IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No.1718/Mum/2020
(**Assessment Year :2015-16**)

M/s. Tata AIG General Insurance Company Limited 15th Floor, Tower-A Peninsula Business Park G.K. Marg, Lower Parel Mumbai – 400 013	Vs.	Deputy Commissioner of Income Tax-8(3)(1), Mumbai
PAN/GIR No.AABCT3518Q		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Madhur Aggarwal
Revenue by	Shri Mehul Jain
Date of Hearing	**18/02/2022**
Date of Pronouncement	**25/04 /2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.1718/Mum/2020 for A.Y.2015-16 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-15, Mumbai in appeal No.CIT(A)-15, Mumbai/10628/2019-20 dated 28/02/2020 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 31/12/2018 by the ld. Dy. Commissioner of Income Tax-8(3)(1), Mumbai (hereinafter referred to as ld. AO).

2. The ground Nos. 1 & 2 raised by the assessee are general in nature and does not require any specific adjudication. It would be relevant to mention here that the assessee being a general insurance company is bound to prepare the accounts in accordance with the provisions of the first schedule to the Income Tax Act, 1961 (hereinafter referred to as 'Act'). The computation of income of insurance company would be prepared on these accounts subject to the adjustments that are provided in Rule 2 and Rule 5 of the first schedule of the Act. In effect as per Rule 5 of the first schedule to the Act, the assessee's income would be profits as disclosed in the profit and loss account prepared as per the Insurance Act, 1938 excluding the amounts disallowable u/s. 30 to 43B of the Income Tax Act. This has been duly followed by the assessee in the instant case.

3. The ground Nos. 3 & 4 raised by the assessee are challenging the disallowance of re-insurance premium paid to non-resident reinsurers, who do not have a place of business / branch in India, u/s.37(1) of the Act. The alternative disallowance that was made by the ld. AO in this regard was u/s.40(a)(i) of the Act for payments made without deduction of tax at source.

3.1. We have heard rival submissions and perused the materials available on record. We find that assessee is in the business of general insurance. During the year, the assessee paid an amount of Rs.681,13,22,176/- to non-resident companies (foreign reinsurers) as reinsurance premium. The assessee had not withheld tax on these outward remittances except one payment of Rs.45,55,87,765/- made to Swiss Reinsurance Co. Ltd., The ld. AO observed that the remaining reinsurance premium paid in the sum of Rs.635,57,94,411/- was liable for

disallowance u/s.37 of the Act in view of the provisions contained in Section 101A r.w.s. 2(9) of the Insurance Act, 1938. Additionally, the ld. AO, on without prejudice basis, also observed that since the said payment of Rs.635,57,94,411/- was made without deduction of tax at source, the same would be liable for disallowance u/s.40(a)(i) of the Act also. When assessee was show-caused in this regard, the assessee gave a detailed explanation before the ld. AO which was not considered. Accordingly, the ld. AO proceeded to make disallowance of reinsurance premium of Rs.635,57,94,411/- u/s.37(1) and alternatively also stated that the same would be liable for disallowance u/s.40(a)(i) of the Act.

3.2. The ld. CIT(A) considering the fact that there was an amendment in Section 2(9) of the Insurance Act, 1938 w.e.f. 26/12/2014 held that the assessee shall be allowed deduction on payments made prior to 26/12/2014 and payments made on or after 26/12/2014 shall be covered within the ambit of Explanation 1 to Section 37 of the Income Tax Act liable for disallowance thereon. The ld. CIT(A) however, said that since the entire payment was made without deduction of tax at source, the ld. AO was justified in alternatively making disallowance u/s.40(a)(i) of the Act.

3.3. We find that assessee is an independent insurance company registered with Insurance Regulatory and Development Authority of India (IRDA) as provided in Section 3(2A) of the Insurance Act, 1938. It is not in dispute that the assessee has paid reinsurance premium to non-resident insurance companies. It is not in dispute that the said non-resident reinsurance companies do not have any branch or any place of business in India. The case of the Revenue is that the payments made to non-resident reinsurance companies were in violation of provisions of

Insurance Act 1938 and accordingly, not allowable as deduction in terms of Explanation-1 to Section 37 of the Act. Hence, the two points that are to be decided in this appeal are as under:-

a) Whether the re-insurance premium paid to non-resident reinsurance companies was in violation of provisions of the Insurance Act and consequently whether the provisions of Explanation to Section 37(1) of the Act after 26/12/2014 could be brought into force ?
b) Whether reinsurance payment made would be in violation of provisions of Section 40(a)(i) of the Act ?

3.4. We find that the ld. AO had heavily placed reliance on the decision of the Co-ordinate Bench of Chennai Tribunal in the case of DCIT vs. Cholamandalam MS General Insurance Co. Ltd where the provisions of Section 2(9) r.w.s. 101A(7) of the Insurance Act, 1938 were dealt with and the issue in dispute was decided against the assessee. In this regard, it would be relevant to reproduce the provisions of Section 2(9) and Section 101A of the Insurance Act, 1938 as under:-

> *(9) "Insurer" means-*
> *(a) any individual or unincorporated body of individuals or body corporate incorporated under the law of any country other than India, carrying on insurance business not being a person specified in sub-clause (c)of this clause which-*
>
> *(i) carries on that business in India, or*
>
> *(ii) has his or its principal place of business or is domiciled in India, or*
>
> *(iii) with the object of obtaining insurance business, employs a representative, or maintains a place of business in India;*
>
> *(b) any body corporate [not being a person specified in sub-clause (c) of this clause] carrying on the business of insurance, which is a body corporate incorporated under any law for the time being in force in India, or stands to any*

such body corporate in the relation of a subsidiary company within the meaning of the Indian Companies Act, 1913 (7 of 1913), as defined by sub-section (2) of section 2 of that Act, and

(c) any person who in India has a standing contract with underwriters who are members of the Society of Lloyd's whereby such person is authorised within the terms of such contract to issue protection notes, cover notes, or other documents granting insurance cover to others on behalf of the underwriters.

But does not include a principal agent' chief agent, special agent' or an insurance agent or a provident society as defined in Part III;

PART IV-A
RE-INSURANCE

Re-insurance with Indian reinsurers

101A. *(1) Every insurer shall re insure with Indian rc-insurers such percentage of the sum assured on each policy as may be specified by the Authority with the previous approval of the Central Government under sub-section (2).*

(2) For the purposes of sub-section (1), the Authority may, by notification in the official Gazette,—

(a) specify the percentage of the sum assured on each policy to be reinsured and different percentages may be specified for different classes of insurance:

Provided *that no percentage so specified shall exceed thirty per cent of the sum assured on such policy; and*

(b) also specify the proportions in which the said percentage shall be allocated among the Indian re-insurers.

(3) Notwithstanding anything contained in sub-section (1), an insurer carrying on fire-insurance business in India may, in lieu of re-insuring the percentage specified under sub-section (2) of the sum assured on each policy in respect of such business, re-insure with Indian re-insurers such amount out of the first surplus in respect of that business as he thinks fit, so however that the aggregate amount of the premiums payable by him on such re-insurance in any year is not less than the said percentage of the premium income (without taking into account premiums on re-insurance ceded or accepted) in respect of such business during that year

Explanation- For the purposes of this-section. the year 1961 shall be deemed to mean the period from the 1st April to the 31st December of that year.

(4) A notification under subsection (2) may also specify the terms and conditions in respect of any business of re-insurance required to be transacted under this section and such terms and conditions shall be binding on Indian re-insurers and other insurers.

(5) No notification under sub-section (2) shall be issued except after consultation with the Advisory Committee constituted under Section 101B.

(6) Every notification issued under this section shall be laid before each House of Parliament, as soon as may be, after it is made.

(7) For the removal of doubts, it is hereby declared that nothing in subsection (I) shall be construed as preventing an insurer from reinsuring with any Indian re-insurer or other insurer the entire sum assured on any policy or any portion thereof in excess of the percentage specified under sub-section (2).”

3.5. Further w.e.f. 26/12/2014, Insurance Laws (Amendment) Act, 2015 was brought into force wherein the erstwhile Section 2(9) of the Insurance Act, 1938 was amended. The amended definition of “insurer” as per Section 2(9) of the Insurance Act is as under:-

(9) "insurer" means—
(a) an Indian Insurance Company, or
(b) a statutory body established by an Act of Parliament to carry on insurance business, or
(c) an insurance co-operative society, or

(d) a foreign company engaged in re-insurance business through a branch established in India.

Explanation.—For the purposes of this sub-clause, the expression "foreign company" shall mean a company or body established or incorporated under a law of any country outside India and includes Lloyd's established under the Lloyd's Act, 1871 (United Kingdom) or any of its Members;”

3.6. From the amended definition of term “insurer” u/s.2(9) of the Insurance Act w.e.f. 26/12/2014, it could be seen that a foreign company engaged in reinsurance business through a branch established in India would also fall within the definition of “insurer”. Prior to 26/12/2014 this amended definition was not in force and hence, not applicable. That’s why the ld. CIT(A) had granted relief to the assessee by holding that any payment of reinsurance premium made to non-resident reinsurers would not be in violation of provisions of Insurance Act and consequently the provisions of Explanation-1 to Section 37 of the Income Tax Act could not be applied thereon. Against this finding, the Revenue is not in appeal

before us and hence, this particular finding had attained finality. Hence, what is required for us to be adjudicated is only whether the payments made on or after 26/12/2014 would be in violation of provisions of Insurance Act and consequently liable for disallowance in terms of Explanation 1 to Section 37 of the Income Tax Act. As stated earlier, undisputedly, reinsurers to whom assessee had made payment, does not have any place of business or branch in India. So, even after 26/12/2014, the amended definition of Section 2(9) of the Insurance Act could not be made applicable to the facts of the instant case.

3.7. The provisions of Section 101A of Insurance Act has already been reproduced hereinabove. The relevant provision which is applicable thereon to the facts of the instant case is Section 101A(7). For the sake of convenience, the Section 101A(7) of the Insurance Act alone is reproduced hereunder:-

101A(7):

> *"For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall be construed as preventing an insurer from re-insuring with any Indian re-insurer or other insurer the entire sum assured on any policy or any portion thereof in excess of the percentage specified under sub-section (2)."*

3.8. From the aforesaid provision, the expression "other insurer" assumes significance. Whether the aforesaid expression "other insurer" would include foreign re-insurers? If the answer is in the affirmative, then the assessee has not violated any provisions of the Insurance Act, 1938 and consequently there cannot be any disallowance in terms of Explanation 1 to Section 37(1) of the Income Tax Act. If the answer is in the negative, then the assessee had violated the provisions of Insurance Act and consequently would be liable for disallowance in terms of Explanation 1 to Section 37 of the Income Tax Act.

3.9. As stated earlier, the provisions of Insurance Act i.e. Section 2(9) and Section 101A(7) were subject matter of adjudication by the Chennai Tribunal in the case of Cholamandalam MS General Insurance Co. Ltd referred to supra which was heavily relied upon by the ld. AO. The relevant operative portion of the said judgement as reproduced in the order of the ld. CIT(A) is reproduced herein for the sake of convenience:-

> *" The question now arises for consideration is when the provisions of Section 2(9) of the Insurance Act, 1938 is applicable with effect from 26.12.2014, why it is not applicable for earlier assessment years? This Tribunal is of the considered opinion that the provisions of Section 2(9) of the Insurance Act, 1938 is applicable as it stood at relevant point of time even for earlier assessment years.*
>
> *The word "other insurer" provided in Section 101A(7) of the Insurance Act, 1938 enables the Indian insurers for re-insuring over and above the percentage fixed by the Insurance Regulatory And Development Authority of India. The re-insurance may be either with Indian re-insurer or other insurer. By taking advantage of the term "other insurer", now the assessee claims that they can re-insure with non-resident re-insurance company ignoring the provisions of Indian Insurance Act, 1938. This Tribunal is of the considered opinion that there is no merit in the contention of the Ld. Sr. counsel for the assessee. The term "other insurer" as provided in Section 101A(7) of the Insurance Act, 1938 is only the insurer which was defined in Section 2(9) of the Insurance Act, 1938. There cannot be any extended meaning which can be given to the term "other insurer". The definition given in Section 2(9) of Insurance Act, 1938 is not inclusive one. It is an exhaustive one. Therefore, an Indian insurer cannot have any re-insurance arrangement with re-insurance company other than the insurer as defined / referred in Section 2(9) of Insurance Act, 1938.*

3.10. This was the strong contention of the Revenue to deny the disallowance of reinsurance premium payment made to non-resident reinsurers in the instant case. We find that the aforesaid finding of Chennai Tribunal has been reversed by the Hon'ble Madras High Court in the case of Cholamandalam MS General Insurance Co. Ltd vs. DCIT reported in 102 taxmann.com 292 dated 12/12/2018. It would be relevant to reproduce the questions raised before the Hon'ble Madras High Court as under:-

"2.The common legal issue arising in these appeals relates to disallowance of reinsurance premium ceded to non-resident reinsurers. The assessees have raised the following substantial questions of law for consideration:-

"(i) Whether the ITAT erred in deciding the validity of reinsurance ceded to the non-resident reinsurers when such issue was not even raised before it by either the Department or the Appellant?

(ii) Whether the ITAT erred in holding that the IRDA (General Insurance – Reinsurance) Regulation, 2000 is contrary to section 101A of the Insurance Act, 1938 when it does not have the power to decide the validity of regulations made by the IRDA?

(iii) Whether the ITAT erred in holding that reinsurance payments to non-residents are prohibited by law and therefore hit by Explanation 1 to section 37 of the Act?

(iv) Whether the ITAT erred in failing to follow co-ordinate bench decisions on the very question of reinsurance payments to non-residents when it ought to have referred the matter to a larger bench if it disagreed with such judgments?"

3.11. The Hon'ble Madras High Court considered Cholamandalam MS General Insurance Co. Ltd case in TCA No.754 of 2018 as the lead case. Out of the aforesaid four questions, the question Nos. 2 & 3 would be relevant for our adjudication in the instant case. The aforesaid questions were addressed by the Hon'ble Madras High Court by observing as under:-

"12.The sum and substance of the conclusion of the Tribunal is that the entire reinsurance arrangement of the assessee-company is in violation and contrary to the provisions of Section 2(9) of the Insurance Act and therefore, the entire reinsurance premium has to be disallowed under Section 37 of the Act. The Tribunal holds that there is a clear prohibition for payment of reinsurance premium to the non- resident reinsurance companies.

13.As noticed above, it is neither the case of the Revenue, nor the case of the assessee that the claim for deduction was made under Section 37 of the Act. The Tribunal suo motu has non-suited the assessee by referring Explanation 1 to Section 37 of the Act. Under the said Explanation, it was declared that any expenditure incurred by an assessee for any purpose, which is an offence or which is prohibited by law, shall not have been

deemed to be incurred for the purpose of business or supervision and no allocation or allowance shall be made in respect of such expenditure. Admittedly, the Tribunal did not render any finding that the assessee has incurred expenditure for a purpose, which is an offence. However, the Tribunal holds that expenditure incurred by the assessee is prohibited by law.

14.The larger question would be whether at all this is an expenditure? However, we do not propose to deal with this, as that was never decided by the Tribunal in the impugned order and leave the issue open. Thus, we are required to examine as to whether in the facts and circumstances, the Tribunal was right in holding that payment of reinsurance premium to non-resident insurance companies is prohibited and to be disallowed under Section 37 of the Act.

15.As pointed out earlier, neither the Revenue, nor the assessee referred to Section 37 of the Act. Thus, the error committed by the Tribunal firstly is in exceeding the scope of the order of remand passed by the Division Bench of this Court in the earlier decision noted above. Secondly, the Tribunal has no jurisdiction to declare a transaction to be either prohibited or illegal occurring under a different statute over which, it has no control. In other words, the Income-tax Officer cannot declare a transaction as illegal under the provisions of the Insurance Act or the Regulations framed thereunder. The Income- tax Officer can examine as to whether any income accrued in the hands of the assessee is required to be taxed. In the instant case, neither the Assessing Officer, nor the Commissioner of Income-tax (Appeals)-II (for brevity "the CIT(A)") has made any such endeavour, but the Tribunal has done such an exercise which, in our considered opinion, was without jurisdiction. Nevertheless, as we have heard elaborate arguments on the side of the assessees as well as the Revenue, we are constrained to test the correctness of the order passed by the Tribunal in this regard. Thus, we have to decide as to whether there is a prohibition under law for insurance payments to non-residents so as to attract the rigour of Explanation 1 to Section 37 of the Act.

16.In this regard, we may straightaway refer to the statement of objects and reasons for the Insurance (Amendment) Bill, 1961, which was introduced in the Lok Sabha on 14th February, 1961. This Bill was passed and the Insurance Act stood amended. The Hon'ble Finance Minister for the Union of India would state that re-insurance is an essential part of general insurance business and at present (1961), insurance companies, operating in India, are dependent on companies outside India for a very large part of their requirements in this connection and more often than not enter into dis-advantageous arrangements. Moreover, re-insurance with companies outside India results in loss of foreign exchange and the Bill is intended to foster the growth of Indian re-insurance companies and also to save foreign exchange. The Bill sought to provide that every insurance company operating in India must re-insure a certain percentage of its business with

Indian re-insurance companies approved in this behalf by the Central Government. The Central Government was given power to fix the percentage and this power to be exercised in consultation with the Advisory Committee so constituted. The power was also conferred on the Central Government to allocate the percentage so fixed amongst the approved Indian re-insurance companies. With the aforesaid object, the Bill proposed to insert Part IVA under the head "Re- insurance" containing two provisions, viz., Sections 101A and 101B.

17.The Bill had been passed by the Parliament and the Insurance Act stood amended with effect from 01.04.1961. For better appreciation, the same is quoted hereinbelow:-

> *"Re-insurance with Indian re-insurers. Section 101A:-*
> *(1) Every insurer shall re-insure with Indian re-insurers such percentage of the sum assured on each policy as may be specified by the [the Authority with the previous approval of the Central Government] under sub-section (2).*
> *(2) For the purposes of sub-section (1), [the Authority] may, by notification in the Official Gazette,-*
> *(a) specify the percentage of the sum assured on each policy to be re-insured and different percentages may be specified for different classes of insurance: Provided that no percentage so specified shall exceed thirty per cent. of the sum assured on such policy; and*
> *(b) also specify the proportions in which the said percentage shall be allocated among the Indian re-insurers.*
> *(3) Notwithstanding anything contained in sub-section (1), an insurer carrying on fire insurance business in India may, in lieu of re-insuring the percentage specified under sub-section (2) of the sum assured on each policy in respect of such business, re-insure with Indian re-insurers such amount out of the first surplus in respect of that business as he thinks fit, so however that, the aggregate amount of the premiums payable by him on such re-insurance in any year is not less than the said percentage of the premium income (without taking into account premiums on re-insurance ceded or accepted) in respect of such business during that year.*
> *Explanation .—For the purposes of this sub- section, the year 1961 shall be deemed to mean the period from 1st April to the 31st December of that year.*
> *(4) A notification under sub-section (2) may also specify the terms and conditions in respect of any business of re-insurance required to be transacted under this section and such terms and conditions shall be binding on Indian re-insurers and other insurers.*
> *(5) No notification under sub-section (2) shall be issued except after consultation with the Advisory Committee constituted under section 101B.*
>
> *(6) Every notification issued under this section shall be laid before each House of Parliament, as soon as may be, after it is made.*
>
> *(7) For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall be construed as preventing an insurer from re-insuring with any Indian re-insurer or other insurer the entire sum assured on any policy or any portion thereof in excess of the percentage specified under sub-section (2).*

> *(8) In this section,—*
>
> *(i) "policy" means a policy issued or renewed on or after the 1st day of April, 1961, in respect of general insurance business transacted in India and does not include a re-insurance policy; and [(ii) "Indian re-insurer" means an Indian insurance company which has been granted a certificate of registration under sub-section (2A) of section 3 by the Authority to carry on exclusively the re-insurance business in India.]"*

18.The interpretation given by the Tribunal is with regard to the meaning of the term "other insurer" occurring in sub-Section (7) of Section 101A of the Insurance Act. Sub-Section (7) of Section 101A starts with the words "For the removal of doubts", which would denote that it is clarificatory with regard to what has been stated in sub- Section (1) of Section 101A. It was clarified and declared that nothing in sub-Section (1) of Section 101A shall be construed as preventing an insurer from re-insuring with any Indian re-insurer or other insurer, the entire sum on any policy or any portion thereof in excess of the percentage specified under sub-Section 2 of Section 101A. The Tribunal while explaining the meaning of the words "other insurer", held that the definition of "insurer" under sub-Section (9) of Section 2 of the Act alone should be relied upon and that is the only definition of "insurer" and if such a definition is applied, re-insurance with foreign companies is prohibited by law. The Tribunal held that the word "other insurer" provided in Section 101A(7) of the Insurance Act enables the Indian insurer for reinsuring over and above the percentage fixed by the Regulatory Authority and the reinsurance may be either with Indian re-insurer or other insurer. It further held that by taking advantage of the term "other insurer", the assessee claims that they can re-insure with non-resident reinsurance company ignoring the provisions of the Insurance Act. It further proceeded to hold that the term "other insurer" as provided in Section 101A(7) of the Insurance Act is only the insurer, which is defined in Section 2(9) of the Insurance Act and there cannot be any extended meaning, which can be given to the term "other insurer". Thus, it held an Indian insurer cannot have any reinsurance arrangement with reinsurance company other than the insurer, as defined in Section 2(9) of the Insurance Act. In our considered view, the conclusion of the Tribunal is not \ sustainable. We support such conclusion with the following reasons.

19.In exercise of the powers under Section 114A of the Insurance Act, and Sections 14 and 26 of the Insurance Regulatory and Development Authority Act, 1999, the Central Government framed the Insurance Regulatory and Development Authority Regulations pertaining to General Insurance – Reinsurance called Insurance Regulatory and Development Authority (General Insurance – Reinsurance) Regulations, 2000. Chapter II of the said Regulations deals with procedure to be followed for re-insurance arrangements and it would be beneficial to refer to the said provision, which reads as follows:-

> *"Chapter II:-*

3. Procedure to be followed for Reinsurance Arrangements:-

(1) The Reinsurance Programme shall continue to be guided by the following objectives to:
a) maximise retention within the country;
b) develop adequate capacity;
c) secure the best possible protection for the reinsurance costs incurred;
d) simplify the administration of business.
(2) Every insurer shall maintain the maximum possible retention commensurate with its financial strength and volume of business. The Authority may require an insurer to justify its retention policy and may give such directions as considered necessary in order to ensure that the Indian insurer is not merely fronting for a foreign insurer.
(3) Every insurer shall cede such percentage of the sum assured on each policy for different classes of insurance written in India to the Indian reinsurer as may be specified by the Authority in accordance with the provisions of Part IVA of the Insurance Act, 1938.
(4) The reinsurance programme of every insurer shall commence from the beginning of every financial year and every insurer shall submit to the Authority, his reinsurance programmes for the forthcoming year, 45 days before the commencement of the financial year;
(5) Within 30 days of the commencement of the financial year, every insurer shall file with the Authority a photocopy of every reinsurance treaty slip and excess of loss cover covernote in respect of that year together with the list of reinsurers and their shares in the reinsurance arrangement

(6) The Authority may call for further information or explanations in respect of the reinsurance programme of an insurer and may issue such direction, as it considers necessary;
(7) Insurers shall place their reinsurance business outside India with only those reinsurers who have over a period of the past five years counting from the year preceding for which the business has to be placed, enjoyed a rating of at least BBB (with Standard & Poor) or equivalent rating of any other international rating agency. Placements with other reinsurers shall require the approval of the Authority. Insurers may also place reinsurances with Lloyd's syndicates taking care to limit placements with individual syndicates to such shares as are commensurate with the capacity of the syndicate.

(8) The Indian Reinsurer shall organise domestic pools for reinsurance surpluses in fire, marine hull and other classes in consultation with all insurers on basis, limits and terms which are fair to all insurers and assist in maintaining the retention of business within India as close to the level achieved for the year 1999-2000 as possible. The arrangements so made shall be submitted to the Authority within three months of these regulations coming into force, for approval.

(9) Surplus over and above the domestic reinsurance arrangements class wise can be placed by the insurer independently with any of the reinsurers complying with sub-regulation (7) subject to a limit of 10% of the total reinsurance premium ceded outside India being placed with any one reinsurer. Where it is necessary in respect of specialised insurance to cede a

> *share exceeding such limit to any particular reinsurer, the insurer may seek the specific approval of the Authority giving reasons for such cession.*
>
> *(10) Every insurer shall offer an opportunity to other Indian insurers including the Indian Reinsurer to participate in its facultative and treaty surpluses before placement of such cessions outside India.*
>
> *(11) The Indian Reinsurer shall retrocede at least 50% of the obligatory cessions received by it to the ceding insurers after protecting the portfolio by suitable excess of loss covers. Such retrocession shall be at original terms plus an over-riding commission to the Indian Reinsurer not exceeding 2.5%. The retrocession to each ceding insurer shall be in proportion to its cessions to the Indian Reinsurer.*
>
> *(12) Every insurer shall be required to submit to the Authority statistics relating to its reinsurance transactions in such forms as the Authority may specify, together with its annual accounts." The above Regulations are Statutory Regulations, which bind the stakeholders.*

20.A conjoint reading of Regulation 3 and sub-Regulations (1) to (10) will clearly show that the objectives were to maximize the retention of revenue within the country. What we are required to see is whether there is any indication in the Insurance Regulatory and Development Authority (General Insurance – Reinsurance) Regulations, 2000 prohibiting re-insurers with a foreign insurer. A reading of Regulations 3(2), 3(4), 3(7), 3(9) and 3(10) clearly show that there is no bar.

21.The sum and substance of the Regulations is that every insurer shall cede such percentage of sum assured on each policy, for different classes of insurance written in India to the Indian re-insurer as may be specified by the Authority under Section 101A of the Insurance Act. Therefore, every Indian insurer is to cede, such specified/notified percentage of the sum assured and not the whole. The commencement date for the re-insurance programme is also spelt out in the Regulations. The insurer has to disclose payments made outside India and there is also a restriction on with whom, they can enter into a contract of re-insurance, as the Regulations place an embargo stating that such entity should have enjoyed the rating of at least BBB or equivalent rating of any other international rating agency. Thus, the reading of the Regulations will clearly show there is absolutely no prohibition for re-insurance with a foreign re-insurance company.

22.The observations made in the finding rendered by the Tribunal stating that the Regulations are inconsistent with the provisions of the Act are utterly perverse and to be outrightly rejected. In 2008, the Standing Committee on Finance proposed the amendment to the Insurance Laws and the Insurance Laws (Amendment) Bill, 2008 was introduced. The report of the Committee states that the General Insurance Corporation Re is the only national re-insurer operating in India and also has re-insurance business in international market and its share of international business is 44 per cent. The Chairman of the General Insurance Corporation (GIC), who is

one of the respondents in these appeals, has deposed before the Standing Committee on Finance and would state that the legal position as of 2008, there was no bar on doing re-insurance business by any foreign re-insurance company in India. The Chairman, GIC expressed deep concern that when GIC has to transact international business in various countries, they are subjected to lot of crosschecks and regulation and there is no corresponding regulation in India, as a result of which, foreign re-insurance companies can accept re-insurance business without taking any licence and without opening any branch in India. Thus, the suggestion was there is a need for regulation for any foreign country coming into India and doing re-insurance business. Ultimately, the Standing Committee on Finance noted that there is no bar on foreign re-insurance business companies carrying on re- insurance business in the country without any licence or opening a branch, nor there was a regulation to control the transaction of foreign re-insurers. This ultimately, led to the amendment to the Insurance Act by amending the definition of "insurer" in Section 2(9) of the Insurance Act to mean a foreign company engaged in re-insurance business through a branch established in India. The Tribunal was of the view that unless and until a branch is opened by the foreign re- insurance company, the question of conducting re-insurance business in India cannot be done. In our considered view, this conclusion of the Tribunal is not sustainable. The answer lies not in any recent proceedings but, a circular issued by the CBDT as early as on 03.10.1956 bearing Circular No. 38(XXXIII-7) [F.No.51(5)-IT/54]. The operative portion of the circular reads as follows:-

> *"Liability to tax or freedom therefrom of the foreign reinsurer will depend on various factors, such as the existence of reciprocity between the Indian insurer and the foreign reinsurer, the magnitude of local retention as compared with the reinsurance premium paid by the Indian insurer to the foreign reinsurer and so on. The Income-tax Officers will, therefore, have to examine each case in the light of its facts and decide where tax liability is attracted, what portion of the income from the reinsurance should be assessed under section 42(2) of the 1922 Act [corresponding to section 92 of the 1961 Act]."*

23.A reading of the above circular would clearly reveal that at no point of time, the Income-tax Department took a stand that the re-insurance business with a foreign re-insurance company was a prohibited business. Further, the Tribunal fell in error in rendering such a finding without noticing the Re-insurance Regulations, which has been provided by the Insurance Regulatory and Development Authority of India. In the said Regulations, the highlights of the statement and objects for introduction of Chapter IVA to the Insurance Act in the amendment, in the year 1961, had been brought into after which, there is an order of Preference for Re-insurance Cessions. In the order of preference, the last among them is what can be offered to Indian insurers and overseas insurers. Thus, the

regulations does not wholly prohibit any re-insurance with overseas re-insurance companies subject to the condition that the other priorities contained in Clauses 1, 2 and 3 of the regulations are exhausted. Furthermore, the Reserve Bank of India, Exchange Control Department, Central Office, Mumbai notified the Foreign Exchange Management (Insurance) Regulations, 2000. The major changes in the procedure as per the memorandum of Exchange Control Regulations relating to General Insurance in India (GIM) were summarised and the relevant Regulation, pertaining to re- insurance arrangement, is as follows:-

S.No.	*Subject Matter*	*Changes*
1	*Reinsurance Arrangement*	*The reinsurance arrangement of public sector general insurance companies registered with ITDA are to be decided by the Reinsurance respective Boards of the insurance companies and IRDA is to be kept informed. ADs designated by these insurance companies are now permitted to make remittances falling under such approved reinsurance arrangements without reference to the bank.*

24.The above will clearly show that re-insurance arrangement with a foreign insurance company is permissible. Thus, it is evidently clear that on and after the introduction of Section 101A to the Insurance Act, there is a mandatory requirement for other insurer to re-insure with the Indian re-insurers and such percentage is put to a maximum of 30% and the language of Section 101A nowhere prohibits the re-insurance with foreign re-insurance companies above the percentage specified by the authority with previous approval by the Central Government. That apart, the Tribunal erred in drawing a presumption regarding prohibition of re-insurance with foreign re- insurance companies. This presumption is erroneous for the simple reason that the statement of objects of the Insurance Act itself clearly stipulates wherever there is a prohibition. By way of illustration, we can refer to Sections 2(c), 2(c)(b), 2(9), 32(a), 40, 41, 42(a) and 52(a). Therefore, no inference could have been drawn, as drawn by the Tribunal and consequently, to be held that there can be no bar or prohibition under the Insurance Act, which prohibits ceding of re- insurance with a foreign re-insurer outside India.

25.Section 2(16B) defines "re-insurance" to mean the insurance of all or part of one insurer's risk by another insurer who accepts the risk for a mutually acceptable premium. There is no distinction drawn between an Indian re-insurer and a foreign re- insurer. As rightly submitted by Mr.M.Vijayaraghavan, learned counsel for CIG, the words "other insurer" occurring in sub-Section 7 of Section 101A of the Insurance Act cannot be treated as a "pronoun" or a "noun" and should be read as a "verb". This is more so because, there is no separate definition provided for "other

insurer" and considering the scheme of Section 101A of the Insurance Act, "other insurer" should mean the insurer, who is outside India and not a person in terms of the definition under Section 2(9) of the Act. In the light of the above discussion, we are of the clear view that the Tribunal erred in coming to a conclusion that it is not the intention of the Parliament to authorize an Indian insurer to have re-insurance outside the country ignoring the provisions of Insurance Act referred above. The Tribunal had no jurisdiction to declare any provisions of the regulations to be inconsistent with the provisions of the Insurance Act. This was wholly outside the purview of the Tribunal. Thus, the Tribunal clearly exceeded its jurisdiction in stating that the assessees have engaged in a transaction, which is prohibited by law and therefore, not entitled for deduction under Section 37 of the Act. This has never been the case of the Revenue either before the Assessing Officer or before the CIT(A) or before the Tribunal, when they filed appeals challenging that portion of the order passed by the CIT(A), which was against the Revenue.

26.The Tribunal while upholding the order of the Assessing Officer did not assign any independent reasons. The discussion in the impugned order relates to the validity of re-insurance business outside India done by an Indian insurer. The Tribunal did not consider the correctness of the order passed by the Assessing Officer or that of the CIT(A). Therefore, the Tribunal could not have held that the Assessing Officer rightly disallowed the re-insurance premium under Section 40(a)(i). This finding is not supported with any reasons. Therefore, the Tribunal misdirected itself, exceeded the scope of remand as ordered by the Division Bench and ventured into a jurisdiction, which is wholly prohibited in the light of the plain language of Section 254(1) of the Act.

27.Thus, for the above reasons, we are of the clear view that the order passed by the Tribunal calls for interference. Accordingly, the appeals, filed by the assessee are allowed and the substantial questions of law framed are answered in favour of the assessee.

28.In the light of the above, the matter stands remanded to the Tribunal to take a decision on the following points:-

(i) Whether the Assessing Officer was right in disallowing the re-insurance premium under Section 40(a)(i) of the Act;

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

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

29.We make it clear that the Tribunal shall decide the above questions alone and nothing more and the decision shall be taken based on the

> *available material and the assessee and the Revenue are not entitled to place any fresh material before the Tribunal so as to enable the Tribunal to take a decision as expeditiously as possible. No costs. Consequently, the connected miscellaneous petitions are closed.*
>
> ***(Underlining provided by this Tribunal while placing reliance on the decision of Hon'ble Madras High Court)***

3.12. Hence, from the aforesaid decision of Hon'ble Madras High Court, it could be safely concluded that payment of re-insurance premium by the assessee to foreign reinsurers who do not have place of business or branch established in India, is not in violation of provisions with Insurance Act and consequently the provisions of Explanation-1 to Section 37 of the Act could not be applied in the facts of the instant case. To this extent, the assessee succeeds. Accordingly, the bifurcation of payments prior to 26/12/2014 and after 26/12/2014 as done by the ld. CIT(A) in his order need not be gone into as they would become redundant.

3.13. It is also pertinent to note that assessee vide letter dated 29/04/2014 had written a letter to IRDA submitting the final re-insurance programme for the year 2014-15 while giving complete list thereon. These documents are enclosed in pages 245-249 of the paper book filed before us. Further the assessee vide letter dated 28/04/2014 had addressed to IRDA seeking approval as per reinsurance regulations 3(11)-2013 in respect of reinsurance premium for the year 2014-15 giving complete details thereon. These documents are enclosed from pages 250-258 of the paper book filed before us. In response to the same, after analyzing the reinsurance programme for the year 2014-15, IRDA had addressed a letter of the assessee dated 27/04/2015 approving the requests of the assessee. This goes to prove that the reinsurance premium sought to be paid to foreign reinsurers outside India was taken due cognizance by the IRDA, being the regulatory authority for insurance

companies, and had not found anything adverse or in any violation of provisions of Insurance Act and insurance regulations thereon. Further we find that IRDA vide letter dated 12/02/2020 had given clarification in respect of assessment proceedings of the assessee company for A.Y.2016-17 and 2017-18 directly addressed to the ld. AO, wherein, it was specifically clarified that the reinsurance premium paid by the assessee to foreign reinsurers outside India who do not have any business presence in India, was permitted in law and was permitted activity under the insurance Act 1938 and IRDA (General Insurance-Reinsurance) Regulations issued by the authority. It was also mentioned in the said letter that the regulations issued by the authority i.e. IRDA are subordinate legislation which are also placed before both the Houses of Parliament. Hence, in view of the above, it could be safely concluded that the payment of reinsurance premium by the assessee to foreign reinsurers could not be construed as payment made in violation of provisions of Insurance Act and IRDA regulations.

3.14. We find that the ld. CIT(A) had considered the entire issue in dispute before us by applying the amended definition of Section 2(9) of the Insurance Amendment Act, 2015 which came into force from 26/12/2014 wherein, it was mentioned that insurer means foreign insurance company having a branch established in India. The ld. CIT(A) observed that since the foreign reinsurer in the instant case does not have a branch or place of business in India, the amended definition of Section 2(9) of the Act w.e.f. 26/12/2014 would go against the assessee. Accordingly, the ld. CIT(A) had granted relief to the assessee in respect of payments made prior to 26/12/2014. But we find that the Hon'ble Madras High Court had already held that the definition of Section 2(9) of the

Insurance Act has no role to play in the instant case. Hence, there was no need to get into the amendment in Section 2(9) thereon.

3.15. We find that the ld. CIT(A) had adjudicated the issue in the instant case by observing as under:-

> *"4.2.5 Having gone through the decision of the Chennai High Court as well as the Income-tax Appellate Tribunal (ITAT) in the case of DCIT vs. Cholamandalam Ms General insurance Company Ltd, it is clear that the question for consideration was whether the provisions of section 2(9) of the Insurance Act, 1938 was applicable with effect from 26-12-2014 or applicable for earlier assessment years. ITAT held that it was applicable for earlier years as well which was reversed by Hon'ble High Court. The A.Y. involved in the said case pertained to A.Y.2003-04 to 2009-10. There has been an amendment carried out by the Parliament in Section 2(9) of the Act by Insurance Laws (Amendment) Act, 2015 with retrospective effect from 26.12.2014. After the said amendment Section 2(9) of Insurance Act, 1938 is applicable in respect of re-insurance premium paid to non-resident companies as well and it enables foreign company engaged in re-insurance business to establish a branch in India. Therefore, unless a branch is established in India, the non-resident insurance company cannot do any business after 2014. Before 2014, in absence of any specific provision, I am in agreement with Hon'ble High Court's decision that Indian insurance companies can reinsure with non-resident companies. However once when specific provisions have been incorporated in the Insurance Act relating to reinsurance as well as non resident reinsurance the applicability of "other insurer" becomes redundant as far as non resident reinsurance is concerned. AO therefore has rightly held that payments made in respect of reinsurance premium to non-resident reinsurance companies were in violation of the Insurance Act, 1938 (Insurance Act) and not admissible as business expenditure as per Explanation (1) to section of 37 of the Act.*
>
> *4.2.6 Further, the said amount was also disallowed without prejudice basis under section 40(a){i) of the Act as no TDS was deducted by the appellant company. Income-tax Appellate Tribunal (ITAT) in the case of DCIT vs. Cholamandalam Ms General insurance Company Ltd held that the profit of non-resident reinsurance company or the person in India who has standing contract with underwriters, who are members of the Lloyds, is taxable in India. Accordingly, it was held that the insurance companies had to necessarily deduct tax on the premium paid to foreign companies for reinsurance. Appellant has not deducted TDS on the ground that income related to reinsurance with non residents is not deemed to accrue or arise in lndia. As per the appellant there are certain treaties which provides that insurance business* ***except reinsurance business*** *would be deemed to be a PE of the non resident in the other contracting state. AO has allowed reinsurance premium ceded to such non resident where there is a specific exclusion for the insurance companies from the purview of PE. As a corollary implies that where there is no specific exclusion, the reinsurance business would be deemed to be a PE in the other contracting state. The business gets generated*

in the contracting state and independent brokers scout for business on behalf of the non resident reinsurers and habitually secures orders on their behalf. When the appellant company enters into a reinsurance contract with a non resident through a broker it implicitly means that the broker has canvassed for orders for the non resident assessee. Accepting appellant's contention of non deduction of IDS creates an inverted structure where appellant is deducting IDS on reinsurance premium in case of non residents which have a branch in India and not deducting any IDS in cases where the non residents have no branch. Interestingly appellant has informed that some non residents procure order u/s 197 of the I.T.Act and in those case it has withheld tax from the payment made to such non-resident reinsurers.

4.2.7 The issue of applicability of TDS on reinsurance premium paid to non residents now gets further clarified after amendment in Section 2(9} by Insurance Laws (Amendment) Act, 2015 with retrospective effect from 26.12.2014 which enables foreign company engaged in re-insurance business to establish a branch in India. In view of the above discussion, it is clear that appellant was liable to deduct TDS on reinsurance premium paid to non residents and hence action of the AO to disallow the same under section 40(a)(i) of the Act is accordingly upheld. Ground 2 and 3 of the appellant is hereby dismissed."

3.16. We find that the Hon'ble Madras High Court in the aforesaid case had held that definition in Section 2(9) of the Insurance Act is irrelevant for the purpose of Section 101A read with IRDA regulations. Hence, the observation made by the ld. CIT(A) in para 4.2.5, in our considered opinion, is wrong.

3.17. Let us now examine the applicability of provisions of Section 40(a)(i) of the Act in respect of reinsurance premium paid to foreign reinsurers. We find that the ld. CIT(A) had placed reliance on the decision of Chennai Tribunal in the case of Cholamandalam MS General Insurance Co. Ltd to drive home the point that the said payment shall be liable for deduction of tax at source in terms of Section 40(a)(i) of the Act. We find that though the Hon'ble Madras High Court in para 26 had held that Chennai Tribunal decision in confirming the action of the ld. AO in invoking provisions of Section 40(a)(i) of the Income Tax Act was not supported with any reasons, finally in para 28, the Hon'ble Madras High Court had remanded this

question to the Tribunal to decide whether the ld. AO was right in disallowing the reinsurance premium u/s. 40(a)(i) of the Act. Hence, that question needs to be decided by the Tribunal. Accordingly, the issue of applicability of provisions of section 40(a)(i) of the Act is adjudicated by us independently. We find that the Co-ordinate Bench of this Mumbai Tribunal in the case of DCIT vs. ICICI Lombard General Insurance Co. Pvt. Ltd., in ITA Nos. 6837 & 6832/Mum/2014 for A.Y. 2005-06 and 2009-10 vide order dated 04/10/2016 had adjudicated the very same issue in respect of payments made to M/s. Odyssey America Reinsurance Corporation, Singapore for providing reinsurance business, without deduction of tax at source and applicability of provisions of Section 40(a)(i) of the Act. We find that the Tribunal in the aforesaid case placed reliance in assessee's own case for A.Y.2004-05 reported in 152 ITD 855 and also in yet another case rendered in the context of revision proceedings u/s.263 of the Act in ITA No.5777/Mum/2011, had quashed the revision proceedings u/s.263 of the Act by observing as under:-

> *"2.3. Thus, the Tribunal by the aforesaid order held that invocation of revisional jurisdiction was not valid. In view of this uncontroverted factual matrix, the appeal of the Revenue is dismissed as infructuous."*

3.18. We further find that the Co-ordinate Bench of this Tribunal in the case of General Reinsurance AG, General Reinsurance AG India Branch vs. DCIT in ITA No.7433/Mum/2018 for A.Y.2015-16 dated 14/06/2019 had an occasion to address the same issue from the perspective of the recipient foreign company. In the said Tribunal order dated 14/06/2019, in para 5, this Tribunal had categorically stated that assessee company in that case had challenged the decision of the income tax authorities in treating the receipt of reinsurance premium as taxable in India. Hence, the question that was raised before

Mumbai Tribunal in that said case was from the perspective of foreign reinsurance company. The decision rendered thereon could be made applicable to the assessee's case before us also by drawing the same analogy. The relevant operative portion of the judgement is reproduced hereinbelow:-

> *"11. We have carefully considered the rival submissions and perused the relevant material and record. As our discussion in the earlier paras show, the substantive dispute in this appeal relates to the taxability or otherwise in India of the reinsurance premium earned by the non- resident foreign assessee by underwriting the risks of various Indian insurance companies. It is not in dispute that the appellant before us is an entity incorporated in Germany and is a tax resident of Germany. The manner in which the reinsurance premium is earned by the assessee is also not in dispute. But to recapitulate, we may note that the appellant is a global re-insurance company which has entered into re-insurance contracts with various Indian insurance companies. For underwriting the risks of the Indian insurance companies, assessee earns reinsurance premiums, which is the subject-matter of dispute before us. So far as the nature of receipts in question is concerned, there is a convergence between the assessee and the Revenue that the same are in the nature of business receipts. It is quite well understood that in such like cases where the foreign company earns business income, the same can be taxed in India only if it has a PE in India or 'business connection' so as to fall within the scope of Indian tax laws. At the outset, it has been asserted by the appellant before us that in such situations, the onus is on the Revenue to establish that the foreign company has a 'business connection' or a PE in India so as to invite any tax liability under the Indian tax laws. Ostensibly, the aforesaid is supported by the judgment of the Hon'ble Supreme Court in the case of E funds IT Solution Inc vs ADIT, (2017) 86 taxmann.com 240. Therefore, in this background, we may now examine the facts of the instant case as to whether such an onus has been discharged by the Revenue or not."*

> *17. It has been asserted before us that the instant year is the first year when the assessee has filed a return of income as it had some taxable income, while in the past years there was no taxable income. In the past, there was no income other than premium on reinsurance business, yet the existence of LO since 2007 is in the knowledge of the assessing authority and no steps have been taken in any of the earlier years to construe the activities of the LO as constituting a 'business connection' or a PE of assessee in India. The learned representative asserted that it is only in this year that the function of the LO (for part of the year) has been understood by the Assessing Officer to be giving rise to a 'business connection' or existence of PE in India so as to hold that the income from the premium on*

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

18. We may now address the point as to whether the operations of the Indian subsidiary, which have indeed been carried out from India, can be construed as enabling invoking of 'business connection' of the assessee as envisaged under Section 9(1)(i) of the Act or whether the Indian subsidiary constitutes a PE of assessee in India. Article 5(1) of the India- Germany Tax Treaty provides that PE means a fixed place of business through which the business or enterprise is wholly or partially carried on. On this aspect, the case set-up by the Revenue is that the key functions of reinsurance business, namely, actuarial services and underwriting services are provided by the Indian subsidiary. Such discussion is contained in paras 9.7.2 to 9.8 of the final order of the Assessing Officer. On this aspect, we have carefully examined the contentions put forth by the Revenue as well as the material on record, namely, the Master Service Agreement and the Addendum to the Master Service agreement between assessee and the Indian subsidiary and find that the approach of the Assessing Officer is quite misdirected. In fact, the services that have been provided by the Indian subsidiary are support services in the field of actuarial and underwriting functions undertaken by the assessee and not services of actuarial or underwriting of insurance risks per se. We have already quite succinctly noted the nature and scope of the services rendered by the Indian subsidiary in the earlier paras 12 and 13 above. In fact, the Assessing Officer is grossly wrong in holding in para 9.7.8 of his order that all the functions with respect to the claim settlement are carried out by the Indian subsidiary itself; rather, it is a case where the Indian subsidiary provides support functions and assists the assessee in such matters. The privity of contract is between the assessee and the Indian insurance companies and, it is abundantly clear from the terms of

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

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

20. So far as the case of the Revenue that there is a dependent PE in India is concerned, herein also, the Revenue has merely brushed aside the claim

of the assessee that the Indian subsidiary does not have any authority to secure contracts or solicit business on its behalf in India independent of the assessee. According to the Revenue, the Indian subsidiary uses brand name of the assessee while carrying out its activities in India. In our view, the same cannot be a ground to say that there existed a dependent PE in India. In fact, a point which has been emphasised before us is that the assertions of the Revenue that the Indian subsidiary has a decision making authority is a mere bald assertion and is devoid of any factual support. We have perused the order of the Assessing Officer as well as of the DRP and find that the assertions of the assessee in this regard have been completely brushed aside. The income- tax authorities have not referred to any particular arrangement or agreement or any other piece of evidence to show that the Indian subsidiary could enter into contracts or was authorised to enter into any business in India on behalf of the assessee. Considering that it was imperative for the Revenue to bring out instances where the Indian subsidiary had concluded contract or secured orders on behalf of the assessee, we find that such burden has not been discharged by the Revenue. In fact, at the time of hearing, the learned representative for the assessee referred to an illustrative agreement placed at pages 28 to 102 of the Paper Book, which is a reinsurance arrangement with SBI Group Life, which has been entered into by assessee and the Indian insurance company, i.e. SBI Group Life directly. Therefore, factually also, we find no support for the case of the Revenue that the Indian subsidiary constitutes a dependent PE of assessee in India.

21. Before we conclude, we may also refer to some of the precedents which have been cited before us in order to establish that in somewhat similar situations, foreign companies engaged in reinsurance business have not been found to be having a fixed PE or an agency PE in India in the form of an Indian subsidiary. In this context, reference has been invited to the decision of the Mumbai Bench of the Tribunal in the case of Swiss re-Insurance Co. Ltd. vs DDIT(IT), [2015] 55 taxmann.com 520 (Mumbai - Trib.), which according to the learned representative, is directly on the point. We have perused the said decision and find that the factual matrix which prevails in the instant case before us is similar to what has been considered in the case of Swiss re-Insurance Co. Ltd. (supra). In para 2.1 of the order, the relevant facts have been noted and the discussion reveals that the facts before us are quite similar to the case before our co-ordinate Bench. It was the case of a reinsurance company based in Switzerland which was receiving income for providing reinsurance to various insurance companies in India. Swiss re-Insurance company had a wholly owned subsidiary in India which was rendering administrative, market intelligence and other risk assessment services, which is quite similar to the services being rendered to assessee before us by its Indian subsidiary. Therein also, the appellant was remunerating its Indian subsidiary on the basis of cost plus mark-up. Therein also, the Assessing Officer had sought to tax the income by invoking 'business connection' in terms of Sec. 9(1)(i) of the Act as well as treating the Indian subsidiary as a PE in India. In

nutshell, the facts as well as the dispute before our co-ordinate Bench in the case of Swiss re-Insurance Co. Ltd. (supra) stood on a similar footing as is the case before us. Our co- ordinate Bench considered the provisions of Explanation-2 to Sec. 9(1) of the Act as well as the provisions of India-Switzerland DTAA, which was the subject matter before it, and concluded that the foreign company therein did not have any 'business connection' in India or a PE in India. The aforesaid precedent fully supports the inference which has been drawn by us in the earlier paras. Similarly, in the context of Sections 201/201(1A) of the Act proceedings in the ITA Nos. 4805 to 4808/Mum/2015 dated 05.07.2017 in the case of M/s. Bharti-AXA Life Insurance Co. Ltd., the foreign company in India was held not to be liable for tax in India on its reinsurance premium earned from the Indian insurance companies. In fact, our co-ordinate Bench in the case of M/s. Bharti-AXA Life Insurance Co. Ltd. (supra) followed the earlier decision in the case of Swiss re-Insurance Co. Ltd. (supra). Similar was the situation in the case of Bajaj Allianz General Insurance Co. Ltd., ITA No. 2560/PN/2012 dated 03.02.2016 wherein also, payments by Indian concerns to the foreign reinsurance company was disallowed on the ground of failure to deduct the requisite tax at source. Our co-ordinate Bench held that the foreign reinsurance company earning reinsurance premium from the Indian concerns was not liable for tax in India and, therefore, the action of the Assessing Officer was set aside.

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

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

3.20. It is a fact that in the impugned case of the assessee before us, i.e. Tata AIG Insurance, it is not in dispute that foreign reinsurer does not have any place of business or branch or any business connection

or permanent establishment in India. Hence, the payments made by the assessee company to the said foreign insurer is not chargeable to tax in India in the hands of the foreign reinsurer in terms of Section 195(1) of the Income Tax Act. Hence, there is no obligation on the part of the assessee payer to deduct tax at source thereon. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd., vs CIT reported in 327 ITR 456. Accordingly, the provisions of Section 40(a)(i) of the Act would not come into operation at all. Moreover, these decisions were duly quoted by the assessee before the ld. CIT(A) vide its submission dated 25/02/2020 which was completely ignored by the ld. CIT(A) while adjudicating the issue.

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

> ***"5.3** Assuming that conditions of (i) & (ii) mentioned herein above are fulfilled, we do not find that the employees of SRSIPL are providing services to the assessee as if they were the employees of the assessee. Therefore, condition laid down under Article-5 of the Treaty are also not fulfilled to treat SRSIPL as PE of the assessee. Article 5(4) of the Treaty reads as under:-*
>
> > *"Notwithstanding the preceding provisions of this Article, an insurance enterprise of Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies."*

3.22. From the perusal of the relevant clause of Article 5(4) of the treaty reproduced supra, it could be concluded that the said Article is

not at all applicable for reinsurer. This is relevant in view of the observations made by the ld. CIT(A) in 4.2.6 as under:-

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

3.23. We hold that the aforesaid observation of the ld. CIT(A) is incorrect in view of the aforesaid decision of Mumbai Tribunal dated 13/02/2015 and in view of the fact that Article 5(4) of the treaty does not apply to reinsurer. Moreover, the ld. CIT(A) accepts the existence of independent brokers involved and if it is so, it cannot constitute a PE.

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

3.25. Accordingly, in view of the aforesaid observations the ground Nos.3 & 4 raised are allowed.

4. The ground No.10 raised by the assessee is with regard to claim of depreciation.

4.1. We have heard rival submissions and perused the materials available on record. We find that assessee had debited depreciation in its profit and loss account and also claimed depreciation as per the provisions of Section 32 of the Act in the return of income. The ld. AO placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of New India Assurance Company Ltd., vs. Additional CIT reported in 12 taxmann.com 465 and disallowed the claim of depreciation as per Section 32 of the Act by holding that no deductions are permissible from the profits as per the profit and loss account while assessing insurance companies as per Rule 5 of the first schedule to the Act read with Section 44 of the Act. We find that the assessee had added back the book depreciation while filing its return of income. Hence by this process, the assessee was neither granted deduction for book depreciation nor granted deduction for income tax depreciation computed u/s.32 of the Income Tax Act. Hence, it had resulted in a situation that no depreciation at all was granted deduction to the assessee. This action was upheld by the ld. CIT(A). This, in our considered opinion, had resulted in gross injustice to the assessee. In any case, the depreciation computed u/s.32 of the Act is to be granted mandatorily to the assessee as per Explanation 5 to Section 32 of the Act. In our considered opinion, the effect of Rule 5, Clause 'a' of schedule-1 is that, if the insurance company has claimed a deduction for any expenditure / allowance or as debited in the

accounts to the profit and loss account by way of provision or reserve, which is not admissible as per the provisions of Section 30 to 43B of the Income Tax Act, the same shall be liable for disallowance. The natural corollary to this would be that deductions that are otherwise specified u/s.30 to 43B would become allowable under the provisions of the Act and the same would get allowed to insurance company. Hence, logically if book depreciation is not allowed to the assessee, then the depreciation computed as per Section 32 of the Act would become automatically allowable to the assessee. This is irrespective of the fact that income tax depreciation u/s.32 is to be mandatorily allowed to the assessee as per Explanation-5 to Section 32 of the Act. In this regard, the language of the Section and the computation provisions mentioned in Rule 5 of first schedule to the Income Tax Act applicable for insurance companies cannot be given a literal interpretation as it manifestly produces unjust result. Reliance in this regard has been rightly placed by the ld. AR on the decision of the Hon'ble Supreme Court in the case of CIT vs. J H Gotla reported in 156 ITR 323 wherein the relevant portion is reproduced hereunder:-

> ***"46.*** *Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the Court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by judge, the learned hand that one should not make a fortress out of dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning."*

4.2. We would like to make it clear that the aforesaid purposive interpretation of the provisions are being considered in the instant case only to avoid unjust and absurd results that would otherwise

prevail in the event of assessee not getting even statutory deductions / allowances while computing the taxable income. The production of unjust and absurd results could never be the intention of the legislature and we are not inclined to make the computation provisions of Rule 5 of first schedule to the Income Tax Act unworkable. Hence, in order to prevent that gross injustice, we are inclined to give purposive interpretation of the provisions instead of literal interpretation.

4.3. We also find that the Finance Act 2020 had addressed the very same anomaly by amending the Rule 5 of the first schedule to the Income Tax Act by inserting the proviso after Clause-C of Rule 5 to provide deduction of amounts previously disallowed u/s.43B in the year in which the same is actually paid. The Explanatory Memorandum to the Finance Bill 2020 explaining the provisions relating to direct tax amendments while proposing an amendment in Section 43B to insurance companies had stated as under:-

> *"Section 44 of the Act provides that computation of profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or a co-operative society shall be computed in accordance with the rules contained in the First Schedule to the Act.*
>
> *Section 43B of the Act provides for allowance of certain deductions, irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by the assessee, only in the previous year in which such sum is actually paid.*
>
> *Rule 5 of the said Schedule provides for computation of profits and gains of other insurance business. It states that 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 and loss account prepared in accordance with the provisions of the Insurance Act, 1938 or the rule made thereunder or the provisions of the Insurance Regulatory and Development Authority Act, 1999 or the regulations*

made thereunder, subject to the condition that any expenditure debited to the profit and loss account which is not admissible under the provisions of sections 30 to 43B shall be added back; any gain or loss on realisation of investment shall be added or deducted, as the case may be, if the same is not credited or debited to the profit and loss account; any provision for diminution in the value of investment debited to the profit and loss account shall be added back. Thus, there is no specific provision, in this rule, in the case of other insurance companies, to allow deduction for any payment of certain expenses specified in section 43B if they are paid in subsequent previous year. There is a possibility that such sum may not be allowed as deduction in the previous year in which the payment is made. This has not been the intention of the legislature.

Therefore, it is proposed to insert a proviso after clause (c) of the said rule 5 to provide that any sum payable by the assessee which is added back under section 43B in accordance with clause (a) of the said rule shall be allowed as deduction in computing the income under the rule in the previous year in which such sum is actually paid.

This amendment will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-21 and subsequent assessment years."

4.4. From the logical reading and understanding of the aforesaid Explanatory Memorandum of Finance Bill 2020, it could be safely inferred and concluded that the legislature never wanted to deny any deduction or allowance that was otherwise allowable to the assessee under the very same provisions of Sections 30 to 43B of the Income Tax Act. It also impliedly mentioned that by this process, the double disallowance that would occur shall be avoided. There would be cases where assessee while making certain provision for certain expenses or provision for certain reserves would add it back voluntarily in the return of income even though the same is an item of legitimate expenditure in the P & L account. When the very same expenditure is actually paid by the assessee in different assessment year, the same should be logically and legally liable for deduction / allowance to the assessee in the year in which such payments are made. This alone

would address the clear intention of the legislature. Moreover these benefits are otherwise available to all other types of the assessee and there is no logical reason that an Insurance company alone should be deprived of the same. This would be more relevant from the point of discrimination of assessee. Considering the totality of these observations, it could be safely concluded that the amendment brought in Finance Act 2020 addressing this anomaly is merely curative in nature and hence has to be construed as clarificatory having retrospective effect as it was brought in to avoid unintended consequences and to avoid discrimination with other assessees. In this regard, we find that the reliance has been rightly placed by the ld. AR on the decision of the Hon'ble Supreme Court in the case of Allied Motors (P) Ltd., vs CIT reported in 224 ITR 677 wherein it was held that *when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give it a reasonable interpretation, it could be read to be retrospective in operation, particularly to give effect to the section as a whole.* This direction, in our considered opinion, would make computation provisions mentioned in Rule 5 of the first schedule of the Income Tax Act workable. In view of the above observations, we direct the ld. AO to grant allowance of depreciation u/s.32 of the Act for the year under consideration. Needless to mention that the ld. AO should rework the depreciation of subsequent years accordingly due to change in the written down value of the block of assets. Accordingly, the ground No.10 raised by the assessee is allowed.

5. The ground Nos. 5 to 9 raised by the assessee are in the same line of ground No.10 wherein certain deductions were claimed by the assessee. The same are detailed hereinbelow:-

(a) Ground No.5 is seeking deduction in respect of profit on sale of fixed assets from the assessee's total income – Since we have already directed the ld. AO to grant depreciation as per Ground No.10 hereinabove u/s.32 of the Act, then consequently on sale of fixed assets would also have to be as per the provisions of Income Tax Act, hence, this ground No.5 becomes consequential in nature.

(b) Ground No.6 is challenging the action of the ld. CIT(A) not excluding the reversal of expenses credited by the assessee to its profit and loss account which had been disallowed in the previous years.

(c) Ground No.7 is challenging the action of the ld. CIT(A) disallowing the claim of expenses u/s.40(a)(ia) of the Act which was disallowed in the preceding previous year and on which tax had been deducted at source and paid to the credit of the Central Government in the previous year under appeal.

(d) Ground No.8 is challenging the disallowance of deduction of bonus and leave encashment paid during the year under appeal which was disallowed in earlier years u/s.43B of the Act.

(e) Ground No.9 is challenging the disallowance of reversal of provision of doubtful debts which was disallowed by the assessee in earlier years.

5.1. We find that all the aforesaid items from (b) to (e) above are to be granted deduction and excluded from the total income of the assessee in order to avoid double disallowance. The amendment brought in Finance Act, 2020 also impliedly concluded that there should be no double disallowance. In this regard, assessee has given detailed submissions before the ld. CIT(A) that are enclosed in pages 217-222 of the paper book filed before us justifying the claim of deduction. The same reasoning that was given by us in ground No.10 hereinabove would apply to these grounds also. Accordingly, the ground Nos. 6 to 9 raised by the assessee are allowed.

6. The ground No.11 raised by the assessee is seeking credit for tax deducted at source.

6.1. We have heard rival submissions and perused the materials available on record. We find that the ld. AO had not granted the credit of additional tax deduced at source claimed by the assessee during the assessment proceedings. Since this matter requires factual verification, we direct the ld. AO to verify the claim of the assessee and grant TDS credit in accordance with law. Accordingly, the ground No.11 raised by the assessee is allowed for statistical purposes.

7. The ground No.12 raised by the assessee was stated to be not pressed by the ld. AR at the time of hearing and accordingly, the same is hereby dismissed as not pressed.

8. The ground No.13 is an additional ground claiming deduction for education cess which was also stated to be not pressed by the ld. AR at the time of hearing and accordingly dismissed as not pressed.

9. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced on 25/ 04/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 25/04/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai