CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.1

Appeal No.ST/88681/2014

[Arising out of Order-in-Original No.PUN-EXCUS-003-COM-010-14-15, dt.30.05.2014 , passed by the CCE & ST Pune-III]

M/s Bajaj Allianz Life Insurance Co. Ltd **……Appellant**
G.E. Plaza, Ground Floor, Air Port Road, Yerwada,
Pune 411006

VERSUS

Commissioner of C.E. & S.T., Pune-III **……Respondent**
41-A, ICE House, Sasoon Road,
Pune 411 001

WITH

SN	Appeal No.	Appellant	Respondent
1	ST/85443/2016	Bajaj Allianz Life Insurance Co. Ltd	C.S.T., Pune-I
2	ST/85829/2016	C.S.T., Pune-I	Bajaj Allianz Life Insurance Co. Ltd
3	ST/86236/2016	Bajaj Allianz Life Insurance Co Ltd	C.S.T., Pune-I
4	ST/90151/2014	Tata AIA Life Insurance Co. Ltd	C.S.T., Mumbai-II
5	ST/87483/2015	Tata AIA Life Insurance Co. Ltd	C.S.T., Mumbai-VII
6	ST/86290/2015	Kotak Mahindra Old Mutual Life Insurance Ltd	C.S.T., Mumbai-VI
7	ST/86321/2016	Kotak Mahindra Old Mutual Life Insurance Ltd	C.S.T., Mumbai-VI
8	ST/86433/2016	India First Life Insurance Co. Ltd	C.S.T., Mumbai-VI
9	ST/86795/2016	Bharati-AXA Life Insurance Co Ltd	C.S.T., Mumbai-VI
10	ST/86796/2016	Bharati-AXA Life Insurance Co Ltd	C.S.T., Mumbai-VI

[Arising out of:-

(i) OIO No.PUN-EXCUS-003-COM-010-14-15, dt.30.05.2014, passed by CST, Pune-III

(ii) OIO No.PUN-SVTAX-000-COM-30-31-32-15-16, dt.27.11.2015, passed by P.CST, Pune and Corrigendum dt.18.1.16

(iii) OIO No.PUN-SVTAX-000-COM-068-15-16, dt.01.03.2016,passed by CST, Pune,

(iv) OIO No.84/ST-II/RS/2014, dt.17.09.2014, passed by CST-II, Mumbai,

(v) OIO No.17/ST-VII/RS/COMMR/2015-16, dt.27.08.2015, passed by CST-VII, Mumbai,

(vi) OIO No.18/ST-VI/RS/2014, dt.19.03.2015, passed by CST-VI, Mumbai,

(vii) OIO No.11/ST-VI/RK/2015, dt.29.01.2016, passed by CST, Mumbai-VI,

(viii) OIO No.14-15/ST-VI/RK/2015, dt.29.02.2016, passed by CST-VI, Mumbai,

(ix) OIO No.17-18/ST-VI/RK/2015, dt.30.03.2016, passed by CST-VI, Mumbai

Appearance:
S/Shri Rohan Shah, S.S. Gupta, Chirag Shetty, Vinay Jain, Harsh Shah, NiraliJigyaji - Advocates for the Assessees
S/Shri K.M. Mondal, Special Counsel, M.K. Sarangi, Jt.Cmr., and M. Suresh, DC- Authorised Representatives for Revenue

CORAM:
HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 04.12.2018
Date of Decision: 31.05.2019

FINAL ORDER NO.A/86013-86023/2019

PER: D.M. MISRA

These 11 appeals are taken up together for disposal since involve common issues. The details of each of the Appeal, i.e impugned order, service tax demand, interest and penalties imposed are tabulated as under:-

SN	Appeal No.	Impugned Order	Service Tax	Penalty
1	ST/88681/2016	OIO No.PUN-EXCUS-003-COM-010-14-15, dt.30.05.2014, passed by CST, Pune-III.	Rs.156,82,08,538/- u/S 73A with interest u/S 74B.	Rs.10,000/- u/S 77(2)
2	ST/85443/2016	OIO No.PUN-SVTAX-000-COM-30-31-32-15-16, dt.27.11.2015, passed by P.CST, Pune. and Corrigendum dt.18.1.16	Rs.2,04,55,253/- u/S 73(1) with interest u/S 75; Rs.37,64,584/- u/S 73(1) with interest u/S 75; Rs.3,02,421/- u/S 73(1) with interest u/S 75 appropriating interest Rs.12,31,309/- paid against above.	Rs.1,14,27.766/- u/S 78(1); Rs.65,47,25/- under 1st proviso to Section 78(1); Penalty shall stand reduced to Rs.44,93,753/- if duty demand with interest is paid within 30 days.
3	ST/85829/2016	-do-	-do-	-do-

4	ST/86236/2016	OIO No.PUN-SVTAX-000-COM-068-15-16, dt.01.03.2016, passed by CST, Pune	Rs.16,60,31,650/- u/S 73A with interest u/S 73B	Rs.10,000/- u/S 77(2).
5	ST/90151/2014	OIO No.84/ST-II/RS/2014, dt.17.09.2014, passed by CST-II, Mumbai	Rs.14,51,18,675/- u/S 73(2) with interest u/S 75; Rs.47,83,73,026/- u/S 73(2) with interest u/S 73B.	@ Rs.200/- per day u/S 76; Rs.5,000/- u/S 77; Rs.62,34,91,701 u/S 78.
6	ST/87483/2015	OIO No.17/ST-VII/RS/COMMR/2015-16, dt.27.08.2015, passed by CST-VII, Mumbai	Rs.2,32,87,955 u/S 73(2) with interest u/S 75; Rs.6,05,25,583/- u/S 73(2) with interest u/S 75	@ Rs.100 per day u/S 76; Rs.10,000 u/S 77
7	ST/86290/2015	OIO No.18/ST-VI/RS/2014, dt.19.03.2015, passed by CST-VI, Mumbai	Rs.1,86,58,017/- u/S 73(2) with interest u/S 75; Rs.73,33,31,000/- u/S 73(2) with interest u/S 73B.	@ Rs.200/- per day u/S 76; Rs.10,000/- u/S 77; Rs.75,19,89,017 u/S 78.
8	ST/86321/2016	OIO No.11/ST-VI/RK/2015, dt.29.01.2016, passed by CST, Mumbai-VI	Rs.78,39,016/- u/S 73(2) with interest u/S 75; Rs.12,70,26,735/- u/S 73A(2) with interest u/S 75.	Rs.7,83,901/- u/S 76; Rs.10,000/- u/S 77 .
9	ST/86433/2016	OIO No.14-15/ST-VI/RK/2015, dt.29.02.2016, passed by CST-VI, Mumbai.	Rs.1,15,04,450/- and Rs.34,64,525/- u/S 73(2) appropriating Rs.68,55,448/- interest u/S 75; Rs.10,21,85,740/- u/S 73(2); Rs.3,34,64,001/- with interest on Rs.13,56,49,742 u/S 75.	Rs.3,46,453/- u/S 76; Rs.20,000/- u/S 77; Rs.1,15,04,450/- u/S 78.
10	ST/86795/2016	OIO No.17-18/ST-VI/RK/2015, dt.30.03.2016, passed by CST-VI, Mumbai	Rs.3,25,76,872/- u/S 73(1) appropriating Rs.46,00,198/- and interest u/S 75 appropriating interest of Rs.14,48,532 already paid;	Rs.1,72,290/- u/S 76; Rs.20,000/ u/S 77; Rs.3,25,76,872/- u/S 78

