CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 51061 OF 2014

(Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-172-13-14 (IND/CEX/000/APPL/172/2013) dated 27.11.2013 passed by the Commissioner (Appeals), Central Excise, Indore)

Satyanarayan Bhalot **...Appellant**
A-UGR, Sudarshan Complex,
Kalani Industries,
Mhow Neemuch Road,
Pithampur (MP)

VERSUS

The Commissioner **...Respondent**
Central Excise,
Indore

APPEARANCE:

Ms. Priyanka Goel, Advocate for the Appellant

Shri Rajiv Kapoor, Authorized Representative for the Department

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

Date of Hearing/Decision: 26.10.2022

FINAL ORDER NO. 51034/2022

JUSTICE DILIP GUPTA:

The order dated 21.11.2013 passed by the Commissioner (Appeals), Customs and Excise, Indore[1] confirming the demand made in the order dated 08.10.2012 passed by the Additional Commissioner has been assailed by Satyanarayan Bhalot[2] in this appeal.

2. The appellant, as an individual person, is engaged in supplying labour. On the basis of an audit objection that the appellant had short paid service tax in respect of 'man power supply' and 'rent a cab

1. the Commissioner (Appeals)
2. the appellant

service', a show cause notice dated 14.07.2010 was issued to the appellant by invoking the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act, 1994[3]. The appellant filed a reply contesting the demand raised both on merits as well as on limitation but the adjudicating authority by order dated 08.10.2012 confirmed the demand raised in the show cause notice dated 14.07.2010 for the period 2005-2006 and 2008-2009. The appeal filed by the appellant before the Commissioner (Appeals) was dismissed by order dated 21.11.2013.

3. Ms. Priyanka Goel, learned counsel for the appellant contended that since the appellant is an individual person and not a commercial concern, the demand raised for the period prior to 01.05.2006 could not have been confirmed and that the amount towards Employees State Insurance and Provident Fund could not have included in the taxable value since the said amount was directly deposited by the service receiver. Learned counsel also emphasized that the extended period of limitation could not have been invoked in the facts and circumstances of the case and even the order passed by the Additional Commissioner and the Commissioner (Appeals) does not hold that the appellant had suppressed material facts with an intention to evade payment of service tax. The submission, therefore, is that the extended period of limitation could not have been invoked.

4. Shri Rajiv Kapoor, learned authorized representative appearing for the Department, however, supported the impugned order.

---

3. the Finance Act

5. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

6. It would be appropriate to first examine the contention raised by the learned counsel for the appellant that the extended period of limitation could not have been invoked in the facts and circumstances of the case since if this issue is decided in favour of the appellant it would not be necessary to examine the issue on merits.

7. Section 73(1) of the Finance 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, is reproduced below:

> **"SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.**
>
> **(1)** Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, 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:
>
> PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —
>
> (a) fraud; or
> (b) collusion; or
> (c) wilful mis-statement; or
> (d) suppression of facts; or
> (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if,

> for the words "one year", the words "five years" had been substituted.
>
> Explanation: Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

8. The show cause notice mentions the following facts in regard to invocation of the extended period of limitation:

> "Further, the noticee has willfully suppressed all the said receipts from the Department, by not showing them in their ST-3 Returns, to evade payment of service tax which could not be detected because the noticee is working under Self-assessment scheme."

9. The Additional Commissioner, in the order dated 08.10.2012, did not address this issue at all and it is only in connection with levy of penalty that the Additional Commissioner observed as follows:

> "As regards penalty, it is observed that the Noticee have mis-declared the value of services provided by them in their ST-3 returns filed from time to time. Had the same has not been detected by the department, the said value would have remained escaped from levy of service tax. Thus, it is clear that Noticee with intend to evade service tax mis declared the value of services provided, therefore are liable to penalty.*****"

10. The Commissioner (Appeals) observed as follows:

> "6. ***** As regards the issue that the present demand is time barred as the show cause notice has been issued after expiry of one year, I find that the Adjudicating authority has correctly invoked the extended period of limitation under the proviso to Section 73(1) of the Finance Act, 1994 for the demand of Service tax in this case."

11. It would be seen from the aforesaid two orders that even though the Additional Commissioner had not dealt with the issue relating to the invocation of the extended period of limitation, the Commissioner (Appeals) observed that the Additional Commissioner had correctly

invoked the extended period of limitation. It was absolutely necessary for the Additional Commissioner to form an opinion that the appellant had deliberately suppressed material information with an intention to evade payment of service tax. Unless the Additional Commissioner had come to a conclusion that the extended period of limitation was rightly invoked in the show cause notice, it could not have confirmed the demand for any period beyond the normal period of limitation. Likewise, it was also necessary for the Commissioner (Appeals) to form an opinion that the appellant had deliberately suppressed material facts with an intention to evade payment of service tax.

12. In **Pushpam Pharmaceuticals Company** vs. **Collector of Central Excise, Bombay**[4], the Supreme Court observed that section 11A of the Central Excise Act empowers the Department to reopen the proceedings if 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. It is in this context that the Supreme Court observed:-

> "2. ****** The Department invoked extended period of limitation of five years as according to it the duty was short-levied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs.
>
> ********
>
> 4. A perusal of the proviso indicates that it has been used in company of such strong works as fraud, collusion or willful 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**

---

4. 1995 (78) E.L.T. 401 (SC)

> **must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty.** Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."
>
> **(emphasis supplied)**

13. It is, therefore, clear that the suppression of facts should be deliberate and in taxation laws it can have only one meaning, namely that the correct information was not disclosed deliberately to escape payment of duty.

14. This decision of the Supreme Court in **Pushpam Pharmaceuticals** was followed by the Supreme Court in **Anand Nishikawa Co. Ltd.** vs. **Commissioner of Central Excise, Meerut**[5] and the relevant paragraph is as follows:-

> "27. Relying on the aforesaid observations of this Court in the case of **Pushpam Pharmaceuticals Co. v. CCE we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty.** When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts."
>
> **(emphasis supplied)**

5. (2005) 7 SCC 749

15. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in **Uniworth Textiles Ltd.** vs. **Commissioner of Central Excise, Raipur**[6] and the relevant portion of the judgment is reproduced below:

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

16. The Supreme Court in **Continental Foundation Joint Venture** vs. **Commissioner of Central Excise, Chandigarh**[7] also observed in connection with section 11A of the Central Excise Act, that suppression means failure to disclose full information with intention to evade payment of duty and the observations are as follows:-

> "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**

---

6. 2013 (288) E.L.T. 161 (SC)
7. 2007 (216) E.L.T. 177 (SC)

> **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 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with knowledge that the statement was not correct."
>
> **(emphasis supplied)**

17. In view of the aforesaid decisions of the Supreme Court, the confirmation of demand for the period beyond the normal period of limitation by invoking the proviso to section 73(1) of the Finance Act cannot be sustained.

18. The impugned order dated 21.11.2013 passed by the Commissioner (Appeals), therefore, cannot be sustained. It is, accordingly, set aside and the appeal is allowed.

(Order dictated and pronounced in open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

Shreya