

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH-COURT NO.1

Service Tax Appeal No. 70377 of 2018

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/ST/002/2017-18 dated 03.08.2017 passed by Commissioner Central GST & Central Excise, Lucknow)

M/s T.S. Motors India Private Ltd.
10, Nawal Kishore Road, Hazratganj, Lucknow

....Appellant

Versus

**Commissioner of CGST & Central Excise,
Lucknow**

....Respondent

APPEARANCE:

Ms. Rinki Arora, Advocate for the Appellant
Shri S. Shekhar, Authorized Representative of the Department

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

FINAL ORDER NO. 70112/2022

Date of Hearing: 14.06.2022

Date of Decision:17.06.2022

JUSTICE DILIP GUPTA

This appeal seeks the quashing of the order dated 03.08.2017 passed by the Commissioner, Central GST and Central Excise, Lucknow¹ by which a portion of the demand raised in the show cause notice has been confirmed and a portion of the demand has been dropped.

2. The appellant is engaged in providing business auxiliary service in terms of section 65(105)(zzb) of the Finance Act, 1994². On scrutiny of the records of the appellant for the period from 2004-2005 to 2007-2008 by officers of the Central Excise and Service Tax, Lucknow it was noticed

1 . the Commissioner

2. the Finance Act

that the appellant had not paid service tax on several items of work though these were part of the service rendered by the appellant under business auxiliary service.

3. A show cause notice dated 24.10.2009 was, therefore, issued to the appellant demanding service tax by invoking the extended period of limitation as contemplated under section 73(1) of the Finance Act. All that was stated in connection with the invocation of the extended period of limitation in the show cause notice is:

"Accordingly, it appears that the party has suppressed the value of taxable service to the tune of Rs. 12,84,20,581/- shown in Sl. No. 10 of the table. (RUD-2-schedule 13 of the Profit and Loss Account for the year 2004-05 to 2007-08) as they have reflected the assessable value/taxable value of the services far less than what is shown in their balance sheet. "

4. The Commissioner in the order dated 03.08.2017 held that the extended period of limitation was rightly invoked and the observations are as follows:-

"I find from the above discussion & findings that the party has evaded payment of Service Tax to the tune of Rs. 85,16,371- (including Ed. Cess and S.H. Ed. Cess) by suppressing correct value of taxable service. In view of this, it is clear that if audit of the records of the party was not undertaken by the Department, the said evasion of Service Tax would not have been unearthed. Therefore, I hold that the provision for extended period of five years under Section 73(1) of the Finance Act, 1994 was rightly invoked in the case and the party is also liable for penal action under section 78 of the Act. Since penalty is imposable upon the party under section 78 of the Act, I am inclined not to impose any penalty under section 76 of the Act. "

5. Ms. Rinki Arora, learned Counsel for the appellant submitted that the extended period of limitation could not have been invoked in the facts and circumstances of the case as it was not a case of suppression of facts, much less suppression of facts with intent to evade payment of service tax.

6. Shri S. Shekhar, learned authorized representative appearing for the Department, however, supported the impugned order and submitted that the Commissioner was justified in holding that the extended period

of limitation had correctly been invoked. Learned authorized representative also pointed out that the show cause notice did state that the appellant had failed to pay service tax with intent to evade payment of service tax.

7. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

8. The issue that arises for consideration in this appeal is as to whether the Department was justified in invoking the extended period of limitation of five years, because admittedly the show cause notice was issued on October 24, 2009 for the period 2004-2005 to 2007-2008.

9. In this connection it would be appropriate, at this stage, to reproduce Section 73 of the Act which deals with recovery of service tax not levied or paid or short levied or short paid or erroneously refunded as it stood at the relevant time. It is as follows;

"73.(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted."

10. It would, therefore, be seen that where any service tax has not been levied or paid, the Central Excise Officer may, within one year from the relevant date, serve a notice on the person chargeable with the service tax which has not been levied or paid, requiring him to show cause why he should not pay amount specified in the notice.

11. The relevant date has been defined in section 73 (6) of the Act as follows;

"73(6) For the purpose of this section, "relevant date" means,-

- (i) In the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short paid-
 - (a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;
 - (b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;
 - (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder; "

12. The proviso to section 73(1) of the Act stipulates that where any service tax has not been levied or paid by reason of fraud or collusion or wilful suppression or suppression of facts or contravention of any of the provisions of the Chapter or the rules made under with intent to evade payment of service tax, by the person chargeable with the service tax, the provisions of the said section shall have effect as if, for the word "one year", the word "five years" had been substituted.

13. It is correct that section 73 (1) of the Act does not mention that suppression of facts has to be 'wilful' since 'wilful' precedes only mis-statement. It has, therefore, to be seen whether even in the absence of the expression "wilful" before "suppression of facts" under section 73(1) of the Act, suppression of facts have still to be wilful with an intent to evade payment of service tax. The Supreme Court and the Delhi High Court have held that suppression of facts has also to be 'wilful' with an intent to evade payment of service tax.

14. Before adverting to the decisions of the Supreme Court and the Delhi High Court, it would be useful to reproduce the proviso to section 11A of Central Excise Act, 1944³, as it stood when the Supreme Court

explained "suppression of facts" in **Pushpam Pharmaceutical Co. vs. Commissioner of Central Excise, Bombay**⁴ and which has been reproduced in the judgment of the Delhi High Court and it is as follows:

"11A: Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of-

- (a) fraud; or
- (b) collusion; or
- (c) any wilful misstatement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under Section 11AA and a penalty equivalent to the duty specified in the notice."

15. In **Pushpam Pharmaceuticals Co.** the Supreme Court examined whether the Department was justified in initiating proceedings for short levy after the expiry of the normal period of six months by invoking the proviso to section 11 A of the Excise Act. The proviso to section 11A of the Act carved out an exception to the provisions that permitted the Department to reopen proceedings if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from the relevant date under the circumstances mentioned in the proviso, one of it was suppression of facts. It is in this context that Supreme Court observed that since 'suppression of fact' had been used in the company of strong words such as fraud, collusion, or wilful default, suppression of facts must be deliberate and with an intent to escape payment of duty. The observations are as follows;

"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. **But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts.** The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different

4. 1995(78) ELT 401 (SC)

that what is explained in various dictionaries unless of court the context in which it has been used indicates otherwise. **A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty.** Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(emphasise supplied)

16. This decision was referred to by the Supreme Court in **Anand Nishikawa Company Ltd. vs. Commissioner of Central Excise⁵** and the observations are as follows:

"**26.....** This Court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay, while dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act held that the term must be construed strictly. It does not mean any omission and the act must be deliberate and willful to evade payment of duty. The Court, further, held :-

"In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act."

17. These two decisions in **Pushpam Pharmaceuticals** and **Anand Nishikawa Company Ltd.** were followed by the Supreme Court in the subsequent decision in **Uniworth Textile Limited vs. Commissioner of Central Excise, Raipur⁶** and the observation are:

5. 2005 (188) ELT 149 (SC)

6. 2013 (288) ELT 161 (SC)

"18. We are in complete agreement with the principal enunciated in the above decisions, in light of the proviso to section 11A of the Central Excise Act, 1944."

18. The Supreme Court in **Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I**⁷ held:

"10. The expression 'suppression' has been used in the proviso to [Section 11A](#) of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under [Section 11-A](#) the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

19. The Delhi High Court in **Bharat Hotels Limited vs. Commissioner of Central Excise (Adjudication)**⁸ also examined at length the issue relating to the extended period of limitation under the proviso to Section 73 (1) of the Act and held as follows;

"**27.** Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word 'suppression' in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in *Uniworth (supra)*, "misstatement or suppression of facts" does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid excise duty.

XXXX

Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a *scenario* where there is a mere omission or mere failure to pay duty or take out a license without the presence of such intention."

XXXX

The Revenue has not been able to prove an intention on the part of the Appellant to avoid tax by suppression of mention facts. In fact it is clear that the Appellant did not have any such intention and was acting under a bonafide belief"

7. 2007 (216) ELT 177 (SC)

8. 2018 (12) GSTL 368 (Del.)

20. It is, therefore, clear that even when an assessee has suppressed facts, the extended period of limitation can be evoked only when 'suppression' is shown to be wilful with intent to evade the payment of service tax.

21. In the present case, as noticed above, the show cause notice merely mentions that the appellant suppressed the value of taxable service. The show cause notice does not mention that suppression was with an intention to evade payment of service tax. The submission of learned authorized representative appearing for the Department that the show cause notice also mentions that suppression was with an intent to evade payment of service tax cannot be accepted because the said allegation is in regard to levy of penalty under sections 76 and 78 of the Finance Act and not section 73(1) of the Finance Act. This is clear from the portion of the show cause notice relied upon by the learned authorized representative which is reproduced below:-

" The party have also failed to pay service tax in terms of section 68 of the Act readwith Rule 6 of the Rules with intent to evade payment of service tax, therefore, it appears that they are liable to pay penalty under section 76 and 78 of the Act. "

22. The Commissioner, however, as noticed above, observed that the appellant had evaded payment of service tax by suppressing the correct value on taxable service. The finding has not only been recorded without giving reasons, but even otherwise the order cannot go beyond the show cause notice.

23. In **Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd.**⁹, the Supreme Court observed that it was well settled that a show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest and if there was no invocation of

9. (2007) 8 (2007) 8 SCC 89

Rule 7 of the Valuation Rules, 1975 in the show causes notice, it would not be open to the Commissioner to invoke the said Rule.

24. In **Nestor Pharmaceuticals Ltd. v. Commissioner of Central Excise, Delhi**¹⁰ a Division Bench of the Tribunal observed that the Commissioner (Appeals) cannot go beyond the scope of the show cause notice and that no matter can be decided on a ground other than the grounds raised in the show cause notice and for this reason the impugned order was set aside. In **Tata Johnson Controls Automotive v. Commissioner of Customs, Mumbai**¹¹ a Division Bench of the Mumbai Tribunal observed that it was not open to the Commissioner (Appeals) to make out a new case in the order passed by the Commissioner and, therefore, the Order passed by the Commissioner (Appeals) deserved to be set aside on this ground alone.

25. It, therefore, follows that the Commissioner was not justified in holding that the extended period of limitation under the proviso to section 73(1) of the Finance Act was correctly invoked.

26. Thus, for all the reasons stated above, the order dated 03.08.2017 passed by the Commissioner cannot be sustained. It is accordingly set aside and the appeal is allowed.

(Order pronounced in the open Court on 17.06.2022)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(RAJU)
MEMBER (TECHNICAL)**

Rekha

10. 2000 (116) ELT 477 (Tri.)

11. 2004 (167) ELT 93 (Tri. Mum)