CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86903 OF 2014

[Arising out of Order-in- Original No: 12-13/AC/COMMR/Th-II/ST/2014 dated 13th March 2014 passed by the Commissioner of Central Excise, Thane – II.]

Bank of Baroda Ltd
Baroda Corporate Centre, C-26, G-Block
Bandra-Kurla Complex, Bandra East, Mumbai - 400051 …***Appellant***

versus

Commissioner of Service Tax– I
115 New Central Excise Building,
MK Road, Churchgate, Mumbai - 400020 ***…Respondent***

WITH

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MK Road, Churchgate, Mumbai - 400020 ***…Respondent***

APPEARANCE:

Shri S S Gupta, Chartered Accountant for the appellant

Shri Nitin M Tagade, Joint Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86746-86747/2021

DATE OF HEARING: 13/07/2021
DATE OF DECISION: 08/09/2021

PER: C J MATHEW

Two show cause notices, dated 21st October 2011 and 18th September 2012 for denial of credit of ₹ 4,64,51,969 and ₹21,41,905 alleged to have been wrongly availed by M/s Bank of Baroda in their CENVAT credit account between April 2006 and March 2011 and in 2011-12, were adjudicated together in order-in-original no.12-13/AC/COMMR/Th-II/ST/2014 dated 13th March 2014 by Commissioner of Central Excise, Thane-II confirming the said demands, along with interest thereon, under rule 14 of CENVAT Credit Rules, 2004 besides imposing penalty of like amount under rule 15 of CENVAT Credit Rules, 2004 and is under challenge before us.

2. Learned Chartered Accountant appearing for appellant intimates that of the demand pertaining to several services covered in the impugned order, denial of credit of tax paid by them on procurement of 'brokerage', 'custodial charge', 'event management' and 'consortium charges' are disputed. Narrating the backdrop to fastening of tax liability of ₹ 1,85,23,176 and ₹47,25,501 respectively.

on ‘brokerage’ and ‘custodial charge’, he contends that these pertain to securities that are required to be invested in, pursuant to the mandate of the monetary policy of the Reserve Bank of India, announced from time to time, and which may be deviated from only at the peril of forfeiting their banking licence. It was contended this regulatory compulsion has the effect of erasing the element of ‘choice’, implicit in ‘service’, from the transaction as laid down by the Hon’ble High Court of Karnataka in *Commissioner of Central Excise & Service Tax, LTU, Bangalore v. Micro Labs Ltd [2011 (270) ELT 156 (Kar)]* thus

> *‘3. The question for consideration therefore is as to whether the assessees are liable to avail Cenvat credit towards payment of service tax on the Group Insurance Health policy. An identical question came up for consideration before the Division Bench in CEA 96/2009 and connected matters which were disposed off on 8-4-2011. The question considered therein was as to whether the assessees are entitled to claim Cenvat credit for the service tax paid on Insurance/Health Insurance policy. The Division Bench held that in so far as Insurance coverage to the employees is concerned in the course of employment if the employees suffer injury or dies, there is a vicarious liability imposed on the employer to compensate the employee. If the employer employs its own transportation facility in order to cover the risk which also includes the risk of workers who are covered in that statutory establishment, he has to take the insurance policy with which the vehicle cannot go on the road. Even for entering into the premises to meet the obligations under the workmen’s compensation Act he has to obtain the Insurance Policy covering the risk of the employees. The employee State*

Insurance Act takes care of the health of the employees also and casts an obligation on the employer to provide insurance services. Under these circumstances, this Group Insurance Health Policy though is also a welfare measure is an obligation which is cast under the Statute that the employer has to obey. Section 38 of the Employees State Insurance Act, 1948, mandates that subject to the provisions of the Act, all employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act. May be the employees also have to contribute but the employer is under an obligation to take an Insurance policy and contribute his share. Therefore, the said Group Insurance Health Policy taken by the assessee is a service which would constitute an activity relating to business which is specifically included in the input service definition.

4. Therefore, merely because these services are not expressly mentioned in the definition of input service it cannot be said that they do not constitute input service and the assessees are not entitled to the benefit of CENVAT credit. In fact, Rule 3 of the Cenvat Rules, 2004, specifically provides that the manufacturer of final products shall be allowed to take credit. The service tax is leviable under Section 66 of the Finance Act and paid on any input service received by the manufacturer of a final product. Therefore under the scheme of the Cenvat Credit Rules, 2004, the service tax paid on all those services which the assessee has utilized directly or indirectly in or in relation to the final product is entitled to claim the credit. Therefore, the Judgment of the Tribunal is legal and valid and is in accordance with law and does not suffer from any legal infirmity which calls for any interference.'

3. It was also pointed out that a Larger Bench of the Tribunal in

South Indian Bank v. Commissioner of Customs, Central Excise and Service Tax, Calicut [2020 (6) TMI 278 – CESTAT Bangalore] was of the view that if the existence of the business itself was contingent upon procurement of a 'taxable service', its essentiality for rendering 'output service' cannot be called into question and held that

> *'43. The contention advanced on behalf of the banks is that the insurance service rendered by the Deposit Insurance Corporation to the banks is covered under the main part of the definition of "input service" and, therefore, the banks are justified in availing Cenvat credit on this "input service" for the "output service" rendered by the banks in relation to "banking and other financial services". The contention of the Department is that since insurance is paid on the deposits and the activity of acceptance of deposits is a transaction in money which would be outside the purview of service tax, the insurance service rendered by the Insurance Corporation to the banks cannot be considered as an "input service".'*

4. Relying upon the decision of the Tribunal, in *Shriram Life Insurance Company Limited v. Commissioner of Customs, Central Excise & Service Tax, Hyderabad [2019 (2) TMI 688 – CESTAT Hyderabad]*, holding that

> *'11. In fact, Hon'ble High Court of Bombay in the case of Insure Policy Plus Services Pvt. Ltd. v. LIC of India as reported at 2007 (109) BOMLR. 559 held that life insurance policy is a actionable claim within the meaning of Section 3 of the Transfer of Property Act. The relevant portion of the ratio is in paragraph No. 7 which we reproduce :*

> *A long time ago Romilly, M.R., in ("7.Strokes v. Cowan), (1860) 30 L.J. Ch.882, observed that "Policies of insurance" "must be considered to be securities for money." The amount payable under a policy of insurance is a debt due from the insurer to the insured on the happening of a certain event or the lapse of a certain time, and the policy is the security for such debts charged upon the property or the stocks or funds of the insurer. A policy of the insurance represents money due and owing to the assured at his death, and it forms part of his estate. A policy of life insurance can be said to be an actionable claim within the meaning of Section 3 of the Transfer of Property Act and is not a mere right to sue. In a policy of life insurance the sum insured is certain, the premium, or the consideration for its payment is certain and the time when its payment is to become due is certain to come. Even the present value of the policy which is called the surrender value can be calculated. A policy of insurance is a present contract in the hands of the assured of which he has a present right to the benefit although the fruits are to be enjoyed in future. A life assurance policy as such would be property. Coitton, L.J. in (Tucan), (1888) 40 Ch. D5 remarked "It was contended that the policies did not come within the term 'property' but in my opinion, they may be considered as acquired by purchase during his life. They are contracts by which the policy holder has a right to recover certain sums of money from the insurance office in certain events, and the premium which he pays may be considered as an investment so as to obtain for him a benefit of the policy holder." Life policies are now construed not as contracts of indemnity but to pay a certain sum in a certain event depending on the duration of human life."*

The judgment of the Hon'ble High Court of Bombay in the case of Insure Policy Pius Services Pvt. Limited was affirmed by Apex Court as reported at 2016 (2) SCC 507. In our view, the judgments and the ratio thereto clearly supports the contention of the appellant that life insurance policy/the right to receive insurance policy money is an actionable claim. The exercise of the right to receive insurance money by the insured is an activity which is a transaction in actionable claim and is outside the scope of the definition of service. In our view, the amounts entered as surrender/discontinuance charges in the appellant assessee's books of account are not consideration for any service rendered by them, but it represents the amount that is retained by insurer on the insured, exercise his right to receive the insurance money.

> *The entirety of the transaction being (sic) in actionable claim is outside the purview of the service tax and does not get covered under provisions of Finance Act, 1994.'*

it was contended that, except when the 'input service' is used for rendering 'exempted service', denial of credit has no basis in law. It was also pointed out that the demands for subsequent period was dropped without challenge mounted by Revenue.

5. It was informed that these 'securities', procured for maintenance of stipulated 'statutory liquidity ratio (SLR)', were entrusted to the custodianship of Stockholding Corporation of India Ltd which, too, was not the consequence of free exercise of 'choice' by the appellant and could be deviated from as provider of 'banking and other financial services' under section 65(105)(zm) of Finance Act, 1994 only at the cost of imperilling their charter as a bank licencee.

6. On the recovery of ₹15,00,258 availed as credit on procurement of 'event management service', it is contended by Learned Chartered Accountant that these were in furtherance of sales promotion as held by the Tribunal, in *Endurance Technologies Pvt Ltd v. Commissioner of Central Excise, Aurangabad [2013 (32) STR 95 (Tri-Mumbai)]*, thus

> *'8. It is not in dispute that the Annual Day function of the appellant Company was celebrated and for the function the*

> *employees and their families were invited. The Annual day function of the appellant company is an integral part of the business activity and it is also found that the appellant is the manufacturer of excisable goods. Therefore, by relying the decisions of Ultratech Cement Ltd. (supra) and Toyota Kirloskar Motor Pvt. Ltd. (supra), the appellant is entitled to input service credit on Mandap Keeper Service. Accordingly, the impugned order is set aside and the appeal is allowed with consequential relief, if any.'*

7. On the recovery of ₹ 2,38,00,319, it is contended by Learned Chartered Accountant that the denial arose from a finding that the document against which credit had been taken lacked similitude with stipulations for 'invoices' in rule 4A of Service Tax Rules, 1994 and in rule 9 of CENVAT Credit Rules, 2004. He further contends that there is no allegation that tax was not paid on 'input services' provided by State Bank of India, the lead bank in the consortium for providing loans to priority sectors, or that 'output service' obtained by beneficiaries in the priority sector was ineligible.

8. Learned Authorised Representative, in connection with the denial of CENVAT credit on 'brokerage' and 'custodial charge', submitted that the activity for which these services were procured does not result in 'output service' within the meaning of CENVAT Credit Rules, 2004. According to him, the same activity for the benefit of other recipients of service would lie within the meaning of 'banking and other financial services' whereas the impugned activity

is nothing but 'trading in securities' which is exempt and, therefore, not eligible for availing the tax paid as credit. For this, he placed reliance on rule 6 of CENVAT Credit Rules, 2004 and the non-taxability arising from the deeming of securities as 'goods' for tax purposes. As far as the disallowance of credit on procurement of 'event management service' is concerned, he contends that the activity has nothing to do with rendering of 'output service' and is merely utilized for celebrating their annual day. He contends that the credit taken on 'consortium charge' is without authority of law as the requirements in rule 4A of Service Tax Rules, 2004 had not been complied with; the description of the service, and classification thereof under appropriate taxable entry, is absent in the documents against which credit was taken. He placed reliance on the decision of the Tribunal in *Orion Appliances Ltd v. Commissioner of Service Tax, Ahmedabad [2010 (19) STR 205 (Tri.-Ahmd)]* and in *Secure Meters Ltd v. Commissioner of Central Excise, Jaipur – II [2017 (3) GSTL 485 (Tri.-Del.)]* and on the decision of the Hon'ble High Court of Rajasthan in *Bansal Classes v. Commissioner of Central Excise & Service Tax, Jaipur – I [2015 (39) STR 967 (Raj.)]* holding that

> *'5. As already mentioned, the appellant is essentially providing commercial training and coaching services to the students. It is not permitted to confer educational degrees on the students. The services of catering, photography and tents are used by the appellant to encourage the successful students in coaching. These services are used only after commercial*

> *training or coaching is over. The celebrations are organized by the appellant during the academic sessions to encourage the existing students and motivate new students. In these celebrations, catering, photography and tents are used by the appellant and these celebrations are held only when students pass commercial training or coaching classes. The appellant is paying Service tax under the output service of commercial training or coaching. Once the students pass their coaching classes, the activities of catering, photography and tent services cannot be said to have been used to provide output service. Similarly, the appellant maintain and repair its motor vehicle during the course of the business and there is no material to show that maintenance and repairs have any nexus to commercial training or coaching. Likewise, the travelling expenses incurred by the appellant for the business tours cannot be related to provision for commercial training or coaching. We find ourselves in complete agreement with the view taken by the Tribunal against the appellant.'*

9. He further places reliance on the decision of the Tribunal in *Hindustan Zinc Ltd v. Commissioner Central Excise, Jaipur – II [2010 (18) STR 33 (Tri.-Del.)]* on the requirement of nexus insofar as availment of credit on 'event management service' is concerned. The observation of the Larger Bench of the Tribunal in *Wipro Ltd v. Commissioner of Central Excise, Bangalore – III [2018 (363) ELT 1111 (Tri.-LB)],* on the relevance of the exclusion clause in the definition of 'input service', and the decision of the Hon'ble High Court of Bombay in *Commission of Central Excise, Nagpur v. Manikgarh Cement [2010 (20) STR 456 (Bom.)]*were also referred to.

10. Taking up the issue of denial of CENVAT credit for incomplete documentation, it is settled law that procedural infirmities cannot stand in the way of availment of substantive benefit. *In Sambhaji and Others v. Gangabai and Others [(2008) 17 SCC 117]*, the Hon'ble Supreme Court asserted that

> *'12. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.'*

and in *Mangalore Chemicals & Fertilisers Ltd v. Deputy Commissioner [1991 (55) ELT 437 (SC)]*, it was held by the Hon'ble Supreme Court that

> *'11….In Kedarnath's case, the question for consideration was whether the requirement of the declaration under the proviso to Section 5 (2) (a) (ii) of the Bengal Finance (Sales-tax) Act, 1941, could be established by evidence aliunde. The court said that the intention of the Legislature was to grant exemptions only upon the satisfaction of the substantive condition of the provision and the condition in the proviso was held to be of substance embodying considerations of policy.…… Such a condition must, says counsel, be equated with the requirement of production of the declaration form in Kedarnath's case and thus understood the same consequences should ensue for the non-compliance. Shri Narasimhamurthy says that there is no way out of the situation and no adjustment was permissible, whatever be the other remedies of the appellant. There is a fallacy in the emphasis of this argument. The consequence which Shri*

Narasimhamurthy suggests would flow from the non-compliance would, indeed, be the result if the condition was a substantive one and one fundamental to the policy underlying the exemption. It's stringent and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve. In Kedarnath's case itself this court pointed out that stringency of the provisions and the mandatory character imparted to them were matters of important policy.… A distinction between the provisions of statute which are a substantive character and which were built in with certain specific objects of policy on the one hand and those which are merely procedural and technical in the nature on the other must be kept clearly distinguished. What we have here is a mere technicality.… The answer to this is in the words of Lord Denning: "Now I know that a public authority cannot be stopped from doing its public duty, but I do think it can be stopped from relying on it technicality and this is a technicality"…

Francis Bennion in his "Statutory Interpretation", 1984 edition, says at page 683:

> *"Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure when these cannot be shown to be necessary to the fulfilment of the purposes of the legislation."'*

These observations have been the foundation in a catena of several decisions of the Tribunal in disputes pertaining to availment of

CENVAT credit. It is not the case of the tax authorities that the services of State Bank of India had not been deployed in the consortium led by them or that tax liability had not been included in the consideration made over to the provider of service. It is also not the case of the service tax authorities that the provider of service is not in the business of 'banking and other financial service'; nor is it the contention that the 'output service' afforded by the consortium, which included the appellant, is not taxable. The denial of credit merely for want of description of service or classification thereof, which are primarily intended for statistical reference, should not be allowed to impede availment of credit as substantive eligibility, prescribed in CENVAT Credit Rules, 2004 is not assailed by Revenue.

11. The issue on 'event management service' and its connection with 'output service' of organisations has been settled by the decision of the Tribunal in *re Endurance Technologies Pvt Ltd.* The reliance placed upon the decision of the Hon'ble High Court of Rajasthan in *re Bansal Classes* would not apply to the facts of the present dispute inasmuch as the activities therein, concerned with programmes after the culmination of 'taxable service' against which credit was claimed, were not attributable to the rendering of the 'output service' thereby emphasizing that each situation should be evaluated on its own facts. The decision in *re Hindustan Zinc Ltd* was in the context of inability on the part of the appellant therein to evidence the profile of the event

against which credit of tax was availed. The events for which the impugned service was procured were concerned with according of publicity to the organization. Consequently, the denial of this credit is not in accordance with established law.

12. It is common ground that the appellant had availed credit of taxes included in the consideration for availing ‘brokerage charges’ and ‘custodial charges’ upon buying and selling of ‘securities’ for compliance with the ratios prescribed for banks in the monetary policy of Reserve Bank of India. The claim of the appellant for eligibility of such credit rests upon their obligation, as licencee of banking operations, to invest in such ‘securities’ as essential to their continuance under the regulatory mechanism for banks. The decision of the Larger Bench of the Tribunal in *re South Indian Bank* is categorical that any activity without which the existence of the assessee, as provider of taxable service, is jeopardized cannot but be an essential ‘input service’ eligible for credit. The denial of credit of these taxes in the impugned order stems from the finding that, unlike the purchase and sale of ‘securities’ for, and on behalf of, their customers, the beneficiary of the impugned activity being themselves takes it out of the purview of ‘taxable service’ in which a provider and a recipient are pre-requisites. In effect, the premise is that the appellant, even if a registered provider of ‘taxable service’, is, nonetheless, a final consumer of the service. Learned Authorised

Representative supplements this proposition with the argument that CENVAT Credit Rules, 2004 acknowledges procured ‘taxable service’ as ‘input service’ only if deployed for ‘output service’ and that ‘exempted service’ is not ‘output service’ in view of the definitions in rule 2 of CENVAT Credit Rules, 2004. According to him, the utilisation of the impugned services for themselves, instead of for their customers, is tantamount to ‘exempted service’ which triggers disentitlement.

13. The fallacy in this proposition is that the procurement of all services by appellant, and chargeable to tax or not, are intended for consumption by themselves with intent to render ‘taxable service’ to their customers and the conceptual appreciation of this flow appears to have been distorted by the legacy of central excise levy that envisages exemption from duties thereof for captive consumption. It is different versions of this distortion that are reflected in the findings of the adjudicating authority and in the argument of Learned Authorized Representative on the score. Moreover, ‘exempted service’ is defined in CENVAT Credit Rules, 2004 and neither of the legs – the principal meaning and the inclusive meaning in the absence of a ‘service’ rendered by the appellant that is not subject to tax – appear to fit the circumstances of procurement of ‘brokerage’ and ‘custodial’ services in the dispute before us. The existence of such ‘service’ is but speculation without the presence of an identifiable recipient and flow

of consideration; else, every consumed service could meet the same fate in the mind of the tax collector. The appellant, as a bank is required, under the regulatory aegis of the Reserve Bank of India, to comply with the 'cash reserve ratio (CRR)' and 'statutory liquid ration (SLR)' for participation in restricting money supply or expanding money supply according to the monetary policy of the country and has thus, undertaken activity which cannot be disaggregated from rendering 'banking and financial service' to its customers. Denial of credit to banks in such circumstances is, therefore, not sanctioned by CENVAT Credit Rules, 2004.

14. For the above reasons, the impugned order is set aside and the appeals allowed.

(Order pronounced in the open court on 08/09/2021)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*