CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No.52191 of 2015

[Arising out of Order-in-Original No. Commissioner/40/2014 dated 29.01.2015 passed by the Commissioner of Central Excise & Service Tax, Saket]

M/s. Max Life Insurance Company Ltd. **...Appellant**
11th Floor, Jacaranda Marg, DLF City,
Phase – II, Gurgaon,
Haryana -122001

VERSUS

Commissioner of Central Excise & Service Tax **...Respondent**
Large Tax Payer Unit, NBCC Plaza,
Pushp Vihar, Saket,
New Delhi-110017.

APPEARANCE:

Mr.Sanjeev Sachdeva, Advocate for the Appellant
Mr.Vivek Pandey, Authorised Representative for the Respondent

Coram: HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 26.06.2019
DATE OF DECISION : 15.11.2019

FINAL ORDER No. 51498/2019

RACHNA GUPTA:

The appellant has assailed the order of Original Adjudicating Authority bearing No.40/2014 dated 29.01.2015. The relevant facts for the adjudication of this appeal are that the appellants are engaged in the business of providing life insurance services and are also registered for Management Consultant Services, Insurance Auxiliary Services, Life Insurance Services, Sponsorship Services and Management of Investment under Unit Linked Insurance Services. Based on an intelligence that the appellants are engaged

in under-valuation of taxable services as well as of Unauthorized Collection of Service Tax from their agents that the matter was investigated. Department observed as follows:-

(1) Service tax amounting to Rs.100,05,78,705/- as was recovered by the appellants from their Insurance Agents as Service Tax for the period 2006-07 upto June, 2012 has not been deposited in the Government Exchequer. As is otherwise required under Section 73A (2) of Finance Act, 1994.

(2) The Service Tax amounting to Rs.12,17,50,892/- in respect of reimbursements paid to the insurance agents of expenses for trainings and overseas trainings during the period of 2007-08 to 2012-13 was also not paid.

(3) The Department also alleged that an amount of Rs.2,27,17,491/- has not been paid by the appellants due to 4% debit adjustment from the insurance commission paid to their insurance/corporate agents during the year 2012-13. Three of these amounts were proposed to be recovered from the appellant vide a Show Cause Notice bearing No. 1874 dated 22.04.2013. Recovery of interest at the appropriate rate and imposition of penalty was also proposed vide the said show cause notice. The said proposal was fully confirmed vide the order under challenge. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Mr. Sanjeev Sachdeva, learned Advocate for the appellant and Mr. Vivek Pandey, learned Departmental Representative for the Department.

3. As there are three different demands, the respective submissions and adjudication is as follows:-

(A) **Demand of amount recovered from the Insurance Agents as Service Tax in terms of sub-section (2) of Section 73A of the Finance Act for the period 2006-07 upto June, 2012**:

It is impressed upon that it is not the case of the Department that appellant was not statutorily obligated to pay the service tax. Rather the emphasis of Department is that once there is tax liability qua insurance company it ought to have paid out of its own pocket. The confirmation based on this opinion is impressed upon as patently illegal and is prayed to be quashed, submitting that appellant was not recovering from their agents anything in addition to what is not warranted by law. It is further submitted that as long as the applicable service tax is paid by the person statutorily required to pay it, the Department cannot object the arrangement between the parties as regards the manner in which the burden is born/shared. It is impressed upon that provisions of section 73A (2) of Finance Act are in *pare materia* with the provisions of Section 11B.. of Central Excise Act, 1944. Learned Counsel has relied upon the decision of Hon'ble Supreme Court in the case of **Mafatlal Industries Ltd. and others vs. Union of India (1997) 5 SCC 536** and also the decision of Larger Bench of this Tribunal in the case of **Unison Metals Ltd. Vs. CCE, Ahmadabad-I – 2006 (4) S.T.R. 491 (Tri. LB)** to impress upon that with respect to the demand it has already been held that the contributions partial or

entire, to the tax liability in an agreement with the provider of service is not forbidden by law. Applying the same principle to the present facts, it becomes clear that there can be no demand from the appellant who had paid the Service Tax, however, has entered into an agreement for it to be recovered from its agents.

5. The ld. Counsel relied upon the following Circular and case law:-

1. **Circular No. IRDA/F&I/CIR/AML/158/09/2010** dated 24.09.2010;
2. Ruling in ***M/s HDFC Standard Life Insurance Company Ltd***. dated 11.02.2014 passed by the Chairman, IRDA.

6. The demand on this aspect is therefore prayed to be set aside.

. Learned Departmental Representative while rebutting these arguments has submitted that taxable service in case of life insurance is defined under Section 65 (105) (zy) and Section 65 (55) of the Act defines insurance auxiliary services. Both these provisions make it clear that service provider for the services is the insurance agent and the recipient thereof is either policy holder or the insurer or reinsurer. As per Rule 2 (1) (d) (A) it is the recipient of Insurance Auxilliary Service who is liable to pay the service tax which otherwise is the principle of economic theory. None of these provisions provide for any contract about sharing the service tax liability. Hence the moment there is a contract of sharing the amount of service tax paid it is Section 73 A (2) which comes into picture. As a result, there is no infirmity in the demand confirmed.

7. After hearing both the parties qua this issue we are of the opinion as follows:-

8. From the arguments of both the parties to this demand, we opine that the issue to be adjudicated herein is :

> "whether assessee can enter into a contract to shift the incidence of his service tax liability."

For the purpose, it is foremost necessary to first have a look on the relevant provision. Section 73 A(1) (2) reads as follows:-

> **"Section 73A. Service tax collected from any person to be deposited with Central Government. —**
>
> (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in (1) excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.
>
> **Service Tax Rules, 1994**
>
> Rule 2. Definitions –
>
> (1) .....
>
> (d) "Person liable for paying service tax" means, -
>
> (i) ..

(ii) ...

(iii) in relation to insurance auxiliary service by an insurance agent, any person carrying on the general insurance business or the life insurance business, as the case may be, in India)

Since ld. Counsel for the appellant has emphasized that Section 11D of Central Excise Act is *pare materia* to Section 73 A, the same has also to be looked into, which reads as under:-

"Every person, who has collected any amount in excess of duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government."

9. In addition, we need to know that Section 66 of the Finance Act is the charging Section, which provides for levy of service tax.

Now, analyzing the scheme of relevant provisions prescribed under Section 73A of Finance Act, 1994, it is clear that

under Sub- section (1) any person who is liable to service tax collects any amount in excess of the service tax assessed and paid, then such excess amount ought to be deposited with the Government.

Sub- section (2) prescribes that any person who collects any amount which is not required to be collected from any other person in any manner, representing service tax, is required to be deposited with the Government.

Sub-section (6) lays down where any service tax amount left after adjustment, such amount either be credited and deposited in Consumer Welfare Fund or be refunded to the person who has borne the incidence of said amount, in accordance with the provisions of Sec.11B of the said Act and such person may make an application under that section within six months from the date of public notice to be served by the central excise officer for refund of the such surplus amount.

10. A careful reading of the said self contained provisions of Sec. 73A, and in particular Sub. Sec.(6), it can be safely inferred that the Government cannot retain the amount in excess of applicable service tax collected and deposited with the Govt., but after adjustment of the tax levied and payable in relation to the service either by the service provider or the service recipient, required to transfer the excess amount to the Consumer Welfare Fund or refund it to the person who borne the incidence of duty. In other words, in the event, initially the service tax has been paid by the service receiver and later it has been collected from the service provider, it cannot be construed that it is the amount in excess of service tax chargeable and has been collected and therefore required to be deposited with the Government. What is the objective and purport of the said provision is that any amount in excess of the tax leviable is collected, the said amount should be deposited with the Govt. and the excess amount would be dealt with by the Govt. either being refunded to the person who bears the burden or being transferred to the consumer welfare Fund. The said inference is supported by the ratio laid down by the Hon'ble Supreme Court in Mafatlal Industries' case(supra) and also is in

conformity with the philosophy of taxation enshrined in the Constitution of India at Art.265 which mandates that no tax shall be collected without authority of law. Their Lordships in Mafatlal Industries' case analysing the scope of Sec. 11D of CEA,1944, observed as under:-

> *"97.It was contended by the learned counsel for the appellants- petitioners that Section 11D provides for double taxation. It was contended that sub-section (1) of Section 11D makes the manufacturer liable to pay duty which he collects from the buyer as part of the price of goods even where the manufacturer has already paid the duty at the time of removal. We do not think that there is any foundation for the said understanding or apprehension. There are no words in the section which provide for payment of duty twice over. All that the section says is this : the amount collected by a person/manufacturer from the buyer of goods as representing duty of excise shall be paid over to the State; even if the tax collected by the manufacturer from his purchaser is more than the duty due according to law, the whole amount collected as duty has to be paid over to the State; if on the assessment being made it is found that the duty collected and paid over by the manufacturer is more than the duty due according to law, such surplus amount shall either be credited to the Fund or be paid over to the person who has borne the incidence of such amount in accordance with the provisions of Section 11B. It is obvious that if in a given case, the manufacturer has collected less amount as representing the duty of excise than what is due according to law, he is not relieved of the obligation to pay the full duty according to law. This is the general purport and meaning of Section 11D. These may be case where goods are removed/cleared without effecting their sale. In such a case, Section 11D is not attracted. It is attracted only when goods are sold. The purport of this section is in accord with Section 11B and cannot be faulted."*

11. Similar issue has been adjudicated by this Tribunal in the case of **HDFC Standard Life Insurance Company vs. Commissioner, Central Excise reported as 2017 (49) S.T.R. 301 (Tribunal-Mumbai**) wherein the facts were similar to the one in the present

case and the Department also had raised demand of service tax recovered from the insurance agents. The Tribunal while setting aside the demand held "contribution partial or entire, to the tax liability in an agreement with the provider of service is not forbidden by law to the extent that the contributor has not ventured to avail credit of such contributions and there is no detriment to the public revenue.

These kind of observations have already been settled by Hon'ble Apex Court and even by Larger Bench of this Tribunal in the case of **Mafatlal Industries** (supra) and Unison Metals (Supra) though with respect of Section 11D of Central Excise Act, 1944. The Section 11 D of Central Excise Act as well as Section 73 A of the Finance Act as quoted above clarifies that the provisions are *pare-materia*. The issue has again been dealt by the Tribunal in the case of **Bajaj Alliance Life Insurance Company vs. Commissioner, Central Excise & Service Tax, Pune in Final Order No. A/86013-86023/2019** wherein it has been held that the service tax initially paid by the assessee (Life Insurance Company) and later collected from insurance agents by adjusting the commission paid cannot be directed to be deposited under section 73A (2) of Finance Act, 1994. This decision was based upon another decision of Hon'ble Supreme Court in the case of Rashtriya Ispat Nigam Ltd. Vs. Divanchand Ramsaran reported as 2012 T.I.O.L 37 S.C., wherein while adjudicating upon to decide whether the principle who was, by law, designated as "assessee" under Section 65 of Finance Act, 1994 could, in enforcing contractual obligations, be allowed to recover the service tax dues paid by it for the services rendered by a contractor and it was held that :

> *As far as '26. the submission of shifting of tax liability is concerned, as observed in paragraph 9 of Laghu Udyog Bharati (supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax. Though the appellant became the assessee due to amendment of2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.'*

12. The contractual obligation to reimburse the tax paid by the person designated to do so by law is, thus, not tax collected in any manner warranting recourse to Section 73A of Finance Act, 1994.

13. Thus, we observe that the impugned issue is no more *res-integra* as already discussed above. Resultantly, we are of the opinion that the demand under Section 73 A (2) confirmed qua the amount recovered from the agent as service tax is held not sustainable and as such is liable to be set aside.

(B) The Service Tax amounting to Rs.12,17,50,892/- in respect of reimbursements paid to the insurance agents

of expenses for trainings and overseas trainings during the period of 2007-08 to 2012-13 was also not paid.

14. Ld. Counsel to the appellant has submitted that the reimbursement of expenses for attending training is not liable to Service Tax under reverse charge because training is provided to the insurance agent as per the statutory mandate of Regulation 5 of IRDA Regulation. As per this Regulation, the onus to provide the training is with the insurer while discharging this onus and also in order to ensure that there is no financial hardship on account of cost incurred to become an agent. The appellant also provided lump-some reimbursement towards conveyance, food etc. to its individual insurance agent for attaining 50 Hrs. of mandatory pre-license training. It is impressed upon that Commissioner has failed to appreciate the fact about appellant to have engaged around 1.5 Lakh individual insurance agents and reimbursing on actual is not at all feasible. The confirmation of demand on this aspect is, accordingly, prayed to be set aside.

15. Ld. D.R. has justified the Commissioner's order submitting that he has distinguished the present case from the others. Appeal is accordingly, prayed to be dismissed.

16. After hearing the rival contentions on this demand, it is held that a combined reading of Section 67 of Finance Act and Clause (ix) of Rule 6(1) of the Valuation Rules makes it evident that only such value or commission or fee would form part of the gross amount, subject to Service Tax, which is in relation to the insurance auxiliary service provided by the insurance agent. The aforesaid submission is borne out by the decision of Hon'ble High Court of

Delhi in the case of ***Intercontinental Consultants & Technocrats Pvt. Ltd. v. Union of India*** [2013 (29) S.T.R. 9 (Del.)]***(page 31 of the Appeal memo)*** – affirmed in ***Union of India*** v. ***Intercontinental Consultants & Technocrats Pvt. Ltd. v. Union of India***[2018 (10) G.S.T.L. 401 (S.C.)] by the Supreme Court.

17. Further, reliance is placed on ***Bajaj Allianz Life Insurance Co. Ltd. v. Commissioner of C.E. & S.T., Pune-III, Final Order No. A/86013-86023/2019*** wherein Hon'ble CESTAT held that expenses incurred in pre-recruitment training and post license training of insurance agents by the Appellants cannot form part of the gross taxable value of commission paid to the Insurance Agents in determining the service tax liability.

18. In the light of these case laws, it becomes clear that even the overseas expenditure in the nature of training and cost /expenses incurred by the appellant in relation to the same cannot be said to be for solicitation or procurement of insurance business, but exclusively for the mandatory training. Hence the such cost and expenses incurred by the appellant cannot be said to be treated as a consideration for service. The proposed demand for Rs.12,17,50,892/- for the period from October 2007 to March, 2013 is therefore, not sustainable. Accordingly, is set aside.

(C) No Service Tax is payable on 4% debit adjustment made by the appellant:

19. Ld. Counsel for the appellant submitted that service tax is consumption base tax and is imposed upon gross value of consideration for services. In the present case insurance agents never owed any amount to the appellants which were set of against the commission paid to the insurance agents. The 4% debit adjustment from the commission to be paid to such agent is akin to the discount as per the agreed terms with such agents, as such, cannot be made taxable. It is impressed upon that Rule 3 of Valuation Rules is not applicable in the instant case. Ld. Counsel has relied upon ***Mccann Erickson (India) Pvt. Ltd. v. Commr of Service Tax*****.** [**2008 (10) S.T.R. 365 (Tri. - Del.)]** & ***Bharti Infotel Ltd. v. CCE, Bhopal*****, [2006 (1) S.T.R. 107 (Tri.- Del.)]**

20. Ld. D.R. while rebutting these arguments has submitted that debit adjustment of commission paid subsequently as discount that too selectively cannot be allowed. Hence, there is no infirmity in the order of Commissioner (Appeals) while confirming the same as the part of taxable value and confirming the impugned demand.

21. After hearing the parties qua this issue it is held that the gross amount charged is defined under Section 67 of Finance Act, 1994. As per Clause (c) of Explanation to Section 67 all debit adjustments and book adjustments etc. are within its ambit for the purpose of payment of service tax. We observe that Department could not produce any evidence to show that there was any amount which the insurance agents were suppose to pay back to the appellant and it is said amount which has been set out by the appellant against the commission paid to the insurance agent. In absence of any such evidence, the 4% debit adjustments from the

commission as was paid to the insurance agent is nothing different than the discount as apparent from the agreed terms with such agents. The emphasis of adjudicating authority below upon rule 3 of Valuation Rules while confirming this demand is also opined erroneous, because Rule 3 (a) of Service Tax Rules is applicable only in the cases where the taxable value is not ascertainable. However, in the present case, the value is ascertainable. The order is, therefore, held to be bad while confirming demand under this head as well. The demand is hereby set aside.

22. Finally coming to the argument about the entitlement of the Department to invoke the extended period of limitation, it is observed and held that apparently and admittedly the appellant was regularly filing its service tax returns. Not only this, the audit of the appellant was conducted by the Office of Commissioner of Service Tax, LTU in 2008 and subsequently, in August, 2012. During the said audit, the Department was made aware of the practice adopted by the appellant as far as sharing of burden to the insurance agents and debit adjustments in the commission paid to the insurance agents are concerned. The original adjudicating authority has even mentioned in the impugned order about their knowledge that the corporate agents are paid in the form of marketing expenses, advertising expenses, non-compete fee etc. and individual insurance agent in the form of context amount, gifts etc. facilitating them to attend seminars and attire allowance. In the light of this fact, it cannot be held that appellant indulged in suppression of facts or had made any willful misstatement as is alleged by the Department. It rather stands clarified that the issue, as has been alleged as the violation on the part of the appellant,

was in the knowledge of the Department since the year 2008. The show cause notice in the present case has been issued on 22.04.2013, which is much beyond the permissible period of one year for the purpose as already discussed above, there is no suppression of facts. Department cannot invoke the extended period of limitation. The show cause notice is otherwise held to be barred by time.

23. Commissioner (Appeal) has committed an error while confirming three of the demands. Three of these issues have already been settled issues. There are umpteen numbers of decisions on these issues. Commissioner (Appeals) was required to follow the same. Hence he is advised to not to throw to the winds the principles of judicial discipline by not following the binding order passed by the higher forum. As a result, the order in hand is set aside. The appeal stands allowed.

[Order pronounced in the open Court on 15.11.2019]

(**BIJAY KUMAR)**
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita