आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री अब्राहम पी.जॉर्ज, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629 & 1630/Chny/2011**

निर्धारण वर्ष / Assessment Years : 2002-03 to 2008-09

आयकर अपील सं./**ITA No.1356/Chny/2013**

निर्धारण वर्ष / Assessment Year : 2009 10

&

आयकर अपील सं./**ITA No.2310/Chny/2014**

निर्धारण वर्ष / Assessment Year : 2010-11

M/s Royal Sundaram Alliance Insurance Company Limited, "Sundaram Towers" 45 & 46, Whites Road, Chennai - 600 002. PAN : AABCR 7106 G (अपीलार्थी/Appellant)	v	The Deputy Commissioner of Income Tax, The Assistant Commissioner of Income Tax. Large Taxpayer Unit, Chennai - 600 101. (प्रत्यर्थी/Respondent)

आयकर अपील स./**ITA Nos.1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669 & 1670/Chny/2011**

निर्धारण वर्ष / Assessment Years : 2002-03 to 2008-09

आयकर अपील सं./**ITA No.1367/Chny/2013**

निर्धारण वर्ष / Assessment Year : 2009-10

&

आयकर अपील सं./**ITA No.2371/Chny/2014**

निर्धारण वर्ष / Assessment Year : 2010-11

The Deputy Commissioner of Income Tax, The Assistant Commissioner of Income Tax. Large Taxpayer Unit, Chennai - 600 101. (अपीलार्थी/Appellant)	v.	M/s Royal Sundaram Alliance Insurance Company Limited, "Sundaram Towers" 45 & 46, Whites Road, Chennai - 600 002. (प्रत्यर्थी/Respondent)

राजस्व की ओर से /Revenue by	:	Shri M. Swaminathan, Sr.Standing Counsel Ms. V. Pushpa, Jr. Standing Counsel
निर्धारिती की ओर से /Assessee by	:	Shri Percy J. Pardiwalla, Sr. Advocate Shri Sandeep Bagmar.R., Advocate Ms. Nitika Fernandas, CA Ms. Raunak Chordia, CA

सुनवाई की तारीख/Date of Hearing : 08.05.2018
घोषणा की तारीख/Date of Pronouncement : 06.08.2018

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

These appeals filed by both the assessee and Revenue are directed against the respective orders of the Commissioner of Income Tax (Appeals), Large Taxpayer Unit, Chennai and pertain to assessment years 2002-03 to 2010-11. Since common issues arise for consideration in all these appeals, we heard these appeals together and disposing of the same by this common order.

2. The first common issue arises for consideration in both the assessee and Revenue's appeals is disallowance of re-insurance premium paid by the assessee to the non-resident re-insurance companies.

3. Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, submitted that there are five categories of re-insurance premiums paid by the assessee to the non-resident.

(1) Directly to non-resident re-insurance companies who are residents of countries with whom India has Double Taxation Avoidance Agreement.

(2) Directly to non-resident re-insurance companies through non-resident brokers who are residents of countries with whom India has Double Taxation Avoidance Agreement.

(3) Directly to non-resident re-insurance companies through resident brokers where there is Double Taxation Avoidance Agreement between India and the residence of re-insurance companies.

(4) Directly to non-resident re insurance companies where there is no Double Taxation Avoidance Agreement.

(5) Directly to non-resident companies through brokers where there is no Double Taxation Avoidance Agreement.

According to the Ld. Sr. counsel, the assessee is engaged in the business of general insurance in India and recognized as such by Insurance Regulatory And Development Authority of India. The Ld. Sr. counsel explained that when an aircraft or satellite was insured, the assessee has to assume large amount of risk which the assessee may not be able to handle by itself. Therefore, in order to distribute the risk, the assessee enters into re-insurance contract with non-resident re-insurance company. According to the Ld. Sr.

counsel, re-insurance contract or re-insurance treaty is independent of insurance between the assessee-company and re-insurer. Re-insurance, according to the Ld. Sr. counsel, is an insurance for insurer. The Ld. Sr. counsel further submitted that the re-insurer and the assessee-company being an insurance company, deal with the each other on principal-to-principal basis. Re-insurance, in fact, does not affect the relationship between the insured person and the assessee-company. The insured person is not a party to the re-insurance treaty or contract. In the event of loss, according to the Ld. Sr. counsel, the assessee being an insurance company, has to compensate the insured person independently. Subsequently, a claim would be made by the assessee in respect of the re-insurance contract / treaty before the re-insurer. The re-insurer, as per the re-insurance treaty, would compensate the assessee being the insurance company.

4. Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, further submitted that in order to distribute the risk, normally, re-insurance would be made with number of re-insurance companies. Referring to Section 101A of the Insurance Act, 1938,

the Ld. Sr. counsel submitted that the assessee being an insurance company, mandatorily reinsure with Indian re-insurer such percentage of sum assured with each policy as specified by the Insurance Regulatory And Development Authority of India. The Insurance Regulatory And Development Authority of India specifies various percentages ranging from 10% to 20% for various accounting years. This is a mandatory requirement, therefore, re-insurance with Indian re-insurer is known as statutory ceding or obligatory ceding. The Ld. Sr. counsel further submitted that the only Indian re-insurance company is General Insurance Corporation of India. Therefore, naturally, the assessee has to reinsure the risk assumed on each policy with General Insurance Corporation of India as specified by the Insurance Regulatory And Development Authority of India. The Ld. Sr. counsel further submitted that in fact, the assessee complied with the mandatory requirement of re-insurance as specified by Insurance Regulatory And Development Authority of India and there is no dispute about this. In other words, there is no dispute with regard to statutory ceding or obligatory ceding of reinsurance as required under Section 101A(1) of the Insurance Act, 1938.

5. Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, further submitted that Section 101A(7) of the Insurance Act, 1938 further clarifies that the assessee over and above the percentage of re-insurance sum fixed by the Insurance Regulatory And Development Authority of India may also at its option, reinsure the risk with any Indian re-insurer or other re-insurer the entire sum assured on the policy or portion thereof in excess of percentage specified by Insurance Regulatory And Development Authority of India. Therefore, according to the Ld. Sr. counsel, in order to reinsure the risk over and above specified by the Insurance Regulatory And Development Authority of India, the assessee opted to reinsure with non resident re-insurance companies. The Ld. Sr. counsel further clarified that while the assessee retains the maximum risk in India as per the Insurance Regulatory And Development Authority of India regulation, they also ceded re-insurance risk to non-resident re-insurance company in order to protect its risk. On a query from the Bench, when sub-section (7) of 101A of the Insurance Act, 1938 clarifies that the insurance companies may have re-insurance with Indian re-insurer or other re-

insurer the entire sum assured on some policy or any portion thereof in excess of the percentage specified by the Insurance Regulatory And Development Authority of India, how can they have re-insurance contrary to the provisions of Section 2(9) of the Insurance Act, 1938? The Ld. Sr. counsel clarified that Section 2(9) of the Insurance Act, 1938 is not applicable to the assessee-insurance company. Referring to Section 114A(zd) of the Insurance Act, 1938, the Ld. Sr. counsel submitted that the Insurance Regulatory And Development Authority of India framed regulations for having re-insurance treaty with non-resident re-insurance company. Since the Insurance Regulatory And Development Authority of India framed a regulation in exercise of its statutory power conferred under Section 114A(zd) of the Insurance Act, 1938, according to the Ld. Sr. counsel, the provisions of Section 2(9) of the Insurance Act, 1938 is not applicable to the assessee.

6. Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, further submitted that Section 2C of Insurance Act, 1938 in categorical terms says that only an Indian re-insurance company holding a valid license for dealing in insurance business can operate

in India. In other words, the foreign re-insurance company cannot do any business in India. The Ld. Sr. counsel further submitted that the foreign insurance company have no place of business in India or business connection in India. Moreover, no license was granted by the Insurance Regulatory And Development Authority of India to any of the non-resident re-insurance company to operate in India. This was clarified by the Insurance Regulatory And Development Authority of India in its letter dated 07/05/2008 addressed to Central Board of Direct Taxes. The Ld. Sr. counsel further submitted that foreign re-insurance company deals only with Indian insurer either directly or through independent brokers situated either in India or outside India. The brokers who operate in India need to get registered themselves with the Insurance Regulatory And Development Authority of India. According to the Ld. Sr. counsel, the brokers represented multiple insurance companies and re-insurance companies. Therefore, they are independent agents / brokers and they are not attached to any particular insurance company or re-insurance company. According to the Ld. Sr. counsel, the independent brokers act only as a facilitator between the assessee-insurance company and non-resident re-insurance

company. The brokers have no role in negotiating the re-insurance contract on behalf of either the Indian insurer or non-resident re-insurer. According to the Ld. Sr. counsel, the brokers function in their ordinary course of business representing no re-insurance or insurance companies. They can also represent multiple non-resident re-insurance companies as non-resident brokers. The brokers are not dependent and agent of any other insurance companies, therefore, the brokers cannot be construed as dependent agent having a permanent establishment in India. According to the Ld. Sr. counsel, even though in some of the re-insurance contract or re-insurance slip, the brokers sign in addition to re-insurance company, the brokers have no role either in negotiating the terms of contract of re-insurance or for settlement of claim. The brokers do not take any decision to accept re-insurance business.

7. Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, further submitted that the re-insurance programme of the assessee-insurance company is approved by the Board of Directors of the assessee and it was submitted before the Insurance Regulatory

And Development Authority of India every year. The assessee-company is expected to identify the re-insurance company to whom re-insurance contract could be entered into over and above the obligatory cession to the General Insurance Corporation of India. On a query from the Bench how the assessee-company identifies the re-insurance company, either by calling for tender or by inviting non-resident company for negotiation? The Ld. Sr. counsel submitted that the assessee contacts the non-resident re-insurance company by sending e-mail. In some cases, the non-resident re-insurance company was also contacted by mails through brokers. The contract was settled by way of communication exchange via e-mail.

8. Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, further submitted that normally the assessee-company deals with re-insurance company outside the country directly. However, in order to distribute the risk to various companies and the assessee may not have the entire list of re-insurance companies across the globe, the assessee has to naturally contact the brokers who have entire information of the international brokers and re-insurance

companies. The knowledge of brokers help the assessee-company in selecting the non-resident re-insurance companies and placement of re-insurance policies.

9. Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, further submitted that negotiation was normally as per the agreed terms with General Insurance Corporation of India. According to the Ld. Sr. counsel, General Insurance Corporation of India is the lead-reinsurer, therefore, whatever terms and conditions accepted by General Insurance Corporation of India for the statutory / obligatory ceding would also be accepted by non-resident re-insurance company. According to the Ld. Sr. counsel, normally, there was no negotiation in the terms and conditions. The re-insurance premium would be paid in proportionate to the risk taken over by the non-resident company. The Ld. Sr. counsel further clarified that if the non-resident re-insurance company takes over the risk of 10% of risk assumed by the assessee-company, the 10% of premium collected by the assessee-company would be paid to the non-resident re-insurance company. According to the Ld. Sr. counsel, the negotiation with non-resident re-insurance company

would only be with respect to percentage of risk that would be taken over by them. The percentage of risk would normally offered by the assessee-company, and then there would be counter offers from the re-insurance company. According to the Ld. Sr. counsel, if there is a broker, he acts only as a communication channel in the transaction and the broker would not play any role for negotiation or finalization of percentage of the re-insurance Once the percentage of re-insurance is accepted by the assessee and non-resident re-insurance company, the proportionate share as per the agreed percentage would be paid to non-resident re-insurance company as per the terms and conditions agreed by the lead-reinsurer, namely, General Insurance Corporation of India. The Ld. Sr. counsel for the assessee further submitted that in case of no claim, the non-resident insurance company would refund 85% of the insurance premium and retain only 15% of the reinsurance premium. The Ld. Sr. counsel also clarified that 40% of insurance premium would be retained by the assessee as its commission.

10. Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, further submitted that the slip or re-insurance slip is signed by the

re-insurer wherever the re-insurance was direct or through a broker. Sometimes, even though the broker may sign the re-insurance slip specifying the share of each re-insurer in respect of particular line of business, each re-insurer signs the re-insurance slip agreeing their respective share of risk. According to the Ld. Sr. counsel, the broker cannot bind the re-insurer by signing the re-insurance slip in case the treaty terms have not been accepted by the re-insurer by signing the treaty or re-insurance slip.

11. The Ld. Sr. counsel for the assessee further submitted that the quarterly statement of accounts is normally sent to the non-resident re-insurer or the broker as the case may be, specifying the re-insurance premium, re-insurance claim, commission and net payable or receivable from the re-insurer. According to the Ld. Sr. counsel, in case the assessee has to pay money to the re-insurer or broker, the same would be paid. In case the re-insurer has to pay money, the same would be paid by the re-insurer either directly or through the broker. In case of claim, according to the Ld. Sr. counsel, it is obligation of the assessee-company to settle the claim irrespective of the fact whether the re-insurer accepts the claim or

not. The assessee would normally appoint independent surveyor to assess damages caused to the machinery which was subject matter of insurance and accepts the obligation on the basis of survey report. The assessee subsequently communicates to the re-insurer the amount of loss and claim the re-insurer to pay their proportionate obligation as per the re-insurance policy. According to the Ld. Sr. counsel, it is open to the re-insurer to appoint independent surveyor to assess the extent of damage. However, no such incident of appointing independent surveyor by the re-insurer has happened.

12. The Ld. Sr. counsel further submitted that the re-insurance is nothing but an insurance taken by the insurance companies to protect itself against the loss and to safeguard its interest. According to the Ld. Sr. counsel, the assessee being an insurer transfers their part of risk to another re-insurer or insurer in order to reduce its own liability in the event of any claim of damages. On a query from the Bench, the Ld. Sr. counsel submitted that normally the re-insurer accepts the claim made by the assessee-company wherever there was a loss to the property which is subject matter of

insurance. However, to meet the extraordinary event, in case of disputes, according to the Ld. Sr. counsel, the treaty slip provides for appointing of arbitrator. The place of sitting of arbitrator is in India. The Ld. Sr. counsel further submitted that since the non-resident re-insurance company operates outside the country, the profit is not chargeable to tax in India. Referring to the order of the CIT(Appeals), the Ld. Sr. counsel submitted that the CIT(Appeals) placed reliance on the judgment of Bombay High Court in the case of Vodafone International Holdings B.V v. Union of India (2010) 329 ITR 126. Since the judgment of Bombay High Court was reversed by the Supreme Court (reported in (2012) 341 ITR 1), the entire basis of finding of the CIT(Appeals) would no longer exist. Therefore, according to the Ld. Sr. counsel, the CIT(Appeals)'s order cannot stand in the eye of law after the reversal of Bombay High Court judgment in the case of Vodafone by the Supreme Court. Since the non-resident re-insurance company operates outside the country, their income is not taxable in India, therefore, the assessee is not liable to deduct tax. Hence, according to the Ld. Sr. counsel, the disallowance made by the Assessing Officer

under Section 40(a)(i) of the Income-tax Act, 1961 (in short 'the Act') is not justified.

