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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) No. 4264/2015**

Date of decision: 3rd January, 2018

MAX LIFE INSURANCE COMPANY LTD. ..... Petitioner

Through Mr. Parag P. Tripathi, Sr. Advocate with Ms. Anuradha Dutt, Mr. Tushar Jarwal, Mr. Rahul Sateeja & Mr. Aarush Bhatia, Advocates.

versus

COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX ..... Respondent

Through Mr. Harpreet Singh, Sr. Standing Counsel & Mr. Bhavya Dubey, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

Max Life Insurance Company Limited has invoked writ jurisdiction of this Court impugning the order-in-original dated 29th January, 2015 passed by the Commissioner of Central Excise and Service Tax to the extent the order records as under:-

> "ii. I, hereby, confirm the demand of Service Tax amounting to Rs.100,05,78,705 (Rupees one hundred crore five lac seventy eight thousand seven hundred five only), as detailed in TABLE-2 to the Show Cause

> Notice, which was so deducted/recovered from individual insurance agents/corporate agents as Service Tax and not deposited in the Government exchequer as required in terms of Section 73A(2) of the Finance Act, 1994 during the period 2006-07 to 2012-13 (upto June, 2012), and order for recovery of the same from them under the proviso to Section 73A (3) of the Finance Act, 1994;"

2. The petitioner has also challenged direction given in sub-para viii imposing penalty under Section 78 of the Finance Act, 1994 for suppressing material facts to the extent it relates to the direction given in paragraph ii above.

3. The afore-stated order-in-original, in fact, decides several other issues in sub-paras i, iii, iv in addition to question of interest, penalty, etc.

4. Upon the writ petition coming up for hearing, vide order dated 29th April, 2015, the Court had issued notice relating to direction No. (ii) and direction No. (viii) to the extent it relates to direction No. (ii). The said order also granted to the petitioner right to file appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in respect of other aspects and findings in the order-in-original. The writ petition has remained pending since then before the Court. The petitioner, it is an accepted position has filed an appeal before CESTAT against the order-in-original on other aspects.

5. Counsel for the respondent has opposed the present writ petition in view of the alternative remedy by way of appeal. He submits that the petitioner cannot challenge one part of the order-in-original before the High Court and another portion before CESTAT.

6. Counsel for the petitioner, on the other hand, has submitted that the petitioner has paid full amount of service tax on reverse charge on the commission paid to the agents at the applicable rate of 12%. As per agreement(s) between the petitioner company and the agents, the petitioner was refunded or reimbursed 40% or 50% of the service tax component. This was as per the mutual understanding. Reliance is placed on decision of the Supreme Court in ***Rashtriya Ispat Nigam Limited versus Dewan Chand Ram Saran***, (2012) 5 SCC 306, in support of the contention that mutual agreements are valid and create a bilateral commercial obligation, without affecting the tax liability imposed as per the charging section. Reference is made to the decision of the Delhi High Court in ***Delhi Transport Corporation versus Commissioner Service Tax,*** 2015 (38) STR 673 (Del.) where an identical issue with regard to service tax liability was examined and relying upon the decision in the case of ***Rashtriya Ispat Nigam Limited*** (supra), the appeal preferred by the Revenue was dismissed. Our attention is also drawn to the judgment of the Gujarat High Court in ***General Manager Food Corporation of India versus Union of India,*** 2016 (44) STR 211 (Guj.). Lastly, reference is made to decision of the Tribunal itself in ***HDFC Standard Life Insurance Company Limited versus Commissioner of Central Excise, Mumbai-II,*** 2017 (49) STR 301 (Tri-Mumbai) on the identical issue.

7. On the question of maintainability of the writ petition, in spite of alternative remedy, our attention is drawn to an order of the Supreme Court dated 22nd April, 2016 passed in Writ Petition (Civil) No. 1055/2013, ***Aircel Limited and Another versus The Commercial Tax Officer and Another***

and other connected matters, ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and Another versus Sri Seetaram Rice Mill,*** (2012) 2 SCC 108 and ***State of U.P. and Others versus M/s Indian Hume Pipe Company Limited,*** (1977) 2 SCC 724.

8. Counsel for the respondent, on the other hand, has relied upon decision of the Supreme Court in ***A.P. State Financial Corporation versus M/s Gar Re-Rolling Mills and Another,*** (1994) 2 SCC 647.

9. Rather peculiar and odd situation has arisen in the present case as the order-in-original decides several issues and aspects. This order-in-original dated 29th January, 2015 has been made subject matter of challenge before the CESTAT on several aspects in view of the liberty granted by this Court vide order dated 29th April, 2015, except for direction No. (ii) and direction No. (viii) which extend to the direction No. (ii).

10. Thus, we have a situation where the petitioner has invoked a statutory remedy of appeal before the CESTAT challenging the order-in-original dated 29th January, 2015 on all aspects, except direction No. (ii) and direction No. (viii) to the extent it relates to direction No. (ii). In these circumstances, we do not think it will be appropriate and proper for us to examine the impugned order in piecemeal. In fact, while deciding the writ petition, we would have to examine aspects and issues, which would also arise before CESTAT.

11. However, the issue arises on requirement and mandate of pre-deposit. The order-in-original holds and accepts that service tax amounting to Rs.100.5 crores has to be paid. Thus, entire service tax payable on reverse

charge basis on the commission paid to the agents, has been paid. The said position is admitted and accepted by the respondents and is also not challenged and contested in the order-in-original. The contention of the respondent is that the petitioner must also pay in addition and over and above 12% service tax, the amount received from the agents under the mutual agreement in view of Section 73A (2) notwithstanding the payment made. The petitioner, as noticed above, has referred to several decisions in which the aforesaid aspect has been considered, including the judgment of the Tribunal in the case of ***HDFC Standard Life Insurance Company Limited*** (supra).

12. Be that as it may, as the petitioner has paid full amount of service tax, which is an accepted and admitted position, on reverse charge basis on the commission payment, we would direct the Tribunal not to dismiss the appeal preferred by the petitioner on the ground of "pre-deposit" under direction (ii), provided the petitioner has made pre-deposit in accordance with law in respect of other adjudication subject matter of the order-in-original dated 29th January, 2015. We further permit the petitioner to file an amendment application before CESTAT and challenge the direction No. (ii) and direction No. (viii) to the extent it relates to direction No. (ii) in the impugned order dated 29th January, 2015 within a period of three weeks from today. In case such amendment application is moved, the same would be considered by the CESTAT in accordance with law and it would not be dismissed on the ground that the amendments sought are belated or beyond time.

13 We have been compelled to take recourse and issue the aforesaid direction to deal with the anomalous position wherein the same order is subject matter of challenge before the High Court and before the Tribunal. This writ petition was entertained and notice was issued limited to direction No. (ii). This order, therefore, has been passed in the particular facts of the present case, which are exceptional. This order cannot be treated as a precedent, which will apply to other cases. We would also request the CESTAT to take up the appeal for hearing as expeditiously as possible.

14. With the aforesaid observations and directions, the writ petition is disposed of. We clarify that we have not commented on the merits. It will be open to the CESTAT to examine the issue, without being influenced by any observation made in this order.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JANUARY 03, 2018
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