CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 85961 of 2015

[Arising out of Order-in-Original No: 3/ST/RN/Commr/M-II/14-15 dated 29th January 2015 passed by the Commissioner of Central Excise, Mumbai – II.]

SBI Life Insurance Company Ltd … ***Appellant***
Natraj, MV Road & Wester Express Highway Junction,
Andheri (East), Mumbai 400 069

versus

Commissioner of Central Excise ***…Respondent***
Mumbai – II
9th Floor, Piramal Chambers, Jijibhoy Lane, Lalbaug,
Mumbai 400 012

APPEARANCE:

Shri V Sridharan, Senior Advocate with Shri SS Gupta, Chartered Accountant for the appellant

Ms PV Sekhar, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A/87354 / 2019

DATE OF HEARING: 08/08/2019
DATE OF DECISION: _18/12/2019

PER: C J MATHEW

The issue for consideration in this appeal of M/s SBI Life

Insurance Company Limited against order-in-original no. 3/ST/RN/Commr/M-II/14-15 dated 29th January 2015 of Commissioner of Central Excise, Mumbai – II is the proposition that implicit in taxing a part of the consideration received from a recipient of service is, in the absence of any assertion to the contrary in the taxing instrument, the legislative intent to consider the untaxed amount as compensation for performance of a separate service.

2. The consequence of this proposition is the denial of otherwise eligible CENVAT credit on taxable services consumed by the assessee for rendering services – taxable as well as non-taxable – in proportionate to the latter. At stake is ₹1,08,26,44,321, pertaining to 'endowment policies' and 'ULIP scheme policy', which is sought to be recovered as ineligible credit availed for the period from 1st April 2008 to 31st March 2011 following the impugned order. In addition, penalty of like amount imposed under section 78 of Finance Act, 1994, by invoking rule 15 of CENVAT Credit Rules, 2004, and further penalty under section 77 of Finance Act, 1994 are also under challenge.

3. The appellant offers many insurance products which are broadly categorised as: 'term policy', 'endowment policy' and 'unit linked insurance policy (ULIP scheme)' and the proceedings initiated by service tax authorities are restricted to the latter two. The tax

liability on ‘life insurance business’ defined in section 2 (11) of Insurance Act, 1938, as incorporated in section 65 (51) of Finance Act, 1994, was legislated by the amending section 149 of Finance Act, 2002 by the insertion of

> *‘(zx) to a policy holder, by an insurer carrying on life insurance business in relation to life insurance business;’*

in section 65(105) of Finance Act, 1994, by which such service was made taxable along with services provided to policy holders by certain other specified players in the sector. Though the amending section came into effect from 16th August 2002, by notification no. 8/2002-ST dated 1st August 2002, the taxable service of the defined provider to ‘policyholders’ was exempted by notification no. 9/2002-ST dated 1st August 2002.

4. That changed with issue of notification no. 23/2004-ST dated 10th September 2004 rescinding the exemption notification alluded to *supra* and, thereby, not only burdening the service with a levy but also affording an opportunity for the tax authorities to adopt recourse to rule 6 of CENVAT Credit Rules, 2004 though the recovery proposed in the show cause notice leading to the impugned order was restricted owing to the bar of limitation beyond the extended period in section 73 of Finance Act, 1994. Thereafter, with effect from 16th May 2008, (zzzzf) was incorporated in section 65 (105) of Finance Act, 1994 to tax the consideration received from the policyholder in relation to

'management of investment' under the ULIP scheme of the appellant. The exemption accorded to the said business immediately following the incorporation of the taxable service in 2002 came a full circle with the deletion of

'in relation to the risk cover in life insurance',

along with amendment of rule 6 (7A) of Service Tax Rules, 1994, *vide* notification no 35/2011-ST dated 25th April 2011.

5. All the three product offerings enumerated in the proceedings comprise, or include, coverage of risk to life which were subjected to tax from 10th September 2004. The 'unit linked insurance policy', consisting of risk cover and returns from investment of that, or some, portion of the premium not attributable to risk, was brought entirely under the tax net with effect from 16th May 2008. Though the alleged non-compliance with rule 6 of CENVAT Credit Rules, 2004 goes back to the taxation of premium attributable to risk cover, the limitation on recovery beyond the extended period, allowed in section 73 of Finance Act, 1994, has restricted the present demand to the period from 1st April 2008 to 15th May 2008 when a portion of the premium ceased to be excluded from assessment. On the 'endowment policy', the dispute relates to the period up to 31st March 2011 as a portion of the premium continued to escape liability for assessment. The demand of tax on the former is ₹ 4,93,60,166 and on the latter

₹103,32,84,155 and it is against the confirmation of these demands that the challenge of the appellant lies.

6. Before adverting to the submissions of Learned Counsel for the appellant, it would be appropriate for us to take stock of the relevant statutory provisions that have been relied upon by the service tax authorities. Rule 3 of CENVAT Credit Rules, 2004 allows a 'provider of taxable service' to take credit of service tax leviable under section 66 of Finance Act, 1994 (along with attendant cess) that has been paid on any 'input service' received for providing 'output service' and the expressions employed therein have been defined in rule 2 of the said rules thus

> *'(r) "provider of taxable service" include a person liable for paying service tax;'*
>
> *'(l) "input service" means any service,-*
>
> *(i) used by a provider of taxable service for providing an output service; or….'*
>
> *'(p) "output service" means any taxable service,…, provided by the provider of taxable service to…, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly;'*

As the eligibility to take the credit on procurement of services by the appellant is not in contention, that aspect need not detain us. According to the impugned order, the appellant herein was excluded from levy of tax on 'management of investment' of funds placed by

the policyholder under the ‘unit linked insurance policy’ and on some portion of the premium paid by the holder of ‘endowment’ till the whole of it was made taxable and which constituted consideration for the handling of investments to enable committed returns to the policyholder. This, according to the adjudicating authority, made the appellant to be a provider of ‘exempted services’, defined as

> *‘(e)… taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act;’*

in rule 2 of CENVAT Credit Rules, 2004 and, which being covered by exclusion in rule 6 therein, as

> *‘(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub- rule (2).*
>
> *(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufacture such final products or provides such output service which is chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.’*

required appellant to be fastened with the liability and detriments in the impugned order for failure thereof.

7. The exclusions from assessment for the different periods in the two categories of policies is common ground. However, while Revenue asserts these to be covered by the inclusive component of ‘exempted services’ and, thereby, rendering rule 6 of CENVAT Credit Rules, 2004 to be applicable, it is the primary submission of the appellant that such vivisection of a composite consideration for a particular service is not the intent of the said Rules.

8. Detailing the objections to the findings in the impugned order, Learned Counsel for the appellant insists that they are in the business of providing ‘life insurance service’ which, legally, and in practice, envisages a single contract with each recipient as contained in the policy and that, all along, the statute intended a single service of which the entire was exempt for a period with a portion taxable thereafter for a further period. With the peculiarity of assessment of the non-excluded portion of the premium received from holders of ‘endowment’ policy having been overcome by taxing the entire premium, under rule 6(7A) of Service Tax Rules, 1994, at 1% as representing the ‘risk cover’ in specific circumstances of non-identification of the latter, Learned Counsel argues that the single service, contemplated in the statute, remains undisturbed. Furthermore, according to him, the investment of some portion of the premium is not intended to benefit the policyholder but to facilitate the appellant who was contractually bound to make good the

commitment of return therein. For these reasons, he submitted that the service remains single and indivisible as 'life insurance business' and, hence, not within the ambit of rule 6 of CENVAT Credit Rules, 2004.

9. It is further submitted by Learned Counsel that the definition of 'exempted service' requires that the whole of it be exempt for the restrictions in rule 6 of CENVAT Credit Rules, 2004 to be operable; reliance has been placed on the decision of the Tribunal in *Sahara India Life Insurance Co Ltd v. Commissioner of Central Excise [2018 (5) TMI 1218-CESTAT Allahabad]* holding that

> *'5. Having considered the rival contentions and on perusal of record and on going through the definitions and provisions of law as pointed out by the learned counsel for the appellant we find that the value on which the Revenue has demanded amount under Sub Rule (3) of Rule 6 of Cenvat Credit Rules, 2004 does not represent value of exempted services....'*

and the implied acceptance of this very interpretation by the competent authority, evident from the response to query made under Right to Information Act, 2005, which did not contemplate disputing of similar findings rendered by the original authority that had adjudicated upon a similar demand proposed to be recovered from M/s ICICI Prudential Life Insurance Company Ltd, precluded any contrary stand by Revenue in the present proceedings. It was probably for this reason that Learned Authorised Representative preferred to seek sustenance from the other component, having nought to do with

exemption, in the definition of 'exempted services' to assert the continued applicability of rule 6 of CENVAT Credit Rules, 2004. In view of the settled position pertaining to exemption of taxable service, we need not tarry further on the submission made on behalf of the appellant including the adjurements in *Birla Corporation Ltd v. Commissioner of Central Excise [2005 (186) ELT 266 (SC), Boving Fouress Ltd v. Commissioner of Central Excise, Chennai [2006 (202) ELT 389 (SC)], Damodar J Malpani v. Collector of Central Excise [2002 (146) ELT 483 (SC)], Jayaswals Neco Ltd v. Commissioner of Central Excise, Nagpur [2006 (195) ELT 142 (SC)]* and in *ICC Reality (India) Pvt Ltd v. Commissioner of Central Excise, Pune – III [2013 (32) STR 427 (Tri-Mumbai)]*. We are in agreement that the taxable service is not wholly exempt.

10. Learned Counsel further submits that the deeming provision of taxability as a service does not suffice to exclude it from the sphere of tax on 'life insurance business' and, thereby, is precluded from inclusion among services that were not leviable to tax prior to the date of incorporation. Suggesting that the investment portion is not liable to treated as consideration for rendering of any service, reliance is placed by him on the decision of the Tribunal in *Max Life Insurance Co Ltd v. Commissioner of Central Excise [2018-VIL-126-CESTAT-DEL-ST]*.

11. While placing emphasis on the definition of ‘exempted services’ which includes services that are not leviable to tax, it is the contention of Learned Authorized Representative that subsequent rendering of taxability of a service is indicative of absence of leviability before such date and that legislative intent to tax only ‘risk cover’ from 10th September 2004 with other services rendered liable separately and subsequently implies the existence of several services within the same bundle offered to the same recipient. It is her submission that both ‘endowment policies’ and ‘unit linked insurance policies’ entice holders to these schemes with promise of returns in addition to coverage of risk. Alleging that discharge of tax liability on one of the services will not entitle the appellant to the benefit of CENVAT credit on all ‘input services’ in its entirety, reliance is place by her on the decision of the Tribunal on *Reliance Life Insurance Co Ltd v. Commissioner of Service Tax, Mumbai [2018 (363) ELT 1050 (T)]*. Referring to circular no. 354/9/2011-TRU dated 12th July 2011 of Central Board of Excise & Customs, elaborating that the compounding of liability on risk cover is limited only to that, it is her contention that appellant is barred from claiming that the whole of the consideration thus stands assessed.

12. It is common ground that discharge of tax liability on ‘output service’ is *sine qua non* for availing credit of tax paid on ‘input services’ and, though the appellant claims that such liability has been

discharged by assessing the portion of premium attributable to providing of 'risk cover', Revenue holds that there are several services that are provided in issuing policies to holders and that the most evident demonstration of being within the ambit of the inclusive portion of 'exempted services' in rule 2(e) of CENVAT Credit Rules, 2004 is the incorporation of a new 'taxable service' in relation to 'unit linked insurance policy' from 2008 and the taxability of the entire premium received from holders of 'endowment policies' from 2011.

13. Even if it assumed that tax liability did arise subsequently on disaggregation of service offered to policy holders, one of the options available on such provision of taxable and exempted services, without having to reverse credit of input services in proportion to the latter, is the payment at the rate prescribed in rule 6(3) of CENVAT Credit Rules, 2004 which cannot be based on the entire invested amount as it includes the contribution of the holder that is returned along with some accretion; neither can the incremental return be the value of exempted service. There is no legislated measure for isolation of value or of such service, if it be one and, as held in *re Max Life Insurance Co Ltd*,

> *'8…….We note that in the present arrangement the appellant-assessee is providing Service of ULIP for the insured. For such service, the tax is paid. There is no separate identifiable service attributable to the investment portion of the premium in the present case. In other words the premium amount received was invested substantially and for managing such investment, administration charges are collected and Service Tax paid……'*

leading to the inevitable conclusion that invested portion of the premium does not represent a service.

14. Though it is submitted by Revenue, in relation to the demand for the period from 1st April 2008 to 15th May 2008 on non-taxability of a portion of the premium paid on 'unit linked insurance policy', we cannot but take note that the provider and recipient in section 65(105)(zx) and section 65(105)(zzzzf) of Finance Act, 1994 remain the same and, that but for the exemption notification no. 9/2002-ST dated 1st August 2002, the whole of the premium would have been liable to tax under the former; even the subsequent amendment in 2004, by which 'risk cover' was subjected to tax, cannot erase the essential integrity of the product offered in the course of 'life insurance business' to extract a new service. Life insurance policies with limited risk cover may not have much appeal for the Indian consumer and the prospect of a return of contribution, packaged as premium and comprehended as premium by the policy holder, impacts upon the marketability of the products. It is, therefore, intrinsic to life insurance business that there be some recompense for having survived the policy term with nothing to show for it. Moreover, as pointed out by Learned Counsel, an activity that has to be deemed to be a service, as per *Explanation (i)* therein, despite being taxable thereafter, will not conform to the expression 'service' in rule 2(e) of CENVAT Credit Rules, 2004.

15. For further elucidation, it would not be out of place to peruse the inclusive component of the definition of ‘exempted service’ which pertains to services that are not leviable to tax under section 66 of Finance Act, 1994. The most proximate of services that are subject to the levy are the entries in section 65(105) of Finance Act, 1994 as stated therein and it is only those which are exempted that can be held to be covered by the said definition which, having been described as the principal component, does not require restatement. It is obvious the legislature had not intended superfluity in incorporating the services that are not leviable to tax in the definition. There is no definition of ‘service’ in Finance Act, 1994 and, therefore, forecloses an ascription that is non-existent. Consideration, though essential to determination of value of taxable service, is not the sole indicator of existence of a service. It fell upon the Hon’ble Supreme Court, in *All India Federation of Tax Practitioners v. Union of India [2007 8 TMI 1 SC],* to unravel the appropriate description of service and, thereafter, subject the taxability thereof to constitutional validity. That an amount from the consideration was added to the taxable component will not suffice as the epiphany of a new taxable event.

16. At the same time, the presumption against superfluity in interpretation of statutes binds us to search for, and determine, the nature of inclusion. As we are dealing with the *schema* of mechanism for avoiding the cascading effect of taxation upon the final customer

who bears the burden of indirect tax levy, it can be posted that there is a recipient of service with whom the buck stops. Such stoppage could be owing to lack of further commercial engagement of the service or because of the non-existence of such service within the jurisdiction to tax. Tax laws have nothing to do with the last consumer in the market chain. It would, therefore, leave us with no option but to determine that legislative intent of 'services that are not leviable to tax under section 66 of Finance Act, 1994' to be those to which the Union cannot extend its taxing arm. The exclusion of a portion of the consideration in providing 'works contract service' under section 65(105)(zzzza) of Finance Act, 1994, as elaborated by the Hon'ble Supreme Court in *Larsen & Toubro v. Commissioner of Central Excise, Kerala [2015 (39) STR 913 (SC)]*, with attendant impact on availment of credit under CENVAT Credit Rules, 2004, and the non-taxability of 'trading' as a service under Finance Act, 1994 in *Orion Appliances Ltd v. Commissioner of Service Tax, Ahmedabad [2010 5 TMI 85 CESTAT Ahmedabad]* are signposts to areas forbidden from tax by the Union. Not unnaturally, such service, unacknowledgeable in the tax jurisdiction, fails the test of utilization in rendering of further service. These, therefore, cannot be 'input services' and the inclusive portion of 'exempted services' must be construed as referring to such and not to services that, though not yet, may still be subject to levy. The proposition of Revenue that subsequent taxability imprints upon it the description of

'non-leviable under section 66 of Finance Act, 1994 fails and, with it, the support for sustaining the demand in the impugned order. The detriments also fail.

17. The appeal is, therefore, allowed and the impugned order set aside.

(Order pronounced in the open court on 18/12/2019)

(Justice Dilip Gupta)
President

(C J Mathew)
Member (Technical)

**/as*