आयकर अपीलीय अधिकरण, **'डी' न्यायपीठ, चेन्नई।**
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री वी. दुर्गा राव**, माननीय न्यायिक सदस्य** एवं
श्री **मंजूनाथा .जी, माननीय** लेखा सदस्य **के समक्ष**

BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND SHRI MANJUNATHA. G, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.1668 to 1670/Chny/2011 & ITA No.1367/Chny/2013**
निर्धारण वर्ष **/Assessment Year: 2006-07 to 2008-09 & 2009-10**

The Dy. Commissioner-of Income Tax, Large Taxpayer Unit, Chennai.	**v.**	M/s.Royal Sundaram – Alliance Insurance Co. Ltd., 21, Patullos Road, Chennai-600 002. [**PAN: AABCR 7106 G**]
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
Department by	:	Mr.M.Swaminathan, Sr.St. Counsel
Assessee by	:	Mr.Sandeep Bagmar, Adv.
सुनवाई की तारीख/Date of Hearing	:	19.06.2023
घोषणा की तारीख /Date of Pronouncement	:	28.06.2023

आदेश **/ O R D E R**

PER MANJUNATHA.G, AM:

This bunch of four appeals filed by the assessee are directed against separate, but identical orders of the Commissioner of Income Tax (Appeals), LTU, Chennai, dated 29.07.2011 & 26.03.2013, and pertains to assessment years 2006-07 to 2008-09 & 2009-10 respectively. Since, the facts are identical and issues are common, for the sake of convenience, these appeals are being heard together and disposed off, by this consolidated order.

2. The Revenue has, more or less, raised common grounds of appeal for all the four assessment years. Therefore, for the sake of brevity, grounds of appeal filed for the AY 2006-07 in ITA No.1668/Chny/2011, are re-produced as under:

1. The order of the learned CIT(A) is contrary to law and facts and circumstances of the case.

2.1 The Ld.CIT(A) erred in directing the assessing officer to restrict the disallowance u/s.40(a)(i) in respect of re-insurance premium ceded to non-resident re-insurer, to 15% of such payments.

2.2 The Ld. CIT(A) erred in arbitrarily estimating the profit element in the sums received by the non-resident re-insurer at 15% and therefore directing the A.O to restrict the disallowance u/s. sec40(a)(i) to 15%.

2.3 The Ld.CIT(A) failed to appreciate that such arbitrary estimation of profit element, is a clear violation of the principles laid down by Hon'ble Supreme Court in the case of G.E India Technology Centre Pvt. Ltd., (327 !TR 456).

2.4 The Ld. CIT(A) ought to have appreciated that in the above cited case, the Supreme Court has clearly laid down that in cases where the payment made is a composite payment in which certain proportion of payment has an element of 'incomer chargeable to tax in India and if the assessee is not sure as to what is the taxable portion of the sum paid, he is required to make an application to the ITO (TDS) for determining the amount.

2.5 The CIT(A) ought to have appreciated that the issue involved in the case of the G.E India Technology Centre Pvt. Ltd is not re-insurance premium but related to royalty component in the software purchased and does not squarely apply to the facts oi the assessee's case.

3.1. The CIT(A) erred in deleting the profit on sale of investments from the total income.

3.2. The CIT(A) ought to have appreciated that as per Rule 5 of the first schedule, the assessee has to offer to tax the profits as disclosed in the Annual Accounts prepared in accordance with the Insurance Act and subject to adjustments only in accordance with Rule-5(a) and 5(c).

3.3. The CIT(A) ought to have appreciated Rule c (b) had been omitted by the Finance Act 1988, and therefore as per the Law applicable for the relevant assessment year. There were no provisions for any adjustments with regard to profit on sale- of investments.

3.4. The CIT(A) failed to appreciate the earlier decision of the ITAT for the A.Yrs.2002-03 to 2004-05 relied on by the CIT(A) has not been accepted by the Department and an appeal to the High Court has been preferred.

4.1. Without prejudice to the grounds raised in 3.1 to 3.4, in ease the issue of taxability of profit on sale of investment is decided against the revenue, the Assessing Officer's stand regarding the disallowance u/s.14A should be upheld.

4.2. CIT(A), failed to appreciate that the expenditure relating to exempt income is basically not allowable as per the provisions of section 37 of the Act and ought to have quantified disallowance as per the provisions of the section 14A.

5.1. The CIT(A) erred in deleting the disallowance of provisions towards solatium Fund in the computation of income under normal provisions.

5.2. The CIT(A) ought to have appreciated that the said provision is an unascertained liability, made on estimated basis, in a routine manner at 0.1% of the gross premium from Motor Vehicle Insurance and therefore liable to be disallowed in the computation of income under normal provisions.

6.1. The CIT(A) erred in deleting the disallowance u/s,40(a)(i) made in respect of reimbursement of expenditure to Mr.RW Ciarke, Royal & Sons Alliance amounting to Rs.3,22,2757- and payment of survey fees to M/s. Royal & Sons Alliance PLC Rs.18,49,458/- .

6.2. The CIT(A) failed to appreciate that as per Board's circular No.715 of 1995 reimbursement of expenditure should also be considered for the purpose of TDS and in the instant case since the reimbursement has been made to persons to whom technical fees has been paid and ought to Have upheld the disallowance.

6.3. The CIT(A) failed to appreciate that the survey fees has been paid for survey activities of various surveyors which amounts to payment towards technical and managerial support to the assassee for the purpose of its business, which would clearly fall under Explanation 2 section 9(1)(vii)

6.4. The CIT(A) ought to have followed the decision of Authority on Advance Rulings in the case of Steffen, Robertson and Kirsten Consulting Engineers and Scientists Vs. C!T. 230 ITR 206 where it was held that an expenditure shall be considered for TDS u/s.195 if the benefits arrived out of the above expenditure is utilized in India.

7.1. The CIT(A) erred in deleting the disallowance u/s.40(a)(ia) in respect of commission payments for the receipt of reinsurance premium.

7.2. The CIT(A) failed to appreciate that the Assessing Officer has treated the impugned payment as commission u/s.194H, thereby invoking the provisions of section 40(a)(ia), for failure to deduct tax at source, whereas, the decision of the ITAT Mumbai in the case of General Insurance Corporation of India (2009 TIOL 191 ITAT Mumbai) was in connection with section 194D.

7.3. The CIT(A) ought to have appreciated that the Board's circular No.786 dated 7.2.2000 was in connection with the deduction of tax u/s.195 and the taxability of export commission payable to nonresident agents rendering services abroad, and has no application to the facts of the present case.

8.1. The CIT(A) erred in deleting the disallowance of provisions towards solatium Fund in the computation of book profits u/s.115JB.

8.2. The CIT(A) ought to have appreciated that the said provision has been made on an estimated basis, in a routine manner at 0.1% of the gross premium from Motor Vehicle Insurance and being an unascertained liability, liable to be disallowed in the computation of u/s.115JB as per Explanation (c) to sub section 2 of 115JB.

9.1 The Ld. CIT(A) erred in directing the assessing officer to add back to book profit, so much of the unexpired risk reserve, on a pro-rata apportionment on the basis of the number of days of the risk period remaining in the subsequent year.

9.2 The CIT(A) failed to appreciate that as per explanation 1(b) of sec. 115JB, the amount carried to any reserve, by whatever name called, otherwise than a reserve specified u/s. 35AC, shall be added back to book profits and ought to have held that the entire amount of reserve for unexpired risk should be added back while computing book profits u/s 115JB.

9.3 The CIT(A) failed to appreciate that the provisions of section 115JB does not allow any pro-rata apportionment and ought to have held that the reserve for un-expired risk created has to be added entirely while computing the book profit.

9.4 The CIT(A) erred in holding that the reserve for unexpired risk represents premium received in advance.

9.5 Assuming but not admitting that the reserve for unexpired risk is only a premium received in advance, such a pre-receipt would still be liable to be added in the computation of book profit because it can, at best, be treated as a liability which is neither quantified nor ascertained.

10. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored.

3. The brief facts of the case are that appeals filed by the Department against the order of Ld.CIT(A) dated 29.07.2011 & 26.03.2013 were earlier disposed off by the Tribunal vide order dated 26.08.2018. The Order of the Tribunal dated 26.08.2018 was challenged by the assessee before the Hon'ble Madras High Court on the following issues:

i) Disallowance of reinsurance premium paid to Non-resident reinsurers.
ii) Addition of profit on sale of investment.
iii) Disallowance u/s.14A.

The Hon'ble Madras High Court allowed the appeals filed by the assessee vide order dated 18.11.2021 in TCA Nos.839, 842, 848, 852, 853 & 854 of 2018, and remanded the issue of disallowance of reinsurance premium paid to non-resident reinsurers to the file of the Tribunal to decide the issue in line with the decision made by the Hon'ble Madras High Court in the case of Cholamandalam MS General Insurance Co. Ltd. v. CIT

reported in [2019] 411 ITR 386 (Madras). The Hon'ble Madras High Court had also remanded the issue of addition of profit on sale of investment to the file of the Tribunal to re-adjudicate the issue after examining the decision of the Hon'ble High Court in the case of United India Insurance Co. Therefore, present appeals filed by the Revenue are listed for hearing to decide the issue of re-insurance premium paid to non-resident reinsurers, and addition of profit on sale of investment.

4. The first issue that came up for our consideration from Grounds of appeal filed by the Revenue is disallowance of reinsurance premium paid to non-resident reinsurers u/s.40(i)(a) of the Act, for non-deduction of TDS u/s.195 of the Act. The Ld.Counsel for the assessee & the Ld.DR present for the Revenue, fairly agreed that this issue is covered in favour of the assessee by the decision of ITAT Chennai Bench in the assessee's own case for AYs 2005-06 to 2010-11 in ITA Nos.1356/Chny/2013, 1626/Chny/2011 & 2310/Chny/2014 and ITA Nos.1628, 1629 & 1630/Chny/2011 and ITA No.1666/Chny/2011 order dated 26.08.2022, where an identical issue had been decided in favour of the assessee and held that reinsurance premium ceded to non-resident is not taxable in India under the Income Tax Act, 1961 or under DTAA between India and respective countries, where NRRs are residents, and thus, on impugned payment, the assessee is not liable to deduct TDS u/s.195 of the Act, and thus, payments to NRRS cannot be disallowed u/s.40(i)(a) of the Act.

4.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal in the assessee's own case for earlier assessment years in ITA Nos.1356/Chny/2013, 1626/Chny/2011 & 2310/Chny/2014 and ITA Nos.1628, 1629 & 1630/Chny/2011 and ITA No.1666/Chny/2011 order dated 26.08.2022, where the Tribunal by considering relevant facts and also by following certain judicial precedents held that reinsurance premium paid to non-resident reinsurers is not taxable in India under the Income Tax Act, 1961 or under DTAA between India and respective countries, where the NRRs are tax residents, and thus, payment to NRRs without deduction of TDS cannot be disallowed u/s.40(a)(i) of the Act. The relevant findings of the Tribunal are as under:

> *8. 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 IRDAi 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.

9. 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 insurance brokers by the non-resident insurer companies in India. 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.

10. 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 judgment 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.

11. 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.

12. 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.

13. 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 favorable 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.

14. 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. 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.

15. 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:-

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 PE of its holding company

(b) Conditions specified in cl (a) to (c) of Explanation 2 to section 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.

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

Summnary :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.

(i) 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 hereinbelow:- —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.

(ii) 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 IndiaSwitzerland 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. 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.‖ (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."

16. 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 judgment 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 judgment 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.

17. 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.

4.2 In this view of the matter and consistent with view taken by the co-ordinate Bench of the Tribunal in the assessee's own case in ITA Nos.1356/Chny/2013, 1626/Chny/2011 & 2310/Chny/2014 and ITA Nos.1628, 1629 & 1630/Chny/2011 and ITA No.1666/Chny/2011 order dated 26.08.2022, we are of the considered view that reinsurance premium paid to NRRs cannot be disallowed u/s.40(a)(i) of the Act, for failure to deduct TDS u/s.195 of the Act, because, reinsurance ceded to non-resident reinsurers is not taxable in India under Income Tax Act, 1961 or under DTAA between India, and respective countries. The Ld.CIT(A) after considering relevant facts has rightly deleted the additions made by the

AO, and thus, we are inclined to upheld the findings of the Ld.CIT(A), and reject the ground taken by the Revenue for all assessment years.

5. The next issue that came up for our consideration from Grounds of appeal of the Revenue for four assessment years is addition of profit on sale of investment. The Ld.Counsel for the assessee & the Ld.DR present for Revenue fairly agreed that this issue also covered in favour of the assessee by the decision of the Hon'ble Madras High Court in the case of CIT v. United India Insurance Co. reported in [2019] 111 taxman.com 217 (Madras), and further, from the decision of ITAT Chennai Benches in the case of Cholamandalam MS General Insurance Co. v. DCIT reported in [2022] 142 taxman.com 3 (Chennai Tribunal), where it has been held that income from profit on sale of investment by insurance companies is not taxable after deletion of sub-rule (b) of Rule 5 of first schedule to Income Tax Rules, 1962.

5.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal in the case of Cholamandalam MS General Insurance Co. v. DCIT (supra) where the Tribunal by considering relevant facts and also by following the decision of the Hon'ble Madras High Court in the case of CIT v. United India Insurance Co. (supra), held that profit on sale of investment is not taxable in the

hands of insurance company. The relevant findings of the Tribunal are as under:

> *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.*

5.2 In this view of the mater and by respectfully following the decision of the Hon'ble High Court in the case of CIT v. United India Insurance Co. (supra), we are of the considered view that profit on sale of investment by insurance company is not taxable in India and thus, we direct the AO to delete the addition towards profit on sale of investment.

6. In the result, appeals filed by the Revenue for all assessment years are dismissed.

Order pronounced on the 28th day of June, 2023, in Chennai.

Sd/-	***Sd/-***
(वी. दुर्गा राव)	(मंजूनाथा.जी)
(V. DURGA RAO)	**(MANJUNATHA.G)**
न्यायिक सदस्य/**JUDICIAL MEMBER**	लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 28th June, 2023.
TLN

आदेश की प्रतिलिपि □ ग्रेषित**/Copy to:**

1. □ पीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF