**CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL**
**PRINCIPAL BENCH, NEW DELHI**
**COURT NO. 1**

**Service Tax Appeal No. 55693 of 2014**

[Arising out of Order-in-Original No. 09/COMMR/IND/ST/2014 dated 07.07.2014 passed by the Commissioner, Central Excise Customs and Service Tax, Indore]

**M/s Pappu Construction** **Appellant**
2, Teacher Colony, Behind Ganesh Mandir,
Bedavalli, Meghnagar, Jhabua
Madhya Pradesh

Versus

**Commissioner, Central Excise,** **Respondent**
**Customs & Service Tax, Indore**
Manik Bagh Palace, Indore
Madhya Pradesh

**<u>Appearance</u>**
Present for the Appellant : Shri Z U Alvi, Advocate

Present for the Respondent: Shri R K Manjhi, Authorised Representative

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

**Date of Hearing/Decision: 14/11/2019**

**<u>FINAL ORDER NO. 51586/2019</u>**

**<u>JUSTICE DILIP GUPTA:</u>**

1. The order dated 07 July, 2014 passed by the Commissioner of Central Excise, Customs and Service Tax Indore[1] has been assailed in this appeal. The Commissioner has ordered for recovery of service tax of Rs. 61,85,787/- under Section 73 of the Finance Act, 1994[2] by invoking the extended period

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1. **the Commissioner**
2. **the Act**

of limitation under the proviso to the aforesaid section. The Commissioner has also directed for payment of interest and penalty.

2. The Appellant executed a contract dated 05 July, 2005 with M/s MP State Mining Corporation Limited[3] for mining of rock phosphate from Government Guwali Meghnagar Mines[4] situated in the State of Madhya Pradesh for a period of three years upto 4 July, 2008. This contract was extended initially upto 30 July, 2009 and thereafter upto March, 2011 on the same terms.

3. It is with effect from 1 June, 2007 that any service provided or to be provided to any person, by any other person in relation to mining or mineral oil or gas was made a taxable service under Section 65 (105)(zzzy) of the Act. The Appellant claims that it was not aware that mining had became a taxable service till January, 2011, when it entered into another contract with the State Corporation for mining at Hirapur mines in District Sagar.

4. A Show Cause Notice dated 03 October, 2012 was issued to the Appellant mentioning therein that the Appellant had not paid service tax on receipts from taxable service provided by it at Meghnagar mines during the period 1 June, 2007 to 31 March, 2011. It was stated that the Appellant should have got itself registered with the Department in June, 2007 and should have paid the service tax on the receipts from the State Corporation, but it did not. It was further stated in the Show Cause Notice that when the Appellant was awarded another contract for mining at Hirapur mines in District Sagar in January, 2011 it got itself registered with the service tax Department and also paid service tax for the mining undertaken at Hirapur mines. It was also stated that the Appellant also paid service tax for the new

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3. **State Corporation**
4. **Meghnagar mines**

contract executed for Meghnagar mines from March, 2011 under the agreement dated 22 March, 2011. In regard to the invocation of the extended period of limitation, as provided for under the proviso to Section 73 (1) of the Act, the Show Cause Notice mentions that by not getting itself registered with the Department and failing to declare the receipts of the taxable services rendered to the State Corporation, the Appellant appeared to have done so with an intention to suppress the value of taxable service so as to avoid detection by the Department that it was not paying service tax.

5. The Commissioner confirmed the demand of service tax and the relevant observations are as follows;

> "I find that the assessee has been providing services to MPSMC since 01.06.2007 i.e. the date from which the mining services were brought under the purview of service tax, without obtaining service tax registration. The assessee had obtained registration (ABRPS7384RSD002) in January, 2012 at Division Sagar of Bhopal Commissionerate for mining services provided by them at MPSMC mines at Hirapur District Sagar (MP), thus the assessee cannot feign ignorance that they were not seized of the fact that the services rendered by them to MPSMC at Meghnagar mines District Jhabua is taxable or otherwise. It was only after the investigation regarding evasion of service tax was taken up by the Directorate of Central Excise Intelligence(DGCEI), Regional Unit, Indore the Noticee got registered under Registration number ABRPS7384RSD003 in July, 2011. It, therefore, appears that there was deliberate attempt of tax avoidance on their part as they were registered for mining services at Sagar (MP) since January, 2011."

6. Shri Z U Alvi, learned Counsel appearing for the Appellant has very fairly stated that mining had become a taxable service with effect from 1 June, 2007, but what has been contended is that the extended period of limitation, in facts and circumstances of the case, could not have been invoked. Elaborating this submission, learned Counsel submitted that the Appellant became aware that mining had became a taxable service with effect from 1 June, 2007 only in January, 2011 when another contract was

executed with the State Corporation for mining at Hirapur, and therefore, the Department cannot urge that the Appellant had not paid service tax by reason of wilful suppression of facts with an intent to evade payment of service tax. In support of this contention, learned Counsel placed reliance upon decisions of the Supreme Court in **Pushpam Pharmaceutical Co. vs. Commissioner of Central Excise, Bombay[5],** and **Uniworth Textile Limited vs. Commissioner of Central Excise, Raipur[6],** and the decision of the Delhi High Court in **Bharat Hotels Limited vs. Commissioner of Central Excise (Adjudication)[7].**

7. Shri R K Manjhi, learned Authorised Representative of the Department has, however, submitted that the extended period of limitation was correctly invoked in the present case as there was wilful suppression of facts with an intent to evade payment of service tax. In this connection learned Authorised Representative of the Department placed reliance upon the statement made by Rajkumar Vijay Pal Singh, proprietor of the Appellant on 18 August, 2011 that the Appellant had provided taxable service but had not paid service tax. Learned Authorised Representative also submitted the bonafides of the Appellant could have been understood, if after coming to know in January, 2011 that mining was a taxable service, it had immediately got itself registered with the Department, but it was only when a fresh contract was entered for the Meghnagar mines with the State Corporation that the Appellant ultimately got itself registered after the investigation in the present proceedings had started. In this connection

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**5. 1995(78) ELT 401(SC)**
**6. 2013(288) ELT 161 (SC)**
**7. 2018 (12) GSTL 368 (Del.)**

learned Authorised Representative placed reliance upon a decision of the Hyderabad High Court in **NRI Academy Guntur vs. Union of India**[8] as also a decision of the Principal Bench of the Tribunal in **Bharti Hexcom Limited vs. Commissioner of Central Excise, Jaipur-I**[9]

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

9. The Appellant entered into an agreement with the State Corporation for mining of rock phosphate on 05 July, 2005. Royalty/Cess/Toll Tax etc., were to be paid by the State Corporation to the State Government. There was no mention of service tax on mining in the contract for the reason that mining became a taxable service with effect from 1 June, 2007 when Clause 65 (105)(zzzy) was introduced in the Act. The contract was extended on the same terms and conditions upto March, 2011. The period of dispute is from 1 June, 2007 to 31 March, 2011. The Appellant does not dispute that mining became a taxable service with effect from 1 June, 2007. The case of the Appellant is that it was not aware of this position and so there was no mention of it in the contract when it was renewed twice, nor did it get itself registered or paid service tax. According to the Appellant, it acquired knowledge that mining being a taxable service only in January, 2011 during the course of entering into another agreement with the State Corporation

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**8. 2019(20) GSTL 23 (A.P.)**
**9. 2019 (24) GSTL 588 (Tri.-Del.)**

in relation to mining at Hirapur and that is why when a fresh contract was entered for the Meghnagar mines with the State Corporation in March, 2011, it started paying service tax after getting itself registered.

10. The issue that arises for consideration in this appeal is as to whether the Department was justified in invoking the extended period of limitation of five years, because admittedly the Show Cause Notice was issued on 3 October, 2012 for the period 1 June, 2007 to 31 March, 2011.

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

> 73.(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
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> **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-
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> (a) fraud; or
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> (b) collusion; or
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> (c) wilful mis-statement; or
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> (d) suppression of facts; or
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> (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,
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> 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.

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

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

> **73(6)** For the purpose of this section, "relevant date" means,-
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> (i) In the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short paid-
> (a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;
> (b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;
> (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

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

15. In the present case, the Department has invoked the extended period of limitation of five years for the reason that the Appellant "by not getting themselves registered with the Department and failing to declare the receipts from taxable services rendered to MPSMC appears to have done so

with intention of suppressing their value of taxable services rendered and to avoid detection by the Department that they were not paying appropriate service tax”. There is no charge in the Show Cause Notice that “suppression” by the Appellant was “wilful”, nor does the Show Cause Notice mentions that suppression was with an intent to evade payment of service tax.

16. The Commissioner, as is clear from the extract of the order reproduced above, observed that since the Appellant had obtained registration in January, 2011 for mining services provided by the Appellant at the mines at Hirapur, the Appellant cannot feign ignorance that the service provided by it to the State Corporation at Meghnagar mines was not taxable and it is only after investigation that the Appellant got itself registered in July, 2011. The Commissioner, therefore, observed that there was a deliberate attempt on the part of the Appellant to avoid payment of service tax since it had earlier got itself registered for the mining services at Hirapura in January, 2011. The Commissioner has also, it needs to be observed not recorded any finding that the suppression by the Appellant was wilful.

17. It is in this background that the contention of learned Counsel for the Appellant that the extended period of limitation could not have been invoked in the present case has to be examined.

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

19. Before adverting to the decisions of the Supreme Court and the Delhi High Court, it would be useful to reproduce the proviso to section 11A of Central Excise Act, 1944[10], as it stood when the Supreme Court explained "suppression of facts" in **Pushpam Pharmaceutical Co.** and which has been reproduced in the judgment of the Delhi High Court and it is as follows:

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

20. In **Pushpam Pharmaceuticals Company**, the Supreme Court examined whether the Department was justified in initiating proceedings for short levy after the expiry of the normal period of six months by invoking the proviso to section 11 A of the Excise Act. The proviso to section 11A of the Act carved out an exception to the provisions that permitted the Department to reopen proceedings if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from the relevant date under the circumstances mentioned in the proviso, one of it was suppression of facts. It is in this context that Supreme Court observed that since 'suppression of fact' had been used in the

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**10. Excise Act**

company of strong words such as fraud, collusion, or wilful default, suppression of facts must be deliberate and with an intent to escape payment of duty. The observations are as follows;

> "4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. **But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts**. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of court the context in which it has been used indicates otherwise. **A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty**. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."
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> **(emphasise supplied)**

21. 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 :-
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> > "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."

**11. 2005 (188) ELT 149 (SC)**

**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."

22. These two decisions in **Pushpam Pharmaceuticals** and **Anand Nishikawa Company Ltd.** were followed by the Supreme Court in the subsequent decision in **Uniworth Textile Limited** and the observation are:

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

23. The Supreme Court in **Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I**[12] 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

**12. 2007 (216) ELT 177 (SC)]**

> 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."

24. 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.
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> **xxxxx**
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> 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."
>
> **xxxxx**
>
> 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"

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

26. Learned Authorised Representative has, however, placed reliance upon the decision of Hyderabad High Court in **NRI Academy Guntur.** In the said case the assessee had obtained registration and filed a "nil" refund followed

by cancellation of the registration. It is for this reason that the Court found that this was a pre-meditated act on the part of the assessee, and therefore, the extended period of limitation was found to be valid.

27. In **Bharti Hexcon Limited,** which has also been relied upon by the learned Authorised Representative of the Department, the Tribunal found that the assessee was registered with the Department, and therefore, should have been aware of the provisions of service tax but still it did not disclose the taxable value. It is in such circumstances, the Tribunal found that extended period of limitation was correctly invoked.

28. These decisions, in our opinion do not help the Department. What was necessary for the Department was to establish that the Appellant had suppressed facts with intention to evade payment of service tax. It was not a charge in the Show Cause Notice that the Appellant had suppressed facts with intention to evade the payment of tax nor has any finding to this effect been recorded by the Commissioner. The extended period of limitation, therefore, could not have been invoked

29. Thus, it has to be held that the demand made for period within one year from the relevant date is justified but taking recourse to the extended period of limitation provided for in the proviso to Section 73 (1) of the Act is not justified. The demand made for the period within the normal period of one year is confirmed but this would have to be determined by the Commissioner afresh within a period of three months after providing an opportunity to the Appellant. The Commissioner shall also determine whether interest or penalty has to be imposed for this period.

30. The impugned order dated 07 July, 2014 is set aside to the extent indicated above and the appeal also stands allowed to that extent.

**(BIJAY KUMAR)**
**MEMBER (TECHNICAL)**

**(JUSTICE DILIP GUPTA)**
**PRESIDENT**

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