IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'A' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Pavan Kumar Gadale (Judicial Member)]

ITA No. 3567/Mum/19
Assessment year: 2009-10

Assistant Commissioner of Income Tax
Circle 3(2)(1), Mumbai ……..……Appellant

Vs

Life Insurance Corporation of India Ltd ……Respondent
Central Office, Yogakshema, Jeevan Bima Marg
Nariman Point, Mumbai 400 005 [PAN:AAACL0582H]

Appearances by
Dr Rajeev Harit *for the appellant*
F V Irani *for the respondent*

Date of concluding the hearing: : 30/09/21
Date of pronouncement of order : 4/10/21

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the Assessing Officer has challenged the correctness of the order dated 26th March 2019, passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 for the assessment year 2009-10.

2. Grievance of the appellant is that "**the learned CIT(A) has erred in deleting the disallowance of Rs 854.96 crores under section 14A r.w.r. 8D by holding that the AO cannot go beyond the provisions of Section 44 and Schedule 1 of the Act"**

3. While the amount in dispute is large, as is the assessed income of the assessee at Rs 16,520.19 crores as also the scale of operations of the assessee, the issue in appeal is really small and neatly identified legal issue. The assessment of income of the life insurance business is done in a rather peculiar manner, under section 44 read with First Schedule of the Income Tax Act 1961, wherein taxable income is uninfluenced by the actual expenditure,

notwithstanding anything contained in section 28 to 43B, inasmuch as rule 2 in first schedule provides that "*(t)***he profits and gains of life insurance business shall be taken to be the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 (4 of 1938), in respect of the last inter-valuation period ending before the commencement of the assessment year, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period**". The question then arises whether any disallowance under section 14A in respect of expense attributable to tax-exempt income. The view of the Assessing Officer is that disallowance under section 14A is applicable and based on rule 8D, disallowance has been computed. The stand of the assessee is that since no expenses have been allowed as a deduction for expenses attributable to earning the tax-exempt income, nullification of which is an unambiguous object of disallowance under section 14A, there is no occasion for such a disallowance- a view which has consistently found favour with the coordinate benches. There is no dispute on this legal position. Learned representatives fairly agree, even as learned Departmental Representative rather dutifully relies upon the stand of the Assessing Officer, that this issue is covered, in favour of the assessee, by several decisions of the coordinate benches- including in the cases of **Birla Sunlife Insurance Co Ltd Vs DCIT [2010-TIOL-535-ITAT-MUM;** order dated 9th September 2010 in ITA No. 602/Mum/2009**]** wherein the coordinate bench has held so. Similar are said to be the views of the coordinate benches in the cases of **Oriental Insurance Co. Ltd. vs. ACIT [2009-TIOL-172-ITAT- Del ITA No.5462 & 5463/del/03; order dated 27.2.2009] , Bajaj Allianz General Insurance Company Limited vs. ACIT and *vice versa*** in ITA No.1447/PN/07 and CO. No.52/PN/2007 order dated 31.8.2009 for the Assessment Year 2003-04. **JCIT vs. Reliance General Insurance Co. and *vice versa*** [ITA Nos.3083, 2950,2951, 3084, 3085 & 3126/M/08 order dated 26.2.2010] **Reliance General Insurance Co. vs. DCIT and *vice versa*** [ITA No.781/M/07.1520 & 6262 and 2144 & 6554/M/2008 order dated 30.4.2010]**,** and many other cases. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches, and learned Departmental Representative also does not dispute that position. We must therefore approve the order of the learned CIT(A) for this short reason alone. The conclusions arrived at by the learned CIT(A) do not, therefore, call for any interference.

4. Learned counsel for the assessee, however, is not content even with the dismissal of revenue's appeal.

5. Learned counsel invites our attention to, and urges us to first take a call on, the petition filed by the respondent-assessee under rule 27 of the Income Tax Appellate Tribunal Rules, 1963, wherein the respondent-assessee has raised a grievance against reopening of the assessment, and submits that once we hold that the reassessment proceedings are vitiated in law- as is the undisputed legal position according to him, adjudication on merits will be

rendered infructuous. That's a little unusual an approach and, rather than taking it at face value and proceeding to adjudicate on the petition under rule 27 straightaway, we must first understand the bigger picture.

6. What emerged as true motivation for this approach is indeed interesting, and we must spend a few minutes dealing with the same. The relevant facts, from this perspective, are as follows. The assessee before us is a public sector undertaking engaged mainly in the business of providing life insurance. While its scrutiny assessment under section 143(3) was completed on 30th December, 2011, the finalized assessment was reopened on 19th February 2015, on two counts- first, missing out on disallowance under section 14A in respect of expenses attributable to tax-exempt income; and, second, the inadmissibility of excessive foreign tax credit granted to the assessee. Its reassessment was thus finalized on 29th February, 2016 at an assessed income of Rs 16,520.91 crores- including disallowance under section 14A amounting to Rs 854.96 crores, and withdrawing inadmissible foreign tax credit of Rs 7.57 crores. So far as the first point regarding disallowance of Rs 854.96 crores is concerned, the assessee moved an appeal before the CIT(A) and succeeded in the said appeal. However, so far as withdrawal of excessive foreign tax credit of Rs 7.57 crores is concerned, the assessee accepted that position by not raising any grievance against the same in appeal. The assessee, in a very subtle manner though, fairly accepts the fact that its foreign tax credit claim, to the extent of Rs 7.57 crores, was incorrect- and perhaps rightly so because, to this extent, the foreign tax credit claim, for taxes paid abroad in Mauritius, Fiji and the United Kingdom in respect of its branches in those jurisdictions, was clearly in excess of the related Indian income tax liability itself. The correct legal position is that the foreign tax credit, in respect of taxes paid abroad, can never exceed the Indian tax liability in respect of related income taxed abroad as also in India- as also elaborated upon in the case of **Bank of India Vs ACIT [(2021) 125 taxmann.com 155 (Mum)**] authored by one of us *(i.e. the Vice President).* It's really gracious on the part of the assessee to accept, though in a rather subtle manner though, incorrectness of its claim and let the matter rest at that. However, today when learned counsel pleads for our quashing the reassessment itself, what he really seeks is that the entire reassessment is quashed, and thus even the withdrawal of excess foreign tax credit to the extent of Rs 7.57 crores, against which the assessee consciously did not offer any resistance by not challenging it in appeal on merits, must stand nullified. When we realized this fallout of the petition under rule 27, and we put it to the assessee, learned counsel candidly accepted this position and submitted that if the reassessment itself is quashed, all consequences must follow. He submits that whatever rights a taxpayer has under the law have to be protected and respected; the notions of propriety or fairness cannot come in the way of implementing these rights. The assessee has a right to challenge the reassessment proceedings at this stage under rule 27, and if that be so, we are bound to adjudicate on the same- whether or not it gives some additional benefit to the assessee. Quite clearly thus, whatever stand of the Assessing Officer, i.e. with respect to the inadmissibility of foreign tax credits

aggregating to Rs 7.57 crores, is accepted even by the assessee, and is not challenged in appeal before the CIT(A), is sought to be nullified in this circuitous manner.

7. Irrespective of the intended fruits of this labour, in our humble understanding of the law, the path so adopted will not yield anything more to the assessee than what the assessee would have got anyway by dismissal simpliciter of the revenue's appeal. Let us see the rationale of this proposition. It is interesting to note that rule 27 of the ITAT Rules 1963 provides that **"***(t)***he respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him**". What can thus be supported is the order impugned in appeal, and, in effect, the conclusions arrived at in the impugned order. In other words, even though the respondent may support on any of the grounds decided against the respondent by the CIT(A), he can never seek more than what the CIT(A) has given him. It is for this reason that the respondent can only "support the order". That is materially distinct a situation vis-à-vis a situation in which the respondent is in appeal or is in cross objection, against the order of the CIT(A), before the Tribunal. It is for the reason when an assessee is in appeal or cross-objections before the Tribunal, he can not only support the conclusions arrived at in impugned order but can also assail the conclusions arrived at in the impugned order, and he can not only challenge, what is decided in the impugned order, but he can also raise a new ground of appeal even wholly unconnected with the findings in the impugned order. When we bear in mind this significant and qualitative difference in scope of an appeal and a cross-objection vis-à-vis the scope of a petition under rule 27, it becomes quite clear that the relief sought by way of a petition under rule 27 can never go beyond what the impugned order has given to the respondent. Therefore, even if we are to uphold the plea of the assessee against reopening of the assessment, it has to essentially come with a rider that the relief eventually to be given to the assessee will not exceed the relief available to the assessee in the impugned order passed by the CIT(A). When the grievance against the withdrawal of foreign tax credit to the tune of Rs 7.57 crore was not even challenged in appeal before the CIT(A), the assessee will not be eligible for any relief on that aspect- directly or indirectly. The assessee thus gets no additional advantage by the petition under rule 27.

8. While dealing with this issue, it is useful to take note of certain judicial precedents from the Hon'ble jurisdictional High Court. In the case of **CIT Vs Hazarimal Nagji & Co [(1962) 46 ITR 1168 (Bom)]**, Their Lordships upheld the plea of the assessee that any additional ground could be raised by the Tribunal, even if not agitated before the CIT(A), as long as it supports, and to the extent it does support, the conclusions arrived at by the first appellate authority. However, even then, Their Lordships put in a word of caution by agreeing with the proposition that if the appellant is to be worse off as a result of being in appeal, and without any cross-appeal or cross objection, that cannot be permitted. Their Lordships, on this aspect of the matter, observed as follows:

Mr. Joshi *(learned counsel for the revenue)* **says that if the fresh ground which the respondent wants to raise has the effect of affecting the appellant adversely, such a ground cannot be permitted to be raised by the respondent, and he says that this submission which he is making is supported by some decisions of our court. Now, if what is meant by saying that a ground cannot be permitted to be taken by the respondent which affects the appellant adversely is that a ground cannot be permitted to be taken by the respondent which relates to that part of the decree against the respondent and in favour of the appellant or relates to the modification of the decree passed by the lower court in favour of the respondent; we agree with Mr. Joshi that such a ground cannot be allowed to be taken unless the respondent has filed a cross-appeal or has filed cross-objections in the appeal of the appellant. But, if the fresh ground sought to be urged has no such effect and is only for the purpose of maintaining the decree of the lower court as it is, we do not think that it is a ground which affects the appellant adversely. A ground which would affect the appellant adversely is a ground which in the event of its succeeding puts the appellant in a position worse than that in which he was under the decree of the lower court.**

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In our opinion…….the respondent will not be permitted to raise a ground which will work adversely to the appellant is that the respondent will not be entitled to raise a ground which he can only raise provided he has cross-appealed or cross-objected. We may refer, in this connection, to the following observations which appear in the decision, at page 282 of the report:

> **"Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal or cross-objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour."**

[Emphasis, by underlining, supplied by us]

9. On a similar note, Hon'ble jurisdictional High Court in the case of **CIT Vs Jamnadas Virji Shares and Brokers Pvt Ltd [(2013) 258 ITR 458 (Bom)**], were dealing with a situation in which the Tribunal was dealing with an appeal filed by the Assessing Officer against an order passed by the CIT(A), and no cross-appeal or cross-objection, against the said order, filed by the assessee was pending for adjudication by the Tribunal. The assessee, however, filed a petition under rule 27, and in effect, sought relief going beyond the relief given by the CIT(A). On these facts, the question arose whether, in such a situation and within the limited scope of rule 27, the Tribunal could grant relief beyond the relief granted by the CIT(A). Their Lordships decided this question in negative and in favour of the revenue authorities, and reversing the relief granted by the Tribunal, observed as follows:

10. Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963 provides as follows:-

> **"27. Respondent may support order on grounds decided against him.:-**
>
> **The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."**

11. Under Rule 27 the Respondent is permitted to support the order appealed against, though he may not have appealed against the order, on any of the grounds decided against him. In B.R. Bamasi v. CIT [1972] 83 ITR 223 (Bom.), a Division Bench of this Court noted an earlier judgment in CIT v. Hazarimal Nagji & Co. [1962] 46 ITR 1168 (Bom.) which had held that the Respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the Lower Court in his favour may not have raised those grounds. In this regard the Division Bench had held that the powers of the Appellate Tribunal are similar to those of an Appellate Court under Order XLI Rule 22 of the Code of Civil Procedure, 1908.

12. Now, in the present case, the Commissioner of Income Tax (Appeals) allowed the appeal of the Assessee in part and deleted the disallowance made by the Assessing Officer to the extent of Rs. 13.73 lacs. However, the Commissioner of Income Tax (Appeals) confirmed the disallowance in regard to the balance representing an amount of Rs. 14.96 lacs. The Assessee's appeal against the order of the Commissioner of Income Tax (Appeals), was withdrawn, perhaps because it was barred by limitation. Once the appeal was withdrawn, it was only open to the Assessee to support the order of the Commissioner of Income Tax (Appeals) on any of the grounds decided against him. Hence, while the Assessee would support the order, that would mean that the Assessee would be entitled to urge that the deletion of the disallowance to the extent of Rs. 13.73 lacs by the CIT(A) was correct and proper. The Assessee, however, would not be entitled to avail of the benefit of the provisions of Rule 27 in regard to that part of the order of the CIT(A) which, upon consideration of the evidence, confirmed the disallowance of Rs.14.96 lacs made by the Assessing Officer.

13. For these reasons, we are of the view that the Tribunal erred in setting aside the order of the CIT(A) in its entirety and by restoring the proceedings to the Assessing Officer in regard to the disallowance to the extent of Rs.28.69 lacs. The order of the Tribunal would have to be confirmed only to the extent to which it restores the proceedings to the Assessing Officer as regards the amount of Rs. 13.73 lacs. We, accordingly, answer the question of law in the negative, in favour of the Revenue and against the Assessee.

10. Quite clearly, therefore, in a situation in which the respondent to an appeal has not filed a cross-appeal or a cross-objection, but has simply moved the petition under rule 27, one of the limitations of invoking rule 27 is that the appellant cannot be worse off vis-à-vis the position he was in when he presented the present appeal. In the present case, however, if entire reassessment proceedings are to be quashed- as is sought by way of a petition under rule 27, the Assessing Officer will be in a worse position vis-à-vis the position if he was not to come in appeal, in the sense that even admitted liability in respect of the incorrect foreign tax credits of Rs 7.57 crores will stand nullified. What the respondent-assessee can at best

seek is the position as on at the outcome of the first appellate order, and that is what he gets anyway when the appeal of the Assessing Officer is dismissed. The relief being sought by this petition rule 27 is thus much more than what is permissible in law. Be that as it may, the appeal of the Assessing Officer having been dismissed on merits, and, thus, the net position as at the time of the outcome of the first appeal having been allowed to be sustained, the present petition under rule 27 becomes wholly academic and infructuous, and it does not therefore call for any adjudication on merits. We, therefore, dismiss the petition as infructuous.

11. In the result and with the observations as above, the appeal is dismissed. Pronounced in the open court today on the 4th day of October, 2021.

Sd/-	**Sd/-**
Pavan Kumar Gadale	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 4th day of October, 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar/Sr.PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai