

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

REGIONAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 80 OF 2012-DB

(Arising out of Order-in-Original No. STC/56/Commr/Ahd/2011 dated 27 December, 2011 passed by the Commissioner of Service Tax, Ahmedabad)

M/s Adani Power Ltd.

7th Floor, Sambhav Building,
Judges Bungalow Road,
Bodakdev, Ahmedabd, 380015

..... **Appellant**

VERSUS

Commissioner of Service Tax

1st floor, Central Excise Bhavan,
Ambawadi, Near Polytechnic,
Ahmedabad

..... **Respondent**

APPEARANCE:

Shri Jitendra Motwani, Advocate for the Appellant
Shri Gobind Jha, Authorised Representative of the Respondent

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

FINAL ORDER NO. **A/11127 / 2020**

DATE OF HEARING: 24.12.2019
DATE OF DECISION: 08 .07.2020

JUSTICE DILIP GUPTA

The order dated 27 December, 2011 passed by the Commissioner of Service Tax, Ahmedabad-I¹, confirming the demand of service tax with penalty and interest has been assailed in this Appeal.

1 The Commissioner

2. The Appellant is an approved developer for developing a Power Project in sector specific Special Economic Zone² in Village Tunda and Siracha, Taluka Mundra in District Kutch. For this purpose, approval was granted by the Ministry of Commerce and Industries, Government of India, by order dated 19 December, 2006. Subsequently, the Appellant was also granted a letter of approval as a co-developer of Mundra Port on 27 February, 2009 by the Ministry of Commerce and Industries, Government of India.

3. The Appellant is in the business of generation and transmission of power. It set up a Thermal Plant at Tunda and Siracha. In regard to the service tax paid by the Appellant under reverse charge mechanism as provided for under Section 66A of the Finance Act, 1994³, the Appellant filed refund claims under the notifications issued from time to time since it was situated within SEZ.

4. An enquiry was, however, initiated against the Appellant in regard to External Commercial Borrowings⁴ transactions for setting up the power plant during the period 18 April, 2006 to 31 March, 2010, particularly in regard to ECB of US\$ 500 million from Standard Chartered Bank, London⁵ on 29 January, 2008 and ECB of US\$ 99 million from ICICI Bank, Hong Kong Bank⁶.

5. Ultimately, a show cause notice dated 27 January, 2011 was issued to the Appellant. It was stated that ECB being "lending" is covered under the definition of 'banking and other

² SEZ

³ the Act

⁴ ECB

⁵ London Bank

⁶ Hong Kong Bank

financial services' and the charges recovered by the lender, apart from the interest, shall be the gross amount charged by the service provider of such service, which would be considered as the taxable amount under Section 67 of the Act.

6. In regard to the ECB of US\$ 500 million from London Bank, the show cause notice mentions as follows :

"5.3 In the instant case, APL has entered into agreement with Standard Chartered Bank, London for arranging ECB of US\$ 500 million and paid upfront underwriting fee of Rs. 13,94,81,875/- on 25-06-2008. In the agreement the fee mentioned are commitment fee, agency fee, security agent fee and advisors fee. There is no fee in the name of upfront underwriting fee, as shown by APL, is appearing at para 13 of the agreement dated 29-01-2008. As such, herein after only the word agency fee is mentioned. As they paid agency fee to the service providers for the services to be provided in future, APL is liable to pay service tax on the value of (agency fee) of Rs.13,94,81,875/- paid on 25-06-2008 to Standard Chartered Bank, London, which is a foreign entity provided services from Outside India. APL should have paid service tax of Rs.1,72,39,960/- at the rate of 12.36% as was applicable at that point of time, latest by 05-07-2008. Their view point that their agreement was cancelled in November, 2009 and amount of agency fee was refunded to them cannot be a point under reckoning. Service tax is to be paid within the stipulated time limit prescribed in the statute adhering the law prevailing at that point of time."

7. In regard to the contention of the Appellant that it is a co-developer of Mundra Port and SEZ and so exempted from payment of service tax under the notification dated 31 March, 2004, the show cause notice mentions :

"5.4(b) This contention of APL is not tenable because this notification exempted taxable services provided to the SEZ or the unit of SEZ approved by the Development Commissioner or the Board of Approval for consumption of the service within such Special Economic Zone. But in this case, service is provided from outside India and it cannot be said that it is received and consumed within SEZ. Therefore exemption provided in this notification is not admissible to them. Further, vide notification No. 9/2009-service tax dated 03.03.2009 as amended by notification No. 15/2009-service tax dated 20-05-2009 the Central Government exempted the taxable services which are provided in relation to the authorised operations in a Special Economic Zone, and received by a developer or units of a Special Economic Zone, whether or not the said taxable services are provided inside the Special Economic Zone, from the whole of the service tax leviable

thereon under section 66 of the said Finance Act and the exemption claimed by the developer or units of SEZ shall be provided by way of refund of service tax paid on the specified services used in relation to the authorized operations in the SEZ except for services consumed wholly within the SEZ. This made it clear that from 03-03-2009, developers or units of a SEZ should pay service tax leviable thereon and subsequently may claim refund from the competent authorities irrespective of the position that whether such specified services are consumed within or outside SEZ."

8. In regard to the ECB of US\$ 99 million from Hong Kong Bank, the show cause notice mentions :

"5.6 It can be seen from the above table that they have made payment of agent fee, upfront fee and legal council fee in the months of December, 2009, January, 2010 and February, 2010 respectively. These information should have been furnished in their ST-3 filed for the second half year of 2009-10 (for the months of October, 2009 to March, 2010). Scrutiny of ST-3 return filed on 23-04-2010 for this period reveal that no information regarding payment made for these services mentioned therein. Rule 4 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 stipulates that the recipient of taxable services provided from outside India and received in India shall make an application for registration and for this purpose, the provisions of section 69 of the Act and the rules made there-under shall apply. This clearly shows that their intention was to evade payment of service tax payable thereon. From the Form ST-2, it appears that they obtained service tax registration under Banking and other financial services and management consultant services on 04-08-2010.

9. The show cause notice further mentions :

"5.8 In view of the facts stated herein above, total service tax payable by APL on commercial charges paid for availing of ECBs of US\$ 500 million and US\$ 99 million under "banking and other financial services" work out to Rs. 3,37,65,298/- and Rs. 1,90,173/- under "management consultant services". But, APL has made payment of service tax of 1,65,25,338/- & interest of Rs. 17,90,352/- under banking and other financial services and Rs. 1,90,173/- and interest of Rs. 16,798/- under management consultant service vide two e-challans both dated 09-12-2010. Therefore, it can be said that APL has not paid remaining service tax Rs. 1,72,39,960/- under "banking and other financial services" which is recoverable from them under Section 73 of the Finance Act, 1994.

10. In regard to the extended period of limitation, the show cause notice mentions:

"7.1 APL was fully aware that service tax is payable on the taxable services received by them from service providers not having office in India, still they did not pay the same. Thus, APL have contravened the provisions of-

Section 68 of the Finance Act, 1994, read with Rule 6 of the Service Tax Rules, 1994, in-as-much as they have failed to make the payment of service tax to the credit of the Government account;

Section 69 of the Finance Act, 1994 read with Rule - 4 of the Service Tax Rules, 1994 in as much as they failed to obtain service tax registration under "banking and other financial services" for the commercial charges paid and under "management consultant services" for the consultancy charges paid to foreign entities not having office in India for availing ECB;

Section 70 of the Finance Act, 1994, read with rule 7 of the Service Tax Rules, 1994, in as much as they had not declared the correct amount of charges paid by them in lieu of taxable services, received by them in the ST-3 returns filed by them.

7.2 The above facts clearly proves that APL have not paid service tax by way of willful suppression of facts and in Contravention to the provisions of Finance Act, 1994 relating to levy and collection of service tax and the Rules made there under with intent to evade payment of service tax. Therefore the service tax is recoverable from them by invoking extended period of five years as per first proviso to sub-section (1) of Section 73 of the Finance Act, 1994."

11. The Appellant filed a detailed reply dated 09 May, 2011 to the aforesaid show cause notice and denied the charges.

12. For the ECB of US\$ 500 million, it was stated that approval was obtained for the said ECB in relation to the power project of 1320 MW in SEZ on 25 June, 2008, but this facility was later cancelled and hence the upfront fee was refunded on 19 December, 2009 by deposit of the amount in the bank account of the Appellant. It was also stated that, in any case, the Appellant was not liable for payment of service tax on upfront fee for availing ECB facility since the services were to be consumed within SEZ and the notification dated 31 March, 2004 granted full exemption to all

the taxable services provided by a service provider to a developer of SEZ or unit of SEZ if the said service was consumed within SEZ. It was further stated that since the entire service was to be used for the purpose of authorized operation of SEZ, it would be used for consumption within SEZ. It was also pointed out that even otherwise, no service tax was required to be paid in terms of the provisions of the Special Economic Zone Act, 2005, which Act had an overriding effect over all other Acts.

13. In regard to the ECB of US\$ 99 million for financing the 1320 MW power project, it was stated that the upfront fee was paid on 07 January, 2010 on which service tax was paid on 09 December, 2010. The delay was explained to have arisen because of a misunderstanding that arose because the registered office of ICICI Bank was situated in India. It was stated that for this reason the bank, as a service provider, had to discharge the liability of service tax and the Appellant would not have to discharge under a reverse charge mechanism. It was only on receipt of summons from the Department that the Appellant consulted a legal advisor and subsequently, in view of the legal advice that was tendered, service tax with interest was deposited before the service of the show cause notice. It was, therefore, pointed out that the Department should not have issued the show cause notice in view of the provisions of section 73(3) of the Act.

14. In regard to the extended period of limitation having been invoked in the show cause notice, the Appellant pointed out that there was no wilful mis-statement or suppression of facts with

an intent to evade payment of service tax and, therefore, the extended period of limitation could not have been invoked.

15. The Commissioner, however, did not accept the contentions of the Appellant. The Commissioner observed that even if the ECB of US\$ 500 million was cancelled, service tax should have been paid first and thereafter refund could have been claimed.

16. The contention of the Appellant that it was entitled to exemption from payment of service tax under the notification dated 31 March, 2004 since the services were to be consumed within SEZ was not accepted. The Commissioner observed as follows :

"26.....I find that M/s APL are having their registered office at 7th Floor, Sambhav Building, Judges Bungalow Road, Bodakdev, Ahmedabad. Services are intangible in nature and therefore their consumption can be anywhere unlike goods which can be consumed in a factory during the manufacturing process. Thus, even though M/s APL may be an approved Developer of power project in Sector specific SEZ, it cannot be said-that the "Banking and "financial services" received by them were wholly consumed within the Special Economic Zone as they have their -registered office outside the Special Economic Zone. This view also finds support from the fact that with regard to the availment of ECB facility of US\$ 99 million from ICICI, Bank Hongkong (which is discussed in detail below) they had made payment of service tax. I find that had the said "Banking and other financial services" been consumed wholly within the SEZ, M/s APL would not have paid service tax in view of exemption provided in notification No. 9/2009-ST dated 3.3.2009 amended by notification No. 15/2009-ST dated 20.5.2009 which superseded notification No. 4/2004-Service Tax dated 31.3.2004."

