

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

REGIONAL BENCH - COURT NO.II

Service Tax Appeal No.70761 of 2025

(Arising out of Order-in-Appeal No. 256-ST/APPL/LKO/2022 dated 23/07/2025 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow)

M/s Rajendra Kumar Gupta,
(10/174, Patel Nagar, Moti Katra, Agra-282003)

.....Appellant

VERSUS

Commissioner of Central Excise &

CGST, Agra

....Respondent

(113/4, Sanjay Place, Agra-282002)

APPEARANCE:

Shri S.P. Ojha, Consultant &
Ms Stuti Saggi, Advocate

for the Appellant

Shri Santosh Kumar, Authorised Representative for the Respondent

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

FINAL ORDER NO.70055/2026

DATE OF HEARING : 20 January, 2026
DATE OF DECISION : 20 January, 2026

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No. 256-ST/APPL/LKO/2022 dated 23/07/2025 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow. By the impugned order, Commissioner (Appeals) has modified the Order-in-Original No.27/ST/DC/HQ/Agra/2024-25 dated 02.05.2024 wherein following has been held:-

"ORDER

a. I confirm the demand of Service Tax amounting to Rs.200855/-(Rupees Two Lakh Eight Hundred and Fifty Five Only) and ordered for its recovery against M/s

Rajendra Kumar Gupta, 10/174, Patel Nagar, Moti Khatra, Agra under the Section 73 (2) of the Finance Act, 1994, read with Section 174 of CGST Act, 2017 as discussed here-in-above.

b. I confirm the liability of interest at the appropriate rates on the aforesaid short paid Service Tax of amount of Rs.200855/- and order for its recovery under the provisions of the Section 75 of the Finance Act, 1994 read with Section 174 of CGST Act, 2017, as discussed here-in-above.

c. I also impose a penalty of Rs.200855/- upon the aforesaid Noticee, under Section 78 of the Finance Act, 1994 read with Section 174 of CGST Act, 2017 for contravention of various provisions of the Act/Rules. However, an option is given to the Noticee under Clause (ii) of sub Section (1) of Section 78 of the Finance Act, 1994 that if the Service Tax along with interest is deposited within thirty days of communication of this order, the amount of penalty liable to be paid by the party shall be twenty five percent of the Service Tax so determined in the order. Provided that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period.

d. I also impose a penalty of Rs.10,000/- s.10,000/- [Rupees Ten Thousand only] upon the Noticee under Section 77(1)(a) of the Finance Act, 1994 read with Section 174 of CGST Act, 2017, for the reasons discussed here-in-above.

e. I also impose a penalty of Rs.10,000/-[Rupees Ten Thousand only] upon the Noticee under Section 77(1)(c) of the Finance Act, 1994, read with Section 174 of CGST Act, 2017, for the reasons discussed here-in-above.

f. I also impose a penalty of Rs.10,000/- [Rupees Ten Thousand only] upon the Noticee under Section 77(2) of

the Finance Act, 1994, read with Section 174 of CGST Act, 2017, for the reasons discussed here-in-above.”

2.1 Appellant having PAN No.ADRPG1364M appeared to have been providing taxable services as defined under Section 65B(44) of the Finance Act, 1994. The said services are not covered in the Negative list under Section 66D of the Finance Act, 1994 nor exempted under Mega Exemption Notification No.25/2012-ST dated 20.06.2012.

2.2 As per the information received from the Income Tax Department, it was observed that appellant had received around Rs.13,85,210/- under Section 194C of the Income Tax Act.

2.3 Inquiries were initiated and letters dated 04.06.2020 and 20.08.2020 were issued to the appellant to furnish various documents alongwith balance sheet for the year 2015-16, but appellant failed to provide any document. Accordingly, service tax liability was calculated on the appellant as detailed in table below:-

Year	Value of services as per ITR	Total Value for TDS (incl. 194 C, 194-1a, 194-Tb, 194-J, 194 H)	Higher Value between Col 2 Col. 3	ST on @ 15% Including All Cess [Col.4x15% [Higher of the two rates as classified for the period	ST Paid as per TPI	Net ST Payable by the Noticee (Col.5-Col6)
1	2	3	4	5	6	7
2015-16	1385210	0	185210	200855	0	200855

2.4 Show cause notice dated 06.11.2020 alleging suppression was issued to the appellant asking them to show cause as to why:-

- a. Service Tax (including cesses) amounting to Rs.200855/- (Rupees Two Lakh Eight Hundred and Fifty Five Only) not paid during the period 2015-16 should not be demanded and recovered from them by way of STEV invoking the extended period under the proviso to Section 73(1) of the Act read with Section 174 of the CGST Act, 2017:*
- b. Interest at the appropriate rates for the relevant period till the payment of the Service Tax mentioned at Sr. No.(a) above, should not be demanded and recovered from them*

under the provisions of Section 75 of the Finance Act, 1994 read with Section 174 of CGST Act, 2017;

c. Penalty should not be imposed upon them under Section 77(1)(c) of the Act read with Section 174 of CGST Act, 2017 in as much as the Noticee failed to furnish the information called by the CGST & Central Excise Officer.

d. Penalty should not be imposed upon them for suppressing the facts from the department with intent to evade payment of service tax under Section 78 of the Act read with Section 174 of the CGST Act, 2017.

e. Penalty should not be imposed upon them under Section 77(1)(a) of the Finance Act, 1994 read with Section 174 of the Central Goods and Services Tax Act, 2017 for their failure to take registration as per provisions of Section-69 of the Act.

*f. Penalty should not be imposed upon them under Section 77(2) of the Act read with Section 174 of the Central Goods and Services Tax Act, 2017 for contravention of various provisions of the Act *ibid* and Rules made there under."*

2.5 The said show cause notice was adjudicated as per the Order-in-Original dated 02.05.2024 referred in para 1 above.

2.6 Aggrieved appellant have filed appeal before Commissioner (Appeals) which has been disposed of as per the impugned order.

2.7 Aggrieved appellant have filed this appeal.

3.1 I have heard Ms Stuti Saggi learned Counsel appearing on behalf of the appellant and Smt Chitra Srivastava, Authorized Representative for the revenue.

4.1 I have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 Impugned order records as follows:-

"5.1 I have carefully gone through the case records. I find that the department has alleged non-payment of service tax on taxable service which are neither covered in

negative list under Section 66D of the Finance Act, 1994 nor exempted under mega exemption Notification No. 25/2012-ST dated 20.06.2012 and that the Appellant has submitted unaudited Balance Sheet in simple form and failed to submit complete ITR.

5.2 The appellant on the other hand contended that as they have provided catering services and abatement @40% is admissible to them in terms of Notification No. 24/2012-ST dated 06.06.2012 thus their abated taxable value of services comes to Rs.8,31,126/- is well within the threshold SSI exemption limit of Rs.10 lacs in terms of Notification No. 33/2012-ST dated 20.06.2012 for F.Y. 2016-17 therefore exempted from payment of service tax. In support of their contention they have provided copy of Balance Sheet, Profit & Loss Account duly certified by a Chartered Accountant, Form 26AS and complete ITR for the F.Y. 2014-15 & 2015-16. In support of their claim, the Appellant has cited the law of the Hon'ble CESTAT, Allahabad in the case of Ashok Kumar Mishra v/s CCE Allahabad.

5.3. I find that the Appellant has provided copy of Balance Sheet, Profit & Loss Account duly certified by a Chartered Accountant, Form 26AS and complete ITR for the F.Y. 2014-15 & F.Y. 2015-16. I find that the Chartered Accountant has certified that the income received by the Appellant on account of Catering Work is Rs. 13,19,280/- & Rs. 13,85,210/- during F.Y. 2014-15 & F.Y. 2015-16 respectively.

5.4 Now, I go through Para 2C of the Service Tax (Determination of Value) Rules, 2006 and relevant portion is reproduced hereunder:

Subject to the provisions of section 67, the value of service portion in an activity wherein goods being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity at a restaurant or as outdoor catering, shall be

the specified percentage of the total amount charged for such supply, in terms of the following Table, namely:-

<i>SN</i>	<i>Description</i>	<i>Percentage of total amount</i>
<i>1</i>	<i>Service portion in an activity wherein goods, being food or any other 40 article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity, at a restaurant</i>	<i>40</i>
<i>2</i>	<i>Service portion in outdoor catering wherein goods, being food or any 60 other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of such outdoor catering</i>	<i>60</i>

