CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.II

(E-Hearing)

Service Tax Appeal No.50464 of 2014

(Arising out of Order-in-Appeal No. 90-ST-ALLD-2013, dated -04/10/2013 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad)

M/s Devendra Pratap Singh .....**Appellant**
(Sahara City Homes C/o Brij Bhushan Singh, Church Compour
Shadatpura, Mau Nath Bhanjan, Mau, UP)

VERSUS

Commissioner, Central Excise, Allahabad ....**Respondent**

(38, M. G. Marg, Civil Lines, Allahabad)

APPEARANCE:

Shri Bipin Garg, Advocate for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)

FINAL ORDER NO.-70735/2025

DATE OF HEARING : 17.07.2025
DATE OF DECISION : 17.07.2025

SANJIV SRIVASTAVA:

The present appeal is directed against the Order-In-Appeal No.90-ST/ALLD/2013 dated 04.10.2013 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Allahabad. By the impugned order appeal filed against the Order-In-Original No.(ST-03/2011) 30 of 2012 dated 30.03.2012 has been dismissed.

2.1 That on the basis of a specific intelligence that appellant is engaged in providing various services to M/s Sahara, relating to the acquisition & land development for their real estate project at Sahara City Homes, Azamgarh (U.P.) and that he has received huge amounts as consideration, in lieu of providing these services but he has not paid Service Tax thereon, the officers of the Kanpur Regional Unit of Directorate General of Central Excise Intelligence, Kanpur (hereinafter referred to as 'KRU' for short) commenced investigations against him.

2.2 As per intelligence available with DGCEI, a MOU had been executed between Sahara Group and appellant in connection with acquisition of land at Azamgarh, Uttar Pradesh. To procure the said MOU and to examine the Service Tax liability, letter F. No. DGCEI/KRU/INV/20/09/205 dated 11.02.2009 was written to DPS calling for the Balance Sheets for the Financial Years 2005-06. 2006-07, 2007-08 and 2008-09; attested copies of all the MOUs/ Agreements between DPS and M/s Sahara India, Lucknow, payment received by DPS in this regard; date wise till date; and copies of Service Tax Registration, returns alongwith details of Service Tax paid, if any, on this issue,

2.3 As appellant did not provide the information, summons were issued on 29.09.2009 and 16.11.2009, directing him to tender his statement in this regard. In response to summon dated 16.11.2009, Shri Devendra Pratap Singh, appeared before the investigating officers on 26.11.09 and tendered his statement. During the course of recording his statement, Shri Devendra Pratap Singh tendered the documents called for, including the memorandums signed with Sahara.

2.4 After the conclusion of the investigation it was observed that

- on the amounts received by appellant they are liable for Service Tax under the heads real estate agents/ site formation and clearance, excavation and earthmoving and demolition services.

- the amount was received by DPS from M/s Sahara India Commercial Corporation Limited, in advance, prior to providing services, but the service tax was actually payable later on, when, the services were actually provided as per availability of the land and other permission/documents.
- The schedule of payments made to DPS has been detailed in the sheets submitted by M/s Sahara India Commercial Corporation Limited. As per the said details DPS, had received a total amount of Rs. 3,53,52,619/- from M/s Sahara India Commercial Corporation, Limited towards purchase of land and its development which is treated as the value of taxable services for DPS towards services rendered.
- Appellant has utilized/purchased land of Rs. 2,54,12,362/- during the period from 02.01.2006 to 24.10.2008 as evident from the schedule of payment, therefore the funds received by DPS are as follows:-

S No	Details	Amount in Rs
1	Total Amount Received	3,53,52,619
2	Amount used for purchase of Land	2,53,12,123
3	Amount used for development	51,51,361
4	Balance Available	48,89,135

- Appellant had not disclosed the period of providing the services relating to development activities, fairly the development work would be only after procurement of land, which is a continuous process and is going on, as such, the total amounts received by DPS for development works have been treated to be taxable.

2.5 Thus the value of the taxable services provided or to be provided against the amounts received is detailed in table below:

Taxable Service	Amount 'Rs
real estate agent services	3,02,01,258
site formation and clearance, excavation and earthmoving and demolition	51,51,361
Total	3,53,52,619

2.5 Treating the aforementioned difference amounts as cum-Service Tax, the Service Tax and Educational Cess leviable at the prevalent rates at different periods has been worked out as below:

Period	Gross Amount Received	Taxable Value	Service Tax (Including Cess)	
			Rate	Amount
01.01.06 to 17.04.06	2,57,45,647	2,33,62,656	10.2	23,82,991
18.04.06 to 10.05.07	5,00,000	4,45,474	12.24	54,526
11.05.07 to 24.10.08	91,06,972	81,05,173	12.36	10,01,799
TOTAL	3,53,52,619			34,39,316

2.6 The Show Cause Notice dated 04.01.2011 was issued to the Appellant asking them to show cause as to why:-

"1. Service Tax totally amounting to Rs. 34,39,316/- (Rs. Thirty Four Lacs Thirty Nine Thousand Three Hundred and Sixteen only) (Service Tax Rs. 33,62,344/- + Education Cess Rs. 67,246/- + Higher Edu. Cess Rs. 9,726/-) during the period 02.01.2006 to 24.10.2008 should not be recovered from them under proviso to Section 73(1) of the Finance Act, 1994;

2. The interest at the appropriate rates should not be recovered from them under Section 75 of the finance Act, 1994;

3. Penalty should not be imposed upon them under Section 76 of the Finance Act, 1994 for not paying service tax in accordance with the provisions of Section 68 of the Finance Act, 1994 and rules made thereunder as mentioned above;

4. Penalty should not be imposed upon them under Section 77 of the Finance Act, 1994 for violation of Section 69 and 70 of Finance Act, 1994 by not making an application to the concerned Superintendent of Service Tax for registration under service tax within 30 days from the date on which the Service Tax under Section 66 of the Finance Act, 1994 was levied and also for not filing the statutory returns with the competent authority of Service Tax for the said services rendered by them;

5. Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 in as much as they have failed to discharge their Service Tax liability to the exchequer by suppression of facts, with intent to evade payment of Service Tax."

2.7 The Show Cause Notice was adjudicated by the Order-In-Original dated 30.03.2012 holding as follows:-

ORDER

"1. I confirm and demand the Service Tax Rs. 10,96,452/- (including Education Cess and Secondary & Higher Education Cess) under Section 73(1) of the Finance Act, 1994.

2. I also demand interest under Section 75 of the Finance act, 1994 to be calculated from the due date of payment of Service Tax till actual date of payment thereof.

3. I impose a penalty of Rs 5,000/- upon Shri Devendra Pratap Singh under Section 77 of the Finance Act, 1994.

4. I also impose a penalty of Rs. 10,96,452/- upon Shri Devendra Pratap Singh under Section 78 of the Finance Act, 1994".

2.8 Aggrieved Appellant filed appeal before the Commissioner (Appeals) which has been dismissed as per the impugned order. Hence the present appeal.

3.1 We have heard Shri Bipin Garg, Advocate for the Appellant and Shri A.K. Choudhary, Authorized Representative for the Revenue.

3.2 Arguing for the Appellant learned Counsel submits that:-

- demand confirmed and penalty imposed is not sustainable hence impugned Order-in-Appeal is liable to be set aside.
- whole of the demand is time barred. The period in dispute is 01.01.2006 to 14.10.2008 whereas show cause notice is dated 04.01.2011 i.e. beyond the normal period of one year. By reading whole of the show cause notice, not even a single word is related to suppression of facts except made allegation in Para 16 at Page 71.
- From the show cause notice itself, it is clear that the officers recorded statement of the appellant on 26.11.2009 and during statement he provided all the documents, on the basis of which the show cause notice was issued with the allegation of suppression of facts.
- The appellant in his statement clearly stated that due to lack of knowledge he could not take service tax registration, not filed ST-3 returns and not paid service tax.
- when the appellant explained each and every fact and provided all the records and the documents on 26.11.2009, on the basis of which show cause notice is issued, why the show cause notice was not issued within one year and on what basis allegation of suppression is made.
- Out of huge demand of Rs.34,39,316 the adjudicating authority reduced it to Rs.10,96,452, allegation of suppression does not stand. The appellant did not suppress any fact from the department.
- Reliance is placed on the following decisions
  - H.M.M. Limited [1995 (76) ELT 497 (SC)]
  - Nestle India Ltd [2009 (235) ELT 577 (SC)].
  - Pushpam Pharmaceuticals Co. [1995 (78) ELT 401 (SC)

- Infinity Infotech Parks Ltd. [2013 (31) STR 653 (Cal.)].
- Ajitabh Mishra [2025 (6) TMI 12 - Tri. ND]

➢ so far as services relating to "Site Formation and Clearance, excavation and' earthmoving and demolition". It is submitted that value of consumable goods should be deducted from the value of services calculated.

➢ appellant is not liable to pay any service tax, did not contravene any provision of law hence no penalty is to be imposed. When the demand is not sustainable the question of payment of interest does not arise.

3.3 Learned Authorized Representative for the Revenue reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order and submissions made in the appeal and during the course of argument.

4.2 The impugned order records the findings as follows:-

> *"I have carefully gone through the records of the case, grounds of appeal of the appellant oral and written submission made at the time of personal hearing. It has been alleged in the show cause notice that the appellant has provided to types pes of services, Le, "Real Estate Agent Service" rice" and "Site formation and cleararice, excavation and earthmoving and demolition service" to their client M/s Sahara India Commercial Corporation Limited. Under Real Estate Agent service the service relates to purchase of land covered by MOU dated 02.12.2005 and another relates to "levelling of soil including filling of gorges / nallah, removing of shrubs, grass and rubbish etc., at Sahara City Homes, Azamgarh, duly covered under three agreements dated 02.01.2006, 16.10.2007 & 02.05.2008 entered into between the appellant and M/s Sahara India Commercial Corporation Limited.*
>
> *The Service Tax is leviable under the head "Real Estate Agent" we.fl 16.10.1998 and under the head "Site formation and clearance, excavation and earthmoving and demolition service" w.e.f. 16.06.2005.*

In their grounds of appeal, the appellant has raised the following issues:

(1) Sale and purchase of land is not a Real Estate.

(ii) They have not received any service tax from the service receiver.

(iii) The adjudicating authority has calculated the service tax under site formation on the gross amount of Rs. 51,51,361/- without giving abatement in respect of disel consumed in tractor and bricks and cement used in the construction of drainage.

(iv) The show cause notice is time barred.

The above issues are discussed as under: -

1. Sale and purchase of land is not a Real Estate - As per Section 65 (88) of the Finance Act, 1994, the definition of Real Estate Agent is given as below: "Real Estate Agenet" means a person who is engaged in rendering any service in relation to sale purchase, leasing or renting of real estate and includes a real estate consultant";

A "real estate consultant" is defined in Section 65 (89) as follows:-

"Real Estate Consultant" means a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management, of real estate".

The term Real Estate has not been specifically define by the Finance Act, 1994 but as per dictionary meaning the term Real Estate can be taken to cover sites, houses apartments, villas, offices, commercial space, farm land, agricultural land, flats etc. The nature of service rendered by the appellant can be understood by the MOU signed between the appellant and the service recipient which is given below.

A Memorandum of Understanding (MOU) dated 2nd December 2005 was signed between M/s Sahara India with its command office at 1, Kapoorthala Complex, Aliganj, Lucknow through its Authorised Signatory Shri O.P Srivastava (hereinafter referred to as First Party") and the appellant, resident of C/o Ram Adhar Singh & Company, Civil Lines, Azamgarh through Shri Devendra Pratap Singh (hereinafter referred to as the Second Party'). According to the said MOU, M/s Sahara India, (the First Party) have entered into a Memorandum of Understanding with M/s Sahara India Commercial Corporation Limited on 01/04/2001 for procurement of land for the projects of M/s Sahara India Commercial Corporation Limited and/or its nominees. According to the wordings of the MOU, the first party ie M/s Sahara India "shown its inclination for purchase of land in the vicinity of 100 to 150 Acres for development of residential township in and around the city of Azamgarh" and the appellant came forward "with a proposal of 75 Acres of land situated in Village Khalilabad and Semraha, Tehsil Sadar, Distt. Azamgarh, with direct opening/access of at least 500 ft., more specifically shown in the Khasra/ Revenue Map marked with the red line in the Annexure No.l" (page 2 of the MOU). The terms and conditions, agreed upon between the two parties have been spelt out in the MOU under clauses 1 to 20. As per clause 5, M/s Sahara India agreed to purchase the land 'at average rate of Rs. 12.00 Lacs per Acre, which shall include all cost of land and development expenses etc. within a period of two months or such further period extended at the discretion of first, party (ie. M/s Sahara India). In terms of clause 14, all payments to the Kashtkars/ land owners shall be made through Pay Orders/ Demand Drafts/ Account Payee Cheques only by the first party (ie M/s Sahara India). Further, Clause 15 specified that the difference between the average rate and the amount actually paid to the land owners was payable to the appellant.

As per terms of the above MOU the appellants rendered the service in relation to the purchase of land for development of residential township, therefore, the services rendered by the appellant for covered under Real Estate Agent Services.

2. They have not received any service tax from the service receiver - On this issue it may be seen that as per provisions of Section 68 of the Finance Act, 1994, every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed. The plea of the appellant that they have not received any service tax from the service receiver is not in consonance with the statutory provisions. Liability to pay service tax in the present case is on the service provider and payment of the service tax is not subject to condition of its receipt from the service receiver. However, on going through the order of the adjudicating authority it is evident that the service tax has been calculated taking the gross amount of value of services as inclusive of service tax. Therefore, the contention of the appellant is not justified.

3. The adjudicating authority has calculated the service tax under site formation on the gross amount of Rs. 51,51,361/- without giving abatement in respect of diesel consumed in tractor and bricks and cement used in the construction of drainage As per agreement the scope of the work has been defined as "Levelling of soil including filling of gorges / nallah, removing of Shrubs, grass and rubbish etc. at Sahara City Homes, Azamgarh;"

From the above terms of the agreement there is no service provided in relation to construction activity as claimed by the appellant. However, the appellant are making only a bald plea regarding use of cement bricks etc. They have not produced any documentary evidence for making them eligible for exemption under Notification No. 12/2003 dated 20.06.2003. Any exemption can be given only if the conditions of exemption are satisfied. The appellant has failed to produce any evidence regarding entitlement of any abatement on this issue.

4. The show cause notice is time barred -

case the appellant provided the services without taking registration, without On this issue, as per facts of the payment of service tax, without filing any return with clear intent to evade payment of service tax. They have contravened the provisions of Section 66, 67, 68, 69 and 70 of the Finance Act, 1994 read with

The Service Tax Rules, 1994. The case was detected by the Officers of Directorate. The appellant are proprietary ship concern and due date for submission of return 25th of the October and 25th of April following the particular half year. In the present case, the appellant has admitted that the material period in their case is 01.12.2005 onwards. The half yearly return of December' 2005 will be filed by 25.04.2006. The show cause notice has issued to the appellant on 04.01.2011 whereas the relevant date for issuance of show cause notice in respect of extended period of limitation is upto 24.04.2011, therefore, the show cause notice have been issued within period of limitation, it is not time barred. The plea of the appellant on the point of limitation is not justified.

4.3 The major challenge made to the impugned order by the Appellant is on the ground of limitation. The only reason recorded for invoking the extended period of limitation is that the Appellant had failed to take registration and had not filed Returns. The Order-In-Original also do not records any findings for invoking the extended period of limitation. Para 16 of the Show Cause Notice records as follows for invoking the extended period of limitation:-

"In view of the facts stated above, it appears that DPS had suppressed the fact of rendering taxable services during the period 02.01.2006 onwards, to their clients from the jurisdictional Service Tax authorities. They never filed the service tax returns in the form ST-3 as prescribed in the Service Tax Rules, 1994. It also appears that by action of omission or failure on the part of DPS, to furnish the returns as prescribed under Section 70 of the Act ibid, for the period 02.01.2006 onwards, to disclose wholly and truly all the material facts viz: nature of services provided by them, the gross amount received by them for rendering the taxable service, necessary for their assessment for the said period, the value of taxable service had escaped assessment. It also appears that the DPS did so deliberately with intent to evade payment of service tax. Had the officers of this Directorate General not initiated the inquiry against DPS, the said non payment of Service Tax by DPS would not been unearthed. Hence, the provisions of Section 73(1) of the Finance Act, 1994

for the extended period of limitation appears to be invokable and service tax amounting to Rs. 34,39,316/- (Service Tax Rs. 33,62,344/- + Education Cess Rs. 67,246/- + Higher Edu. Cess Rs. 9,726/-) during the period 02.01.2006 to 24.10.2008 (as detailed in para 14 & 15 of this Show Cause Notice), appears to be recoverable from DPS. Further, the interest at appropriate rate on the said amount of Service Tax and Education Cess also appears to be recoverable from DPS under Section 75 of the said Act."

4.4 In the absence of any findings of the suppression, mis-statement with intent to evade payment of service tax in the impugned order and in the Order-In-Original the Show Cause Notice is definitely barred by limitation. It is a settled position in law that mere failure to provide certain information or declaration, certain fact would not amount to suppression with intent to evade payment of taxes for invocation of extended period of limitation.

4.5 Further, we also note that though demand in the Show Cause Notice have been made of Rs.34,39,316/- the demand of Rs.10,96,452/- has been confirmed after excluding the value of the land purchase from the total value received and after allowing the benefit of cum tax value as the issue involved were of interpretation of various provisions of the Finance Act, 1994 with regards to levy of Service Tax on 'Real Estate Agent', which includes 'Real Agent Consultant' and the other is 'Site Formation & Clearance, Excavation & Earthmoving and Demolition' services. We do not find much merits for invoking extended period of limitation.

4.6 The Appellant could have entertained a bona fide belief that he was not liable to pay any service tax. In the case of **Ajitabh Mishra V/s Commissioner of Central Excise & CGST, Raipur reported at 2025 (6) TMI 12-CESTAT NEW DELHI** following has been held:-

7. Before going into the merits of the case, it would be appropriate to consider the issue of limitation raised by the *appellant. From the submissions of the appellant, I find that it is not a case of suppression of facts, fraud or collusion, which would justify the invocation of the extended period. The appellant has duly reflected the receipt of the said amount which they had received from their service receivers in the income tax returns and the balance sheet which is a public document and accessible to the Revenue Authority. In fact, the case has been made against the appellant on the basis of the records of the income tax returns. The learned Counsel for the appellant has relied on series of decisions by the Tribunal as under:*

a. *C.S.T., New Delhi Vs. Kamal Lalwani – 2017[49] S.T.R. 552 [Tri.-Del.]*
b. *Shri Balaji Industrial Products Ltd. Vs. Commr. Of Cus. & C. Ex., Jaipur- 2019 [370] E.L.T.280[Tri.-Del.]*
c. *Antares Services Pvt. Ltd. Vs. Commissioner of C. Ex., Chandigarh – 2024[388] E.L.T.200[Tri.-chan.]*
d. *Balajee Machinery Vs. Commissioner of CGST & Excise, Patna-II-*
e. *Maa Kalika Transport Pvt. Ltd. Vs. Commissioner of CGST & C.Ex., Rourkela. -2023[79] G.S.T.L. 263[Tri. Kolkata]*
f. *Om Sai Professional Det. & Security Ser. P. Ltd. Vs. C.C.E., Guntur-2008(10) S.T.R.59[Tri.-Bang.]*

8. In ***Central Sales Tax, New Delhi versus Kamal Lalwani (supra)****, it has been categorically observed that all the activities undertaken by the appellant were a part of the reflection made in the balance sheet and income tax returns in which case no suppression or malafide can be attributed to the assessee. Revenue has not been able to produce any evidence on record to show that tax, which, according to the Revenue was payable, was not being paid on account of any malafide. Hence the extended period would not be available to the Revenue. Similarly in Shri Balaji Industrial Products Ltd (supra) the Tribunal noticed that admittedly, the appellant was recording the entire* *activity in their balance sheet, which is a proper document and as per the settled law, it cannot be said that they suppressed anything with a malafide intention. Since there was confusion as to the liability of the tax, the Tribunal held that there can be a bonafide belief on the part of the assessee, especially even when the entire activities are being reflected in the books of accounts. Accordingly, the demand was maintained only for the normal period. Reiterating the decision in the case of* ***Balaji Machinery (supra)****, the Tribunal in the case of* ***Antares Services Private Limited (surpa)*** *held that where the demand is merely on the basis of data obtained from the Income Tax Department, it cannot be alleged that there was suppression, etc. on the part of the assessee. To justify the invocation of extended period, the settled principle of law is that once the declaration has been made with the Income Tax Department, there cannot be any suppression of facts and, therefore, the extended period of limitation cannot be invoked. Applying the above principle to the instant case, I find that in view of the exemption provisions, the appellant was under a bona-fide belief that the services provided are not taxable. This seems to be evident by the fact that in the balance sheet and the income tax returns filed by them, they have fully described the receipt of the amount towards the services received. At the relevant time, the normal period prescribed for issuing the show cause notice was 18 months, however the show cause notice dated 12.10.2018 was issued raising the demand for the period 2013–2014. The demand raised is, therefore, barred by limitation and in view of the discussion, above the extended period is not invokable. Hence, the entire demand is quashed on the ground of time bar.*

4.7 In the case of **Uniworth Textiles Ltd. V/s Commissioner of Central Excise, Raipur reported at 2013 (288) E.L.T. 161 (S.C.)** the Hon'ble Supreme Court has held as under:-

*"**12.** We have heard both sides, Mr. R.P. Bhatt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.*

***13.** This Court, in Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay - 1995 Supp (3) SCC 462 = 1995 (78) E.L.T. 401 (S.C.), while interpreting the proviso of an analogous provision in Section 11A of The Central Excise Act, 1944, which is pari materia to the proviso to Section 28 discussed above, made the following observations :*

> *"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 course 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]*

14. *In Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara - (2005) 2 SCC 168 = 2005 (179) E.L.T. 3 (S.C.), a three-judge Bench of this Court, while referring to the observations extracted above, echoed the following views :*

"23. Now coming to the question of limitation, at the outset, we wish to clarify that there are two concepts which are required to be kept in mind for the purposes of deciding this case. Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation. Under section 11A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to section 11A(1). Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful mis-statement or suppression of facts, or in contravention of

any provision of the Act or Rules with the intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, we are concerned with the proviso to section 11A(1).

24. In the case of Cosmic Dye Chemical v. Collector of Central Excise, Bombay (1995) 6 SCC 117, this Court held that intention to evade duty must be proved for invoking the proviso to section 11A(1) for extended period of limitation. It has been further held that intent to evade duty is built into the expression "fraud and collusion" but mis-statement and suppression is qualified by the preceding word "wilful". Therefore, it is not correct to say that there can be suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for invoking the proviso to section 11A.

25. In case of Pushpam Pharmaceuticals Company v. C.C.E. [1995 (78) E.L.T. 401 (S.C.)], this Court has held that the extended period of five years under the proviso to section 11A(1) is not applicable just for any omission on the part of the assessee, unless it is a deliberate attempt 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 constitute suppression of fact."

15. *In Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut - (2005) 7 SCC 749 = 2005 (188) E.L.T. 149 (S.C.), while again referring to the observations made in Pushpam Pharmaceuticals Company (supra), this Court clarified the requirements of the proviso to Section 11-A, as follows :-*

"26... This Court in the case of Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay (supra), 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 and 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 the proviso to Section 11A of the Act."

***16.** In Collector of Central Excise v. H.M.M. Ltd. - 1995 Supp (3) SCC 322 = 1995 (76) E.L.T. 497 (S.C.), this Court held that mere non-disclosure of certain items assessable to duty does not tantamount to the mala fides elucidated in the proviso to Section 11A(1) of the Central Excise Act, 1944. It enunciated the principle in the following way :-*

"The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty

> *due on the said product. There could be, counsel contended, bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, misconduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention."*

Therefore, if non-disclosure of certain items assessable to duty does not invite the wrath of the proviso, we fail to understand how the non-payment of duty on disclosed items, after inquiry from the concerned department meets, with that fate.

17. *In fact, the Act contemplates a positive action which betrays a negative intention of willful default. The same was held by Easland Combines, Coimbatore v. The Collector of Central Excise, Coimbatore - (2003) 3 SCC 410 = 2003 (152) E.L.T. 39 (S.C.) wherein this Court held :-*

> *"31. It is settled law that for invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or willful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation."* *[Emphasis supplied]*

18. *We are in complete agreement with the principle enunciated in the above decisions, in light of the proviso to Section 11A of the Central Excise Act, 1944. However, before extending it to the Act, we would like to point out the niceties that separate the analogous provisions of the two,* *an issue which received the indulgence of this Court in Associated Cement Companies Ltd. v. Commissioner of Customs - (2001) 4 SCC 593, at page 619 = 2001 (128) E.L.T. 21 (S.C.) in the following words :-*

"53… Our attention was drawn to the cases of CCE v. Chemphar Drugs and Liniments - (1989) 2 SCC 127, Cosmic Dye Chemical v. CCE - (1995) 6 SCC 117, Padmini Products v. CCE - (1989) 4 SCC 275, T.N. Housing Board v. CCE - 1995 Supp (1) SCC 50 and CCE v. H.M.M. Ltd. (supra). In all these cases the Court was concerned with the applicability of the proviso to Section 11-A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show-cause notice in the case of non-levy or short-levy to five years from a normal period of six months...

54. While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11-A to be invoked, the intention to evade payment of duty must be shown. This has been clearly brought out in Cosmic Dye Chemical case where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial. While disagreeing with the aforesaid interpretation this Court at p. 119 observed as follows : (SCC para 6)

'6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words 'misstatement or suppression of facts' which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to

evade payment of duty'. It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful.'

The aforesaid observations show that the words "with intent to evade payment of duty" were of utmost relevance while construing the earlier expression regarding the misstatement or suppression of facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso could be invoked.

55. Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11-A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11-A of the Excise Act which are missing in Section 28(1) of the Customs Act and the proviso in particular...

56. The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions "misstatement" and "suppression of facts" are to be qualified by the word "wilful", as was done in the Cosmic Dye Chemical case while construing the proviso to Section 11-A, the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee."

[Emphasis supplied]

19. *Thus, Section 28 of the Act clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of Section 28 of the Act and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite.*

20. *This Court in Aban Loyd Chiles Offshore Limited and Ors. v. Commissioner of Customs, Maharashtra - (2006) 6 SCC 482 = 2006 (200) E.L.T. 370 (S.C.) observed :-*

"The proviso to Section 28(1) can be invoked where the payment of duty has escaped by reason of collusion or any willful misstatement or suppression of facts. So far as "misstatement or suppression of facts" are concerned, they are qualified by the word "willful". The word "willful" preceding the words "misstatement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty."

21. *The Revenue contended that of the three categories, the conduct of the appellant falls under the case of "willful misstatement" and pointed to the use of the word "misutilizing" in the following statement found in the order of the Commissioner of Customs, Raipur in furtherance of its claim :*

"The noticee procured 742.51 kl of furnace oil valued at Rs. 54,57,357/- without payment of customs duty by misutilizing the facility available to them under Notification No. 53/97-Cus., dated 3-6-1997"

22. *We are not persuaded to agree that this observation by the Commissioner, unfounded on any material fact or evidence, points to a finding of collusion or suppression or misstatement. The use of the word "willful" introduces a* *mental element and hence, requires looking into the mind of the appellant by gauging its actions, which is an indication of one's state of mind. Black's Law Dictionary, Sixth Edition (pp 1599) defines "willful" in the following manner :-*

"Willful. Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass…

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done…"

23. *In the present case, from the evidence adduced by the appellant, one will draw an inference of bona fide conduct in favour of the appellant. The appellant laboured under the very doubt which forms the basis of the issue before us and hence, decided to address it to the concerned authority, the Development Commissioner, thus, in a sense offering its activities to assessment. The Development Commissioner answered in favour of the appellant and in its reply, even quoted a letter by the Ministry of Commerce in favour of an exemption the appellant was seeking, which anybody would have found satisfactory. Only on receiving this satisfactory reply did the appellant decide to claim exemption. Even if one were to accept the argument that the Development Commissioner was perhaps not the most suitable repository of the answers to the queries that the appellant laboured under, it does not take away from the bona fide conduct of the appellant. It still reflects the fact that the appellant made efforts in pursuit of adherence to the law rather than its breach.*

24. *Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a* *cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in Union of India v. Ashok Kumar & Ors. - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."*

4.8 Thus in view of the discussion as above we do not find any ground specified, in show cause notice or the orders of lower authorities justifying the invocation of extended period of limitation for making this demand. Thus the demand is barred by limitation as the Show Cause Notice for the period 01.12.2005 to 24.10.2008 has been issued on 04.01.2011.

4.9 As we are allowing the appeal on the ground of limitation we have not considered the other issues urged in the appeal on the merits of demand or its quantification.

5.1 Appeal is allowed.

(Operative part of the order is pronounced in open court)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Sd/-
(ANGAD PRASAD)
MEMBER (JUDICIAL)

Nihal