(emphasis supplied)

17. The contention of the Appellant in regard to the ECB facility of US\$ 99 million was also not accepted by the Commissioner and the observations are as follows :

"29.....I find that service tax has been demanded in the show cause notice by alleging suppression of facts thereby invoking the extended period under proviso to section 73(1) of the Finance Act, 1994. Therefore, the provisions of section 73(3) of the said Act can not be applied in this case in view of section 73(4) of the Finance Act, 1994. I also find that service tax of Rs. 1,65,25,338/- on "upfront fee/agency fee/other commercial charges" has been paid by M/s APL on 9.12.2010 only after the investigations under summons proceedings were initiated against them on 5.5.2010 and not on their own as argued by them. Similarly, service tax amounting to Rs. 1,90,173/- on "legal counsel fee" has also been paid by M/s APL on 9.12.2010 only after the investigations under summons proceedings were initiated against them on 5.5.2010 and not on their own as argued by them. In view of this, the ratio of judgments relied upon by M/s APL cannot be applied in the case before me."

(emphasis supplied)

18. The Commissioner did not also accept the contention of the Appellant that the extended period of limitation under the proviso to section 73 (1) of the Act could not have been invoked in the facts and circumstances of the case and the observations are as follows:

"37 It is needless to recapitulate that the present show cause notice has arisen out of the investigation conducted by the Ahmedabad Zonal unit of the Directorate General of Central Excise Intelligence. Had they not taken up investigations in the case, the evasion of service tax would have remained unnoticed. **Therefore, this is a case of improper assessment amounting to deliberate non-declaration and suppression of vital information with a willful intention to evade payment of service tax.** Accordingly, the invoking of extended period under proviso to Section 73(1) of the Act in the case before me is fully justified.

38. I find that in the present system of self-assessment, documents like invoices and other transaction details are not supplied to the Department. Moreover, M/s APL did not furnish the required details of payment of "upfront fee/agency fee/other commercial charges/legal counsel fee" amount either in the ST-3 returns or in any other way to the Department. Since, they even did not consult the Department in case of any doubt, the intention will have to be believed as that of evasion. Once the details are not submitted to the Department, misdeclaration or suppression is rightly invoked. **I, therefore, conclude that the element of suppression with intent to evade payment of service tax is conspicuous by the peculiar facts and circumstances of the case as discussed above and, therefore, the extended period of limitation under Section 73(1) of the Finance Act, 1994 is rightly invocable for recovery of service tax demanded in the impugned show cause notice.** In view of the

above discussion and findings, the ratio of cases relied upon by M/s APL cannot be applied in the case before me.

(emphasis supplied)

19. The Commissioner, therefore, confirmed the demand on service tax with penalty and interest.

20. Shri Jitendra Motwani, learned Counsel for the Appellant made the following submissions:-

- (i) The Commissioner committed an error in confirming the demand of service tax on the ECB facility of US\$ 500 million given by the London Bank and imposing penalties upon the Appellant. In this connection it has been submitted that the Appellant was entitled to the benefit of notification dated 31 March, 2004 and it could not have been denied merely because the office of the Appellant was situated outside SEZ. In any case, the Appellant was granted the aforesaid ECB facility of US\$ 500 million for the power plant situated within SEZ but since the said facility was cancelled and the charges deposited by the Appellant were refunded to the Appellant, no service was ultimately rendered to the Appellant and, therefore, there would be no liability to pay service tax;
- (ii) The Commissioner failed to correctly appreciate the provisions of section 26(1)(e) of the SEZ Act and rule 31 of the SEZ Rules that provide that every developer shall be entitled to exemption from service tax under chapter V of the Act of taxable services provided to a

developer to carry on the authorized operations in SEZ. The provisions of the Act give overriding effect to anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than the SEZ Act. Thus, the Appellant was entitled to exemption from payment of service tax in terms of the notification dated 31 March, 2004;

- (iii) The Commissioner also committed an error in imposing penalties upon the Appellant in regard to the ECB facility of US\$ 99 million provided by the Hong Kong Bank on the premise that the Appellant had paid the amount of service tax and interest only after the investigation was caused by the Department. The Commissioner failed to appreciate that the Appellant had not paid service tax in time as the Appellant was under a bonafie belief that the ICICI Bank was an Indian bank which had an office in India and so the liability of payment of service tax would be upon the bank and not upon the Appellant. The liability could be fastened upon the Appellant on a reverse charge basis only when the service provider did not have a fixed establishment in India;
- (iv) In any case, as the Appellant had deposited the amount of service tax with interest before the service of the show cause notice in regard to the ECB facility of US\$ 99 million, the show cause notice could not have

been issued to the Appellant in view of the provisions of section 73(3) of the Act and the provisions of section 73(4) of the Act could not have been resorted to as there was no wilful mis-statement or suppression of facts or fraud on the part of the Appellant, more particularly when service tax, if paid, would in any event have been refunded to the Appellant under the notification dated 3 March, 2009;

- (v) The Commissioner committed an error in holding that the extended period of limitation provided for under the proviso to section 73 (1) of the Act was correctly invoked in the show cause notice. In the present case there was no willful mis-statement or suppression of facts with an intention to evade payment of service tax as the service tax, if deposited by the Appellant, would have been refunded to the Appellant; and
- (vi) The Commissioner also committed an error in imposing penalties under sections 77 and 78 of the Act.