Explanation 1. For the purposes of this rule, "total amount" means the sum total of the gross amount charged and the fair market value of all goods and services supplied in or in relation to the supply of food or any other article of human consumption or any drink (whether or not intoxicating), whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any, and

(ii) the value added tax or sales tax, if any, levied thereon: Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

In view of the above provisions I find that abatement @40% is admissible to the Appellant as they provided outdoor catering services. I find that taxable value i.e. total amount charged for Catering Work by the Appellant is

Rs. 13,85,210/- during F.Y. 2015-16. After abatement @40% of the value of service portion, the taxable value is reduced to Rs. 8,31,126/-.

5.5 Now, I go through contents of Notification 33/2012-ST dated 20.06.2012 and relevant portion is reproduced hereunder:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Finance Act), and in supersession of the Government of India in the Ministry of Finance(Department of Revenue) notification No. 6/2005-Service Tax, dated the 1 st March, 2005, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide G.SR. number 140(E), dated the 1 st March, 2005, 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 services of aggregate value not exceeding ten lakh rupees in any financial year from the whole of the service tax leviable thereon under section 668 of the said Finance Act:

.....

2. The exemption contained in this notification shall apply subject to the following conditions, namely:

(i)

(ii)

(vii) the aggregate value of taxable services rendered by a provider of taxable service from one or more premises, does not exceed ten lakh rupees in the preceding financial year.

.....

Explanation. For the purposes of this notification,-

(A).....

(B) "aggregate value" means the sum total of value of taxable services charged in the first consecutive invoices issued during a financial year but does not include value

charged in invoices issued towards such services which are exempt from whole of service tax leviable thereon under section 66B of the said Finance Act under any other notification."

From the explanation, I find that Aggregate value ONLY EXCLUDES values for services which are FULLY EXEMPT and includes values for services which are not fully exempt or partially exempt. Therefore, I hold that aggregate value of taxable services of the Appellant is Rs. 13,19,280/- & Rs. 13,85,210/- during F.Y. 2014-15 & F.Y. 2015-16 respectively.

I also find that Para 2(viii) unambiguously provides that for claiming benefit of exemption under this notification the aggregate value of taxable services should not exceed ten lakh rupees in the preceding financial year whereas I find that the aggregate value of taxable services of the Appellant has exceeded ten lakh rupees in the preceding financial year i.e. F.Y. 2014-15. Therefore, I hold that the Appellant is not eligible for benefit of in terms of exemption Notification 33/2012-ST dated 20.06.2012 during F.Y. 2015-16. Accordingly, tax would be calculated on an aggregate value of Rs.13,85,210/- after allowing abatement @40% in terms of Notification 33/2012-ST dated 20.06.2012.

5.6 Accordingly, I hold that the Appellant is liable to pay Service Tax amounting to Rs. 1,20,513/- along with interest under Section 75 of the Act and mandatory penalty equal to the amount of Service tax under Section 78 of the Act. I also impose penalties of Rs. 10,000/ each under Section 77(1)(a), 77(1)(c)(i) & 77(2) of the Act."

4.3 From the reading of the findings recorded in the impugned order, I find that there is no discussion in respect of invocation of extended period of limitation to show that ingredients have prescribed by proviso to Section 73(1) are present in this case. Further, it is nowhere coming from the impugned order to show that whether the default payment of tax was on account of

ignorance or deliberate suppression with intent to evade. Thus, in absence of any such findings in the impugned order, I hold that the impugned order has been made on the presumption that extended period of limitation will be invokable for making this demand.

4.4 On perusal of the Order-in-Original, I do not find any discussion showing that whether the act of non-payment of tax was out of deliberate ignorance etc. I find that major portion of the demand has been found not to be sustainable against the appellant.

4.5 As the major portion of the demand has been dropped by the original authority himself, I find that there is sufficient ground to hold that appellant entertained a bonafide belief that he was not required to pay service tax in respect of these receipts and accordingly he had not paid the tax even if it was actually due. Hon'ble Supreme Court in the case of Uniworth Textiles Ltd. [2013 (288) ELT 161 (SC)] has held as follows:-

"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."

25. *Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In Aban Loyd Chiles Offshore Limited and Ors. (supra), this Court made the following observations :*

"21. This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement or suppression of fact with intent to evade the payment of duty. It has been observed :

'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or

suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held :

...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso...." (Emphasis supplied)

26. *Hence, on account of the fact that the burden of proof of proving mala fide conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant."*

4.6 In the following decisions also it has been held that extended period of limitation could not have been invoked for making the demand when the person entertained a bonafide belief about non taxable nature or exempted nature of the services provided.

- Anand Nishikawa Co. Ltd. Vs CCE, Meerut 2025 (188) ELT 149;
- Infinity Infotech Parks Ltd. Vs UOI 2014 (36) STR 37;
- CCE, Chennai Vs Chennai Petroleum Corporation Ltd. 2007 (211) ELT 193;

4.7 I observe that Hon'ble Supreme Court has in the case of Stemcyte India Therapeutics Pvt. Ltd [Order dated 14.07.2025 Civil Appeal Nos. 3816-3817 of 2025] observed as follows:

"9. In the present case, the disputed period is from 01.07.2012 to 16.02.2014. However, the show cause notice was issued only on 28.07.2017, demanding a sum of Rs.2,07,29,576/- towards service tax, by invoking the extended period of limitation. Under section 73(1) of the Finance Act, 1994, a show cause notice must ordinarily be issued within one year from the relevant date. The proviso to section 73(1) allows an extended period of up to five years only where the nonpayment or short payment of service tax is due to fraud, collusion, wilful misstatement, suppression of facts, or contravention of the provisions of the Act or Rules, with an intent to evade payment of service tax.

9.1. It is evident from the communication dated 02.12.2013 issued by the Deputy Commissioner of Central Excise, Ahmedabad-III, directing the appellant to furnish the documents relating to their activities, that the department was already aware of the nature of the appellant's operations as early as in 2013. Despite such awareness, the department issued the show cause notice after an inordinate delay, well beyond the ordinary period

of limitation, and sought to justify it by invoking the extended period.

9.2

9.3. *It is a settled principle of law that, for the department to invoke the extended period of limitation, there must be an active and deliberate act on the part of the assessee to evade payment of tax. Mere non-payment of tax, without any element of intent or suppression, is not sufficient to attract the extended limitation period. In this regard, reference may be made to the following judgments:*

(i) Padmini Products v. CCE [(1989) 4 SCC 275]

"12. Shri V. Lakshmi Kumaran, learned counsel for the appellant drew our attention to the observations of this Court in CCE v. Chemphar Drugs and Liniments, Hyderabad [(1989) 2 SCC 127 : 1989 SCC (Tax) 245] where at p. 131 of the report, this Court observed that in order to sustain an order of the Tribunal beyond a period of six months and up to a period of five years in view of the proviso to sub-section (1) of Section 11-A of the Act, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. It was observed by this Court that something positive other than mere inaction or failure on the part of the manufacturer or producer of conscious or deliberate withholding of information when the manufacturer knew otherwise, is required to be established before it is saddled with any liability beyond the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any

Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal, however, had held contrary to the contention of the appellant. The Tribunal noted that dhoop sticks are different products from agarbatis even though they belonged to the same category and the Tribunal was of the view that these were to be treated differently. Therefore, the clarification given in the context of the agarbatis could not be applicable to dhoop sticks etc. and the Tribunal came to the conclusion that inasmuch as the appellant had manufactured the goods without informing the central excise authorities and had been removing these without payment of duty, these would have to be taken to attract the mischief of the provisions of Rule 9(2) and the longer period of limitation was available. But the Tribunal reduced the penalty. Counsel for the appellant contended before us that in view of the trade notices which were referred to by the Tribunal, there is scope for believing that agarbatis were entitled to exemption and if that is so, then there is enough scope for believing that there was no need of taking out a licence under Rule 174 of the said Rules and also that there was no need of paying duty at the time of removal of dhoop sticks, etc. Counsel further submitted that in any event apart from the fact that no licence had been taken and for which no licence was required because the whole duty was exempt in view of Notification No.111 of 1978, referred to hereinbefore, and in view of the fact that there was scope for believing that it was exempt under Schedule annexed to the first notification i.e. No.55 of 1975, being handicrafts, the appellant could not be held to be guilty of the fact that excise duty had not been paid or short-levied or short-paid or erroneously refunded because of either any fraud or

collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act. Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision. Shri Ganguly, appearing for the Revenue, contended before us that the appellant should have taken out a licence under Rule 174 of the said Rules because all the goods were not handicrafts and as such were not exempted under Notification No. 55 of 1975 and therefore, the appellant were obliged to take out a licence. The failure to take out the licence and thereafter to take the goods out of the factory gate without payment of duty was itself sufficient, according to Shri Ganguly, to infer that the appellant came within the mischief of Section 11-A of the Act. We are unable to accept this position canvassed on behalf of the Revenue. As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11-A of the Act. In the facts and circumstances of this case, there were materials, as indicated to suggest that there was scope for confusion and the appellant believing that the goods came within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that behalf, when there was no contrary evidence

that the producer or the manufacturer knew these were excisable or required to be licensed, would not attract the penal provisions of Section 11-A of the Act. If the facts are otherwise, then the position would be different. It is true that the Tribunal has come to a conclusion that there was failure in terms of Section 11-A of the Act. Section 35-L of the Act, inter alia, provides that an appeal shall lie to this Court from any order passed by the appellate tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purpose of assessment. Therefore, in this appeal, we have to examine the correctness of the decision of the Tribunal. For the reasons indicated above, the Tribunal was in error in applying the provisions of Section 11-A of the Act. There were no materials from which it could be inferred or established that the duty of excise had not been levied or paid or short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of the Act or of the Rules made thereunder. The Tribunal in the appellate order has, however, reduced the penalty to Rs 5000 and had also upheld the order of the confiscation of the goods. In view of the fact that the claim of the Revenue is not sustainable beyond a period of six months on the ground that these dhoop sticks, etc. were not handicrafts entitled to exemption, we set aside the order of the Tribunal and remand the matter to the Tribunal to modify the demand by confining it to the period of six months prior to issue of show-cause notice and pass consequential orders in the appeal on the question of penalty and confiscation. The appeal is allowed to the extent

indicated above and the matter is, therefore, remanded to the Tribunal with the aforesaid directions. This appeal is disposed of accordingly."

(ii) CCE v. Chemphar Drugs and Liniments [(1989) 2 SCC 127]

"7. The respondent filed an appeal before the Tribunal. The Tribunal considered the matter and noted that the appellant's case was that the demand for duty for the period beyond six months was time-barred; and the respondent's case was that the demand for the period beyond 6 months from the receipt of show-cause notice, was time-barred inasmuch as there was no suppression or misstatement of facts by the appellant with a view to evade payment of duty. In support of its claim the respondent produced classification list approved by the authorities during the period 1978-79, and also produced extracts from the survey register showing that the officers had been visiting its factory from time to time and also taking note of the previous goods manufactured by the respondent. The plea of the Revenue was that there was suppression and/or mis-declaration and/or wrong information furnished in the declaration itself. The Tribunal noted the facts as follows:

"We observe it is not denied by the Revenue that the appellants had been submitting their classification lists from time to time showing the various products manufactured by them including those falling under T.I. 14-E and 68 also these containing alcohol. The officers who visited the factory as seen from the survey register at the factory also took note of the various products being manufactured by the appellants. It cannot be said that the appellants had held back any information in

regard to the range and the nature of the goods manufactured by them. The appellants have maintained that the value of the exempted goods under T.I. 68 and also value of medicines containing alcohol, according to their interpretation, were not required to be included for the purpose of reckoning of the total excisable goods cleared by them. There is nothing on record to show that the appellants non-bonafidely held back information about the total value of the goods cleared by them with a view to evade payment of duty. Their explanation that it was only on the basis of their interpretation that the value of the exempted goods were not required to be included that they did not include the value of the exempted goods which they manufactured at the relevant time and falling under T.I. 68 is acceptable in the facts of that case. The departmental authorities were in full knowledge of the facts about manufacture of all the goods manufactured by them when the declaration was filed by the appellants. That they did not include the value of the product other than those falling under T.I. 14-E manufactured by the appellants has to be taken to be within the knowledge of the authorities. They could have taken corrective action in time. We therefore find there was no warrant in invoking longer time-limit beyond six months available for raising the demand. So far as the demand for the period within six months reckoned from the date of receipt of the show-cause notice is concerned, we observe that the appellants' case is that value of the goods under T.I. 68 was not required to

be included but the Revenue's plea is that only value of the specified goods under Notifications Nos. 71/78 and 80/80 was not required to be excluded."

8. On the aforesaid view the Tribunal came to the conclusion that the demand raised on this for a period beyond 6 months was not maintainable.

9. Aggrieved thereby, the Revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or shortlevied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included

and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that explanation was plausible, and also noted that the department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under T.I. 14-E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence.”

(iii) Pushpam Pharmaceuticals Co. v. CCE [1995 Supp (3) SCC 462]

"4. Section 11-A empowers the Department to reopen 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. Infact 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."

(iv) *CCE v. Punjab Laminates (P) Ltd. [(2006) 7 SCC 431]*

"12. At no point of time, the Revenue doubted the correctness or otherwise of the manufacturing process or the ingredients disclosed by the respondent. The stand of the respondent that the industry as such had adopted the same manufacturing process and had been extended the benefit of the exemption notification of 1989 has not been called in question. If the stand of the manufacturer is correct, there was no reason as to why it should be singled out.

13. This Court decided Bakelite Hylam Ltd. [(1997) 10 SCC 350] on 10-3-1997. The impugned notice was issued only on 9-12-1997 evidently relying on or on the basis thereof.

14. It is not a case where the respondents had not disclosed the activities of manufacturing products carried out by them by declaration or otherwise. They responded to each and every query of the appellant, as and when called upon to do so. The authorities of the appellant must have verified the said disclosures. At least they are expected to do so. The disclosure made by the respondent was acceptable to them. Their bona fides were never questioned.

15. The applicability of the extended period of limitation is, therefore, required to be considered in the aforementioned context. The proviso, it is trite, provides for an exception. It is not the rule. A case, therefore, has to be made out for attracting the same.

16. *In Primella Sanitary Products (P) Ltd. v. CCE [(2005) 10 SCC 644 : (2005) 184 ELT 117]* a three-Judge Bench of this Court was dealing with a case where a concession was made by a counsel appearing on behalf of the Revenue. The Court opined that although the item was put under the right classification list but they had not been permitted to take a different stand stating: (SCC p. 648, para 13)

"As the matter of classification has proceeded on a matter of concession of facts we do not allow the appellants to withdraw from that concession. They are now not permitted to argue on the question of classification."

17. *In Pahwa Chemicals (P) Ltd. v. CCE [(2005) 189 ELT 257]* this Court held:

*"The appellants have all along claimed that merely because they were affixing the label of a foreign party, they did not lose the benefit of Notification No. 175/86-CE as amended by Notification No. 1/93-CE. The view taken by the appellants had, in some cases, been approved by the Tribunal which had held that mere use of the name of a foreign party did not disentitle a party from getting benefit of the notifications. It is only after larger Bench held in *Namtech Systems Ltd. v. CCE [(2000) 115 ELT 238 (cegat)]* that the position has become clear. It is settled law that mere failure to declare does not amount to wilful misdeclaration or wilful suppression. There must be some positive act on the part of the party to establish either wilful mis-declaration or wilful suppression. When all facts are before the Department and a party in the belief that affixing of a label makes no difference does not make a declaration, then there would be no wilful mis-declaration or wilful suppression. If the Department*

felt that the party was not entitled to the benefit of the notification, it was for the Department to immediately take up the contention that the benefit of the notification was lost.”

18. Keeping in view the peculiar facts and circumstances of this case, we are of the opinion that it is not a fit case where this Court should interfere. The appeal is, therefore, dismissed. The parties shall, however, pay and bear their own costs.”

9.4. Therefore, in the absence of fraud, collusion, wilful misstatement, or suppression of facts with an intent to evade payment of service tax, the invocation of the extended period of limitation under Section 73 of the Finance Act, 1994 is wholly unwarranted. Mere non-payment of service tax, by itself, does not justify the invocation of the extended limitation period. Accordingly, the show cause notice issued by the department is clearly time-barred. On this ground alone, the impugned order deserves to be set aside.”

4.8 In view of the above, I find that demand made by invoking extended period of limitation cannot be upheld. The impugned order which have made a presumption about the fact that the extended period of limitation will be invokable is bad in law.

5.1 Appeal is allowed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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