

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

TAX CASE APPEAL NOS.754, 834, 836, 837, 838, 840,
841, 845, 847, 851, 856, 862, 866, 868, 871,
903, 907, 910 AND 913 OF 2018
AND CONNECTED CIVIL MISCELLANEOUS PETITIONS

M/S.CHOLAMANDALAM MS GENERAL
INSURANCE CO.LTD., DARE HOUSE,
NO.2, NSC BOSE ROAD, CHENNAI-600 001.
PAN AABCC 6633 K

... Appellant in T.C.A.Nos.754, 834,
836, 837, 838, 840, 841 of 2018

M/S.ROYAL SUNDARAM GENERAL INSURANCE CO.LTD.,
"SUNDARAM TOWERS" 45 AND 46,
WHITES ROAD, CHENNAI 600 002
PAN.AABCR7106G

... Appellant in T.C.A.Nos.845,
847, 851, 856 of 2018

M/S.UNITED INDIA INSURANCE CO.LTD.,
24-WHITES ROAD, CHENNAI-600014

... Appellant in T.C.A.Nos.862, 866, 868,
871, 903, 907, 910 and 913 of 2018

-vs-

1. The Deputy Commissioner of Income Tax,
Large Tax Payer Unit,
Chennai-600 101.

.. Respondents in T.C.A.Nos.754, 834,
836, 837, 845, 851, 856 of 2018

1. The Assistant Commissioner of Income Tax,
Large Tax Payer Unit,
Chennai-600 101.

.. Respondents in T.C.A.Nos.838,
840, 841, 847 of 2018

1. The Deputy Commissioner of Income Tax
Assistant Commissioner of Income Tax/
Income Tax Officer (TDS),
Large Tax Payer Unit,
Chennai-600 101.

.. Respondents in T.C.A.Nos.862, 866, 868,
871, 903, 907, 910 and 913 of 2018

2. Ministry of Finance,
Department of Financial Services,
Rep., by its Secretary, Jeevan deep Building,
Parliament Street, New Delhi-110 001.
3. Insurance Regulatory and Development
Authority of India,
Rep., by its Chairman,
Sy No.115/1, Financial District,
Nanakramguda, Gachibowli,
Hyderabad-500 032.
4. The Central Board of Direct Taxes,
Rep., by its Chairman, 9th floor,
Lok Nayak Bhavan,
Khan Market, New Delhi-3.
5. General Insurance Council,
Rep., by its Secretary General,
5th floor, National Insurance Building,
14, Jamshedji tata Road, Churchgate, Mumbai-20.

(RR2 to 5 - Impleaded vide Court order dated
20.11.2018 made in T.C.A.No.754 of 2018)

... Respondents

Prayer:-

Tax Case Appeal filed under Section 260A of the Income-tax Act, 1961 against the order of the Income-tax Appellate Tribunal 'A' Bench, Chennai, dated 31.07.2018, in I.T.A.No.2276/Chny/2014, I.T.A.No.1350/Chny/2013, dated 31.07.2018, I.T.A.No.1676/Chny/2011, dated 31.07.2018, I.T.A.No.1621/Chny/2011, dated 31.07.2018, I.T.A.No.2146/Chny/2008, dated 31.07.2018, I.T.A.No.1759/Chny/2011, dated 31.07.2018, I.T.A.No.40/Chny/2009, dated 31.07.2018, I.T.A.No.1666/Chny/2011, dated 06.08.2018, I.T.A.No.1626/Chny/2011, dated 06.08.2018, I.T.A.No.1356/Chny/2013, dated 06.08.2018, I.T.A.No.2310/Chny/2014, dated 06.08.2018, I.T.A.No.1689/Chny/2011, dated 28.08.2018, I.T.A.No.1608/Chny/2011, dated

28.08.2018, I.T.A.No.1688/Chny/2011, dated 28.08.2018, I.T.A.No.1673/Chny/2011, dated 28.08.2018, I.T.A.No.1692/Chny/2011, dated 28.08.2018, I.T.A.No.36/Chny/2014, dated 28.08.2018, I.T.A.No.696/Chny/2014, dated 28.08.2018, I.T.A.No.1693/Chny/2011, dated 28.08.2018 for the assessment year 2009-10. Assessment Year 2008-09, 2007-08, 2007-08, 2005-06, 2006-07, 2005-06, 2005-06, 2005-06, 2009-10, 2010-11, 2005-06, 2006-07, 2004-05, 2003-04, 2007-08, 2009-10, 2010-11 and 2008-09.

TCA.Nos.754, 836, 837, 910 and 913 of 2018:-

Against the Order of the Commissioner of Income Tax (Appeals) Large Tax Payer Unit, Chennai made in ITA.No.13/13-14/LTU(A) dated 26.06.2014, ITA.No.37/10-11/LTU(A) dated 28.07.2011, ITA.No.12/13-14/LTU(A) dated 23.01.2014 and ITA.No.51/10-11/LTU(A) dated 20.07.2011 against the order of the Deputy Commissioner of Income Tax, Large Tax Payer Unit, Chennai made in G.I/P.A.No.AABCC 6633K, dated 28.03.2013, G.I/P.A.No.AABCC 6633K, dated 16.12.2010, G.I/P.A.No.AACU 5552C, dated 27.03.2013 and G.I/P.A.No.AACU 5552C, dated 28.12.2010.

For Appellant : Mr.R.V.Eshwar,
(United India Insurance) Senior Counsel
assisted by
: Mr.M.V.Swaroop
: Mr.V.Prashanth Kiran
: Mr.M.S.Hredai
: & Ms.Sheetal Srikanth

For Appellant : Mr.Percy Pardiwallia,
(Royal Sundaram Senior Counsel
& Cholamandalam) assisted by
: Mr.Sandeep Bagmar
: Mr.Bharat R. Srinivas
: & Ms.Neelaya Dakshi

For R1 : Mr.M.Swaminathan,
(In all Appeals) Senior Standing Counsel
assisted by

: Mrs.V.Pushpa,
Junior Standing Counsel

For RR2 and 4 : Mr.Venkataswamy Babu,
(In all Appeals) Central Govt. Standing Counsel

For R3 : Mr.M.B.Gopalan (IRDAI)
(In all Appeals)

For R5 : Mr.M.Vijayaraghavan (GIC)
(In all Appeals)

COMMON JUDGMENT
(Delivered by T.S.Sivagnanam, J.)

In all these appeals, filed by the assesseees under Section 260A of the Income-tax Act, 1961 ("the Act" for brevity), who are Insurance Companies, viz., United India Insurance Company Limited, Cholamandalam MS General Insurance Company Limited, and Royal Sundaram General Insurance Company Limited, the challenge is to the common order passed by the Income-tax Appellate Tribunal 'A' Bench, Chennai ("the Tribunal" for brevity), in

I.T.A.No.2276/Chny/2014, dated 31.07.2018, for the assessment year 2009-10;

I.T.A.No.1350/Chny/2013, dated 31.07.2018, for the assessment year 2008-09;

I.T.A.No.1676/Chny/2011, dated 31.07.2018, for the assessment year 2007-08;

I.T.A.No.1621/Chny/2011, dated 31.07.2018, for the assessment year 2007-08;

I.T.A.No.2146/Chny/2008, dated 31.07.2018, for the assessment year 2005-06;

I.T.A.No.1759/Chny/2011, dated 31.07.2018, for the assessment year 2006-07;

I.T.A.No.40/Chny/2009, dated 31.07.2018, for the assessment year 2005-06;

I.T.A.No.1666/Chny/2011, dated 06.08.2018, for the assessment year 2005-06;

I.T.A.No.1626/Chny/2011, dated 06.08.2018, for the assessment year 2005-06;

I.T.A.No.1356/Chny/2013, dated 06.08.2018, for the assessment year 2009-10;

I.T.A.No.2310/Chny/2014, dated 06.08.2018, for the assessment year 2010-11;

I.T.A.No.1689/Chny/2011, dated 28.08.2018, for the assessment year 2005-06;

I.T.A.No.1691/Chny/2011, dated 28.08.2018, for the assessment year 2006-07;

I.T.A.No.1688/Chny/2011, dated 28.08.2018, for the assessment year 2004-05;

I.T.A.No.1673/Chny/2011, dated 28.08.2018, for the assessment year 2003-04;

I.T.A.No.1692/Chny/2011, dated 28.08.2018, for the assessment year 2007-08;

I.T.A.No.36/Chny/2014, dated 28.08.2018, for the assessment year 2009-10;

I.T.A.No.696/Chny/2014, dated 28.08.2018, for the assessment year 2010-11;

I.T.A.No.1693/Chny/2011, dated 28.08.2018, for the assessment year 2008-09; respectively.

2.The common legal issue arising in these appeals relates to disallowance of reinsurance premium ceded to non-resident reinsurers. The assesseees have raised the following substantial questions of law for consideration:-

"(i) Whether the ITAT erred in deciding the validity of reinsurance ceded to the non-resident reinsurers when such issue was not even raised before it by either the Department or the Appellant?

(ii) Whether the ITAT erred in holding that the IRDA (General Insurance - Reinsurance) Regulation, 2000 is contrary to section 101A of the Insurance Act, 1938 when it does not have the power to decide the validity of regulations made by the IRDA?

(iii) Whether the ITAT erred in holding that reinsurance payments to non-residents are prohibited by law and therefore hit by Explanation 1 to section 37 of the Act?

(iv) Whether the ITAT Erred in failing to follow co-ordinate bench decisions on the very question of reinsurance payments to non-residents when it ought to have referred the matter to a larger bench if it disagreed with such judgments?"

3.We have elaborately heard Mr.R.V.Eshwar, learned Senior Counsel for M/s.United India Insurance Company Limited; Mr.Percy Pardiwallia, learned Senior Counsel for M/s.Cholamandalam MS General Insurance Company Limited, and M/s.Royal Sundaram General Insurance Company Limited; and Mr.M.Swaminathan, learned

Senior Standing Counsel and Mrs.V.Pushpa, learned Junior Standing Counsel for the respondent/Revenue.

4.T.C.A.No.754 of 2018 is taken as the lead case.

5.The cases on hand have had a chequered history and this is the second round of litigation before this Court. Earlier, the assessee had approached this Court by filing tax case appeals in T.C.(A) Nos.361 to 370 of 2012 and etc., batch challenging the order passed by the Tribunal by which, the assessments were set aside and the matter was remanded to the Assessing Officer for fresh consideration. The Tribunal opined that both the assessee and the Revenue had filed fresh documents and therefore, the matter has to be remanded to the Assessing Officer for fresh consideration. The assessee as well as the Revenue filed miscellaneous petitions before the Tribunal contending that no fresh documents were produced and remand to the Assessing Officer was unnecessary. The Tribunal rejected those applications, which were challenged by way of writ petitions, which were not numbered, however, were tagged along with the tax case appeals.

6.The Division Bench, by judgment dated 17.06.2013, in Cholamandalam MS General Insurance Co. vs. Assistant/Deputy commissioner of Income-tax, [2013] 357 ITR 597 (Madras), allowed the appeals filed by the assessee and set aside the order of remand passed by the Tribunal. The Division Bench pointed out that there is absolutely no material, which necessitated the remand of the case to the Assessing Officer, as the admitted factual position was that the materials, which were relied on by the assessee and the Revenue, were admitted before the Assessing Officer. In the background of such a conclusion, the appeals were allowed with the following directions:-

"18. We may point out that the order of the Tribunal makes no mention at all as to what were the documents filed before the Tribunal as by way of fresh document, necessitating remand. In the background of the facts pleaded and admitted by the Revenue, we set aside the order of the Tribunal and remand the appeal to the Tribunal to bestow its attention in all sincerity to the issues raised by the Revenue as well as by the assessee in their appeals and pass orders in accordance with law. This would include consideration of the relevance of the retrospective amendment to Section 9 of the Income Tax Act after the Vodafone Case to the facts of the case. Thus taking note of the submissions of the learned senior counsel appearing for the assessee and the learned standing counsel

appearing for the Revenue, particularly on the amendment to the Act consequent on the Vodafone case, we direct the Income Tax Appellate Tribunal to consider the case of the assessee afresh on the materials placed and the effect of the amended provision on the assessee's cases. It is open to the assessee to file such additional grounds on the points of law before the Tribunal for a full-fledged hearing on the issues raised."

7. In terms of the above direction, the Tribunal had to bestow its attention in all sincerity to the issues raised by the Revenue as well as by the assessee in their appeals and pass orders in accordance with law. Thus, the Tribunal was bound to strictly adhere to the directions issued by the jurisdictional High Court which in no unclear terms, set out what the Tribunal has to do. (Union of India and Others vs. Kamalakshi Finance Corporation Limited, AIR 1992 SC 711)

8. It needs to be reiterated that the Division Bench directed the Tribunal to bestow its attention to the issues raised by the Revenue and the issues raised by the assessee in their appeals. Thus, the Tribunal was bound to consider the issues raised by the Revenue and the assessee in their appeals.

9. The other limb of the direction was permitting the assessee to file additional grounds on the points of law before the Tribunal. It is not disputed before us that no such additional grounds, raising points of law, were filed before the Tribunal and the parties were left to contest the issues, which they have raised in their respective memorandum of grounds of appeal. We have perused the memorandum of grounds of appeal filed by the assessee as well as the Revenue, in September, 2018. There is no dispute or controversy on this issue, and the parties are clear that the grounds raised by them are those which are contained in the grounds of appeal filed before us in the typed set of papers. Thus, the Tribunal should have endeavoured to consider the grounds raised by both parties and take fresh decision on merits.

10. Section 254 of the Act states that the Appellate Tribunal, may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. What is to be borne in mind is the words "such orders thereon". Therefore, the Tribunal is required to take a decision on the appeal petition and in the instant case, on the grounds raised by the assessee and the Revenue questioning the order passed by the Assessing Officer. Unfortunately, in the impugned decision taken by the Tribunal, it proceeded on an independent issue, which was never raised by the assessee or the

Revenue, this, in our considered view, was without jurisdiction and wholly unwarranted.

11. From a reading of the impugned order passed by the Tribunal, more particularly, in para 6, it shows that the decision of the Tribunal on the effect of certain provisions of the Insurance Act, 1938 (for brevity "the Insurance Act") whether reinsurance was permissible with foreign entities and whether the same was prohibited or valid in law, were all queries, which were raised by the Tribunal suo motu, when the appeals were heard. It is true that the learned counsels appearing for the assessee and the Revenue responded to the queries and made their submissions and ultimately, the Tribunal held against the assessee. However, the moot question is whether the Tribunal could have done so in the light of the pointed directions issued by the Division Bench in its judgment dated 17.06.2013 (supra).

12. The sum and substance of the conclusion of the Tribunal is that the entire reinsurance arrangement of the assessee-company is in violation and contrary to the provisions of Section 2(9) of the Insurance Act and therefore, the entire reinsurance premium has to be disallowed under Section 37 of the Act. The Tribunal holds that there is a clear prohibition for payment of reinsurance premium to the non-resident reinsurance companies.

13. As noticed above, it is neither the case of the Revenue, nor the case of the assessee that the claim for deduction was made under Section 37 of the Act. The Tribunal suo motu has non-suited the assessee by referring Explanation 1 to Section 37 of the Act. Under the said Explanation, it was declared that any expenditure incurred by an assessee for any purpose, which is an offence or which is prohibited by law, shall not have been deemed to be incurred for the purpose of business or supervision and no allocation or allowance shall be made in respect of such expenditure. Admittedly, the Tribunal did not render any finding that the assessee has incurred expenditure for a purpose, which is an offence. However, the Tribunal holds that expenditure incurred by the assessee is prohibited by law.

14. The larger question would be whether at all this is an expenditure? However, we do not propose to deal with this, as that was never decided by the Tribunal in the impugned order and leave the issue open. Thus, we are required to examine as to whether in the facts and circumstances, the Tribunal was right in holding that payment of reinsurance premium to non-resident insurance companies is prohibited and to be disallowed under Section 37 of the Act.

15. As pointed out earlier, neither the Revenue, nor the assessee referred to Section 37 of the Act. Thus, the error committed by the Tribunal firstly is in exceeding the scope of the order of remand passed by the Division Bench of this Court in the earlier decision noted above. Secondly, the Tribunal has no jurisdiction to declare a transaction to be either prohibited or illegal occurring under a different statute over which, it has no control. In other words, the Income-tax Officer cannot declare a transaction as illegal under the provisions of the Insurance Act or the Regulations framed thereunder. The Income-tax Officer can examine as to whether any income accrued in the hands of the assessee is required to be taxed. In the instant case, neither the Assessing Officer, nor the Commissioner of Income-tax (Appeals)-II (for brevity "the CIT(A)") has made any such endeavour, but the Tribunal has done such an exercise which, in our considered opinion, was without jurisdiction. Nevertheless, as we have heard elaborate arguments on the side of the assessee as well as the Revenue, we are constrained to test the correctness of the order passed by the Tribunal in this regard. Thus, we have to decide as to whether there is a prohibition under law for insurance payments to non-residents so as to attract the rigour of Explanation 1 to Section 37 of the Act.

16. In this regard, we may straightaway refer to the statement of objects and reasons for the Insurance (Amendment) Bill, 1961, which was introduced in the Lok Sabha on 14th February, 1961. This Bill was passed and the Insurance Act stood amended. The Hon'ble Finance Minister for the Union of India would state that re-insurance is an essential part of general insurance business and at present (1961), insurance companies, operating in India, are dependent on companies outside India for a very large part of their requirements in this connection and more often than not enter into disadvantageous arrangements. Moreover, re-insurance with companies outside India results in loss of foreign exchange and the Bill is intended to foster the growth of Indian re-insurance companies and also to save foreign exchange. The Bill sought to provide that every insurance company operating in India must re-insure a certain percentage of its business with Indian re-insurance companies approved in this behalf by the Central Government. The Central Government was given power to fix the percentage and this power to be exercised in consultation with the Advisory Committee so constituted. The power was also conferred on the Central Government to allocate the percentage so fixed amongst the approved Indian re-insurance companies. With the aforesaid object, the Bill proposed to insert Part IVA under the head "Re-insurance" containing two provisions, viz., Sections 101A and 101B.

17. The Bill had been passed by the Parliament and the Insurance Act stood amended with effect from 01.04.1961. For better appreciation, the same is quoted hereinbelow:-

"Re-insurance with Indian re-insurers.

Section 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 [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 re-insured 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 sub-section, the year 1961 shall be deemed to mean the period from 1st April to the 31st December of that year.

(4) A notification under sub-section (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 sub-section (1) shall be construed as preventing an insurer from re-insuring 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 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.]"

18. The interpretation given by the Tribunal is with regard to the meaning of the term "other insurer" occurring in sub-Section (7) of Section 101A of the Insurance Act. Sub-Section (7) of Section 101A starts with the words "For the removal of doubts", which would denote that it is clarificatory with regard to what has been stated in sub-Section (1) of Section 101A. It was clarified and declared that nothing in sub-Section (1) of Section 101A shall be construed as preventing an insurer from re-insuring with any Indian re-insurer or other insurer, the entire sum on any policy or any portion thereof in excess of the percentage specified under sub-Section 2 of Section 101A. The Tribunal while explaining the meaning of the words "other insurer", held that the definition of "insurer" under sub-Section (9) of Section 2 of the Act alone should be relied upon and that is the only definition of "insurer" and if such a definition is applied, re-insurance with foreign companies is prohibited by law. The Tribunal held that the word "other insurer" provided in Section 101A(7) of the Insurance Act enables the Indian insurer for reinsuring over and above the percentage fixed by the Regulatory Authority and the reinsurance may be either with Indian re-insurer or other insurer. It further held that by taking advantage of the term "other insurer", the assessee claims that they can re-insure with non-resident reinsurance company ignoring the provisions of the Insurance Act. It further proceeded to hold that the term "other insurer" as provided in Section 101A(7) of the Insurance Act is only the insurer, which is defined in Section 2(9) of the Insurance Act and there cannot be any extended meaning, which

can be given to the term "other insurer". Thus, it held an Indian insurer cannot have any reinsurance arrangement with reinsurance company other than the insurer, as defined in Section 2(9) of the Insurance Act. In our considered view, the conclusion of the Tribunal is not sustainable. We support such conclusion with the following reasons.

19. In exercise of the powers under Section 114A of the Insurance Act, and Sections 14 and 26 of the Insurance Regulatory and Development Authority Act, 1999, the Central Government framed the Insurance Regulatory and Development Authority Regulations pertaining to General Insurance - Reinsurance called Insurance Regulatory and Development Authority (General Insurance - Reinsurance) Regulations, 2000. Chapter II of the said Regulations deals with procedure to be followed for re-insurance arrangements and it would be beneficial to refer to the said provision, which reads as follows:-

"Chapter II:-

3. Procedure to be followed for Reinsurance Arrangements:-

(1) The Reinsurance Programme shall continue to be guided by the following objectives to:

- a) maximise retention within the country;
- b) develop adequate capacity;
- c) secure the best possible protection for the reinsurance costs incurred;
- d) simplify the administration of business.

(2) Every insurer shall maintain the maximum possible retention commensurate with its financial strength and volume of business. The Authority may require an insurer to justify its retention policy and may give such directions as considered necessary in order to ensure that the Indian insurer is not merely fronting for a foreign insurer.

(3) Every insurer shall cede such percentage of the sum assured on each policy for different classes of insurance written in India to the Indian reinsurer as may be specified by the Authority in accordance with the provisions of Part IVA of the Insurance Act, 1938.

(4) The reinsurance programme of every insurer shall commence from the beginning of every financial year and every insurer shall submit to the Authority, his reinsurance programmes for the forthcoming year, 45 days before the commencement of the financial year;

(5) Within 30 days of the commencement of the financial year, every insurer shall file with the

Authority a photocopy of every reinsurance treaty slip and excess of loss cover covernote in respect of that year together with the list of reinsurers and their shares in the reinsurance arrangement;

(6) The Authority may call for further information or explanations in respect of the reinsurance programme of an insurer and may issue such direction, as it considers necessary;

(7) Insurers shall place their reinsurance business outside India with only those reinsurers who have over a period of the past five years counting from the year preceding for which the business has to be placed, enjoyed a rating of at least BBB (with Standard & Poor) or equivalent rating of any other international rating agency. Placements with other reinsurers shall require the approval of the Authority. Insurers may also place reinsurances with Lloyd's syndicates taking care to limit placements with individual syndicates to such shares as are commensurate with the capacity of the syndicate.

(8) The Indian Reinsurer shall organise domestic pools for reinsurance surpluses in fire, marine hull and other classes in consultation with all insurers on basis, limits and terms which are fair to all insurers and assist in maintaining the retention of business within India as close to the level achieved for the year 1999-2000 as possible. The arrangements so made shall be submitted to the Authority within three months of these regulations coming into force, for approval.

(9) Surplus over and above the domestic reinsurance arrangements class wise can be placed by the insurer independently with any of the reinsurers complying with sub-regulation (7) subject to a limit of 10% of the total reinsurance premium ceded outside India being placed with any one reinsurer. Where it is necessary in respect of specialised insurance to cede a share exceeding such limit to any particular reinsurer, the insurer may seek the specific approval of the Authority giving reasons for such cession.

(10) Every insurer shall offer an opportunity to other Indian insurers including the Indian Reinsurer to participate in its facultative and treaty surpluses before placement of such cessions outside India.

(11) The Indian Reinsurer shall retrocede at least 50% of the obligatory cessions received by it to the ceding insurers after protecting the

portfolio by suitable excess of loss covers. Such retrocession shall be at original terms plus an over-riding commission to the Indian Reinsurer not exceeding 2.5%. The retrocession to each ceding insurer shall be in proportion to its cessions to the Indian Reinsurer.

(12) Every insurer shall be required to submit to the Authority statistics relating to its reinsurance transactions in such forms as the Authority may specify, together with its annual accounts."

The above Regulations are Statutory Regulations, which bind the stakeholders.

20. A conjoint reading of Regulation 3 and sub-Regulations (1) to (10) will clearly show that the objectives were to maximize the retention of revenue within the country. What we are required to see is whether there is any indication in the Insurance Regulatory and Development Authority (General Insurance - Reinsurance) Regulations, 2000 prohibiting re-insurers with a foreign insurer. A reading of Regulations 3(2), 3(4), 3(7), 3(9) and 3(10) clearly show that there is no bar.

21. The sum and substance of the Regulations is that every insurer shall cede such percentage of sum assured on each policy, for different classes of insurance written in India to the Indian re-insurer as may be specified by the Authority under Section 101A of the Insurance Act. Therefore, every Indian insurer is to cede, such specified/notified percentage of the sum assured and not the whole. The commencement date for the re-insurance programme is also spelt out in the Regulations. The insurer has to disclose payments made outside India and there is also a restriction on with whom, they can enter into a contract of re-insurance, as the Regulations place an embargo stating that such entity should have enjoyed the rating of at least BBB or equivalent rating of any other international rating agency. Thus, the reading of the Regulations will clearly show there is absolutely no prohibition for re-insurance with a foreign re-insurance company.

22. The observations made in the finding rendered by the Tribunal stating that the Regulations are inconsistent with the provisions of the Act are utterly perverse and to be outrightly rejected. In 2008, the Standing Committee on Finance proposed the amendment to the Insurance Laws and the Insurance Laws (Amendment) Bill, 2008 was introduced. The report of the Committee states that the General Insurance Corporation Re is the only national re-insurer operating in India and also has re-insurance business in international market and its share of international business is 44 per cent. The Chairman of the

General Insurance Corporation (GIC), who is one of the respondents in these appeals, has deposed before the Standing Committee on Finance and would state that the legal position as of 2008, there was no bar on doing re-insurance business by any foreign re-insurance company in India. The Chairman, GIC expressed deep concern that when GIC has to transact international business in various countries, they are subjected to lot of crosschecks and regulation and there is no corresponding regulation in India, as a result of which, foreign re-insurance companies can accept re-insurance business without taking any licence and without opening any branch in India. Thus, the suggestion was there is a need for regulation for any foreign country coming into India and doing re-insurance business. Ultimately, the Standing Committee on Finance noted that there is no bar on foreign re-insurance business companies carrying on re-insurance business in the country without any licence or opening a branch, nor there was a regulation to control the transaction of foreign re-insurers. This ultimately, led to the amendment to the Insurance Act by amending the definition of "insurer" in Section 2(9) of the Insurance Act to mean a foreign company engaged in re-insurance business through a branch established in India. The Tribunal was of the view that unless and until a branch is opened by the foreign re-insurance company, the question of conducting re-insurance business in India cannot be done. In our considered view, this conclusion of the Tribunal is not sustainable. The answer lies not in any recent proceedings but, a circular issued by the CBDT as early as on 03.10.1956 bearing Circular No. 38 (XXXIII-7) [F.No.51(5)-IT/54]. The operative portion of the circular reads as follows:-

"Liability to tax or freedom therefrom of the foreign reinsurer will depend on various factors, such as the existence of reciprocity between the Indian insurer and the foreign reinsurer, the magnitude of local retention as compared with the reinsurance premium paid by the Indian insurer to the foreign reinsurer and so on. The Income-tax Officers will, therefore, have to examine each case in the light of its facts and decide where tax liability is attracted, what portion of the income from the reinsurance should be assessed under section 42(2) of the 1922 Act [corresponding to section 92 of the 1961 Act]."

23.A reading of the above circular would clearly reveal that at no point of time, the Income-tax Department took a stand that the re-insurance business with a foreign re-insurance company was a prohibited business. Further, the Tribunal fell in error in rendering such a finding without noticing the Re-insurance Regulations, which has been provided by the Insurance

Regulatory and Development Authority of India. In the said Regulations, the highlights of the statement and objects for introduction of Chapter IVA to the Insurance Act in the amendment, in the year 1961, had been brought into after which, there is an order of Preference for Re-insurance Cessions. In the order of preference, the last among them is what can be offered to Indian insurers and overseas insurers. Thus, the regulations does not wholly prohibit any re-insurance with overseas re-insurance companies subject to the condition that the other priorities contained in Clauses 1, 2 and 3 of the regulations are exhausted. Furthermore, the Reserve Bank of India, Exchange Control Department, Central Office, Mumbai notified the Foreign Exchange Management (Insurance) Regulations, 2000. The major changes in the procedure as per the memorandum of Exchange Control Regulations relating to General Insurance in India (GIM) were summarised and the relevant Regulation, pertaining to re-insurance arrangement, is as follows:-

S.No.	Subject Matter	Changes
1	Reinsurance Arrangement	The reinsurance arrangement of public sector general insurance companies registered with ITDA are to be decided by the respective Boards of the insurance companies and IRDA is to be kept informed. ADs designated by these insurance companies are now permitted to make remittances falling under such approved reinsurance arrangements without reference to the bank.

24.The above will clearly show that re-insurance arrangement with a foreign insurance company is permissible. Thus, it is evidently clear that on and after the introduction of Section 101A to the Insurance Act, there is a mandatory requirement for other insurer to re-insure with the Indian re-insurers and such percentage is put to a maximum of 30% and the language of Section 101A nowhere prohibits the re-insurance with foreign re-insurance companies above the percentage specified by the authority with previous approval by the Central Government. That apart, the Tribunal erred in drawing a presumption regarding prohibition of re-insurance with foreign re-insurance companies. This presumption is erroneous for the simple reason that the statement of objects of the Insurance Act itself clearly stipulates wherever there is a prohibition. By way of illustration, we can refer to Sections 2(c), 2(c)(b), 2(9), 32(a), 40, 41, 42(a) and 52(a). Therefore, no inference could have been drawn, as drawn by the Tribunal and consequently, to be held that there can be no bar or prohibition under the Insurance Act, which prohibits ceding of re-insurance with a

foreign re-insurer outside India.

25. Section 2(16B) defines "re-insurance" to mean the insurance of all or part of one insurer's risk by another insurer who accepts the risk for a mutually acceptable premium. There is no distinction drawn between an Indian re-insurer and a foreign re-insurer. As rightly submitted by Mr. M. Vijayaraghavan, learned counsel for CIG, the words "other insurer" occurring in sub-Section 7 of Section 101A of the Insurance Act cannot be treated as a "pronoun" or a "noun" and should be read as a "verb". This is more so because, there is no separate definition provided for "other insurer" and considering the scheme of Section 101A of the Insurance Act, "other insurer" should mean the insurer, who is outside India and not a person in terms of the definition under Section 2(9) of the Act. In the light of the above discussion, we are of the clear view that the Tribunal erred in coming to a conclusion that it is not the intention of the Parliament to authorize an Indian insurer to have re-insurance outside the country ignoring the provisions of Insurance Act referred above. The Tribunal had no jurisdiction to declare any provisions of the regulations to be inconsistent with the provisions of the Insurance Act. This was wholly outside the purview of the Tribunal. Thus, the Tribunal clearly exceeded its jurisdiction in stating that the assessee has engaged in a transaction, which is prohibited by law and therefore, not entitled for deduction under Section 37 of the Act. This has never been the case of the Revenue either before the Assessing Officer or before the CIT(A) or before the Tribunal, when they filed appeals challenging that portion of the order passed by the CIT(A), which was against the Revenue.

26. The Tribunal while upholding the order of the Assessing Officer did not assign any independent reasons. The discussion in the impugned order relates to the validity of re-insurance business outside India done by an Indian insurer. The Tribunal did not consider the correctness of the order passed by the Assessing Officer or that of the CIT(A). Therefore, the Tribunal could not have held that the Assessing Officer rightly disallowed the re-insurance premium under Section 40(a)(i). This finding is not supported with any reasons. Therefore, the Tribunal misdirected itself, exceeded the scope of remand as ordered by the Division Bench and ventured into a jurisdiction, which is wholly prohibited in the light of the plain language of Section 254(1) of the Act.

27. Thus, for the above reasons, we are of the clear view that the order passed by the Tribunal calls for interference. Accordingly, the appeals, filed by the assessee are allowed and the substantial questions of law framed are answered in favour of the assessee.

28. In the light of the above, the matter stands remanded to the Tribunal to take a decision on the following points:-

(i) Whether the Assessing Officer was right in disallowing the re-insurance premium under Section 40(a)(i) of the Act;

(ii) Whether the CIT(A) was right in rejecting partially the appeal filed by the assessee; and

(iii) Whether the CIT(A) was justified in restricting the claim of the assessee to 15% instead of confirming the order passed by the Assessing Officer.

29. We make it clear that the Tribunal shall decide the above questions alone and nothing more and the decision shall be taken based on the available material and the assessee and the Revenue are not entitled to place any fresh material before the Tribunal so as to enable the Tribunal to take a decision as expeditiously as possible. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

abr
To

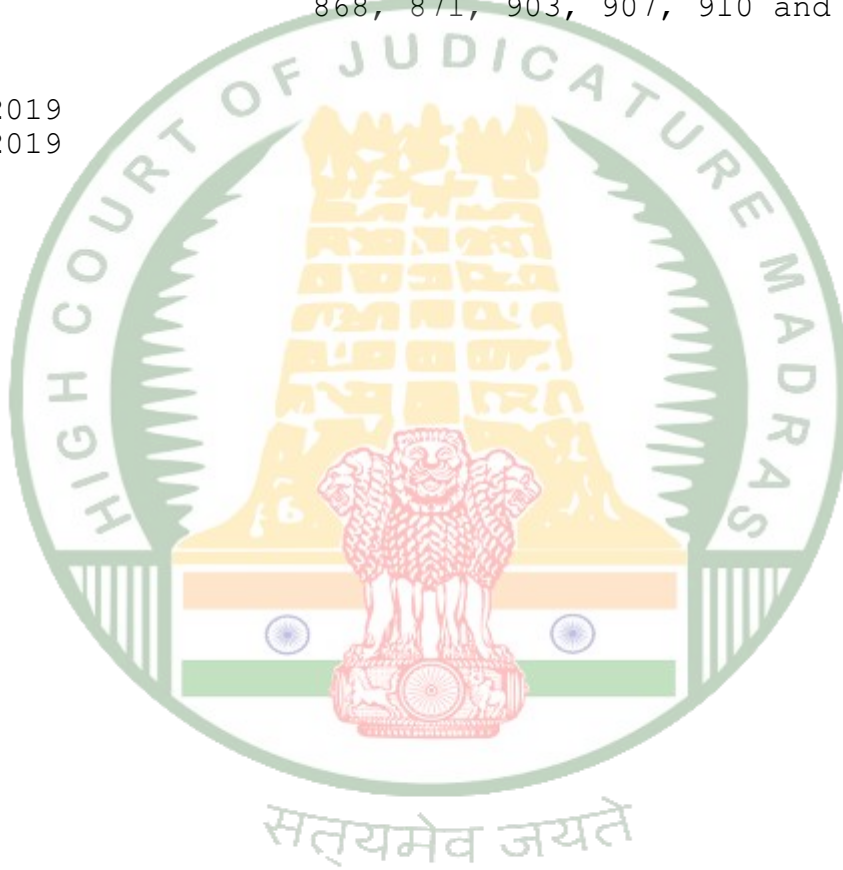
1. The Income-tax Appellate Tribunal,
'A' Bench, Chennai.
2. The Commissioner of Income Tax (Appeals),
Large Tax Payer Unit, Chennai.
3. The Deputy Commissioner of Income Tax,
Large Tax Payer Unit, Chennai.
4. The Assistant Commissioner of Income Tax,
Large Tax Payer Unit, Chennai.
5. The Deputy Commissioner of Income Tax,
Assistant Commissioner of Income Tax,
Income Tax Officer (TDS)
Large Tax Payer Unit, Chennai.
6. The Chairman,
Central Board of Direct Taxes,
9th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi-3.

7. The Assistant Registrar,
Income Tax Appellate Tribunal,
III Floor, Rajaji Bhavan,
Besant Nagar, Chennai-90

+1cc to Mr.Venkataswamy Babu, Advocate, S.R.No.86929
+2ccs to Mr.Sandeep Bagmar, Advocate, S.R.No.86056 & 86055
+8ccs to Mr.M.Swaminathan, Advocate, S.R.No.87064 to 87067

T.C.A.Nos.754, 834, 836, 837, 838, 840,
841, 845, 847, 851, 856 862, 866,
868, 871, 903, 907, 910 and 913 of 2018

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