CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 85973 of 2015

[Arising out of Order-in-Original No: 01/ST/Commr/M-II/14-15 dated 30th January 2015passed by the Principal Commissioner of Central Excise, Mumbai – II.]

HDFC Standard Life Insurance Co Ltd
13th Floor, Lodha Excelus, NM Joshi Road,
Apollo Mills Compound, Mahalaxmi, Mumbai – 400 011 …***Appellant***

versus

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

WITH

SERVICE TAX APPEAL NO: 85990 of 2015

[Arising out of Order-in-Original No: 04/ST/RN/M-II/14-15 dated 30th January 2015 passed by the Principal Commissioner of Central Excise, Mumbai – II.]

Birla Sun Life Insurance Company Ltd
One India Bulls Centre, Tower 1, 15-16th Floor,
Jupiter Mills Compound, 841 SB Road, Elphinston Road
Mumbai – 400 013 …***Appellant***

versus

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

<u>APPEARANCE</u>:

Shri SS Gupta, Chartered Accountant for the appellants

Shri Bidhan Chandra, Additional Commissioner (AR) for the respondent

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLEDR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85819-85820 / 2020

DATE OF HEARING:	30/07/2019
DATE OF DECISION:	11/06/2020

PER: C J MATHEW

As both these disputes, of M/s Birla Life Insurance Company Limited and of M/s HDFC Standard Life Insurance Co Ltd, arise from identical grievances proceeding from orders-in-original no. 4/ST/RN/COMMR/M-II/14-15 and no. 1/ST/RN/COMMR/M-II/14-15 both dated 30th January 2015 of Commissioner of Central Excise, Mumbai-II, it would not be inappropriate for us to dispose them by this common order. Both appellants are in the business of offering ‘life insurance’ products to policyholders in exchange for premium.

2. By way of a prelude, the kaleidoscope of perspectives on the impugned activity that started off as a mutual benefit association within a group for the very same eventuality and now boasts of such gargantuan proportion as to subsume the several anonymous beneficiaries may offer insights that could be of assistance in deciding

these appeals. To the public large, it is, probably, the tenacity of the agent who persuasively bags a policy. To the agent, it may be the promise of a steady life-long income. To those in the business of setting money to work, it would be the enormous annual inflows. To the taxman, it appears to be the premium contributed by the policy holder. However, as in the famous poem of John Godfrey Saxe, in which *‘each was partly in the right, and all were in the wrong!’*, the elephant in the room remains glaringly unnoticed. Essentially, a life insurance policy is financial instrument that represents the individual contribution to a pool of such mammoth proportions in which the certainty of ultimate extinction of the individual is eclipsed by the probability of perpetual existence of the whole. Implicitly, the pooled fund is mobilized for keeping the premium within reach of sufficiently large number of individuals. The ‘life insurance’ companies, by this very expertise in investments, are best suited to offer their competency and financial clout for ramping up returns for ‘policyholders’ who may need persuasion other than payout after death. The variants of ‘endowment’ and ‘investment’ policies achieve that end. The difference between the two, promising more than ‘risk’ cover, is the facility of opting for one among the broadly constructed portfolios. Nonetheless, these are not offered as distinct from, or by excluding, coverage of risk but as an additional attraction.

3. Risk cover in life insurance policies was rendered taxable upon

incorporation 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 and, with effect from 16th May 2008, the inclusion of

> *'(zzzzf) to a policyholder, by an insurer carrying on life insurance business, in relation to the management of investment'*

in section 65(105) of Finance Act, 1994 brought the burden to a further portion of the premium in policies other than the 'vanilla' or plain ones. It is the contention of the service tax authorities that, to the extent of the premium attributable to 'investment policies' not being taxed till then, 'exempted service' had been rendered. Again, by amending section 65 (105) (zzzzf) with effect from 1st July 2010, the value of taxable service was restricted to such fees as were prescribed by the Insurance Regulatory and Development Authority towards funds management charges before the amendment, effective from 1st May 2011, in

> *'(zx) to a policyholder or any person by an insurer, including re-insurer, carrying on life insurance business'*

which taxed the entirety of consideration received by the insurance companies.

4. Consequently, it was alleged that a portion of the premium received, from 1st April 2008 to 15th May 2008, and from 1st July 2010 to 31st March 2011, represented consideration for ‘exempted services’ within the meaning of rule 2 of CENVAT Credit Rules, 2004 with attendant implications. On the premium paid by holders of ‘endowment policies’, the exercise of option of composition, permitted by rule 6(7A) of Service Tax Rules, 1994, was deemed by service tax authorities to have taxed only of the ‘risk’ component of the consideration with the untaxed portion representing consideration for ‘exempted services’ within the meaning of rule 2 of CENVAT Credit Rules, 2004 with attendant implications.

5. In the show cause notice, the proposal for recovery was based on the data furnished by M/s Birla Sun Life Insurance Co Ltd to the effect that the tax liabilities had not been discharged on ₹ 5,32,71,853, ₹ 2,34,29,816, ₹ 8,79,73,185, ₹ 10,07,91,72,713 and ₹ 71,48,93,646 of the amount received as premium for 2008-09, 2009-10 (till 30th June), for the rest of 2009-10, 2010-11 and 2011-12 respectively and fastened with liability of ₹ 17,38,12,097 under rule 14 of CENVAT Credit Rules, 2004 read with *proviso* to section 73(1) of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, and penalty of like amount under rule 15 of CENVAT Credit Rules, 2004 while dropping demand of another ₹ 80,88,53,089 proposed in the show cause notice. In like manner, the grievance of

M/s HDFC Standard Life Insurance Co Ltd is the confirmation of liability of ₹ 13,06,61,840 under section 73 of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, and penalty of like amount under section 78 of Finance Act, 1994 while dropping demand of ₹43,85,43,480 proposed in the show cause notice. The demands were confirmed in accordance with the scheme, in rule 6 of CENVAT Credit Rules, 2004 for neutralization of ineligible credit, on the difference between the premium collected on 'investment policies' and value subjected to self-assessed tax and on the difference between the premium collected on 'endowment policies' and the value obtained by reverse computation from that to which the composition rate was applied for assessment.

6. This dispute is not about evasion of tax. There is no allegation that the credit taken by the appellant, at the time of procurement of the services, were not in accordance with the law. The allegation is restricted to the subsequent failure in neutralizing the credit to the extent of not being attributable to taxable 'output services.' It is of interest, therefore, that the mandate of rule 6(3) of CENVAT Credit Rules, 2004, intended for compensatory reversals of such portion of credit of tax paid on 'input services' that was permitted to be availed in entirety on procurement but not utilized entirely for rendering of 'taxable services', and to be invoked upon failure to maintain separate accounts for the two categories, is claimed as the statutory

empowerment in the impugned order.

7. We have deliberately described the liability as 'compensatory reversal' in the light of the rates prescribed, from time to time and independent of that in section 66 of Finance Act, 1994, and the bar on availing such amount, in the books of the recipient of the 'exempted service', as credit. Akin to the mechanics of proportional utilization also prescribed therein, this liability acknowledges the deployment of 'input service' for rendering of 'taxable service' and 'exempted service' without being amenable to segregation on procurement. It, however, piques attention as the several alternatives for neutralization, within the self-contained bar on unacceptable utilization, are options to be exercised only by the assessee. Notwithstanding such option not having been exercised exercise, 8%, 6%, 5% and 6% of the value of allegedly 'exempted services' was computed for the period from 1st April 2008 to 6th July 2009, from 7th July 2009 to 31st March 2010, from 1st April 2010 to 31st March 2012 and for the period from 1st April 2012 respectively to fasten the adjudicated liability.

8. In this context, it would not be inappropriate to visit the provisions of CENVAT Credit Rules, 2004 that were drawn upon, *viz.*,

Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-

(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).

Provided *that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are 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.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of

output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely:-

(i) *the manufacturer of goods shall pay an amount equal to five per cent. of value of the exempted goods and the provider of output service shall pay an amount equal to six percent. of value of the exempted services; or*

(ii) *the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A).*

Explanation I.- *If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.*

Explanation II.-*For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.*

xxxxx

(3A) *………..*

Explanation I*.- "Value" for the purpose of sub-rules (3) and (3A) shall have the same meaning assigned to it under section 67 of the Finance Act, 1994 read with rules made* *thereunder or, as the case may be, the value determined under section 4 or 4A of the Central Excise Act, 1944 read with rules made thereunder.*

Explanation II.*-The amount mentioned in sub-rules (3) and (3A), unless specified otherwise, shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the 5th day of the following month except for the month of March, when such payment shall be made on or before the 31st day of the month of March.*

Explanation III.*- If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rule (3) or as the case may be sub-rule (3A), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken.*

(4) No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year.

(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services.

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either-

(i) cleared to a unit in a special economic zone; or to a developer of a special economic zone for their authorized operation; or

(ii) cleared to a hundred per cent. export-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excise, dated the 28th August, 1995, number G. S R. 602 (E), dated the 28th August, 1995; or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

(vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting; or.

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under sub-section (1) of section 3 of the said Customs Tariff Act when imported into India and are supplied,-

> *(a) against International Competitive Bidding; or*
>
> *(b) to a power project from which power supply has been tied up through tariff based competitive bidding; or*
>
> *(c) to a power project awarded to a developer through tariff based competitive bidding,*
>
> *in terms of notification No. 6/2006-Central Excise, dated the 1st March, 2006.'*

9. The extensive computation required for ascertaining the credit to be disallowed by resort to the second option juxtaposed with the ready availability of value on which tax liability has not been discharged during the period of dispute appears to have prompted the invoking of the first of the two alternatives in rule 6(3) of CENVAT Credit Rules, 2004. We also take note that rule 6(1) and rule 6(2) complement each other while rule 6(3), qualified with *non obstante* condition, is independent of these two and to be operated in accordance with rule 6(3A) if the option of proportionate reversal of credit is more advantageous to the provider of taxable service. As the segregation of 'taxable service' and 'exempted service' is the critical factor in the impugned order, the definitions of the two are pertinent. The latter is relevant only in the context of availment of credit and, accordingly, in rule 2 of CENVAT Credit Rules, 2004 means

> *'(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 the light of submissions made on behalf of the appellants that the portion of the premium on which tax has not been paid is not consideration for 'exempted services', as defined, we do not, unless requited to, propose to delve into the issue of the adjudicating authority having appropriated the exercise of the option available in rule 6 of CENVAT Credit Rules, 2004.

10. Considering the amount involved in the disputes and the rigidity of adversarial stances adopted by either side, the profusion and verbosity of arguments as well as the citation of several judgements in support of nuances postulated as favourable to one side or the other was not unexpected. We, however, are fortunate enough not to be excluded from the discipline of judicial consistency and precedent that affords us the privilege of discarding many of these to restrict our findings in accordance with the law, as settled, since the impugned orders came to be challenged.

11. It is the contention of Learned Chartered Accountant, appearing for the two appellants, that the allegation of ineligible utilization of 'input services' is an erroneous presumption as the services on which liability had been discharged, and the consideration received by the appellant, was solely in relation to eligible 'output service.' It is also

submitted that, insofar as ‘endowment policies’ are concerned, the discharge of tax liability on the entire value would render the definition of ‘exempted services’, mandating escapement from tax in its entirety as a necessary qualification, as alien to them for which reliance was placed on the decision of the Tribunal in *Ambejogai Peoples Coop Bank Ltd v. Commissioner of Central Excise [2016 (41) STR 450 (Tri-Mum)]*.

12. Learned Chartered Accountant informs that M/s Birla Sun Life Insurance Company Ltd availed the credit of ₹ 1,89,81,91,803 on ‘input services’ that were not used exclusively for ‘exempted services’ and that it has been laid down by the Tribunal, in *Taher Ali Industries & Projects Pvt Ltd v. Commissioner of Central Excise, Hyderabad-III [2006 (195) ELT 225 (Tri-Bang)]*, in *Sahyadri Starch & Industrial Pvt Ltd v. Commissioner of Central Excise, Kolhapur [2016-TIOL-615-CESTAT-MUM]* and in *Commissioner of Central Excise, Thane-II v. Ciron Drugs [2016-TIOL-1415-CESTAT-MUM]*, that the assessee should be permitted to choose the manner of reversal of credit. He points out that, guided by the principles of equity, and the availability of the different options for neutralization envisaged in rule 6 of CENVAT Credit Rules, 2004, it has been judicially determined that fastening of liability at the rates prescribed therein in excess of the credit, alleged to have been taken erroneously, would be disproportionate detriment.

13. According to Learned Chartered Accountant, the definition of 'life insurance business', in section 2(11) of Insurance Act, 1938, providing, as it does, for eventualities connected with human life - whether death or attainment of contracted age - leaves no room for doubt that the activity is not amenable to segregation as separate contracts. It was further argued that though the new levy, brought about by the incorporation of section 65(105)(zzzzf) in Finance Act, 1994, did tax a further portion of the premium, it is clear from the *Explanation* that 'management of segregated fund' of unit linked insurance business could be so subject only by legislatively deeming it within the scope of 'in relation to management of investment under unit linked insurance business' implying that the legal fiction cannot be stretched to assert the existence of such 'deemed service' prior to 15th May 2008. It was also contended that the computation of value of 'exempted service' by reverse deduction includes the amount invested in accordance with the regulations issued by the Insurance Regulation & Development Authority.

14. Our attention is also drawn to the decisions of the Tribunal in *Reliance Life Insurance Co Ltd v. Commissioner of Service Tax, Mumbai [2017-TIOL-3839-CESTAT-MUM]* and in *Sahara India Life Insurance Co Ltd v. Commissioner of Central Excise & Service Tax, Lucknow [final order no. 70810/2018 dated 22 February 2018]* and that order of the Commissioner of CGST & CEX, Mumbai Central

dated 28th December 2017, dropping proceedings in an identical dispute, has been accepted by Revenue.

15. Learned Authorized Representative, providing us with a background of the dispute, stated that M/s Birla Sun Life Insurance Company Ltd offered ‘unit linked insurance policy’ in which the ‘risk cover’ and ‘management of investment’ were taxable since 10th September 2004 and 16th May 2008 respectively and that, thereby, in the notice covering the period from April 2008, the non-maintenance of separate accounts for utilization of ‘input services’ procured in common for ‘taxable service’ and ‘exempted service’ warranted discharge of liability prescribed in rule 6(3) of CENVAT Credit Rules, 2004. On the ‘endowment policies’, which was subject to tax on the ‘risk cover’ since 10th September 2004, he informed that, by rescinding the restriction within section 65(105)(zx) of Finance Act, 1994 with effect from 1st April 2011, a portion of the consideration that was charged by the appellants for service other than providing of ‘risk cover’ was exempted from tax and, hence, deployment of common ‘input service’ should have been identified separately leading to fastening of liability under rule 6(3) of CENVAT Credit Rules, 2004. It was pointed out that ‘endowment policy’ included both risk and investment which, unlike ‘unit linked insurance policy’, does not segregate the two, and the tax under section 65(105)(zzzzf), being specific to the other type of policy, continued uninterrupted liability

only for ‘risk cover’ service. Likewise, according to him, the two offerings, ‘unit linked insurance policy’ and ‘endowment policy’, of the other appellant, M/s HDFC Standard Life Insurance Company Ltd, were rightly held to comprise of ‘taxable service’ and ‘exempted service.’ He contends that the extending of option, under rule 6(7A) of Service Tax Rules, 1994, for the composition scheme to discharge tax liability subject to certain conditions, did factor the existence of a separate service, which, as yet, was not taxable, to facilitate computation of assessable value of the tax on ‘risk cover’ that was, undisputedly, taxable during the entire period of dispute.

16. He placed reliance on circular no. 334/1/2008-TRU dated 29th February 2008 of Central Board of Excise & Customs (CBEC), and on the illustration therein, to contend that the proposed tax was intended to cover the fees charged for management of the segregated fund which, being an essential component of the ‘unit linked insurance policy’, was, till then, an exempted service. Drawing attention to the opinion of the Tribunal in *re Reliance Life Insurance Company Ltd* that

> *‘5…… However we are of the view that in terms of explanation to Rule 2 (e) of CCR, 2004 the services on which no service tax is payable is to be considered as “exempted service” and the credit of input or input services is not available to the service provider...’*

he contends that the law so settled should not be disturbed. We must here state that, in our view, the context in which that observation was made therein does not validate it as a precedent for resolving the present dispute: the scheme under consideration was ‘Traditional Golden Year Plan’ which did not offer ‘risk cover’ and remained entirely out of the tax net. Pointing out that circular no. 354/9/2011-TRU dated 12th July 2011 of Central Board of Excise & Customs (CBEC) has clearly addressed the scope of the composition scheme in rule 6(7A) of Service Tax Rules, 1994, he submits that the claim of partial exemption put forth on behalf of the appellants is not tenable. He further contends that this very circular again makes it abundantly clear that

> *‘2…… Consequently, the said companies were providing taxable as well as exempt it services till 1-5-2011, attracting, thereby the provisions of Rule 6 of “CENVAT Credit Rules”.’*

and places the issue beyond dispute. As the circulars issued by Central Board of Excise & Customs (CBEC) appears to carry much weight, as it should, with the Learned Authorized Representative, it would only be appropriate for us to give it some consideration. We, therefore, turn to that aspect immediately.

17. The proposition that is postulated on behalf of the respondent herein is that any portion of payments received by the assessee that remains untaxed at the appropriate rate is to be construed as consideration for ‘exempted service’ and, according to Learned

Authorized Representative, such intent has been unambiguously articulated in the referred circulars of Central Board of Excise & Customs(CBEC). In the context of the nuanced taxation of the premiums paid by policy holders, the question that arises is whether the consideration, certainly relevant, though not of itself, to the concept of ‘service’ and of itself, though only for ascertaining ‘value’, suffices to determine that ‘service’ has been rendered. We are hampered by the absence of definition of ‘service’ in CENVAT Credit Rules, 2004 or, for that matter, in Finance Act, 1994. While the former has secured a place for ‘exempted service’ in rule 2, the latter appears to be concerned only with ‘taxable service’ in section 65(105). It would appear that the proposition canvassed by Learned Authorized Representative, and on which the confirmation of demand relies, of Revenue is intended to bridge the lack of definition of acknowledgement of ‘service’ other than ‘taxable’ or ‘exempted’ in the taxing statute or in CENVAT Credit Rules, 2004.

18. There are two legs to the definition assigned to ‘exempted service’, *viz.,* the definitive aspect and the inclusive aspect, in CENVAT Credit Rules, 2004. Of particular relevance is that the former has to be comprehended only within the framework of ‘taxable services’ and is designed to limit the application thereof to full exemption, by notification in exercise of section 93 of Finance Act, 1994, accorded to any of the enumerations in section 65 (105) of

Finance Act, 1994. It is palpably clear that such an ‘exempted service’ must be a ‘taxable service’ first. Recourse has not been had by the tax authorities to this aspect of ‘exempted service’ in the proceedings initiated against the appellants. The second leg, comprising the inclusive aspect, is intended to encompass ‘services’ that, even without recourse to section 93 of Finance Act, 1994, are not leviable to tax within its fold. It is interesting to note that, just this once, is the expression ‘service, found in Finance Act, 1994, and the attendant rules, without the crutch of ‘taxable’ to support it and devoid of any meaning assigned to it. That Finance Act, 1994 does not is understandable as the taxing provision can be enforced, in the classificatory regime, without having to define ‘service’ for undertaking enumeration of ‘taxable service’ in section 65 therein.

19. It is not within the sphere of subordinate legislation to expand the scope of a concept that is non-existent in the parent statute. In like manner, an interpretation of subordinate legislation should not venture where the notified Rules have not forayed. It is clear that the articulation of the inclusive aspect thus within the definition of ‘exempted service’ in rule 2 of CENVAT Credit Rules, 2004 is neither accidental nor redundant or superfluous. That this could be deliberate, and with particular intent, does not appear to have crossed the minds of the tax authorities. That there is an inherent illogicality in their proposition also does not have appeared to crossed the mind of

the tax authorities. Indeed, it is that very illogic that leads to the inevitable conclusion of deliberate deployment of 'service', unqualified and undefined, and solely this once. It would be appropriate, therefore, to deal with the illogic before positing the consequential inference.

20. The present dispute has its genesis in not subjecting the entirety of premium to tax from the time that service in relation to 'life insurance' was incorporated in section 65(105) of Finance Act, 1994 but was, by a series of amendments, expanded within the premium payable by the policy holder. Even after the last of the changes before that tax regime ended on 30th June 2012, the entirety of premium was not subject to tax as a certain portion therein could not be attributed to service. Even the two inclusions, effected in 2008 and 2010, could not be said to have incorporated a new service for taxation as the former depended on deeming of service for coverage by a new enumeration without going beyond the premium and the latter, too, not only did not travel beyond the premium but also remained within 'life insurance' as the activity under coverage. Hence, new identifiable 'taxable services' were not the subject of the impugned levy. Even if these were to considered as new 'taxable services' the question of harmonizing the proposition of Revenue with the scheme of tax arises. Finance Act, 1994 is concerned with 'taxable service' and not 'service' and it is only upon incorporation within section 65(105) that

that a new 'taxable service' can be acknowledged. Rule 6 of CENVAT Credit Rules, 2004 is concerned with 'exempted service' to the extent that 'input services' are deployed for rendering such 'exempted services' and credit has been availed thereon. If recovery or neutralization under rule 6 of CENVAT Credit Rules, 2004, flowing from the inclusive aspect of 'exempted service' as proposed by Revenue, would not possible upon deployment of service as mandated therein. Indeed, contingent, as it is, on the unveiling, by incorporation in section 65(105) of Finance Act, 1994, of an unrevealed service, rationally acceptable time frame for neutralization does not exist. And for a statutory mechanism in which 'time', owing to limitation on recovery and mandatory interest, is no less crucial a factor than 'taxability', enforcement of rule 6 of CENVAT Credit Rules, 2004 on such contingency is not legislative intent. Invoking of section 73 for recovery is restricted only to such consideration that was legally subject to tax for the period of dispute and retrospective taxability, or non-taxability, as in this case, is not contemplated therein. Hence, we can reasonably deduce that legislative intent of the inclusive aspect of 'exempted service' did not contemplate subsequent incorporation as the test of exemption. Nevertheless, we must travel on to ascertain the legislative intent.

21. There are certain activities that may well be beyond the competence of the Union to tax and, thereby, beyond contemplation

for inclusion in section 65(105) of Finance Act, 1994. 'Trading' is one which comes to mind immediately and yet another is 'works contract' with a catena of decisions based on exclusion of competence to tax by the Union. Such services being beyond the realm of taxation are, acknowledgedly, existent by negation of jurisdiction. It is but natural that the incidence of tax on 'inputs' and 'input services' employed for rendering such services must be borne by the provider of the service and recovered through pricing instead of being privileged to neutralize it by set off of taxes paid. The deliberate addition of the inclusive aspect in the definition of 'exempted services' is thus warranted to provide for that.

22. In the absence of a definition of 'service', this is the interpretation that is doctrinally satisfying and but for which the inclusive component is otiose. Likewise, in a scheme of levy that enumerates the taxable activities, it is only by statutory incorporation that a service is acknowledgeable in law and any service that may be legislated within Finance Act, 1994 can be considered as 'exempted' only through notification under statutory authority.

23. Furthermore, the collection of premia in excess of the actuarial determination of probability of payout from holders of policies that are not vanilla 'life insurance' is intended for investment to enable payment of the endowment contracted with the policy holder. Such

investments yield returns that allow for compensating the policy holder and cannot, therefore, be consideration for service that is taxable under the entry proposed in the notice. While the premium for 'risk cover' is aggregated and subsumed, as it is, for administration of insurance business and investment is also not delinked from the binarity probability – death or life – that impacts the timing of payout. It is the consideration for this bundle of services that was intended to be taxed at different stages in the evolution of the entry relating to 'life insurance' and the only service rendered by the appellants. Investment is not a service rendered to the policy holder and, even when it was incorporated in section 65 (105) (zzzzf), the disaggregation was a delineation artificially effected by law to tax a portion of the administrative costs incurred by the insurer in pursuance of its business. Hence, it can be concluded that there is only one service and that is 'risk cover' with attendant payouts contingent upon death or maturity; subsequent taxation by creating a service within, and assigning a value to it, was not intended to cover a new service. Both were extractions from the expenditures incurred by the insurer in relation to the policy.

24. These were considered and disposed off by the Tribunal in *SBI Life Insurance Company Ltd v. Commissioner of Central Excise, Mumbai-II [final order no. A/87354/2019 dated 18th December 2019 in appeal no. ST/85961/2019]* wherein the issue in question was

discussed thus

> *'6... 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*
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> *xxxx*
>
> *in rule 2 of CENVAT Credit Rules, 2004 and, which being covered by exclusion in rule 6 therein, as*
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> *xxxxx*
>
> *required appellant to be fastened with the liability and detriments in the impugned order for failure thereof.*
>
> 1. *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.*

before going on to hold that

> *'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, Ahmadabad [2010 5 TMI 85 CESTAT Ahmadabad] 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.'*

25. In the light of lack of definition of 'service', the finding that the inclusive portion of the definition of 'exempted service' is restricted to certain services and settled law *supra*, the proposition of Revenue fails. The appeals are, therefore, allowed by setting aside the impugned order.

(Order pronounced in the open court on 11/06/2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/as*