CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 249 OF 2016

(Arising out of Order-in-Original No. 02/YG/Commr/Adjn/ST/FBD-I/2015-16 dated 29.10.2015 passed by the Commissioner of Central Excise & Service Tax, Faridabad-II)

Ishant Sharma **...Appellant**
3186, 1st Floor, Steet No. 09,
Ranjeet Nagar,
New Delhi-110008

Versus

Commissioner of Central Excise and Service Tax, **...Respondent**
Faridabad-II, New CGO Complex,
NH-4, Faridabad

APPEARANCE:

Ms. Reena Khair, Ms. Shreya Dahiya, Ms. Vrinda Bagaria and Shri Subham Jaiswal, Advocates for the appellant

Dr. Radhe Tallo, Authorized Representative for the Department

WITH

SERVICE TAX APPEAL NO. 50331 OF 2016

(Arising out of Order-in-Original No. 02/YG/Commr/Adjn/ST/FBD-I/2015-16 dated 29.10.2015 passed by the Commissioner, Central Excise & Service Tax, Faridabad-I)

Commissioner, Service Tax Commissionerate, Delhi-III, **...Appellant**
7th Floor, Block No. 11, CGO Complex,
Lodhi Road, New Delhi-110003.

Versus

M/s. Ishant Sharma, **...Respondent**
3186, 1st Floor,
Ranjeet Nagar,
New Delhi-110008

APPEARANCE:

Dr. Radhe Tallo, Authorized Representative for the Department

Ms. Reena Khair, Ms. Shreya Dahiya, Ms. Vrinda Bagaria and Shri Subham Jaiswal, Advocates for the appellant

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 17.05.2023
Date of Decision: 11.08.2023

FINAL ORDER NO's 51044-51045/2023

JUSTICE DILIP GUPTA:

Service Tax Appeal No. 249 of 2016 has been filed by Ishant Sharma [1] to assail the order dated 29.10.2015 passed by the Commissioner, Central Excise and Service Tax, Faridabad-I[2] by which the demand of service tax amounting to Rs. 59,28,053/- has been confirmed with interest and penalty by invoking the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act, 1994[3].

2. **Service Tax Appeal No. 50331 of 2016** has been filed by the department to assail that portion of the order dated 29.10.2015 passed by the Commissioner that bifurcates the player fee between fee for playing cricket and for value of services in the ratio of 80% to 20% and accordingly, confirms the demand for the value of services only.

3. The order dated 29.10.2015 passed by the Commissioner adjudicates the two show cause notices dated 26.04.2012 and 17.04.2014 that were issued for the period 2008-09 to 2010-11 and the period 2012-13 respectively.

4. The first show cause notice dated 26.04.2012, after referring to Schedule-I to the Agreement that provides that the appellant was to be paid the sum of Rupees Three Crores and Eighty Lakhs for the two types of activities namely for playing cricket and for business support,

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1. **the appellant**
2. **the Commissioner**
3. **the Finance Act**

alleges that the amount was taken by the appellant from M/s. Knight Riders Sports Private Limited[4] for providing 'business support services'. Accordingly, the appellant was called upon to show cause as to why:

> "i) Service Tax amounting to Rs. 1,25,24,800/- (including Edu./SHE Cess) in respect of services provided under 'Business Support Services' should not be demanded and recovered from them under provision of Section 73(1) of the Act by invoking the extended period;
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> ii) Interest at the appropriate rates on the aforementioned amount should not be recovered from him under Section 75 of the Finance Act, 1994; and
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> iii) Penalty should not be imposed on him under the provisions of Section 76, 77 and 78 of the Finance Act, 1994 for the aforementioned contraventions."

5. The second show cause notice dated 17.04.2014, after noticing that with effect from 01.07.2012 service tax was payable on all the services except those specified in section 66D of the Finance Act, 1994[5] or those exempted under any Notification, alleges that the activities carried out by the appellant are neither covered in the Negative List nor exempted by any Notification and, therefore, would be leviable to service tax. Accordingly, the appellant was called upon to show cause as to why:-

> "(i) Assessment for the period 2012-13 should not be done under Section 72 of Finance Act, 1994 under Best Judgment Assessment and value of taxable services

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4. Knight Riders
5. the Finance Act

should not be determined with Service Tax payable as proposed at para 6 of this Show Cause Notices.

(ii) Service Tax of Rs. 34,23,093/- including Education Cess/Sec. Higher Education Cess (Rs. Thirty Four Lakh Twenty Three Thousand Ninety Three Only,) in respect of services provided under 'Business Support Services' and 'Brand Promotion Service' should not be demanded and recovered from them under proviso to Section 73(1) of the Act by invoking the extended period of limitation;

(iii) Interest at the appropriate rates on the aforementioned amount should not be recovered from him under Section 75 of the Finance Act, 1994;

(iv) Penalty should not be imposed on him under Section 76, of the Finance Act, 1994 for the aforementioned contraventions;

(v) Penalty should not be imposed under Section 77, of the Finance Act, 1994 for the aforementioned contraventions."

6. The appellant plays cricket at the National and International Level. By an Agreement dated 09.05.2008, the appellant was engaged by the Knight Riders to play cricket in the Indian Premium League[6] for three seasons commencing from 2008. The show cause notice dated 26.04.2012 was issued to the appellant alleging that in terms of the Agreement, the payments received by the appellant would be taxable under 'business support services', as the appellant granted rights to Knight Riders to get photographed, filmed, televised, identified, record

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6. IPL

his performance and had agreed to wear and use only team clothing. The appellant submitted a reply dated 05.12.2013 to the show cause notice, disputing the allegations raised in the notice. The appellant, amongst other grounds, submitted that he had been engaged by Knight Riders to play cricket, which is not a taxable service under the Finance Act. He further submitted that the contract with Knight Riders was an employment contract, and the relationship was that of an employer and employee, which was also not taxable under the Finance Act. Subsequently another show cause notice dated 17.04.2014 was issued to the appellant raising a service tax demand. The appellant disputed the allegations in the said notice by a reply dated 22.06.2015 and reiterated that the Agreement between Knight Riders and the appellant was that of employment, which was not taxable under the Finance Act. The Commissioner, by order dated 29.10.2015, confirmed part of the demand of service tax with applicable interest by taking recourse to the extended period of limitation contemplated under section 73(1) of the Finance Act. For the period prior to July 2012, the Commissioner, based on clause 4.8 of the Agreement, held that only 20% of the consideration received by the appellant pursuant to the Agreement would be attributable to promotional activities and liable to service tax. The Commissioner, therefore, dropped the demand for the balance 80% of the player fees. For the period post 2012, the Commissioner confirmed the demand for the entire amount of remuneration received by the appellant.

7. The Commissioner found that the consideration received by the appellant would be towards business support service and the relevant findings are as follows:

> "13.5 As such considering the pure business model of the IPL franchisee teams, I find that the argument that the remuneration received by the noticee is for playing cricket and not for providing support services is incorrect. It is public knowledge that the franchisee teams need to participate in open bids for the players and the team owner bidding the highest for a player only gets the participating player for the entire tournament. **I find from this mechanism adopted for determining the contract fee that it is the endorsement value and the pull factor of the player in addition to their playing abilities that contribute to the said amount which in all known cases are much more than the standard player fee the said players are entitled to and get paid by the National Cricket Body** (like BCCI in India) while playing for their national teams.
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> 13.6 **Accordingly, I find that the consideration received by Sh. Ishant Sharma is for providing support services in the business with M/s. KRSPL and the same are in the nature of business support services. A part of the services became classifiable as 'Brand promotion services' with effect from 1.7.2010 i.e. from the date of insertion of the said service."**

8. The Commissioner however, held that since 80% of the consideration was towards playing cricket, service tax would be payable only on 20% of the remaining consideration. The relevant findings recorded by the Commissioner on this aspect are as follows:

> 15.3 **I find from the submissions made in defence that it has been contended that it was a single contract which can't be split up. It has also been contended that it is not possible to compute as to how much time was spent on playing and how much time was spent on the other activities like promotion, endorsement etc..** It has further been contended in additional submissions that the relationship between the notice and franchisee is that of an employee to an employer. **In this regard, I also**

have no doubt that the entire remuneration is not for providing support services and that a certain component of the remuneration was for playing cricket. I also agree that no such split has been given by the notice in their reply to the show cause notice. **To examine this aspect as also the validity of the argument that the relationship between the notice and franchisee is that of an employee to an employer, I proceed to examine the terms of their contract titled "Indian Premier League Playing Contract".**

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15.7 **The above discussed clauses and the contract between the notice and the franchisee definitely do not read the employer-employee contract.** The contract clearly recognizes the endorsement value of the player and there are sufficient in built provisions to ensure the comfort of the player. In addition the expenses incurred for any of the personal appearances are sought to be reimbursed by the franchisee had declared being a mere employee of the franchisee. There was absolutely no need to build any conditions regarding the number of appearances and the maximum duration of such appearances, had the relationship been that of an employer and employee. Further, had an employee been employed to play matches not being played, no employer would have allowed him to retain the remuneration paid in advance. **In the present case without playing the player is entitled to retain upto 20% or 10% subject to conditions. It is clearly a 'Celebrity' contract where both the core ability of the celebrity as also his endorsement value were sought to be exploited by a business enterprise.**

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15.10 **In view of the above I find that for both the periods i.e. prior to 1.7.2012 and after 1.7.2012, Sh. Ishant Sharma is liable to pay Service Tax on the remuneration received from the IPL franchisee and these services provided by the noticee to M/s KRSPL are appropriately**

> **classifiable under 'Business Support Services' as defined under Section 65(104c) and are held taxable in terms of Section 65(105) (zzzq) of Finance Act, 1994. However, keeping in view the terms of the contract where maximum upto 20% of the fee agreed in terms of the contract, is only retainable if for some reason the player fails to play cricket, I find that not more than 80% (should be 20%) of the player fee can be termed as the value of services provided by Sh. Ishant Sharma and that the balance 80% remuneration is meant for playing cricket.**"
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> **(emphasis supplied)**

9. The extended period of limitation was also examined by the Commissioner and it was held that it had been correctly invoked. The findings are as follows:

> "15.11 Another contention of the Noticee is that the demand is issued beyond the normal period of limitation and that as such the demands are time barred. **However, I find that the copies of the contracts etc. disclosing the details of the nature of engagement of the Noticee with the Franchisee KRSPL were not in the knowledge of the jurisdictional Service Tax officers till the time the Department initiated the enquiries in 2010.** It is also seen that Shri Sharma was registered with Service Tax for 'Business Auxiliary Service' but was not paying any Service Tax including on the services rendered in pursuance to his contract with KRSPL, though there is nothing on record to indicate that Shri Sharma informed the department about this contract or that he ever sought the opinion/confirmation from the department regarding the taxability of the services provided by him. **As such I find that it is not the case where there was an issue of interpretation or doubt about the taxability of the services provided by the Noticee. The notice did get himself registered with service tax which actually shows that he was aware that the services provided by him were or could be taxable but instead of seeking any clarification from the**

> **department to be certain about the taxability or otherwise, Shri Ishant Sharma chose to keep mum and wait till the department finds out. But for the enquiries the details of the terms of contract would not have come to light as these contracts are not available in public domain and as such it's a clear case of suppression and non-payment even though registered.** I find that all the case laws cited in defence are those of central excise duty where the central excise officers have many occasions of interaction and thus allegations regarding suppression of information or misstatement are difficult to sustain, but the said case laws do not apply in the current case where the tax officials couldn't have come to know about the services but for the enquiries conducted by the Department. **I also find that the noticee did not file the ST-3 returns and not paid due service tax to the government, even though in terms of the contract M/s KRSPL must have paid applicable service tax to the notice. As such I find that extended period in terms of Section 73 is invokable and that as such the demands raised are not hit by limitation.** The invocation of the provision of Section 72(a) of the Act requiring determination of the assessment of the service tax liability is justified as no information was provided by the Noticee nor has the same been contested in reply to the SCN dated 17.04.2014."
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> **(emphasis supplied)**

10. **Service Tax Appeal No. 249 of 2016** has been filed by the appellant to assail that part of the order dated 29.10.2015 that has confirmed the demand with interest, while **Service Tax Appeal No. 50331 of 2016** has been filed by the department to assail that part of the order dated 29.10.2015 that has dropped the demand.

11. Ms. Shreya Dahiya, learned counsel for the appellant, made the following submissions:

(i) The Agreement between the appellant and the Knight Riders is that of employment and, therefore, not taxable. In this connection reliance has been placed upon the decisions of the Tribunal in **Shri Karn Sharma** vs. **Commissioner of Central Excise & S.T., Meerut-I**[7], **CCE & ST, Chennai** vs. **L. Balaji and others**[8] and **Yusufkhan M Pathan and Irfankhan Pathan** vs. **C.C.E. & S.T. – Vadodara-II**[9]**;**

(ii) Prior to July 2012, the definition of 'taxable services' under section 65 of the Finance Act did not include any activity carried out by a person during his employment. Post July 2012, the definition of services, under section 65B(44) excludes any service provided by an employee to the employer in the course of employment. Therefore, the demand of service tax for the period 2008-2011 raised in the first show cause notice and for the period 2012-13 raised in the second show cause notice are liable to be set aside;

(iii) The first show cause notice dated 26.04.2012, raises the demand of service tax on the appellant under the category of 'business support services' as defined under section 65(104c) of the Finance Act. The services covered under the definition are back-end office support, commission agent or administrative work. There is no finding in order as to how the activities undertaken by the appellant are supporting the business of Knight Riders in terms of the definition provided under the Finance Act;

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7. 2018 (4) TMI 111 – CESTAT Allahabad
8. 2019 (5) TMI 377 – CESTAT Chennai
9. 2023 (1) TMI 938 – CESTAT Ahmedabad

(iv) The agreement is not a divisible contract and there is no component of the fees attributable towards promotional activities. Even if it is assumed that the appellant is doing promotional activities, the agreement is indivisible. There is no clause in the agreement bifurcating the fees attributable to the activity of playing cricket and the activity of promotion. The impugned order, on the basis of clause 4.8 of the Agreement, alleges that even if the appellant does not play any match in the tournament, he is entitled to receive 10%/20% of the player's fee, which shows that this amount is in relation to the promotional activities undertaken by the appellant. This finding is not correct. The said amount is merely to retain the player and to block him from playing for any other team or tournament;

(v) The demand for the period 2012-13 is erroneous as the taxable value has been increased arbitrarily by 20%;

(vi) The extended period of limitation could not have been invoked in the facts and circumstances of the case; and

(vii) Penalties under sections 76, 77 and 78 of the Finance Act could not have been imposed on the appellant.

12. Dr. Radhe Tallo, learned authorized representative appearing for the department, however, supported the impugned order.

13. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

14. The entire demand has been raised on the appellant on the basis of clauses 4 and 5 of the Agreement. Clause 4 of the Agreement merely

stipulates that Knight Riders can photograph the appellant, record his performance and televise it. In terms of clause 5 of the Agreement, the appellant is required to wear the team clothing provided by Knight Riders. The impugned order records that the appellant undertook promotional activities pursuant to the contract, which service would be taxable.

15. It clearly transpires from the Agreement that the appellant has been employed by the Knight Riders to play cricket in the IPL tournaments. The appellant is under the control of Knight Riders and has to act in the manner instructed by them. The activity undertaken by the appellant pursuant to the contract of employment would, therefore, not be a 'service' and, therefore, not leviable to service tax.

16. This issue was examined by the Tribunal in **Yusuf Khan M Pathan** and **Irfan Khan Pathan** and the relevant portion of the decision is as follows:-

> "5.2 Further, on perusal of the agreement title "Indian Premiere League Playing Contract" it clearly emerges that it is the appellant who is recognized as player first. Clause -2 of this agreement even makes it all the more clear that the franchisee is engaging players as professional cricketer who shall be employed by the franchisee. From this, it is abundantly clear that a person who has earned the reputation and recognition as a player is employed by the franchisee and it is not the other way round. The revenue while referring to clause -5 of the contract wants to impress that by virtue of the dress code, a player is obligated to his franchisee. On going through the clauses 5.2., 5.3, 5.4 which prohibits commercial usage of supplied clothing. **Therefore, if the same is considered as a binding condition, then its all the more strengthens the employer –employee relationship and we do not see anything wrong with employer prescribing uniform code with his employee.** Further, as seen from the clause 2 and clause 8.1(b) read with

> other clause of the agreement , there is no doubt that appellant has been appointed/ engaged by the respective Franchisee under the agreement of "employment". The agreement create the relationship of "employer – employee". After carefully considering the facts of the case, we find that the employer – employee relationship cannot be disputed and therefore the decisions relied upon by the Learned Counsel are squarely applicable to the present case. Though there are many cases decided in respect of various cricket players of IPL teams which are on the identical facts and issue of the present case."
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> **(emphasis supplied)**

17. Neither of these clauses in any manner indicate that the appellant is providing any support or assistance to Knight Riders to carry out its business. The appellant is not undertaking any business promotion activities. The appellant is an employee of Knight Riders. Clauses 4 and 5 of the Agreement only stipulate certain conditions which the appellant has to follow as an obligation under the contract of employment. The player's fee in the Agreement is a fixed amount which is not linked to or subject to change pursuant to any alleged promotional activities to be performed under the Agreement. The fee is payable to the appellant for participating in the matches organized in the tournament regardless of whether he does or does not undertake any promotional activity. This clearly indicates that the consideration paid under the contract is for the activity of playing cricket and not for any promotional activity.

18. This is also what was held by the Tribunal in **Yusuf Khan M Pathan** and **Irfan Khan Pathan** and the relevant portion is reproduced below:

> "5.1 The issue that arises for consideration is whether the activity carried out by the appellants would be taxable to service tax under Business support service. We find

> that though in the impugned order the appellants were made liable to pay service tax under the business support service but as, no specific entry as mention in above definition of "Business Support service" has been shown to be applicable to levy service tax. It is not appearing from the finding of the impugned order as how the activity of appellant covered under the above category of services. The apparel that they had to wear was team clothing, which bears the brand/marks of various sponsors. The Appellants was not providing any service as an independent individual. In our opinion, it cannot be said that the appellants was rendering any services which could be classified as business support services. Appellants are not promoting any particular brand or product or service and also not taking part in any business activity of promoting the sale of any product or service of any entity. The entry for "Business Support Service" envisages taxing activities which are needed for doing business activities almost in the nature of outsourcing of activities connected with business. We find that the definition of "Business Support Service" does not specifically cover the activity done by Appellant."

19. The Commissioner also committed an error in holding, because of clause 4.8 of the Agreement, that 20% of the consideration received by the appellant would be towards promotional activities and the remaining 80% would be towards playing fee. Clause 4.8 of the Agreement merely provides that if the appellant does not play any match in the tournament, he would be entitled to receive 10%/20% of the player fee. It cannot be said that this amount of 10%/20% is towards promotional activities. Infact, this amount is paid to retain the player and not because of promotional activities.

20. The second show cause notice has also, without any basis, increased the player fees for the year 2011-12 by 20%. In any view of the matter, since the demand cannot be sustained, it is not necessary to discuss this finding.

21. Learned counsel for the appellant also submitted that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

22. The demand for both the periods has been confirmed under the proviso to section 73 (1) of the Finance Act. The impugned order seeks to uphold the invocation of the extended period of limitation for the reason that the appellant had registered himself with the service tax department and instead of seeking any clarification from the department about the taxability of the services provided by him, kept quiet and it is only through enquiries that the details of the terms of contract came to the notice of the department. Thus, the appellant suppressed facts. There is no finding in the impugned order that the so called suppression was with an intent to evade payment of service tax.

23. There is substance in the contention advanced by the learned counsel for the appellant that mere suppression of fact is not enough as it has also to be conclusively established that suppression is wilful with an intent to evade payment of service tax.

24. It is correct that section 73 (1) of the Finance Act does not mention that suppression of facts has to be "wilful" since "wilful" precedes only misstatement. 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 Finance Act, suppression of facts has still to be willful and with an intent to evade payment of service tax. The Supreme Court and the Delhi High Court have held that suppression of facts has to be "wilful" and there should also be an intent to evade payment of service tax.

25. 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, 1944, as it stood when the Supreme Court explained "suppression of facts" in **Pushpam Pharmaceutical Co.** vs. **Commissioner of Central Excise, Bombay[10].** It is as follows:

> "**11A:** Where any duty of excise has not been levied or paid or has been short-levied or short-pain or erroneously refunded, by the reason of-
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> (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 of the rules made thereunder with intent to evade payment of duty
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> by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant dated, 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."

26. In **Pushpam Pharmaceuticals Company**, 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 11A of the Excise Act. The proviso to section 11A of the Excise 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 which was

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10. 1995 (78) E.L.T. 401 (SC)

suppression of facts. It is in this context that the Supreme Court observed that since "suppression of facts" has 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 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."
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> **(emphasis supplied)**

27. This decision was referred to by the Supreme Court in **Anand Nishikawa Company Ltd.** vs. **Commissioner of Central Excise**[11] 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

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11. 2005 (188) E.L.T. 149 (SC)

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."

(emphasis supplied)

28. 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, Raipur**[12] and the observation are:

> "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."

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12. 2013 (288) E.L.T. 161 (SC)

29. It will also be useful to refer to a recent decision of the Delhi High Court in **Mahanagar Telephone Nigam Ltd.** vs. **Union of India and ors.**[13] and the relevant observations are reproduced below:

> "32. **As noted above, the impugned show cause notice discloses that the respondents had faulted MTNL for not approaching the service tax authorities for clarification.** The respondents have surmised that this would have been the normal course for any person acting with common prudence. **However, it is apparent from the statements of various employees of MTNL that MTNL did not believe that the amount of compensation was chargeable to service tax and therefore, there was no requirement for seeking clarifications. Further, there is no provision in the Act which contemplates any procedure for seeking clarification from jurisdictional service tax authority. Clearly, the reasoning that MTNL ought to have approached the service tax authority for clarification, is fallacious.**
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> 33. **It is also important to note that MTNL had declared the receipt of compensation as income in its books of accounts. The final accounts of MTNL are in public domain. In the circumstances, the allegation that MTNL had suppressed any material facts from the Service Tax Department is wholly without any basis.**
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> 34. **Mr. Harpreet Singh, learned counsel appearing for the respondents, submitted that the allegation that MTNL had suppressed material facts was based on non-disclosure of the receipt of compensation in its service tax returns.** However, he did not contest the contention that there is no provision in the Act to disclose receipt of any funds in the service tax returns, which are not regarded as consideration for rendering services (whether taxable or exempt). In the circumstances, there is no basis for the allegation that MTNL had suppressed

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13. W.P. (C) 7542/2018 decided on 06.04.2023

any material facts. **Mere non-disclosure of a receipt, which a party believes is not chargeable to service tax, in the service tax returns, would not constitute suppression of facts within the proviso to Section 73(1) of the Act, unless it is, ex facie, clear that the receipt is on account of taxable services or it is unreasonable for any assessee to believe that the receipt does not fall in the net of service tax.** In cases where there is a substantial dispute as to whether receipt of any amount is on account of taxable service – as in the present case – the nondisclosure of the same in the service tax return cannot, absent anything more, lead to the conclusion that the assessee is guilty of suppression of facts to evade tax.

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41. **In the facts of this case, the impugned show cause notice does not disclose any material that could suggest that MTNL had knowingly and with a deliberate intent to evade the service tax, which it was aware would be leviable, suppressed the fact of receipt of consideration for rendering any taxable service.** On the contrary, the statements of the officials of MTNL, relied upon by the respondents, clearly indicate that they were under the belief that the receipt of compensation/financial support from the Government of India was not taxable. Absent any intention to evade tax, which may be evident from any material on record or from the conduct of an assessee, the extended period of limitation under the proviso to Section 73(1) of the Act is not applicable. The facts of the present case indicate that MTNL had made the receipt of compensation public by reflecting it in its final accounts as income. **As stated above, merely because MTNL had not declared the receipt of compensation as payment for taxable service does not establish that it had willfully suppressed any material fact.** MTNL's contention that the receipt is not taxable under the Act is a substantial one. No intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return.

> 42. We agree with the contention that the impugned show cause notice was issued beyond the period of limitation and is, thus, liable to be set aside."
>
> **(emphasis supplied)**

30. A perusal of the aforesaid judgment of the Delhi High Court reveals that when an assessee believes that the amount received was not chargeable to service tax, there is no requirement for seeking clarification, more particularly when the Finance Act also does not contemplate any procedure for seeking clarification from the jurisdictional service tax authority. The Delhi High Court also emphasised that it is only when an assessee knowingly and deliberately with an intent to evade payment of service tax, which it was aware would be leviable, suppresses receipt of consideration for rendering a taxable service, that the extended period of limitation can be invoked.

31. In view of the aforesaid decision it has to be held that it was not necessary for the appellant to seek a clarification from the department. The extended period of limitation could not, therefore, have been invoked. This apart, in the absence of any allegation in the show cause notice that suppression was with an intent to evade payment of service tax, the extended period of limitation could also not have been invoked.

32. The entire demand has been confirmed by invoking the extended period of limitation. As the extended period of limitation could not have been invoked in the present case, the demand deserves to be set aside.

33. The appeal filed by the department to assail that portion of the order dated 29.10.2015 that bifurcates the player fee between fee for playing cricket and for the value of services would, therefore, have to be dismissed.

34. The impugned order dated 29.10.2015 passed by the Commissioner is, accordingly, set aside. Service Tax Appeal No. 249 of 2016 filed by the appellant is, therefore, allowed and Service Tax Appeal No. 50331 of 2016 filed by the department is dismissed.

(Order pronounced on **11.08.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANAJANI KUMAR)
MEMBER (TECHNICAL)

Shreya, Jyoti