IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'G' : NEW DELHI)

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER

AND

SH.ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 1952/Del/2018, A.Y. 2013-14

M/s. The Oriental Insurance Co. Ltd. A-25/27, Asaf Ali Road, New Delhi- 110002 PAN :AAACT0627R	Vs.	DCIT, Circle-1, LTU, New Delhi

ITA No. 1750/Del/2018, A.Y. 2013-14

DCIT, Circle-1, LTU, New Delhi	Vs.	M/s. The Oriental Insurance Co. Ltd. A-25/27, Asaf Ali Road, New Delhi- 110002 PAN :AAACT0627R
Appellant		Respondent

Assessee by	Sh. Taran Deep Singh, Adv.
Revenue by	Sh. Sujit Kumar, CIT DR

Date of hearing:	17.05.2023
Date of Pronouncement:	29.05.2023

ORDER

Per Anubhav Sharma, JM :

The appeal is preferred by the Assessee & Revenue against the order dated 26.12.2017 of CIT(A)-22, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No. 202/17-18/CIT(A)22, New Delhi arising out of an appeal before it against the assessment order dated 15.03.2016 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the DCIT, LTU, New Delhi (hereinafter referred as the Ld. AO).

2. The facts in brief are that return of income declaring total income under normal provisions of the Act at Nil and book profit u/s 115JB at Rs. 6,60,63,49,113/- was filed which was taken up for scrutiny. The assessee is a public sector undertaking of Government of India and is in the business of Non Life Insurance. The assessee offers insurance covers for large projects like power plants, petrochemical, steel and chemical plants. It also offers various insurance products like Motor Policies, Health-Mediclaim/Overseas Mediclaim/ Personal Accident: Motor Vehicle, Agriculture/ Sericulture/ Poultry, Aviation, Marine and other miscellaneous policies. During the assessment proceedings as in earlier year the following issues cropped up for determination and the same were examined by the Ld. AO.

- Profit on sale of investment.
- Interest income not provided as income.
- Disallowance of depreciation u/s 32.
- Disallowance u./s. 14A.
- Guest House Expenses.
- Provision for standard assets.

3. Ld. AO made additions while following the earlier years and Ld. CIT(A) had given relief to the assessee in regard to the deletion of addition u/s 14A and deletion of 50 % disallowance on account of expenses incurred on guest house.

Accordingly, Revenue is in appeal raising following grounds :

"1. On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs. 49,51,26,420/- made u/s 14A of the I.T.Act by the AO.

2. On the facts and circumstances of the case and in law, Ld. CIT(A) has erred in deleting 50% disallowance of Rs. 57,69,416/- on account of expenses incurred on Guest House made by the AO.

3. The appellant craves leave to, add to, alter, amend or vary from the above grounds of appeal at or before the time of hearing."

4. Assessee is in appeal raising following grounds "

"1. That on facts and in law the commissioner of income tax (appeals) {hereinafter referred to as "CIT(A)"} has erred in upholding an addition to total income of Rs. 8,00,23,29,329/- on account of Profit on Sale/ Redemption of Investment.

2. That on facts and in law the CIT(A) erred in upholding the action of Assessing Officer {hereinafter referred to as "AO"} in denying benefit of exemption u/s 10(38) of the Income Tax Act, 1961 {hereinafter referred to as "Act"}.

2.1 Without prejudice, on facts and in law the CIT(A) erred in upholding the action of AO in denying benefit of concessional rate of tax as per section 111A and / or 112 of the Act.

3. That on facts and in law the CIT(A) erred in upholding disallowance of Rs. 52,88,173/- out of total depreciation allowance of Rs. 1,82,35,078/- claimed by the appellant under section 32 of the Act. 3.1 That on facts and in law the AO/ CIT(A) erred in making/ upholding the above disallowance without considering the fact that unlike earlier years assessments / appeals all the necessary details relevant to depreciation

allowance claim for 2013-14 were on record. 4. On the facts and in law the CIT(A) erred in upholding disallowance of Rs. 3,16,82,836/- being provision made for standard assets.

5. *That on facts and in law the order of Assessment u/s 143(3) passed by the AO is bad in law and void ab initio."*

5. Heard and perused the record.

IN REGARD TO GROUNDS OF APPEAL OF THE ASSESSEE : ITA 1952/Del/2018

6. As regards **Ground No 1 and 2** Ld. AR submitted that vide the decision of Hon'ble Delhi High Court in assessee's own case reported in 407 ITR 658(Del) it has been held by Hon'ble High Court that in years prior to AY 2011-12 owing to CBDT Circular No. 528 of 1988 income from Profit on Sale/Redemption of Investments is not liable to tax. This decision has thereafter been followed by Tribunal in the case for assessee for years upto AY 2010-11. Last appellate order for AY 2010-11 in ITA no. 4535/Del/2016 dated 04.06.2021 was accordingly refered. It was submitted that for AYs 2011-12 onwards an alternative claim for exemption u/s 10(38) of the Act has been made and Tribunal has allowed this claim in case of assessee for AY 2011-12 in ITA No. 200/Del/2016 vide order dated 22-11-2022, though the AO is directed to verify about status of STT payment.

6.1 It can be observed that in regard to ground no. 1 and 2 of assesse's apeal this bench while dealing with the case of assessee for A.Y. 2011-12 in ITA no. 200/Del/2016 vide order dated 22.11.2022 had made following relevant observations while holding that assessee is entitled to claim benefit of exemption u/s 10(38) and Ld. AO was however directed to verify about status of STT payments :-

"8. In regard to Ground No. 1, 1.1, 2, 2.1, 2.2 it was submitted that the primary question involved is whether assessee is entitled for making a claim u/s 10(38) of the Act. In this context it can be observed that the ld AO has classified the gains from transfer of long term capital asset being as part of the business activities of the assessee and accordingly denied exemption u/s 10(38) of the Act.

9. Ld. AR relied on the judgment of the Hon'ble Bombay High Court in the case of General Insurance Corporation of India for Assessment Year 2006-07 (342 ITR 27) to contend that Hon'ble High Court has held that exemption available to any other assessee under any clauses of section 10 is also available to General insurance business company subject to fulfillment of the conditions attached to the relevant provisions and it was submitted that assessee fulfilled both the conditions. Ld counsel relied on the judgment of the Hon'ble Bombay High Court in case of Life Insurance Corporation of India Vs. CIT (1978) 115 ITR 45 (Bombay) to contend that the Hon'ble High Court has held that there is no bar by virtue of section 44 of the Insurance Act and the insurance business corporation are entitled to claim deduction it was otherwise admissible in the case when the assessee computation of income is governed by the other provisions of the Act. It was submitted that Bombay High Court in CIT Vs. New India Assurance Company Ltd 71 ITR 761 allowed benefit of exemption to assessee engaged in the business of general insurance and also allowed the benefit of exemption claimed by LIC. Reliance was placed on the Mumbai ITAT decision in the case of New India Assurance Company Ltd for Assessment Year 2002-03 and 2003-04 in ITA No. 6498 and 6499/Mumbai/2005 to contend that the Tribunal has sustained the claim of general insurance business in exemption under provision u/s 10(38) of the Act. It was submitted that the assessee being into business of Insurance has to abide by the IRDA guidelines and instructions with regard to its investment activity. It was contended that its holdings are in the nature of investment and not stock in trade. It was submitted that CBDT Circular No. 528 dated 16.12.1988 had considered the holdings in shares by the insurance company as investments. It was submitted that section 44 of the Act provides that irrespective of anything contrary contained in the provisions of section 45 of the Act the profit and gains of insurance business is to be computed in accordance to Rule 5 of the First Schedule of the Act and the Rule 5 also consider shall holding to be investments. It was submitted that on behalf of the assessee that in fact the Rule 5 was deleted by Finance Act, 1988 w.e.f. 01.04.1989 and substituted by Finance Act, 2010 w.e.f. 01.04.2011. The ld counsel submitted that in fact when this Rule 5 stood omitted, the Circular No. 528 dated 16.08.1988 was considered to give relief to the insurance company.

10. The ld DR relied on the order of the ld tax authorities below and submitted that the case of assessee has to be distinguished from the life insurance company business in which the judgment has been relied by the ld AR.

11. In regard to issue arising out of these grounds, it can be observed that the revenue does not dispute the fact that the income of the assessee is to be computed in accordance with provisions of section 44 read with Rules 5 of the First Schedule. The controversy raised by the ld AO is that the sale of investment does not qualify to be income from general insurance business therefore, section 40 of the Act is not applicable and the general section 28 of the Act will come into action. The ld AO has considered the investments of the assessee as stock in trade. However, in assessee's own case for AY 2005-06, reported in 407 ITR 658 (Del) Hon'ble High Court has held such assets to be , "floating assets" and observed in para 25 to 29 as below:-

"25. Section 27B (1) of the IA mandates that no insurer carrying on general insurance business shall "invest or keep invested any part of his assets otherwise than in any of the following approved investments." These 'approved investments are set out in clauses (a) to (j) there under. Section 27B (4) states that an insurer "shall not invest or keep invested any part of his assets in the shares of any one banking company or investment company to the extent of more than (a) 10% of his assets, or (b) 2% of the subscribed share capital and debentures of the banking company or investment company concerned, whichever is less."

26. Section 27B(16)(b) of the IA clarifies that "assets" means all assets required to be shown in the balance-sheet as per Form A, in Part II of the First Schedule but excludes any items against the head "Other Accounts (to be specified)". Section 27D of the IA also specifies the manner and conditions of investment. Section 28 of the IA pertains to statement and return of investment of assets.

27. A conspectus of the above provisions of the IA makes it clear that there is no option with a company carrying on general insurance business, like the Assessee, to treat any part of its investment as "stock-in-trade" as is sought to be contended by the Revenue before the Court. These investments are, at best, "floating assets". The argument that these constitute "stock-in-trade" is ingenious but does not find resonance in the provisions of the IA.

28. It is also pertinent to note that the reason the AO proceeded to reject the plea of the Assessee that the profit from the sale of investments should not be brought to tax is not because it was stock-in-trade but because, according to him, the entire income of the Assessee is assessable as business income in accordance with Rule 5 of the First Schedule to the Act. Indeed, if one carefully peruses the assessment order dated 3 rd December 2007, nowhere does it treat investment as the Assessee's stock-in-trade. This argument appears to be taken for the first time before this Court to counter the submission of the Assessee based on Circular No. 528 dated 16th December 1998 which the AO had rejected on the basis that it was not supported by any statute.

29. In the view of this Court, the argument of the Revenue in this regard requires to be rejected as not being consistent with either the factual position or the legal position."

12. At the same time in para 38 to 48, Hon'ble High Court has gone into question of applicability of Circular No. 528 of CBDT, after Rule 5b stood deleted by Finance Act, 1988 and has held as below:-

"38. Thus, the major change, therefore, sought to be brought about by the 2009 amendment was to align it with the IRDA Regulations regarding preparation of accounts of general insurance companies. The changed norms, in terms of said Regulations, required a non-life insurance company to include in its Profit and Loss ('P&L') Account or Revenue Account "profit or loss on realisation/sale of investment". This was said to be consistent with the international standards.

39. With the Assessee carrying on a general insurance business, it was bound by the provisions of the IA as well as the IRDA Regulations referred to hereinbefore. Even the CBDT, in its Circular No. 5/2010 dated 3rd June 2010, acknowledged that, after the introduction of the IRDA Regulations in 2002, non-life insurance companies are required to credit income from the sale of investments directly to the P&L Account. This requirement, which would make the income so earned amenable to tax, was made applicable only from AY 2011-12. Prior to 1st April 2011, there was no provision which required the Revenue to disallow the deduction of loss on sale of investments.

40. As explained by the Supreme Court in CIT v. Karnataka State Co-operative Apex Bank (supra) in the context of Section 80 P (2) (a) (i) of the Act, where an entity is obliged to place a part of its funds with the State Bank or the Reserve Bank of India to enable it to carry on its banking business, then "any income derived from funds so placed arises from the business carried on by it and the assessee has not, by reason of section 80P(2)(a)(i), to pay income-tax thereon. The placement of such funds being imperative for the purposes of carrying on the banking business, the income derived therefrom would be income from the assessee's business."

41. In the AY in question, the AO did not accept the case of the Assessee that the income earned on the sale/redemption is not chargeable to tax because, in the past, the profit on sale of investment was sometimes shown in the balance sheet and sometimes in the P&L account. According to the AO, the entire income of the Assessee was assessable as 'business income'. According to the AO, Circular No. 528 dated 16th December 1988 of the CBDT did not create a dent insofar as it stated that both profit and loss on sale of investments will not be taken into account in calculation of insurance profits.

Binding nature of the Circular

42. The above approach of the AO in relation to Circular No. 528 and its binding nature as far as the Revenue is concerned, appears to be flawed. In Principal Commissioner of Income Tax v. National Insurance Company Ltd. [2017] 393 ITR 52 (Cal), it was held that Circular No. 528 of 1988 did not permit the AO to add back the profits arising from the sale of investments made by the Assessee in that case which was also carrying on a general insurance business. The Calcutta High Court in the above decision referred to the decision in Paper Products Ltd. v. Commissioner of Central Excise [2001] 247 ITR 128 (SC) where it was held that the circulars issued under Section 37B of the Central Excise Act, 1944 would be binding on the Department and that, "it does not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with the statutory provisions. Consistency and discipline are, according to this Court, of far greater importance than the winning or losing of Court proceedings." It is, therefore, too late in the day for the Revenue to disown its own Circular No. 528 and contend that it does not apply to the facts of the present case.

43. In CIT v. Ashok Mittal [2013] 357 ITR 245 (Del), the Court reiterated the well settled position that, where the CBDT circular has not been withdrawn and is beneficial to the Assessee, it would be binding on the AO and other Revenue authorities. The Court was merely reiterating what has been held in a large number of cases including Navnitlal C. Zaveri v. K.K. Sen (supra) and CIT v. Milk Food Ltd. [2006] 280 ITR 331 (Del).

44. The ITAT itself has taken a consistent stand that the taxability of income in the case of insurance companies is not on commercial profits but on such profits as are computed in accordance with the provisions of the IA, subject to the permissible adjustments under the Act. In other words, the taxability of profits in the hands of the insurance companies is confined to profits in terms of annual accounts of such insurance companies drawn up in accordance with the IA."

13. The present case of the assessee is for Assessment Year 2011-12 and the ld AR admitted that as such the substituted Rule 5b w.e.f. 01.04.2011 or the circular No. 528 are not directly applicable therefore, rescue is taken of section 10(38) of the Act. However, in principle the Rule 5b and CBDT Circular 528 as interpreted in favour of the assessee in assessee's own case in 407 ITR 658 (Del), can be reasonably interpreted to hold that as the assessee is required to make investments within the statutory frame work of the Insurance Act and the IRDA guidelines. Also that the assessee being in general insurance business cannot operate into any other business. So, the investments made by the

assessee in insurance business regulated by the Insurance Act, cannot be treated as stock in trade for the purpose of the Act.

14. Infact, if we look at Section 44 of the Act, the same provides;

"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 6 43B], the profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or by a cooperative society, shall be computed in accordance with the rules contained in the First Schedule."

The words " business of insurance" here includes all the activities, which enable the insurance company to run the said business of insurance to not just earn profits and for gains but to indemnify the policy holders. Investment of funds in most secured modes has been ensured by IRDA guidelines and the Insurance Act, so that in an attempt of Insurance business company, trying to earn out of risk bearing investments, the insured persons is not left at loss. So, these investments cannot be termed as stock in trade of the to earn income and make gain, independently of the business of insurance run by the assessee and ld Tax authorities below have completely failed to take note of it and Ld. AO reached a erroneous conclusion that the assessee was doing two different business, one of general insurance business and second 'other business'.

15. Then, in the present assessment year the ld AO has himself allowed exemption u/s 10(15)(iv)(h) of the Act in regard to investment of tax free in public sector bonds. But still the Ld. AO, without citing reasons as to how u/s 10(15)(iv)(h) of the Act is applicable and Section 10(38) of the Act is not applicable, made the distinction and made the addition avoiding Section 10 of the Act.

16. In this context here it can be observed that 'Profits and gains of business' is one of the classified heads of the income as per Section 14 of the Act. To arrive at the income by way of 'Profits and gains of business' for the purpose of Section 14 of the Act, the scope of total income provided under Section 5 of the Act has to be read with Section 10 of the Act, which as part of Chapter III of the Act, falls under the heading "incomes which do not form part of Total Income". So, in any case the income by way of ''Profits and gains of business' which here in case of assessee means ''Profits and gains of insurance business", has to be arrived after giving benefit of exclusion of the incomes falling under Section 10 of the Act. That would include disputed exemption of section 10(38) of the Act.

17. Even otherwise, the issue about applicability of provisions of section 10 of the Act in case of general insurance company stands decided in favor of insurance business companies and relevant observation in Max New York Life Insurance Co. Ltd V. DCIT 191 TTJ 897(Del) are as follows:-

"97. Now coming to the additional ground taken by the assessee which relates to the claim of deduction by the assessee u/ 10 (34) in respect of dividend income, we noted that this issue is duly covered by decision of Mumbai Bench of this Tribunal in case of ICICI Prudential Insurance Company Ltd v ACIT 140 ITD 41 in which under para 47 while dealing with similar issue following decision of General Insurance Corp of India v CIT 204 Taxman.com 587 by Bombay HC gave clear cut finding that assessee is entitled to exemption u/s 10(34) for the dividend income. We also noted while disposing of ground relating to applicability of S. 14A for disallowance of expenditure in respect of income not forming part of Total Income. This Tribunal Mumbai Bench in the aforesaid case under para 45-46 took the view that since S. 44 creates a specific exception to the applicability of S. 28-43B, therefore purpose object & purview of S. 14A has no apllicability to profits and gains of an insurance business. This decision of co-ordinate Bench is binding on us. The learned DR in this regard although referred to decision of Delhi Tribunal in the case of assessee reported in 86 Taxman.com 239 for Assessment Year 2002-03 dt 17/10/2017, we noted Tribunal took the view when the question of application of provision of S. 92 came before it, it took the view that S. 92 applied to an assessee carrying on insurance business. In case of computation of determination of ALP of International transaction, we are concerned with S. 92 in the case of an assesse carrying on life insurance business, there has to be two staged computation of income. First income has to be computed as per S. 44 read with First Schedule & while computing income all the other provisions relating to the computation of income chargeable under the head 'Interest on Securities', 'income from house property', 'income from capital gains' or 'income from other sources' or in S. 199 or in S. 28-43B has to be disregarded. Second stage comes after computation of income u/s 44, computation as per provision of S. 92 by making addition on a/c of transfer pricing adjustment.

98. This decision in our view will not apply w.r.t. the applicability of S. 14A as the applicability or inapplicability of S 14A has to be considered at the stage of making computation of income u/s 44. We also do not agree with submission of learned DR since the only activity in shareholders a/c is of investment, it cannot be said that no expenditure was incurred for earning dividend. In this regard, we may state question before us is not whether any expenditure has been incurred or not for earning of dividend but the question relates to the applicability of S. 14A, which issue has already been decided by co-ordinate Bench against Revenue in view of discussion under para 46 of the order of this

Tribunal Mumbai Bench in case of ICICI Prudential (Supra), in which they have followed the decision of Delhi Bench in case of Oriental Insurance Co Ltd v ACIT 130 TTJ (Delhi) 338. No contrary decision for applicability of S. 10(34) & S. 14A was brought to our knowledge. We accordingly allow the additional ground and dismiss the plea of learned DR that directions be given in case exemption is granted u/s 10(34) to disallow be expenditure u/s 14A of the Income Tax Act."

18. In ICICI Prudential Insurance Co. Ltd vs ACIT reported in 140 ITD 41 (Mum) it is held as under:

''48. All the above three grounds are on the issue whether exemption under Sec 10 can be allowed when incomes are computed under Sec.44 of the IT Act. In arriving at the deficit from the insurance business, assessee claimed certain exempt incomes under section 10(23AAB) with reference to Pension Business and dividend under section 10(34). AO did not allow the amounts on the reason that these incomes are part of income of life insurance business and it is included as income by the actuary, therefore, they cannot be exempted. This issue is covered in favour of assessee and against the Revenue by the orders of the General Insurance Company of India(supra) wherein the issue of deduction under section 10 have been considered and allowed following the Hon'ble Bombay High Court judgment in General Insurance Corpn. of India v. CIT [2012] 204 Taxman 587/17 taxmann.com 247. The order in the case of General Insurance Corpn. of India (supra) vide Para 7 to 8 is as under:

7. "Issue No.5: Availability of Section 10 Exemption (Modified Ground of Appeal No.2 - Original Ground of Appeal No. 2.1 & 2.2) -. The issue arises in a peculiar manner in this assessment year. While dealing with the issue of profit on sale of investments, the Assessing Officer proposed to differ from assessee stand and bring to tax the profit on sale of investment. The assessee alternately submitted that the deduction under section 10(38) in respect of long term capital gain was available. When this issue came up before the CIT (A), the CIT (A) not only rejected the claim under section 10(38) but also considered and elaborately discussed how and why the assessee was not eligible for deductions already allowed by the Assessing Officer in respect of 'interest on tax free bonds' amounting to Rs. 3,45,19,352/- under section 10(15) and dividend income amounting to Rs. 270,66,46,489/- under section 10(34). He has elaborately discussed this issue from Para 6 onwards and ultimately made an enhancement of income to an extent of Rs. 274,11,65,844/- the amount which was allowed by the Assessing Officer as exempt under section 10. The contention of the CIT (A) was that the assessee was not eligible for deduction under section 10, once the incomes are brought to tax under section 44 r.w. Rule 5 of First Schedule to the Income Tax Act, 1961.

8. There is no need to consider the arguments of the CIT (A) and how he has arrived at that conclusion in this order as this issue was decided by the Hon'ble Bombay High Court in favour of the assessee in writ petition No.2560 of 2011 in the assessee's own case dated 1.12.2011. Consequent to the findings of the CIT(A) in AY 2007-08 (impugned AY) the Assessing Officer seems to have issued notice under section 148 for reopening the assessment for the AY 2006-07 on the reason that the assessee was not eligible for claiming income as exempt under sub-sections 15, 23G, 34 and 38 of Section 10 and assessee challenged the issue by way of writ petition. The Hon'ble Bombay High Court not only disapproved the reopening of the assessment but gave the findings on merit also which are as under:-

"11. Section 44 of the Income Tax Act, 1961 stipulates as follows:

"44. Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head "interest on securities", "Income from house property", "Capital gains" or "Income from other sources", or in section 199 or in 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 cooperative society, shall be computed in accordance with the rules contained in the First Schedule".

Section 44 provides that the profits and gains of any business of insurance of a mutual insurance company shall be computed in accordance with the rules in the First Schedule. Part 'A' of the First Schedule containing Rules 1 to 4 deals with profits of life insurance business while Part B consisting of Rule 5 deals with computation of profits and gains of other insurance business. Rule 5 provides as follows:

"5. The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required under the Insurance Act, 1938 (4 of 1938), to be furnished to the Controller of Insurance subject to the following adjustments:

(a) Subject to the other provisions of this rule, any expenditure or allowance (including any amount debited to the profit and loss account either by way of a provision for any tax, dividend, reserve or any other provision as may be prescribed) which is not admissible under the provisions of section 30 to (43B) in computing the profits and gains of a business shall be added back;

(b) (;

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

The Assessing Officer has in the reasons for reopening the assessment proceeded on the premise that in computing the profits and gains of business for an assessee who carries on general insurance business no other section of the Act would apply and that the computation could be carried out only in accordance with section 44 read with Rule 5 of the First Schedule, In Life Insurance Corporation of India, Bombay v. Commissioner of Income Tax Bombay City- Ill, a Division Bench of this Court construed the provisions of section 44 and of the First Schedule. The assessee in that case which carried on life insurance business had made a claim to exemption under section 10(15) and section 19(1). In a reference before the Court, the questions referred included whether in computing the profits and gains of the business of insurance under section 44 read with the First Schedule certain items which were ordinarily not includible in the total income were rightly included in the taxable surplus. The Division Bench of this Court held as follows:

"The question which essentially falls to be determined in this reference is whether, in view of the provisions in section 44 or rule 2 of the first Schedule, the Life Insurance Corporation will not be entitled to claim the deductions which are otherwise admissible in the case of an assessee, computation of whose income is governed by the other provisions of the Act. The argument of Mr. Kolah for the Life Insurance Corporation is that unless there are express provisions which disable the Corporation from claiming the deductions referred to above, the Corporation cannot be deprived of the benefit of the provisions referred to in the questions Nos. 1 to 6. Section 44, which deals with computation of profits and gains of business of insurance, begins with a non-obstante clause, the effect of which is that the provisions of the 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", do not apply in the case of computation of income from insurance business. The effect of the non-obstante clause so far as the earlier part of section 44 is concerned, therefore, is that the provisions of section 44 will prevail notwithstanding the fact that there are contrary provisions in the Act relating to computation of income chargeable under the four heads mentioned in section 44. The only other overriding effect of section 44 is that its provisions operate notwithstanding the provisions of section 191 and of section 28 to 43A. Thus, the only effect of section 44 is that the operation of the provisions referred to therein is excluded in the case of an assessee who carried on insurance business and in whose case the provisions of rule 2 of the First Schedule are attracted. If the deductions which are claimed by the assessee do not fall within the provisions which are referred to in section 44, it will have to be held that the applicability of those provisions in the case of an assessee whose assessment is governed by section 44 read with rule 2 in the First Schedule is not excluded".

This judgment is sought to be distinguished by the Assessing Officer while disposing of the objections on the ground that the decision was rendered in the

context of an assessee which carried on life insurance business to whom Rules 1 to 4 of the First Schedule applied whereas in the case of the assessee in this case which carries on general insurance business Rule 5 could apply. According to the Assessing Officer, Rule 5 would not permit any adjustment to the balance of profit as per annual accounts prepared under the Insurance Act, and hence the judgment would not be applicable. The Assessing Officer has clearly not noticed that the decision in Life Insurance Corporation (supra) though rendered in the context of an assessee which carries on life insurance business, followed an earlier decision of a Division Bench of this Court in Commissioner of Income-Tax v. New India Assurance Co Ltd. That was a case of an assessee which carried on non life insurance business. In New India Assurance Co. Ltd. the Division Bench dealt inter alia with the provisions of section 19(7) of the Income Tax Act, 1922. The questions referred to this Court included whether the assessee was entitled to claim an exemption from tax under section 15B and 15C (4) and in respect of interest on a government loan under a notification issued under section 60. Section 10(7) of the Income Tax Act, 1922 provided that notwithstanding anything to the contrary contained in section 8,9,10,12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to the Act. The Division Bench held that upon the language of sub-section (7) of section 10 read along with rule 6 it was impossible to hold that the provisions relating to exemptions stood excluded from operation. In that context the Division Bench held as follows:

"It is only after the profits and gains of a business are computed that any question of granting exemptions arises and if the latter stage were intended to be excluded by the law we should have thought that a clearer provision than is made in sub-section (7) of section 10 and in rule 6 would have been made".

In the subsequent judgment of the Division Bench in Life Insurance Corporation (supra), the Division Bench noted that there was a difference in the language of section 10(7) of the Act of 1922 when compared with section 44 of the Act of 1961 since section 44 does not refer to the computation of tax but merely to the computation of profits and gains in the business of insurance. The Division Bench held that this would however not make any difference to the principle laid down by the Court in the earlier decision in the case of New India Assurance Co. Ltd. Accordingly, the decision of Life Insurance Corporation (Supra) could not have been ignored by the Assessing Officer on the supposition that the decision was rendered in the context of an assessee who carried on life insurance business and was, therefore, not available to an assessee which carries on general insurance business.

12. In General Insurance Corporation of India v. Commissioner of IncomeTax, the Supreme Court considered in an appeal arising out of a judgment of the High Court the issue as to whether a sum of Rs. 3 crores, being a provision for redemption of preference shares, was not liable to be added back in the total

income of the assessee for AY 1977-78?. The Supreme Court held that a plain reading of rule 5(a) of the First Schedule made it clear that in order to attract the applicability of the provision the amount should firstly be an expenditure or allowance and secondly it should be one not admissible under the provisions of section 30 to 43A. The Supreme Court held that the sum ofRs. 3 crores in that case which was set apart as a provision for redemption of preference shares could not have been treated as an expenditure and hence could not have been added back under rule 5(a). In that context the Supreme Court held as follows:

"There is another approach to the same issue. Section 44 of the Income-tax At read with the rules contained in the First Schedule to the Act lays down an artificial mode of computing the profits and gains of insurance business. For the purpose of income-tax, the figures in the accounts of the assessee drawn up in accordance with the provisions of the First Schedule to the Income-tax Act and satisfying the requirements of the Insurance Act are binding on the Assessing Officer under the Income-tax Act and he has no general power to correct the errors in the accounts of an insurance business and undo the entries made therein".

The question whether an assessee who carries on general insurance business would be entitled to avail of an exemption under section 10 did not arise. The issue as to whether the assessee which carries on the business of general insurance would be entitled to the benefit of an exemption under clauses (15), (23G) and (33) of section 10 is directly governed by the decision rendered by the Division Bench in Life Insurance Corporation v. Commissioner of Incometax (Supra) following the earlier decision in Commissioner of Income-tax v. New India Assurance Co. Ltd (supra). The Assessing Officer could not have ignored the binding precedent contained in the two Division Bench decisions of this Court. Moreover, the Assessing Officer in allowing the benefit of the exemption in the order of assessment under section 143(3) specifically relied upon the view taken by the CBDT in its communication dated 21 February 2006 to the Chairman of IRDA. The communication clarifies that the exemption available to any other assessee under any clauses of section 10 is also available to a person carrying on non-life insurance business subject to the fulfillment of the conditions, if any, under a particular clause of section 10 under which exemption is sought. It needs to be emphasized that it is not the case of the Assessing Officer that the assessee had failed to fulfill the condition which attached to the provisions of the relevant clauses of section 10 in respect of which the exemption was allowed. This of course is apart from clause (38) of section 10 where the Assessing Officer had rejected the claim for exemption in the original order of assessment under section 143(3). The Assessing Officer above all was bound by the communication of the CBDT. Having followed that in the order under section 143(3) he could not have taken a different view while purporting to reopen the assessment. Having applied his mind specifically to the issue an having taken a view on the basis of the communication noted earlier, the act of reopening the assessment would have to be regarded as a

mere change of opinion which has also not been based on any tangible material. Consequently, we hold that the reopening of the assessment is contrary to law. The Petition would have, therefore, to be allowed".

Respectfully following the above, we hold that the assessee is entitled for exemption under section 10. The enhancement made by the CIT (A) is therefore, cancelled. Ground is accordingly allowed".

49. In view of the above and respectfully following the same, we hold that assessee is entitled to exemption under section 10. Therefore, we do not see any reason to differ from the order of the CIT (A) where he has allowed assessee's claim of exemption under section 10(23AAB) of surplus of Participating Pension Business and also dividend under section 10(34).
Accordingly Revenue ground on this issue is rejected."

19. Thus, in any way we look, the assessee is entitled exemption u/s 10(38) like any other assessee for computation of Income and ld tax authorities below have fallen in error in not extending the benefit. In fact the ld CIT(A) has decided the issue against the assessee following his finding in Assessment Year 2007-08 wherein, the Tribunal's order dated 22.07.2011 for Assessment
Year 2004-05 was followed. However, as a matter of fact in assessee's own case for Assessment Year 2005-06, reproduced above, issue were decided in favour of the assessee by the Hon'ble Delhi High Court. Consequently, ground 1, 1.1, 2, 2.1, 2.2 are decided in favour of the assessee by holding that assessee/appellant is entitled to benefit of Section 10(38) of the Act. However, the matter needs to be restored to the files of the Ld. AO to enquire that claim of assessee u/s 10(38), fulfills the desired conditions about payment of Securities Transaction Tax (STT)."

Accordingly, the issue is decided in favour of the assessee and Ld. AO is directed to verify about the status of STT payment and accordingly allow the exemption u/s 10(38) of the Act."

6.2 As regard **Ground no. 3** of challenging the upholding of disallowance of depreciation, Ld. AR refered to the decision of Tribunal in assessee's own case for AY 2010-11 in ITA No. 4535/Del/2016 order dated 30-06-2021 and AY 2011-12, submitted that Tribunal has remanded the matter back to the AO and assessee claims for similar relief and similar directions have been issued in earlier years.

6.3 Again in assessee's own case for A.Y. 2011-12 this Bench has remanded the matter back to the AO with following relevant findings :

> *"20. In regard to ground No. 3 and 3.1, the admitted state of affairs is that in assessee's own case for Assessment Year 2010-11 in ITA No. 4535/Del/2016 vide order dated 30.06.2021 the issue has been restored to the file of the ld AO with following findings in para 9 and 9.1:-*
>
> *"9.0 We have carefully perused the orders of the lower authorities and the material available on record. It is seen that similar issue arose before this Tribunal in the case of the assessee for AY 2007-08 in ITA No. 5796/Del/2015. Vide order dated 12th January 2018, the coordinate bench of this Tribunal held as under:*
>
> *"6.8 As we compare the factual position prevalent during assessment year 2000-01 and 2001-02 based on which the Tribunal confirmed the disallowance of depreciation, we observe that it was so decided because assessee failed to furnish relevant information before the Assessing Officer along with Audit Report. Facts of the present assessment year are different as Ld. AR sufficiently demonstrated that the details were very much available before Ld. AO and Assessing Officer has not taken any steps to verify the same.*
> *6.9 We therefore are inclined to set aside this issue to Ld. AO for proper verification of the details filed by assessee. Ld. AO is directed to decide the issue as per law after taking into consideration all the material facts available on record. Accordingly this ground raised by assessee stands allowed for statistical purposes."*
>
> *9.1 In the year under consideration also, the relevant details for addition made to fixed assets in Financial Year 2009-10 have been placed on record by the assessee. The AO has, however, failed to take the same into consideration. We are, therefore, inclined to set aside this issue to the records of the AO for a de novo verification of the relevant facts. In the result, Grounds 3 and 3.1 are partly allowed for statistical purposes."*
>
> *21. The ld AO here has also erred in comparing facts with the earlier assessment years while making a disallowance ignoring that requisite details were filed as Annexure of the Tax Audit Report which have also been made available with the paper booked titled as 'Index of Papers'. As the facts are similar to AY 2010-11, the issue is decided in favour of the assessee for statistical purposes and issue is restored to file of Ld. AO for afresh determination, as supra."*
>
> The issue decided in favour of the assessee.

Ld. DR has not pointed and distinguishing the fact so the ground is decided in favour of assessee and issue restored to file of Ld. AO to decide afresh as directed for A.Y. 2010-11 to 2011-12.

Ground no. 4

6.4 As with regard to the Ground no 4 upholding disallowance being provisions made for standard assets, Ld. AR referred to decision of Tribunal is assessee's own case for AY 2010-11 in ITA No. 4535/Del/2016 order dated 3006-2021 and for AY 2011-12 where the Tribunal has deleted the disallowance and allowed the ground of appeal.

6.5. In regard to this ground, this Bench in assessee's own case for A.Y. 2011-12 has deleted the disallowance with following relevant findings :-

> "22. In regard to issue No. 4 the admitted state of affairs again is that in assessee's own case for Assessment Year 2010-11 in ITA No. 4535/Del/2016 vide order dated 30.06.2021 issue has been discussed at para No. 10 as follows:-
>
> *"10.0 In Ground No. 4 of the appeal, the assessee is aggrieved by the action of the AO in making a disallowance of Rs 56,59,609/- on account of Provision made for Standard Assets. In this regard, in the order of assessment, it has been held by the AO as under:*
>
> *"During the year under reference, the assessee has made a provision for standard assets of Rs.56,59,609/-. When asked to explain as to why the same should not be allowed, the assessee made the following submission:*
>
> *"As per IRDA's CIRCULAR NO.32/F&A/Circulars/169/Jan/ 2006-07 dt.24.01.2007, Standard Asset is defined as under:*
>
> *Standard asset is one which does not disclose any problem and which does not carry more than normal risk attached to the business. Such as asset is not an NPA.*

As per the same circular, the insurer should make a general provision on Standard Assets of a minimum of 0.40 per cent of the value of the asset. The change in provision from last year is taken to P&L A/c.

10.2 The reply of the assessee has been perused and carefully considered. As per the assessee's own submission standard asset does not disclose any problem and does not carry more than normal risk and is not an NPA. The provision for standard assets of Rs.56,59,609/- is therefore disallowed. Penalty u/s 271(1)(c) is initiated for furnishing of inaccurate particulars of income and concealment of the particulars of income."

10.1 The Ld. first appellate authority has upheld the disallowance by relying on the appellate order passed by him in the case of the assessee for AY 2011-12. The Ld AR has filed a copy of the appellate order dated 16th November 2015 passed by the Ld CIT (A) in its case in appeal No. 40/13-14. The Ld. CIT (A) has upheld the disallowance by observing as under:

"The AO has followed the order for AY10-11 on this issue. However, it needs to be mentioned here, there has been an amendment under rule 5 (supra), w.e.f., 01-04-2011, Under rule 5(a), the legislature has provided w.e.f., 01-04-2011, that any expenditure or allowance, which is not admissible under the provision of section 30 to 43B would include any amount debited to the P&L account by way of provisions. The appellant has relied on the decision of the Apex Court in the case of M/s Oriental Fire and General Insurance Company Ltd., reported in 291 ITR 370, wherein the Apex Court has held that the provision is deducted from an asset and is made against anticipated losses, while the reserve is an appropriation of profit and remains as proprietors interest in the balance sheet. The Apex Court further held that a provision made for bad and doubtful debts against an anticipated loss, is not an expenditure and since rule 5of first schedule of Income Tax Act provides for adding back of only an expenditure or allowance, the provision for bad and doubtful debts cannot be added back. The appellant also relied on the decision of the Apex Court in the case of General Insurance Corporation of India reported in 240 ITR 139. However, the said decision is also in respect of AY77-78 and it deals with the provision for redemption for preference shares, which was held to be not an expenditure covered by section 30 to section 43B.

5.2 In view of amendment to Rule 5 including rule 5(a) w.e.f., 01-042011, the decisions of the Apex Court relied upon by the appellant, no longer apply and the word 'expenditure or allowed' referred to in section 5(a) now includes provision, which is not admissible under the provisions of section 30 to section 438. without prejudice to the same, as per IRDA Circular dated 24-01-07 reported on page 15 of the assessment order, the standard asset is one which does not disclose any problem and which does

not carry more than normal risk attached to the business and such assets is not on NPA. Therefore, the provision for Standard Asset is not even a provision for anticipated losses, referred to in the decision of the Apex Court reported in 291 ITR 370, as the provision in that case, was for bad and doubtful claims, I.e., an anticipated loss. In view of the same, even without considering the amendment to rule 5 and 5(a) w.e.f., 01.04.2011, the facts in the case of the appellant are distinguishable from the two decisions of the Apex Court, relied upon by the appellant. Moreover, since the Act has been amended w.e.f., 01.04.11, the provision for Standard Asset is to be added back even otherwise, in view of amended provision. Consequently, ground no. 7 of the appeal is dismissed."

10.2 Before us it was submitted by the Ld AR that the lower authorities have erred in making/sustaining the disallowance. In this regard it was submitted by the Ld. AR that the total income of the assessee is to be computed as per provisions of section 44 read Rule 5 of Schedule 1. It was submitted that as per the scheme of taxing provisions, the audited annual accounts of the assessee are to be treated as sacrosanct and only the adjustments provided for in Rule 5 of the First Schedule are permissible. It was submitted that under Rule 5 there is no enabling provision which directs for disallowance of provision made for Standard Assets.

10.3 The Ld. CIT (DR), on the other hand, vehemently supported the disallowance made by the lower authorities. It was submitted that the Ld. CIT (A), in AY 2011-12, has justifiably sustained the disallowance. The Ld. CIT.(DR) also relied upon the decision of the coordinate bench of this Tribunal in case of Chaitanya Godavari Grameen Bank reported in 170 ITD 668(Vishaka)."

6.6 In ITA no. 4535/Del/2016 vide order dated 30/06/2021 Co-ordinate Bench observed and concluded as follows :

"11.11 As a result, we find that there is no enabling mechanism in Rule 5(a) mandating an adjustment to disclosed profits by making an addition on account of provision made for Standard Assets. The Ld. CIT (DR) has relied upon decision of the coordinate bench of this Tribunal in case of Chaitanya Godavari Grameena Bank (supra). However, in that case the assesee was a bank and had claimed deduction on account of Provision for Standard Assets u/s 36(l)(viia). This was not a case of an Insurance Company to which provisions of Rule 5 was applicable. As already held above, under Rule 5 the Statute makes profit disclosed in Profit and Loss account sacrosanct, subject only do adjustments prescribed in Rules 5(a) to 5(c). The case law relied is, therefore, 'distinguishable. The Ld. CIT (A), in AY 2011-12, has also not properly addressed the issue. Relevant

statutory provisions have been inadvertently misread and hence not properly understood. We therefore delete the disallowance and for reasons given by us above Ground No 4 is allowed.

Accordingly, the issue no. 4 is decided in favour of the assessee.

IN REGARD TO GROUNDS OF APPEAL OF THE REVENUE :

ITA 1750/Del/2018 :

GROUND NO. 1

7. Ld. DR submitted that at one end assessee is taking benefit of Section 10(38) of the Act on other hand pleading for benefits under Section 44 qua Section 14A. The Bench is of considered opinion that it is a settled proposition of law now that as Section 44 of the Act provides a complete code for computation of profit and gain of the business of the assessee insurance company. The assessing officer cannot make any adjustments in the profit of the assessee's business when they are calculated in accordance with the rules contained in first schedule. Reliance can be placed on the judgment of Delhi High Court in the case of assessee reported in (2002) 125 taxman 1094 (Delhi).

In assessee's own case for A.Y. 2000-01, 2001-02 co-ordinate Bench in ITA No. 5462, 5463/Del/2003 have held that in the light of aforesaid provisions of Section 44 of the Act there is no requirement of head wise bifurcation while computing the income u/s 44 in the case of insurance company. Thus, provisions of Section 14A are not relevant to make a disallowance. The findings of Ld. CIT(A) require no interference. The ground is decided against the Revenue.

Ground no. 2

8. The issue is squarely covered in assessee's own case for A.Y. 1999-2000, 2001-02, 2005-06, 2007-08, 2010-11 and 2011-12. No distinguishing fact is argued on behalf of the Ld. AO. The ground is decided against the Revenue.

9. In the light of aforesaid, **the appeal of Revenue is dismissed and of assessee is allowed partly.**

Order pronounced in the open court on 29th May, 2023.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:-29th .05.2023
Binita, SR.P.S Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI