a PE in India within the meaning of Article 5(1) and/or 5(4) of the India-Germany Tax Treaty. In view of the aforesaid discussion, we hereby set-aside the order of Assessing Officer and uphold the stand of the assessee. As a consequence, so far as Ground of appeal nos. 1 to 4 are concerned, the same are treated as allowed.

3.19. Similar view was taken by the Co-ordinate Bench of Pune Tribunal in the case of Bajaj Alliance General Insurance Co. Ltd. ,vs. DCIT in ITA No.2560/PN/2012 for A.Y.2008-09 dated 03/02/2016 vide paras 26-43. For the sake of brevity, the relevant operative portion of that Pune Tribunal order is not reproduced herein.

3.20. It is a fact that in the impugned case of the assessee before us, i.e. Tata AIG Insurance, it is not in dispute that foreign reinsurer does not have any place of business or branch or any business connection or permanent establishment in India. Hence, the payments made by the assessee company to the said foreign insurer is not chargeable to tax in India in the hands of the foreign reinsurer in terms of Section 195(1) of the Income Tax Act. Hence, there is no obligation on the part of the assessee payer to deduct tax at source thereon. Reliance in this regard is

placed on the decision of the Hon"ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd., vs CIT reported in 327 ITR 456. Accordingly, the provisions of Section 40(a)(i) of the Act would not come into operation at all. Moreover, these decisions were duly quoted by the assessee before the ld. CIT(A) vide its submission dated 25/02/2020 which was completely ignored by the ld. CIT(A) while adjudicating the issue.

3.21. We further find that the Co-ordinate Bench decision of this Tribunal in Swiss Reinsurance Co. Ltd., vs. DDIT International Taxation, Mumbai reported in 55 taxmann.com 520 (Mumbai Trib.) dated 13/02/2015 for A.Y.2010-11 had also addressed the very same issue. The relevant operative portion of the said order is reproduced hereunder:-

"5.3 Assuming that conditions of (i) & (ii) mentioned herein above are fulfilled, we do not find that the employees of SRSIPL are providing services to the assessee as if they were the employees of the assessee. Therefore, condition laid down under Article-5 of the Treaty are also not fulfilled to treat SRSIPL as PE of the assessee. Article 5(4) of the Treaty reads as under:-

"Notwithstanding the preceding provisions of this Article, an insurance enterprise of Contracting State shall, except in regard to re-insurance, be deemed to have a permanent

establishment in other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies."

3.22. From the perusal of the relevant clause of Article 5(4) of the treaty reproduced supra, it could be concluded that the said Article is not at all applicable for reinsurer. This is relevant in view of the observations made by the ld. CIT(A) in 4.2.6 as under:-

"As per the appellant there are certain treaties which provides that insurance business except reinsurance business would be deemed to be a PE of the non-resident in the other contracting state. AO has allowed reinsurance premium ceded to such non-resident where there is a specific exclusion for the insurance companies from the purview of PE. <u>As a corollary implies that where there is no specific exclusion, the reinsurance business would be deemed to be a PE in the other contracting state</u>."
(Underlining provided by this Tribunal)

3.23. We hold that the aforesaid observation of the ld. CIT(A) is incorrect in view of the aforesaid decision of Mumbai Tribunal dated 13/02/2015 and in view of the fact that Article 5(4) of the treaty does not apply to reinsurer. Moreover, the

ld. CIT(A) accepts the existence of independent brokers involved and if it is so, it cannot constitute a PE.

3.24. Hence, the entire observations of the lower authorities had been duly addressed in the aforesaid findings by us. At the cost of repetition, we would like to reiterate the fact that there is absolutely no dispute that the foreign reinsurers does not have any place of business in India / permanent establishment in India / branch established in India / Liaison office in India. Hence, any payment made by the assessee company to such foreign insurers would not be chargeable to tax in the hands of the foreign reinsurers in India in terms of Section 195(1) of the Act. Accordingly, as stated earlier, there would be no obligation on the part of the assessee, being a payer, to deduct tax at source and consequently there cannot be any disallowance u/s.40(a)(i) of the Act. Accordingly, assessee succeeds on this ground also."

20. Insofar as case laws relied upon by the learned CIT(A), of the Hon'ble Bombay High Court in case of Vodafone International Holdings (329 ITR 126), in upholding action of the AO of subjecting reinsurance premium to tax in India, we find that the Hon'ble Supreme Court has subsequently overruled this decision and same has been reported in 341 ITR 1 (SC) and thus, entire basis for the decision of the CIT(A) for

the assessment year 2007-08 has no legs to stand. Further, the learned CIT(A) for the assessment year 2007-08 did not follow order of his predecessor for the assessment year 2005-06 on the ground that judgement of the Hon'ble Bombay High Court in Vodafone International Holdings (supra) and of the Hon'ble Supreme Court in the case of Kanchanganga were not considered. We find that the Hon'ble Supreme Court has reversed decision of the Hon'ble Bombay High Court in the case of Vodafone International Holdings and thus, basis of the CIT(A) to rest his decision on basis of said judgement is no longer justifiable. As regards decision of the Hon'ble Supreme Court in the case of Kanjanganga, we find that facts of the said case is completely distinguishable and only issue which was decided therein was whether there was receipt of income in India which gave rise to a charge. In this case, it was clearly held that sum paid by the assessee to NRR is not taxable in India under the Act as well as DTAA between India and respective countries and thus, case laws relied upon by the Assessing Officer on the issue is incorrect.

21. In this view of the matter and considering facts and circumstances of the case and also by following various case laws discussed hereinabove, we are of the considered view that reinsurance premium ceded to non-resident reinsurer is not taxable in India under the Income Tax Act, 1961 or under DTAA between India and respective countries where NRRs are tax residents and thus, on impugned payments the assessee is not liable to deduct TDS u/s.195 of the Income Tax Act, 1961. Consequently, payments made to NRR cannot be disallowed u/s.40(a)(i) of the Act, 1961. Hence, we direct the Assessing Officer to delete additions made towards disallowance of reinsurance premium ceded to NRRs.

22. The next issue that came up for our consideration from the Department appeal for the assessment year 2010-11 and 2013-14 is disallowance of excess depreciation on UPS.

23. Mr. Percy J. Pardiwalla, learned Sr. counsel for the assessee submitted that this issue is covered in favour of the assessee by the decision of the ITAT., Chennai, in assessee's own case for the assessment year 2008-09 in ITA

No.1366/Mds/2013 dated 31.07.2018, where the Tribunal has allowed 60% depreciation on UPS as applicable to computer software.

24. Mr. M.Swaminathan, learned Senior Standing Counsel for the Revenue fairly agreed that this issue is covered in favour of the assessee by decision of the ITAT., Chennai in assessee's own case for the earlier year.

25. We have heard both the parties and considered relevant materials on record and we find that the ITAT., Chennai in assessee's own case for the assessment year 2008-09 in ITA No.1366/Mds/2013 had considered an identical issue and held that UPS is part of computer and eligible for depreciation @ 60% and directed the Assessing Officer to allow 60% on UPS also. Therefore, consistent with the view taken by the co-ordinate Bench, we are inclined to uphold findings of the learned CIT(A) and direct the Assessing Officer to allow depreciation on UPS @ 60% as claimed by the assessee.

26. The next issue that came up for our consideration from the Revenue appeal for the assessment years 2010-11 & 2013-14 and the assessee appeal for the assessment year 2014-15 is excess claim of deduction on unexpired premium reserve. The assessee had made provision for unexpired premium reserve and deducted from premium income on the basis of period of insurance policy and transferred it to subsequent assessment year. The Assessing Officer has disallowed unexpired premium reserve on the ground that when the assessee has received entire premium during the financial year, there is no reason to make provision for UPR by claiming that it has received advance premium receipt.

27. The learned counsel for the assessee explaining accounting treatment of UPR, submitted that but for terminology of reserve in books of account, it is nothing but deferral of advance premium collected pertain to subsequent assessment year on the basis of period of policy to give true and correct position of income and expenditure in the relevant financial year. The assessee being in the insurance business has issued

insurance policy for period of 12 months which may spread to subsequent financial years. The premium income has been accounted on the basis of policy issued, however at the end of the financial year premium pertains to subsequent financial year has been reduced from income account and transferred to liability. However, the Assessing Officer has misconstrued the term used 'reserve' and understand that the assessee has created reserve for unexpired premium and disallowed and added back to the total income.

28. The learned Sr. Standing Counsel for the Revenue, on the other hand, submitted that Rule 6E of Income Tax Rules, 1962 governed allowability of UPR in determining taxable income of insurance company. The Rule 6E states that deduction for UPR from total income of non-life insurance companies shall not exceed certain limits prescribed in rules thereunder. The assessee has not furnished any details to prove that provision made for UPR is governed by Rule 6E of I.T. Rules, 1962. The Assessing Officer, after considering relevant facts has disallowed excess claim of deduction on UPR. The learned CIT(A) without understanding above facts

deleted additions made by the Assessing Officer and hence, order passed by the Assessing Officer should be upheld.

29. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The assessee has made provision for unexpired premium reserve of Rs.1,20,63,30,000/- and reduced it from premium income on the basis of term of policies issued during the relevant assessment year. The Assessing Officer has added back provision made for UPR to book profit computed u/s.115JB of the Act on the ground that when the assessee has received entire premium income for the relevant assessment year, in the books of account, then any reserve created other than those reserves mentioned in Explanation (1) (b) u/s.115JB of the Act cannot be allowed as deduction. It was explanation of the assessee that term ‘reserve’ and ‘provision ‘ are different, just because, the assessee term it as reserve, the nature of income / expenses does not change. The assessee further claimed that provision for UPR is nothing but deferrable of income received in advance to subsequent financial years for true and correct disclosure of income and expenditure to

relevant assessment year. Therefore, when the assessee has made provision for unexpired premium and reduced it from income of the relevant assessment year and also accounted said income in subsequent financial year, question of making additions to book profit u/s.115JB of the Act does not arise, because income does not pertain to impugned assessment year.

30. Having heard both sides and considered relevant material on record, we find that this issue is squarely covered in favour of the assessee by the decision of the ITAT, Kolkata Bench in the case of DCIT Vs. National Insurance Co.Ltd. (2016) 72 taxmann.com 116, where the Tribunal, after considering relevant facts and also Rule 6E of Income Tax Rules, 1962, held that if provision for unexpired premium reserve is within allowable limit as prescribed under Rule 6E, then same does not fall in the category of those reserves which have been specified in Rule 1(b) of section 115JB(2) of the Act, and thus, deleted additions made by the Assessing Officer towards excess provision on UPR to book profit computed u/s.115JB(2)

of the Income Tax Act, 1961. The relevant findings of the Tribunal are as under:-

"11. Addition towards Reserve created for Unexpired risk u/s 115JB of the Act The brief facts of this issue is that while computing the Book Profit u/s. 115JB of the Act for the purpose of MAT, the ld AO considered a sum of Rs.169,45,00,000/- being the Reserve for Unexpired Risk created as per the requirement of law, as allegedly required to be added back. The ld AO added back the aforesaid sum of Rs.169,45,00,000/- in computing the Book profit. The assessee submitted that as per the Insurance Act, 1938, in case of an Insurance Company carrying on General Insurance business, Premium is recognised as income over the contract period or the period of risk, whichever is appropriate. Premium received in advance which represents Premium Income not relating to that particular accounting period in which the said Premium has been received, is separately disclosed in the Financial Statements of an Insurance Company. That part of income which is attributable to the succeeding accounting period or periods is reduced from the total Premiums received during an accounting period by way of creation of a Reserve for Unexpired Risk in accordance with Section 64V(l)(ii)(b) of the Insurance Act, 1938. The aforesaid Reserve is to be created for a minimum amount as prescribed under the above mentioned section. Appreciating the special nature of the Insurance Business, the Law makers prescribed special procedure for Computation of Total Income of an Insurance Company carrying on Business of Insurance other than Life Insurance which are to be found in Rule 5 of the First Schedule to the Income-tax Act, 1961 read with Rule 6E of the Income-tax Rules, 1962. This particular procedure has to be

mandatorily complied with in making the assessment for Income-tax purposes.

Every year adjustments are made to the existing Reserve for Unexpired Risk by way of crediting or debiting by the amount of difference between the Reserve created in the immediate preceding year and the Reserve required to be credited during the current accounting year. This cannot be considered as any alleged "Amount carried to any Reserve" debited to the Profit & Loss Account, but it should be appreciated that this Reserve represents that part of Premium Income which does not relate to the current accounting period. It must be appreciated that as per the Mercantile System of accounting, it is only that Income/Expenditure which relate to the current accounting period, should find places in 'the Revenue/Profit & Loss Account of the year. Hence it was submitted that in case of an Insurance Company (carrying on General Insurance Business), the creation of "Reserve for Unexpired Risk" cannot be considered to be similar to those "Reserves" which have been referred to in Clause (b) of Explanation (1) to Section 115JB(2). It may also be appreciated that the "Reserve for Unexpired Risk" can, in any case, not be considered as any provision made for meeting liabilities, other than ascertained liabilities as referred to in Clause(c) of Explanation (1) to Section 115JB(2).

On the basis of the above facts it may kindly be appreciated that there has not been any requirement to add back any sum in relation to the "Reserve for Unexpired Risk" while computing "Book Profit" u/s.115JB(2) for the Assessment Year 2008-09. Accordingly, the assessee submitted that the "Reserve for Unexpired Risks" not being of the nature as specified in clause

(b) of Explanation 1 to section 115JB(2), the action of the ld AO in making an addition of such Reserve should be held as unjustified. Hence, the assessee submitted that the ld AO may kindly be directed to delete the addition of Rs.169,45,00,000/- made by him in computing the Book profit u/s 115JB of the Act.

11.1. The ld CITA observed that the provisions contained in Rule 6E of the Income-tax Rules, 1962 has also been considered. Section 115JB(2)- Explanation (1)(b) requires increasing "the amounts carried to any reserve, by whatever name called, other than a reserve specified u/s 33AC" if such amount is debited to the Profit & Loss Account. It is held that the Reserve for Unexpired Risk has not been debited in the Profit & Loss account at any point of time, therefore explanation 1 to sub-section 2 of section115JB is not applicable in the peculiar facts of the general insurance business carried out by the assessee. In the assessee's case, firstly the concerned reserve for Unexpired Risk has not been created through any debit entry made in the Profit & Loss Account. The reserve has been created in accordance with the relevant provisions of the Insurance Act, 1938, by way of debiting the premium received for adjusting the amount of premium that may be related to future year or years. It is noted that Rule 5 of the First Schedule of the Income-tax Act, 1961, which specifies the procedure to be followed for computing the business income of a General Insurance business, specifically allows deduction for reserve carried over for Unexpired Risk and Rule 6E of the Income-tax Rules, 1962 provides that such deduction will be allowed to the maximum extent of 50% of the net premium received during the relevant year. Hence, this creation of reserve out of the premium received during the year, is a statutory requirement

and the same is duly recognised by the Income-tax Act/Rules. As already mentioned hereinabove, this particular reserve does not fall in the category of those reserves which have been specified in Explanation 1 (b) to section 115JB(2). Therefore, this reserve viz., the reserve for Unexpired Risk in the case of a General Insurance business, should not be added back for the purpose of computation of Book Profit u/s. 115JB(2) for MAT purposes. On the basis of this observation, it was held that the ld AO's action in adding back a sum of Rs.169,45,00,000/- being reserve created for Unexpired Risk, was not in accordance with the relevant provisions of the Income Tax Act, 1961 and accordingly deleted addition."

31. In this case, it was contention of the Assessing Officer that the assessee has not furnished necessary break up of premium received during the year to prove that such provision is within permissible limit of Rule 6E of Income Tax Rules, 1962. Therefore, we are of the considered view that issue needs further verification from the Assessing Officer. Hence, we set aside the issue to file of the Assessing Officer and direct the Assessing Officer to examine claim of the assessee and if provision made for UPR is in accordance with Rule 6E of Income Tax Rules, 1962, then, the Assessing Officer is directed to delete additions made towards excess claim of deduction

towards UPR to book profit computed u/s.115JB(2) of the Income Tax Act, 1961.

32. The next issue that came up for our consideration from the Revenue appeal for the assessment years 2010-11 & 2013-14 and the assessee appeal for the assessment year 2014-15 is disallowance u/s.14A read with Rule 8D of the Income Tax Rules, 1962.

33. During the previous year relevant to assessment years under consideration, the assessee has earned exempt income, but not made any *suo motu* disallowance towards expenditure relatable to exempt income. The Assessing Officer has disallowed expenditure relatable to exempt income u/s.14A of the Act by invoking Rule 8D of Income Tax Rules, 1962. It was explanation of the assessee before the Assessing Officer that a provision of section 14A of the Income Tax Act, 1961 does not apply to insurance companies.

34. We have heard both the parties, perused material available on record and gone through orders of the authorities

below. We find that the Hon'ble High Court of Madras in the case of the assessee in TCA No. 755& 842 of 2018 vide order dated 18.11.2021, had considered an identical issue and held that section 14A of the Income Tax Act, 1961, stands excluded while computing income tax of an insurance company, in view of non-obstante clause contained in section 44 of the Income Tax Act, 1961. The relevant findings of the Hon'ble High Court are as under:-

> *"4. In so far as the second issue namely applicability of Section 14A of the Income Tax Act,1961 in computation of Income of an Insurance Company, we find that the issue stands resolved by the decision of the Delhi High Court in the matter Principal Commissioner of Income Tax, LTU, New Delhi Vs OrientalInsurance Company Ltd reported in [2020] 118 taxmann.com 245 (Delhi) wherein in para No.9 it is held that:*
>
> > *"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."*

5. It is thus clear that Section 14A of Income Tax Act, 1961 stands excluded while computing the Income Tax of an Insurance Company, in view of the non-obstante clause contained in Sec. 44 of Income Tax Act, 1961, the questions of law stand decided against the assessee."

35. In this view of the matter and by respectfully following decision of the Hon'ble High Court of Madras in assessee's own case, we are of the considered view that provisions of section 14A of the Income Tax Act, 1961, does not apply to insurance companies, because income of the insurance company should be computed in accordance with provisions of section 44 of the Income Tax Act, 1961 and thus, we direct the Assessing Officer to delete additions made towards disallowance u/s.14A read with Rule 8D of Income Tax Rules, 1962.

36. The next issue that came up for our consideration from the Revenue appeal for the assessment years 2010-11 & 2013-14 and the assessee appeal for the assessment year 2014-15 is disallowance of provision for IBNR and IBNER.

37. The learned Senior counsel Mr. Percy J Pardiwalla appearing for the assessee submitted that during the relevant assessment years, the assessee has made provision for claims incurred, but were not reported (IBNR) and claims incurred, which were not enough reported (IBENR) and such provision has been made for all unsettled claims on the basis of claim lodged by insured persons. According to the learned Sr. counsel, date of damage/loss was considered for recognizing the claim in a particular year. In certain circumstances, damages / loss were not reported in the balance sheet of the insurance company and such claims are known as claims incurred, but not reported. Sometimes, damage/loss incurred may be reported, however, it was not enough reported and therefore, the assessee has made provision as per IRDAI guidelines. The liability of the assessee company is determined based on the actual loss / damage. Therefore, such provision is in accordance with guidelines and norms issued by IDRAI and thus, is deductible u/s.37(1) of the Income Tax Act, 1961.

38. Mr. M.Swaminathan learned Sr. Standing Counsel for the Revenue, on the other hand, submitted that the assessee has

created provision in anticipation of settlement of claims that were not ascertained. What is reported to the assessee is damage/ loss caused to the insured persons. According to the Sr. Standing Counsel, the assessee is yet to assess loss and determine amount to be compensated. Therefore, it is unascertained liability and same cannot be allowed as deduction. The Sr. Standing Counsel further submitted that this issue is covered by the decision of the ITAT., Chennai in assessee's own case for earlier assessment years, where the Tribunal has held that provision made for IBNR and IBNER is not deductible, because merely incident happened during the year which is basis for making claim, that cannot be a reason for allowing compensation payable by the assessee in the subsequent financial years.

39. We have heard both the parties, perused material available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal in assessee's own case in ITA Nos.1674 to 16756 & 1759/Chny/2011 & Ors. vide order dated 31.07.2018 for relevant assessment years and after considering relevant facts

held that provision for IBNR & IBNER is not deductible u/s.37(1) of the Income Tax Act, 1961, because such provision is only on unascertained liability, which is not accrued to the assessee for the relevant assessment year. The relevant findings of the Tribunal are as under:-

> *"43. We have considered the rival submissions on either side and perused the relevant material available on record. Admittedly, the assessee made provision in respect of claims incurred but not reported and in respect of claims incurred but not enough reported. The compensation for making insurance claim arises on the date of loss or damage occurred to the insured property. But, the actual liability to make the payment arises on the date on which the loss or damage was assessed and the amount was determined. In this case, the accident or loss was reported to the assessee but the actual loss or compensation was not determined during the assessment year 2009-10. Therefore, as rightly submitted by the according to the Ld. Sr. Standing Counsel for the Revenue, the liability to make the payment accrues to the assessee only in the year in which the loss or damage was ascertained and compensation payable to insured person is determined. Admittedly, the compensation payable to insured person was not determined during the assessment year 2009-10. Therefore, this Tribunal is of the considered opinion that merely because the incident happened during the year which is the basis for making claim, that cannot be a reason for allowing the compensation payable by the assessee for the assessment year 2009-10. In other words, the compensation payable by the assessee has to be allowed in the year in which the amount of compensation was*

determined. Since the amount was not determined during the year under consideration, this Tribunal is of the considered opinion that the same cannot be allowed for assessment year 2009-10. Hence, the CIT(Appeals) is not correct in allowing the claim of the assessee. Accordingly, the order of the CIT(Appeals) is set aside and that of the Assessing Officer is restored."

40. In this view of the matter and consistent with view taken by the co-ordinate Bench, we are of the considered view that the assessee is not entitled for deduction towards provision created for IBNR & IBNER and thus, we reverse findings of the learned CIT(A) on this issue for the assessment years 2010-11 & 2013-14 and uphold findings of the learned CIT(A) for the assessment year 2014-15 and reject ground taken by the assessee. The appeal filed by the Revenue on this issue for the assessment year 2010-11 & 2013-14 is allowed.

41. As regards contention of the assessee that actual utilization of IBNR & IBNER should be allowed, we find that what was disallowed by the Assessing Officer is only provision created for the relevant assessment year, but there was no discussion on the spending in respect of IBNR & IBNER. In

case, the assessee has made actual utilization towards IBNR & IBNER, then same needs to be allowed as deduction on payment basis. In other words, the compensation payable by the assessee has to be allowed in the year in which amount of compensation was determined. Therefore, we direct the Assessing Officer to verify claim of the assessee and in case, the assessee is able to prove actual utilization towards IBNR & IBNER, then the Assessing Officer is directed to allow claim of the assessee.

42. The next issue that came up for our consideration from the assessee appeals for the assessment years 2010-11 & 2013-14 is disallowance of excess depreciation claimed on motor vehicles. The assessee has claimed depreciation @ 50% on motor vehicles as per Rule 5 read with Appendix I clause III (Machinery & Plant) (via), as per which new motor vehicles purchased after certain dates is entitled for 50% depreciation. The Assessing Officer has allowed depreciation @ 15% as per Item 3 of Part A of Appendix - entry 2, which is applicable to general category of motor cars acquired or put to use on or after 01.04.1990.

43. Mr. Percy J. Pardiwalla, learned Sr. counsel for the assessee referring to Motor Vehicles Act, submitted that commercial vehicles, include light motor vehicle and thus, as per Clause 5A of New Appendix 1 read with Rule 5, the assessee is entitled for 50% depreciation on new motor vehicles acquired and put to use after certain dates. However, the Assessing Officer as well as the learned CIT(A) has relied upon Circular No. 609 dated 29.07.1991 and judgement of Hon'ble Bombay High Court in the case of CIT Vs S.C. Takur & Brothers 322 ITR 252 and disallowed excess claim of depreciation over and above normal depreciation of 15% applicable to general category. The learned Sr. counsel further submitted that the Hon'ble Bombay High Court in the case of CIT Vs. Birla Global Asset Finance Co. Ltd. in ITA No.828 of 2010 dated 08.08.2012 has held that the assessee was entitled to claim depreciation @ 50% in respect of commercial vehicles used by them in their business as per the term commercial vehicles has been defined into light motor vehicles Act.

44. Mr. Swaminathan, Sr. Standing Counsel for the Revenue submitted that additional higher depreciation is applicable to new motor vehicles acquired and put to use in the business of run them on hire, but such higher depreciation cannot be given to the assessee, who is buying motor vehicles for his own business. Therefore, the Assessing Officer has rightly disallowed depreciation claimed by the assessee over and above normal rate of depreciation and thus, their order should be upheld.

45. We have heard both the parties, perused material available on record and gone through orders of the authorities below. As per new Appendix 1 read with Rule 5 of Income Tax Rules, 1962, Motor cars, other than those used in a business of running them on hire, acquired or put to use on or after the 1st day of April, 1990, except those covered under entry (ii) are eligible for 15% depreciation. Further, as per S.No.3 of plant and machinery clause (via), new commercial vehicles which are acquired on or after the 1st day of January, 2009, but before the 1st day of October, 2009 is eligible for higher depreciation of 50%. The assessee has claimed depreciation @

50% on the ground that commercial vehicles, includes light motor vehicle. Therefore, any light motor vehicle, which is purchased on or after certain date by any assessee in the business is entitled for 50% depreciation, but not 15% under general entry 2(i) of Item 3 of plant and machinery. The Assessing Officer has disallowed excess depreciation over and above normal depreciation of 15% on the ground that higher depreciation is allowable to only those assessees, who had been engaged in the business of running them on hire. Since, the assessee has not in a business of hiring motor buses, motor lorries and motor cars, it cannot claim higher rate of 50% depreciation.

46. Having heard both the sides and considered material on record, we find that this issue is squarely covered in favour of the assessee by the decision of the Hon'ble High Court of Bombay in the case of CIT vs. M/s.Birla Global Asset Finance Co.Ltd. in (2012) 76 DTR 342, where the Hon’ble High Court has defined the term ‘commercial vehicles' in light of Motor Vehicles Act, and held that commercial vehicle includes light motor vehicles. The Hon'ble Bombay High Court in the case of

CIT Vs Shah Rukh Khan in ITA No.1206 of 2010 had considered very similar issue and held that commercial vehicle includes light motor vehicle also. In this case, there is no dispute with regard to fact that higher depreciation claimed on the vehicles is light motor vehicles which were acquired on or after specified date. Therefore, we are of the considered view that the assessee is entitled for higher depreciation @ 50% on motor vehicles and thus, we direct the Assessing Officer to delete additions made towards excess depreciation on motor vehicles.

47. The next issue that came up for our consideration from appeal of the assessee for the assessment years 2013-14 and 2014-15 is disallowance of payment made to motor vehicle dealers. The facts with regard to impugned dispute are that during the course of assessment proceedings, information was received from DIT(Investigation), Chennai, that the assessee made some payment to motor vehicle dealers and claimed deduction u/s.37(1) of the Income Tax Act, 1961. The DGCEI investigation made in this case was aimed at identifying input credit availed on service tax. The assessee company entered

into an agreement with certain automobile manufactures like Toyota, Kirloskar Motor India P.Ltd., M/s. Ashok Leyland, Nissan etc. In these cases, statements from employees of the manufacturing companies and its retailers were recorded by service tax authorities and they have found that no service was rendered to them. The Assessing Officer on the basis of statements of some employees opined that the motor vehicle dealers do not provide any service to the assessee and thus, disallowed payment made to motor vehicle dealers on the ground that the assessee could not file any evidences to prove rendering of services against payment.

48. The learned Sr. counsel for the assessee Mr. Percy J. Pardiwalla submitted that sole basis for the Assessing Officer to disallow payment made to motor vehicle dealers is investigation carried out by the service tax authorities and statements recorded from certain persons to allege that the assessee has made payment to motor vehicle dealers without any services rendered by them. However, fact remains that assessment framed by the service tax authorities on the basis of investigation has been challenged before the Appellate Tribunal

for Service Tax (CESTAT), where the Tribunal held that motor vehicle dealers have rendered service. Therefore, the learned Sr. counsel submitted that since, sole basis for the Assessing Officer to make disallowances towards payment made to motor vehicle dealers is the assessment proceedings of service tax authorities and such assessments has been cancelled / annulled by the CESTAT, additions made by the Assessing Officer towards payment made to motor vehicle dealers cannot be sustained.

49. Mr. M. Swaminathan, learned Sr. Standing Counsel for the Revenue, submitted that the assessee could not file any evidences to justify huge payment made to motor vehicle dealers. Further, investigation carried out by Service Tax Directorate reveals that the assessee has availed input tax credit without any services being rendered and on that basis; the Assessing Officer has disallowed payment made to motor vehicle dealers. Although, the assessee claims that the CESTAT has held that motor vehicle dealers have rendered services to finance companies, but fact needs to be examined

by the Assessing Officer in light of order passed by the CESTAT and thus, issue may be set aside to the file of the Assessing Officer.

50. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The assessee had entered into agreement with various vehicle manufacturing companies for arrangement of finance for customers. As per said agreement, motor vehicle dealers provide certain services to the assessee company in furtherance of their business. The assessee has made payments to motor vehicle dealers, which is supported by necessary invoices and further, such payment has been made through banking channel after deducting necessary tax at source. The sole basis for the Assessing Officer to disallow payments made to motor vehicle dealers is report of Directorate of Income Tax (Investigation), which was further supported by investigation carried out by Directorate of Service Tax on the issue of input credit availed by motor vehicle dealers. The Assessing Officer, on the basis of report of DIT (Investigation) which was further supported by investigation carried out by

Service Tax Directorate opined that the assessee has made payment without there being any services rendered by motor vehicle dealers and such finding is based on statement of certain employees. We find that the assessee has challenged assessment proceedings of service tax authorities before CESTAT and the CESTAT vide their order dated 24.02.2021 in Service Tax Appeal No.40938/2017 held that if the department contends that no service has been provided, crucial question arises as to why service tax was collected from the dealer, therefore, opined that dealers have provided services to the assessee and thus, allowed service tax credit taken by the assessee. Since, sole basis for the Assessing Officer to doubt genuineness of payment made by the assessee to motor vehicle dealers is proceedings before the service tax authorities and such proceedings has been held to be incorrect by the CESTAT, we are of the considered view that the Assessing Officer has erred in disallowing payment made by the assessee to motor vehicle dealers only on the basis of findings of Service Tax Directorate, more particularly, when the assessee has filed sufficient evidences, including invoices and agreements to

prove that there is agreement for providing services to the assessee. Moreover, this issue is covered in favour of the assessee by the decision of ITAT, Chennai in the case of United India Insurance Co. Ltd., where an identical issue has been considered by the Tribunal and held that payment made to motor vehicle dealers is allowable deduction. Therefore, we are of the considered view that in principle, the assessee is eligible for deduction towards payment made to motor vehicle dealers, because there is sufficient proof for rendering services by said dealers. However, fact remains that the order passed by the CESTAT is not available to the Assessing Officer, we are of the considered view that the issue needs to be set aside to the file of the Assessing Officer for limited purpose of verifying the issue with reference to the CESTAT order and allow the claim of the assessee. Hence, we set aside the issue to the file of the Assessing Officer and direct that Assessing Officer to verify facts with reference to order passed by the CESTAT in the assessee's own case with reference to investigation carried out by the Service Tax Directorate. In case, the Assessing Officer finds that there is finding on rendering of services, then the

Assessing Officer is directed to delete additions made towards disallowances of payment made to motor vehicle dealers.

51. The next issue that came up for our consideration from the Revenue appeal for the assessment years 2008-09 to 2010-11 is addition towards profit on sale of investments. The Assessing Officer has considered profit on sale of investments as taxable income. However, there is no discussion in the assessment order regarding this addition. But, it is noticed that in para 5 on page 20 of the assessment order while computing taxable income, the Assessing Officer has added short term capital gain of Rs.2,70,40,990/- for the assessment year 2008-09. It was contention of the assessee before the CIT(A) that profit on sale of investments in shares and mutual funds has inadvertently offered to tax as income from short term capital gain, even though, profit on sale of investments is not taxable in the case of general insurance company by virtue of deletion of clause (b) in Rule 5 of first schedule to Income tax Rules, 1962 by the Finance Act, 1988. In this regard, the assessee has relied upon CBDT circular No.14(HL)35 dated 11.04.1955. The

learned CIT(A) has allowed claim of the assessee and deleted additions by following decision of ITAT., Chennai in the case of M/s.Royal Sundaram Alliance General Insurance Co.Ltd., in ITA Nos.847 to 849/Mds/2008 dated 05.03.2010, where it has been held that profit on sale of investments is not taxable in case of general insurance companies.

52. The Sr. Standing Counsel for the Revenue submitted that the learned CIT(A) erred in deleting additions towards profit on sale of investments without appreciating fact that as per Rule 5 of first schedule, the assessee has to offer to tax profits as disclosed in the annual accounts prepared in accordance with Insurance Act and subject to adjustments only in accordance with Rule 5A & 5C. The learned CIT(A) ought to have appreciated that Rule 5B had been omitted by Finance Act, 1988 and therefore, as per law applicable for the relevant assessment year, there was no provision for any adjustment with regard to profit on sale of investments. The learned Sr. Standing Counsel further submitted that learned CIT(A) failed to appreciate fact that the Department has not accepted decision

of the ITAT in the case of Royal Sundaram Alliance General Insurance Co.Ltd. (supra) and had preferred further appeal and therefore, the CIT(A) ought not to have followed said decision and allowed relief to the assessee.

53. The learned Sr. counsel for the assessee, on the other hand, supporting order of the learned CIT(A) submitted that this issue is squarely covered in favour of the assessee by the decision of the Hon'ble High Court of Madras in the case of CIT Vs. United India Insurance Company, (2019) 111 taxmann.com 217(Mad), where it has been held that profit on sale of investments is not taxable in the hands of insurance companies. The learned Sr. counsel for the assessee further submitted this issue is covered in favour of the assessee by the decision of ITAT., Chennai in the case of Royal Sundaram Alliance General Insurance Co.Ltd. (supra). Therefore, the learned CIT(A) has rightly deleted additions made by the Assessing Officer and their findings should be affirmed.

54. We have heard both the parties, perused material available on record and gone through orders of the authorities

below. We find that the Hon'ble High Court of Madras had considered an identical issue in the case of United India Insurance Co. Vs.CIT (2019) 111 taxmann.com 217(Mad) and held that profit on sale of investments is not taxable in the hands of insurance companies. We further noted that the ITAT, Chennai has upheld decision of the learned CIT(A) in the case of Royal Sundaram Alliance General Insurance Co.Ltd. (supra) and held that profit on sale of investments is not taxable in the hands of insurance companies. The ITAT., Pune Bench in the case of M/s.Bajaj Allianz General Insurance Co. Ltd. Vs. ACIT (2010) 38 DTR 282 had considered identical issue and held that income from profit on sale of investments by insurance companies is not taxable, after deletion of sub-rule (b) of Rule 5 of First Schedule. Therefore, from the above, it is very clear that profit on sale of investments is not taxable in the case of insurance companies. The learned CIT(A), after considering relevant facts has rightly deleted additions made by the Assessing Officer towards profit on sale of investments and thus, we are inclined to uphold findings of the learned CIT(A)

and reject ground taken by the Revenue for the assessment years 2008-09 to 2010-11.

55. The next issue that came up for our consideration from the Revenue appeal for the assessment years 2010-11 and 2013-14 is disallowance of payment made to Third Party Administrators. The facts with regard to impugned dispute are that the assessee in the business of General Insurance entered into an agreement with Third Party Administrators like M/s. Paramount Health Services, which in turn makes payment to hospitals for cashless treatment to insured people. The Assessing Officer has disallowed payment made to Third Party Administrators u/s.40(a)(ia) of the Act on the ground that the assessee ought to have deducted TDS on such payments. It was the contention of the assessee that as per CBDT Circular No.8/2009 dated 24.11.2009; it is responsibility of third party administrators to deduct TDS while making payments to hospitals, but not the assessee.

56. We have heard both the sides and considered relevant materials on record. There is no dispute with regard to

applicability of provisions of section 194H of the Act to payments made by the assessee to hospitals through third party administrators. However, as per CBDT circular No.8/2009 dated 24.11.2009, it is very clear that services rendered by hospitals to various patients of primarily medical services and therefore, provisions of section 194J are applicable on payment made by the TPAs to hospitals etc. In the said circular, it was clarified that TPAs who are making payment on behalf of insurance companies to hospitals for settlement of medical/insurance bills etc., are liable to be deduct TDS u/s.194J on such payments. Therefore, we are of the considered view that when the CBDT itself clarified that payments made by the assessee to hospital through TPAs are subjected to TDS from the TPAs, question of deducting TDS on such payments by the assessee does not arise. It is practically impossible to deduct TDS on payment made to beneficiaries / hospitals, when the assessee is not directly making payment to hospitals. The learned CIT(A), after considering relevant facts has rightly deleted additions made by the Assessing Officer and thus, we are inclined to uphold findings of the learned CIT(A)

and reject grounds taken by the Revenue for the assessment years 2010-11 & 2013-14.

57. The next issue that came up for our consideration from appeal of the Revenue for the assessment years 2010-11 & 2013-14 is non-applicability of section 115JB of the Income Tax Act, 1961 for insurance companies.

58. The learned Sr. counsel for the assessee and the learned Sr. Standing Counsel appeared for the Revenue fairly agreed that this issue is covered by various decisions of the Tribunal, including decision of the ITAT., Chennai in assessee's own case for earlier assessment year, where it has been clearly held that provision of section 115JB of the Income Tax Act, 1961 has no application to insurance companies.

59. Having heard both the sides, we find that co-ordinate Bench of the ITAT., Chennai, in the assessee's own case for the assessment year 2003-04 to 2007-08 in ITA Nos.1674 to 1676/Chny/2011 had considered identical issue and held that upto the assessment year 2013-14, provisions of section 115JB

of the Act, does not apply to the insurance companies, because insurance companies are preparing their financial statements in accordance with guidelines issued by IRDAI and not as per part II & III of Schedule VI of the Companies Act. The relevant findings of the Tribunal are as under:-

"61. Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that the provisions of Section 115JB of the Act, which enables the Department to compute the income, is not applicable to insurance companies, therefore, there cannot be any addition to the book profit. According to the Ld. Sr. counsel, the insurance companies prepare Profit & Loss account as per the guidelines issued by Insurance Regulatory And Development Authority of India and not as per Part II and III of Schedule VI of Companies Act. According to the Ld. Sr. counsel, the applicability of Schedule VI of the Companies Act was specifically excluded in respect of insurance companies.

62. We heard Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue also. It is not in dispute that the applicability of provisions of Schedule VI of the Companies Act was excluded in respect of insurance companies. Therefore, the provisions of 115JB of the Act, which enables the companies to compute the book profit, may not be applicable to the insurance companies. Therefore, this Tribunal is unable to uphold the orders of both the authorities below. Accordingly, orders of both the authorities

below are set aside and the Assessing Officer is directed to delete additions."

60. In this view of the matter and consistent with view taken by the co-ordinate Bench, we are of the considered view that provisions of section 115JB of the Act, has no application to insurance companies and thus, adjustments made by the Assessing Officer towards book profit cannot be sustained and thus, we direct the Assessing Officer to delete additions made to book profit u/s.115JB of the Income Tax Act, 1961.

61. The next issue that came up for our consideration from appeal of the assessee for the assessment years 2013-14 & 2014-15 is addition made towards UPR to book profit u/s.115JB of the Act. The assessee has made provision for UPR and deducted income and shown under the head 'liabilities'. The Assessing Officer has disallowed excess claim of UPR on the ground that the assessee could not file necessary evidence to prove said provision is in accordance with Rule 5 of First Schedule of the Act. The Assessing Officer

had also made similar adjustments towards UPR u/s.115JB of the Income Tax Act, 1961.

62. The learned Sr. counsel for the assessee submitted that this issue is squarely covered in favour of the assessee by the decision of ITAT., Mumbai in the case of M/s.Munchener Ruckversicherungs Gesellschaft Aktiengesellschaft in Munchen Vs. CIT in ITA No. 937/Mum/2021 dated 13.05.2022 and also decision of the ITAT., Kolkata Bench in the case of DCIT Vs. National Insurance Co.Ltd. (2016) 72 taxmann.com 116, where it has been held that provision made for UPR is not an item contemplated to be added in Explanation 1 to section 115JB(2) of the Income Tax Act, 1961.

63. The learned Sr. Standing Counsel for the Revenue, on the other hand, supporting order of the learned CIT(A) submitted that once liability has been treated as unascertained liability, then same needs to be added back to the book profit computed u/s.115JB of the Income Tax Act, 1961, and thus, the Assessing Officer has rightly added UPR to book profit and their orders should be upheld.

64. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The addition of UPR to book profit u/s.115JB of the Act had been subject matter of deliberations by the ITAT., Mumbai in the case of M/s.Munchener Ruckversicherungs Gesellschaft Aktiengesellschaft in Munchen Vs. CIT in ITA No. 937/Mum/2021 dated 13.05.2022, where the Tribunal by following decision of the ITAT., Kolkatta Bench in the case of DCIT Vs. M/s. National Insurance Co.Ltd. (supra), held that provision for UPR is not an item contemplated to be added in Explanation 1 to section 115JB(2) of the Income Tax Act, 1961. The relevant findings of the Tribunal are as under:-

> "*3. We have heard the rival submissions and perused the materials available on record. We find that the assessee is a German re-insurance company Munchener Ruckversichrungs Gesellschaft Aktiengesellschaft in Munchen (Munich Re) which provides re-insurance solutions worldwide and operates in three segments namely, non-life reinsurance, life insurance and health solutions. The assessee is registered with Insurance Regulatory and Development Authority of India ('IRDAI') from 01/02/2017 and carries on various activities through its Indian Branch including receipts of premium on re-insurance treaties and purchase / sale of investment as per IRDAI guidelines. The assessee is regulated by the IRDAI and it maintains books of account as per the IRDAI*

guidelines. The assessee maintains its regular books of accounts by preparing a policyholders account (called revenue account) and shareholders account (profit and loss account) separately and a balance sheet as a whole which is mandated by IRDAI. The assessee is also audited under the regulation of IRDAI. The creation of reserves, accounting of liabilities, etc. is determined by the actuary in accordance with the Insurance Regulatory and Development Authority of India Act, 1999 ('IRDA Act') and its regulations related thereto.

4. We find that the expenditure and "reserves" are created as per IRDAI guidelines and one such entry booked by the assessee pertains to "reserve for unexpired risk". The "reserve for unexpired risk" is an amount calculated using statistical method for covering risks which have not expired on the reporting date but the premium for which is received during the year under consideration and it reflected the same as a reduction from the premium earned. Hence, the reserve for unexpired risk is not ad-hoc but a sum created statistically to cover the risk of reinsurance policies underwritten by the assessee. We find that the assessee has claimed a deduction for the "reserve for unexpired risk" to the extent of Rs. 5,24,000/- in accordance with Rule 6E while computing its total income under the normal provisions of the Act. However, while computing its book profits u/s 115JB of the Act, no adjustment was made in respect thereof as it would not fall within any of the items specified in clause (a) to (k) of Explanation 1 to section 115JB(2) of the Act. However, the ld. AO restricted the allowance in terms of rule 6E to Rs. 8,75,44,500 as evident from page 15 of the assessment order. The ld. DRP deleted the addition of Rs. 5,32,31,500/- made by the ld. AO under the normal provisions of the Act. This has been accepted by both the

assessee as well as the revenue and no appeal is preferred before this Tribunal on the same.

5. We deem it fit and appropriate to narrate the facts relevant for the issue in dispute and the basis of disallowance made by the ld. AO in respect of provision for unexpired risks and premium deficiency while computing the book profits u/s 115JB of the Act as under:-

a) The ld. AO passed a draft assessment order making an adjustment of Rs. 14,13,00,000/- on account of provision for unexpired risk and premium deficiency reserve of Rs. 7,73,000/- totaling Rs. 14,20,95,000/- for the year under consideration for the purpose of calculating book profits u/s 115JB of the Act.

b) The ld. AO in his draft assessment order relied on clause (b) of Explanation 1 to section 115JB(2) of the Act which provides that the amount carried to any reserves, by whatever name called, should be added and held that the entry passed in respect of the reserve for unexpired risk should be added for the purpose of computation of book profit. The ld. AO observed that the word 'any reserve' in clause (b) of Explanation 1 to section 115JB(2) of the Act refers to all kinds of reserves and encompasses all types and categories and only excludes the reserve specified under section 33AC of the Act.

c) The ld. AO observed that the assessee has deferred its income by creating 'the Reserve for Unexpired Risk' but has not deferred the expenditure incurred for earning the same during the year and is accumulating the premium over time by a reserve for unexpired risk without any taxation. The ld. AO observed that the accounting treatment of the assessee does not fulfil the matching concept of accounting.

d) Further, the ld. AO while making the adjustment, considered the reserve for unexpired risks as an unascertained liability which is required to be added and included for the purpose of book profits u/s 115JB of the Act. The reliance placed by the assessee on Bharat Earth Movers v. CIT (2000) 245 ITR 428 (SC) was

disregarded on the basis that it is in respect of actuarial valuation of leave encashment and not applicable to facts of the assessee.

6. We find that the ld. AR submitted that the "Reserve for Unexpired Risk" represents that part of net premium which is attributable to and set aside for subsequent risks to be borne by the assessee under contractual obligations on contract period basis or risk period basis. Premium deficiency is recognised if the ultimate amount of expected net claim costs, related expenses and maintenance costs exceeds the sum of related premium carried forward to the subsequent accounting period as the reserve for unexpired risk. The reserve for unexpired risk is provided as determined by the actuary and the expected claim costs is also calculated and duly certified by the actuary. It was submitted that the premium received in advance which is not related to a particular accounting period is separately disclosed in the financial statements of the assessee and is reduced from the total premium received during the accounting period by way of creation of a 'Reserve for Unexpired Risk'. The Unexpired Risk Reserve is created to cover expected claims and expenses arising from active portfolio of the insurer. Reserve for Unexpired Risk is defined as a prospective assessment of amount that needs to be set aside in order to provide for claims and expenses which emerge from unexpired risks covered under insurance contract period. The reserve is calculated using statistical methods and is determined and certified by the actuaries using statistical methods. The certificate as per IRDAI Regulations, 2016 is provided in Form IRDAI-GI-TR, i.e., the statement of liabilities as on 31/03/2017 which is certified by the appointed actuary and statutory auditor of the assessee. Thus, it is submitted that insurance companies are required to provide for reserve for unexpired risk in the books of accounts while preparing financial statements for the year under consideration.

7. We find that the aforesaid facts and submissions made by the ld. AR remain undisputed and hence the same are not reiterated for the sake of brevity. From the perusal of the above, in our considered opinion, the reserve for unexpired risk does not fall under clause (b) of Explanation 1 to section 115JB(2) of the Act as the premium is recognized as income over the contract period or the period of risk, whichever is appropriate. Premium received in

advance which represents premium income not relating to the particular accounting period in which the said premium has been received, is separately disclosed in the financial statements. Hence logically that part of income which is attributable to the succeeding accounting period is reduced from the total premiums received during an accounting period by way of creation of a reserve for unexpired risk which is in accordance with the Insurance Act, 1938. In this regard, the ld. AR also submitted that every year adjustments are made to the existing reserve for unexpired risk by way of crediting or debiting the amount of difference between the reserve created in the immediately preceding year and the reserve required to be credited during the current accounting year. Accordingly, we hold that it cannot be considered as any "amount carried to any reserve" debited to the Profit & Loss Account, but it represents that part of premium income which does not relate to the current accounting period. Hence, in our considered opinion, the creation of a reserve for unexpired risk cannot be considered to be similar to those "reserves" which have been referred to in clause (b) of Explanation (1) to section 115JB(2) of the Act. The amount of provision for unexpired risk has been reduced from the net premium received and there is no debit to the profit and loss account at any point of time. It is elementary that the provisions of section 115JB of the Act require an amount referred to in clause (a) to (k) to be debited to the profit and loss account. Since, there is no debit to the profit and loss account, there is no need to make an addition to the provision for unexpired risk and premium deficiency.

8. Further, the ld. AR also drew our attention to the Companies Act, 1956 and also relied on certain decisions of Hon'ble Supreme Court to cull out the meanings of "provision" and "reserve" as understood by the courts. We do not deem it fit to get into the same as we would like to address the entire issue in dispute on first principle itself as above.

9. We find that the assessee has prepared the financial statements as per the principles and guidelines prescribed by IRDAI. The expenditure claimed by the reinsurer are calculated and certified by the actuary and the computation of expenditure like reserve for unexpired risk and premium deficiency reserve is

certified by the actuary and filed with IRDAI. Further, the statutory auditor in IRDAI-GI-TR has stated that liabilities of the assessee have been determined in the manner prescribed in IRDAI Regulations, 2016 and the amount of liabilities are fair and reasonable. Further, the statutory auditor has also certified that the outstanding claims reserves are estimated using statistical methods determined by the actuaries. Based on the above, it is submitted that the regulatory requirement for creation of a reserve for unexpired risk is created using statistical methods under the IRDAI guidelines and certified by the statutory auditor and actuary and, therefore, it is an ascertained liability and it cannot be construed as an adhoc or contingent liability. Hence the same would not fall under clause (c) of Explanation 1 to section 115JB(2) of the Act also under the category of unascertained liability. We find that the Hon'ble Supreme Court in the case of Bharat Earth Movers reported in 245 ITR 428 (SC) has held that the provision for leave encashment based on actuarial valuation is allowed although the liability may have to be quantified and discharged at a future date. The fact that it is capable of being estimated with reasonable certainty although actual quantification may not be possible and such liability cannot be a contingent one. This decision would be squarely applicable for the reserve for unexpired risk and premium deficiency made by the assessee in the instant case as they are not only estimated but are also derived based on statistical method and the same has been duly certified by the actuary and the auditors of the assessee. Hence we hold that the same should be excluded for the purpose of computing book profit.

10. Our aforesaid view is also fortified by the decision of Co-ordinate Bench of Kolkata Tribunal in the case of DC1T v. National Insurance Co.Ltd reported in 72 taxmann.com 116, wherein it was held that a reserve created for unexpired risk in case of general insurance business cannot be added back for the purpose of computation of book profits u/s 115JB of the Act as it does not fall in the category of reserves specified in clause (b) of Explanation 1 to section 115JB(2) of the Act. The relevant facts and the adjudication thereon by the Kolkata Tribunal are reproduced hereunder for the sake of convenience:-

11. Addition towards Reserve created for Unexpired risk u/s 115JB of the Act

The brief facts of this issue is that while computing the Book Profit u/s. 115JB of the Act for the purpose of MAT, the ld AO considered a sum of Rs.169,45,00,000/- being the Reserve for Unexpired Risk created as per the requirement of law, as allegedly required to be added back. The ld AO added back the aforesaid sum of Rs.169,45,00,000/- in computing the Book profit. The assessee submitted that as per the Insurance Act, 1938, in case of an Insurance Company carrying on General Insurance business, Premium is recognised as income over the contract period or the period of risk, whichever is appropriate. Premium received in advance which represents Premium Income not relating to that particular accounting period in which the said Premium has been received, is separately disclosed in the Financial Statements of an Insurance Company. That part of income which is attributable to the succeeding accounting period or periods is reduced from the total Premiums received during an accounting period by way of creation of a Reserve for Unexpired Risk in accordance with Section 64V(l)(ii)(b) of the Insurance Act, 1938. The aforesaid Reserve is to be created for a minimum amount as prescribed under the above mentioned section. Appreciating the special nature of the Insurance Business, the Lawmakers prescribed special procedure for Computation of Total Income of an Insurance Company carrying on Business of Insurance other than Life Insurance which are to be found in Rule 5 of the First Schedule to the Income-tax Act, 1961, read with Rule 6E, of the Income-tax Rules, 1962. This particular procedure has to be mandatorily complied with in making the assessment for Income-tax purposes.

Every year adjustments are made to the existing Reserve for Unexpired Risk by way of crediting or debiting by the amount of difference between the Reserve created in the immediate preceding year and the Reserve required to be credited during the current accounting year. This cannot be considered as any alleged "Amount carried to any Reserve" debited to the Profit & Loss Account, but it should be appreciated that this Reserve represents that part of Premium Income which does not relate to the current accounting period. It must be appreciated that as per the

Mercantile System of accounting, it is only that Income/Expenditure which relate to the current accounting period, should find places in 'the Revenue/Profit & Loss Account of the year. Hence it was submitted that in case of an Insurance Company (carrying on General Insurance Business), the creation of "Reserve for Unexpired Risk" cannot be considered to be similar to those "Reserves" which have been referred to in Clause (b) of Explanation (1) to Section 115JB(2). It may also be appreciated that the "Reserve for Unexpired Risk" can, in any case, not be considered as any provision made for meeting liabilities, other than ascertained liabilities as referred to in Clause(c) of Explanation (1) to Section 115JB(2).

On the basis of the above facts it may kindly be appreciated that there has not been any requirement to add back any sum in relation to the "Reserve for Unexpired Risk" while computing "Book Profit" u/s.115JB(2) for the Assessment Year 2008-09. Accordingly, the assessee submitted that the "Reserve for Unexpired Risks" not being of the nature as specified in clause (b) of Explanation 1 to section 115JB(2), the action of the ld AO in making an addition of such Reserve should be held as unjustified. Hence, the assessee submitted that the ld AO may kindly be directed to delete the addition of Rs.169,45,00,000/-made by him in computing the Book profit u/s 115JB of the Act.

***11.1** The ld CITA observed that the provisions contained in Rule 6E of the Income-tax Rules, 1962 has also been considered. Section 115JB(2)- Explanation (1)(b) requires increasing "the amounts carried to any reserve, by whatever name called, other than a reserve specified u/s 33AC" if such amount is debited to the Profit & Loss Account. It is held that the Reserve for Unexpired Risk has not been debited in the Profit & Loss account at any point of time, therefore Explanation 1 to sub-section 2 of section115JB is not applicable in the peculiar facts of the general insurance business carried out by the assessee. In the assessee's case, firstly the concerned reserve for Unexpired Risk has not been created through any debit entry made in the Profit & Loss Account. The reserve has been created in accordance with the relevant provisions of the Insurance Act, 1938, by way of debiting the premium received for adjusting the amount of premium that may be related to future year or years. It is noted that Rule 5 of the First Schedule of the Income-tax Act, 1961, which specifies the procedure to be followed for computing the business income of a*

General Insurance business, specifically allows deduction for reserve carried over for Unexpired Risk and Rule 6E of the Income-tax Rules, 1962 provides that such deduction will be allowed to the maximum extent of 50% of the net premium received during the relevant year. Hence, this creation of reserve out of the premium received during the year, is a statutory requirement and the same is duly recognised by the Income-tax Act/Rules. As already mentioned hereinabove, this particular reserve does not fall in the category of those reserves which have been specified in Explanation 1 (b) to section 115JB(2). Therefore, this reserve viz., the reserve for Unexpired Risk in the case of a General Insurance business, should not be added back for the purpose of computation of Book Profit u/s. 115JB(2) for MAT purposes. On the basis of this observation, it was held that the ld AO's action in adding back a sum of Rs.169,45,00,000/- being reserve created for Unexpired Risk, was not in accordance with the relevant provisions of the Income-tax Act, 1961 and accordingly deleted the addition.

11.2 *Aggrieved, the revenue is in appeal before us on the following ground:—*

"4. The CIT(A) erred on the facts of the case and in law in holding the sum of Rs.1694500000 being the reserve created for unexpired risk should be considered as reserve for computing the Book Profit under section 115JB of the Income-tax Act."

11.3 *The ld DR vehemently relied on the order of the ld AO. In response to this, the ld AR vehemently relied on the order of the ld CITA.*

11.4 *We have heard the rival submissions. We find that the ld CITA had dealt this issue very elaborately and had given proper finding that the reserve created for unexpired risk need not be added back for the purpose of computation of book profits u/s 115JB of the Act. The revenue was not able to controvert the findings of the ld CITA before us. Hence we find no infirmity in the order passed by the ld CITA in this regard. Accordingly, the Ground No. 4 raised by the revenue for Asst Year 2008-09 is dismissed.*

10.1. We further find that this decision of Kolkata Tribunal has been subsequently affirmed by the Hon'ble Calcutta High Court in ITA No. 76 of 2019.

11. Before we conclude the issue, we would also like to address the issue in dispute that Rule 5 of the First Schedule of the Act specifies the computation mechanism of profits/gains arising from general insurance business and specifically allows deduction for reserve for unexpired risk while computing taxable income for the year under consideration. Rule 6E of the Income-tax Rules, 1962 prescribes certain percentage of the net premium for creating reserve for unexpired risks which is allowed as a deduction. Accordingly, in view of the special nature of insurance business, the Act prescribes special procedure for computation of total Income of an Insurance Company. The creation of a reserve for unexpired risk out of the premium received during the year, is a statutory requirement and the same is duly recognised by the provisions of the Act. Accordingly, it can be inferred that the intent of the law has been to allow the said reserve for unexpired risk created by the insurance companies to the extent of specified limits which is derived as a percentage of net premium. Therefore, in our considered opinion, making an addition of reserve for unexpired risk u/s 115JB of the Act would defeat the purpose of the Act which allows deduction of the said reserve to the extent of prescribed limits. Further, the provisions of section 115JB of the Act do not specifically provide for any adjustment in connection with the reserve for unexpired risk and no adjustment is permitted to such profits other than those listed in Explanation 1 to section 115JB of the Act. Reliance in this regard is rightly placed on the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd reported in 255 ITR 273 (SC).

12. We further find that the premium deficiency of Rs 773000 has been allowed by the ld. AO under the normal provisions of the Act but the same has been added back while computing book profits

u/s 115JB of the Act. As stated supra, this is not an item contemplated to be added in the Explanation 1 to section 115JB(2) of the Act. Hence the revenue grossly erred in adding back the same while computing book profits u/s 115JB of the Act.

13. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we direct the ld. AO to delete the addition made in respect of reserve for unexpired risk and premium deficiency while computing the book profits u/s 115JB of the Act. Accordingly, the grounds raised by the assessee are allowed."

65. In this view of the matter and consistent with the view taken by the co-ordinate Bench, we direct the Assessing Officer to delete additions made towards UPR to book profit u/s.115JB of the Income Tax Act, 1961, for both the assessment years.

66. The next issue that came up for consideration from appeal of the Revenue for the assessment year 2013-14 is addition of IBNR & IBNER to book profit u/s.115JB of the Income Tax Act, 1961. We find that provisions of section 115JB of the Income Tax Act, 1961, has no application to insurance companies upto assessment year 2013-14 and thus, no addition can be made to book profit computed u/s.115JB of the

Act, including addition towards IBNR & IBNER upto assessment year 2013-14 and thus, we direct the Assessing Officer to delete additions made towards IBNR & IBNER to book profit u/s.115JB of the Act for the assessment year 2013-14.

67. The next issue that came up for our consideration from appeal of the assessee for the assessment year 2010-11 is validity of reopening of assessment. At the time of hearing, learned counsel for the assessee submitted that the assessee does not want to press grounds taken for challenging validity of reopening of assessment and thus, ground taken by the assessee challenging validity of reopening of assessment is dismissed as not pressed for the assessment year 2010-11.

68. The next issue that came up for our consideration from appeal of the assessee for the assessment year 2014-15 is ground on jurisdiction and principles of natural justice. The learned A.R for the assessee submitted that the assessee does not want to press these grounds and thus, these grounds raised by the assessee for the assessment year 2014-15 are dismissed as not pressed.

69. The next issue that came up for our consideration from appeal of the assessee for the assessment years 2013-14 and 2014-15 is deduction for cess u/s.37(1) of the Income Tax Act, 1961. The learned counsel for the assessee submitted that the assessee does not want to press additional ground taken by the assessee on the issue of allowance of cess and thus, we dismiss grounds taken by the assessee for the assessment years 2013-14 and 2014-15 as withdrawn.

70. To sum up, appeals filed by the assessee and the Revenue are disposed off in terms of the above order.

Appeals filed by the assessee:-

ITA No.	Assessment year	Result
2146/Chny/2008	2005-06	is allowed.
1620 /Chny/2011 1621/Chny/2011 1350/Chny/2013 2276/Chny/2014 782/Chny/2018 784/Chny/2018 711/Chny/2020	2006-07 2007-08 2008-09 2009-10 2013-14 2010-11 2014-15	are partly allowed for statistical purposes.
783/Chny/2018	2010-11	Partly allowed.

Appeals filed by the Department :-

ITA No.	Assessment year	Result
40/Chny/2009 & 949/Chny/2018	2005-06 2010-11	are dismissed.
1759 /Chny/2011 1676/Chny/2011 1366/Chny/2013 950/Chny/2018 951/Chny/2018	2006-07 2007-08 2008-09 2010-11 2013-14	are partly allowed for statistical purposes.

Order pronounced in the open court on 26th August, 2022

Sd/-
(वी.दुर्गा राव)
(V.Durga Rao)
न्यायिक सदस्य /Judicial Member

Sd/-
(जी. मंजुनाथ)
(G.Manjunatha)
लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 26th August, 2022
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant 2. Respondent 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.as