13. On the contrary, Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that Section 101A of the Insurance Act, 1938 clearly says that every insurer shall re-insure with Indian re-insurer such percentage of sum assured on each policy as may be specified by the authority. In this case, according to the Ld. Sr. Standing Counsel, the authority referred in Section 101A is Insurance Regulatory And Development Authority of India. In fact, Insurance Regulatory And Development Authority of India by way of notification specified the percentage of sum assured on each policy to be re-insured with Indian re-insurer. In fact, according to the Ld. Sr. Standing Counsel, there is no dispute with regard to re-insurance premium paid by the assessee to the Indian re-insurer. The Ld. Sr. Standing Counsel further submitted that the Indian re-insurer is General Insurance Corporation of India. Therefore, the assessee being an insurer has obligation to re-insure the percentage of sum assured as specified by the Insurance

Regulatory And Development Authority of India with General Insurance Corporation of India.

14. Referring to sub-section (7) of Section 101A of the Insurance Act, 1938, the Ld. Sr. Standing Counsel for the Revenue submitted that the Parliament in its wisdom clarified that the assessee or other insurer, over and above obligatory re-insurance as specified by the Insurance Regulatory Development Authority of India with General Insurance Corporation of India also re-insures with any Indian re-insurer or other insurer the entire sum assured on any policy or any portion thereof in excess of percentage specified by the Insurance Regulatory And Development Authority of India under sub-section (2) of Section 101A of the Insurance Act, 1938. According to the Ld. Sr. Standing Counsel, the “Indian re-insurer” is defined in sub-section (8)(ii) of Section 101A. As per this definition, “Indian re-insurer” means an insurance company which has been granted registration certificate under sub-section (2a) of Section 3 by Insurance Regulatory And Development Authority of India to carry on exclusively the re-insurance business in India. As on date, the authority granted registration exclusively for carrying on re-

insurance business only to the General Insurance Corporation of India. Therefore, according to the Ld. Sr. Standing Counsel, the General Insurance Corporation of India is the only Indian re-insurance company. Sub-section (7) of Section 101A of Insurance Act, 1938 also enables the assessee to have re-insurance with other insurer. Therefore, according to the Ld. Sr Standing Counsel, the real question is who are the other insurers other than Indian re-insurer, namely, General Insurance Corporation of India?

15. Referring to Section 2(9) of the Insurance Act, 1938, the Ld. Sr. Standing Counsel for the Revenue submitted that the term "insurer" is defined in Section 2(9) of the Insurance Act, 1938. Section 2(9) as it stood at the relevant point of time clearly says that "insurer" means in respect of body corporate incorporated under the law of any country other than India which carries on that business in India or its principal place of business is in India or maintains a place of business in India. The insurer as defined in Section 2(9) of Insurance Act, 1938 alone can carry on the re-insurance business. Therefore, according to the Ld. Sr. Standing Counsel, the other insurer as referred in sub-section (7) of Section 101A of the

Insurance Act, 1938 is an insurer as defined in Section 2(9). It does not include non-resident re-insurance company or other insurance company which is not referred in Section 2(9).

16. Referring to Section 2(7A) of Insurance Act, 1938, the Ld. Sr. Standing Counsel for the Revenue submitted that "Indian insurance company" was also defined in Section 2(7A) Therefore, the non-resident re-insurance company which has no place of business in India or business connection in India would not fall within the term "other insurer" as provided in sub section (7) of Section 101A. According to the Ld. Sr. S anding Counsel, if the assessee claims that non-resident re-insurance company has no business connection or permanent establishment, the payment of reinsurance premium would be in violation of Insurance Act, 1938, therefore, the entire premium paid by the assessee has to be disallowed under proviso to Section 37 of the Act. The Ld. Sr. Standing Counsel further submitted that if the assessee claims that there is a business connection for non-resident re-insurance company in India or non-resident company has permanent establishment in India, then naturally the profit of non-resident company is liable for taxation in

India, hence, the assessee is liable to deduct tax. In this case, according to the Ld. Sr. Standing Counsel, admittedly, the assessee-company has not deducted any tax, therefore, the Assessing Officer has rightly disallowed the entire reinsurance premium paid by the assessee under Section 40(a)(i) of the Act. The CIT(Appeals), however, restricted the disallowance to 15% without any rhyme or reason. When the assessee failed to deduct tax, according to the Ld. Sr. Standing Counsel, the entire amount has to be disallowed under Section 40(a)(i) of the Act. Even otherwise, the re-insurance premium was paid contrary to the statutory provision, namely, the Insurance Act, 1938, therefore, the CIT(Appeals) is not justified in restricting the disallowance to 15%. According to the Ld. Sr. Standing Counsel, the Revenue filed appeal against the order of the CIT(Appeals) where he restricted disallowance to 15%. According to the Ld. Sr. Standing Counsel, the entire re-insurance premium paid by the assessee-company has to be disallowed under Section 37 of the Act since it was paid in violation of Section 2(9) of the Insurance Act, 1938 as it stood at the relevant point of time.

17. By way of rejoinder, Shri Percy J. Pardiwala, the Ld. Sr. counsel for the assessee, submitted that re-insurance programme of the assessee-company was made after extensive discussion with General Insurance Corporation of India, the lead-reinsurer. The Ld. Sr. counsel further submitted that Section 2(9) of the Insurance Act, 1938 is not at all applicable to the assessee. By virtue of the rule framed by the Insurance Regulatory And Development Authority of India, in exercise of its statutory power under Section 114A of the Insurance Act, 1938, the assessee was allowed to have re-insurance programme with non-resident reinsurer. The Ld. Sr. counsel has also referred to the memorandum of object for introduction of Section 101A in the Parliament. The memorandum clearly says that there was no prohibition for the Indian insurance companies for re-insuring their risk with non-resident re-insurance companies. After 2014, according to the Ld. Sr. counsel, the assessee is deducting taxes while making payment to non-resident re-insurance companies in view of amended provision of Section 2(9) of the Insurance Act, 1938. On a query from the Bench whether the assessee can have re-insurance as such with other Indian insurance companies apart from General Insurance

Corporation of India? The Ld. Sr. counsel clarified that the assessee can also have re-insurance programme with other Indian insurers like United India Insurance, New India Assurance, etc. apart from General Insurance Corporation of India. In fact, according to the Ld. Sr. counsel, the assessee has taken up re-insurance programme with Indian companies for its own risk and also received re-insurance premiums from other Indian insurer by taking part of their risk.

18. We have considered the rival submissions on either side and perused the relevant material available on record. The assessee is an Indian insurance company registered with Insurance Regulatory And Development Authority of India as provided in Section 3(2A) of the Insurance Act, 1938. Till 2014, the re-insurance programmes are not regularized in India. The Parliament for the first time amended the Insurance Act, 1938 by introducing Part IVA by Insurance (Amendment) Act, 1961. For the purpose of convenience, Part IVA is reproduced as under:-

PART IV-A
RE-INSURANCE

Re-insurance with Indian reinsurers

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

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

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

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

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

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

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

(4) A notification under subsection (2) may also specify the terms and conditions in respect of any business of re-insurance required to be

transacted under this section and such terms and conditions shall be binding on Indian re-insurers and other insurers.

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

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

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

(8) In this section,

(i.) "policy" means a policy issued or renewed on or after the 1st day of April, 1961, in Respect of general insurance business transacted in India and does not include a re insurance policy; and

(ii.) 'Indian re-insurer" means an insurer specified in sub-clause (b) of Clause (9) of Section 2 who carries on exclusively re-insurance business and is approved in this behalf by the Central Government.

Advisory Committee

101B. (1) The Authority with the previous approval of the Central Government shall, for the purposes of Section 101A, constitute an Advisory Committee consisting of not more than five persons having special Knowledge and experience of the business of insurance.

(2) The term of office of, and the allowance payable to, members of the Advisory Committee, the procedure to be followed by, and the quorum necessary for the transaction of business of, the Committee and the manner of filling casual vacancies therein shall be such as may be determined by the regulations made by the Authority.

Examination of re-insurance treaties

101C. The Authority may, at any time

(a) call upon an insurer to submit for his examination at the principal place of business of the insurer in India all re-insurance treaties and other re-insurance contracts entered into by the insurer;

(b) examine any officer of the insurer on oath in relation to any such document as is referred to in C1ause (a) above; or

(c) by notice in writing, require any insurer to supply him with copies of any of the documents referred to in Clause (a), certified by a principal officer of the insurer.

19. Section 114A of the Insurance Act, 1938 enables the Insurance Regulatory And Development Authority of India to make regulations in consistent with the provisions of Insurance Act and the rules made thereunder, to carry out the purposes of the Insurance Act. The term "re-insurance" is also defined in Section 2(16B) of the Insurance Act, 1938 which reads as follows:-

> "re-insurance" means the insurance part of one insurer's risk by another insurer who accepts the risk for a mutually acceptable premium.

20. Therefore, the entire business of insurance / re-insurance is codified and regulated by Insurance Act, 1938. All the insurance companies which are carrying on insurance business in India have to necessarily comply with the provisions of Insurance Act, 1938 as

amended and the rules made thereunder. For the purpose of regularizing the insurance business in a better manner, the Insurance Regulatory And Development Authority of India was established and the said authority was also empowered to frame regulations in consistent with the provisions of Insurance Act, 1938 and rules made thereunder. Therefore, it is obvious that Insurance Regulatory And Development Authority of ndia has to frame regulations in consistent with the provisions of Insurance Act and rules made thereunder. In other words, Insurance Regulatory And Development Authority of India cannot frame any regulation contrary to the provisions of Insurance Act and the rules made thereunder. Hence, the insurers who are engaged in the business of insurance and e-insurance are governed by the provisions of Insurance Act, 1938. The Insurance Act, 1938 is the parent act which regulates the business of insurance and re-insurance in India.

21. The term "insurer" is also defined in Section 2(9) of Insurance Act, 1938. Section 2(9) of the Insurance Act, 1938 reads as follows:-

"Insurer" means -

(a) any individual or unincorporated body of individuals or body corporate incorporated under the law of any country other than India, carrying on insurance business [not being a person specified in sub-clause (c) of this clause] which—

(i) carries on that business in India, or

(ii) has his or its principal place of business or is domiciled in India or

(iii) with the object of obtaining insurance business, employs a representative, or maintains a place of business, in India;

(b) any body corporate [not being a person specified in sub-clause (c) of this clause] carrying on the business of insurance, which is a body corporate incorporated under any law for the time being in force in India; or stands to any such body corporate in the relation of a subsidiary company within the meaning of the Indian Companies Act, 1913 (7 of 1913), as defined by sub-section (2) of section 2 of that Act, and

(c) any person who in India has a standing contract with underwriters who are members of the Society of Lloyd's whereby such person is authorised within the terms of such contract to issue protection notes, cover notes, or other documents granting insurance cover to others on behalf of the underwriters, but does not include a principal agent, chief agent, special agent, or an insurance agent or a provident society as defined in Part III;

Section 2(9) of Insurance Act, 1938 was amended with effect from 1.11.1956 which reads as follows:-

"insurer" means –

(a) an Indian Insurance Company, or

(b) a statutory body established by an Act of Parliament to carry on insurance business, or

(c) an insurance co-operative society, or

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

Explanation – For the purposes of this sub-clause, the expression "foreign company" shall mean a company or body established or incorporated under a law of any country outside India and includes

> Lloyd's established under the Lloyd's Act, 1871 (United Kingdom) or any of the Members;]

22. The term "Indian insurance company" is also defined in Section 2(7A) of Insurance Act, 1938, which reads as follows:-

> (7A) "Indian insurance company" means any insurer being a company—
>
> (a) which is formed and registered under the Companies Act, 1956 (1 of 1956);
>
> (b) in which the aggregate holdings of equity shares by a foreign company, either by itself or through its subsidiary companies or its nominees, do not exceed twenty-six per cent. paid-up equity capital of such Indian insurance company;
>
> (c) whose sole purpose is to carry on life insurance business or general insurance business or re-insurance business.
>
> Explanation.— For the purposes of this clause, the expression "foreign company" shall have the meaning assigned to it under clause (23A) of section 2 of the Income-tax Act, 1961 (43 of 1961);]

Section 2(7A) was amended by Insurance Laws (Amendment) Act, 2015 with retrospective effect from 26.12.2014, which reads as follows:-

> (7A) "Indian insurance company" means any insurer, being a company which is limited by shares, and –
>
> (a) which is formed and registered under the Companies Act, 2013 (18 of 2013) as a public company is converted into such a company within one year of the commencement of the Insurance Laws (Amendment) Act, 2015;
>
> (b) in which the aggregate holdings of equity shares by foreign investors, including portfolio investors, do not

exceed forty-nine per cent of the paid-up equity capital of such Indian insurance company, which is Indian owned and controlled, in such manner as may be prescribed.

Explanation – For the purposes of this sub-clause, the expression "control" shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements;

(c) whose sole purpose is to carry on life insurance business or general insurance business or re-insurance business or health insurance business;]

23. The term "insurance company" is also defined in Section 2(8) of Insurance Act, 1938 which was omitted with retrospect effect from 26.12.2014, reads as follows:-

(8) "insurance company" means any insurer being a company, associa ion or partnership which may be wound up under[18] [the Compan es Act, 1956 (1 of 1956)], or to which the Indian Partnership Act, 1932 (9 of 1932), applies;

24. The term "Indian re-insurer" is also defined in Section 101A(8)(ii) of Insurance Act, 1938 which reads as follows:-

"Indian re-insurer" means an insurer specified in sub-clause (b) of clause (9) of section 2 who carries on exclusively re-insurance business and is approved in this behalf by the Central Government.

The definition of "Indian re-insurer" was subsequently amended by Insurance (Amendment) Act, 2002 with effect from 23.9.2002 which reads as follows:-

> "Indian re-insurer" means an Indian insurance company which has been granted a certificate of registration under sub-section (2A) of section 3 by the Authority to carry on exclusively the re-insurance business in India.

25. As of now, an "Indian re-insurer" means an Indian insurance company which was granted a certificate of registration by Insurance Regulatory And Development Authority of India under Section 3(2A) of the Insurance Act, 1938. In other words, other than General Insurance Company of India, all other Indian insurance companies including the assessee may engage itself in reinsurance business By keeping the above provisions in mind, if we examine the transaction of the assessee in paying re-insurance premium to non-resident company, it is obvious that the assessee has violated the provisions of Indian Insurance Act, 1938. Provisions of Section 101A makes it mandatory to every insurer to re-insure with Indian re-insurers such percentage of sum assured on each policy as may be specified by the authority, namely, Insurance Regulatory And Development Authority of India. An

option was given to the insurer under sub-clause (7) of Section 101A of Insurance Act, 1938 that an insurer may re-insure over and above the percentage prescribed by Insurance Regulatory And Development Authority of India with other insurer. By taking advantage of this provisions of sub-caluse (7) of Section 101A, the assessee now claims before this Tribunal that there was no prohibition in Insurance Act, 1938 or rules made thereunder or any regulation framed by Insurance Regulatory And Development Authority of India from re-insuring over and above the percentage prescribed by Insurance Regulatory And Development Authority of India with non-resident re-insurer. There is no dispute that Insurance Act, 1938 is the parent Act which governs and regulates the business of insurance and re-insurance. As observed earlier, Insurance Regulatory And Development Authority of India Act, 1999 was enacted to implement the provisions of Insurance Act, 1938 more effectively and Insurance Regulatory And Development Authority of India was empowered to frame regulations in consistent with the provisions of Insurance Act, 1938 and rules made thereunder. Therefore, insurance or re-insurance business in India

cannot be carried on contrary to the provisions of Insurance Act, 1938 and rules made thereunder.

26. In the case before us, the assessee has paid re-insurance premium to non-resident re-insurance company and claimed the same as deduction while computing the taxable income. The Assessing Officer disallowed the claim of the assessee on the ground that tax was not deducted as required The contention of the Ld. Sr. counsel for the assessee before this Tribunal is that the provisions of Section 2(9) of the Insurance Act, 1938 is not applicable to the assessee insurance company. The Ld. Sr. counsel has also referred to provisions of Section 114A(zd) of the Insurance Act, 1938 and submitted that Insurance Regulatory And Development Authority of India framed regulations for having re-insurance treaty with non-resident re-insurance companies. The non-resident re-insurance company, according to the Ld. Sr. counsel, was not granted any license to do insurance business in India. Therefore, according to the Ld. Sr. counsel, the entire transaction of the non-resident re-insurance company was outside the territorial jurisdiction of India and the individual brokers acted

only as facilitator between the assessee-insurance company and non-resident re-insurance companies, therefore, the profit of the non-resident re-insurance company is not taxable in India. Hence, according to the Ld. Sr. counsel, there cannot be any disallowance for non-deduction of tax under Section 40(a)(i) of the Act. The Ld. Sr. counsel for the assessee very fairly admitted before this Tribunal that from the year 2014, the assessee started deducting tax on re-insurance premium paid to non-resident companies.

27. We have gone through the provisions of Section 2C of the Insurance Act, 1938 which eads as follows:-

"2C. (1) Save as hereinafter provided, no person shall, after the commencement of the Insurance (Amendment) Act, 1950 (47 of 1950), begin to carry on any class of insurance business in India and no insurer carrying on any class of insurance business in India shall after the expiry of one year from such commencement, continue to carry on any such business unless he is-

(a) a public company, or

(b) a society registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to co-operative societies, or

(c) a body corporate incorporated under the law of any country outside India not being of the nature of a private company:

Provided that the Central Government may, by notification in the official Gazette, exempt from the operation of this section to such extent for such period and subject to such conditions as it may specify, any person or insurer for the purpose of carrying on the business of granting superannuation allowances and annuities of the nature specified in sub-clause (c) of clause (11) of Section 2 or for the purpose of carrying on any general insurance business:

Provided further that in the case of an insurer carrying on any general insurance business no such notification shall be issued having effect for more than three years at any one time:

Provided also that no insurer other than an Indian insurance company shall begin to carry on any class of insurance business in India under this Act on or after the commencement of the Insurance Regulatory and Development Authority Act, 1999.

Provided also an insurer, being an Indian Insurance Company, insurance co-operative society or a body corporate referred to in clause (c) of this sub-section carrying on the business of insurance, may carry on any business of insurance in any Special Economic Zone as defined in clause (za) of section 2 of the Special Economic Zones Act, 2005.

(2) Every notification issued under subsection (1) shall be laid before Parliament as soon as may be after it is issued.

(3) Notwithstanding anything contained in sub-section (1), an insurance co-operative society may carry on any class of insurance business in India under this Act on or after the commencement of the Insurance (Amendment) Act, 2002."

28. Section 2C of the Insurance Act, 1938 prohibits from carrying on insurance business otherwise they are permitted under the Insurance Act, 1938. Third proviso to Section 2C clearly says that no insurer other than Indian insurance company shall begin to carry

on any class of insurance business in India. We have also carefully gone through the provisions of Section 2(9) of the Insurance Act, 1938. The Ld. Sr. counsel for the assessee very fairly submitted before this Tribunal that after 2014, the assessee started deducting tax on the re-insurance premium paid to the non-resident re-insurance company. This is because of the amendment carried out by the Parliament in Section 2(9) of the Act by Insurance Laws (Amendment) Act, 2015 was with retrospective effect from 26.12.2014. Therefore, the Ld. Sr. counsel for the assessee admits that from 26.12.2014, Section 2(9) of Insurance Act, 1938 is applicable in respect of re-insurance premium paid to non-resident companies.

29. The question now arises for consideration is when the provisions of Section 2(9) of the Insurance Act, 1938 is applicable with effect from 26.12.2014, why it is not applicable for earlier assessment years? This Tribunal is of the considered opinion that the provisions of Section 2(9) of the Insurance Act, 1938 is applicable as it stood at relevant point of time even for earlier assessment years. The word “other insurer” provided in Section

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

30. After 2014, Section 2(9) of the Insurance Act, 1938 was amended which enables foreign company engaged in re-insurance

business to establish a branch in India. Therefore, unless a branch was established in India, the non-resident insurance company cannot do any business after 2014. Hence, naturally the profit of non-resident re-insurance company is taxable in India. Accordingly, the assessee-insurance company has to deduct tax under Section 40(a)(i) of the Act.

31. Before amendment, the term "insurer" clearly says that any person who in India has a standing contract with underwriters who are members of the Society of Lloyd's, whereby such person is authorized within the terms of such contract, to issue protection notes, cover notes or other documents granting insurance cover to other on behalf of he underwriters. Therefore, it is obvious that the first condition is that the person, namely, the insurer or re-insurer shall be in India. The second condition is that such person shall have standing contract with underwriters who are members of the Society of Lloyd's, whereby such person in India was authorized to issue protection note or cover note or other documents granting insurance cover. The question now may arise what is meant by "Lloyds"? Lloyds is nothing but an insurance market located in the

city of London. "Lloyds" is a body corporate established by Lloyds Act, 1871 to operate as a partially- mutualised market place within which multiple financial brokers, grouped in syndicates, come together to pool and spread risk. These underwriters or members are a collection of both Corporations and private individuals, the latter being traditionally known as "Names". Therefore, a person in India has a standing contract with underwriters who are members of the Lloyds, can be an insurer or re-insurer in India before 2014. This Tribunal is of the considered opinion that Section 2(9) of Insurance Act, 1938 before amendment is also equally applicable for insurance and re-insurance business in India. It cannot be the intention of the Parliament to authorise Indian insurer to have re-insurance outside he country ignoring the provisions of Insurance Act, 1938. Section 2(9) of the Insurance Act, 1938 was amended by Insurance Laws (Amendment) Act, 2015. Therefore, the contention of the Ld. Sr. counsel for the assessee that the provisions of Section 2(9) of Insurance Act, 1938, as it stood before 2014, is not applicable to the assessee-company has no merit at all. This Tribunal is of the considered opinion that the provisions of Section 2(9)(c) of Insurance Act, 1938 is very much applicable to

the re-insurance business, therefore, the profit of non-resident re-insurance company or the person in India who has standing contract with underwriters, who are members of the Lloyds, is taxable in India. Hence, the assessee has to necessarily deduct tax on the premium paid to non-resident re-insurance company for re-insurance. Even otherwise, if the assessee claims that there was no person in India, who has standing contract with underwriters who are members of the Lloyds and premium was paid directly to non-resident re-insurance company, then the transaction of the assessee is clearly in violation of provisions of Section 2(9)(c) of Insurance Act, 1938. In other words, the entire re-insurance arrangement of the assessee- company is in violation and contrary to the provisions of Section 2(9) of Insurance Act, 1938. Therefore, the entire re-insurance premium has to be disallowed under Section 37 of the Act. In this case, the Assessing Officer disallowed for non-deduction of tax. Section 2C read with Section 2(9)(c) of Insurance Act, 1938 prohibits any person from doing insurance or re-insurance business in India otherwise permitted under Insurance Act, 1938. Therefore, there is a clear prohibition for payment of re-insurance premium to the non-resident re-insurance companies. Hence, the

disallowance has to be made under Explanation 1 to Section 37 of the Act also.

32. In view of the above, this Tribunal is of the considered opinion that the Assessing Officer has rightly disallowed the re-insurance premium under Section 40(a)(i) of the Act. Therefore, the CIT(Appeals) is not justified in restricting the claim of the assessee to 15% without any reason.

33. We have carefully gone through the judgment of Apex Court in the case of Vodafone International Holdings (supra). The provisions of Insurance Act, 1938, more particularly Section 2(9) was not considered by the Apex Court and that is not the subject matter of adjudication before the Apex Court. Therefore, this Tribunal is of the considered opinion that the judgment of Apex Court in Vodafone International Holdings (supra) is not applicable at all.

34. We have carefully gone through the decision of Mumbai Bench of this Tribunal in Swiss Re-Insurance Company Limited v. DDIT (38 ITR 568) and other decisions cited by the Ld. Sr. counsel

for the assessee on identical issue. In all these cases, the provisions of Section 2(9) of Insurance Act, 1938 was not brought to the notice of the Benches of the Tribunal which decided the above cases. Therefore, the Mumbai Bench and Pune Bench had no occasion to decide the applicability of Section 2(9) of Insurance Act, 1938. Since this Bench of the Tribunal finds that Section 2(9) of Insurance Act, 1938 as it stood before amendment in 2014, is applicable to the payment of re-insurance premium to non-resident re-insurance company, the assessee is liable to deduct tax. Therefore, the above decisions of Mumbai Bench and Pune Bench of this Tribunal also may not be of any assistance to the assessee.

35. In view of the above, the orders of the CIT(Appeals) are set aside and that of the Assessing Officer are restored.

36. The assessee has taken one more ground with regard to validity of reopening of assessments for the assessment years 2002-03, 2003-04, 2004-05 and 2005-06.

37. Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that for the assessment year 2002-03, the

assessment was reopened within 6 years. For assessment year 2003-04, the assessment was reopened within four years. There was a reassessment for second time that was within 6 years. For assessment years 2004-05 and 2005-06, the assessments were opened within four years. According to the Ld. Sr. counsel, all the details were part of financials made available during the course of original assessment. According to the Ld Sr. counsel, the assessee has disclosed all the information during the course of original assessment, therefore, the reopening of assessments were only on account of change of opinion, hence it cannot be allowed to happen.

38. On the con rary, Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that the Assessing Officer disallowed the re-insurance premium paid to non-resident companies in the original assessment itself for all the years, therefore, the assessments were not reopened in respect of re-insurance premium. Moreover, according to the Ld. Sr. Standing Counsel, the Assessing Officer obtained permission of the Commissioner for reopening the assessments, therefore, the

reassessment proceedings were rightly initiated for assessing the income escaped in the assessments.

39. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that for the assessment years 2002-03, 2003-04, 2004-05 and 2005-06, the assessment proceedings were completed under Section 143(3) of the Act. Subsequently, notice was issued under Section 148 of the Act within four years for assessment years 2004-05 and 2005-06. For the assessment year 2002-03, the assessment was reopened beyond four years. For the assessment year 2003-04, the Assessing Officer reopened the assessment for second time after four years. The Madras High Court in the case of TANMAC India v. DCIT in Tax Case (Appeal) No.1426 of 2007 dated 19.12.2016 found that provisions of Sections 147 & 148 of the Act are not giving extended time for completing assessment. The Madras High Court found that unless there is a tangible material found after completion of assessment, the completed assessment cannot be reopened on the basis of the material already available on record. Since there is no tangible material found by the

Assessing Officer after completing the original assessment, the reopening of assessment is invalid. Therefore, the consequential orders passed by the Assessing Officer for the assessment years 2002-03, 2003-04, 2004-05 and 2005-06, after reopening of assessments cannot stand in the eye of law. Accordingly, the same are set aside and all the appeals filed by the assessee challenging the validity of reassessment are allowed.

40. The next issue arises for consideration is disallowance of provision created towards claim incurred but not reported and claim incurred but not enough reported. This issue arises for consideration in Revenue's appeal for assessment year 2010-11.

41. Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that during the relevant year, claims were incurred but were not reported. Moreover, the claims incurred which were not enough reported. The Ld. Sr. counsel explained that the assessee-company has made provision of ₹1,24,97,27,939/- on account of claim incurred but not reported and claim incurred but not enough reported. Hence, a provision has been made for all the unsettled claims on the basis of the claim

lodged by the insured persons. According to Ld. Sr. counsel, the date of damage / loss was considered for recognising the claim in a particular year. In certain circumstances, the damages / losses were not reported in the balance sheet of the insurance company. Such claims are known as claims incurred but not reported. Sometimes, according to the Ld. Sr. counsel, the damages / losses incurred may be reported. However, it was not enough reported. According to the Ld. Sr. counsel, the liability of the assessee has to be met by making necessary provision as per the Insurance Regulatory And Development Authority of India guidelines. The liability of the assessee-company is determined based on the actual loss / damage. According to the Ld. Sr. counsel, the methodology to determine the liability is also certified by the actuary in accordance with guidelines and norms issued by the Institute of Actuaries of India and Insurance Regulatory And Development Authority of India. The Ld. Sr. counsel further submitted that the assessee claimed before the Assessing Officer under Section 37(1) of the Act since all the conditions were fulfilled. The Ld. Sr. counsel further submitted that the provisions were made on the basis of the damages / losses occurred during the year under consideration,

therefore, the liability of the assessee-company is ascertained. The provisions made were in respect of the liability incurred by the assessee and not based on any future liability. Therefore, according to the Ld. Sr. counsel, the CIT(Appeals) has rightly allowed the claim of the assessee.

42. On the contrary, Shri M. Swaminathan, Sr Standing Counsel for the Revenue, submitted that the assessee created provision in anticipation of settlement of claims that were not ascertained. What was reported to the assessee is damage / loss caused to the insured persons. According to the Ld. Sr. Standing Counsel, the assessee is yet to assess the loss and determine the amount to be compensated, therefore, it is unascertainable liability. What is to be allowed under the Income-tax Act is ascertainable liability and not the unascertainable liability. In this case, according to the Ld. Sr. Standing Counsel, at the best, the assessee may claim that there is a liability for compensation. But, the amount of compensation is not quantified on the last day of the financial year. Therefore, according to the Ld. Sr. Standing Counsel, it has to be allowed in the year in which the liability was quantified. Referring to the order of the

CIT(Appeals), the Ld. Sr. Standing Counsel submitted that the assessee made the provision of ₹1,24,97,27,939/- for the assessment year 2010-11. It is not known how much amount was actually paid by the assessee towards compensation. No details were available even after long time. Therefore, according to the Ld. Sr. Standing Counsel, it has to be ascertained when the actual compensation or loss was quantified by the insurance company. The year in which the actual loss or compensation was quantified is the year in which the assessee is liable to make the payment. Therefore, according to the Ld. Sr Standing Counsel, even though technically loss or damage suffered is the point for determining the compensation, as fa as the assessee is concerned, the actual compensation or damage is quantified only after assessment of actual damages. Therefore, according to the Ld. Sr. Standing Counsel, whether the claim incurred but not reported or incurred but not enough reported, the year in which the actual damages or losses were determined and crystalized is the year in which the assessee is eligible to claim the damages.

43. We have considered the rival submissions on either side and perused the relevant material available on record. Admittedly, the assessee made provision in respect of claims incurred but not reported and in respect of claims incurred but not enough reported. The compensation for making insurance claim arises on the date of loss or damage occurred to the insured property. But, the actual liability to make the payment arises on the date on which the loss or damage was assessed and the amount was determined. In this case, the accident or loss was reported to the assessee but the actual loss or compensation was not determined during the assessment year 2010-11. Therefore, as rightly submitted by the the Ld. Sr. Standing Counsel for the Revenue, the liability to make the payment accrues to the assessee only in the year in which the loss or damage was ascertained and compensation payable to insured person is determined. Admittedly, the compensation payable to insured person was not determined during the assessment year 2010-11. Therefore, this Tribunal is of the considered opinion that merely because the incident happened during the year which is the basis for making claim, that cannot be a reason for allowing the compensation payable by the assessee for

the assessment year 2010-11. In other words, the compensation payable by the assessee has to be allowed in the year in which the amount of compensation was determined. Since the compensation amount was not determined during the year under consideration, this Tribunal is of the considered opinion that the same cannot be allowed for assessment year 2010-11. Hence, the CIT(Appeals) is not correct in allowing the claim of the assessee. Accordingly, the order of the CIT(Appeals) is set aside and that of the Assessing Officer is restored.

44. The Revenue has taken one more ground for assessment years 2006-07, 2007-08, 2008-09, 2009-10 & 2010-11 with regard to disallowance made by the Assessing Officer under Section 14A of the Act

45. Shri M. Swaminathan, Sr. Standing Counsel for the Revenue, submitted that the CIT(Appeals) has deleted the disallowance on the ground that provisions of Section 14A of the Act are not applicable to the insurance company. According to the Sr. Standing Counsel, expenditure relating to exempted income is not allowable under Section 37 of the Act. Therefore, according to the

Sr. Standing Counsel, it ought to have been quantified under Section 14A of the Act.

46. On the contrary, Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that Section 44 of the Act specifically says that the provisions of Sections 28 to 43B are not applicable to the insurance companies. According to the Ld. Sr. counsel, the income has to be computed as per the provisions contained in the First Schedule of the Income-tax Act, 1961. Therefore, according to the Ld. Sr. counsel, it is not correct to contend that under Section 37 of the Act the expenditure relating to income has to be disallowed in respect of insurance company.

47. We have considered the rival submissions on either side and perused the relevant material available on record. In respect of insurance companies, the profit has to be computed as per the provisions contained in the First Schedule of the Income-tax Act, 1961. Section 44 of the Act reads as follows:-

Insurance business

"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 co-operative society, shall be computed in accordance with the rules contained in the First Schedule."

Rule 5 of First Schedule to Income-tax Act, 1961 read as follows:-

Computation of profits and gains of other insurance business.

5. The profits and gains of any business insurance other than life insurance shall be taken to be the profit before tax and appropriations as disclosed in the profit and loss account prepared in accordance with the provisions of the Insurance Act, 1938 (4 of 1938) of the rules made thereunder or the provisions of Insurance Regulatory And Development Authority Act, 1999 (4 of 1999) or the regulations made thereunder,] 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 described] which is not admissible under the provisions of sections 30 to [43B] in computing the profits and gains of a business shall be added back;

(b) (i) any gain or loss on realization of investments shall be added or deducted, as the case may be, if such gain or loss is not credited or debited to the profit and loss account;

> (ii) any provision for diminution in the value of investment debited to the profit and loss account, shall be added back;
>
> (c) such amount carried over to a reserve for unexpired risks as may be prescribed in this behalf shall be allowed as a deduction."

In view of Rule 5(a), the expenditures which are not for insurance business cannot be allowed and it has to be added back.

48. In view of the above, this Tribunal is unable to uphold the order of the CIT(Appeals). Accordingly, the orders of the CIT(Appeals) are set aside and that of the Assessing Officer are restored.

49. The next issue arises for consideration is taxability of profit on sale of investments. This issue arises for consideration in the Revenue's appeals for the assessment years 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11

50. Shri M. Swaminathan, Sr. Standing Counsel for the Revenue, submitted that as per Rule 5 of the First Schedule of the Income-tax Act, 1961, the assessee has to offer to tax the profit as disclosed in the annual accounts prepared in accordance with the

provisions of Insurance Act and subjected to adjustments made in accordance with Rule 5(a) and Rule 5(c) of the First Schedule to the Income-tax Act, 1961. According to the Ld. Sr. Standing Counsel, Rule 5(b) was omitted by Finance Act, 1988, therefore, as per the law applicable during the relevant year, there was no provision for any adjustment with regard to profit on sale of adjustment. Hence, according to the Ld. Sr. Standing Counsel, the CIT(Appeals) is not justified in allowing the claim of the assessee

51. On the contrary, Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that the CIT(Appeals) followed the order of this Tribunal in the case of DCIT v. Royal Sundaram Alliance Insurance Company Ltd. in I.T.A. Nos.847-849/Mds/2008 dated 5th March, 2010, therefore, no interference is called for.

52. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that Rule 5(b) of the First Schedule to the Income-tax Act, 1961 was deleted by Finance Act, 1988 with effect from 01.04.1989 and it was re-inserted by Finance (No.2) Act, 2009 with effect from 01.04.2011. Therefore, during the years under consideration, i.e.

2006-07, 2007-08, 2008-09 and 2009-10, the provisions of Rule 5(b) were not in statute book. Hence, as rightly contended by the Ld. Sr. Standing Counsel for the Revenue, the Assessing Officer has rightly taken the sale of investments as taxable income of the assessee. In the earlier order of this Tribunal the fact of deletion of provisions of Rule 5(b) of the First Schedule to the Act by Finance Act, 1988 was not brought to the notice of the Bench. Therefore, the earlier order of this Tribunal may not be applicable to the facts of the case. Accordingly, the order of the CIT(Appeals) is set aside and that of the Assessing Officer is restored.

53. The next issue arises for consideration in the assessee's appeals for assessment years 2002-03, 2003-04, 2004-05 and 2005-06 and 2008-09 is with regard to depreciation on UPS. The Revenue has also raised the same issue for assessment year 2010-11.

54. We heard Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, and Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue. When UPS is attached with computer, it forms a part of computer. Therefore, it is eligible for depreciation as

computer. The Assessing Officer found that UPS cannot be considered as part of computer block. The Madras High Court recently found that UPS is a part of computer system, therefore, eligible for depreciation at the rate of 60%. In view of the above, we are unable to uphold the orders of the lower authorities. Accordingly, the orders of both the authorities below in respect of depreciation on UPS are set aside and the Assessing Officer is directed to allow the claim of the assessee. A similar view was taken by this Tribunal in Sundaram Asset Management Co. Ltd. v. DCIT in 145 ITD 17.

55. The next issue arises for consideration is depreciation on EPABX. This issue arises for consideration in the assessee's appeals fo assessment years 2006-07, 2007-08 and 2008-09.

56. Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that EPABX is part and parcel of computer, therefore, eligible for depreciation at the rate of 60%.

57. We heard Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue also. According to the Ld. Sr. Standing

Counsel, EPABX is not a computer. It is a telecommunication system for transmitting voice signal from one end to another end. The computer is known as a machine which is used for processing the data. In this case, EPABX is used for transmitting voice signal from one end to another end. Therefore, according to the Ld. Sr. Standing Counsel, EPABX cannot be construed as computer system.

58. We have considered the rival submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld. Sr. Standing Counsel for the Revenue, EPABX is just a telecommunication exchange which receives voice signal from one end and transmitting the same to the other end. This cannot be equated with computer system. Therefore, this Tribunal is of the considered opinion that EPABX is not eligible for depreciation at the rate of 60%. Hence, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

59. The next issue arises for consideration is disallowance of provision made towards contribution to solatium fund. This issue is

raised by the Revenue for assessment years 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11.

60. Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that solatium fund is created on the recommendation made at the General Insurance Council meeting on 04.02.2005. According to the Ld. Sr. counsel, solatium fund was payable to the Government and the assessee has no right to use the fund. According to the Ld. Sr. counsel, 0.1% of gross premium from motor vehicle insurance has to be paid as solatium fund. Therefore, according to the Ld Sr. counsel, the CIT(Appeals) has rightly allowed the claim of the assessee.

61. On the contrary, Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that the assessee on estimate basis, in a routine manner, made a provision of 0.1% of gross premium from motor vehicle insurance. According to the Ld. Sr. Standing Counsel, this amount is unascertainable liability, therefore, liable to be disallowed while computing the book profit under Section 115JB of the Act.

61. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that 0.1% of gross premium from motor vehicle insurance was given to the Government. Once the amount was paid, the assessee has no control over it. This amount was paid as per the recommendation of General Insurance Council meeting held on 04.02.2005. This Tribunal is of the considered opinion that contribution of 0.1% of the gross premium from motor vehicle insurance is not liable for taxation. Therefore, the CIT(Appeals) has right allowed the claim of the assessee, hence the same is confirmed.

62. The next issue arises for consideration is disallowance of commission paid for receipt of re-insurance premium. This issue arises for consideration in the Revenue's appeals for assessment years 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11.

63. Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that the assessee has paid commission for receipt of re-insurance premium. However, the assessee has not deducted tax at source. Therefore, according to the Ld. Sr.

Standing Counsel, the Assessing Officer disallowed the payment of commission under Section 40(a)(ia) of the Act, hence, the CIT(Appeals) is not justified in allowing the claim of the assessee.

64. On the contrary, Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that the assessee received re-insurance premium from M/s Cholamandalam MS General Insurance Company on discount basis, therefore, there is no question of deduction of tax. On identical circumstances, according to the Ld. Sr. counsel, the Mumbai Bench of this Tribunal in General Insurance Corporation of India (2009-TIOL-191) found that TDS need not be made in respect of discount given to insurance company for re-insurance premium. The CIT(Appeals), in fact, placed his reliance on the decision of Mumbai Bench of this Tribunal in General Insurance Corporation of India (supra).

65. We have considered the rival submissions on either side and perused the relevant material available on record. While making re-insurance premium, the assessee can retain the commission at the agreed rate and pay the balance to the re-insurer. The re-insurer may be either domestic insurance company or General Insurance

Corporation. Hence, the assessee can retain the so-called commission. It is not a case of payment of commission. At the best, it can be termed as discount given to the insurance companies for making re-insurance premium. Therefore, as rightly found by Mumbai Bench of this Tribunal in General Insurance Corporation of India (supra), such payment cannot be construed as commission. Therefore, the assessee is not liable for deduct on of tax. In view of the above, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

66. The next issue arises for consideration is disallowance of payments made to Mr. R W. Clarke and M/s Royal & Sun Alliances Plc towards survey fee. This issue was raised by the Revenue for assessment years 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10.

67. Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that the assessee incurred an expenditure of ₹3,22,275/- in foreign currency towards so-called reimbursement of expenditure to Mr. R.W. Clarke, Royal & Sun Alliance Plc and the London Assurance. The assessee has also paid survey fees to the

extent of ₹18,49,458/- to Royal & Sun Alliance Plc. According to the Ld. Sr. Standing Counsel, even though the assessee claims that it is only a reimbursement of expenditure, the same is liable for taxation. Therefore, according to the Ld. Sr. Standing Counsel, the assessee is expected to deduct tax as per the CBDT circular No.715 of 1995. By Circular No.786, the CBDT specifically excluded the commission expenditure in foreign currency. Therefore, according to the Ld. Sr. Standing Counsel, the Assessing Officer has rightly disallowed the claim of ₹21,71,733/-.

68. On the contrary, Shri Pe cy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that the assessee has paid ₹3,22,275/- to Mr. R.W. Clarke and ₹18,49,458/- to M/s Royal & Sun Alliance Plc. According to the Ld. Sr. counsel, the assessee hired the service of settling agents / surveyors to assess the loss or damage in transit of goods to foreign country. The expenses incurred by the surveyors for assessing the damage to the goods in transit were reimbursed by the assessee. According to the Ld. Sr. counsel, it is not a technical service made known to the assessee. They are all independent surveyors who assess the damages and report to the

assessee the extent of damage suffered in transit. Therefore, according to the Ld. Sr. counsel, no disallowance is called for.

69. We have considered the rival submissions on either side and perused the relevant material available on record. Mr. R.W. Clarke and M/s Royal & Sun Alliances Plc are non-residents. It is not in dispute that they have assessed the damage of goods outside the country. The surveyors assessed the damages as per their experience and knowledge. The knowledge for assessing the damages of goods was not made known to the assessee. The extent of damage is reported to the assessee so as to enable the assessee to compensate the loss to the customers. Therefore, this Tribunal is of the considered opinion that such payments made to surveyors are not liable for taxation in India. Hence no TDS is liable to be made. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

70. The next issue arises for consideration is brokerage and other acquisition charges pertaining to investments. In the

assessee's appeal, this issue arises for consideration for assessment year 2007-08.

71. During the course of hearing, the Ld. Sr. counsel for the assessee submitted that the assessee is not pressing this issue. Therefore, the ground relating to disallowance of brokerage and other acquisition charges is dismissed as not pressed.

72. The next issue arises for consideration is addition made on account of unexplained expenditure under Section 69 of the Act. This issue arises for consideration in the assessee's appeal for assessment year 2008-09.

73. During the course of hearing, Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that the assessee is not pressing this ground. Therefore, this ground relating to unexplained expenditure under Section 69 of the Act is also dismissed as not pressed.

74. The next issue arises for consideration is applicability of Minimum Alternate Tax (MAT) under Section 115JB of the Act. This issue arises for consideration in the assessee's appeals for

assessment years 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11.

75. Shri Percy J. Pardiwalla, the Ld. Sr. counsel for the assessee, submitted that the provisions of Section 115JB of the Act, which enables the Department to compute the income, is not applicable to insurance companies, therefore, there cannot be any addition to the book profit. According to the Ld. Sr. counsel, the insurance companies prepare Profit & Loss account as per the guidelines issued by Insurance Regulatory And Development Authority of India and not as per Part II and III of Schedule VI of Companies Act. According to the Ld. Sr. counsel, the applicability of Schedule VI of the Companies Act was specifically excluded in respect of insurance companies.

76. We heard Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue also. It is not in dispute that the applicability of provisions of Schedule VI of the Companies Act was excluded in respect of insurance companies. Therefore, the provisions of 115JB of the Act, which enables the companies to compute the book profit, may not be applicable to the insurance

companies. Therefore, this Tribunal is unable to uphold the orders of both the authorities below. Accordingly, orders of both the authorities below are set aside and the Assessing Officer is directed to delete the additions.

77. In the result, the appeals filed by both the Revenue and the assessee are partly allowed.

Order pronounced on 6th August, 2018 at Chennai.

sd/-	sd/-
(अब्राहम पी.जॉर्ज)	(एन.आर.एस. गणेशन)
(Abraham P. George)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 6 August, 2018.
Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A), LTU, Chennai
4. आयकर आयुक्त/CIT, LTU, Chennai
5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.