			Rs.17,22,897/- u/S 73(2) with interest. Rs.1,54,24,042/- u/S 73(2) with interest u/S 75.	
11	ST/86796/2016	-do-	-do-	-do-

2. Out of the eleven Appeals ten are filed by the assessees and one by the Revenue. The facts almost common in all these appeals, are that the Appellants are providing taxable services viz. Insurance Auxiliary Service, Life Insurance Service, Management of Investment under ULIP Business Support Service etc. during the relevant period. The Appellants have appointed various individuals as well as corporate agents (insurance agents) for the purpose of selling Life insurance products marketed by the Appellants. The Appellants pay commission to these agents for providing the said services. Since the services provided by the insurance agents fall under the category of "Insurance Auxiliary Services", which are liable to service tax under the reverse charge mechanism basis, in terms of Rule 2(1)(d)(iii) of Service Tax Rules, 1994, the Appellants have discharged Service Tax on the commission amount paid to the insurance agents. Subsequently, in the light of the agreement entered into between the Appellants and the insurance agents, the Appellants recovered the amount equivalent to the Service Tax paid on the commission charges from the agents. Alleging that since the Appellant has recovered the Service Tax from the insurance agents, even though the Service Tax was required to be paid by the Appellant, therefore, such collection is without authority of law and accordingly required to be deposited as per Section 73A(2) of

Finance Act, 1994, consequently, demands have been raised against each of the Appellant with interest and proposal for penalty invoking extended period of limitation. It is also alleged that the Appellants had collected and incurred pre-training expenses from the prospective insurance agents and also provided post licence training to the insurance agents, the expenditure incurred on account of the said trainings have been considered as an additional consideration and proposed to be included in computing the gross taxable value i.e. in the commission amount paid to the insurance agent, in determining the service tax liability. On adjudication, the demands were confirmed with interest and penalty. Hence, the present appeal.

3. The learned Advocate Shri Rohan Shah appearing for the Appellant M/s Kotak Mahindra Old Mutual Life Insurance Co. Ltd, has submitted that the total demand of Rs.88,68,64,768/- has been confirmed against the Appellant, which comprises of Rs.86,03,57,735/- on the issue of recovery of Service Tax from the insurance agents, but not deposited with the Government as per Section 73A(2) of Finance Act, 1994 and Rs.2,64,97,033/- is on account of non-inclusion of the value of pre-recruitment training expenditure in the commission paid to the insurance agents.

4. The learned Advocate has submitted that Section 73A of FA,1994 prescribes two situations: (i) Sub-section (1) of Section 73A covers the situation where Service Tax is payable and paid under the Finance Act is @ 12% whereas, the Service Tax was collected @ 18% , then the additional amount of 6% collected as Service Tax by

the person liable to pay the Service Tax, is required to deposit the same with the Government. Thus, the said sub-section (1) would attract only when the Service Tax collected is in excess of the Service Tax required to be paid under the Finance Act. In the present case, the Service Tax paid by the Appellant is exactly equal to the Service Tax collected from the insurance agent, hence the said provision is not applicable to the present case. In any case, it is his contention that the show cause notice has not demanded duty under sub-section (1) of Section 73 of Finance Act, 1994, the basis of charge rests under sub-section (2) of Section 73 of Finance Act, 1994. (ii) The second situation enumerated in Sub. Sec.(2) of Section 73 of Finance Act,1994 is the amount collected representing as service tax which is not required to be collected.

5. Thus, two key issues are involved in the present case for determination viz. (i) the meaning of the term "Not required to be collected" and (ii) under a reverse charge mechanism, is an assessee barred from contracting to pass the burden of tax.

6. The learned Advocate, advancing his arguments further submitted that the term "Not required to be collected" mentioned in sub-section (2) of Finance Act, 1994 has to be read as "not liable to Service Tax under the Finance Act, 1994". In support of his contention, the learned Advocate referred to the judgment of this Tribunal in the case of Prabhu Dayal Kanojiya Vs CCE Jaipur – 2014-TIOL-1279-CESTAT-DEL, Josh P. John &Ors. Vs CST, Bangalore – 2014-TIOL-1753-CESTAT-BANG. Therefore, in the present case, as the Service Tax was leviable under the Finance Act, 1994 on

insurance auxiliary service provided by the insurance agent, sub-section (2) of Section 73A of Finance Act, 1994 cannot be made applicable to the present case.

7. He has further submitted that Section 73A of Finance Act, 1994, is *pari materia* to Section 11D of Central Excise Act, 1944. Section 11D (1) of the Central Excise Act, 1944, corresponds to Section 73A (1) of Finance Act, 1994. Further Section 11D(1A) of the Central Excise Act, which was inserted w.e.f. 10.05.2008 corresponds to both the situations (exempt or Nil rate) covered under Section 73A (1) and (2) of the Finance Act, 1994. Therefore, the judicial interpretation of Section 11D of Central Excise Act, 1944 is squarely applicable to Section 73A of Finance, Act, 1994. Further he has submitted that accordingly the law laid down by Hon'ble Supreme Court in the case of Mafatlal Industries Ltd &Ors. Vs UOI – [(1997)5 SCC 536] in the context of Section 11D is squarely applicable to the present case. In the said case, the Hon'ble Supreme Court, at Para 133 of the judgment, has held that if the Excise duty due has already been paid by the manufacturer and later collected by him when the goods are sold, such collection need not be paid to the Government. It was held that only if the duty has not been paid or if any excess is collected over and above the duty already paid, then only in such circumstances, the excess amount collected would attract Section 11D.

8. Further, the learned Advocate for the Appellant, referring to the judgment of Hon'ble Supreme Court in the case of Rashtriya

Ispat Nigam Limited Vs Dewan Chand Ram Saran – 2012 (26) STR 289 (SC) submitted that there is no bar under the law on contractual shifting of burden of tax arising out of an obligation under the contract, that the it would be borne by the other party. Therefore, they have not contravened the provisions of law by passing on the burden of Service Tax paid by them to the insurance agent. Further, the Service Tax is payable under the reverse charge mechanism, in no manner, affects the aforesaid interpretation. From the Circular dt.21.12.2007 issued by CBEC, it is clear that the liability of payment of service tax has been shifted by Government to the recipient of service as a measure of administrative convenience. Thus, Appellant cannot be asked to bear the burden of tax merely because they are liable to discharge the service tax under reverse charge mechanism. The principle been laid down in Mafatlal Industries and Rashtriya Ispat Nigam Ltd's case (supra), are equally applicable to the payment of Service Tax under reverse charge mechanism. Consequently, passing of burden of service tax by the Appellant to the insurance Agent is appropriate and hence the demand cannot be sustained under Section 73A(2) of Finance Act, 1994. The learned Advocate further submitted that the Tribunal on an identical issue, in the case of HDFC Standard Life Insurance Co. Ltd. Vs. Commr. C.E, Mumbai-II 2017 (49) STR 301(Tri.-Mum.) held that since the amount collected by the assessee from the insurance agent was not in excess of the tax already deposited with the Government, therefore, such amount collected cannot fall under Section 73A of Finance Act, 1994.

9. On the issue of inclusion of pre-recruitment training expenses, in the value of commission paid, the learned Advocate has submitted that the said expenses relates to the phase, when an individual is not qualified or appointed as an insurance agent, accordingly, such individual was not in a position to render taxable service of "insurance auxiliary service". It is also possible that several of those who undertake the training do not qualify as an insurance agent; also, those who qualify may not choose to be an agent or remains an agent of the Appellant. The commission paid by the Appellant to all insurance agents is same irrespective of where they have received pre-recruitment training or entered as a trading agent. The commission required to be paid to the agents as per insurance scheme is approved by the regulatory authority i.e. IRDA. Further he has submitted that Rs.1,000/- collected from each individual towards pre-training under a separate arrangement whereas under the said agreement the Appellant is a service provider and individual is the service recipient. The Appellant, after introduction of negative list from 1.7.2012 paid service tax on the said amount of Rs.1,000/- collected as pre-recruitment training expenses. Further, he has submitted that the demand is inflated as it includes the amount paid by those individual who do not qualify and/or who do not become an agent after pre-recruitment training.

10. The learned Advocate Shri S.S. Gupta for the Appellant M/s Tata AIA Life Insurance Co., subscribing to the arguments advanced by the learned Advocate Shri Rohan Shah, has further submitted that the issue is more or less covered by the judgment of the

Tribunal in the case of HDFC Standard Life Insurance Co. Ltd – 2017 (49) STR 301 (T) and the argument advanced by the Department that the said judgment of the Tribunal is sub-silentio is incorrect. In the said case, the Tribunal has observed that the provision of Section 73A(2) is applicable only to a person who is not an assessee. Further, referring to Section 68 of Finance Act, 1994, the learned Advocate has submitted that there is no bar under the said Section 73A to pass on the burden of tax to others.

11. On the issue of inclusion of pre-recruitment training expenses and post licence training expenses in the value of commission paid by the Appellant to the insurance agents, the learned Advocate has submitted that the insurance agent has been defined under Section 2(10) of Insurance Act, 1938. It is evident that the insurance agent is a person who is licenced under Section 42 of IRDA for the purpose of soliciting business for the appellants. The pre-recruitment training expenses incurred by the Appellant are for recruitment of agents and not in soliciting of business. Every agent is required to undergo training as per Rule 5 of IRDA and cost of prospective agent is borne by the Appellant. Before training, the person is not qualified as an agent, therefore, the expenditure incurred by the Appellant cannot be included in the value of taxable services provided by the agent. In support, he has referred to the judgment of Hon'ble Supreme Court in the case of Bhayana Builders – 2018-TIOL-66-SC-ST. In the said judgement, the Hon'ble Supreme Court has observed that there should be nexus between the service and the amount received. In the present case, the insurance agent provides service

of soliciting clients for insurance policies. Hence, the amount having nexus to the said service can only be considered as part of the value of the service. Further, he has submitted that in view of the ratio laid down at Para 16 the transaction value cannot be ignored and any amount cannot be included in the same. He has further submitted that the expenses incurred during the course of providing services are in the nature of hiring conference hall, printing of training materials, arranging for lodging and boarding of the agents, hiring of instructor, arranging food at the training venue, travelling expenses of the agents from various locations to central location where training is conducted etc are incurred for the benefit of the agents. These expenses are directly borne by the Appellant and never reimbursed to the agent. Hence, provision of Rule 5 (1) of Service Tax (Determination of Value) Rules cannot be applicable. It is his contention that the value of service required to be determined as per Sec.67 of Finance Act, 1994. Further, he has submitted that the Appellant have already paid service tax under reverse charge mechanism and availed credit of the same. Therefore, the excess amount if included in the value of commission, the same would be available to the Appellant as credit which is a revenue neutral situation. Consequently, invoking of extended period of limitation in confirming the demand is untenable.

12. The learned Advocate Shri Vinay Jain appearing for Appellant viz. M/s Bajaj Allianz Life Insurance Company Ltd, submitted that the Appellants are not liable to discharge the service tax on pre-recruitment training expenses as the expenses when incurred by

the Appellant, the individuals are not even licenced to act in the capacity of insurance agent by IRDA. Referring to the definition of insurance agent, under Insurance Act,1938 the learned Advocate has submitted that the insurance agent is a person who is licenced by IRDA to act as an agent for soliciting and procuring insurance business. Since the individuals were not licenced to act as an insurance agent, at the time of training for recruitment, therefore, inclusion of such pre-training expenses in the taxable value of insurance auxiliary service does not arise. On the issue of inclusion of post-licence training expenses, he has submitted that these expenses are incurred by the Appellant in providing training facilities to the Insurance Agents are in fact used by the Appellant itself in furtherance of their insurance business. The agreement with training institutes for training the agents is between the Appellant and the institute only. Insurance agents are beneficiary of such training hence the expenditure incurred for training of insurance agent forms part of normal business expenditure by the Appellant and cannot be included in the consideration received by the insurance agent. It is his contention that the term "consideration" means what is received by the service provider for the taxable service provided by him. Recipient of a service may provide various facilities available for the service provider which can be useful in provision of taxable service, however, such facility provided free does not necessarily form part of the consideration. He has vehemently argued that the Appellants are paying commission to the insurance agent, according to the IRDA norms and not just adjusting the said commission against the expenditure incurred by them for

imparting the training to the insurance agents. Thus, the expenditure incurred by the Appellant are for his own business expenditure. In support, he has referred to the Australian GSTR 2001/6 on Non-Monetary consideration, which says mere utilisation of these services cannot form a part of services by the agent to the Appellant. Since the expenditures are incurred to improve the ability of insurance agents to sell the Appellant's product in the market and the Appellants are themselves beneficiary of the said expenditure, hence such expenditure cannot be included in the value of service received.

13. He has further submitted that it is well settled principle that just because the third party derives benefit out of a particular service it does not mean that the original party who contracted to receive the service will be denied this benefit. In support, he has referred to the decision of the House of Lords in the English case of Customs & Excise Commissioners Vs Redrow Group Plc. (1999 ALL ER 1). A similar view has been expressed by Hon'ble Supreme Court in the case of CIT Vs Chandulal Keshavlal & Co. (1960) 38 ITR 601 (SC).

14. The learned Advocate further contended that Rule 5 and Rule 6 of the Valuation Rules are not applicable to the present case. It is his contention that Section 67 of Finance Act, 1994 prescribes for gross amount charged by the service provider for providing taxable service which shall be the value on which the service tax is required to be paid. In the present case, the Appellants are already

discharging service tax on the gross amount charged by the insurance agent under reverse charge mechanism, hence the expenditures for training cannot be included. Further, Rule 5(1) of the Service Tax Valuation Rules,2006 provides that all expenses incurred by the service provider during the course of provision of taxable service shall be included in the value of taxable service. But, in the present case, the Appellants are not service recipient and not service provider. It is also not the case of the department that the insurance agents have incurred expenditure and then claimed reimbursement. The expenditure is purely incurred in the course of business operation of the Appellant.

15. Referring to Rule 6 of the Service Tax Valuation Rules,2006 he has submitted that it comprises of any commission, fee or any other sum received by the insurance agents which shall form a part of value of taxable service. The value of taxable service rendered by the insurance agent already comprises of commission incentive on which the Appellant discharged service tax on reverse charge basis. Therefore, this rule is also not applicable.

16. Further, referring to the judgment of Hon'ble Delhi High Court in the case of Intercontinental Consultants & Technocrats Pvt. Ltd., it is submitted that Rule 5(1) which purports to include expenditure incurred and the cost in the course of providing service has been declared to be ultra vires. The said judgment of Hon'ble Delhi High Court has been upheld by Hon'ble Supreme Court reported in the case of UoI Vs Intercontinental Consultants & Technocrats Pvt. Ltd –

2018-TIOL-76-SC-ST. The Hon'ble Supreme Court has held that only w.e.f. 14.05.2015, the expenditure or cost incurred by the service provider in the course of providing taxable service would also form a part of valuation of taxable service. The learned Advocate further submitted that "any further sum" appearing in Clause (v) of Rule 6 of Service Tax (Determination of Value) Rules, 2006 should be construed to include any amount in the nature of commission, fee applying principle of *ejusdem generis*, hence, the expenses incurred by the Appellant during the training in the normal course of business not covered by the expression "commission" or "fee". In support, he has relied upon the judgment of Hon'ble Supreme Court in the case of Devi Dass Gopal Krishnan & Others Vs State of Punjab – (1967) 20 STC 430.

17. Further, he has submitted that 'any other sum' should refer to only monitory consideration and cannot extend to any other benefit. In support, he has referred to the decision of Hon'ble Supreme Court in the case of H.H. Sri Rama Verma Vs CIT – (1991) 187 ITR 308 (SC).

18. Rebutting the appeal filed by Revenue that the corrigendum issued by the Commissioner subsequent to the issue of OIO is not within his jurisdiction, the learned Advocate referred to Section 74 of Finance Act, 1994 and submitted that the issue of corrigendum is well within the jurisdiction of the Commissioner. In support, he has referred to the judgment of Hon'ble Supreme Court in the case of

Assistant Commissioner of Income Tax Rajkot Vs Saurashtra Kutch Stock Exchange Ltd – 2010 (18) STR (SC).

19. The learned Advocates appearing for other Appellants more or less subscribed to the aforesaid submissions advanced by the learned Advocates Shri Rohan Shah and Shri S.S. Gupta.

20. Per contra, the Special Counsel Shri K.M. Mondal for the Revenue, has submitted that Section 73A was inserted in Chapter 5 of Finance Act, 1994 w.e.f. 18.04.2006. Prior to such insertion, Section 11D of Central Excise Act, 1944 was not made applicable to Finance Act, 1994 and referring to the provision of sub-section (2) of Section 73A of Finance Act, 1994, the Special Counsel has submitted that sub-section (1) of Finance Act, 1994 is analogous to sub-section (1) of Section 11D of Central Excise Act, 1944. However, sub-section (2) of Section 73A of Finance Act, 1994 mentions no such provision in Section 11D of Central Excise Act, 1944. It is his contention that on careful reading of sub-section (1) and sub-section (2) of Section 73A of Finance Act, 1994, it is clear that the provisions are mutually exclusive and their scope and ambit are also totally different. It is his contention that the expression "any person" used in both sub-sections has the same meaning and same sense throughout. In support, he has referred to the judgment of HDFC Standard Life Insurance Co. Ltd, S.K. Modi Vs UOI – 2002 (144) ELT 59 (Del.) and the judgment of Hon'ble Supreme Court in the case of Central Bank of India Vs Ravindra & Ors – JT 2001 (9) SC 101. Further, he has submitted that the expression 'any person who is liable to pay

tax' used in sub-section (1) also applicable to sub-section (2) of Sec. 73A. As the Appellant is registered with Service Tax department and liable to pay service tax for the transaction under reverse charge mechanism basis, only provisions which can be invoked in the present case is Sec.73A(1) of Finance Act, 1994. Referring to Section 3 (42) of General Clauses of Act, 1984, the learned Special Counsel has submitted that it can safely be inferred that "any person" will include insurance company and 'any other person' will include insurance agent regardless of whether they are registered or not with the Service Tax Department. Thus, both registered and unregistered persons be covered under sub-section (2) of Section 73A of Finance Act, 1994. It is settled law that statute has to be interpreted to give it true meaning and not to make it purposeless or nugatory.

21. He has submitted that the provision of sub-section (1) or sub-section (2) being mutually exclusive, they cannot be mixed with each other. Sub-section (2) mandates that where any person has collected any amount as service tax from any other person, which is not required to be collected, such person shall immediately pay the said amount to the credit of Central Government. Thus, the insurance company which has collected service tax from the insurance agents, must deposit the same with the Central Government. Otherwise, sub-section (2) of Section 73A of Finance Act, 1994 will be rendered purposeless and nugatory. It is his argument that the present proceedings are concerned only with

provision of sub-section (2) and not with provisions of sub-section (1) of Section 73A of Finance Act, 1994.

22. Referring to the judgment of this Tribunal in HDFC Standard Life Insurance Co. Ltd's case, the learned Counsel submitted that the Tribunal in the said case, has not recorded any specific finding regarding the scope and ambit on sub-section (2) of Section 73A of Finance Act, 1994. The judgment totally based on the interpretation of sub-section (1) of Section 73A. The decision is therefore sub-silentio in respect of the issue involved. In support, he has referred to the judgment of this Tribunal in the case of Oil & Natural Gas Corporation Ltd Vs CC Raigad - 2010 (262) ELT 1078 (T).

23. Further, he has submitted that excess collection of service tax over and above the service tax due which is covered by Section 73A(1) of Finance Act, 1994. This is case of collection of service tax by the Appellant i.e. insurance company from the insurance agent who are not liable to pay service tax covered under Section 73A (2). In support, he has referred to the judgment of Hon'ble Delhi High Court in the case of Makemytrip (India) Pvt. Ltd Vs UoI - 2016 (44) STR 481 (Del.), Prabhu Dayal Kanojia Vs CCE Jaipur 2014-TIOL-1279-CESTAT-DEL (supra).

24. Admittedly, since each of the Appellants has collected Service Tax from the insurance agent, which was not required to be collected said agents, therefore, it is clear violation of mandate of Section 73A (2) of Finance Act, 1994. Also, in each of these cases,

the Appellant is an assessee and is also a person liable for payment of service tax under reverse charge mechanism in terms of provision of Rule 2(1)(d)(iii) of Service Tax Rules, 1994 read with Section 68(2) of Finance Act, 1994.

25. It is his contention that the judgment of Hon'ble Apex Court in the case of Mafatlal Industries Ltd (supra) and Larger Bench decision in the case of Unison Metal Ltd Vs. CCE 2006 (4) STR 491(Tri-LB), which dealt with the provisions of Section 11D of Central Excise Act, 1944 have no application with the present proceedings inasmuch as Section 11D does not have the provision identical to Section 73A (2) of Finance Act, 1994. He has further contended that the decision of the Tribunal in Sangam India Ltd. Vs.CCE, Jaipur 2012 (28) STR 627 (T), besides being factually different, follows the Larger Bench decision. Therefore, the said judgement also not applicable to the facts of the present case. Referring to the judgment of Hon'ble Supreme Court in CCE Vs Alnoori Tobacco Products 2004 (170) ELT 135 (SC), the learned Special Counsel has submitted that a judgment cannot be blindly followed and made applicable to a case without proper analysis of the facts.

26. Further, he has submitted that even though there is no doubt that service tax is an indirect tax and the burden can be shifted to ultimate consumer recipient of service, however, the present case is not the case of shifting a burden of tax but it is collection of tax from a person who is not required to pay tax. An assessee cannot ignore mandate of Section 73A(2) of Finance Act, 1994 on the plea that it is

permissible under an agreement between the parties to collect the tax. Referring to the judgment in the case of Delhi Transport Corporation Vs. Commissioner of Service Tax 2015 (38) STR 289 (SC), the learned Special Counsel has submitted that in the said case the honourable court has held that in terms of statutory provision it is the appellant. Discharge the liability was revenue on account of service tax. Further, distinguishing the judgment in Rashtriya Ispat Nigam Ltd's case, the learned Special Counsel has submitted that the judgment is not an authority on the subject to say that the agreement between the parties would take precedent over the statutory provisions.

27. On the issue of inclusion of training expenses in the value of taxable service, the learned Special Counsel has submitted that in view of Board's Circular dt.10.04.2006 wherein it is clarified that the value for the purpose of charging service tax is the gross amount received as a consideration for provision of service. All the expenses or cost incurred by the service provider in providing the taxable service form an integral part of the taxable value and hence are includible in the value.

28. On the issue of time bar, the learned Special Counsel has submitted that no time limit has been prescribed under Section 73A of Finance Act, 1994 for recovery of amount either under Section 73A(1) or 73A(2). Therefore, the time limit prescribed under Section 73 cannot pressed into service. Provisions of section 73 and

those of Section 73A are quite distinct and different. In support, the learned Special Counsel refers to the judgment of this Tribunal in Checkmate Industries Services Vs. CCE, Pune 2016 (44) STR 290 (T). Further, he has submitted that Section 73A is self-contained provision, therefore, the time limit prescribed under Section 73 is not applicable to the Section 73A. In support, he has referred to the decision of this Tribunal in the case of Indian Farmers Fertilizers Co-op. Ltd. Vs. CCE,1989 (41) ELT 474(T) where under it is held that for recovery of central excise duty under rule 196 of the erstwhile Central Excise Rules, 1944, the limitation prescribed under section 11A cannot be made applicable. Rebutting the plea of revenue neutrality, the learned Special Counsel has submitted that it cannot be the ground for non-payment of service tax on the training expenses incurred by the appellant on the agents forming part of the value of taxable services. ce. In support, he has referred to the judgment in the case of Nitin Spinners Ltd. Vs. CCE, Jaipur-II 2017 (355) ELT 562(T).

29. The learned A.R. for the Revenue Shri M.K. Sarangi, reiterating the arguments advanced by the learned Special Counsel Shri K.M. Mondal on the issue of applicability of Section 73A of Finance Act, 1994 on the issue of valuation submitted that the Appellant had heavily relied upon the judgment of Hon'ble Supreme Court in the case of Intercontinental Consultant & Technocrats Pvt. Ltd. In the said judgment, Hon'ble Supreme Court was concerned with the fact that any amount not providing "such" taxable service cannot form part of taxable value. The said judgment cannot be

made applicable as in the present case it is not relevant to consider inclusion of value of reimbursement, but rather it is a case that what are the input services for providing taxable output service i.e. insurance auxiliary service by the agent. In the present case, if any input service is required for providing output service by the agent, the same is includible in the value. The insurer is liable to pay on reverse charge basis. Expenses which are in the nature of input service, cannot be included from the gross taxable value for the purpose of service tax. In support, he has referred to the judgment in the case of Jecobs Engineering India Pvt. Ltd Vs CST Ahmedabad – 20178 –TIOL-2914-CESTAT-AHM, Sri Bhagavathy Traders Vs CCE Cochin – 2011 (24) STR 290 (Tri-LB), BEE Am Industries Pvt. Ltd Vs CST – 2017-4-GSTL-185-Tri-Del. Further, referring to the Board's Circular No.B-1/4/2006-TRU, dt.19.04.2006, on the issue of reimbursable expenditure, it is clarified that all the expenses or cost incurred by the service provider in the course of providing taxable service forms an integral part of the taxable value and are includible in the value. It is not relevant that various expenses or costs are separately indicated in the invoice or bills issued by the service provider to his client.

30. Heard both sides at length and perused the records.

31. The common issues involved in these appeals for determination are:-

(i) Whether service tax paid by the Appellant in accordance with Rule 2(1)(d)(iii) of Service Tax Rules, 1994 as recipient of

'Insurance Auxiliary service' and then recovered from the service providers i.e. 'insurance agents' is required to be deposited as per Section 73A(2) of Finance Act, 1994;

(ii) The expenses incurred in pre-recruitment training a*nd post* licence training of the Insurance Agents be includible in the value of commission paid to the agents.

32. The contention of the Appellants on the first issue is that since the Appellants are registered with the Service Tax Department and assessed to service tax for receiving the insurance services in accordance with Rule 2(1)(d)(iii) of Service Tax Rules, 1994, therefore, when the tax amount initially paid and later collected from the insurance agents, at best would fall under sub-section (1) and not under sub-section (2) of Section 73A of Finance Act, 1994 as held in the impugned order. It is further argued by the Appellants that the principle of law laid down by the Hon'ble Supreme Court in Mafatlal industries' case and Larger Bench decision in Unison Metal Ltd.'s case in relation to Sec.11D of CEA,1944 is squarely applicable to Sec. 73A of the Finance Act,1994. The Revenue's contention, on the other hand, is that both these provisions i.e. sub sec. (1) & (2) of Sec 73A are mutually exclusive, hence, any person who has collected any amount representing as service tax, which is not authorised to be collected from any other person, whether he is a service Tax assessee or otherwise, then such person shall forthwith deposit the said collected amount with Central Government. It is the contention of the Revenue that since the circumstances prescribed under subsection (2) of section 73A is not contained under Sec.11D

of CEA,1944, hence the principle of law laid down with regard to Sec. 11D is not applicable to the facts of the present case.

33. Before analysing the arguments advanced, it is necessary to have a glimpse on Section 11D of Central Excise Act, 1944, and Section 73A(1) and (2) of Finance Act, 1994 in its form as was in force during the relevant period. The said provisions are reproduced as below:-

> **SECTION 11D. Duties of excise collected from the buyer to be deposited with the Central Government.** —
>
> (1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (2) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.
>
> (3) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.
>
> (4) The amount paid to the credit of the Central Government under [sub-section (1) or sub-section (3), shall be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in sub-section (1).
>
> (5) Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount.

34. The said Section 11D has been amended w.e.f. 10.05.2008 by insertion of sub-section (1A) 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."

35. Section 73A (1) and (2) inserted in Finance Act, 1994 w.e.f. 18.04.2006 reads as under:-

> **"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.
>
> (3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.
>
> (4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.
>
> (5) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).
>
> (6) Where any surplus amount is left after the adjustment under sub-section (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 (1 of 1944) or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice

to be issued by the Central Excise Officer for the refund of such surplus amount."

36. In the present case, the Revenue sought to recover the amount of service tax initially paid by the Appellant, but later passed on the burden under an agreement/arrangement to the insurance agents, while paying their commission for the service received. Neither side raised the issue that the service tax amount paid by the Appellant has been collected in excess from the insurance agents; it is the plea of the Revenue that since the payment of service tax has been cast on the recipient of service by virtue of Rule 2(1)(d)(iii) of Service Tax Rules, 1994, hence, the person liable to discharge service tax should absorb the liability and hence such person is precluded from shifting the burden to the insurance agent. However, in the event he passes on the service tax burden, then he is required to deposit the said amount with the govt., as the tax amount is not required to be further collected from the insurance agents.

37. In the impugned order, the learned Commissioner has observed that once the law requires the Appellant to discharge the service tax on receipt of the service from insurance agents, the tax assumes the character of direct tax and ought to have been retained by the Appellant instead of shifting the burden to the insurance agents. The learned Special Counsel did not pursue the said finding before us. However, his argument is that the Appellants are not authorised/required to collect the service tax amount from the insurance agent in view of Rule 2(1)(d)(iii) of Service Tax Rules,

1994 as the law requires the Insurer to discharge the service tax, hence, the amount so collected cannot be retained by the Appellant, but to be deposited with the govt. as per sub.-sec.(2) of Sec. 73A.

38. To examine the said argument, it is relevant to read Rule 2(1)(d)(iii), which is as under:-

> **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)

39. Needless to mention, generally it is the economists concepts who classify tax base broadly into direct and indirect one. Income tax, Wealth tax property tax, etc. is placed in the category of direct tax, whereas customs, excise, sales tax, VAT, GST etc. are popularly called as indirect taxes. In India the tax is not levied and collected classifying as Direct and Indirect Tax unlike few other Countries. It is held by the Hon'ble Supreme Court, that service tax is an indirect tax and is a destination based consumption tax. However, for the purpose of administrative convenience, the collection of service tax could be made either from the service provider or service recipient in relation to the service which is the object of the tax. Merely because the tax is collected from the service recipient, the character of the service tax will not be altered, but it would continue to remain as service tax only. Therefore, the reasoning of the learned

Commissioner that since the service tax on Insurance Auxiliary service since to be paid by the Appellant, is in the nature of direct tax, hence, not authorised to pass on the burden to the Insurance agents, is incorrect and contrary to the principles of law laid down by the Hon'ble Supreme Court.

40. The next question which needs to be addressed is whether the person is liable to pay service tax by virtue of Rule 2(1(d)(iii) of Service Tax Rules, 1994 is prohibited from passing on the burden to the customer. We do not find any such stipulation under the Act or under Rule 2(1)(d)(iii) of Service Tax Rules,1994 which puts an embargo on an assessee who is initially required to discharge service tax, if later elects to shift the burden to the provider of service or to any other person by an arrangement or agreement, is restricted in doing so. In absence of any such stipulation to say that the burden of service tax initially discharged by the service recipient cannot be shifted to the service provider would be contrary to the observation by the honourable Supreme Court in Rashtriya Ispat Nigam's case (supra).

41. Now, coming to the core of the issue, that is, whether the amount collected by the Appellant from the insurance agent is required to be deposited even though initially the applicable tax amount has been paid to the Government.

42. It is the contention of the learned Special Counsel for the Revenue that even though there is no bar under the Act and rules

made there under in passing the burden to the service provider, but the amount so collected from the service provider is required to be deposited under Section 73A(2) of Finance Act, 1994.

43. Now, analysing 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 (3) empowers the Central Excise officers to issue notice for recovery of amount not deposited with Government. Sub-section (4) authorises the officer to determine the amount payable by the said person and such person will pay the amount so determined. Sub-section (5) prescribes that the amount so paid under Sub-Sec.(1) or Sub-sec. (2) or Sub. Sec (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceedings for determination of service tax relating to the taxable service referred to in sub-section (1). Sub-section (6) lays down whether any service 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 sued by the central excise officer for refund of the such surplus amount.

44. A careful reading of the said self contained provisions of Sec. 73A, and in particular Sub. Sec.(6), it can 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 refunding to the person who bears the burden or transfer it 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 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:-

MEANING AND PURPORT OF SECTION 11D

> **"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."

45. Both sides have referred to the judgment of this Tribunal in the case of Prabhu Dayal Kanojiya Vs CCE Jaipur (supra). Revenue, referring to the said judgment, has argued that in the event no service tax liability arise out of the transaction, if any, collected has to be deposited with the Government. To understand the said judgment in its proper perspective, it is necessary to read Paras 4 & 5 of the judgment before analyzing the observation of the Tribunal which reads as under:-

> "4. However, in para-39 of the impugned order, the Authority confirmed a demand for Rs.4,18,665/- on the ground that this amount is the service tax component on the work executed by the appellant under work order no.MB6 PO-2817 dated 4.3.2010, involving construction of digester domes for the Delhi Jal Board. The Adjudicating Authority observed that since the relevant agreement contains a term that service tax element if payable is extra, it must be inferred that the appellant had collected the amount of service tax; the appellant had not furnished any evidence to prove that no

service tax was collected from the recipient under this contract, hence, Rs.4,18,665/- must be remitted, in terms of Section 73 A(2) of the Act.

5. Section 73 A of the Act enumerates provisions for liability to remit service tax collected by a person. Sub-section (2) of this provision enacts: 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. On a true and fair construction of this provision, the legislative intent is clear. The conditions precedent for ordering any person to remit (an amount collected as service tax, which is not required to be so collected), is a finding of fact that the person had in fact collected an amount towards service tax even though no service tax liability arises under the transaction qua which such collection is made. This finding of fact must be recorded by the Revenue. The liability to remit service tax under Section 73 A(2) does not arise on the basis of a mere permission in an agreement that the liability to compensate/reimburse to service tax liability of the service provider, is on the service recipient. A factual finding that a person has collected service tax is a condition precedent for passing an order under Section 73A(2) read with sub-section (4) thereof. Sub-section (4) specifically enjoins that an order should be passed under this provision only after considering the representation, if any, made by the person on whom the notice is served under sub-section (3) and to determine the amount due from such person, not being in excess of the amount specified in the notice. Sub-section (3) of Section 73(A) requires a notice to be issued to show cause why the amount, as specified in the notice, in respect of a liability arising under Section 1 and 2, should not be paid by the Noticee to the credit the Central Government."

46. While dealing with the circumstances at Para 4 i.e. confirmation of the demand for Rs.4,18,685/- solely on the ground that the said amount must have been paid under the relevant agreement, since the stipulation in the agreement disclosed that service tax element, if payable, is extra, the Tribunal, analyzing the scope of Section 73A(2) of Finance Act, 1994, observed that the conditions required for directing any person to remit any amount collected as service tax, which is not required to be so collected, is a finding of fact and it is for the Revenue to establish that the person had, in fact, collected the amount, representing as service tax, even though no service tax liability arises under the transaction qua for which such collection is made. It is the observation of the Tribunal that the condition need to be satisfied for demanding the amount u/s 73A(2) that no service tax liability arises, but the amount has

been collected representing as service tax. Subsequently, the Tribunal proceeded in observing that the liability to remit service tax under Section 73A(2) does not arise on the basis of mere permission in an agreement that the liability to compensate, reimburse the service tax liability of the service provider, is on the service recipient. In other words, a liability which is not accrued, cannot ultimately be translated into a liability merely because there is stipulation in the agreement that in the event, any liability arises, the service recipient to discharge the liability.

47. The Appellant has also placed reliance on the judgment of this Tribunal in the case of HDFC Standard Life Insurance Co. Ltd. Vs. Commr. C.E. The facts are similar to the present case. In the case of HDFC Standard Life Insurance Co. Ltd. Vs. Commr. C.E, discharged the service tax liability on insurance auxiliary service taxable under Section 65(105)(zy) in accordance with the Rule 2(1)(d)(iii) of the Service Tax Rules, 1994. Referring to a particular clause in the agreement between Appellant and their agents, the Department proceeded on the premise that reimbursement were collection-cum-tax in excess and consequently required to be credited/deposited under Section 73A of the Finance Act, 1994. This Tribunal, observed as follows:-

> "9.In service tax levy, too, the person liable to pay the tax is required to deposit the tax amount irrespective of the quantum or stage of recovery from the person who bears the burden of tax. There is a distinct dichotomy, in both Central Excise Act, 1944 and Finance Act, 1994, of the obligation to credit the tax with Central Government and the recovery of the amount from the other person. And that is a dichotomy that does not brook any latitude whatsoever and its acceptance by Revenue is amply evidenced by Circular No. 870/8/2008-CX, dated 16th May, 2008 which clarifies that Section 11D of Central Excise Act, 1944 is not liable to be invoked even if the mandated payment for availing Cenvat credit on inputs used in exempt goods is recovered from the buyers of the output goods. That this ratio applies to service tax levy and that recovery of amount

already paid would be tantamount to double deposit is enunciated by the Tribunal in *Sangam India Ltd*. v. *Commissioner of Central Excise, Jaipur-II* [2012 (28) S.T.R. 627 (Tri.-Del.)].

10.In *Rashtriya Ispat Nigam Ltd*. v. *Dewn Chand Ram Saran* [2012-TIOL-37-SC-ST = 2012 (26) S.T.R. 289 (S.C.)], the Hon'ble Supreme Court was called upon to decide whether the principal 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 of 2000, 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.'

11.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.

12.The appellant has paid the tax on commission paid to agents on 'reverse charge' basis and appellant is, under Cenvat Credit Rules, 2004, entitled to take credit of such tax paid. Contribution, partial or entire, to the tax liability in an agreement with the provider of the service is not forbidden by law. To the extent that the contributor has not ventured to avail credit of such contributions, there is no detriment to public revenue. And to the extent that the appellant has not deprived the provider of the service of any amount in excess of the tax deposited by the appellant, there can be no substance to the allegation that appellant has contravened Section 73A of Finance Act, 1994."

48. The learned Special Counsel for the Revenue, have vehemently argued that the said judgment of this Tribunal is *sub-silentio*, as it did not take into consideration specific provision viz. sub-section (2) of Section 73A of Finance Act, 1994. Opposing the said contention, it was argued by the learned Advocates on behalf of the Appellant that the Tribunal, taking note of the

argument at Para 5 of the judgment, about the applicability of Section 73A(2) of the Finance Act, 1994 and parallel provision under Excise Act viz. Section 11D, summarized its findings at Paras 9 to 12 of the judgment. Therefore, it cannot be said that the judgment is not a binding precedent being *sub silentio.*

49. We find merit in the contention of the learned Advocate for the Appellant. This Tribunal, after analyzing the scheme of sub-section (1) and sub-section (2) of Section 73A, arrived at the finding that any amount if collected in excess only is required to be deposited with the Government.

50. The next issue for consideration is whether the expenditure incurred by the Appellant in providing pre-recruitment and post licence training to the insurance agent be considered as a part of the value of commission paid to the insurance agents. The pre-recruitment training expenses are nothing but training and examination fee provided by the Appellant to the individuals so as to qualify to work as insurance agent as per IRDA norms. In some cases, viz. Kotak Mahindra Old Mutual Life Insurance Ltd, the Appellant had collected Rs.1,000/- as pre-training expenditure charges from the individuals, whether subsequently after receiving the training, the trainees took up the profession as an insurance agent and served the Appellant or otherwise. It is the contention of the learned Advocate Shri Rohan Shah for the said Appellant is that out of the total candidates provided with pre-recruitment training approximately 40% later, rendered service to the Appellant as

Insurance Agents. It is his contention that the amount of Rs.1,000/- collected from the individuals cannot, in any manner, be considered to be a part of the value of commission as per Section 67 of Finance Act, 1994 read with Service Tax Valuation Rules before the candidates quality to become Agent. Further, he has submitted that it is a service rendered by the Appellant to the insurance agents and hence after introduction of negative regime w.e.f. 1.7.2012, they discharged the service tax. The contention of the learned A.R. for the Revenue is that by providing pre-recruitment training to the prospective insurance agents, the expenditure incurred, which otherwise, would have been the cost to the insurance agents in providing service, hence, liable to be included in the taxable value of commission paid to the insurance agents. Similar line of argument advanced by the Advocates appearing for other Appellants with regard to the inclusion of pre-recruitment training expenditure as well as post licence training expenditure provided by the Appellant by way of training to the insurance agents, who later after recruitment provides the service to the Appellant. The Appellants have heavily relied upon the judgment of Hon'ble Supreme Court in the case of Bhayana Builders (supra).

51. Before considering the argument advanced by both sides, it is appropriate to refer to the relevant valuation provisions as were in force during the relevant time.

SECTION 67. Valuation of taxable services for charging service tax-

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation. — For the purposes of this section, —

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

Service Tax (Determination of Value) Rules, 2006

RULE 5. Inclusion in or exclusion from value of certain expenditure or costs. — (1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.

……..

RULE 6. Cases in which the commission, costs, etc., will be included or excluded. — (1) Subject to the provisions of section 67, the value of the taxable services shall include, -

(i) …

(ii) …

(iii) ….

(iv) ….

(v) the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;

…….

52. Even though while confirming the demand by including pre-recruitment training expenses as well as post licence training expenses in the value of commission, the learned Commissioner has not specifically referred to the relevant rule, but, we find that in the notice, the said expenditure has been proposed to be included in the value of commission paid to insurance agents in accordance with Rule 67 of Finance Act, 1994 read with Rule 5(1) and Rule 6 of Service Tax (Determination of Value) Rules, 2006. In our view, this issue has been more or less, in the context of inclusion of value of free-issue material in the value of taxable service, has been considered and settled in Bhayana Builders' case (supra) by the Hon'ble Supreme Court. Their Lordships observed as follows:-

> "12. On a reading of the above definition, it is clear that both prior and after amendment, the value on which service tax is payable has to satisfy the following ingredients :
>
> a. Service tax is payable on the gross amount charged :- the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into

the equation for determining the value on which service tax is payable.

b. The amount charged should be for "for such service provided" : Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined"

13. A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

14. We may note at this stage that Explanation (c) to sub-section (4) was relied upon by the learned counsel for the Revenue to buttress the stand taken by the Revenue and we again reproduce the said Explanation herein below in order to understand the contention :

"gross amount charges" includes payment by (c) cheque, credit card, deduction from account and *any form of payment* by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to

any account, whether called 'suspense account' or *by any other name,* in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]"

15. It was argued that payment received in 'any form' and 'any amount credited or debited, as the case may be...' is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the 'gross amount charges' inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words 'in any form of payment' are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, 'any amount credited or debited, as the case may be', to any account whether called 'suspense account or by any other name, in the books of accounts of a person liable to pay service tax' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.

16. In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider."

53. The Hon'ble Supreme Court, while examining the vires of Rule 5(1) of Service Tax (Determination of Value) Rules, 2006, in Intercontinental Consultants & Technocrats Pvt. Ltd case(supra), observed as follows:-

"21. Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.

22. Section 66 of the Act is the charging Section which reads as under:

> "there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."

23. Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable services'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.

24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasized that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service.

25. This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider."

54. Hon'ble Supreme Court in the above case, at Para 29 of the said judgment has concluded that Clause (a) of Section 67(4) of Finance Act, 1994 which deals with 'consideration' is suitably amended w.e.f. 14.05.2015 to include reimbursable expenditure or cost incurred by the service provider and charged in the course of

providing the taxable service. Thus, only w.e.f. 14.05.2015, by virtue of provision of Section 67 itself, such reimbursable expenditure or cost would also form part of the value of taxable service for charging service tax. In other words, prior to 14.05.2015, such expenditure or cost incurred by the assessee in providing taxable service cannot be included in the value of service. Thus in the value commission paid by the Appellant to insurance agents such expenses cannot be included. In other words, pre and post training expenses, incurred by the Appellant cannot form part of the value of commission paid to the insurance agents.

55. We summarise the findings as below:-

i) The service tax initially paid by the Appellants and later collected from the insurance agents by adjusting the commission paid, cannot be directed to be deposited under Section 73A(2) of Finance Act, 1994.

(ii) The expenses incurred in pre-recruitment training and post licence 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.

56. The impugned orders contrary to the above findings are set aside, and the assesses Appeals are allowed accordingly. Revenue's Appeal being devoid merit is rejected. In appeals No.ST/86795/2016 and ST/86796/2016 filed by M/s Bharati-AXA Life Insurance Co Ltd, the service tax amount paid on 'other expenses', have not been contested, only the penalty imposed on account of such demand has

been disputed. We find merit in the submission of the Appellant that since the said issue is a pure question of interpretation of law, hence, imposition of penalty on this count is unwarranted and accordingly set aside and the impugned Orders are modified accordingly.

57. All the Appeals are disposed of as above.

(Order pronounced in the open court on 31.05.2019)

(D.M. Misra)
Member (Judicial)

(C.J. Mathew)
Member (Technical)

CBBahalkar