IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE DR. BRR KUMAR, VICE PRESIDENT &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

I.T.A. Nos.827&828/Ahd/2024
(Assessment Years: 2011-12 & 2012-13)

Axis Bank Ltd., "Trishul", 3rd Floor, Opp. Samtheshwar Mahadev, Nr. Law Garden, Ellisbridge, Ahmedabad-380006	Vs.	Assistant Commissioner of Income Tax, Cricle-1(1)(1), Ahmedabad
[PAN No.AAACU2414K]		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri Tushar Hemani, Sr. Advocate & Shri Parimalsinh B. Parmar, A.R
Respondent by:	Shri R. N. Dsouza, CIT-DR & Shri B.P. Srivastava, Sr. D.R.

Date of Hearing	19.12.2024
Date of Pronouncement	14.02.2025

O R D E R

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

These are appeals have been filed by the Assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals), (in short "Ld. CIT(A)"), National Faceless Appeal Centre (in short "NFAC"), Delhi vide orders dated 01.03.2024 passed for A.Ys. 2011-12 and 2012-13. Since common facts and issues are involved for both the years under consideration, both the cases are taken up together.

2. The Assessee has taken the following grounds of appeal:-

ITA No. 827/Ahd/2024 (A.Y. 2011-12)

"1. Ld. CIT(A) has erred in confirming disallowance of Rs.5,82,60,619/- under 'section 37' in respect of an 'expense' which has not at all been claimed in the Profit & Loss ac/.

2. Ld. CIT(A) has further erred in not appreciating that such disallowance under 'section 37' was in respect of an 'expense' incurred in order to generate commission income pursuant to 'contractual arrangement' with Max Life Insurance Co. whereby it was mutually agreed upon that 'assessee' will bear '50% of service tax liability' of Max Life

Appellant craves leave to add, amend, alter, change, delete and edit the above ground of appeal before or at the time of hearing of appeal."

ITA No. 828/Ahd/2024 (A.Y. 2012-13)

"1. Ld. CIT(A) has erred in confirming disallowance of Rs.11,80,12,860/- under 'section 37' in respect of an 'expense' which has not at all ben claimed in the Profit & Loss a/c.

2. Ld. CIT(A) has further erred in not appreciating that such disallowance under 'section 37' was in respect of an 'expense' incurred in order to generate commission income pursuant to 'contractual arrangement' with Max Life Insurance Co. whereby it was mutually agreed upon that 'assessee' will bear '50% of service tax liability' of Max Life.

Appellant craves leave to add, amend, alter, change, delete and edit the above ground of appeal before or at the time of hearing of appeal."

3. The brief facts of the case are that the assessee acts as a corporate agent for Max Life Insurance Company in respect of marketing it's insurance policies. The assessee charges commission from Max Life in lieu of rendering such services. During the course of assessment proceedings, the Assessing Officer observed that on investigation in the case of Max Life Insurance Company Ltd., it was found that Max Life had entered into a corporate agency agreement under which it had shared the service tax liability of Rs. 5,82,60,619/- with Axis Bank Ltd. i.e. the assessee. Normally, in case of Insurance Auxiliary Services, the liability to pay the service tax is to be borne by the recipient of service (i.e. Max Life Insurance Company Ltd.) as

per provision of Section 2(1)(d) of the Finance Act, 1994 under reverse charge mechanism. Therefore, in the instant case, the liability of service tax was on Max Life. However, this service tax liability was not discharged by Max Life since the service tax so collected by Max Life was not deposited with the Government and had been kept by Max with itself, which is an offence in terms of Section 73A of the Finance Act, 1994. The Assessing Officer noted that 50% of such service tax liability amounting to Rs. 5,82,60,619/- was shared/borne by the assessee in terms of an agreement with Max Life and the same had been claimed as an expense under Section 37 of the Act. The Assessing Officer was of the view that Axis Bank booked this as an expense, which is neither a tax nor an expense incurred in relation to business or profession of the assessee within the meaning of Section 37 of the Act. The Assessing Officer was of the view that Explanation 1 to Section 37 clearly mandates that any expenditure incurred by the assessee for any purpose which was an offence or which was prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction shall be allowed in respect of such expenditure. The Assessing Officer was of the view that in this case the assessee i.e. Axis Bank Ltd. had claimed expenses amounting to Rs. 5,82,60,619/- as a service tax expense, which was actually in the nature of an offence and therefore, the same was not liable to be allowed in view of Explanation 1 to Section 37 of the Act. Accordingly, this amount was added as income of the assessee, while filing the assessment order.

4. In appeal, Ld. CIT(A) confirmed the addition made by the Assessing Officer with the following observations:

"7.1 I also find that it is an undisputed fact that M/s Max Life Insurance Co. Ltd. who was under the legal obligation to pay the service tax liability had failed to discharge the onus and therefore the liability was to be borne by the recipient of service. Further as per Section 2(1)(d) of the Financial Act, 1994 as amended, liability to pay Service Tax rests upon service tax recipient in the case of Insurance Auxiliary Services. Therefore in this case, liability of Service Tax is upon Max Life Insurance Company Limited. Further as per provision of section 73A of the Finance Act 1994 any amount collected as Service is required to be deposited with Govt. exchequer. Further as per the agreement, the M/s. Max Life Insurance Company Limited will first pay the full amount to the statutory authorities and thereafter the Corporate Agent will pay its share of the service tax amount to M/s. Max Life Insurance Company Limited. However in this case, Service Tax so collected by M/ s. Max Life Insurance Company Limited was not deposited the with the Govt. and had been kept with itself which is an offence" whereas Axis Bank Ltd. booked its share of service tax as expenses under the head "Service Tax Expenses". Indeed the Axis Bank Limited had never incurred any expense towards service tax as M/s. Max Life Insurance Company Limited never paid the service tax collected to the Govt. Exchequer. As per the provisions of Section 2(1)(d) of the Financial Act,1994, the onus to pay service tax rested upon the recipient and not upon the provider so, if paid by the recipient to Govt. Exchequer, the same would be allowable in the books of recipient only, no other person can bear the liability to pay service tax on the behalf of others and claim the same as expense in his/ its IT Return. Besides this, the collection of Services Tax from M/s Axis Bank Ltd. is not as per the provisions of the Finance Act, 1994, therefore, collection of such Service Tax from providers of Service i.e. M/s Axis Bank Ltd. is without—authority of law. Further, as per explanation of Section 37 of the Income Tax Act. 1961 which deals with allow ability of business expenditure stipulate that:

> *a) Any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.*
>
> *b) The expenditure should have been incurred wholly or exclusively for the purpose of the business or profession.*

Section 37 states that the expenses incurred have to be in accordance with the statutory obligation whereas in this ynslant case the assessee is not suppose to pay the service tax on behalf of the recipient and if it does, it's a contravention of Section 2(1)(d) of the Financial Act, 1994 and therefore, S.37 of the Act has to be triggered to disallow the said sum.

7.2 In view of the discussion as above I am of the considered view that the Service Tax Expenses amounting to Rs. 5,82,60,619/- for the F.Y. 2010-11 relevant to A.Y. 2011-12 was correctly disallowed and added to the total income by the AQ. Accordingly, the disallowance made by the AO is sustained.

Hence, the ground of appeal of the assessee is Dismissed.

8. In the result, the appeal of the assessee is Dismissed."

5. The assessee is in appeal before us against the aforesaid order passed by Ld. CIT(A).

6. Before us, the Counsel for the assessee took several arguments which can be summed up as under: Firstly, the Counsel for the assessee submitted that normally under "reverse charge mechanism", the principal liability to pay service tax to the Central Government is that of Max Life. Therefore, what has been paid by the assessee to Max Life was not towards any service tax liability but was purely as per contractual obligation between the two parties under which the assessee had agreed to bear 50% service tax liability of Max life insurance. The service tax liability of Max Insurance was adjusted by Max Life against the commission income of the assessee for providing Insurance Auxiliary Services. Therefore, the first argument of the Counsel for the assessee was that the payment was under a contractual obligation for securing the business of Insurance Auxiliary Services from Max Life and the said expenditure was incurred purely out of business necessity and hence liable to be allowed as a deduction under Section 37 of the Act. Secondly, such payment was neither an offence nor prohibited by law, since the liability to pay service tax was that of Max Life and not the assessee. If Max Life had illegally kept the service tax with itself and not deposited the same with the Government, then it was Max Life which had committed an offence and not the assessee. Therefore, the rigour of Explanation to Section 37(1) of the Act cannot be extended to cover such expenditure. Thirdly, the Counsel for the assessee submitted that the purpose behind the sharing of service tax laibility was to facilitate the growth of insurance business of the assessee, which

cannot be termed as either unlawful or illegal. Accordingly, in light of the above submissions, the Counsel for the assessee submitted that the Ld. CIT(A) has erred in facts and in law in upholding the order of the Assessing Officer in disallowing such expenditure in the hands of the assessee.

7. In response, Ld. D.R. placed reliance on the observations made by the Assessing Officer and Ld. CIT(A) in their respective orders.

8. We have heard the rival contentions and perused the material on record.

9. On going through the facts of the case, we observe that the assessee earned commission income from Max Life Insurance Company Ltd. (Max Life) during the year under consideration. As per "contractual agreement" between the assessee and Max Life, the assessee was to share 50% of the service tax payable by Max Life on such Insurance Auxiliary Services. Accordingly, Max Life paid "net commission" to the assessee after deducting assessee's 50% share in service tax agreed to be borne by the assessee in view of contractual arrangement between them. Such expenses with respect to 50% of service tax payable by Max Life borne by the assessee was disallowed by the Assessing Officer under Section 37 of the Act. In our considered view, the Ld. CIT(A) failed to appreciate certain vital aspects of the arrangement. Firstly, we observe that what was paid by the assessee was arising out of a "contractual agreement" with Max Life to share the service tax liability, which under law was to be borne by Max Life. It is nobody's case that under law, in respect of the aforesaid services, the liability to pay such services tax was that of the assessee and such service tax liability was under law was

admittedly required to be borne by Max Life under "reverse charge" mechanism. The Assessing Officer took note of the fact that Max Life had kept the service tax paid by the assessee with itself and had not deposited this amount with the Government as per law. However, though this may constitute an offence on part of Max Life, but so far as assessee is concerned, this should not have any impact on the expenditure amounting to Rs. 5,82,60,619/- claimed by the assessee under Section 37 of the Act since the same was arising purely out of a contractual arragement between two parties. Further, on perusal of the contract terms, it is apparent that such agreement was entered into purely with a view to generate commission income from Max Life and in absence of such contractual arrangement, such work of providing Insurance Auxiliary Services could not have been secured by the assessee, from Max Life. Therefore, in our considered view, the underlying amount paid by the assessee qualifies as an expenses incurred by the assessee in order to secure the business of earning commission income from Max Life and such amount does not partake the character of service tax liability since such service tax liability was, under law never that of the assessee. Such service tax liability was essentially that of Max Life under "reverse charge" mechanism. Further, we also note that there is no specific provision which prohibits entering into such contractual agreement for sharing service tax liability and hence such agreement cannot be held to be an offence and hence prohibited by Explanation to Section 37 of the Act. As regards, the Assessing Officer's contention that the amount in question was collected by Max Life from assessee but was not deposited to with the Government and was kept for itself, whereas the assessee had booked the same as an expenses, we observe that as per the provision of Section 2(1)(d) of the Service Tax Rules,

1994 such service tax liability was that of Max Life and not that of the assessee. Therefore, in our considered view, the underlying amount of service tax which was agreed to be borne by the assessee does not partake the character of service tax liability, but is a "contractual arrangement" entered into between Max Life Insurance with a view to secure the business of Insurance Auxiliary Services from Max Life. Accordingly, in view of our observations, in the foregoing paragraphs of the order, we are of the considered view that such expenses should be allowed to the assessee under Section 37 of the Act.

10. In the result, the assessee's appeal is allowed.

11. Since, common facts and issues for consideration are arising for both the years under consideration, the appeal of the assessee is allowed for A.Y. 2012-13 as well.

12. In the combined result, both the appeal of the assessee are allowed.

This Order is pronounced in the Open Court on 14/02/2025

Sd/-	**Sd/-**
(DR. BRR KUMAR)	**(SIDDHARTHA NAUTIYAL)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Ahmedabad; Dated 14/02/2025

TANMAY, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad