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आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य **एवं** श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./I.T.A. No. 7390/Mum/2012
(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Birla Sunlife Insurance Company Limited. 16th Floor, Tower 1, One India Bulls Centre, 841, Senapati Bapat Marg, Elphinstone Road, Mumbai-400 013	**बनाम**/ Vs.	Jt. CIT(OSD)-8(1), Room No. 210, 2nd Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABCB 4623 J		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Yogesh Thar
प्रत्यर्थी की ओर से/**Respondent by**	:	Mrs. Parminder

सुनवाई की तारीख / **Date of Hearing**	:	19.02.2015
घोषणा की तारीख / **Date of Pronouncement**	:	14.05.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-16, Mumbai ('CIT(A)' for short) dated 10.10.2012, confirming the rejection of the assessee's application u/s. 154 of the Income Tax Act, 1961 ('the Act' hereinafter) by the Assessing Officer (A.O.) vide his order there-under dated 05.12.2011. The assessment year (A.Y.) under reference is 2009-10.

2. The facts of the case are that the assessee, a company in the business of providing life insurance and allied services, filed its return of income for the relevant year on

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25.08.2009, disclosing a loss of Rs.59,656.76 lacs. In arriving at the said figure, loss from pension business (at Rs.14,162.68 lacs) was deducted, and only that from another segment of the insurance business, i.e., linked and non-linked business, taken into account. This was in view of the income - which would include loss as well, of the pension business being exempt u/s. 10(23AAB) of the Act (refer PB pg. 6). During the assessment proceedings, it was explained vide its letter dated 27.06.2011 by the assessee that the computation of profits and gains of the insurance business is covered by section 44 of the Act. However, as the income from the pension business falls under Chapter III (i.e., the Chapter, incomes specified where-under do not form part of the total income), the same has been excluded in computing its business income under Chapter IV of the Act. Income was assessed at the returned income vide order u/s. 143(3) dated 20.07.2011. Subsequently, the assessee moved an application u/s.154 dated 24.10.2011 (copy on record at PB pgs. 1-5) on 31.10.2011, claiming of a mistake in reducing the loss of its pension business in-as-much as the same was also a part of its insurance business and, thus, liable to be taken into account in computing income from the same u/s. 44 of the Act r/w First Schedule thereto, citing the recent decision (dated 02.08.2011) by the Hon'ble jurisdictional High Court in *CIT vs. Life Insurance Corporation of India Ltd.* (since reported at [2011] 338 ITR 212 (Bom)) in support. The hon'ble high court had clarified that the loss incurred from pension fund, like Jeevan Suraksha Fund maintained by LIC of India, had to be excluded while determining the actuarial valuation from the insurance business u/s.44 of the Act r/w First Schedule thereto. Several decisions, including by the apex court in the case of *Asst. CIT vs. Saurashtra Kutch Stock Exchange Ltd.* [2008] 305 ITR 227 (SC), were cited toward the proposition that a subsequent decision by the apex court or the jurisdictional high court would be a valid basis for inferring a mistake apparent from record. This was as the law was always the same and the later decision does not make a new law, but only discovers the correct principle of law, so that it would apply retrospectively. The same, however, did not find favour with the Assessing Officer (A.O.), in whose view there was no inadvertent mistake, as contended in its application u/s. 154; the assessee having, as borne out from the record,

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taken a considered view in excluding Chapter III income, which by definition does not form part of the total income. There was, accordingly, no question of a mistake apparent from record, which must be a obvious and patent mistake. Its application being rejected thus, the assessee carried the matter in appeal, to no avail. The matter had attained finality, with the assessee having accepted the assessed income. No doubt a subsequent decision by the apex court (or the jurisdictional high court) could give rise to a mistake apparent from record where an order is inconsistent therewith. However, the same would apply only where the issue stands agitated and is, accordingly, alive, while in the present case the assessment had attained finality. The ld. CIT(A), confirming the order u/s.154 thus, aggrieved, the assessee is in second appeal.

3. We have heard the parties, and perused the material on record.

3.1 The proposition that a subsequent decision by the jurisdictional high court renders an order by the subordinate court under its jurisdiction mistaken, liable for rectification, is well accepted; the assessee having cited decisions, viz. *CIT v Aruna Luthra* [2001] 252 ITR 76 (P&H); *Kil Kotagiri Tea & Coffee Estates Co. Ltd. vs. Income-tax Appellate Tribunal* [1988] 174 ITR 579 (Ker); and *Walchand Nagar Industries Ltd. vs. V.S. Gaitonde* [1962] 44 ITR 260 (Bom) toward the same. Though there have been contrary decisions in the matter, as in the case of *Jiyajeerao Cotton Mills Ltd. v. ITO* [1981] 130 ITR 710 (Cal), the issue can only be considered as settled in view of the decision by the apex court in *Saurashtra Kutch Stock Exchange Ltd.* (supra).

3.2 Next, we may consider the decision by the hon'ble jurisdictional high court in the case of *LIC of India Ltd.* (supra), on which the assessee's case is based. The relevant questions of law ((c) & (d)) as raised before and admitted by the hon'ble court were as under:

> '(*c*) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the addition made by the Assessing Officer on account of loss from Jeevan Suraksha Fund ignoring the settled position of law that income includes loss and that the income from Jeevan Suraksha Fund does not form part of the total income of the

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Assessee Corporation under section 10(23AAB) of the Income-tax Act, 1961 ?

(*d*) Whether on the facts and in the circumstances of the case the Tribunal was justified in ignoring the fact that the *non obstante* clause in section 44 is not extended to section 10(*23AAB*) of the Income-tax Act, 1961 ?'

The same were answered by the hon'bl court thus,:-

'15. As regard questions (*c*) and (*d*) are concerned, the dispute is whether the loss incurred by the assessee from Jeevan Suraksha Fund is liable to be excluded in computing the actuarial valuation surplus in view of the fact that the income from Jeevan Suraksha Fund is exempt under section 10(*23AAB*) of the Income-tax Act, 1961.

16. The argument of the revenue is that with the insertion of section 10(*23AAB*) by Finance (No. 2) Act, 1996 with effect from 1-4-1997, the profits as well as loss arising from Jeevan Suraksha Fund would not be includible in the total income of the assessee and, therefore, while determining the distributable profits of the assessee, the loss from Jeevan Suraksha Fund ought not to be allowed to be adjusted against the taxable income.

17. It is not in dispute that the Jeevan Suraksha Fund is a pension fund approved by the Controller of Insurance appointed by the Central Government to perform the duties of the Controller of Insurance under the Insurance Act, 1938. The loss incurred in the Jeevan Suraksha Fund has been considered by the actuary as a business loss, as per the valuation report as on the last day of the financial year, allowable under section 44 read with the First Schedule to the Income-tax Act, 1961. The fact that the income from such fund has been exempted under section 10(*23AAB*) with effect from 1st April, 1997, does not mean that the pension fund ceases to be insurance business, so as to fall outside the purview of the insurance business covered under section 44 of the Income-tax Act, 1961. In other words, the pension fund like Jeevan Suraksha Fund would continue to be governed by the provisions of section 44 of the Income-tax Act, 1961 irrespective of the fact that the income from such fund are exempted, or not. Therefore, while determining the surplus from the insurance business, the actuary was justified in taking into consideration the loss incurred under Jeevan Suraksha Fund.

18. The object of inserting section 10(*23AAB*) as per the Board Circular No. 762, dated 18-2-1998 was to enable the assessee to offer attractive terms to the contributors. Thus, the object of inserting section

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> 10(*23AAB*) was not with a view to treat the pension fund like Jeevan Suraksha Fund outside the purview of insurance business but to promote insurance business by exempting the income from such fund. Therefore, in the facts of the present case, the decision of the Income-tax Appellate Tribunal in holding that even after insertion of section 10(*23AAB*), the loss incurred from the pension fund like Jeevan Suraksha Fund had to be excluded while determining the actuarial valuation surplus from the insurance business under section 44 of the Income-tax Act, 1961 cannot be faulted. Accordingly, questions (*c*) and (*d*) are answered in the affirmative, that is, in favour of the assessee and against the revenue.'

Clearly, therefore, as a reading of the admitted questions of law as well as the decision in their respect would show, the hon'ble court has decided the same issue as arising in the instant appeal.

3.3 True, these are rectification proceedings, so as to eliminate from its ambit admission of a debatable issue, and which is otherwise apparent, at least *prima facie*, in-as-much as the matter was admitted by the hon'ble jurisdictional high court as raising substantial questions of law. So, however, our purview in the present proceedings is only to see if the issue under reference is the same as arising before and answered by the hon'ble high court, so that, where so, an order (by a court under its jurisdiction) inconsistent therewith is liable to be deemed as mistaken. This would also meet the argument by the ld. CIT(A) to the assessment having attained finality; we having already found an identity of the issue under reference. The Revenue when confronted therewith was unable to controvert the same, i.e., the said proposition as well as the identity of the issue. As regards the other contention raised by the Revenue, i.e., of the assessee having taken a well considered stand in the matter, the same would again be of no consequence. True, both the assessee and the Revenue in the instant case were of the considered view that 'income' including 'loss', the loss of the pension fund had to be excluded in determining the business income under Chapter IV-D, i.e., in terms of section 44, of the Act. However, it is the correct legal position that is relevant and not the view that the parties may take of their rights in the matter (refer: *CIT v. C. Parakh & Co. (India) Ltd.* (1956) 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* (1971) 82 ITR 363 (SC)).

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The Revenue's case, as made before us, is without merit. In fact, the tribunal in the assessee's own case for the earlier years, being A.Ys. 2005-06 to 2007-08, has adopted the same view following the decision in *LIC of India Ltd.* (supra) (in ITA Nos. 8356 to 58/Mum/2010 dated 19.12.2013/copy on record).

3.4 We may, however, before parting, state our view in the matter, considering it obligatory on our part and, in fact, as being duty bound to do so. The proposition that 'income' includes 'loss' is trite law, explained at length by the apex court, among others, per its larger bench decisions in *CIT v. Harprasad & Co. P. Ltd.* [1975] 99 ITR 118 (SC) and *CIT v. Gold Coin Health Foods (P.) Ltd*. [2008] 304 ITR 308 (SC). The reason is simple. The concept of income under the Act corresponds with the common understanding and connotation of the said word and, therefore, implies net income, i.e., after deduction of all expenses and outgoings properly attributable to the receipt (of the business or profession, say). A loss may arise in the event of the expenditure incurred being in excess of income, as where the same may not yield income or which may not materialize to the extent expected, even as expenditure has to be incurred. There is, as such, no qualitative difference in such a case, and all that alters or is different is only the extent of net income, and which could as well be in the negative or at a loss. Chapter III of the Act enlists incomes which do not form part of the total income as defined u/s. 2(45) of the Act. The same, accordingly, do not enter the computation process for the total income, which is to be under the different heads of income enumerated under parts A to F of Chapter IV of the Act. Where, therefore, there arises an income, the nature and character of which is as specified under a particular provision/s of Chapter III, there is no obligation on the part of the assessee to compute it in accordance with under the relevant provisions of Chapter IV of the Act. That the said income may pertain to its principal or allied business or may even otherwise arise to it, is of no moment in-as-much as it does not enter the computation process (for the total income under the Act). Further, whether the business income is under law required to be computed u/s.44 of the Act (as for the insurance business) or any other, as sections 28 to 43B, as is ordinarily the case, is of

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little consequence. The surplus (or deficit) arrived at by actuarial valuation, which is even otherwise obligatory on the part of the insurance company in terms of its governing law, would bear the same character and, accordingly, stand to be excluded in determining the total income under the Act. We have also referred to Circular No. 762 dated 18.02.1998, which only conveys of the introducing section (sec. 10 (23AAB)) as being brought as an incentive measure for the insurance sector, and has little interpretative value (for the said section). In fact, the decision also does not either interpret the said provision or otherwise refers to the judicial precedents. It is, rather, difficult to say that the decision reflects its ratio as well in-as-much as the same (ratio) would have to be in generic terms, or for that matter, what the ratio of the decision is, which alone has a precedent value. The fore-going, we may clarify, is being stated, with respect, representing our view in the matter, only with the intent and purpose of the same being considered by the hon'ble high court in appropriate proceedings.

3.5 Be that as it may, we have already clarified of the issue being identical, the said decision would be binding on us and, further, being by the jurisdictional high court, would render even an earlier decision, insofar as it is inconsistent therewith, as mistaken (to that extent). The Revenue's case would, thus, warrant being dismissed, and we hold accordingly.

4. In the result, the assessee's appeal is allowed.
परिणामतः निर्धारिती की अपील स्वीकृत की जाती है ।

Order pronounced in the open court on May 14, 2015

Sd/-	Sd/-
(Amit Shukla)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 14.05.2015

व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

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उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai