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

BEFORE SHRI VIKAS AWASTHY, JM
AND
SHRI PRASHANT MAHARISHI, AM

ITA No. 14/Mum/2021

(Assessment Year 2015-16)

The Dy. Commissioner of Income Tax-8(3)(1), Aayakar Bhavan, Room No. 615, M.K. Road, New Marine Lines, Mumbai - 400 020	Vs.	M/s Tata AIG General Insurance Co. Ltd. 15th Floor, Tower A, Peninsula Corporate Park, G.K. Marg, Lower Parel, Mumbai-400 013
(Appellant)		**(Respondent)**
PAN No. AABCT3518Q		

Appellant by	:	Shri Rajesh Damor, CIT DR
Respondent by	:	S/Shri J.D. Mistry & Madhur Agrawal, ARs'

Date of hearing:	23.12.2021
Date of pronouncement :	08.03.2022

ORDER

PER PRASHANT MAHARISHI, AM:

1. This appeal [ITA No. 14/Mum/2021] is preferred by the Dy. Commissioner of Income Tax on 08.03.2001, Mumbai (the learned Assessing Officer/AO) for the Assessment Year 2015-16 against the order passed by the Commissioner of Income-Tax (Appeals)-15 [The Learned CIT(A)], Mumbai dated 28.02.2020.

2. Ld AO has raised 3 grounds of appeal as under:-

"1. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in holding that the provisions for claim Incurred but Not Reported (IBNR) and claim Incurred But Not Enough Reported (IBNER) amounting to Rs. 148,43,01,915/- is allowable u/s 37(1) of the Act without appreciating that such provisions are in the nature of contingent liability."

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the co-insurance fee of Rs. 41,49,000/- is allowable u/s 40(a)(ia) of the Act and the assessee is not required to deduct tax at source on such payments."

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the expenditure of Rs. 29,46,886/- incurred towards the purchase of pen drives, laptop adaptors etc. without appreciating that such expenditure incurred by the assessee creates enduring benefit and was a capital asset eligible for depreciation u/s 32 of the Act.""

3. This appeal preferred by the learned Assessing Officer on 5 January 2021 is delayed by 249 days. The learned Assessing Officer has also submitted an application for condonation of delay stating that in

view of the order of the Hon'ble Supreme Court where cognizance for extension of limitation was taken and the respective due date for various purposes were extended and therefore, now the appeal filed by the Assessing Officer is within the time limit prescribed as explained by the Hon'ble Supreme Court. Therefore, there is no delay. The learned Authorised Representative did not controvert the above submissions; therefore, in view of the decision of Honourable Supreme court, there is no delay in filing of appeal.

4. It was also noted that assessee has also filed an appeal against the same order of the learned CIT(A) which was heard by different co-ordinate Bench earlier i.e. on 2nd September, 2021 vide ITA No. 1718/Mum/2020, but order is awaited. When this question was pointed out to the learned parties at the time of hearing, both the parties confirmed that there were no connected issues in both the appeals, though they are against the same order by both the parties. Nevertheless, parties submitted that it does not have any implication even if the appeal of the assessee has already been heard and if the appeal of the Revenue can now be heard and disposed off, they do not express any objection. Now as the appeal of the assessee has been heard, parties are also advocating that issues in both appeals are

independent, therefore, the above matter is taken up for hearing.

5. The brief fact shows that assessee is a company engaged in general insurance business in pursuance of license issued by Insurance Regulation and Development Authority of India [IRDAI] on 22 January 2001. The assessee filed its return of income on 28th November, 2015 computing the total income at ₹168,77,66,500/- under the provisions of section 44 of The Income-Tax Act, [the Act] read with Rule 5 of the Schedule. The learned Assessing Officer passed an order under section 143(3) of the Act on 31.12.2018 at ₹1,33,26,67,350/-. The assessee preferred an appeal against 14 different disallowances/ additions made by the learned Assessing Officer. As per order passed by the learned CIT (A) now, the Revenue is aggrieved against three issues as per the grounds of appeal.

06. The learned Departmental Representative vehemently supported the order of the learned Assessing Officer and merely referred to the order of the learned Assessing Officer and learned CIT (A) stating relevant paragraph of the issues involved. It was submitted that the issues are decided in favour of the assessee by the co-ordinate Bench in assessee's own case; however, the above

disallowance should not have been deleted by the learned Commissioner of Income-Tax (Appeals) for the reason given in assessment order y the ld AO. He extensively referred assessment order on all these [3] issues.

7. The Authorised Representative submitted that the appeal of the Revenue deserves to be dismissed in view of the issues already decided in favour of the assessee by the co-ordinate Bench in assessee's own case for earlier years as well as in case of other insurance companies involving similar issues. He placed on record the decision of ITAT in assessee's own case in ITA No. 3535 and 1702/Mum/2011 and ITA No. 1584 and 3596/Mum/2011 preferred by both the parties for Assessment Year 2006-07 and also appeal for Assessment Year 2008-09 dated 20/11/2015. He also submitted a case law compilation to support that issues are covered in this appeal.

8. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also considered the order of the coordinate bench in assessee's own case as well other decision of coordinate benches involving similar issues.

9. First ground of appeal is related to the provisions for claim Incurred but Not Reported (IBNR) and claim

Incurred But Not Enough Reported (IBNER) amounting to ₹148,43,01,915/- held to be liable under section 37(1) of the Act by the learned Commissioner of income-tax (Appeals).

10. Fact shows that the assessee has debited the above sum to the profit and loss account and claimed as allowable. The Assessing Officer questioned the same and assessee submitted that the above claims are incurred on account of the contractual obligations between the insurance company and the insurer. Assessee, insurance company, has an obligation to settle claims incurred. Such settlement of claim involve time so cannot be finally settled during the financial year. Above provision are created as per the guidelines prescribed by the IRDA, the method of provisioning a scientific calculation, it is ascertained liability under section 37(1) of the Act. Therefore, it is an allowable expense.

11. The learned Assessing Officer held that it is a provisions created by the assessee in anticipation of claims and it is not ascertained liability so it cannot be allowed. He further noted it is not known that how much liability is good enough to pay out above claims and therefore, it is purely a contingent liability and cannot be allowed as deduction. The Assessing Officer further held that the above claim is not

supported by the actual valuation and hence, he disallowed ₹148,43, 01,915/-. The ld CIT (A) after considering the decision of the honourable Supreme Court in case of Rotork controls India private limited versus Commissioner of income tax 314 ITR 62 considered that if there is a present obligation with respect to the provision, and it arises out of events involving outflow of resources and can be based on reliable estimation of such obligation then the liability incurred by the assessee company is allowable. He further held that the methodology to determine the liability is also certified by actuary in accordance with guidelines and norms issued by the Institute of actuaries of India and insurance regulatory and development authority of India. He further held that such provisioning relates to present obligation and involves outflow of resources. He further considered the provisioning made by the assessee in different years and actual utilization of such provision with respect to those financial years and then he found that the provision was made less than the actual amount incurred in settling those claims. He further held that the coordinate bench in case of DCIT vs. National Insurance co. Ltd. (2016) 72 taxmann.com 116 (Kolkata p Trib.) which has been affirmed by Hon'ble Calcutta High Court in ITA No.76 of 2019. Therefore he held that such provisioning is allowable

u/s 37 (1) of the act and the addition made by the learned AO was deleted.

12. We have carefully considered the rival contentions and perused the orders of the lower authorities. The facts show that during the year the assessee has made a provision of ₹148,43,01,950/- towards claims Incurred But Not Reported (IBNR) and claims Incurred But Not Enough Reported (IBNER). The above deduction was claimed under section 36(1) of the Act. The basis of the claim was that the provision has been made for all the unsettled claims on the basis of the claims alleged by insured persons. Certain times the loss incurred are not reported in the balance sheet of the insurance company and therefore, such claims are classified as claims incurred but not reported. Certain times such claims are reported, however they were not

adequately reported. These are called claims incurred but not enough reported. The assessee made the provisions on the basis of the guidelines provided by insurance regulator and development authority of India. The claims made and provided for, are certified by the Actuary in accordance with the guidelines and norms issued by the Institute of Actuaries of India (IAI) and Insurance Regulatory and Development Authority (IRDA). As according to the assessee, the claims have been approved by

Actuary, therefore, the assessee has incurred loss / expenses during the year, and hence, it is allowable under section 37(1) of the Income-tax Act. The Assessing Officer considered the same as unascertained liability because ultimately the settlement of claim happens then, only according to him such claims are settled. We find that the assessee is a General Insurance Company and is covered by the guidelines issued by IRDA. The Insurance Companies are required to settle the claims of insured on the occurrence of the loss, which is covered under insurance. Such claims are required to be accounted despite the fact that such claims would not have finally settled but are pending at various stages of processing. The settlement of such claims may happen in subsequent period. Such claims are accounted by the assessee by making a provision as the liability to pay to the insurer agreed during the year. The learned Assessing Officer held that it is an anticipation of settlement of claim and therefore it cannot be said to be a definite liability. We find that identical issue arose in the case of DCIT vs. Export Credit Guarantee Corporation of India Ltd. in ITA No.7657/Mum/2014, wherein the co-ordinate Bench vide order dated 11.10.2017 vide para No.3.3 has allowed the identical claims. The learned CIT(A) while deciding the issue has relied upon the decision

co-ordinate Bench in DCIT vs. National Insurance Company Limited (supra) has held that the provisions made available the above claim are based on scientific calculation with a proper and rational and therefore, it could only be termed as ascertain liability. Though the above decision was rendered with respect to the computation of book profit under section 115JB of the Act, however, the learned CIT (A) applied it and allowed the claim of assessee for deduction under section 37(1) of the Act for the reason that the claim of the assessee is ascertained claim, supported by Actuarial valuation and also made on a scientific basis. To reach at this calculation, the learned CIT (A) obtained information for 6 different assessment years and found that the actual claim settled is always higher than the provisions made by the assessee. This it shows that the provisions made are not excessive. Further, it was stated before us that this claim is allowed to the assessee from year to year. In view of this, we find that assessee has incurred an expenditure, which is incurred during the year with respect to the provisions made for the IBNER and IBNR claims, on scientific basis and also certified by the valuer with respect to the methodology adopted in making such provisions. Thus, it satisfies the entire ingredient for its allowance u/s 37 (1) of the act. Thus, there is no

infirmity in the order of the learned CIT (A) in allowing the claim of ₹148,43,01,915/- under section 37(1) of the Act. Accordingly, the ground no.1 of the appeal is dismissed.

13. The ground no. 2 of the appeal is with respect to the non-deduction of tax at source on co-insurance fees of ₹41,49,00,000/- and therefore, same is disallowed under section 40a(ia) of the Act.

14. The brief facts of the case show that assessee has paid on amount of Rs . 1,38,33,000 as coinsurance administration fees without deduction of tax at source. The assessee was asked to explain why the amount paid should not be disallowed and added to the total income since the expenditure is hit by the provisions of Section 40 (a) (ia) of the act the assessee submitted that the above expenditure is not covered within the provisions of Section 194H as there is no relationship of principal and agent between the assessee and the insurer. Therefore, no tax is required to be deducted at source. The learned assessing officer rejected the claim of the assessee and held that the above sum is included under the provisions of Section 194H of the act as commission or brokerage. With respect to the decision of the coordinate bench in assessee's own case for assessment year 2006 – 07, 2007 – 08 and

2008 – 09 dated 20 November 2015 the learned assessing officer held that as the issue involved is a substantial question of law the Department has filed appeal against that order and is pending. Therefore, he disallowed 30% of the above sum of Rs 1,38,33,000/- paid. Thus, ₹ 4,149,900 was disallowed. That the assessee has paid co-insurance fees towards its liability to the lead insurer in the respective policies and its shares. The assessee has entered into an arrangement with co-insurer for sharing the risk premium as per the agreed ratio. As per the claim of the assessee, there is no requirement of tax deduction at source on the above sum because co-insurers were not the stands of the assessee and transactions between them were on principle-to-principle basis. The learned Assessing Officer rejected the contention of the assessee for the reason that in earlier year's identical disallowance was made. The Assessing Officer further noted that co-ordinate Bench in assessee's own case vide order dated 28th November, 2015 has held that no disallowance is to be made with respect to the co-insurance fees. However, the Assessing Officer held that the above matter involves substantial question of law and the appeal of the Assessing Officer is pending before the Hon'ble High Court, the disallowance is made. As assessee has

paid a sum of ₹41,49,900/- on which no tax is deducted, he disallowed 30% thereafter amounting to ₹13,83,03,000/-. When the matter reached the learned and CIT – A, he agreed with the contention of the assessee and following the decision of the co-ordinate bench in assessee's own case for earlier year deleted the above disallowance.

15. After hearing both the parties, we find that identical issue is covered in favour of the assessee by paragraph No. 27 in ITA No.3535 and 1702/11 and 4167/12, 1584 &3596/2011. The co-ordinate Bench in Para No. 31 held that no disallowance is warranted under section 40a (IA) of the Act in case of co-insurance fees paid. The coordinate bench in ITA number 3535 and 1702/MU M/2011 and ITA number 4167/MU M/2012 for assessment year 2006 – 07 to 2008-09 in Tata AIG Gen insurance Co Ltd versus additional Commissioner of income tax Mumbai dated 20/11/2015 held as Under:-

"27. The next grievance of the assessee relates to disallowance of coinsurance fees u/s 40 (a) (ia) of the act for non-deduction of TDS. By the impugned order, the CIT (A) confirmed the disallowance by observing as under:-

„9.3 I have considered the facts of the issue and the submissions made by the AR of the

appellant but do not find merit in them. The provisions of Section 194H are clearly applicable since the appellant has made payment to the other coinsurer which would be termed as payment for services rendered by them on behalf of the appellant. The appellant would obviously not make any payment to the coinsurer unless services were rendered by the coinsurer in the course of the insurance business. Since 194H clearly talks about „commission or brokerage"to include any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities. I find merit in the AO"s finding that the appellant has availed of the services of sharing of risk and in order to avail of the services, it has paid commission/service charge on which it has deducted tax Under chapter XVIIB of the act and that the appellant has failed to explain as to why tax was not deductible on the impugned amount. Hence, it is held that the AO was justified in disallowing the coinsurance fee of

₹ 4,280,853/– u/s 40 (a)(ia) for non-deduction of TDS. This ground is dismissed."

28. Against the above order of CIT (A), assessee is in appeal before us.

29. Similar disallowances was also been made by the AO in the assessment year 2007 – 08 and 2008 – 09 and the same has been confirmed by the CIT (A) after having similar observation as given in the assessment year 2006 – 07, reproduced hereinabove.

30. It was contended by the learned that AR that assessee has entered into an arrangement with the coinsurers for sharing the risk premium as per the agreed ratio. It was pleaded that the coinsurers were not the agents of the assessee and that the transactions between the assessee and the coinsurers were on principal to principal basis. The same effect was stated to be evidenced by the arrangement between the two parties and therefore no with the holding was required. It was further submitted that the essential characteristic of commission was payment to an agent. In the present case, the coinsurers were stated to be neither acting as an agent nor acting as broker for and on behalf the assessee and therefore the payments of coinsurance fees could not be construed as commission as per the act or in common

parlance. The AR made detailed submissions to bring out how the provisions of Section 194H are not applicable in their case. The AR also placed reliance on a number of judicial pronouncements, the ratio of which is not applicable to the facts of the case.

31. Considering totality of facts and circumstances of the case, we are in agreement with the contentions of the learned AR that no disallowances warranted u/s 40 (a) (ia) in respect of coinsurance fees paid by the assessee."

16. We have carefully considered the decision of the coordinate bench in assessee's own case wherein it has been held that no disallowance can be made u/s 40 (a) (ia) of the act in respect of whom insurance fees paid by the assessee. We have also perused the decision of the honourable Bombay High Court in case of the assessee in 111 taxmann.com 92 wherein the question was examined with respect to the tax deduction at source u/s 194D of the act. The honourable court decided the issue in favour of the assessee. However the issue before us is that the disallowance has been made by the learned assessing officer for the reason that the impugned payment according to AO falls under the provisions of Section 194H of the act. In the decision of the

coordinate bench we find that there is no discussion with respect to any of the agreements between the insurance company and the reinsurance Co, no such agreements were also available before us. Therefore it is very difficult for us to say without looking at the evidence that the provisions of Section 194H do not apply. In the earlier decision of the coordinate bench in[2009] 28 SOT 453 (Mumbai)/[2009] 125 TTJ 779 (Mumbai) it was held as Under:-

> **"12.** At the outset, it may be pertinent to mention that section 194H also makes it obligatory for any person, other than individual or a Hindu undivided family, to deduct tax at source from the payment or credit of any income by way of commission or brokerage to the account of the payee at the specified rate. The said section 194H, however, is not applicable in respect of any insurance commission referred to in section 194D. We leave it at that."

17. Based on the above, the honourable High Court has already held that the provisions of Section 194D do not apply to such commission. Therefore it is pertinent to examine whether the provisions of Section 194H applies to it or not. Before us, the assessee has relied merely on the decisions. There are neither the copies of agreement of

Reinsurance/coinsurance between the parties. Further in the order of the coordinate bench , we did not find any guidance that how the above payments were held to be on principal to principal basis and are not covered u/s 194 H of the Act , because para no 31 of the order merely says that it agrees with arguments of the assessee. Thus, these facts are not coming from the order of the lower authorities also. Therefore, in absence of any evidence placed before us, we are not in position to decide whether the above payments are covered u/s 194 H or not. Further, we also do not know whether the nature of payments and parties covered in earlier orders are also same. in the interest of justice we set-aside the whole issue back to the file of the learned assessing officer with a direction to assessee to produce the relevant agreements and arrangements before the assessing officer to show that the above payment does not fall within the purview of Section 194H of the act. The learned assessing officer may examine the same and then decide whether on such payment the provisions of Section 194H applies or not based on the various arguments raised before him by the assessee as well as the arguments raised by the assessee before the coordinate bench in earlier years as per para number 30 of that order. Accordingly,

ground no. 2 of the appeal of the Assessing Officer is allowed subject to above direction.

18. The third ground of appeal is with respect to the disallowance of expenditure of ₹29,46,886/- incurred by the assessee for purchase of pen drives and laptop adapters.

19. The facts clearly shows that the assessee has incurred an expenditure of ₹29,46,886/- on non EDP and EDP equipments under IT expenses. This expenditure is related to purchase of Pen drives, laptop adapters, batteries and hard disk, etc. The learned Assessing Officer made the disallowance based on his order for Assessment Year 2014-15 holding that these are capital expenditure. He granted the depreciation on this items at the rate of 60% and disallowed the balance sum of ₹11,75,755/-. This disallowance was challenged before the learned CIT (A) vide ground no.17. The learned CIT (A) held that as in assessee's own case, the co-ordinate Bench for Assessment Years 2006-07 to 2008-09 has deleted the identical disallowance holding that these are revenue expenditure. Thus, he deleted the disallowance of the above expenditure.

20. On hearing both the parties, we find that identical issue arose in case of the assessee for Assessment

Year 2006-07 to 2008-09. The co-ordinate Bench vide Para nos. 22,23, relaying on the decision of Hon'ble Madras High Court in case of Southern Roadways Ltd. 288 ITR 15 (Mad) held that purchase of hard disk, battery, etc. is revenue expenditure and not capital. Further identical issue in case of the assessee honourable Bombay High Court in [2020] 116 taxmann.com 492 (Bombay) [05-08-2019] as already decided this issue in favour of the assessee. Therefore, this issue is squarely covered in favour of the assessee. Hence, we confirm the order of the learned CIT (A) in deleting the above disallowance. In the result, ground No. 3 of the appeal is dismissed.

21. In the result, the appeal filed by the learned Assessing Officer is partly allowed.

Order pronounced in the open court on 08.03.2022

Sd/-	Sd/-
(VIKAS AWASTHY) (□□□□□□□□ □□□□□ / JUDICIAL MEMBER)	(PRASHANT MAHARISHI) (□□ □□□□□/ ACCOUNTANT MEMBER)

Mumbai, Dated: 08.03.2022
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to :

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai