CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

SERVICE TAX Appeal No. 55125 of 2014

(Arising out of Order–in-Original No. DL-SVTAX-ADJ-COM-90/2014-15 dated 27.06.2014 passed by Commissioner (Adjudication), Service Tax Commissionerate, New Delhi)

M/s. Gannon Dunkerley & Co. Ltd. ...Appellant

Versus

Commissioner (Adjudication) ....Respondent
of Service Tax, New Delhi

APPEARANCE:

Mr. Narender Singhvi, Ms. Neha Choudhary, Advocates for the Appellant
Mr. Dr. Radhe Tallo, Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/ Decision: October 22, 2020

FINAL ORDER No.: 51627/2020

JUSTICE DILIP GUPTA

M/s. Gannon Dunkerley and Co. Ltd.[1] has filed this appeal to assail the order dated June 27, 2014 passed by the Commissioner (Adjudication), Service Tax Commissionerate, New Delhi[2]. The demand of service tax has been confirmed with interest and penalties under sections 75, 76, 77 and 78 of the Finance Act 1994[3].

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1. The Appellant
2. The Commissioner
3. The Finance Act

2. The appellant is primarily engaged in the provision of commercial or industrial construction services. It had applied for centralized registration on February 23, 2007. An audit of the records of the appellant was carried out by the Service Tax Department and a view was entertained by the Department that the appellant had received an advance of Rs.8,88,75,470/- as on September 10, 2014 for construction service which became taxable with effect from September 9, 2004 for which the appellant should have deposited service tax of Rs.90,65,298/-. The Department also entertained a view that the appellant had availed irregular CENVAT Credit during the period 2006-07, being the credit pertaining to unregistered premises. The Audit Team also observed that the appellant had short-paid service tax amounting to Rs.79,18,607/- during the period from October 2005 to March 2006 and that of Rs.1,58,24,365/- during the year 2006-07. The audit team also observed that during the period from 2004-05 to 2007-08, the appellant had deposited service tax after the expiry of the due date and thus, was liable to pay interest @ 13% per annum for the delayed period which came to the Rs16,45,973/-. The audit report is dated April 2, 2009,

3. A show cause notice dated October 22, 2009 was, therefore, issued to the appellant reiterating the observations made in the audit report and a demand was proposed.

4. It will be useful to reproduce the facts in a Tabular Form and they are as follows:

S.No.	Issues	Period	Demand
1.	Advances of Rs.8,88,75,470/- received prior to 10.09.2004 in respect of construction services rendered from 10.09.2004	Received prior to 10.09.2004	Rs.90,65,298/-
2.	Cenvat credit on invoices addressed to allegedly unregistered premises	23.02.2006 to 13.02.2007	Rs.24,53,229/- (out of which Rs.14,31,667/- utilized for payment of Service Tax)
3.	Alleged short-payment of Service tax	October, 2005 to March 2006	Rs.79,18,607/-
4.	Alleged short-payment of Service Tax	2006-07	Rs.1,58,24,365/-
5.	Alleged delay in payment of Service Tax	2004-05 to 2007-08	Rs.16,45,973/- (interest)
6.	**Total**	**-**	**Rs.3,66,93,236/-**

5. The appellant filed a reply to the show cause notice on December 9, 2009. The demand was contested both on merits as well as on limitation, except the demand of interest of Rs.16,45,973/- on account of delayed payment of service tax.

6. The Commissioner, however, confirmed the demand proposed in the show cause notice.

7. This appeal has, accordingly, been filed to assail the order passed by the Commissioner.

8. Shri. Narender Singhvi learned counsel for the appellant submitted that the extended period of limitation contemplated under the proviso to section 73 of the Finance Act could not have been invoked in the facts and circumstances of the present case and therefore, the impugned order deserves to be set aside on this ground alone. At the same time, learned counsel made number of submissions on merits also, but very fairly stated that these may be considered only if the issue of limitation is not decided in favour of the appellant.

9. Dr. Radhe Tallo, learned Authorised Representative of the Department, however, submitted that the extended period of limitation was correctly invoked in the present case.

10. The submissions advanced by learned counsel for the appellant and the learned Authorised Representative of the Department have been considered.

11. To appreciate the contention advanced by the learned counsel for the appellant and the learned Authorised Representative of the Department, it would be appropriate to reproduce the relevant provisions of sub-section (1) of section 73 of the Act and 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, 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 be pertinent to refer to that portion of the show cause notice dated October 22, 2009 that deals with the invocation of the extended period of limitation and it is reproduced below:

"2. Whereas the audit of assessee i.e. M/s Gannon Dunkerley & Co. Ltd., B-228-229, Okhla Indl. Area, Phase-1, New Delhi 110020 for the year 2004-05 to 2007-08 (RUD-1) was conducted by DGACR and have observed as under:-

(i) The assessee had received advances of Rs.8,88,75,470/- on 9.09.2004 for providing of construction services after 09.09.2004. The service became taxable from 10.09.2004. Thus, the assessee was liable to pay service tax of Rs.90,65,298/- upto 05.10.2004 on the amount taken or received as advances. It was however noticed that the assessee had not paid any service tax on this advance amount. This has resulted short in payment of service tax of Rs.88,87,547/- & cess amounting to Rs.1,77,751/-.

(ii) M/s Gannon Dunkerley & Co. Ltd, had got Centralized Registration number AAACG1846PST006 in form ST-2 from the Service Tax Commissionerate, Delhi for the premises B-228-229 Okhla Industrial Area Phase-I, New Delhi wef 14.02.2007. However, the assessee had taken cenvat credit for inputs received and billed for other than the registered premises. The total value of irregular cenvat credit works out to Rs.24,53,299/- including cess(as annexure-A). Out of this amount assessee has also utilized Rs.14,31,667/- for payment of service tax.

(iii) Scrutiny of ST-3 returns for the period from October 2005 to March 2006 revealed that M/s Gannon Dunkerley & Co. Ltd. had made short payment of Service Tax of Rs.79,18,607/-.

(iv) During the scrutiny of ST-3 returns and TR-6 challans of the noticee for the financial year 2006-07, it was noticed that the notice had made short payment of Service Tax of Rs.15824365/- including Educatation Cess (annexure B attached) as the amount of service tax paid in TR-6 challan were lesser than the amount of Service Tax to the tune of Rs.1.58 crore including Education cess.

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7. As self-assessment provisions apply to Service Tax, the incorrect assessment and payment of Service Tax by the assessee amount to deliberate misdeclaration and suppression of facts with intent to evade Service Tax. All these actions of M/s Gannon Dunkerley & Co. Ltd., amount to non-disclosure of facts to the Department, resulting in contravention of various provisions of the said Rules with an intent to evade payment of Service Tax as applicable. Thus, it appears that the proviso to of section 73(1) of the said Act can be invoked and thus, demand and recovery can be made for non-levy and non-payment of Service tax for five years from the relevant date. It appears that the assessee has deliberately misdeclared and suppressed the facts with an intention to evade payment of due discharge of Service Tax liability. The assessee also appears to be liable for imposition of penalty under section 78 of the Act, ibid for their deliberate evasion of Service Tax."

13. It would be seen from the aforesaid show cause notice that the period involved is from 2004 upto March 2007. The audit report is dated April 2, 2009. The period within which the show cause notice can be served is 18 months from the relevant date. The show cause notice is dated October 22, 2009 and is,

therefore, clearly beyond 18 months. The Department has relied upon the proviso to section 73(1) of the Finance Act, since under the proviso, the period of 18 months stands substituted by five years.

14. Learned counsel for the appellant has referred to the audit report dated April 2, 2009 to show that there can possibly be no mis-statement or suppression of facts, much less, willful statement or willful suppression of facts with an intent to evade payment of service tax and, therefore, the extended period contemplated under the proviso to section 73(1) of the Finance Act could not have been invoked.

15. The relevant portion of the audit report dated April 2, 2009 is reproduced below:

> "54 During the course of audit of your company for the above-mentioned period by audit party of D.G.Audit Central Revenues, New Delhi the following observations were made:
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> **Para I** :- You had advance of Rs. 88875470/- as on 09/09/2004 when the Construction Services became taxable w.e.f.10/09/04 Service Tax payable on this amount including cess was Rs. 90,65,298/- which was not deposited by you. You are therefore liable to pay above-mentioned amount with interest @13% per annum till the date of deposit.
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> **Para II** :- During test check, it was observed that you have availed irregular CENVAT credit during the period 2006-2007 (upto 13/02/2007) as the credit taken pertains to the premises other than your registered office which is not allowed under Rule 3(1) of the Service Tax Rule, 1994. You are therefore requested to submit the records pertaining to Service Tax upto the period 14/02/2007, to ascertain the quantum of irregular CENVAT credit availed and utilized by you during that period. Please also intimate the value of CENVAT credit taken period wise on invoice issued upto 14/02/2007.
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> **Para III** :- On scrutiny of ST-3 returns for the period from October 2005 to March 2006, it was observed that you have short- paid the Service Tax amounting to Rs. 7918607/-. You are required to deposit this amount alongwith interest @ 13% per annum.
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> **Para IV** :- During the year 2006-07 you have made short payment of Service tax amounting to Rs. 15824365 /- (including cess) by showing the amount of Service Tax in challan less than the amount of Service Tax shown in ST-3 return for that period, as having paid.
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> **Para V** :- During the period from 2004-05 to 2007-08 you have deposited the Service Tax after the expiry of due date as reflected in TR-6 challans. You are therefore liable to pay interest @ 13% per

annum for the delayed period. The amount of interest, on this account, works out to Rs. 1645973/-."

16. The appellant filed a reply to the audit report and the relevant portion is reproduced below:

1**. Para I of your notice 1S based on the presumption that the Company had received an advance of Rs.888.75.470.00 and which was standing as on the date when the Construction Services became taxable i.e. 10.09.2004 and service tax became payable on the amount including cess, which was not deposited by us.** It is denied that as on 10.09.2004, there was any liability to pay or deposit Service Tax on the advances received for the services to be provided.

It is submitted that liability to pay tax on advances arose only after 16.06.2005 when the Finance Act, 2005 inserted Explanation 3 to Section 67 of the Act w.e.f. 16.06.2005 in the following words:

The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provisions of such service.

Prior to the said date no Service Tax was payable on advances received for the services to be provided. lt shall not be out of place to mention that the Company had deposited tax on advances standing as on 16.06.2005 and on the amount of advance adjusted towards payment for the work done between 10.09.2004 and 16.06.2005.

2 **Contents of para 2 of the said notice has not been correctly stated. centralized registration on 23.02.2006 has totally escaped the attention of Audit team**. The fact of applying for observation of the Audit team on based on the date of issue of centralized registration certificate and not on the effective date of registration certificate i.e. the date of application for centralized registration. The Company had correctly taken credit of all the premises for which centralized registration had been obtained from the date of application i.e. 23.02.2006.

3. **Contents of para 3 of the said notice is incorect and the contents are not admitted. It is denied that the Company had deposited short amount of Rs. 7918,607.00 towards the service tax. During the period October 2005 to March, 2006.** The calculation of Service Tax payable is as under.

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4. **Contents of para 4 of the said notice is incorrect and the contents are not admitted. It is denied that the Company had deposited short amount of Rs. 158,24,365.00 towards the service tax. During the vear 2006-07. At the outset, we would like to submit that the audit department has not fully considered the amount of Service Tax deposited by us and ignored the treasury challans for Rs. 1,49,35,368.00**. We are enclosing copies to 16 Numbers of challans in TR-6 for the said amount. We are unaware as to how the said figure of Rs. 1,58,24,365.00 has been arrived by audit team, whereas actual total works out to Rs. 148,92,943.00.

5. Admittedly there was delay in deposit of Service Tax. We have deposited the amount of interest demanded although there are

> minor calculation error of about Rs.500.00 which has been demanded in excess, on 10.06.2009(challan enclosed)."

(emphasis supplied)

17. It would be seen that the appellant, in the reply to paragraph 1 of the audit report, stated that since the construction services became taxable on September 10, 2004, there was no liability to pay or deposit service tax on the advances received for the services to be provided since the liability to pay tax on advances and arose only after June 16, 2005, when Explanation-3 to section 67 of the Finance Act was inserted.

18. In regard to the second paragraph of the audit report, it was pointed out that the appellant had applied for centralized registration for February 23, 2006 and therefore the appellant had correctly taken credit of all the premises for which centralized registration had been obtained from the date of application.

19. In regard to paragraph three of the audit report, it was pointed out that there was no short-payment of service tax amounting to Rs.79,18,607/- and the calculation details was provided.

20. In regard to the paragraph four of the audit report, it was denied that there was short-payment of service tax amounting to Rs.1,58,24,365/- as the treasury challan for Rs.1,49,39,368/- were ignored by the audit team. It was also pointed out that the total amount should have been worked out to Rs.1,48,92,943/- and not Rs.1,58,24,365/-.

21. In regard to the paragraph five of the audit report, it was pointed out that the appellant had deposited the amount of interest.

22. The findings recorded by the Commissioner need to be reproduced and they are as follows:

> 25.1 **Section 73 of the Act, as it stood during the period prior to 10.09.2004, has been substituted by Section 90 of the Finance (No. 2) Act, 2004 (23 of 2004), whereby the provisions of recovery of Service Tax have been made analogous to Section 11A of the Central Excise Act, 1944.** Proviso clause of Sub-section (1) of this section inter alia contemplates, in respect of extended period, that **where any service tax has not been levied or paid by reason of** (a) fraud, or (b) collusion; or (c) willful mis-statement, or (d) **suppression of facts**; or (e) contravention of any of the provisions of Chapter V of the Finance Act, 1994 or the rules made there under **with intent to evade payment of service tax, show cause notice may be served upon a person chargeable with the service tax within five years from the relevant date**.
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> 26. **It has been alleged in the notice dated 22.10. 2009 that the said Noticee had deliberately suppressed the facts and avoided payment of due service tax to deliberate misdeclaration and suppression of facts with intent to evade Service Tax. They were working under self-assessment and the onus to pay proper service tax was on them**. It has further been alleged that the Noticee had deliberately indulged in concealing the facts from the department with sole intention to avoid payment of due service tax. **Had it not been for the audit conducted by the audit branch, the facts about short payment of service tax would have gone un-noticed**. Hence, the provisions of Section 73 of the Finance Act, 1994 for discharging the Service Tax liability, for the extended period have been invoked in the instant case.
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> 27. So far as suppression of facts' is concerned, the phrase implies that with-holding of information is suppression of facts. P. Ramanatha Aiyar's Concise Law Dictionary [1997 Edition Reprint 2003 page 822] defines the phrase lucidly and accurately as Where there is an obligation to speak, a failure to speak will constitute the "suppression of fact" but where there is no obligation to speak, silence cannot be termed "suppression" It is manifestly clear from this definition that intention to evade payment of tax is implied in the suppression of facts as per this definition.
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> 28. The Noticee had an obligation to comply with the statutory provisions and to furnish the information as required there under. Section 66 provides the rate of tax as well as levy of the tax on the services specified therein. Section 65 (105) of the Act has specified the taxable services. Section 70 directs that every person liable to pay the Service Tax shall himself assess the tax due on the services provided by him and shall furnish the periodical returns as prescribed. **Thus, afore mentioned statutory provisions of service tax cast an obligation upon the Noticee to pay service tax on self-assessment basis; and to file periodical returns. Had the officers of audit branch not conducted the audit, the non-payment of service tax would not have been unearthed**.
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> 29. **The above examination of the statutory provisions clearly and unambiguously establishes the suppression of facts with**

> **intention to evade service tax with respect to the services provided by the Noticee. The intention to evade service tax is not required to be calculated on mathematical precision in the regime of self-assessment, especially when the assessment is made by the assessee himself.** Therefore, it was the bounden duty of the Noticee to pay service tax and to file the statutory returns accordingly. The Noticee has not paid the service tax on the amount received by them on the account of services provided by them."
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> **(emphasis supplied)**

23. It is seen that sub-section (1) of section 73 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 examined whether even in the absence of the expression "wilful" before "suppression of facts", suppression of facts have still to be wilful with an intent to evade payment of service tax. The Supreme Court and the Delhi High Court have held that suppression of facts has also to be "wilful" with an intent to evade payment of service tax.

24. 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[4] , as it stood when the Supreme Court explained "suppression of facts" in **Pushpam Pharmaceutical Co. v/s Commissioner of Central Excise, Bombay[5].** The provisions of section 11A of the Excise Act have been reproduced in the judgment of the Delhi High Court in **Bharat Hotels Limited v/s Commissioner of Central Excise (Adjudication)[6]** and they are 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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4. Excise Act
5. 1995 (78) ELT 401 (SC)
6. 2018 (12) GSTL 368 (Del.)

> (a) fraud; or
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> (b) collusion; or
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> (c) any wilful misstatement; or
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> (d) suppression of facts; or
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> (e) contravention of any of the provisions of this Act of the rules made thereunder with intent to evade payment of duty by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant 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."

25. In **Pushpam Pharmaceuticals Co.**, the Supreme Court examined whether the Department was justified in initiating proceedings for short levy after the expiry of the normal period of six months by invoking the proviso to section 11A of the Excise Act. The proviso to section 11A of the Act carved out an exception to the provisions that permitted the Department to reopen proceedings if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from the relevant date under the circumstances mentioned in the proviso, one of which was suppression of facts. It is in this context that the Supreme Court observed that since "suppression of facts" had been used in the company of strong words such as fraud, collusion, or wilful default, suppression of facts must be deliberate and with an intent to escape payment of duty. The observations are as follows;

> "4.Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. **But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts**. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of court the context in which it has been used indicates otherwise. **A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression**

> **used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty**. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."
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> **(emphasis supplied)**

26. This decision was referred to by the Supreme Court in **Anand Nishikawa Company Ltd. vs. Commissioner of Central Excise**[7] 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."
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> 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."

27. These two decisions in **Pushpam Pharmaceuticals Co.** and **Anand Nishikawa Company Ltd.** were followed by the Supreme Court in a subsequent decision of the Supreme Court in

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7. 2005 (188) ELT 149 (SC)

Uniworth Textile Limited v/s Commissioner of Central Excise, Raipur[8] and the observations are:

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

28. The Supreme Court in **Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I**[9] also held:

> "10. The expression 'suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

29. 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.
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> xxxxx

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8. 2013 (288) ELT 161 (SC)
9. 2007 (216) ELT 177 (SC)

> 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."

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

31. In relation to the invocation of the extended period of limitation, the allegations made in the show cause notice and the consideration of this aspect by the Commissioner in the impugned order need to be noticed now.

32. The show cause notice mentions that because of self-assessment provisions, an incorrect assessment and consequential short payment of service tax by an assessee would amount to deliberate mis-declaration and suppression of facts with an intent to evade service tax.

33. The Commissioner (Appeals) noticed that section 70 of the Finance Act requires every person liable to pay the service tax to himself assess the tax due on the services provided by him and furnish to the Superintendent of Central Excise, a return in such form and in such manner as may be prescribed and then observed that if the officers of the audit team had not conducted the audit, non-payment of service tax would not have been unearthed.

34. Learned Counsel for the appellant has placed the Circular dated April 23, 2009 issued by the Central Board of Excise and Custom regarding Return Scrutiny Manual for scrutiny

of ST-3 returns. The relevant paragraph 2 of the Circular dealing with self-assessment is reproduced below:

> "The self-assessment facility requires a strong compliance verification system which in turn necessitates an effective return scrutiny mechanism. The RSMST proposes to bifurcate the scrutiny into two parts, preliminary scrutiny and detailed scrutiny. While the preliminary scrutiny would cover all the returns and could be done even online, detailed scrutiny would cover selected returns, identified on the basis of risk parameters, developed from the information furnished in the return submitted by the taxpayers."

35. A perusal of paragraph 2 of the Circular indicates that the self-assessment facility requires a strong compliance verification system, which intern necessitate an effective scrutiny mechanism. The scrutiny can be divided in two parts namely primary scrutiny and a detailed scrutiny. The primary scrutiny covers all the return, while a detailed scrutiny covers selected returns, identified on the basis of risk parameters, developed from the information furnished in the returns submitted by the tax-payers.

36. It has, therefore, been submitted by the learned counsel for the appellant that since the appellant had been regularly filing returns, an obligation was cast upon the officers, at least in relation to the primary scrutiny, to examine the returns and, therefore, the Department cannot be permitted to take a stand that it is only during the audit that the factual position could be examined.

37. It has also been submitted by learned counsel for the appellant that in any view of the matter there was no mis-statement or suppression of facts, much less willful statement or willful suppression of facts, with an intent to evade payment of

service tax, for the reason that even a cursory reply submitted by the appellant would indicate that none of the objection raised by the audit team in the four paragraphs in the audit report were correct and that the appellant was not required to pay service tax under the heads stated in the audit report.

38. The contentions advanced by learned counsel for the appellant deserve to be accepted. It is correct that section 70 of the Finance Act requires every person liable to pay service tax to himself assess the tax on the services provided by him and furnish a return, but at the same time the Circular dated April 23, 2009 also casts a duty on the assessing officer to effectively scrutinize the returns, at least at the preliminary stage. The appellant has been regularly filing the returns and so the Department cannot take a stand that it is only during the audit that it can examine the factual position. Thus, it cannot be urged by the Department that if the officers of the audit team had not conducted the audit, non-payment of service tax would not have been unearthed.

39. It, therefore, follows that the Commissioner (Appeals) was not justified in holding that the extended period of limitation was correctly invoked. The extended period of limitation could not have been invoked in the facts of the present case as facts were not suppressed by the appellant.

40. It has been pointed out by learned Counsel for the appellant that the appellant had no intention, much less any willful intention, to evade payment of service tax. To examine this, it

would be necessary to examine the audit objection and the explanation offered by the appellant.

41. **The first** audit objection is regarding the advances received by the appellant prior to September 10, 2004 under construction services. According to the appellant, the demand of service tax on advances received prior to September 10, 2014 in respect of constructions services rendered from September 10, 2004 were exempt from payment of service tax, in terms of the Notification dated September 10, 2004. The said Notification is reproduced below:

> "**Service tax on new service- Exemption to part of services received prior to 10-9-2004**
>
> In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts that portion of the value of taxable services which are defined in sub-clause zzm, zzn, zzo, zzq, zzr, zzs, zzt, zzu, zzv, zzw, zzx and zzy of clause 105 of section 65 of the said Act, from the whole of service tax leviable thereon under section 66 of the said Act, which is received by the service provider from the customer, exhibitor, client or any person, as the case may be, prior to the 10th day of September, 2004."

42. In view of the aforesaid Notification, the advances received by the appellant prior to September 10, 2004 are clearly exempted from payment of service tax.

43. **The second** audit objection is regarding irregular availment of CENVAT credit since the appellant had availed credit on the basis of invoices issued by the supplier of inputs addressed to unregistered premises of the appellant.

44. There is no requirement under the Credit Rules for addressing the invoices to registered premises only. Even otherwise, the appellant had obtained centralized registration for

the subject premises and thus, the basis for denial of Cenvat credit in the impugned order is factually incorrect. In this connection it needs to be pointed out that the appellant is registered with Service Tax Department since October 12, 2004. On February 02, 2006, the appellant applied for grant of centralized registration certificate enclosing a list of its all premises and the appellant was granted centralized registration on February 14, 2007. Rule 4(5) of the Service Tax Rules, 1994, provides that any application for registration or change in particulars must be considered and certificate of registration pursuant thereto must be granted within 7 days from the date of application/ intimation and in case such a certificate of registration is not granted within 7 days, the registration applied shall be deemed to have been granted. Thus, the certificate of registration shall be deemed to have been granted to the appellant since no decision was taken within 7 days. The credit availed by the appellant during the period from February 23, 2006 to February 13, 2007 is, therefore, proper.

45. **The third** and **the fourth** audit objections relate to short-payment of service tax.

46. It is stated by the appellant that there is no short payment of service tax by the appellant during October, 2005 to March, 2007.

47. In regard to the period from October, 2005 to March, 2006, the appellant had submitted working of ST-3 return in the reply to show cause notice, but it has been rejected by the Adjudicating Authority merely on the ground that the working was

not supported by any document or a certificate from the Chartered Accountant. The Adjudicating Authority could have asked the appellant to supply the documents, if it was not satisfied with the explanation.

48. The appellant has also stated that the computation of demand in the show cause notice is not correct. In this connection, reference has been made to the Notification dated September 10, 2004 that provides for abatement of 67%. Thus, service tax was effectively payable only on 33% of the gross value. The calculation of service tax liability of the appellant, based on figures considered in the show cause notice would, according to the appellant, be as under:

particulars	**Figures shown in return (in Rs.)**
Gross taxable value	115,60,58,043/-
Less: abatement(67%)	77,45,58,889/-
Taxable value (33%)	38,14,99,154/-
Service Tax payable (including cess) @ 10.20%	3,89,12,914/-
Service Tax paid (including cess)	8,31,21,023/-
Service Tax excess-paid (including cess)	4,42,08,109/-

49. The explanation offered by the Appellant is plausible.

50. Further, in regard to the period from April, 2006 to March, 2007, the contention of the appellant is that the show cause notice has not explained as to how there was an alleged short-payment of Rs.1,58,24,365/- during the aforesaid period. According to the appellant, the impugned order has confirmed the demand of Rs.1,58,24,365/- without considering the TR-6 challans submitted by the appellant in the reply to the show cause notice. The challans have been enclosed with the Appeal.

51. It cannot, therefore, be said that the appellant had any intention, much less willful intention not to pay service tax in regard to the four audit objections referred to the Audit Report.

52. It is, therefore, more than apparent that even otherwise, the appellant did not suppress facts with an intention to wilfully evade payment of service tax.

53. The impugned order dated June 27, 2014 passed by the Commissioner, therefore, cannot be sustained. It is, accordingly, set aside and the Appeal is allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

ARCHANA