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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 2nd August, 2017
Date of decision: 30th August, 2017

\+ **ITA No. 372 of 2015**

ORIENTAL INSURANCE CO. LTD. .....Appellant
Through: Mr. M. S. Syali, Senior Advocate with Mr. Mayank Nagi and Mr. Tarun Singh, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX .....Respondent
Through: Mr. Ashok K. Manchanda, Senior Standing Counsel and Mr. Anand K. Chaudhuri, Advocates

\+ **ITA No. 447 of 2015**
\+ **ITA No. 448 of 2015**

COMMISSIONER OF INCOME TAX (LTU), NEW DELHI .....Appellant
Through: Mr. Ashok K. Manchanda, Senior Standing Counsel and Mr. Anand K. Chaudhuri, Advocates.

versus

ORIENTAL INSURANCE COMPANY LTD. .....Respondent
Through: Mr. M. S. Syali, Senior Advocate with Mr. Mayank Nagi and Mr. Tarun Singh, Advocates.

J U D G M E N T

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

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Dr. S. Muralidhar, J.:

1. These are three appeals under Section 260A of the Income Tax Act, 1961 ('Act') directed against the same impugned order dated 21st November 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 4493 and 4786/Del/2012. ITA No. 372/2015 has been preferred by the Assessee against the order of the ITAT in ITA No. 4493/Del/2012, which was the Assessee's own appeal for the Assessment Year ('AY') 2005-06. The other two appeals, ITA Nos. 447 and 448 of 2015 are by the Revenue against ITA Nos. 4493 and 4786/Del/2012, respectively for the same AY.

Questions of Law

2. The questions of law in each of the appeals differ. In the Assessee's appeal, i.e. ITA No. 372/2015, by an order dated 7th July 2015, the following question of law was framed for determination:-

> "Whether the ITAT was correct in law in holding that the income earned on sale/redemption of investment is chargeable to tax?"

3. In ITA No. 447/2015, the question framed by the order dated 17th May 2016 reads:

> "Whether the Tribunal was correct in holding that the provisions of Section 115JB of the Income Tax Act are not applicable to insurance companies?"

4. As far as ITA No. 448/2015 is concerned, notice was issued by the order dated 18th September 2015 on only one of the four questions projected by the Revenue, viz.:

> "Whether the ITAT was correct in upholding the decision of the CIT (A) in deleting the addition of Rs. 3,39,60,000/- made by the Assessing Officer ('AO') on account of the investment written off?"

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5. At one stage, the above appeals were directed to be listed with ITA No. 174 of 2013 which was the Assessee's appeal for AY 2006-07. One of the questions framed in the said appeal by the order dated 10th July 2013 was:

> "Whether the ITAT was correct in law in holding that the income earned on sale/redemption of investment is chargeable to tax?"

6. However, when that appeal came to be decided by the decision in ***Oriental Insurance Company v. CIT [2015] 378 ITR 421 (Del)***, the above question was left open since the other two questions in that appeal regarding reopening of the assessment under Section 148 of the Act were answered in favour of the Assessee.

Background facts

7. The background facts are that the assessee is the subsidiary of General Insurance Corporation of India ('GIC') and is engaged in the business of General Insurance comprising of Fire, Marine and Miscellaneous Insurance Business. The Assessee was originally incorporated on 12th September 1947 as the Oriental Fire Insurance Company Ltd. Its name was changed to Oriental Insurance Ltd. on 1st May 1984.

8. For the AY in question, the Assessee filed a tax return declaring a loss of Rs. 76,71,41,581/- and a book profit of Rs. 3,62,45,18,770/- under the special provisions of Section 115JB of the Act.

Proceedings before the Assessing Officer

9. The return was picked up for scrutiny. The Assessing Officer ('AO') passed the assessment order on 3rd December 2007 assessing the total

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income of the Assessee at Rs. 4,65,97,73,716/- under the normal provisions of the Act and at book profits of Rs. 9,05,14,34,065/- as per the Minimum Alternate Tax (MAT) provision i.e. Section 115 JB of the Act. The AO, by the said assessment order, *inter alia* made the following additions to the returned income of the Assessee:

(i) Profits/Gains derived by the Assessee from sale/redemption of investments - Rs. 457,60,43,000/-.

(ii) Provision for Diminution in the Value of Investments - Rs. 7,47,40,000/-

10. As regards (i) above the AO disbelieved the Assessee's plea that it was consistently following the policy of claiming exemption in respect of the profit on sale of investments. The AO found that in some years where there was nil income the Assessee did not claim exemption but only when there were profits. According to the AO the said profit "represented the actual income of the Assessee" and was "not any notional income keeping in view the fact that Assessee is following the mercantile method of accounting."

11. As regards (ii) above, the AO held that Circular No. 528 of the Central Board of Direct Taxes ('CBDT') dated 16th December 1988 reported in 176 ITR 154 (St) was not applicable. It was held that once Rule 5 (b) stood omitted the "benefit/adjustments arising from that Rule also is destroyed and cannot be enjoyed."

Order of the CIT (A)

12. Aggrieved by the above order, the Assessee went before the Commissioner of Income Tax (Appeals) ['CIT (A)']. By the order dated

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2nd July 2012, the CIT (A) confirmed the additions made by the AO. On the question of profits/gains from the sale/redemption of investments, the ITAT's order for AY 2004-05 was followed. As for the provision of diminution of the value of investment, the disallowance was upheld in view of the order of the ITAT for AY 2003-04.

Order of the ITAT

13. Both the Assessee and the Revenue filed appeals before the ITAT. Both appeals were disposed of by the impugned common order dated 21st November 2014 upholding the additions made by the AO.

14. On the issue of addition on account of profit on the sale of investments, the ITAT followed its own order in the Assessee's case for AY 2004-05 and accordingly rejected the Assessee's appeal on this ground. On the issue of addition on account of diminution in the value of investments, the ITAT followed its own order in the Assessee's case for AY 2003-04 and accordingly rejected the Assessee's appeal on this ground. On the issue of investments written off the ITAT followed its own order in the Assessee's case for AYs 2000-01 and 2001-02. The Revenue's appeal was accordingly rejected on this issue.

Contentions on behalf of the Assessee

15. Mr. M. S. Syali, learned Senior Counsel appearing on behalf of the Assessee, points out that the basis of the claim for exemption in respect of profit on the sale of investments is not omission of Rule 5(b) but the Circular No. 528 dated 16th December 1988. He contends that, in the context of Section 119 of the Act, a circular that is in favour of the Assessee can

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supplant the law. He referred to the decisions of the Supreme Court in ***Navnitlal C. Javeri v. K. K. Sen, [1965] 56 ITR 198 (SC)*** and ***Ellerman Lines Ltd. v. CIT, [1971] 82 ITR 913 (SC)*** in this regard. He also referred to the decision of the Kerala High Court in ***CIT v. Punalur Paper Mills Ltd., [1988] 170 ITR 37 (Ker)*** and the judgments of the Supreme Court in ***UCO Bank v. CIT, [1999] 237 ITR 889 (SC)*** and ***UOI v. Arviva Industries India Ltd., (2014) 3 SCC 159***. According to him, both the CIT (A) and the ITAT erred in simply following the ITAT's earlier order in the Assessee's own case for AY 2004-05 and failed to appreciate that, in the said order, the Revenue had actually given up the point.

16. Mr. Syali places considerable reliance on the decision of the Supreme Court in ***CIT v. Karnataka State Co-operative Apex Bank [2001] 251 ITR 194 (SC)*** where it was held that if, by the mandate of statute, investment is to be made as a pre-condition to carrying on banking business then the profits on sale thereof would constitute profits in the same business. He pointed out that investments to be made by insurance companies were stipulated under Sections 27 and 28 of the Insurance Act 1938 (IA). Section 3 of the IA prohibits the Assessee from carrying on any other business. In particular, Section 3 (4) (h) of the IA states that the Insurance Regulatory Development Authority (IRDA) can cancel the registration of an insurer if it carries on any business other than the insurance business or any prescribed business.

17. Mr. Syali referred to the decisions of the other benches of the ITAT that had taken the consistent view that profits or losses from the sale of

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investment are not to be taxed. The mere fact that, in some earlier year, the Assessee may have taken a stand to the contrary cannot act as an estoppel. In support of this proposition, reliance was placed on the decisions in ***CIT v. Mr. P. Firm, [1965] 56 ITR 67 (SC)*** and ***Chryscapital Investment Advisors v. DCIT [2015] 376 ITR 183 (Del)***.

Contentions on behalf of the Revenue

18. In reply Mr. Ashok Manchanda, learned Senior Standing counsel appearing on behalf of the Revenue, first traced the background to the changes brought about by the IA and the Insurance Regulatory Development Authority Act, 1999 ('IRDA Act'). Mr. Manchanda maintained that the investments made by the Assessee have to be treated as its stock-in-trade. He submitted that this was the Assessee's own case in its grounds of appeal in ITA No. 372 of 2015. He pointed out that the long term capital gains (LTCG) on the investments in equity shares alone qualified for exemption under Section 10 (38) of the Act and not investments in debentures, bonds, preference shares and other securities.

19. According to Mr. Manchanda, such long term capital assets constitute only a very small portion of the Assessee's portfolio of so-called investments. A substantial part of the securities, having not been held by the Assessee for more than one year, could not be treated as long term capital assets. The very fact that the Assessee has included the surplus on account of the appreciation of the value of the stock-in-trade and also the profits realised on the transfer of stock-in-trade in its books of accounts, there was no scope for the Assessee to now claim that the same should be exempted as LTCG.

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20. Mr. Manchanda submitted that that much of the profits of Rs. 457 crores were not as a result of transfer/sale of shares, but notional i.e. on account of upward revision/appreciation in the value of so called investments which form part of the stock-in-trade of the business of the assessee. The profits attributable to the increase in the value of stock-in-trade are always taxable as business profits. Most of the so-called investments being not capital assets and having been held for short periods, the profits resulting therefrom on account of appreciation/sale etc. are in no way exempt under any provision of the Act.

21. Mr. Manchanda contended that the Assessee had changed its stand before this Court by relying on the Circular No. 528 of the CBDT instead of relying on Section 44 of the Act read with Rule 5 of the First Schedule thereto. According to Mr. Manchanda, Circular No. 528 had no application in the facts and circumstances of the case. He contended that Circular No. 528 did not contain any binding instructions and could not have been deemed to be issued under Section 119 of the Act. It was *ultra vires* Section 119 of the Act and was not of a binding nature. Moreover, it was issued with reference to the GIC and its subsidiaries. In the AY in question, the Assessee was not a subsidiary of GIC and was, therefore, not covered by said circular. The circular could neither impose a new tax nor grant exemption from payment of tax and was, therefore, not applicable.

22. Mr. Manchanda further contended that in earlier AYs, i.e. prior to 2002-03, the Assessee credited the profits on the sale of shares to the general reserve instead of to the P&L account. The Revenue also did not seek to

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bring it to tax, consistent with Section 44 read with the First Schedule to the Act and the IRDA Regulations. However, for the AY in question, where the Assessee itself has brought the profits into the P&L Account, it cannot be claimed that, for the purposes of taxation, they should not be treated as taxable. Reliance in this regard is placed on ***J.K. Synthetics Ltd. v. CBDT [1972] 83 ITR 335 (SC)***.

23. According to Mr. Manchanda, there was no occasion for Rule 5 not to apply during the AY since the investment in question was not exempt for the purpose of clauses (a) and (c) thereof. There was no question of excluding the profit from the sale of such investment for the purposes of computation of taxable income. He also noted that, for AY 1990-91, the Assessee had argued before the ITAT that Circular No. 528 is not applicable and this was accepted by the ITAT. The ITAT had held that Section 44 of the Act read with Rule 5 of the First Schedule gives only method of computation of the income of a company carrying on the business of insurance. It does not provide for taxing or not taxing of any particular income. Rule 5(b) also impacted the writing off of investments. Once Rule 5(b) stood omitted, any loss suffered by the Assessee could not be allowed.

24. Mr. Manchanda supplemented his oral submissions with a 16 page written note of submissions.

Whether investments could be considered as stock-in-trade?

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

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‘approved investments are set out in clauses (a) to (j) thereunder. 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 3rd December 2007, nowhere

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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.

Profits on sale/redemption of investments

30. Since the Assessee's case with respect to the addition of profits earned on sale/redemption of investments essentially rests on Circular No. 528, this circular requires to be examined in some detail. Before reference is made to the said Circular, the background requires to be traced.

31. As already noticed, Section 44 of the Act is specific to 'Insurance Business'. It states that, notwithstanding anything to the contrary contained in the Act relating to the computation of income chargeable under different heads 'interest on securities', 'income from house property', 'capital gains' or 'income from other sources', the profits and gains of any business of insurance shall be computed in accordance with rules contained in the First Schedule of the Act. Therefore, in the case of the Assessee which is carrying on general insurance business, the profits and gains of its business have to be computed only in terms of the First Schedule.

Analysis of Rule 5 (b)

32. The First Schedule sets out the Rules under Part 'B'. We are concerned

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with Rule 5(b) which stood omitted by the Finance Act, 1988 and was re-introduced by the Finance Act, 2009 with effect from 1st April 2011. The rationale for omitting Rule 5(b) was to exempt profits and gains in investments by the General Insurance Corporation of India and the four companies formed under Section 16 of the General Insurance Business (Nationalisation) Act, 1972.

33. Rule 5 in First Schedule to the Act, i.e. the provisions relating to "Computation of profits and gains for other Insurance business" reads as under:

> "Computation of profits and gains of other insurance business.-
>
> 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 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 realisation 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."

34. The current clause (b) of Rule 5 was substituted by the Finance Act,

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2010 with effect from 1st April 2011 for the previous clause (b) which stood re-inserted by the Finance (No. 2) Act, 2009 with effect from 1st April 2011 after its omission by the Finance Act, 1988 with effect from 1st April 1989. The clause, prior to substitution, read as under:-

> "Computation of profits and gains of other insurance business.-
>
> 5. [...]
>
> (a) [...]
>
> (b) (i) deduction in respect of any amount either written off or provided in the account to meet diminution in or loss on realisation of investments in accordance with the regulations made by the Insurance Regulatory and Development Authority;
>
> (ii) increase in respect of any amount taken credit for in the account on account of appreciation of or gains on realisation of investments in accordance with the regulations made by the Insurance Regulatory and Development Authority;
>
> (c) [...]"

35. Prior to this, while proposing deletion of Clause (b) of Rule 5 of the First Schedule with effect from 1st April 1989, the explanation offered in the Memorandum to the Finance Bill, 1988 was as under:

> "*Liberalization of provisions in respect of taxation of profits and deduction of tax at source applicable to the General Insurance Corporation and its subsidiaries*
>
> 17. Under the existing provisions of Section 44 of the Income Tax Act, the profits and gains of any insurance business is computed in accordance with the rules contained in the First Schedule to the Act. In rule 5 of this Schedule, profits and gains

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of any business of insurance, other than life insurance, are taken to be balance of profits disclosed in the annual accounts furnished to the Controller of Insurance subject to certain adjustments. One of the adjustments provided therein is in respect of any amount either written off or reserved in the accounts to meet depreciation or loss on the realisation of investment which is allowed as deduction. Similarly, any sum taken credit for in the account on account of appreciation of or gain on the realisation of investments is taken as part of the profits and gains of the business.

With a view to enable the General Insurance Corporation and its subsidiaries to play a more active role in the capital markets for the benefit of policy holders, it is proposed to provide for exemption of the profits earned by them on the sale of investments. As a corollary, it is proposed to provide that the losses incurred by the General Insurance Corporation on the realisation of investment shall not be allowed as deduction in computing the profits chargeable to tax. To achieve this objective, clause (b) of rule 5 of the First Schedule to the Income tax Act is proposed to be deleted.

This amendment will take effect from 1st April, 1989, and will, accordingly, apply in relation to the assessment year 1989-90 and subsequent years."

36. Simultaneous with the omission of Rule 5 (b) in 1988, Circular No. 528 dated 16th December 1988 was issued by the Central Board of Direct Taxes ('CBDT') which purported to introduce through the Rules a policy of 'Liberalisation of provisions in respect of taxation of profits and deduction of tax at source applicable to the holding company' of the Assessee, that is, the GIC and its subsidiaries (including the Assessee). Thus what an insurance company was deprived of by omission of Rule 5 (b) was provided to it by the above Circular. Whether this was permissible in law is the

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central question in the present case.

37. To complete the chronological sequence, when again a change was brought about in 2009 to Rule 5, the Memorandum appended to the Finance (No. 2) Bill, 2009, explained the rationale thus:

> "Taxation of Investment Income/loss of Non-life Insurance business.
>
> The profits and gains of non-life insurance business is computed under section 44 read with rule 5 of the First Schedule. As per Rule 5, profits and gains of non-life insurance business is taken to be profits disclosed in the annual account, copies of which are required under the Insurance act, 1938 (4 of 1938), to be furnished to the Controller of Insurance, subject to adjustments for unexpired risk and disallowances under Section 30 to Section 43B.
>
> The Insurance Act, 1938 was amended in 1999 and the Insurance Regulatory Development Authority (IRDA) was created. In the financial year 2001-02, IRDA introduced "IRDA (Preparation of Financial Statements and Auditor's Report of Insurance Companies) Regulations, 2002". The regulations mandated new guidelines and formats for preparation of accounts by General Insurers. According to these changed norms, a non-life insurance company has to include profit or loss on realization/sale of investment in the profit and loss account or revenue account. This is also consistent with international best practice on taxation of investment income of non-life insurance companies."

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

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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

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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.

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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.

45. Indeed, the legislative policy appears to be clear. Where it is intended to bring the profit on sale of investments to tax, the legislature has chosen to re-introduce the earlier provision by virtue of the amendment effective from AY 2011-12. The intention behind omitting Rule 5(b) was clearly expressed in the Circular. If the Circular was not intended to fill the gap brought about by the omission of Rule 5(b), viz., to exempt the profits on sale of investments made by the insurance companies from tax, there was no need to re-introduce Rule 5(b) with effect from AY 2011-12. The resultant position is that for the period during which there was no Rule 5(b) the profits on sale of investments were not taxable in the hands of the Assessee. Further, the Assessee has itself clarified that it is not claiming the loss

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suffered on the writing off of the investments in compliance with the CBDT Circular No. 528.

46. The different benches of the ITAT have, in other cases, consistently held that during the period when Rule 5(b) was not operational the profit on sale of investments made by general insurance companies cannot be brought to tax. In ***Bajaj Allianz General Insurance Co. Ltd. v. Additional Commissioner of Income Tax (2010) 130 TTJ (Pune) 398***, the ITAT addressed the specific question of whether a logical conclusion could be drawn that an income that is not taxed in terms of Rule 5(b) could, even after such amendment was deleted, be taxed in the hands of the insurance company. It was held that income which was earlier taxable under one specific clause could not be brought to tax after the deletion of such clause.

47. It is futile, therefore, for the Revenue to seek to bring to tax profits on sale of investment because in some earlier year the Assessee may have taken what appears to be a contradictory stand. In any event, the Assessee appears to have explained that the issue that arose in the earlier case was regarding investments written off and not profit on sale/redemption of investments. The observations of the ITAT in its order for AY 1990-91 with regard to the profit on sale/redemption of investment could, at best, be treated as *obiter* since that was not in issue in the case before it.

48. The Court is, therefore, unable to subscribe to the submission of Mr. Manchanda that the Circular No. 528 has no application to the present case. The decision in ***J.K. Synthetics v. CBDT*** *(supra)* relied upon by him has no application to the facts of the case. Furthermore, it is not even the case of the

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Revenue that the said Circular is *ultra vires* of the Act.

49. The question framed in ITA No. 372 of 2015 is accordingly answered in the negative, in favour of the Assessee and against the Revenue, by holding that the ITAT erred in holding that the income earned on sale/redemption of investment was chargeable to tax.

On the disallowance of investments written off

50. The disallowance of the investments written off is the subject matter of the Revenue's ITA No. 448/2015. The ITAT has in the impugned order while setting aside the disallowance, followed its decision for AYs 2000-01 and 2001-02. The ITAT held that the guidelines issued by the GIC permitted insurance companies to book the loss in their accounts rather than waiting for the actual loss on the sale of investment. Since it represented a loss and not an expenditure or allowance, the AO was held to have erred in adding back the said loss in the computation of the Assessee's income. Reliance was placed on the decision in ***General Insurance Corporation of India v. CIT [1999] 240 ITR 139 (SC)***.

51. The contention of the Revenue is that contradictory pleas have been taken by the Assessee before the ITAT in the appeal for the AY 1990-91 where, on the issue of write off of investments, it was contended that since Rule 5(b) had been omitted, no exemption has been provided in respect of the profits earned and that since they were chargeable to tax, the losses, if any, were required to be allowed as a deduction.

52. In the written note of submissions filed on behalf of the Assessee, it is

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stated that: “**When the petitioner is availing the non-taxation of its profits from sale of investments it is also not claiming the loss suffered on these investments**. The AO has not only taxed the profits on sale of investment but has also disallowed the losses.” (emphasis supplied) Therefore, even the Assessee acknowledges that if it succeeds, as it has, in its plea that the profit from sale/redemption of investments must be exempt from tax, then it cannot seek deduction as a result of losses on the write off of such investments.

53. Consequently the question framed in the Revenue’s ITA No. 448/2015 is answered in the negative, i.e. in favour of the Revenue and against the Assessee. It is held that CIT (A) erred in deleting the addition of Rs. 3,39,60,000/- by the AO on account of the investment written off.

Applicability of Section 115JB to insurance companies

54. Turning now to ITA No. 447/2015, the question concerns the applicability of Section 115JB of the Act to insurance companies. The ITAT has permitted the Assessee to raise this question since, in a large number of judgments of the ITAT, the question has been answered in favour of the Assessee.

55. It is plain, from a reading of Section 44 read with the First Schedule of the Act, that insurance companies are required to prepare accounts as per the IA and the regulations of the IRDA and not as per Parts II and III of Schedule VI of the Companies Act. The Assessee prepares its accounts as per the IRDA principles. The IRDA Regulations govern the preparation of the auditor’s report.

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56. Consequently, the question framed in ITA No. 447/2015 is answered in the affirmative, i.e. in favour of the Assessee and against the Revenue by holding that Section 115JB of the Act does not apply to insurance companies.

Conclusion

57. ITA No.372 and 448 of 2015 are allowed and ITA No. 447 of 2015 is dismissed.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 30, 2017
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