CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 51676 OF 2016

(Arising out of Order–in-Original No. DLI-LTUNT-000-COM-077-2015-16 dated 19.02.2016 passed by the Commissioner of Customs, Central Excise & Service Tax Appeals, Delhi)

M/s Oriental Insurance Company Ltd. **.....Appellant**
25-27, Asaf Ali Road,
New Delhi-110002

Versus

Commissioner, Large Tax Payer Unit **.....Respondent**
Saket, Delhi-110017

APPEARANCE:

Shri B.L. Narasimhan, Advocate and Shri Narender Singhvi, Advocate for the Appellant
Shri R.K. Majhi, Authorised Representative for the Deparment

CORAM : HON"BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON"BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: January 19, 2021
Date of Decision: January 28, 2021

FINAL ORDER No. 51032/2021

JUSTICE DILIP GUPTA :

The Commissioner of Central Excise & Service Tax, New Delhi[1] has confirmed the demand of CENVAT credit of Rs. 196,46,97,360/-with interest and penalty and dropped the demand of CENVAT credit of Rs. 430,70,99,163/- by order dated February 19, 2016. This part of the order confirming the demand of CENVAT credit with penalty and interest has been assailed in the present appeal.

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1. The Commissioner

2. The Appellant is a registered insurer under the provisions of Insurance Act 1938[2] and is engaged in providing general insurance services. It issues various kinds of insurance policies like motor vehicle insurance, fire insurance and marine insurance. The insurance business in India is regulated by the Insurance Act. Section 3 deals with registration and sub-section (1) of section 3 provides that no person shall, after commencement of the Insurance Act, carry on any class of insurance business in India and no insurer carrying on any class of insurance business in India shall, after the expiry of three months from the commencement of the Insurance Act, continue to carry on any such business, unless he has obtained from the Authority a certificate of registration for the particular class of insurance business. Section 3(4)(f) provides that the authority shall cancel the registration of an insurer, either wholly or in so far as it relates to a particular class of insurance business, if the insurer makes default in complying with, or acts in contravention of any requirement of the Insurance Act or of any rule or any regulation or order made or any direction issued thereunder. Section 101A of the Insurance Act deals with reinsurance with Indian re-insurers. It provides that every insurer shall re-insure with Indian re-insurers such percentage of the sum assured on each policy as may be specified by the Insurance Regulatory and Development Authority of India[3] that has been established under sub-section (1) of section 3 of the Insurance Regulatory and Development Authority Act 1999[4]. The Government of India has constituted IRDA with a view to protect the interest of holders of insurance policies and to regulate, promote and ensure orderly growth of the insurance industry. The Appellant claims that because of the requirement set out under section 101A of the Insurance Act and as a prudent business practice it has been availing

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2. The Insurance Act
3. IRDA
4. IRDA Act

re-insurance services from Indian as well as foreign reinsurance companies in respect of the insurance policies.

3. Section 114A of the Insurance Act empowers the IRDA to make regulations in respect of various matters including matters relating to re-insurance under sections 101A and 101B of the Insurance Act. In due exercise of the aforesaid powers, IRDA has issued the Re-insurance Regulations for re-insurance of general insurance business.

4. Section 146 of the Motor Vehicles Act, 1988[5] mandates taking of an insurance cover against third party risks by a person using a motor vehicle in a public place. The rate for third party insurance premium is regulated by the Insurance Act. It is stated that problems were faced by companies in issuing insurance cover against these policies as very high risks arose therefrom.

5. Directions dated December 4, 2006, were issued by IRDA, in due exercise of powers conferred under section 34 of the Insurance Act, for creation of an Insurance Pool. All the general insurers, registered to carry on general insurance business (including motor insurance business) or general re-insurance business, were directed to collectively participate in a pooling arrangement to share all motor third party insurance business underwritten by any of the registered general insurers. It is in pursuance of the aforesaid directions that all general insurance companies in India entered into an agreement with GIC for creating the Insurance Pool. This Insurance Pool is a mechanism to render re-insurance services by general insurance companies to each other as regards third party motor vehicle insurance. Under this pool arrangement, a matrix is prepared periodically to determine the amount of premium to be paid by one member to another and vice versa.

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5. MV Act

6. The Appellant claims that in pursuance of the aforesaid matrix, it raised an invoice on each member specifying the premium allocated to it under the matrix and charged service tax thereon. Likewise, invoices were raised by all pool members on each other. The service tax charged in such invoices is availed as credit by each member. The Appellant has also availed CENVAT credit of service tax paid on such re-insurance service provided by the pool member companies under the Insurance Pool.

7. In respect of re-insurance services rendered by Indian Companies, service tax is charged from the Appellant and then deposited in the Government account. In respect of re-insurance services rendered by foreign companies, the Appellant is discharging service tax under the reverse charge mechanism. The Appellant has been availing CENVAT credit of service tax paid on such re-insurance services. This CENVAT credit can broadly be categorized as under:-

(a) Re-insurance services rendered by pool member companies which charge service tax from the Appellant on their invoices;

(b) Re-insurance services rendered by other Indian reinsurers which charge service tax from the Appellant on their invoices; and

(c) Re-insurance services rendered by foreign reinsurance, on which service tax is paid by the Appellant under the reverse charge.

8. The following three questions were framed by the Commissioner for determination.

i. "Whether CENVAT Credit of Rs. 627,17,96,523/- (Six Hundred Twenty seven Crores Seventeen Lakh Ninety Six Thousand Five Hundred Twenty Three Only) should be disallowed and recovered from the Noticee under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 73(1) and Section 73(4) of the Finance Act, 1994;

ii. Whether interest as applicable should be charged and recovered from them under Section 75 of the Finance Act, 1994;

iii. Whether penalty should be imposed under rule 15(4) effective up to 26.02.2010 or 15(3) effective from 27.02.2010 of the CENVAT Credit Rules, 2004 read with section 78 of the Finance Act, 1994."

9. CENVAT Credit of Rs. 627,17,96,523 proposed to be disallowed for the period 2008-09 and 2011-12 in the show cause notice comprises following components:

a. Reinsurance services obtained directly from the Indian reinsurers.
b. Reinsurance services obtained directly from the foreign reinsurers.
c. Reinsurance service obtained under Indian Motor Third Party Insurance Pool.

10. The Commissioner drew a distinction between the aforesaid services rendered prior to April 01, 2011 and w.e.f. April 01, 2011 for the reason that an amendment had been made in the definition of "input service" in the CENVAT Credit Rules 2004[6] w.e.f. April 01, 2011. According to the Commissioner, the definition of „input service" in rule 2 (l) of the CENVAT Rules included within its ambit all such services which can reasonably be used for providing any output service. Thus, before April 01, 2011, the issue of nexus of input service viz-a-viz output service has to be examined. However, w.e.f. April 01, 2011, an amendment was made in the definition of „input services" in rule 2 (l) by adding an exclusive clause, excluding service of general insurance business and this exclusion clause is reproduced below:-

"2 (l) „input service" means any service –

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but excludes

"(B) specified in sub-clauses (d),(o),(zo) and (zzzzj) of clause (105) of section 65 of the Finance Act, in so far as they relate to a motor vehicle except when used for the provision of taxable services for which the credit on motor vehicle is available as capital goods: or"

11. In connection with period prior to April 01, 2011, the Commissioner noted that there was no difference between reinsurance

6. CENVAT Rules

services obtained directly from the Indian reinsurers, reinsurance services obtained directly from the Foreign reinsurers and reinsurance services obtained under Indian Third Party Insurance Pool in as much as that all the three components relate to the service of reinsurance and, therefore, what was important to examine was whether reinsurance services fall within the ambit of "input service" as defined in rule 2(l) of the CENVAT Rules. The Commissioner found that reinsurance service has a nexus with the output service.

12. It is for this reason that the Commissioner dropped the demand for the period prior to April 01, 2011 and the observations are;

> "21.7.14 Hence, in view of the above, **for the period prior to 01.04.2011, the said "reinsurance service"** within the ambit of definition of "input service" as given under Rule 2(1) of the CENVAT Credit Rules, 2004 in as much as that the same **has been obtained by the Noticee for the purpose of providing/ rendering output service, viz. general insurance service and the same has a nexus with the output service of the Noticee.**
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> 21.7.15 Hence, in view of the above decisions and discussion, I hold that the Noticee herein has correctly availed CENVAT Credit during the period from 2008-09 tom 2010-11 on the reinsurance service in relation to general insurance services as the said reinsurance service is covered within the ambit of the definition of "input service" as given under Rule 2(1) of CENVAT Credit Rules, 2004 and also has a nexus with the output service being provided by the Noticee. The quantum of CENVAT Credit correctly availed by the Noticee is as follows:-"

Year	Input Credit for service tax paid on reinsurance Indian business (Rs.)	Input Credit for reinsurance business paid under reverse charge (Rs.)	Input Credit on Service tax paid to Indian Motor Third Party Pool Members (Rs.)
2008-09	628766032	358929311	0
2009-10	696772459	368066377	0
2010-11	621662417	471976774	1160925793
Total	**1947200908/-**	**1198972462/-**	**1160925793/-**
Grand Total	**4307099163/-**		

(emphasis supplied)

13. The Commissioner then examined whether CENVAT Credit had been availed on the basis of invalid documents and observed that the Appellant had correctly availed CENVAT Credit of Rs. 430,70,99,163/-

during the period from 2008-09 to 2010-11 on the reinsurance service in relation to general insurance services.

14. It would be seen from the aforesaid order of the Commissioner that availment of CENVAT Credit for the period prior to April 01, 2011 has been justified. This view of the Commissioner is in accordance with the decision of this Tribunal in **Shriram General Insurance Company Ltd. vs. Commissioner of Central Excise, Jaipur-I**[7]. After examining the provisions of the Insurance Act and the definition of „input service", the Division Bench observed as follows:-

> "15. The first issue that arises for consideration in these three appeals is as to whether re-insurance services are used for provision of insurance services and, therefore, would qualify as „input service" for the Appellant. Section 65 (58) of the Finance Act, 1994[8] defines "insurer" to mean any person carrying on general business or life insurance business and includes a re-insurer. Under section 65(80) of the Finance Act, "policy holder" has the meaning assigned to under section 2(2) of the Insurance Act. Under section 65(105)(d) of the Finance Act, "taxable service" means any service provided or to be provided to a policy holder or any person, by an insurer, including re-insurer carrying on general insurance business in relation to general insurance business.
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> 16. An insurer issues insurance policy to insure and assumes the risks arising thereunder. The insurance of such risks assumed by the insurer by another insurer is called re-insurance, which would, therefore, be insurance of insurance. Re-insurance, thus, is an insurance of insurer"s risks. An insurance policy is issued for a specific term and it is for whole term of the policy that the insurer assumes the risk on the insured subject. This business of the insurer is insured by any insurer called a re-insurer and for this purpose the insurer pays a premium to the re-insurer.
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> 17. As noticed above, both insurance and re-insurance services are covered under the scope of the general insurance service classifiable under section 65(105)(d) of the Finance Act and chargeable to service tax. The Appellant has stated that it has paid service tax on the "output service" rendered by it. The re-insurers providing re-insurance services also pay service tax on output re-insurance service rendered by them to the Appellant and charge service tax from the Appellant. It is, therefore, clear that such reinsurance services are used by the insurer for providing output insurance service. Without the use of such re-insurance services, it may not be commercially prudent for any insurance company to assume such high risks under the original insurance policies. It is the assumed risks of the original insurer that are insured under the re-insurance policies. **It is,**

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7. Service Tax Appeal No. 54096 of 2014 decided on March 04, 2020
8. Finance Act

> **therefore, difficult to hold that reinsurance services are not used by the insurer for providing the „output services"**. It would also not be correct to hold that since reinsurance services are availed after the provision of insurance services, CENVAT credit of service tax paid on re-insurance services cannot be availed. The insurance policy is issued for particular term during which the risks are assumed by the insurer and the re-insurance availed by the insurer is co-terminus with the original risks assumed by the insurer.
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> 18. In this connection it will be useful to refer to a decision of the Karnataka High Court in **PNB Met Life Insurance Co Ltd**. The issue that came up for consideration before the Karnataka High Court was whether an assessee can avail CENVAT credit of service tax paid on reinsurance services by treating the said service as an "input service". The High Court noted that since reinsurance has to be taken under section 101A of the Insurance Act, it is a statutory obligation and, therefore, has to be considered as having nexus with the "output service" and, therefore, would be an "input service", for which CENVAT credit can be availed.

15. It needs to be noted that the aforesaid decision of the Karnataka High Court in **PNB Metlife India** was accepted by the Central Board of Excise and Customs in the Circular dated February 16, 2018.

16. The Commissioner thereafter considered the amendment to the definition of "input service", in rule 2 (l) of the CENVAT Rules w.e.f. April 01, 2011 and observed:

> "21.8.1 A bare perusal of the above provisions makes it apparent **that during the period from 01st April, 2011 to 30th June, 2012, the said definition was modified by introducing an exclusion clause in the said definition whereby, certain services were categorically excluded** from the purview of the said definition of input service, implying thereby that in respect of such services, no CENVAT Credit could be availed as such services were not deemed to be input services for the manufacturers and/or output service providers. **The said exclusion clause unambiguously and categorically included the service availed in respect of general insurance services as defined under Section 65(105)(d) of the Finance Act, 1994.** Thus, it is materially evident that during this period the allegations pertain to "exclusion clause" of general insurance services falling under Section 65(105)(d) of the Act *ibid* and related to motor vehicles, which incidentally is the subject matter of the disputed issue in the instant case.
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> 21.8.4 **Since the said governing provisions specifically and unambiguously excludes all services availed for the purposes of rendering general insurance services from the definition of "input service", thus, I hold that for period from 01st April, 2011 to 30th June, 2012, the said reinsurance service cannot be considered as an input**

service and according, the CENVAT Credit availed by the Noticee in respect of the same has been wrongly and incorrectly availed. The quantum of CENVAT Credit wrongly and incorrectly availed by the Noticee is as follows:-

Year	Input Credit for service tax paid on reinsurance Indian Business (Rs.)	Input Credit for reinsurance business paid under reverse charge (Rs.)	Input Credit on service tax paid to Indian Motor Third Party Pool Members (Rs.)
2011-12	706065972	427172874	831458514
Grand Total	**1964697360/-**		

(emphasis supplied)

17. Shri B.L. Narasimhan, learned Counsel of the appellant assisted by Shri Narender Singhvi made the following submissions:

(i) The Order, in denying CENVAT credit to the Appellant for the period 2011-12, has gone beyond the scope of the allegations made in the show cause notice and thus, confirmation of the demand therein is not sustainable. The finding that the general insurance service is covered under exclusion clause of definition of „input service" was never an allegation in the show cause notice proposing denial of CENVAT credit to the Appellant. In such a case, the confirmation of demand, being beyond the scope of the show cause notice, is liable to be set aside;

(ii) The amendment in rule 2 (l) of the CENVAT Rules does not affect the eligibility of the Appellant to avail CENVAT credit on re-insurance services. The general insurance services relating to a motor vehicle have been excluded from the purview of „input service",

but the exclusion clause cannot be the read to cover

re-insurance services in **respect of a motor vehicle**;

(iii) The Appellant is eligible to avail CENVAT credit on re-insurance services provided by member companies under the Indian Motor Third Party Insurance Pool[9] that has been created under section 34 of the Insurance Act; and

(iv) In any view of the matter, the extended period of limitation could not have been invoked nor could penalties have been imposed in the facts and circumstances of the case.

18. Shri R.K. Majhi , learned Authorised Representative of the Department, however supported the impugned order and emphasized that since re-insurance services pertaining to a motor vehicle has been excluded in the definition of „input service" by way of an amendment made in Rule 2(l) of the CENVAT Rules w.e.f. April 01, 2011, it will not qualify to be „input service" w.e.f. the said date. Learned Authorized Representative also submitted that the extended period of limitation was correctly invoked in facts and circumstances of the case.

19. The submissions advanced by the learned counsel for the Appellant and the learned Authorized Representative of the Department have been considered.

20. The Commissioner has granted relief to the appellant for the period prior to April 01, 2011 because of the definition of „input service" as it stood prior to April 01, 2011. The dispute is only with the regard to the period subsequent April 01, 2011, when the definition of „input

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9 . Insurance Pool

service“ was amended by adding an exclusion clause in rule 2(l) of the CENVAT Rules.

21. A perusal of the exclusion clause shows that its scope is limited to those general insurance services, which relate to a motor vehicle. Use of the word „a“ assumes significance here, also considering the exception drawn in the exclusion clause.

22. In the instant case, the reinsurance services availed by the Appellant are for insuring its business risks and not in respect of any particular motor vehicle. Reinsurance, by its nature, pertains to the insurance of business of the Appellant. Reinsurance services have never been availed by the Appellant in respect of a particular motor vehicle. In such a case, the above exclusion clause has no applicability to the present case and denial of CENVAT credit on basis of such a clause is not sustainable.

23. The submission made by the learned Counsel for the appellant, therefore, deserves to be accepted. The contention also finds support from of the decision of Tribunal in **Shriram General Insurance Company**. The Bench examined whether the amendment made in the definition of “input service” w.e.f. April 01, 2011 in rule 2 (l) of the CENVAT Rules would affect the eligibility of the Appellant to CENVAT credit on reinsurance services. The observations are as follows:

> “23. It needs to be noted that motor vehicles have been excluded from the definition of “capital goods“. For this reason, the general insurance services relating to such motor vehicles have also been excluded from the purview of “input service“. The purpose of this amendment , thus, is to restrict the credit on insurance services availed in respect of motor vehicles to only two class of persons, i.e. (a) manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; and (b) an insurance company in respect of a motor vehicle insured or re-insured by such person. This exclusion clause cannot be read to cover reinsurance services, which are not insurance services in respect of a motor vehicle. **What is excluded under the said exclusion clause is general insurance services in respect of a motor vehicle. Insurance services received by an owner of motor vehicle**

> **for insurance of such vehicle stands excluded from the definition of „input service". However, a re-insurance service is not in respect of a motor vehicle, but is in respect of the assumed risks of an original insurer and thus, the aforesaid exclusion clause has no application to qualification of re-insurance services as "input service".**
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> **(emphasis supplied)**

20. The Division Bench of this Tribunal in **Shriram General Insurance Company** also examined whether the appellant would be eligible to avail CENVAT Credit of reinsurance provided by pool member companies under the insurance pool after the amendment of the definition of „input service" in rule 2(l) w.e.f. April 01, 2011 and observed that the appellant would be eligible to avail CENVAT credit of service tax paid thereon. The relevant portion of decision is reproduced below:

> 26. It now remains to be examined whether the Appellant is eligible to avail CENVAT credit of re-insurance service provided by pool member companies under the Insurance Pool. In the first instance, the finding in the impugned order that the Appellant is not eligible for CENVAT credit of service tax paid under the Insurance Pool since the Appellant has not actually paid any amount to the member companies is beyond the scope of the show cause notice. Even otherwise, the factual position has not been correctly appreciated by the Commissioner. As noticed above, under the pool arrangement, the Appellant deposits the whole premium collected by it in the pool account and based on the prescribed formulae, the GIC determines the amount of re-insurance premium due to each member as against the other members. Thus, in effect, each company pays the re-insurance premium after deducting the amount due from the other member companies. The service tax liability stands discharged on the whole re-insurance premium paid to the other members. It cannot be, therefore, be urged by the Department that the invoices that are issued by the pool member companies are not for any provision of service or without any payment. The re-insurance services are provided by the pool member companies and it is for this reason that the Insurance Pool was formed by IRDA. Clause 3 of the direction dated December 4, 2012 (should be 2011) are relevant and are reproduced below:-
>
> "3. Pooling Mechanism: The pooling of business among all insurers will be achieved through a multi-lateral reinsurance arrangement between the underwriting insurer and all the other registered insurers carrying on general insurance business (including motor insurance business) and general insurance reinsurers."
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> 28. Thus, it cannot be doubted that re-insurance services are rendered by pool member companies to each other and

> payment of premium takes place with the pooling of the original premium into the pool. The Appellant would, therefore, be eligible to avail the CENVAT credit of service tax paid thereon. The impugned orders denying such CENVAT credit cannot, therefore, cannot be sustained."

21. Thus, even after the amendment of the definition of „input service" in rule 2(l) of the CENVAT Rule w.e.f. April 01, 2011, the appellant would be eligible to avail CENVAT credit on both the aforesaid reinsurance services.

22. It would, therefore, not be necessary to examine the contentions raised by the learned counsel for the appellant that by confirming the demand for the period w.e.f. April 01, 2011, the order has gone beyond the scope of the allegation made in the show cause notice or that extended period of limitation could not have been invoked in the facts and circumstances of the case.

23. Thus, for all the reasons stated above, it is not possible to sustain that part of the order of the Commissioner that confirms the demand of CENVAT Credit of Rs. 196,46,97,360/- with interest and penalty. It is accordingly, set aside and the appeal is, allowed.

(Order pronounced in the open Court on January 28, 2021)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

Shreya