21. Shri Gobind Jha, learned Authorized Representative of the Department has, however, supported the impugned order and made the following the submissions.

- i. Even if the ECB facility provided to the Appellant by the London Bank for availing US\$ 500 million had been cancelled, still the liability to pay service tax had arisen before the event of cancellation and, therefore, the Appellant could have subsequently claimed refund of the

tax deposited and this could not have been made a ground to evade payment of service tax;

- ii. The benefit of the notification dated 31 March, 2004 was denied to the Appellant for a good reason since the Appellant could not prove that the ECB facility was to be wholly consumed within SEZ. In any case, the Appellant had paid service tax for the ECB facility of US\$ 99 million from Hong Kong Bank and, therefore, the Appellant understood that the service was not wholly consumed within SEZ;
- iii. The extended period of limitation was correctly invoked as there was suppression of facts since the Appellant had not furnished the required details of payment made by it for import of services either in the ST-3 returns or in any other manner; and
- iv. The penalties have been correctly imposed upon the Appellant.

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

23. The SEZ Act provides for the establishment, development and management of special economic zones for the promotion of exports and for matters connected therewith or incidental. The Appellant claims that the Ministry of Commerce and Industries, Government of India, granted approval to the proposal submitted by the Appellant for development, operation and maintenance of

sector specific SEZ power sector in Village Tunda and Siracha by letter dated 19 December, 2006. Subsequently, the Appellant was also granted approval as a co-developer of Mundra Port and SEZ by letter dated 27 February, 2009 issued by the Ministry of Commerce and Industries, Government of India. The Appellant, accordingly, set up a thermal plant in village Tunda and Siracha in District Kutch.

24. The dispute in the present Appeal is regarding ECB facility obtained by the Appellant from the London Bank and the Hong Kong Bank. In regard to the ECB facility of US\$ 500 million from the London Bank granted on 29 January, 2008, the Appellant claims to have paid Rs. 13,94,81,875/- as upfront fee on 25 June, 2008 but as the said facility was later cancelled, the London Bank refunded the fees on 19 November, 2009 and credited it in the bank account of the Appellant. The Appellant, therefore, contends that since no service was provided, no liability to pay service tax could have arisen and even otherwise, there is no liability to pay service tax in view of the provisions of the SEZ Act and the Rules framed thereunder and the notification dated 31 March, 2004. In regard to the ECB facility of US\$ 99 million granted by the Hong Kong Bank, the Appellant contends that initially the Appellant was under a belief that since ICICI Bank had a registered office in India, it would not be required to pay service tax on a reverse charge mechanism, but when summons were received from the Department, legal opinion was sought pursuant to which the Appellant deposited the service tax with interest and intimated the Department before the service of the show cause notice. Thus, the

show cause notice proposing tax on this facility could not have been issued in view of the provisions of sections 73 (3) of the Act and section 73 (4) of the Act could not have been resorted to by the Department as there was no wilful mis-statement or suppression of facts with intent to evade payment of service tax, nor any penalty could have been imposed.

25. To appreciate the contentions, it would be appropriate to examine the relevant provisions.

26. It is under section 66A of the Act that service tax on reverse charge basis was introduced with effect from 18 April, 2006. Liability was fastened on the recipient of service in India, if a service is provided from outside India as if the recipient had himself provided this service in India.

27. It will also be appropriate to reproduce the relevant provisions of the notifications dated 31 March, 2004 and 3 March, 2009 that relate to service tax exemption to services provided to a developer or units of SEZ. The notification dated 31 March, 2004 is reproduced below:-

Notification No. 4/2004-S.T. dated 31-March-2004

Service tax exemption to services provided to a Developer or units of Special Economic Zone

-- Notification No. 17/2002-S.T. superseded

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) and in supersession of the notification of the Government of India in the erstwhile Ministry of Finance and Company Affairs (Department of Revenue), No. 17/2002-ServiceTax, dated the 21st November, 2002, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated the 21st November, 2002, vide, G.S.R.777(E), dated the 21st November 2002, except as respects things done or omitted to be done before such supersession , the Central Government being satisfied that it is necessary in the public interest so to do, **hereby exempts taxable service of any description as defined in clause (90) of sub-section (1) of section 65 of the said Act provided to a developer of Special Economic Zone or a unit (including a unit under**

construction) of Special Economic Zone by any service provider for consumption of the services within such Special Economic Zone, from the whole of service tax leviable thereon under section 66 of the said Act, subject to the following conditions, namely:-

- (i) the developer has been approved by the Board of Approvals to develop, operate and maintain the Special Economic Zone;
- (ii) the unit of the Special Economic Zone has been approved by the Development Commissioner or Board of Approvals, as the case may be, to establish the unit in the Special Economic Zone;
- (iii) the developer or unit of a Special Economic Zone shall maintain proper account of receipt and utilisation of the said taxable services.

Explanation .- For the purposes of this notification,-

- (1) " Board of Approvals " means the combined Board of Approvals for export oriented unit and Special Economic Zone units, as notified in the Official Gazette, from time to time by the Government of India in the Ministry of Commerce and Industry;
- (2) " developer " means a person engaged in development or operation or maintenance of Special Economic Zone, and also includes any person authorised for such purpose by any such developer;
- (3) " Special Economic Zone" means a zone specified as Special Economic Zone by the Central Government in the notification issued under clause (iii) of Explanation 2 to the proviso to sub-section (1) of section 3 of the Central Excise Act, 1944 (1 of 1944).

28. The notification dated 31 March, 2004 was superseded by notification dated 03 March, 2009 and the relevant portion is reproduced below:-

**"NOTIFICATION NO. 09/2009-SERVICE TAX, DATED :
MARCH 3, 2009**

G.S.R. 146(E) - In exercise of the powers conferred by subsection (1) of section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the notification of the Government of India, Ministry of Finance (Department of Revenue), No. 4/2004-Service Tax, dated the 31st March, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated the 31st March, 2004, vide, G.S.R.248(E), dated the 31st March, 2004, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby **exempts the taxable services specified in clause (105) of section 65 of the said Finance Act, which are provided in relation to the authorised operations in a Special Economic Zone, and received by a developer or units of a Special Economic Zone, whether or not the said taxable services are provided inside the Special Economic Zone, from the whole of the service tax leviable thereon under section 66 of the said Finance Act:**

Provided that–

- (a) the developer or units of Special Economic Zone shall get the list of services specified in clause (105) of section 65 of the said Finance Act as are required in relation to the authorised operations in the Special Economic Zone, approved from the Approval Committee (hereinafter referred to as the specified services);
- (b) the developer or units of Special Economic Zone claiming the exemption actually uses the specified services in relation to the authorised operations in the Special Economic Zone;
- (c) **the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone;**
- (d) the developer or units of Special Economic Zone claiming the exemption, by way of refund in accordance with clause (c), has actually paid the service tax on the specified services;
- (e) no CENVAT credit of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone has been taken under the CENVAT Credit Rules, 2004;
- (f) exemption or refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone shall not be claimed except under this notification.
- (g) the developer or unit of a Special Economic Zone shall maintain proper account of receipt and utilisation of the taxable services for which exemption is claimed.

2. The exemption contained in this notification, except for services consumed wholly within the Special Economic Zone, shall be subject to the following conditions namely:-

Xxxxxxxx

xxxxxxx

xxxxxxx

[emphasis supplied]

29. The notification dated 03 March, 2009 grants exemption to the taxable services specified in section 65 (105) of the Act provided in relation to the authorized operations in the SEZ and received by a developer or units of a SEZ, whether or not the said taxable services are provided inside the SEZ, from the whole of the service tax leviable thereunder under section 66 of the Finance Act.

The proviso, however, stipulates that the exemption claimed by the developer or units or SEZ shall be provided by way of refund of service tax paid on the specified services used in relation to the authorized operations in the SEZ.

30. Proviso (c) to the aforesaid notification dated 03 March, 2009, on which reliance has been placed by the Appellant and which has been referred to in the show cause notice and the impugned order, was amended by notification dated 20 May, 2009.

The amended proviso (c) is reproduced below:-

“(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone except for services consumed wholly within the Special Economic Zone.”

31. It would, therefore, be seen that prior to 20 May, 2009, the exemption could be claimed by way of refund of service tax paid on the specified services used in relation to the authorised operations in the SEZ. However, proviso (c) was amended by notification dated 20 May, 2009. The amended proviso (c) stipulates that the exemption claimed by the developer or units of SEZ shall be provided by way of refund of service tax paid on the specified services, except for services consumed wholly within the SEZ. It is, therefore, clear that on and after 20 May, 2009, exemption from payment of service tax can be claimed only if the services are consumed wholly within the SEZ, otherwise the exemption shall be claimed by way of refund.

32. Section 65 (12) of the Act deals with ‘banking and other financial services’. It gives a list of services provided by a banking

company or a financial institution and includes, amongst others, in clause (ix) other financial services, namely, lending. 'Taxable service' under section 65 (105) (zm) of the Act means any service provided or to be provided to any person, by a banking company or a financial institution including a non-banking financial company, or any other body corporate or commercial concern, in relation to banking and other financial services. External Commercial Borrowing (ECB), is a term used to refer to commercial loans from non-resident lenders in the form of bank loans. Being 'lending', it is covered under 'banking and other financial services'. The charges recovered by the bank shall be the gross amount charged by the service provider of such service provided or to be provided.

33. It has been contended on behalf of the Appellant that since the ECB facility for setting up the power project was to be consumed within the SEZ, it was entitled to exemption from service tax on the taxable services provided to the Appellant under the notification dated 31 March, 2004.

34. The impugned order confirming the demand made in regard to the two ECB facilities of US\$ 500 million from London Bank and US\$ 99 million from Hong Kong Bank shall be separately considered.

ECB facility of US\$ 500 million from London Bank

35. It is stated that the Appellant entered into an agreement with London Bank on 29 January, 2008 for ECB facility of US\$ 500 million in relation to the power project in the SEZ and an upfront fee was paid to the bank on 25 June, 2008. This fee was

subsequently refunded by the bank on 19 November, 2009 to the Appellant since the facility was later cancelled. It has also been stated that the refund amount was deposited in the bank account of the Appellant. In the first instance, it has been contended that under the notification dated 31 March, 2004, exemption was granted to the taxable services of any description provided to a developer of SEZ to any service provider for consumption of the services within such SEZ, from the whole of service tax leviable thereon under section 66 of the Act, subject to certain terms and conditions. The Appellant contends that since the entire service rendered by the service provider to the Appellant was to be used for the authorized operation of SEZ, the same would be used for consumption of the services within SEZ and to further justify this, it has been stated that the Appellant does not carry out any other business, other than the authorized operation in the SEZ.

36. The benefit of this notification has been denied to the Appellant for the reason that the Appellant has its registered office at Ahmedabad, which is outside the SEZ and, therefore, the services received by it cannot be said to be 'wholly' consumed within the SEZ. An additional reason has also been given by the Commissioner for not accepting the contention of the Appellant that the entire services would be consumed within SEZ and that is that in that event the Appellant would not have paid service tax on the ECB facility of US\$ 99 million granted by the Hong Kong Bank in view of the notification dated 3 March, 2009, as amended by the notification dated 20 May, 2009.

37. These two reasons stated by the Commissioner for denying the benefit of the notification dated 31 March, 2004 have been assailed by the Appellant. It has been contended that benefit of the notification dated 31 March, 2004 could not have been denied merely for the reason that the registered office of the Appellant is situated in Ahmedabad, which is outside SEZ nor could the benefit have been denied because the Appellant had chosen to deposit the service tax for the services rendered by the Hong-Kong Bank in regard to US\$ 99 million ECB and then sought refund under the notification dated 3 March, 2009.

38. The notification dated 31 March, 2004 refers to a service of any description provided to a developer of SEZ by any service provided for consumption of the services within such SEZ. All that has, therefore, to be seen is whether the services provided to a developer of SEZ by any service provider is for consumption of the services within such SEZ because it is only in such a situation that the whole of the service tax leviable thereon would be exempted. The concept of location of a registered office being within SEZ or outside SEZ is, therefore, not material.

39. In this connection it will also be appropriate to refer to a Circular dated 18 May, 2011 issued by the Central Board of Excise and Customs regarding doubts and clarifications subsequent to the issuance of the notification dated 1 March, 2011. This notification dated 1 March, 2011 is also in connection with exemption to the taxable services received by units or developer of SEZ. Clause (2) of the said notification provides that the exemption contained in the notification shall be subject to certain conditions, one of which

contained in (a) is that exemption shall be provided by way of refund of service tax on the specified services received for the authorized operations in SEZ. The Explanation is as follows:-

“Explanation.- For the purposes of this notification, the expression “wholly consumed” refer to following taxable services, received by a Developer or Unit of a SEZ, for the authorised operations, namely:-

- (i) xxxxxxxxxxxx
- (ii) xxxxxxxxxxxx
- (iii) services other than those falling under (i) and (ii) above, provided to a Developer or Unit of SEZ, who does not own or carry on any business other than the operations in the SEZ;”

40. It is in this context that question number 3 and its clarification contained in the Circular dated 18 May, 2011 have to be appreciated. The said question and the clarification are reproduced below:-

S.No.	Question	Clarifications
1.	-----	-----
2.	-----	-----
3.	Meaning of the expression ‘who does not own or carry on any business other than the operations in the SEZ’ appearing in paragraph 2(a)(iii) of the notification, which creates a difference between ‘standalone’ and ‘non-standalone’ SEZ Unit/Developer, may be clarified.	The expression refers to an entity which is carrying out business operations in SEZ and also DTA. Merely having an office in the DTA for the purpose of liaison/business promotion, does not restrict a SEZ Unit from availing benefit extended to a standalone unit.

41. It is evident from the clarification that merely having an office in the DTA⁷ for the purpose of liaison/business promotion would not restrict a SEZ from availing the benefit of the notification.

42. In this view of the matter the Commissioner was not justified in denying the benefit of the notification dated 31 March, 2004 to the Appellant on this ground.

⁷ Domestic Tariff Area

43. The second reason indicated in the impugned order of the Commissioner for denying the benefit of the notification dated 31 March, 2004 is also erroneous. The ECB facility of US\$ 99 million was granted to the Appellant by the Hong Kong Bank on 7 January, 2010, on which service tax was paid by the Appellant on reverse charge basis on 9 December, 2010. By this time the notification dated 31 March, 2004 had been superseded by the notification dated 3 March, 2009. The Central Government exempted the taxable service specified in clause (105) of section 65 of the Act which are provided in relation to the authorized operations in SEZ, and received by a developer or units of a SEZ, whether or not the said taxable services are provided inside the SEZ, from the whole of the service tax leviable thereon. However, under proviso(c), the exemption claimed by the developer of SEZ was to be provided by way of refund of service tax paid on the specific services used in relation to the authorized operations within SEZ. The Appellant claims that it paid service tax and thereafter claimed the refund which was granted. The Commissioner has referred to the notification dated 20 May, 2009 that amended proviso (c) contained in the notification dated 3 March, 2009 to the extent that the exemption claimed by the developer of SEZ would be provided by way of refund of service tax paid on the specified services used in relation to the authorized operations in the SEZ **except for services consumed wholly within the SEZ.** Thus, if services were to be consumed **wholly** within SEZ, there was a complete exemption and there was no necessity of first depositing the

service tax and then filing a refund. It is for this reason that the Commissioner has observed that the Appellant should not have deposited the service tax for the ECB facility of US\$ 99 million, if the services were to be consumed wholly within SEZ and, thereafter, claimed refund.

44. It is correct that in case the services were to be consumed wholly within SEZ, the Appellant should not have deposited the service tax in terms of the amended provision (c) of the notification dated 3 March, 2009. It is, however, seen that the Appellant had deposited the service tax and thereafter claimed refund of the tax deposited under proviso (c) of the notification dated 3 March, 2009. It appears that the Appellant was unaware of the amendment made in proviso (c) by notification dated 20 May, 2009. In any case, an erroneous deposit of service tax and then claiming refund would not mean that the Appellant should be directed to commit the same mistake in regard to the ECB facility of US\$ 500 million granted by the London Bank. This apart, the Department has not even pointed which part of service was actually utilized by the Appellant outside SEZ. Thus, deposit of service tax and then making a claim for refund cannot in any manner lead to a conclusion that the services were not wholly consumed within SEZ. The Commissioner, therefore, clearly fell in error in observing that since the service tax was deposited and then refund was claimed in regard to the ECB facility of US\$ 99 from the Hong Kong Bank, the services provided to the Appellant were not wholly consumed within SEZ.

45. The Appellant was, therefore, in connection with the US\$ 500 million ECB facility, entitled to exemption from payment of the whole of the service tax since the service provided was to be consumed within SEZ.

46. It is, therefore, not necessary to examine the contention of the Appellant that the finding recorded by the Commissioner that even if the ECB facility of US\$ 500 million was subsequently cancelled, the Appellant should have first deposited the service tax in time and then claimed refund, nor is it necessary to examine the contention of the Appellant that it was not required to pay any service tax since ultimately no service was provided to the Appellant as the ECB facility was cancelled.

ECB Facility of U\$ 99 million from Hong Kong Bank

47. This ECB facility was granted to the Appellant by the Hong Kong Bank and the amount was paid by the bank on 7 January, 2010. The Appellant has contended that it did not pay service tax in time as it was under a bonafide belief that liability to pay service tax on a reverse charge basis will arise only when the service provider did not have a fixed establishment of its business in India. However, when summons were received from the Department, the Appellant sought legal opinion and when it received an opinion that liability would arise even if ICICI Bank had a fixed establishment in India, the Appellant paid the appropriate service tax with interest on 9 December, 2010 and intimated this fact to the Department. It is, therefore, the contention of learned Counsel for the Appellant that since, as contemplated under section 73 (1) of the Act, the service tax was paid before service of the

show cause notice, the show cause notice should not have been issued to the Appellant in view of the provisions of sections 73(3) of the Act.

48. To appreciate this contention, it would be appropriate to reproduce the relevant provisions of sub-sections (1), (3) and (4) of section 73 of the Act and they are 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 eighteen months 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.

(2) xxxxxxxxxxxx

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:

xxxxxxxxxxxxxx

(4) Nothing contained in sub-section (3) shall apply to a case 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."

49. The contention of the Appellant has not been accepted by the Commissioner for the reason that service tax was demanded in the show cause notice alleging suppression of facts and thereby invoking the extended period of limitation under the proviso to section 73(1) of the Act. The Commissioner has, therefore, held that provisions of section 73(3) of the Act cannot be applied in view of the provisions of section 73(4) of the Act. The Commissioner has also observed that the service tax was paid by the Appellant only after the investigation was initiated on 5 May, 2010 by issuance of a summon.

50. The contention of the Appellant is that the provisions of section 73(4) of the Act would not apply in the instant case as there was no wilful suppression of facts since the Appellant had a bonafide belief that liability to pay service tax on a reverse charge mechanism would not arise in this ECB facility as the ICICI Bank had a registered office in India. The Appellant has stated that it is only when summons were received from the Department that a legal opinion was sought after which the Appellant deposited the entire service tax with interest before the service of the show cause notice. To substantiate that there was no wilful suppression of facts, the Appellant has contended that any service tax paid by the Appellant would have been refunded to the Appellant in terms of the notification dated 3 March, 2009 since the services were provided to the Appellant in relation to the authorized operations within the SEZ and so the Appellant could not possibly have had any intention of evading payment of service tax.

51. Though sub-section (1) of section 73 of the Act provides that where service tax has not been paid, the Central Excise Officer may serve notice on the person chargeable with the service tax requiring him to show cause why he should not pay the amount specified in the notice, but sub-section (3) of section 73 also provides that where any service tax has not been paid, the person chargeable with the service tax may pay the amount of such service tax before service of the notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1). The Appellant paid the service tax before service of the show cause notice and informed the Central Excise Officer of the payment in writing. The Revenue has relied upon sub-section (4) of section 73 that provides that nothing in sub-section (3) shall apply to a case where any service tax has not been paid by reason of fraud; or collusion; or wilful mis-statement; or suppression of facts; or contravention of any of the provisions of the Chapter or of the rules made thereunder with intent to evade payment of service tax. The Commissioner has merely stated that since the extended period of limitation under the proviso to section 73 (1) had been invoked, the benefit of sub-section (3) of section 73 will not be available to the Appellant.

52. The issue as to whether sub-section (4) of section 73 of the Act would apply in the present case can be considered together with the contention raised on behalf of the Appellant that the extended period of limitation provided for under the proviso to

section 73(1) of the Act could not have been invoked because the conditions for invocation are identical in both the situation.

53. It is seen that sub-sections (1) & (4) of section 73 of the Act do not mention that suppression of facts has to be "wilful" since "wilful" precedes only mis-statement. It has, therefore, to be examined whether even in the absence of the expression "wilful" before "suppression of facts", 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.

54. 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, 1944⁸, as it stood when the Supreme Court explained "suppression of facts" in **Pushpam Pharmaceutical Co. v/s Commissioner of Central Excise, Bombay**⁹. The provisions of section 11A of the Excise Act have been reproduced in the judgment of the Delhi High Court in **Bharat Hotels Limited v/s Commissioner of Central Excise (Adjudication)**¹⁰ and they are 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

8 Excise Act

9 1995 (78) ELT 401 (SC)

10 2018 (12) GSTL 368 (Del.)

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."

55. 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 11A 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 which was suppression of facts. It is in this context that the Supreme Court observed that since "suppression of facts" 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 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."

(emphasis supplied)

56. 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 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."

57. These two decisions in **Pushpam Pharmaceuticals Co.** and **Anand Nishikawa Company Ltd.** were followed by the Supreme Court in a subsequent decision of the Supreme Court in **Uniworth Textile Limited v/s Commissioner of Central Excise, Raipur**¹² and the observations 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."

¹¹ 2005 (188) ELT 149 (SC)

¹² 2013 (288) ELT 161 (SC)

58. The Supreme Court in **Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I**¹³ also 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."

59. The Delhi High Court in **Bharat Hotels Limited** 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.

xxxxxx

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."

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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."

13 2007 (216) ELT 177 (SC)

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

61. The Commissioner has denied the benefit of sub-section (3) of section 73 to the Appellant for the reason that the provisions of sub-section (4) of section 73 were applicable. The findings are as follows:-

"I find that service tax has been demanded in the show cause notice by alleging suppression of facts thereby invoking the extended period under proviso to section 73(1) of the Finance Act, 1994. Therefore, the provisions of section 73(3) of the said Act cannot be applied in this case in view of section 73(4) of the Finance Act, 1994."

62. The Commissioner also held that the extended period of limitation provided under the proviso to sub-section (1) of section 73 would be applicable because if the Directorate General of Central Excise Intelligence had not taken up the investigation, the evasion of service tax would have remained unnoticed. Therefore, according to the Commissioner, it would be a case "amounting to deliberate non-declaration and suppression of vital information with a wilful intention to evade payment of service tax". The Appellant, according to the Commissioner, had not furnished the required details of payment of 'upfront fee' either in the ST-3 returns or in any other way to the Department.

63. The Appellant had, in reply to the show cause notice, explained that the extended period of limitation under the proviso to section 73 (1) of the Act could not have been invoked and also explained why the provisions of sub-section (4) of section 73 could

not have been applied. In particular, the Appellant pointed out that there was no suppression of facts with intention to evade service tax in regard to the ECB facility of US\$ 500 million from the London Bank or the ECB facility of US\$ 99 million from Hong Kong Bank. It was also pointed that even if the service tax was paid, the same would have been refunded and, therefore, there could have been no intention to evade payment of service tax. The Commissioner has not considered the reply submitted by the Appellant and has merely observed that evasion of service tax would have remained unnoticed if investigation had not been initiated.

64. There could not possibly have been any intention of the Appellant to wilfully mis-state or suppress facts with an intention to evade payment of duty. This is for the reason that service tax paid by the Appellant on the upfront fee for the ECB facility of US\$ 99 million ECB from the Hong Kong Bank would eventually have been refunded to the Appellant in terms of the notification dated 3 March, 2009 and in fact was refunded by order dated 27 January, 2012 passed by the Assistant Commissioner of Service Tax Division-ii, Ahmedabad. This refund order was also upheld by the Tribunal in **Adani Power Ltd. v/s Commissioner of Service Tax, Ahmedabad**¹⁴. The Appellant could have been initially under a bonafide belief that since the ICICI Bank had a registered office in India, the Appellant would not be required to pay service tax on a reverse charge mechanism. It is also seen that as soon as legal advice was tendered to the Appellant it immediately deposited the service tax before the issuance of the show cause notice. The

14 2016 (44) STR 146 (Tri. - Ahmd.)

contention advanced by the learned Counsel for the Appellant, therefore, deserves to be accepted.

65. Thus, the show cause notice could not have been issued as the Appellant had paid the service tax with interest before the service of the show cause notice and had also informed the Department of this fact.

66. This apart, if the dispute is revenue neutral there can be no intention to evade payment of duty and consequently the extended period of limitation could not have been invoked. In this connection reference can be made to a Division Bench decision of the Tribunal in **Reliance Industries Ltd. v/s Commissioner of Central Excise and Service Tax, LTC, Mumbai**¹⁵. Paragraph 12 of the decision is reproduced below:-

"12. We also note that the entire dispute being revenue neutral, there could have been no intention to evade payment of duty and consequently the extended period of limitation was per se not invokable. It is settled law laid down in the following amongst other judgements a series of judgement including that of the Apex Court that in a case where credit is available to an assessee itself it cannot be said that there is any intention to evade payment of duty, which is a pre-requisite for invoking the extending period of limitation. In the instant case also if any tax was payable it could have been available immediately to the Appellant, thereby rendering the entire dispute being revenue neutral. This being the case the invocation of extended period of limitation is clearly not justified:-

a) Reliance Industries Ltd vs CCE 2009 (244) ELT 254 (Tri-Ahd.)

b) CCE & C vs. Indeos ABS Ltd. 2010 (254) ELT 628 (Guj.)

c) Mafatlal Industries Ltd vs CCE 2009 taxman .com 493 (Ahd.-CESTAT); affirmed by the Apex Court by dismissing the Civil Appeal reported in 2010 (255) ELT A77 (SC)

d) Nirlon Ltd vs CCE (2015) 58 taxman.com 28/51 GST 177 (SC)"

67. In this view of the matter, the Appellant is justified in asserting that the show cause notice could not have been served upon the Appellant under sub-section (1) of section 73 of the Act

¹⁵ [2016] 72 taxman.com 6 (Mumbai-CESTAT)

since the Appellant had deposited the entire tax with interest before the service of the show cause notice. The Department also could not have relied upon the provisions of sub-section (4) of section 73 of the Act as the conditions set out therein were not satisfied.

68. Thus, for all the reasons stated above, the impugned order dated 27 December, 2011, passed by the Commissioner cannot be sustained and is set aside. The Appeal is, accordingly, allowed.

(Pronounced in the open Court on 08 July, 2020_)

(JUSTICE DILIP GUPTA)
PRESIDENT

(RAJU)
MEMBER (TECHNICAL)

Rekha