IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI

BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. No.3556 & 3557/Mum/2012
(Assessment years : 2003-04 & 2004-05)

TATA AIG LIFE INSURANCE COMPANY LIMITED, 2nd FLOOR, DELPHI-B WING, ORCHARD AVENUE, HIRANANDANI BUSINESS PARK, POWAI, ANDHERI (EAST), MUMBAI-400 076 **PAN :AABCT3784C**	vs	COMMISSIONER OF INCOME TAX-2, ROOM NO.355, 3RD FLOOR, AAYAKAR BHAVAN M.K. ROAD, MUMABI-400 020
APPELLANT		**RESPONDENT**

Assessee represented by	Shri Percy Pardiwala, Shri Hiten Chande
Department represented by	Shri Manoj Kumar – CIT DR

Date of hearing	26-06-2023
Date of pronouncement	30-06-2023

O R D E R

PER: MS PADMAVATHY S. (AM)

These appeals are against the order of Commissioner of Income-tax-2, Mumbai passed under section 263 of the Income-tax Act, 1961 (in short, 'the Act') dated 20/03/2012 for the assessment year 2003-04 & 2004-05.

2. The assessee was incorporated in August, 2000 as a joint venture between Tata Sons Ltd and American International Group. The assessee is an Indian insurance company in terms of section 2(7A) of the Insurance Act, 1938 and is carrying on the business of life insurance. The assessee has obtained license from Insurance Regulatory & Development Authority (IRDA) to carry on business in India on 25th February, 2001 and started operations on 1st April, 2001. For the assessment year 2003-04, the assessee filed return of income on 28/11/2003 declaring a loss of Rs.42,88,54,156/-. The assessee filed the return of income for the assessment year 2004-05 on 30/10/2004 declaring a loss of Rs.58,09,01,041/-. The returns were selected for scrutiny and the assessments were completed under section 143(3) where the Assessing Officer had made disallowance towards following:-

a) Disallowance of amortization of pre-operative expenses;
b) Disallowance of amortization of licence fee
c) Disallowance of amount of donation
d) Transfer Pricing adjustment.

3. The assessee preferred appeals against the aforesaid order of assessment before the CIT(A). In the meantime, notices under section 148 were issued for the following reasons:-

> *"On perusal of records, post assessment it came to light that the certified actuary Valuation Report for the year ended 31.03.2003 was filed for the first time in respect of A.Y. 2003-04 during the course of assessment proceedings for A.Y. 2005-06, which in turn was maintained by the assessee company as required in the first Schedule of Rule 2 applicable in the case of assessee being in the business of life insurance. However, the same was not filed with the return of income for A.Y. 2003-04. It was found from the said report that there was surplus (income / profit) as worked out by the Authorised appointed actuary Shri Phoung Chung of Rs.2,54,50,000/- rather than a loss of Rs.42,88,54,156/- as reported in the report of income filed on 28.11.2003.*
>
> *The Assessing Officer was, therefore, satisfied and had reason to believe that excessive claim of loss of Rs.42,88,54,156/- was allowed to the assessee and on income of Rs.2,54,50,000/- being surplus shown by Authorised Actuary in the*

certified report as per the provisions of section 44 of the Act had escaped assessment."

4. The assessment for AY 2004-05 was also reopened for the same reason. In response, the assessee filed letter with the Assessing Officer objecting to the jurisdiction to reopen the assessment and also made submissions on merits. The Assessing Officer completed the re-assessment proceedings and passed order under section 143(3) read with section 147 wherein he has assessed the income based on the surplus declared as per actuary report and also made addition towards deficit from Pension Schemes.

5. The assessee preferred further appeal before the CIT(A) against the order of the Assessing Officer passed under section 143(3) read with section 147 of the Act. The CIT(A) gave partial relief to the assessee wherein he directed the Assessing Officer to adjust the amount of capital contribution transferred from shareholders' account to policy holders' account against the surplus as per the actuary report. The department preferred further appeal against the order of CIT(A) before the ITAT, in which the ITAT, through common order passed for AYs 2002-03 to 2008-09 had allowed the issue in favour of the assessee.

6. The Commissioner of Income-tax-2, Mumbai issued a notice dated 02/08/2010 under section 263 of the Income-tax Act proposing to set aside the order passed under section 143(3) read with section 147 for the reason that the Assessing Officer while passing the re-assessment order did not incorporate the additions made by the Assessing Officer in the original assessment order passed under section 143(3) of the Act.

7. The assessee, in response, submitted before the CIT that the assessee being a life insurance company is governed by the provisions of section 44 of the Act, which provides that the taxable income of a company carrying on life insurance business shall be calculated in accordance with the Rules in the First Schedule without making any adjustments in the form of additions or disallowances, which are applicable, in case of any other company not engaged in the business of life insurance. The assessee objected to the proposed revision proceedings by submitting that the re-assessment order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of the revenue. The assessee further submitted that the Assessing Officer has consciously adopted the position that surplus as per Form I should be as it is recorded as total income of the assessee without making any adjustment prescribed under section 28 to 43D of the Act and the Assessing Officer has applied his mind while completing the re-assessment accordingly. Therefore, the assessee submitted that the order is not erroneous merely because the addition for disallowance / additions made during original assessments are not considered.

8. The CIT, after considering the submissions of the assessee held that –

"The matter has been given due consideration but I am afraid I cannot agree with the assessee. The present order is only an extension to section 143(3) order dated 01-08-2006. A reopened assessment u/s. 147 has to start from where one ends in the order u/s. 143(3). It is possible that there may be additions as per the recording of the reasons or part of it, or even nil but the base of such a reassessment will continue to be the original order u/s. 143(3). As has been described in detail by the Hon'ble Supreme Court in the case of CIT Vs. Sun Engineering Works (P) Ltd., (198 ITR 297) a fresh claim cannot be entertained in the reassessment proceedings with respect to income already assessed.

Secondly, if one was to see the reasons recorded, the main ground of reopening is that a copy of actuarial Report was not available with the Assessing Officer during the course of assessment proceedings. For the purpose of applyjng section 44 read with Rule (2) of Schedule I, it is necessary that the share holders fund and policy holders fund, be completely segregated. In the present assessment framed i.e. reopened assessment, the Assessing Officer has gone straightaway with the actuarial valuation and the surplus declared therein. On the other hand, in the original return of income, as well as while completing the original assessment, the assessee's policy holders fund and the share holders fund stood merged and the Assessing Officer had made the disallowance out of this combined set of accounts. Therefore, consequently while completing the present assessment, the Assessing Officer was duty bound to co-relate and verify such disallowance which he had made in the original assessment viz-a-viz the income being computed u/s. 44. Therefore, this reassessment patently suffers from lack of proper scrutiny. There is not even a whisper of verification of those disallowances.

Therefore, in view of the above mentioned reasons, the assessment order in question is erroneous on both the accounts namely, he has ignored the original assessment framed and not made the addition which had already been made and in any case, there has been lack of scrutiny on the part of the Assessing Officer before framing the order with respect to these additions. It is now that lack of enquiries / scrutiny in making an assessment order makes it erroneous. In the present order where this erroneous action has led to leaving out the two additions, referred to in the notice u/s. 263, obviously have revenue implications and, therefore, is prejudicial to the interest of revenue. Hence, considering all the facts of the case and legal position, and the power vested u/s. 263, I set aside the assessment passed u/s. 143(3) rws 147 dated 01-08-2006 to be framed denovo after taking due consideration of the disallowance already made u/s. 143(3)."

9. The Ld.AR submitted that the revision under section 263 is done for the reason that the Assessing Officer has not incorporated the additions / disallowances made in the original assessment while passing the re-assessment order and has not verified the same. In this connection, the Ld.AR drew our attention to the order passed under

section 143(3) r.w.s. 147 wherein the Assessing Officer has given a detailed finding while assessing the income wherein he has taken the surplus declared as per the annual report as the income of the assessee. The Ld.AR further pointed out that the Assessing Officer did not adjust the amount of capital contribution from shareholders fund to policy holders fund by relying on various judicial pronouncements. Therefore, the Ld.AR submitted that the Assessing Officer while completing the reassessment has applied his mind and, therefore, the CIT is not justified in holding that the order is erroneous and prejudicial to the interest of the revenue. Further , the Ld.AR drew our attention to the order of the CIT(A) passed against appeal filed against the original assessment under section 143(3) wherein the CIT(A) had held that the original assessment stood effaced and hence that order passed under section 143(3) does not survive. The Ld.AR, therefore, submitted the revenue itself has admitted that the order u/s.143(3) stands effaced once the re-assessment proceedings are done which would mean that the disallowances/additions made in the original assessment does not survive. Accordingly the revenue cannot change its own stand while initiating the proceedings u/s.263. The Ld.AR also submitted that the Assessing Officer in the re-assessment proceedings has carried out a fresh assessment of facts to compute the income of the assessee and, therefore, the order cannot be held to be erroneous for not considering the disallowance / additions made in the original order of assessment. The Ld.AR relied on the order of the Supreme Court in the case of Income Tax Officer & Anr vs KL Shri Hari (HUF) & Ors (2001)-ITR 193 where it has been held that the Assessing Officer if in the re-assessment order makes a fresh assessment of the entire income of the assessee, then the earlier assessment order is effaced by the subsequent order. The Ld.AR further relied on the decision of the Hon'ble Karnataka High Court in the case of Karnataka State Co-operative Apex Bank Ltd vs DCIT wherein a similar view has been held. The Ld.AR thus summarised his submission by stating that when the

original assessment order is effaced by the order passed under section 143(3) read with section 147, the CIT is not correct in holding the re-assessment order as erroneous for the reason that the additions / disallowances made in the original assessment is not retained in the re-assessment order.

10. The Ld.DR, on the other hand, relied on the order of the CIT.

11. We heard the parties and perused the material available on record. The assessee's original assessment was completed under section 143(3) on 17/03/2006 wherein the Assessing Officer has made certain disallowances towards pre-operative expenses, amortisation of license fees besides the transfer pricing adjustment. The assessee had filed an appeal against the said order of assessment before the CIT(A) on 18/04/2006. There was a re-assessment initiated by issue of notice u/s.148 on 14/12/2008 for the reason that as per the actuarial valuation report for AY 2003-04 the income of the assessee is at Rs.2,54,50,000 as against the loss declared by the assessee and that the said report was not filed during the course of original assessment due to which the assessing officer could not know the actual profit arising out of the business. On this premise the assessing officer proceeded to compute the total income of the assessee as per the actuarial report and completed u/s.147 on 07/12/2009. While completing the assessment under section 147 the Assessing Officer computed the income of the assessee by considering the surplus declared as per the actuarial report and did not adjust the amount of capital contribution transferred from shareholders' account to policy holders' account against the surplus as per the actuary report. Considering the facts and on perusal of the order u/s.147, we see merit in the contention of the ld AR that the Assessing Officer, during the re-assessment the assessing officer has merged the entire proceedings by assessing the total income of the assessee afresh.

It is also noticed that the Assessing Officer has analysed the provisions of section 44 of the Act along with relevant rules, has taken into consideration the various submissions of the assessee and also has relied on a plethora of judgements while completing the re-assessment. Therefore the revenue's contention that the assessing officer has not applied his mind while completing the re-assessment is not tenable.

12. Before proceeding further we will look at the provisions of section 44 and first schedule which govern the computation of income of assessees engaged in life insurance business

"Section 44 - Insurance business.

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 sections 28 to 43B, the 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

A. – Life insurance business

Profits of life insurance business to be computed separately.

1. *In the case of a person who carried 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.]*

13. From the plain reading of the above provisions it is clear that the computation of income of the assessee engaged in the business 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 not with standing sections 28 to 43B and also the provisions relating to the computation of income chargeable under the head "Interest on securities", "Income from house property", "Capital gains" or "Income from other sources".

14. On perusal of the original order of assessment u/s.143(3) we notice that the Assessing Officer in the original assessment has made the disallowance considering the Shareholders Account separately from the Policy Holders Account and the plea of the assessee before the Assessing Officer was that only for presentation purposes, the assessee prepares 'policyholders account' and 'shareholders account' and that shareholders account cannot be treated as other regular business carried out by the assessee. This issue is no longer res integra in view of the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. ICICI Prudential Insurance Co. Ltd. [2016] 73 taxmann.com 201 where the issue considered was whether 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 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. The Hon'ble High Court in this regard held that –

> *"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 nor 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 shareholders' 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."

15. From the facts of the assessee's case it is clear that in the original assessment the Assessing Officer has clearly segregated the Shareholders Account and Policyholders Account and made the disallowances treating income from Shareholders Account as not part of income from life insurance business of the assessee. Therefore, considering the decision of the jurisdictional High Court and the provisions of the Act r.w. rules, the CIT holding the order of re-assessment as erroneous for the reason that the disallowances made by the Assessing Officer has not been considered is not well-founded and is debatable.

16. Further from the notice under section 263 it is evident that the CIT has invoked the provisions of section 263 mainly for the reason that the Assessing Officer in the order under section 143(3) read with section 147 did not consider the additions / disallowance made in the original order of assessment and to this extent, he held the order to be erroneous and prejudicial to the interest of the revenue. Further the CIT held that for the purpose of applying section 44 read with Rule (2) of Schedule I, it is necessary to segregate the share holders fund and

policy holders fund and that in the original assessment the assessee's policy holders fund and the share holders fund stood merged and the Assessing Officer in original assessment had made the disallowance out of this combined set of accounts. It was also held by the CIT that Assessing Officer during re-assessment did not consider this and directly proceeded with the surplus as per actuarial report. This finding of the CIT is factually incorrect, since the assessing officer in the original assessment has clearly segregated the Shareholders Account and Policyholders Account and on the basis of this segregation made additions treating income from Shareholders Account as not part of income from life insurance business of the assessee.

17. One more contention of CIT is that the reopened assessment starts from where one ends in the order u/s.143(3). In assessee's case, the assessment was reopened for the reason that the surplus as per the actuarial report has not been taken as the income of the assessee and the assessing officer proceeded to compute the total income of the assessee afresh completely ignoring the way income has been assessed in the original assessment u/s.143(3). In this regard we notice that the Hon'ble Supreme Court in the case of KL Shri Hari (HUF) & Ors (supra) where it has been held that the Assessing Officer if in the re-assessment order makes a fresh assessment of the entire income of the assessee, then the earlier assessment order is effaced by the subsequent order. In the facts of the present case the Assessing Officer has made a fresh assessment of the income of the assessee considering the provisions of the Act along with the various judicial proceeding and therefore in our view the ratio laid down by the Hon'ble Supreme Court is applicable in assessee's case also. Accordingly we are of the view that the excise of the revisionary powers u/s.263 for this reason is not justifiable.

18. It is apposite now to take note of the relevant extract of section 263 and the Explanation (2) to section 263 of the Act, which read as under :-

"Revision of orders prejudicial to revenue.

263. (1) The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer 89[or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, 90[including,—

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Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer 94[or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal 95[Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

19. Thus, from close scrutiny of the provisions of section 263, it is evident that twin conditions are required to be satisfied for exercise of revisional jurisdiction under section 263 of the Act i.e., firstly, the order of the Assessing Officer is erroneous; and secondly, it is prejudicial to the interests of the revenue on account of error in the order

of assessment. The Bombay High Court in the case of *Gabriel India Ltd. (1993) 203 ITR 108* has explained as to when an order can be termed as erroneous as follows:-

> *"From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an income tax officer acting in accordance with the law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the Income tax officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income tax officer. That would not vest the Commissioner with power to examine the accounts and determine the income himself at a higher figure. It is because the Income tax officer has exercised the quasi judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion ……..... There must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed."*

20. There is no dispute that u/s. 263 of the Act, the CIT does have the power to set aside the assessment order and send the matter for a fresh assessment if he is satisfied that further enquiry is necessary and the assessment order is prejudicial to the interests of the Revenue. However, in doing so, the CIT must have some material which would enable to form a *prima facie* opinion that the order passed by the AO is erroneous, insofar as it is prejudicial to the interests of the Revenue. In the present case of the assessee it is clear from the order of the Assessing Officer that he has applied his mind while concluding the re-assessment where he has computed the income of the assessee

afresh by relying on the various judicial pronouncements and the provisions of the laws. The CIT has not brought anything on record to show that the disallowances made in the original assessment are sustainable under the law or any material to show that there been an error in the order that is prejudicial to the interest of the revenue. Therefore, the CIT in our opinion is not the right in exercising revisionary powers u/s. 263 of Act, as the error envisaged by Section 263 of the Act is not one that depends on possibility as a guess work, but it should be actually an error either of fact or of law.

21. The CIT has set aside the order of the Assessing Officer u/s.143(3) r.w.s.147 for AY 2004-05 also for the same reason that the disallowances made in the original order of assessment u/s.143(3) has not been considered. The facts for AY 2004-05 being identical our view as expressed in the above paragraphs is applicable to AY 2004-05 also.

22. In view of the above discussion, we are of the considered view that the CIT is not justified in setting aside the re-assessment order of the assessing officer for AY 2003-04 and 2004-15 and accordingly we hold that the order of the CIT u/s. 263 is without jurisdiction and liable to be quashed.

23. In the result, the appeals of the assessee are allowed

Order pronounced in the open court on 30/06/2023.

Sd/-	**sd/-**
KULDIP SINGH	**(PADMAVATHY S)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt : 30th June, 2023
Pavanan

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai