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INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 541/Del/2018
(Assessment Year: 2014-15)

Max New York Life Insurance Company Ltd, Plot No. 90A, Sector-18, Udyog Vihar, Haryana	Vs.	DCIT, Circle-1, LTU, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Himanshu S. Sinha, Adv Shri Bhuwan Dhoopar, Adv
Revenue by:	Ms. Parmita M. Biswas, CIT DR
Date of Hearing	18/02/2020
Date of pronouncement	13/05/2020

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the ld CIT (A)-22, New Delhi dated 15.11.2017 for the Assessment Year 2014-15.

2. The assessee has raised the following grounds of appeal:-

"1. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the various additions made by the Ld. AO to the returned income of the Appellant whereby the income of the Appellant was assessed at Rs 9,53,09,92,000 to be taxed under Section 115B of the Act and Rs. 224,77,96,000 to be taxed under normal provisions of the Act as against the returned income of Rs. 4,74,19,55,000.*

2. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) / AO erred in holding that the total profit disclosed by the Appellant in the Shareholder's Profit and Loss Account (Form A-PL) amounting to Rs. 221,77,96,000 (which includes profit on sale of investments amounting to Rs. 31,07,15,000) was not the profit of the life insurance business of the Appellant and, consequently, erred in holding that the provisions of Section 44 of the Act read with the First Schedule thereto do not apply to the said profit.*

3. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) / AO erred in not appreciating the Appellant's contention that its income was to be computed taking into account the surplus of the*

actuarial valuation done in accordance with the Insurance Act, 1938 as represented in Form I ('Old Form I').

4. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the addition of Rs. 310,94,94,000 to the taxable income of the Appellant made by the Ld. AO by considering the amount appropriated as Funds for Future Appropriation ("FFA") as part of the actuarial surplus being liable to tax under Section 44 read with Rule 2 of the First Schedule of the Act.*
5. *That on thefacts and circumstances of the case and in law, the Ld. CIT(A)erred in upholding the addition of Rs. 389,73,39,000 to the taxable income of the Appellant made by the Ld. AO by treating the amount declared and allocated as bonus for policyholders as part of the actuarial surplus being liable to tax under Section 44 read with Rule 2 of the First Schedule of the Act.*
6. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding disallowance of Rs. 3,00,00,000 made by the Ld. AO on account of donation made by the Appellant.*
7. *That on the facts and circumstances of the case and in law, the CIT(A)/AO erred in not allowing exemption under Section 10(34) of the Act in respect of dividend income earned by the Appellant during the previous year relevant to subject AY.*
8. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) exceeded jurisdiction in directing the Ld. AO to re-compute the losses assessed in earlier assessment years as per section 44 of the Act and further erred in directing the Learned Assessing Officer to grant set off under section 72 of the Act only in respect of income covered under section 115B(ii) of the Act (income from shareholder's account) and that too against loss as re-computed in earlier years.*
9. *That on the facts and circumstances of the case and in law, the ld CIT(A) erred in not directing the ld AO too drop the penalty proceedings under section 271(1)(c) of the Act.*

3. During the course of hearing the assessee has also raised the additional grounds related to claim of deduction u/s 80G of the Act on account of donation expenditure incurred of Rs. 3 crores in the event that the said expenditure is not an allowable as expenditure u/s 37(1) of the Act and same may be allowed as a deduction u/s 80G of the Act.

4. The brief facts of the case shows that assessee is a joint venture between Max India Ltd and New York Life insurance International Holding Ltd. The assessee filed the return of income on 27.11.2014 declaring income of Rs. 4741955000/-. The assessment was made on 29.12.2016 determining the total income of Rs. 9536768000/-. The income of the assessee was taxed u/s 115B of the Act. The ld AO treated the income from share holders account as business income being income earned from non insurance

activities and taxed the same @30% in that assessment year, the AO made the following additions as under:-

S. No	Particulars	Amount (in Rs.)
1.	Bonus allocated to policyholders account was treated as^ part of taxable actuarial surplus u/s 44 read with Rule 2 of the First Schedule of the Act	389,73,39,000 -
2.	Amount set aside as Funds for Future Appropriations (FFA) was also treated as part of the taxable actuarial surplus u/s 44 r.w. Rule 2 of the First Schedule of the Act	310,94,94,000
3.	Provision for bad debts was disallowed	57,76.000
4.	Donation paid (taxed as business income at 30%) was disallowed	3,00,00,000
5.	Income from shareholder's account taxed at normal rates (i.e. @30%) (this amount also includes the adjustment made on account of profit on sale of investment amounting to Rs. 31.07.15.000/-) on the ground that profit on sale of investments in the shareholder's account don't form part of the life insurance business	221,77,96,000

5. The assessee challenged the assessment before the ld CIT (A) who passed an order dated 15.11.2017 deleted the disallowance of provision of doubtful debts and dismissed all other grounds. The assessee also raised the additional grounds before him with respect to allowability of exemption u/s 10(34) of the Act and it was also dismissed. Therefore, the assessee is in appeal.

6. The ground No. 1 of the appeal is general in nature, no arguments were advanced and therefore, it is dismissed.

7. Ground No. 2 of the appeal is with respect to not treating the profit disclosed in shareholder's account amounting to Rs. 2217796000/-. It included profit on sale of investment of Rs. 310715000/- as profit in the Life Insurance Business and it was held that provision of section 44 of the Act read with 1st Schedule do not apply to the said profit.

8. The ld AR submitted that this issue is squarely covered by the decision of the coordinate bench in assessee's own case vide order dated 05.01.2018. it was further stated that vide order dated 22.04.2019 in assessee's own case for Assessment Year 2006-07 also the issue has been decided in favour of the assessee. The ld AR also submitted that in several other years in case of the assessee the coordinate bench has decided the issue in favour of the

assessee. Therefore, he submitted that ground No. 2 of the appeal is squarely covered in favour of the assessee.

9. The ld DR reiterated the finding of the lower authorities.

10. We have carefully considered the rival contentions and find that the above issue has been decided in favour of the assessee in assessee's own case for earlier years. We find no reason to defer from the same. There is no change in the facts and circumstances of the case. The coordinate bench in assessee's own case for several years has held as under:-

> "**65.** Ground No.1 is general and therefore does not require any adjudication. Ground Nos. 2 and 3 deals with finding of the CIT(A) that the profit disclosed by the assessee in the shareholder's Profit and loss account (Form A-PL) is not the profit derived from Life Insurance business and therefore the provisions of section 44 read with Schedule First of the Income Tax Act are not applicable. Before deciding this issue, it is necessary to look into the relevant provisions of Income Tax Act which are reproduced as under:—
>
> *Section 44:*
>
> 'Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head "interest on Securities", "Income from House Property", "capital gains" or "Income from other sources", or in section 199 or in section 28 to 43B, profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or by a co-operative society, shall be computed in accordance with the rules contained in the First Schedule.'
>
> The First schedule to the Income tax Act contains three parts, viz., A,B & C. Part A which pertains to life insurance business is extracted here under for ready reference as is in existence during the impugned assessment year:
>
> *"The First Schedule*
>
> Insurance Business

A.- Life insurance business

Profits of life insurance business to be computed separately.

1. In the case of a person who carries on or at any time in the previous year carried on life insurance business, the profits and gains of such person from that business shall be computed separately from his profits and gains from any other business.

Computation of profits of life insurance business.

2. The profits and gains of life insurance business shall be taken to be the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 (4 of 1938), in respect of the last inter-valuation period ending before the commencement of the assessment year, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period].

Deductions.

3. . . . . .

Adjustment of tax paid by deduction at source.

4. Where for any year an assessment of the profits of life insurance business is made in accordance with the annual average of a surplus disclosed by a valuation for an inter-valuation period exceeding twelve months, then, in, computing the income-tax payable for that year, credit shall not be given in accordance with section 199 for the income -tax paid in the previous year, but credit shall be given for the annual average of the income-tax paid by deduction at source from interest on securities or otherwise during such period."

Section 115B of the Act provides the rate of tax leviable on profits and gains of life insurance business. The said section reads as under:—

"Section 115B - Tax on profits and gains of life insurance business.

(1) Where the total income of an assessee includes any profits and gains from life insurance business, the income-tax payable shall be the aggregate of —

(*i*) the amount of income-tax calculated on the amount of profits and gains of the life insurance business included in the total income, at the rate of twelve and one-half percent; and

(*ii*) the amount of income-tax with which the assessee would have been chargeable had the total income of the assessee been reduced by the amounts of profits and gains of the life insurance business.

(2) Notwithstanding anything contained in sub-section (1) or in any other law for the time being in force or any instrument having the force of law, the assessee shall, in addition to the payment of income-tax computed under sub-section (1), deposit, during [the previous years relevant to the assessment years commencing on the 1st day of April, 1989 and the 1st day of April, 1990], an amount equal to thirty-three and one-third per cent of the amount of income-tax computed under clause (i) of sub-section (1), in such social security fund (hereafter in this sub-section referred to as the security fund), as the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that where the assessee makes during the said previous [years] any deposit of an amount of not less than two and one-half per cent of the profits and gains o the life insurance business in the security fund, the amount of income-tax payable by the assessee under the said clause (i) shall be reduced by an amount equal to two and one-half per cent of such profits and gains and, accordingly, the deposit of thirty-three and one third per cent required to be made under this sub-section shall be calculated on the income-tax as so reduced."

66. Section 115B was inserted by the Finance Act, 1976 but with effect from 1 June, 1976. It is, therefore, applicable for assessment year 1977-78 and thereafter. At the time of insertion, the section contained only the provisions that were later

renumbered as sub-section (1). The scope and effect of the insertion was explained by the Board in a circular as under:

"Rate of tax on profits and gains of life insurance business - New section 115B. -

37.1 As explained in paragraph 40 of this circular, the Finance Act has substantially modified the basis for determining profits and gains of life insurance business. The rate of income-tax to be charged on the profits and gains of the life insurance business determined on the modified basis has been laid down in new section 115B of the Income-tax Act. Under the new provision, in case of a taxpayer having income from life insurance business, the income-tax payable on the profits and gains of the life insurance business will be calculated at the rate of 12½ per cent of such profits and gains and the remaining income, if any, will be charged to tax at the rates specified in the annual Finance Act.

37.2 This amendment has come into force with effect from the 1st June, 1976, and will apply in relation to the assessment year 1977-78 and subsequent years."

Rule 2 had been amended and Rule 3 stand omitted by the Finance Act, 1976 w.e.f. 1.4.1977. These Rules when in existence read as under:—

'Old Rule 2 read as follows:

"2. Computation of profits of life insurance business. —

(1) The profits and gains of life insurance business shall be taken to be the greater of the following:-

(*a*) the gross external incomings of the previous year from that business, less the management expenses of that year;

(*b*) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 (IV of 1938), in respect of the last inter-valuation period ending before the commencement of the assessment year, so as to exclude from it any surplus or deficit included

therein which was made in any earlier inter-valuation period and any expenditure or allowance which is not deductible under the provisions of section 30 to 43 in computing income chargeable under the head "Profits and gains of business or profession".

(2) The amount to be allowed as management expenses under sub-rule (1) shall not exceed the aggregate of the following:—

(*a*) $7_{1/2}$ per cent of the premiums received during the previous year in respect of single premium life insurance policies;

(*b*) in respect of the first year's premiums received in respect of other life insurance policies for which the number of annual premiums payable is less than twelve, or for which the number of years during which premiums are payable is less than twelve, for each such premium or each such year $7_{1/2}$ per cent of such first year's premiums received during the previous year;

(*c*) 90 per cent of the first year's premiums received during the previous year in respect of all other life insurance policies;

(*d*) in respect of all renewal premiums received during the previous year, an amount calculated at such percentage thereof as is permissible under sub-section (2) of section 40B of the Insurance Act, 1938 (IV of 1938), as reduced by any expenditure or allowance which is not deductible under sections 30 to 43 in computing income chargeable under the head "Profits and gains of business or profession".

(*ii*) *Rule 3 was in the following terms:*

(*a*) four-fifths of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction:

Provided that if any amount so reserved for policy-holders ceases to be so reserved, and is not paid to or expended on behalf of policy- holders, that proportion of such amount (one-half or four-fifths, as the case may be) if it has been previous allowed as a deduction under this Act or under the Indian Income-tax Act, 1922 (XI of 1922), shall be treated as part of the surplus for the period in which the said amount ceased to be so reserved;

(*b*) any amount either written off or reserved in the accounts or through the actuarial valuation balance sheet to meet depreciation of or loss on the

realisation of investments shall be allowed as a deduction, any sums taken credit for in the accounts or actuarial valuation balance sheet on account of appreciation of or gains on the realisation of investments shall be included in the surplus:

Provided that if upon investigation it appears to the Income-tax Officer after consultation with the Controller of Insurance that having due regard to the necessity for making reasonable provision for bonuses to participating policy-holders and for contingencies, the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of investments so as artificially to reduce the surplus, such adjustment shall be made to the allowance for depreciation or to the amount to be included in the surplus in respect of appreciation of such investments as shall increase the surplus for the purposes of these provisions to a figure which is fair and just;

(*c*) interest received during the inter-valuation period in respect of any securities of the Central Government which have been issued or declared to be income-tax free, shall not be excluded, but no income- tax shall be payable on the annual average of the amount of such interest'.

67. CBDT issued **Circular No. 202 dated 5th July, 1976** [105 ITR (St pg 22, 43 and 45)] being the explanatory memorandum, with respect to, the Amendment made by Finance Act, 1976, which read as under and has been vehemently referred to by the learned CIT(DR) again and again for the purpose of interpreting why the income-tax rate under section 115B has been reduced from 52.5 per cent to 12.5 per cent for the assessee carrying on life insurance business:—

"9.2 No separate rate schedule has been specified in the case of Life Insurance Corporation of India. This is in view of the position that the basis of taxation of profits from life insurance business has been modified and the rate of income-tax to be charged on the profits and gains of the life insurance business determined on the modified basis has been laid down in new section 115B of the Income-tax Act. These changes have been explained in paragraphs 37 and 40 of this circular."

Rate of tax on profits and gains of life insurance business - New section 115B.

"37.1 As explained in paragraph 40 of this circular, the Finance Act has substantially modified the basis for determining profits and gains of life insurance business. The rate of income-tax to be charged on the profits and gains of the life insurance business determined on the modified basis has been laid down in new section 115B of the Income-tax Act. Under the new provision, in the case of a taxpayer having income from life insurance business, the income-tax payable on the profits and gains of the life insurance business will be calculated at the rate of 12 ½ percent. of such profits and gains and the remaining income, if any, will be charged to tax at the rates specified in the annual Finance Act.

37.2 This amendment has come into force with effect from the 1st June, 1976, and will apply in relation to the assessment year 1977-78 and subsequent years. [Section 20 (part) of the Financial Act].

Revised basis for computation of profits of life insurance business - First Schedule.

40.1 The Finance Act has amended the First Schedule to the Income- tax Act with a view to simplifying the determination of profits from life insurance business. Broadly, the profits and gains of a life insurance business are computed at the higher of the two following figures -

(*a*) the gross external incomings of the nature of rent, interest, etc., of the previous year (but exclusive of premiums received from the policy-holders and interest and dividends on any annuity fund) less the management expenses of that year;

(*b*) the annual average of the valuation surplus disclosed by the last valuation made under the Insurance Act, 1938, after excluding from it any surplus or deficit relating to any earlier inter-valuation period and deducting 80 per cent. of the amount paid to or reserved for or expended on behalf of the policy-holders. The figure so arrived at is increased by the amount of expenditure and allowances which are not deductible under the provisions of sections 30 to 43A in computing income chargeable under the head "Profits and gains of business or profession.

40.2 Under the amendment made by the Finance Act, the method of determining the profits on the basis of gross external incomings, as stated at (i) in the preceding paragraph has been dropped and the profits and gains of a life insurance business will, in all cases, be taken to be the annual average of the surplus arrived at by

adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act in respect of the last inter-valuation period ending before the commencement of the assessment year, so as to exclude there from any surplus or deficit which was made in any earlier inter-valuation period. No further adjustment to the annual average of the surplus so arrived at will be made. In other words, no further deduction will be allowed in respect of any portion of the amount paid or reserved or expended on behalf of the policy-holders nor will the expenditure and allowances which are not deductible under the provisions of sections 30 to 43A be added back. The profits and gains of life insurance business so arrived at will be charged to tax at the rate of 12½ per cent. as explained in paragraph 37.

40.3 This amendment will come into force with effect from the 1st April, 1977, and will accordingly apply in relation to the assessment year 1977-78 and subsequent years. [Section 23 of the Finance Act]."

68. We noted that Section 44 of the Act start with a non-obstante clause and overriding other provisions of the Act, provides for profits and gains from life insurance business to be computed in accordance with the rules contained in the First Schedule to the Act. As per rule 2 of the First Schedule to the Act, profits and gains of life insurance business has to be taken to be the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938, in respect of the last inter valuation period ending before the commencement of the assessment year, so as to exclude any surplus or deficit included therein, which was made in any earlier inter valuation period. According this rule as is applicable from A.Y.1977-78, the surplus or deficit between two inter valuation periods disclosed by the actuarial valuation made in accordance with Insurance Act,1938, can only be taken as income or loss of the period. The old Rule 2 which was in existence prior to amendment made by Finance Act, 1976 contains two methods of determining profits and gains of the insurance business and greater of these two method was regarded to be the profit and gains of life insurance business. The first method prescribes calculation of net income = Gross external incomings of the previous year from that business less the management expenses of that year. Clause (2) of old rule 2 restricts the deduction of management expenses under old Rule (1). Old Rule 2 (2) refers to average surplus arrived at by adjusting the surplus disclosed in the actuarial valuation made with regard to the Insurance Act,1938 in respect of inter valuation period. We noted by amendment made by Finance Act 1976 Sub Rule (1) of Rule 2 was omitted but sub rule (2) has been substituted by new Rule 2 in amended form, which does not require computation of profit and gains of the life insurance business on the basis of gross external income and deducting therefrom the management expenses. New Rule 2 prescribes the profits and gains of the life insurance business to be taken annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 in respect of the last inter valuation period ending before the commencement of the assessment year, so as to exclude from it any surplus or deficit included therein which was made in any earlier intern valuation period.

69. We noted that Supreme Court in *LIC of India* (*supra*) made the following pertinent observations while interpreting the provisions relating to the computation of taxable income of the life insurance company:

"It is clear that the Income Tax Act contemplates that the assessment of insurance companies should be carried out not according to the ordinary principles applicable to business concerns as laid down in section 10, but in quite a different manner. Insurance companies do not compute their profits in the ordinary way because premiums cover risks which run into future years and loss includes losses for previous years. The method prescribed ensures that by taking the average of several years a fair and reasonable conclusion is reached. Actuarial estimation plays an important part and surplus only results when there is an excess of the fund over the liability after all other charges are met. The rules which have been quoted lay down two different methods of ascertaining profits. So the annual average of the surplus found by the actuary had to be taken and from it the surplus of the last inter-valuation period had to be deducted as also expenditure allowable under section 10 of the Income Tax Act. This is the basic calculation and they were followed."

The Bombay High Court in *Life Insurance Corpn. of India* (*supra*) summarised the scope of section 44 of the Act in the following terms:—

"… … It is now well known that so far as the life insurance business is concerned, the computation of the profits has to be made not in the matter in which it is normally done in the case of an ordinary assessee but according to the special and artificial mode prescribed in the First Schedule, having regard to the provisions of s.44 of the I. T. Act, 1961. The effect of s. 44 of the I. T. Act, 1961, is that the provisions relating to interest on securities, income from house property, capital gains and income from other sources are not made applicable in the case of an insurance company and the profits are to be computed in accordance with rr. 2, 3 and 4 in the First Schedule so far as life insurance business is concerned. Thus, so far as the proceedings regarding assessment to tax under the I. T. Act are concerned, they will be controlled solely by the provisions of s. 44 and the First Schedule which, as already pointed out, is an artificial mode of computation of income. The basic figure which is required to be taken for the purposes of computation of income from insurance business is the annual average of the surplus. Rule 2(b), which is the only material rule so far as the present case is concerned, provides for the annual average of the surplus. The surplus contemplated is the surplus as determined actuarially in accordance with s. 13 read with Sch. IV of the Insurance Act. … … …"

The same view was echoed by the Supreme Court in the later decision reported as *General Insurance Corpn. of India* (*supra*). The pertinent observations at pg 144 of the said judgement are reproduced hereunder:

"Section 44 of the Income-tax Act is a special provision governing computation of taxable income earned from business of insurance. It opens with a non-obstante clause and thus has an overriding effect over other provisions contained in the Act. It mandates the assessing authorities to compute the taxable income for business of insurance in accordance with the provisions of the First Schedule."

There is change in the reporting format for companies carrying on insurance business pursuant to enactment by IRDA Regulations. Such change in the reporting format for companies carrying on life insurance business pursuant to change in the regulatory framework and pursuant to enactment by IRDA of Regulations, 2000 and Regulations, 2002 was noticed by the Bombay High Court in *ICICI Prudential Life Insurance Co. Ltd.* (*supra*) in the following words : (pages 474-476)

"Before 1999, companies engaged in the business of life insurance were required to prepare one consolidated account. Section 11 of the Insurance Act, 1938 was amended so as to include sub-sections (1A) and (1B). Subsection (1A) to section 11 provides that every insurer, on or after the commencement of the IRDA Act, 1999, in respect of insurance business transacted by him and in respect of shareholder's funds, shall, at the expiration of each financial year, prepare with reference to that year, a balance sheet, a profit and loss account, a separate account of receipts and payments, and revenue account in accordance with the Regulations made by the Authority. Section 13(1) provides that every insurer carrying on life insurance business shall, inter alia, in respect of the life insurance business transacted in India, cause an investigation to be made each year by an actuary into the financial condition of the life insurance business carried on by him, including a valuation of his liabilities and shall cause an abstract of the report of such actuary to be made in accordance with the Regulations laid down in Part I of the Fourth Schedule and in conformity with the requirements of Part II of that Schedule. The fifth proviso to section 13 stipulates that on or after the commencement of the IRDA Act, 1999 every insurer shall cause an abstract of the report of the actuary to be made in the manner specified by the Regulations made by the Authority.

In exercise of the powers conferred by section 114A of the Insurance Act, 1938, the IRDA notified the Insurance Regulatory and Development Authority (Actuarial Report and Abstract) Regulations, 2000. Regulations 3 and 4 stipulate the procedure for preparation of actuarial reports and abstracts and the requirements applicable. Under Regulation 3(4)(v), each abstract and statement is to be accompanied by a certificate signed by the appointed actuary, inter alia, stating that

in his opinion, the mathematical reserves are adequate to meet the insurer's future commitments under contracts and the reasonable expectation of policyholder's. Each insurer is required to prepare statements which are to be annexed to the abstract and a list of those statements is set out in Regulation 4(2). Regulation 8 provides that a statement showing the total amount of surplus arising during the inter-valuation period and allocation of such surplus, shall be furnished separately for participating business and for non-participating business, together with the particulars as mentioned in the Regulation. The composition of surplus, inter alia, includes the surplus shown by Form I, interim bonuses, loyalty additions and sums transferred from shareholder's funds during the inter-valuation period.

The Authority has also notified the Insurance Regulation and Development Authority (Preparation of Financial Statements and Auditor's Report of Insurance Companies) Regulations, 2002. Part V deals with the provision of financial statements. Every insurer is required to prepare (i) a revenue account which is also described as a policyholder's account; and (ii) a profit and loss account, which is also described as a shareholder's account, apart from a balance- sheet. The statutory forms are prescribed by the Regulations. Form A-RA is prescribed for the preparation of the revenue account or the policyholder's account. Form A-RA reflects the surplus or, as the case may be, the deficit generated in the revenue account for the year ending 31st March.

As a result of the Regulations, the petitioner which is engaged in the business of life insurance is required to prepare and maintain two accounts namely, (i) a revenue account of policyholders, and (ii) a profit and loss account of shareholders. … …"

70. On this basis, we can summarize the impact of the amendment of the Regulations as below:

(*i*) The erstwhile format for the presentation of surplus/deficit required each insurance company to aggregate the results relating to shareholder's operations. The impact of the consolidated revenue account was transferred to the actuary's valuation balance-sheet in Form I which disclosed the surplus/deficit for the year.

(*ii*) The format for presentation of the insurance accounts was amended by the Regulations of 2000 and by the revised format, the impact of the actuarial valuation was transferred to the revenue account relating to the policyholders for the year and the surplus/deficit was disclosed therein;

(*iii*) The profit and loss for shareholders and the

surplus/deficit for policyholders are since segregated after the amended Regulations of 2002

Mumbai Bench of the Tribunal in the case of *ICICI Prudential Insurance Co. Ltd.* (*supra*) as relied by learned Senior Advocate discussed these provisions as under:—

'27. Respectfully following the above principles and examining the provisions of IT Act, we are of the opinion that the actuarial valuation made in accordance with the Insurance Act, 1938 do mean that the actuarial valuation done in accordance with the Insurance Act, 1938. In arriving at the above decision we have also taken into consideration that Rule-5 in Part-B of the First Schedule with reference to other insurance business did incorporate the IRDA and its Regulations as amended by the Finance Act 2009 w.e.f. 1.4.2011 which is as under:

B-Other Insurance Business:

Computation of profits and gains of other insurance business.

5. The profits and gains of any business of insurance other than life insurance shall be taken to be the profit before tax and appropriations as disclosed in the Profit & Loss A/c prepared in accordance with the provisions of the Insurance Act, 1938 (4 of 1938) or the rules made thereunder or the provisions of the Insurance Regulatory and Development Authority Act, 1999 (4 of 1999) or the Regulations made thereunder subject to the following adjustments:—

(*a*)	Subject to other provisions of this rule, any expenditure or allowance including any amount debited to the profit and loss account either by way of a provision for any tax, dividend, reserve or any other provision as may be prescribed which is not admissible under the provisions of section 30 to 43B in computing the profits and gains of a business shall be added back:
(*b*)	(*i*) any gain or loss on realisation of investments shall be added or deducted, as the case may be, if such gain or loss is not credited or debited to the Profit & Loss A/c;

(*c*) such amount carried over to a reserve for unexpired risks as may be prescribed in this behalf shall be allowed as a deduction.

This indicates that the legislature consciously omitted incorporating the provisions of IRDA or the Regulations made there under in Rule 2, which still refers to the Insurance Act 1938 only.

28. Further, we also notice that the Insurance Act itself was amended along with the introduction of IRDA Act 1999. Along with the said IRDA Act there are various amendments proposed in the Insurance Act in tune with IRDA Act by amending the relevant provisions of Insurance Act, 1938. However, since the Rule 5 was amended in the First Schedule by specifically referring to the IRDA Act 1999 or the Regulations made there under, we are of the opinion that the legislature intended not to modify or amend the Rule-2. This indicates the intention of legislature that the actuarial valuation has to be made in accordance with the unamended Insurance Act, 1938. We are of the firm opinion that the unamended provisions of Insurance Act, 1938 were only incorporated into the Income Tax Act as far as life insurance business is concerned. Therefore, AO's action in following the format prescribed under the Regulations of IRDA Act is not in accordance with the spirit of Rule-2 and provisions as made applicable under the Income Tax Act.

29. We also notice that the actuarial report and abstracts under the Insurance Act, 1938 has to be prepared vide section 13 of that Act in accordance with the Regulations contained in Part-I of the Fourth Schedule and in conformity with the requirement of Part-II of that schedule. Section 13 of Insurance Act 1938 (as amended now) is as under:

"13. Actuarial report and abstract.

(*i*) Every insurer carrying on life insurance business shall, in respect of the life insurance business transacted by him in India, and also in the case of an insurer specified in sub-clause (a)(ii) or sub-clause (b) of clause (9) of section 2 in respect of all life instance business transacted by him, (every year) cause an investigation to be made by an actuary in to the financial condition of the life insurance business carried on by him, including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the Regulations contained in Part I of the Fourth Schedule and in conformity with the requirements of Part II of that Schedule:

Provided that the Authority may, having regard to the circumstances of any particular insurer, allow him to have the investigation made as at a date not later than two years from the date as at which the previous investigation was made:

Provided:

Provided:

Provided:

Provided also that every insurer on or after the commencement of the Insurance Regulatory and Development Authority Act, 1999 shall cause an abstract of the report of the actuary to be made in the manner specified by the Regulations made by the Authority."

30. The First to Fourth Schedule of the Insurance Act 1938 was omitted by the Insurance Amendment Act 2002 after incorporation of the relevant schedules in the IRDA Act. Even though the said schedules were omitted from the Insurance Act, 1938, we are of the opinion that as far as Rule-2 is concerned by the principle of 'Legislation by incorporation' unamended Insurance Act, 1938 is applicable and the actuarial valuation has to be made in accordance with the then existing Part-I of the Fourth Schedule and in conformity with the requirements of Part-II of that schedule. Therefore, assessee's contention that the IRDA Regulations even though are applicable to assessee since it has commenced business after the commencement of the IRDA Act, 1999, for the purpose of Rule-2, the actuarial valuation has to be done in accordance with the Regulations contained in erstwhile Fourth Schedule Part-I and Part-II. This is what assessee is contending and merging the accounts of policyholder's and shareholders account and arriving at the actuarial deficit, without taking into consideration the transfer of funds from the shareholder's account to policyholder's account.

31. After introduction of IRDA Act, the entire Regulation of insurance business has gone to the authority and in order to protect the interests of holders of insurance policies, to regulate, to promote and ensure orderly growth of insurance industry number of regulations have been prescribed by the IRDA. One such is, Insurance Regulatory and Development Authority (IRDA) (Actuarial Report and Abstract) Regulations 2000 by which method of preparation of actuaries report and abstracts were prescribed. An actuary is responsible for analysing possible outcomes of the types of events that would potentially cost policy holders to made

claims against their insurance policies. Insurance companies need to make sure that the money they are charging and collecting from policy holders is adequate to cover the cost of certain claims that might beneficially be made by policy holders as well as their other expenses. In fact, the work that actuaries perform is crucial to an insurance company's ability to remain in business. Actuaries are involved at all stages in product development and in the pricing risk assessment and marketing of the products. Their job involves making estimates of ultimate out-come of insurable events. In the business of insurance the product cost is an abstraction, depending on the timing issues, variability issues and risk parameters. One big function actuaries provide is making reserves to insure that insurance companies keep enough money on their balance sheets to make good of all the claims they will have to pay. This involves arriving at actuarial surplus or deficit depending on various factors. In order to ensure a fair play in the business, the IRDA prescribed regulations according to which various norms were prescribed in order to ensure that Life Insurance of business (even other insurance business) are done according to healthy business practices. As per the above regulations, Regulation 4 prescribes number of abstracts and statements in respect of (a) linked business; (b) non-linked business and (c) health insurance business. As part of this Regulation 4(2)(d) item No. iv, Form -'I' was prescribed for the purpose of valuation results and to indicate the surplus or deficit in the life insurance business of a company. Apart from the above regulations, IRDA also prescribed Insurance Regulatory and Development Authority (Preparation of Financial Statements and Auditor's Report of Insurance Companies) Regulations 2002. The surplus or deficit arrived at by the actuary in his valuation for the inter valuation period has to be taken in to consideration under the regulations in financial accounts as well.

32. IRDA Regulations specifically require to maintain the policyholder's account and the shareholder's account separately and permits transfer of funds from shareholder's account to policyholder's account as and when there is a deficit in policyholder's account. As rightly noted by the Hon'ble Bombay High Court, as a policy company is transferring funds/assets from shareholder's account to policyholders account even during the year periodically as and when the actuarial valuation was arrived at in policyholder's account. Most of the companies are required to submit quarterly accounts under the Company Law, there is requirement of actuarial valuation report periodically and accordingly assessee was transferring funds from the shareholder's account to policyholder's account. Since the insurance business will not yield the required profits in the initial 7 to 10 years, lot of capital has to be infused so as to balance the deficit in the policyholder's account. During the year as already stated assessee has issued fresh capital to the extent of Rs.250 crores and transferred funds to the extent of Rs.233 crores from the shareholders' account to policyholder's account. Since assessee is having only one business of life insurance, the entire transactions both under the policyholder's and shareholder's account do pertain to the life insurance business only as it was not permitted to do any other business. Once assessee is in the life insurance business, the computation has to be made in accordance with the Rule-2 as per provisions of section 44. Therefore, there is a valid argument raised by assessee that both the policyholder's and shareholder's account has to be consolidated into one and transfer from one account to another is tax neutral. What AO has done is to tax the surplus after the funds have been transferred from shareholder's account to the policyholder's account at the gross level while ignoring such transfer in

shareholder's account, while bringing to tax only the incomes declared in the shareholder's account that too under the head 'other sources of income'. In fact, while giving the finding that assessee is in the life insurance business only and incomes are to be treated as income from life insurance business only and incomes are to be treated as income from life insurance business, the CIT(A) surprisingly in subsequent assessment years appeals accepted AO's contention that surplus in shareholder's account is to be taxed as other sources of income. But once the provisions of section 44 of I T Act are invoked to arrive at the profit. Therefore, in our opinion both the policyholder's and shareholder's account has to be consolidated for the purpose of arriving at the deficit or surplus.'

71. We noted that the Revenue challenged the order passed by the Tribunal in appeal under section 260A of the Act before the Bombay High Court raising amongst several questions, the following question of law:

"(8) Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in allowing relief to the assessee by holding that surplus available in Share Holders Account is not to be taxed separately as "income from other sources" and at the normal corporate rate and holding that surplus from Share Holders Account was only part of income from insurance business arrived at after "combining" surplus available in Share Holders Account with the surplus available in Policy Holders Account and then add taxing this 'net surplus' arrived at, the rate specified u/s.115B of the Act?"

Although the appeal filed by the Revenue was admitted on other substantial questions of law, with respect to the aforesaid question, the Bombay High Court in the case reported as *ICICI Prudential Insurance Co. Ltd.* (*supra*) did not admit the Revenue's appeal and held as under:

"(5) So far as Question No. 8 is concerned, the grievance of the revenue is that the income on shareholders' account has to be taxed as income from other sources. This on the ground that the income earned on shareholders' account is not an income which represents income on account of Life Insurance Business. Therefore, it is the revenue's contention that it has to be taxed as income from other sources. The impugned order while allowing the assessee's appeal holds that income earned on shareholders' amount has to be considered as arising out of Life Insurance Business. Moreover, in terms of Section 44 of the Act, such income has to be taxed in accordance with First Schedule as provided therein. None of the authorities under the Act or even before us is it urged that the assessee is carrying on separate business other than life insurance business. Accordingly, the impugned order holding that the income from shareholder's account is also to be taxed as a part of life insurance business cannot be found fault with in view of the clear mandate of

Section 44 of the Act. Accordingly, Question No. 8 also does not raise any substantial question of law. Thus not entertained."

72. The Supreme Court has admitted the special leave petition filed by the Revenue against the judgment of the Bombay High Court, vide decision reported as *ICICI Prudential Life Insurance Co. Ltd.* (*supra*) but has not stayed operation of the order of High Court. The learned DR even though tried his best to convince us that we should not follow the decision of Income Tax Appellate Tribunal as approved by Mumbai High Court in the case of ICICI Prudential, but that decision is the only decision of coordinate bench of this tribunal as confirmed by Mumbai High Court has been referred to before us. Although Supreme court admitted SLP, that will not loose the value of binding precedent until the decision is reversed or operation of the order is stayed. But, we noted in respect of the issue whether the income in shareholder account has to be taxed as part of the income of the insurance business, the learned DR in this regard contended that if shareholder income is also taxed as part of life insurance business, the provisions of section 115(1)(ii) will become redundant and we cannot interpret the law in this manner to make part of the section to be redundant. In this regard, he vehemently relied on the decision of the Supreme Court in the case of *Surat Art silk cloth Mfgr. Association* (*supra*) in which it was held "The construction contended for the revenue would have the effect of rendering section 11(4) totally redundant after the enactment of section 13(1)(bb). A construction which renders a provision of the Act superfluous and reduces it to silence cannot be accepted". He also referred to the decision of Ahmadabad Bench of this tribunal in the case of *Mayurbhai Mangaldas Patel* (*supra*) particularly the observations made my Hon'ble Supreme Court in the case of *Mumbai Kamgar Sabha* v. *Abdulbhai Faizulbhai* AIR 1976 SC 1455 referred to in that decision "It is trite, going by Anglophonic principles that a ruling of a superior court is binding law. It is not of scriptural sanctity but of ratio-wise luminousity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and dehors the milieu we cannot impart eternal vernal value to the decision, exalting the precedents into a prison house of bigotry, regardless of the varying circumstances and myriad developments. Realism dictates that a judgement has to be read, subjec6 to the fact directly presented for consideration and not affecting the matters which may lurk in the dark." We noted in the decision of Ahmadabad Bench the bench noted the facts that the approval u/s 151(2) was first duly given by the joint commissioner which was apparent from the facts therein and therefore the bench decided against the assessee while upholding the validity of the approval u/s 151. The learned DR Also relied on the decision of *Blue star Ltd.* v. *CIT* [1996] 217 ITR 514/79 Taxman 281 (Mum) for the proposition of law that a case is only an authority for what is actually decides. In this decision it was held "Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generally of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides." In view of these decisions, the learned DR was of the view that the decision of Mumbai bench of this Tribunal should not be followed by this tribunal in the case of *ICICI Prudential Life Insurance Co. Ltd.* (*supra*). We do agree with learned DR that each decision has to be interpreted with the facts and the contents involved there in. We noted that Section 115B(1) (ii) was inserted by Finance Act,

1976 when the condition that life insurance company are not permitted to carry on any other business was reinforced by the provisions of the Section 3(4)(F) of the Insurance Act enabling IRDA to cancel the registration of an insurer if the insurer carried on any business other than life insurance business or any prescribed business. There may be a case that in future government may amend the Act and permit life insurer to carry on other business or there may be a case where insurer, although allowed license for life insurance business but in violation of license, may have carried out any other business but IRDA have not exercise the power of cancelling registration ,under these circumstances income so derived has to be assessed at the rate prescribed u/s 115B(1)(ii). There may be a case that the assessee may have interest income on refund of income tax, the income so received be taxed u/s 115(1)(ii). Therefore, we do not agree with the plea of learned DR that the provisions of section 115(1)(ii) will become redundant in case the income in shareholders account is taken to be the income derived from life insurance business. We may also mention that we cannot take a different view what has been taken by the coordinate Bench approved by High Court. The learned DR was fair enough to state that there is no other decision either of the Tribunal or superior court on this issue taking a contrary view as has been taken in the case of *ICICI Prudential Life Insurance Co. Ltd.* (*supra*).

73. The observations of the Tribunal in the case of *ICICI Prudential Life insurance Co. Ltd.* (*supra*) that "the entire transactions both under the policyholder's and shareholder's account do pertain to the life insurance business only as it was not permitted to do any other business" are reinforced by provisions of section 3(4F) of the Insurance Act which enables IRDA to cancel the registration of an insurer if the insurer carries on any business other than the life insurance business or any prescribed business. In other words, a life insurer, such as the assessee, is not permitted to carry on any other business other than that of life insurance; the manner of investment is strictly regulated by IRDA, implying thereby that investments made out of shareholder funds is an integral and inextricable part of the life insurance business and not an independent business. Respectfully following the decision of coordinate bench on this issue, we allow ground no.2. Even we noted that the assessee is consistently following the same method for determining the income under the head profits and gains of business or profession by aggregating/consolidating, both the policyholders and shareholders account for the purposes of arriving at the deficit/surplus from the life insurance business and this has duly been accepted by the revenue upto financial year 2008-09. On the principle of consistency this method in our view until and unless is held to be illegal cannot be discarded. We have gone through the decisions as relied before us. We noted that Hon'ble Supreme court in the case of *Radhasoami Satsang Saaomi Bagh* (*supra*) referred to the following passage from *Hoystead* (*supra*) wherein it was observed (page 328):

"Parties are not permitted to begin fresh litigation because of new view they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted.

It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the Plaintiff and traversable by the Defendant, has not been traversed. In that case also a Defendant is bound by the judgement, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

At pg 329 of the judgement, Their Lordships observed as under:

"We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating though the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

19. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter and if there was not change it was in support of the assesses - we do not think the question should have been reopened and contrary to what had been decided by the Commission of Income-Tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under Sections 11 and 12 of the Income Tax Act of 1961."

74. The aforesaid dictum of law was reiterated recently by the Supreme Court in *Excel Industries Ltd.* (*supra*).

"It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the Assessee and did not pursue the mater any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather spend the tax payers money in pursuing litigation for the sake of it."

> **75.** We therefore respectfully following the decision of this Tribunal in the case of *ICICI Prudential Insurance Co. Ltd.* (*supra*), set aside the order of CIT(A) on this issue and direct the assessing officer to take profit shown in shareholders' profit and loss account i.e. Form A-PL to be part of the income derived from life insurance business. Thus these grounds are allowed."

11. The other decision of coordinate bench in other years simply followed this decision. Therefore, respectfully following decision of the coordinate bench in assessee's own case we also hold accordingly. In view of this ground no. 2 of the appeal is allowed.
12. Ground No. 3 is with respect to not considering the surplus actuarial valuation done in accordance with the Insurance Act, 1938 as per old Form No. 1.
13. The ld AR also submitted that this issue also been decided by the coordinate bench for Assessment Year 2010-11 in favour of the assessee and therefore same is also covered. He further submitted the old Form No. 1,, New from No 1 and reconciliation statement thereof.
14. The ld DR vehemently supported the orders of the lower authorities.
15. We have carefully considered the rival contentions and perused the orders of the lower authorities. The ld AO has held that after the commencement of IRDA Act. 1999 and the taxable income should be equivalent to the actuarial valuation as per the new regulation and not as per old From in From No. G, H and I. The ld AO has relied upon the decision of the ld CIT(A) in assessee's own case for Assessment Year 2010-11. The ld CIT(A) also confirmed the action of the ld AO relying upon the order of his predecessor for that year. The order of the ld CIT(A) for Assessment Year 2010-11 travelled up to the coordinate bench and the issue has been decided as per para No. 69, 70 of that order in favour of the assessee. Further in para no 86 it is held that:-

> **"86.** We do not find any ambiguity in Rule 2 of the First Schedule. Rule 2 of the First Schedule does not refer to any deduction but merely refers to actuarial surplus or deficit determined in accordance with Insurance Act, 1938. Prior to amendment of law in 1976 there was limitation in the erstwhile Rule 3, which limited the allowability of the deduction pertaining to the amount set aside for the benefit of policy holders to 80%. Post amendment no such limitation exists. We do not find any provision under the Income tax which states that while arriving at actuarial surplus liability ascertained by the actuary as bonus payable in future or amount set

aside for further appropriation for the benefit of the policy holders would not be deductible. Actuarial surplus/deficit is the amount that is computed after providing for liabilities, which includes amount of future bonus payments set aside for the benefit of the policy holders both by way of bonus allocation as well as Funds for Future Appropriation. We noted that the old Form G, H and I prescribed under the Insurance Act 1938 clearly provide for the same. ITAT Bench in the case of *ICICI Prudential Insurance Co. Ltd*. (*supra*) has already held that accrual surplus or deficit has to be determined in the manner provided in old Form G, H & I. This decision of the co-ordinate Bench is binding on us. Therefore, any amount which is recognized as accrual liability has to be necessarily reduced while arriving at the actuarial surplus. Although IRDA has prescribed a new method of presentation i.e. share holders account and policy holders account to be shown separately though a consolidated balance sheet to be drawn up. But the norms regarding the actuarial valuation have not been altered so that recognition of the accrual liabilities by way of bonus allocation to the policy holders be excluded. We do agree that the term accrual surplus is not defined under the act. The CBDT Circular cannot control the interpretation of Rule 2. We find force in the submissions of the learned Sr. Advocate that CBDT Circular has limited application to a situation where the insurance benefits are assigned to third parties, where the benefits are to be paid/reserved/expended on behalf of the policy holder or the assignee. As the term "on behalf of" implies agency relationship and when the benefits are assigned to third parties, insurance company acts as agent of the policy holder. Even otherwise, if we go to the explanatory note as given under para 40.2 of the Circular 202, according to this bonus paid to the policy holder will also be taxed but that is not the case of the Revenue. The Revenue has only contested the bonus declared and the incremental FFA. 89. We also noted that no such disallowance has been made by the Revenue in the earlier assessment years i.e. up to A.Y.2009-10 and it is for the first time that the CIT(A) has enhanced the assessment . We are of the view, even on the ground of consistency, the Revenue cannot discard the consistent and regular method followed for determining the taxable income without there being any change or otherwise, the bonus declared and the incremental FFA has been allowed as deduction by the Revenue. Our aforesaid view is supported by the following decisions."

16. The other years decision of ITAT merely follows this decision. Therefore, as there is no distinction in the facts and circumstances of the case we do not find any reason not to follow the order of the coordinate bench. Accordingly, ground No. 3 of the appeal of the assessee is allowed.

17. Ground No. 4 and 5 of the appeal of the assessee is with respect to the addition of Rs. 3109494000/- on account of funds for further appropriation and Rs. 3897339000/- on account of bonus allocated to the policyholders to

the taxable income of the appellant and treating the same as part of the actuarial surplus liable to be taxed u/s 44 of the Act read with Rule 2 of the 1st Schedule.

18. The ld AR submitted that this issue has also been decided in favour of the assessee by the coordinate bench for Assessment Year 2010-11 vide para No. 77 to 91 of that order. Therefore, it was submitted that the issue is squarely covered in favour of the assessee.

19. The ld DR vehemently supported the orders of the lower authorities.

20. We have carefully considered the rival contentions and perused the orders of the lower authorities. The issue involved in this case is squarely covered by the decision of the coordinate bench for Assessment Year 2010-11 in assessee's own case. The coordinate bench has held as under :-

> "**87.** Ground no. 4 relates to enhancement of Rs.42,18,54,000/- the CIT(A) considering Funds for Future Appropriation ("FFA") as part of the actuarial surplus. We noted from the Funds for Future Appropriation aforesaid technical Form A-RA(as reproduced hereinabove) that a sum of Rs.453478000/- has come after reducing from the closing balance the funds available for future appropriation amounting to Rs.622938000/- a sum of Rs.169460000/- which represented opening balance of Funds for Future Appropriation. The facts are that in the participating policies there was surplus amounting to Rs.558934000/- and after bringing the opening balance of the funds available for Future Appropriation Rs.55269000/- total surplus available was Rs.614203000/- out of which sum of Rs.137080000 was transferred to the share holders account and the balance funds available were Rs.477123000/- out of which Rs.1432862000/- were allocated as bonus to the policy holders including a sum of Rs.14278000/- participating policies- pensions. The CIT(A) while making enhancement treated the said FFA which were added during the year as part of the taxable income pertaining to the life insurance business as it is part of the actuarial surplus, while learned AR contended that it is not a part of actuarial surplus. As we noted from the Form A-RA this is an unallocated surplus relating to the participating policy holder. In fact, this fund has to be used by assessee in future to meet its contracted obligation towards policy holders. The contention of the learned AR is that this is akin to the policy holders liability which has been determined through due process of the actuarial valuation. If it is part of the liability while working out the actuarial valuation this fund will not form part of the accrual surplus. From provisions of section 44 read with Rule 2 of Schedule A, it is apparent that the profits and gains of a life insurance company has to be computed on the basis of the actuarial surplus. The assessee company is contractually bound in terms of the insurance policies taken out to provide various benefit to its policy holders including, inter alia, survival benefits, cash or reversionary bonuses and other payouts/benefits linked to the happening of future uncertain events. The premiums earned by the assessee, therefore, in our opinion, have embedded obligation to make available such benefits in future. The premiums earned have to be set off by estimated liability to make available future

benefit as actuary declared such provision in form of the FFA. In our view this present the provision of future bonus which it is bound to pay even though this liability has not been allocated but it is a ascertained liability and, therefore, while working out the actuarial surplus this has to be taken into account. While disposing of ground no.5 in the preceding para, we held that in the absence of any definition being given for actuarial surplus, we have to give a meaning to it, what actuarial surplus mean in common parlance. Actuarial surplus in our view represent the surplus i.e. the amount available for the shareholders after providing for all the expenses and ascertained liabilities of life insurance business. policyholders are not the shareholders but are the customers. The insurance policies are written by the company on the life of several insured persons while the liability of the assessee to make available the stipulated benefits to a particular insured may be contingent, such liability is definite and certain. Even otherwise also in view of the contract for the life insurance as well as the regulation given by the IRDA, the share holders are entitled only for 10% of the surplus or deficit out of participating policy holders account; rest of the amount belong to the policy holders and company cannot allocate the funds to the share holders. Therefore, participating policyholders has a charge over this amount. These funds are generally kept as participating for FFA for declaring or smoothening bonuses in future. In fact, it represents the reasonable expectation of the future bonus on account of the performance of participating funds over the years. But FFA, in our view, represents the provision of definite and ascertained liability and, therefore, it is a charge on the profit while determining the profit and gains from the life insurance business. The learned AR in this regard relied on the decision of Hon'ble Supreme Court in the case of *Bharat Earth Movers* (*supra*), which relate to the deductibility if provision for leave encashment to employees where the Supreme Court has noted the facts of the case as under:

"…….. The company has floated beneficial schemes for its employees for encashment of leave. The officers are entitled to earned leave calculated at the rate of 2.5 days per month, i.e., 30 days per year. The staff (other than officers) is entitled to vacation leave calculated at the rate of 1.5 days per month, i.e., 18 days in a year. The earned leave can be accumulated upto 240 days maximum while the vacation leave can be accumulated upto 126 days maximum. The earned leave/vacation leave can be encashed subject to the ceiling on accumulation. The officers may at their option avail the accumulated leave or in lieu of availing the leave apply for encashment whereupon they would be paid salary for the period of leave earned but not availed. So does the scheme extend facility of encashment to the staff in respect of vacation leave. Any leave earned beyond the said ceiling limit of 240/126 days cannot be accumulated and goes a waste. It can neither be availed nor encashed. The appellant company has created a fund by making a provision for meeting its liability arising on account of the accumulated earned/vacation leave. In the assessment year 1978- 1979 an amount of Rs.62,25,483/- was set apart in a separate account as provision for encashment of accrued leave. It was claimed as a deduction. In the opinion of the Tribunal the assessee was entitled to such deduction. The High Court has formed a different opinion and held that the provision for accrued leave salary was a contingent liability and therefore was not a permissible deduction. The reasoning applied by the High Court is that the liability will arise only if an employee may not go on leave and instead apply for encashment. If the employee avails the leave as per his

entitlement, then he would be paid salary for the period of leave and liability for encashment would not arise. The other event on the occurrence of which the employee may stake his claim is termination or retirement which again is an uncertainty. Accordingly the High Court has answered the question in the negative, that is, in favour of the Revenue and against the assessee……. "

Ultimately, the Hon'ble Supreme Court laid down the following proposition of law:

"The law is settled if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in present though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to b e discharged is not certain."

88. We also noted that while holding so the Supreme Court took note of the principles laid down in the earlier judgment in the case of *Metal Box Co. of India Ltd*. (*supra*), wherein the Apex Court allowed provision for gratuity payable on termination of employees' service due to retirement/death or termination, worked out on an actuarial basis.

89. No doubt in our view, this decision is not strictly applicable to the facts of the case because in this decision, the question was relating to the deductibility of the expenditure towards the provision for leave encashment i.e. for the purpose of computation of profit and gains from business but this decision may assist to the assessee for ascertaining whether the funds earmarked to be distributed to the customers from whom the assessee is getting income by way of premium i.e. whether the amount in FFA a/c is a liability which is deductible while working out acturial surplus. This is an undisputed fact that the assessee cannot utilise these funds for shareholders or distributing them as dividends to the shareholders. On the basis of this decision of Hon'ble SC, one can say that the amount allotted to the FFA a/c is a provision for a definite liability although it may arise when the bonus is distributed out of this. Therefore, since the amount is earmarked for policyholders, it cannot form part of the acturial surplus rather it has to be reduced while working out the actuarial surplus under Rule 2 Schedule A of the Income Tax Act for determining profit and gains of assessee from life insurance business. We have also gone through the decision of Delhi HC in case of *Triveni Engg. & Industries* Ltd. (*supra*), as relied by Senior Advocate. This decision in our view will not apply to the facts of the case. In that case, the contract receipts taken as income includes the unbilled revenue for which bills to be raised in succeeding

year. Therefore, the provision for *forseeable* losses towards completion of contract was allowed as deduction. It is not a case where all future premiums to be received in the case of present assessee are treated as part of the income. We have also gone through the decision of *Rotor Controls (P.) Ltd*. (*supra*),This decision relate to the claim of the deduction u/s 37 for provision of warranty. This decision may assist only for ascertaining whether while calculating acturial surplus, there exists any liability which has to be reduced while calculating acturial surplus. In this decision, Hon'ble SC laid down following four aspects to be satisfied so that the provision made is not to be regarded as a contingent liability :—

(*i*) The provision relates to present obligation;

(*ii*) It arises out of obligating events;

(*iii*) It involves outflow of resources; and

(*iv*) It involves reliable estimation of obligation.

If these principles are applied to the FFA, in our view the FFA since being earmarked for participating policyholders and represents provision for expectation of further bonuses based on terms & conditions laid down in the insurance policies and will also involve outflow of the resources, will represent ascertained liabilities towards the policyholders as it cannot be used by the insurance company for allocating it to the shareholders although it has not due to the policyholders.

90. We have also gone through the decision of Bijli cotton Mills as relied by learned AR. This decision of SC in *Bijlee Cotton Mills* (*supra*), is on different facts. In that case, dharmada was collected for spending towards charity but in the impugned case, assessee is collecting premiums which are not earmarked to be spent on policyholder, rather, out of the surplus arrived at after meeting the expenses, shareholders are entitled upto 10% of surplus. In the case of *Addl. CIT* v. *Mumbai International Airport (P.) Ltd*. [2017] 184 TTJ 229 (Mum. - Trib), passenger service fee was being collected to be spent on security agencies, while it is not the case of assessee that all the premiums received have to be earmarked or spent on policyholders. Therefore, these decisions cannot apply to the facts of the assessee's case. Similar is the case in *UP Bhoomi Sudhar Nigam* (*supra*). We have also gone through the decision of *Modipon Ltd.* (*supra*). This decision also in our view is not applicable as in that case the assessee has departed the amount towards the excise duty liability which is to be discharged in future but in the case of the assessee amount remains with the assessee. We have also gone through decision of Mumbai HC in *Nagri Mills Co Ltd.* . (*supra*), as well as Delhi HC in *Shriram Pistons & Rings Ltd*. (*supra*), These decisions cannot be applied in the impugned case as these decisions relate to the issue of allowing deduction but does not relate to the issue of computation of actuarial surplus. Whether while computing acturial surplus, amount appropriated towards FFA will form part of acturial liabilities or not. Learned DR basically relied Rule 3 & old Rule 2 which were in existence prior to the amendment made by the Finance Act 1976 and also given the logic as has been mentioned by us earlier why the rate of tax on the company carrying on

life insurance business has been reduced from 52.5% to 12.5% as well as para 40.2 of Circular No. 202 dt 05/09/1976 which deals with the Explanatory Notes in respect of the amendment made by Finance Act,1976 as well as the decisions as discussed by us while disposing off ground no. 5. We have already taken a view while disposing off ground no. 5 that the golden rule of interpretation is that external aid to the interpretation is not required when there is no ambiguity in the relevant provision and the language of the relevant provision is plain and clear. The language of Rule 2 is plain and clear and there is no ambiguity. Therefore, as held by us earlier, explanatory note given in the circular 202 will not help the Revenue while interpretating Rule 2 of Schedule A We noted that Hon'ble SC in the case of *Marwanji P Desai* (*supra*), has observed as under:—

"True intent at the legislature shall have to be gathered and deciphered in its proper spirit having due guard the language used therein. Statements of objects and reasons is undoubtedly an aid to construction but that by itself cannot be term to be and by itself cannot be interpreted. It is an useful guide but the interpretations and the intent shall have to be gathered from the entirety of the statute and when the language of the sections providing an appeal to a forum is clear and categorical no external aid is permissible in interpretations of the same." .

Similarly, we noted SC vide order dt 17/10/2011 in the case of *J K Johnson* (*supra*), held as under:—

"When the language of the statutory provisions is plain and clear no external aid is required and the legislative intention has to be gathered from the language employed."

Not only this, we noted Hon'ble SC in the case of *Nawab Sir Mir Usman Ali Khan* (*supra*), while interpreting the word 'belonging to' in the Wealth Tax Act observed in respect of injustice being caused to the assessee as under—

The position is that though all statutes including the statute in question should be equitably interpreted, there is no place for equity as such in taxation laws. The concept of reality in implementing a fiscal provision is relevant and the Legislature in this case has not significantly used the expression " owner " but used the expression " belonging to ". The property in question legally, however, cannot be said to belong to the vendee. The vendee is in rightful possession only against the vendor. Speaking for myself, I have deliberated long on the question whether in interpreting the expression "belonging to" in the Act, we should not import the maxim that " equity looks upon a thing as done which ought to have been done " and though the conveyance had not been executed in favour of the vendee, and the

legal title vested with the vendor, the property should be treated as belonging to the vendee and not to the assessee. I had occasion to discuss thoroughly this aspect of the matter with my learned brother and since in view of the position that legal title still vests with the assessee and the authorities, we have noted, are preponderantly in favour of the view that the property should be treated as belonging to the assessee in such circumstances, I shall not permit my doubts to prevail upon me to take the view that the property belongs to the vendee and not to the assessee. I am conscious that it will work some amount of injustice in such a situation because the assessees would be made liable to bear the tax burden in such situations without having the enjoyment of the property in question. But times perhaps are yet not ripe to transmute equity on this aspect in the interpretation of law-much as I would have personally liked to do that. As Benjamin Cardozo has said, "The judge, even when he be free, is not wholly free ". The judge cannot innovate at pleasure.

It may be said that the Legislature having designedly used the expression " belonging to " and not the expression " owned by " had perhaps expected judicial statesmanship in the interpretation of this expression as leading to an interpretation that in a situation like this, it should not be treated as belonging to the assessee but, as said before, times are not yet ripe and in spite of some hesitation, I have persuaded myself to come to the conclusion that for all legal purposes, the property must be treated as belonging to the assessee and perhaps the Legislature would remedy the hardship of the assessee in such cases if it wants. Even though the assessee had a mere husk of title and as against the vendee no reality of title, as against the world he was still the legal owner and the real owner.

91. We therefore, are of the view that in case the Revenue is of the opinion that due to the language of Rule 2, the companies carrying on life insurance business will be paying unjustifiably tax at a lower rate, the Revenue can approach the Parliament for making the necessary amendment in the Income Tax Act.

92. We even noted upto Assessment Year 2009-10, the Revenue has consistently excluded amount appropriated for FFA out of the available surplus for the purpose of ascertaining acturial surplus while computing profit and gains of life insurance business of the assessee. Therefore, following principle of consistency as has been held by Hon'ble SC in the case of *Radhasaomi Satsang Baug* (*supra*), that of *Excel Industries Ltd.* (*supra*), we set aside the order of CIT(A) and delete the enhancement made by CIT(A) in this regard.”

21. Decisions of other years of the coordinate bench has merely followed this decision. There is no change in the facts and circumstances of the case in view of this as held by the coordinate bench we also allow grounds No. 4 and 5 of the appeal.

22. Ground No. 6 of the appeal is with respect to disallowance of Rs. 3 laks incurred on account of donation. The above donation was made by the assessee to the concern in which the directors of the appellate company are trustees. The ld AO disallowed the above expenditure. The ld CIT(A) also upheld the above disallowance relying on the decision of the coordinate bench. The matter travelled to the coordinate bench for Assessment Year 2010-11 which decided against the assessee as under :-

> “**94.** Ground Nos. 7 & 8 relates to the sustenance of disallowance of Rs.2,50,00,000/-. made by the Assessing Officer on account of donation paid by the assessee. Ground no. 8 relates to the sustaining disallowance of Rs.2500/- in respect of share issue expenses. While disposing of ground no. 6 in preceding paragraph, we held that the income of the assessee has to be computed in accordance with Rule 2 of First Schedule provided in S. 44 of the Income Tax Act and the normal provisions of the Income Tax Act relating to the profit and gains of the business will not apply. Section 44 specifically excludes the provisions of computation of the income chargeable under the head "Interest on Securities", "Income from house properties", "capital gain" or "Income from other sources" or in section 199 or in sections 28 to 43B and requires that the profit and gains of any business of insurance has to be computed in accordance with the rules contained in the First Schedule. Section 28 to 43B are applied when the income is computed under the head "Income from business" but in view of section 44 these provisions are not to be applied while computing the profit and gains of business of insurance. The learned DR even though vehemently contended that since the donations paid are covered under section 80G, therefore, they have to be disallowed. The provision of section 80G falls under Chapter VI-A and the deduction u/s 80G has to be allowed out of the gross total income of the assessee. The gross total income arise at after computing income under each head of income and after giving effect to the inclusion of the other persons income as stipulated under Chapter V, under section 60 to 65, whichever is applicable, and after aggregating the income under various heads of income giving effect to the set off or carried forward of the losses. This means applicability of the provisions of Chapter VI-A have not been denied under section 44 while computing the income in accordance with Rule 2 contained in the First Schedule. We find force in this regard and agree with the contention of the learned DR as it is not a case that the deduction of the donations while computing the income from insurance business has to be allowed as per the provision of section 28 to 43B. The learned Senior Advocate did not advance any argument that the claim of the donation made by the assessee would have been eligible for deduction under section 37 of the Income tax Act while computing the income under the head "Income from business or profession" had it not been the question

of determining the profit and gains of business of life insurance. We, therefore, dismiss ground no.7 taken by the assessee and confirm the disallowance of Rs. 2,50,00,000/- as there is no submission or argument made on behalf of the assesee that the assessee is eligible for deduction under section 80G of the Income tax Act and the assessee had complied with the conditions as stipulated under section 80G. It is also not the case of the assessee that the assessee has incurred these expenses eligible for deduction under section 35CCA, 35CCB, 35CCC or 35CCD so that we have taken a view that while computing the income from insurance business, in view of specific provisions of section 44 no disallowance could have been made"

23. Respectfully following the decision of the coordinate bench with respect to disallowance of donation made u/s 37(1) of the Act is the ground No. 6 is confirmed.

24. The assessee has raised additional ground of appeal which is also related to the above disallowance of donation u/s 37(1) of the Act claiming that the assessee should be allowed. The claim of the assessee is that though donation is disallowable u/s 37(1) of the Act, if it fulfills the condition of the allowability of the donation under chapter VI A of the Act it should be allowed to the assessee. It is submitted that the additional ground is purely technical in nature and alternative claim and therefore, it should be admitted.

25. The ld DR vehemently opposed the admission of the additional ground.

26. We have carefully considered the rival contentions and perused the orders of the lower authorities. All the facts relating to the claim of the assessee are available on record. The assessee is merely raised an alternative claim of deduction. Such ground of appeal can be raised any time of the proceedings. Hence, we admit the same.

27. Adverting to the additional ground the ld AR submitted that identical issue has been decided by the coordinate bench in assessee's own case for Assessment Year 2006-07 in ITA No. 5643/Del/2010 dated 22.04.2019. Similar issue was also decided by the coordinate bench for Assessment Year 2012-13 to 2013-14 as per order dated 14.01.2020. Assessee therefore, submitted the assessee should be allowed for the claim of the above donation.

28. The ld DR submitted that the claim of the assessee has been set aside by the coordinate bench to the file of the ld AO for verification of satisfaction of certain conditions.

29. We have carefully considered the rival contentions and perused the orders of the lower authorities as well as orders of the coordinate bench in assessee's own case for Assessment Year 2006-07, 2012-13. For all these years the coordinate bench has set aside the whole issue back to the file of the ld AO with a direction to verify the claim of the assessee u/s 80G of the Act. Accordingly, giving the same reason, we also set aside the additional ground of appeal back to the file of the ld AO to decide the issue afresh in accordance with the law. Accordingly, additional ground of appeal is allowed for statistical purposes.

30. Ground No. 7 of the appeal is with respect to the exemption of claim by the assessee u/s 10(34) of the Act and with respect to dividend income earned by the appellant. This issue was raised by the assessee as an additional ground before the ld CIT(A). The ld CIT(A) rejected the same on the ground that since the claim was not made in the return of income or before the ld AO, he does not have the power to entertain the additional claim. Accordingly, he dismissed the claim of the assessee. While arguing so he relied upon the order of the ld CIT(A) for assessee's own case for Assessment Year 2010-11.

31. The ld AR submitted that this issue in assessment year 2010-11 reached to the level of the coordinate bench and ITAT vide para No. 98 of that order allowed the claim of the assessee. Further, for Assessment Year 206-07 also as per order dated 22.04.2019 the coordinate bench allowed the claim of the assessee. Further, for Assessment Year 2007-08 to 2009-10 and Assessment Year 2012-13 to 2013-14 also similar claim of the assessee was allowed.

32. The ld DR vehemently supported the order of the lower authorities.

33. We have carefully considered the rival contentions and also perused the orders of the lower authorities as well as order of the coordinate bench wherein identical claim of the assessee is allowed as under :-

> **97.** Now coming to the additional ground taken by the assessee which relates to the claim of deduction by the assessee u/ 10 (34) in respect of dividend income, we noted that this issue is duly covered by decision of Mumbai Bench of this Tribunal in case

of *ICICI Prudential Insurance Co. Ltd.* (*supra*) in which under para 47 while dealing with similar issue following decision of *General Insurance Corp of India* (*supra*) by Bombay HC gave clearcut finding that assessee is entitled to exemption u/s 10(34) for the dividend income. We also noted while disposing of ground relating to applicability of S. 14A for disallowance of expenditure in respect of income not forming part of Total Income. This Tribunal Mumbai Bench in the aforesaid case under para 45-46 took the view that since S. 44 creates a specific exception to the applicability of S. 28-43B, therefore purpose object & purview of S. 14A has no apllicability to profits and gains of an insurance business. This decision of co-ordinate Bench is binding on us. The learned DR in this regard although referred to decision of Delhi Tribunal in the case of assessee *Asstt. CIT* v. *Max New York Life Insurance Co. Ltd.* [2017] 86 taxmann.com 239/167 ITO 540 (Delhi-Trib.) for AY 2002-03 dt 17/10/2017, we noted Tribunal took the view when the question of application of provision of S. 92 came before it, it took the view that S. 92 applied to an assessee carrying on insurance business. In case of computation of determination of ALP of International transaction, we are concerned with S. 92 in the case of an assesse carrying on life insurance business, there has to be two staged computation of income. First income has to be computed as per S. 44 read with First Schedule & while computing income all the other provisions relating to the computation of income chargeable under the head 'Interest on Securities', 'income from house property', 'income from capital gains' or 'income from other sources' or in S. 199 or in S. 28-43B has to be disregarded. Second stage comes after computation of income u/s 44, computation as per provision of S. 92 by making addition on a/c of transfer pricing adjustment.

98. This decision in our view will not apply w.r.t. the applicability of S. 14A as the applicability or inapplicability of S 14A has to be considered at the stage of making computation of income u/s 44. We also do not agree with submissionof learned DR since the only activity in shareholders a/c is of investment, it cannot be said that no expenditure was incurred for earning dividend. In this regard, we may state question before us is not whether any expenditure has been incurred or not for earning of dividend but the question relates to the applicability of S. 14A, which issue has already been decided by co-ordinate Bench against Revenue in view of discussion under para 46 of the order of this Tribunal Mumbai Bench in case of *ICICI Prudential Insurance Co. Ltd.* (*Supra*), in which they have followed the decision of Delhi Bench in case of *Oriental Insurance Co. Ltd.* v *Asstt. CIT* [2010] 40 SOT 19 (URO). No contrary decision for applicability of S. 10(34) & S. 14A was brought to our knowledge. We accordingly allow the additional ground and dismiss the plea of learned DR that directions be given in case exemption is granted u/s 10(34) to disallow be expenditure u/s 14A of the Income Tax Act.

34. There is no change in the facts and circumstances. Therefore, respectfully following the decision of the coordinate bench in assessee's own case for several year we also allow ground No.7 of the appeal.

35. Ground No. 8 of the appeal is with respect to direction of the ld CIT(A) to the ld AO to re-compute the losses assessed in earlier assessment years as per section 44 of the Act and further the grant set off u/s 72 of the Act only in

respect of income covered u/s 115B(ii) of the Act and that too against the loss as re-compute in earlier years.

36. The ld AR submitted that this issue arose in the Assessment Year 2010-11 and coordinate bench vide para No. 96 has amended the direction given by the ld CIT(A).

37. The ld DR supported the orders of the ld CIT(A).

38. We have carefully considered the rival contentions and perused the orders of the lower authorities as well as the orders of the coordinate bench in assessee's own case for earlier years. The coordinate bench for Assessment Year 2010-11 vide para No. 96 has amended the direction given by the ld CIT(A). There is no change in the facts and circumstances of the case therefore, for the same reason as contained in the order of the coordinate bench for Assessment Year 2010-11 we also amend the direction of the ld CIT(A) accordingly. Hence, ground No. 8 of the appeal is allowed.

39. Ground no. 9 of the appeal is with relation to initiation of penalty proceedings u/s 271(1)(c) of the Act. We find that the issue of initiation of the penalty cannot be a ground and further as no penalty has been levied the above ground is premature. Hence, it is dismissed.

40. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 13/05/2020.

-Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 13/05/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi