# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
## NEW DELHI

## PRINCIPAL BENCH

## SERVICE TAX APPEAL NO. 50145 OF 2019

(Arising out of Order-in-Original No. 03/COMMR/ST/IND/2018 dated 21.08.2018 passed by the Commissioner, Customs, Excise & Service Tax, Indore)

**M/s. Mount Everest Breweries Limited ...Appellant**

Versus

**Commissioner of CGST & Central Exicse, Indore ...Respondent**

**APPEARANCE:**

Shri Tarun Gulati, Senior Advocate with Shri Abhishek Jaju and Shri Mihir Turakhia, Advocates for the Appellant

Shri Ravi Kapoor, Authorized Representative for the Department

**CORAM:**

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
**HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 15.02.2023**
**Date of Decision: 03.07.2023**

**FINAL ORDER NO. 50802/2023**

**JUSTICE DILIP GUPTA:**

The order dated 21.08.2018 passed by the Commissioner, CGST & Central Excise[1] confirming the demand of service tax under the category of business auxiliary services[2] provided by M/s. Mount Everest Breweries Limited[3] to M/s. United Breweries Limited[4] with interest and penalty has been assailed in this appeal.

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1. **the Commissioner**
2. **BAS**
3. **the appellant**
4. **UBL**

2. The appellant is engaged in manufacturing, brewing and bottling of alcoholic beverages i.e. beer of their own brands as well as those owned by UBL. The appellant entered into an Agreement dated 01.03.2009 for manufacturing beer of brands own by UBL. A show cause notice dated 04.07.2014 was issued to the appellant for the period from September 2009 to June 2012 alleging that the transaction between the appellant and UBL would be taxable under the category of BAS as defined under section 65(19) and made taxable under section 65(105)(zzb) of the Finance Act, 1994[5].

3. The appellant filed a reply to the show cause notice and denied the allegations made in the show cause notice. The Commissioner, however, by order dated 21.08.2018 confirmed the demand of service tax with interest and penalty.

4. According to the appellant, the parties had agreed that:

**(i)** The appellant would manufacture the goods on principal to principal basis;

**(ii)** Under clause 6 of the Agreement, UBL authorized the appellant to produce the goods and sell the same in the State of Madhya Pradesh or export it out of the State;

**(iii)** The appellant had the sole authority and responsibility to procure the required raw materials and convert them into finished goods;

**(iv)** Under clause 6.3 of the Agreement, UBL undertook to purchase itself or through its nominees the entire quantity of the goods manufactured by the appellant;

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**5. the Finance Act**

**(v)** The appellant purchased the raw material, packing material and consumable in its name for manufacturing the goods;

**(vi)** Pursuant to the sale of goods by the appellant, the appellant discharged the central sales tax; and

**(vii)** Under the Agreement, UBL merely authorized the appellant to use the brand name and the recipe of the goods and sell them in exchange of a 'brand fee'.

5. The impugned order holds that the appellant has not been conferred with the title of the goods nor it has been granted the right of ownership of the goods belonging to UBL and, therefore, even if the goods were removed on the invoices of the appellant, the entire proceeds were being deposited and controlled by UBL only.

6. Shri Tarun Gulati, learned senior counsel for the appellant assisted by Shri Abhishek Jaju and Shri Mihir Turakhia, contended that the nature of the operations carried out by the appellant was that of pure manufacturing and the appellant purchased the goods for itself and not 'for, or on behalf' of UBL. Learned senior counsel, therefore, contended that this activity cannot be subjected to service tax under the category of BAS. Learned senior counsel also contended that 'control of UBL' is not a test to determine the ownership of the goods. Learned senior counsel further pointed out from the Agreement that it follows that the appellant manufactured the goods for itself and the contention of the department that the appellant manufactured the goods 'for, or on behalf' of UBL is not correct. Learned senior counsel also pointed out that in any view of the matter, the extended period of limitation could not have been invoked

in the facts and circumstances of the case and since the entire demand falls under the extended period, it would have to be set aside.

7. Shri Ravi Kapoor, learned authorized representative appearing for the department, however, supported the impugned order and contended that it does not call for any interference in this appeal.

8. Though submissions have been advanced by learned senior counsel appearing for the appellant on merits, but the submission made by the learned senior counsel for the appellant that the extended period of limitation could not have been invoked in the facts and circumstances of the case needs to be examined first. This is for the reason that the entire period involved in the appeal is for the extended period of limitation and if the extended period of limitation could not have been invoked, the demand would have to be set aside.

9. For this purpose it would be necessary to examine the allegations made in the show cause notice for invoking the extended period of limitation. After noting that the appellant was providing BAS w.e.f. 23.09.2009 and the exclusion from BAS would be applicable only if the activity results in 'manufacture' of 'excisable goods', the show cause notice proceeds to state that the appellant appeared to have contravened the provisions of Chapter V of the Finance Act by reason of fraud, suppression of facts and willful mis-statement with an intent to evade payment of service tax.

10. The appellant filed a reply to the show cause notice and in relation to the invocation of the extended period of limitation pointed out as follows:

> "53. That it is quite strongly established from the submissions in the foregoing paragraphs that the

> matter relates to a interpretative difference and as a matter of fact the appellant has always been genuine in their practices, thus treating the same as a penal offence would certainly result in lack of adherence to essential principles of justice. Also, As mentioned in the submissions above, the noticee in all times was under the interpretation that since the arrangement is purely a manufacturing agreement, there can be no levy of Service Tax, and rightly so, being the manufacturing activity, the noticee was not liable to pay tax on the same. Now, adding further to the fact that the notice in all times was under the actual belief of manufacturing operations, there was no question of levying Service tax at all, thus there can be no case of 'Short' payment as there has to be no payment in itself of tax at all, and therefore there can be no allegation as to fraud on part of the Noticee. "

11. The Commissioner, however, found that the appellant with mala-fide intention distorted the facts 'by way of willful misstatement, suppression of facts and in contravention of the provisions of the Finance Act 1994 with intent to evade payment of the service tax' and the relevant findings are as follows:

> "73. **From the above discussions, I find that M/s. MEBL's contentions do not hold any ground and it is clear that MEBL are providing various services in relation to production or processing of alcoholic beverages for and on behalf of M/s. United Breweries, MEBL entitled to get fixed cost from UBL against the services provided by him, M/s. MEBL are not engaged in the manufacturing, brewing bottling etc. of alcoholic breweries of M/s. UBL, absolute ownership of the business alongwith operational control are remain with UBL** as such Circular No. F. No. 334/13/2009-TRU, Circular F. No. 332/17/2009 TRU dated 30/10/2009 and Notification No. 39/2009 dated 23/09/2009 are applicable in this case. M/s. MEBL were providing services in relation to 'Business Auxiliary Services' as defined under section 65(19) of the Finance Act, 1994,

> as amended, which were taxable services as per section 65(105)(zzb) of the Act, ibid and as such, were levied to Service Tax under Section 66 of the Finance Act. Even though the services provided by M/s. MEBI were levied to Service Tax, they have not paid the same, (till the DGCEI have asked them to do so and consequently certain amount paid under protest) neither have registered themselves under the said category of services nor have reflected true facts in the returns fined under the provisions of the Finance Act, 1994.
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> 74. **I find that the Noticee with the mala-fide intention distorted the facts by way of willful misstatement, suppression of facts and in contravention of provisions of the Finance Act 1994 with intent to evade payment of Service Tax.**
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> **(emphasis supplied)**

12. It would be seen that the entire period from September, 2009 to June, 2012 falls in the extended period of limitation as the normal period was of one year from 01.09.2009 upto 28.05.2012 and eighteen months from 29.05.2012 to 30.06.2012. The following chart would clearly depict the factual portion:

| **Period** | **Normal period of limitation as per section 73 of the Finance Act** | **Whether notice issued within normal or extended period** |
|---|---|---|
| 01.09.2009 to 31.12.2009 | One year from the relevant date – 25.01.2009 | Extended period |
| 01.01.2010 to 30.06.2010 | One year from the relevant date – 25.07.2010 | Extended period |
| 01.07.2010 to 31.12.2010 | One year from the relevant date – 25.01.2010 | Extended period |
| 01.01.2011 to 30.06.2011 | One year from the relevant date – 25.07.2011 | Extended period |
| 01.07.2011 to 31.12.2011 | One year from the relevant date – 25.01.2012 | Extended period |
| 01.01.2010 to 28.05.2012 | One year from the relevant date – 25.07.2012 | Extended period |
| 29.05.2012 to 30.06.2012 | 18 months from the relevant date – 25.07.2012 | Extended period |

13. It would seen from a perusal of the show cause notice that it proceeds on the footing that the appellant provided BAS and, therefore, non-declaration of such fact would amount to suppression of facts with intent to evade payment of the service tax. The contention of the appellant is that it never rendered BAS and, therefore, disputed the liability to pay service tax. The amendment in the definition of BAS w.e.f. 01.09.2009 resulted in confusion regarding the liability of service tax on manufacture of alcoholic beverages in the industry. The amendment introduced a new levy which created doubts on the scope and ambit in the industry. The Tax Research Unit in the Department of Revenue issued a Circular dated 06.07.2009. Instructions dated 30.10.2019 were also issued by the Tax Research Unit of the Department of Revenue regarding the clarification that was sought by the industry after the amendment was made.

14. The contention of the appellant is that it was always under a bonafide belief that service tax was not payable by it, as it was a manufacturer in its own right and was not manufacturing alcohol for or on behalf of a client. After noting that this contention of the appellant is not correct since it was providing BAS and service tax would be leviable, the order holds that the appellant with mala-fide intention made a willful statement and suppressed facts with intent to evade payment of the service tax.

15. The first issue that arises for consideration is whether the Commissioner was justified in holding that the extended period of limitation contemplated under section 73(1) of the Finance Act was correctly invoked in the facts and circumstances of the case.

16. The contention of the learned counsel for the appellant is that the necessary ingredients for invoking the larger period of limitation contemplated under the proviso to section 73 (1) of the Finance Act, namely willful suppression of facts with an intent to evade payment of service tax do not exist and, therefore, the extended period of limitation could not have been invoked.

17. In order to appreciate this contention it would appropriate to reproduce section 73 of the Finance Act as it stood at the relevant time. This section deals with recovery of service tax not levied or paid or short levied or short paid or erroneously refunded. 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:
>
> **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,
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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."

18. It would be seen from a perusal of sub-section (1) of section 73 of the Finance Act 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.

19. The 'relevant date' has been defined in section 73 (6) of the Finance 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-
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> (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;
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> (b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;
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> (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

20. It is correct that section 73 (1) of the Finance Act does not mention that suppression of facts has to be "wilful" since "wilful" precedes only misstatement. 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 Finance Act, suppression of facts has still to be wilful and with an intent to evade payment of service tax. The Supreme Court and the Delhi High Court have held that

suppression of facts has to be "wilful" and there should also be an intent to evade payment of service tax.

21. 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, as it stood when the Supreme Court explained "suppression of facts" in **Pushpam Pharmaceutical Co.** vs. **Commissioner of Central Excise, Bombay[6].** 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."

22. 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 11A of the Excise Act. The proviso to section 11A of the Excise Act carved out an exception to the provisions that permitted the Department to reopen proceedings

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**6. 1995 (78) E.L.T. 401 (SC)**

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" has 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)**

23. 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."
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> **(emphasis supplied)**

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**7. 2005 (188) E.L.T. 149 (SC)**

24. 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** vs. **Commissioner of Central Excise, Raipur**[8] 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."

25. 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."
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> **(emphasis supplied)**

26. The Delhi High Court in **Bharat Hotels Limited** vs. **Commissioner of Central Excise (Adjudication)**[10] also examined at length the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Finance Act and held as follows;

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**8. 2013 (288) E.L.T. 161 (SC)**
**9. 2007 (216) E.L.T. 177 (SC)**
**10. 2018 (12) GSTL 368 (Del.)**

> "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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> **xxxxxxxx**
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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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> **xxxx**
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> **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."**
>
> **(emphasis supplied)**

27. It would also be useful to refer to a decision of the Tribunal in **Shiv-Vani Oil & Gas Exploration Services Ltd.** vs. **C. S. T., New Delhi[11],** wherein the Tribunal after making reference to the decision of the Supreme Court in **Cosmic Dye Chemical** vs. **CCE, Bombay[12],** observed that there should be an intent to evade payment of service tax if the extended period of limitation has to be invoked. The observations are as follows:

> "8. Regarding the demand for extended period, we find the reason given by the Original Authority is not

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**11. 2017 (47) STR 200 (Tri-Del.)**
**12. 1995 (75) E.L.T. 721 (SC)**

legally sustainable. In fact he recorded that in terms of proviso to Section 73 of Finance Act, 1994, the intention to evade payment of duty is not required to invoke extended period or to impose penalty. We find that for invoking extended period as well as for imposing penalty under Section 78, the legal provisions are identical. The words used like fraud, collusion, willful mis-statement, suppression of fact or contravention of any provisions of Chapter V of Finance Act, 1994 or of the Rules made thereunder with intent to evade the payment of Service Tax, will show that the ingredient of mala fide is a pre-requisite to invoke both the legal provisions (proviso to Section 73 and Section 78). The Original Authority recorded that it may be true that the assessee has not contravened any provisions with intend to evade payment of service tax, however, he proceeded to confirm the demand for extended period and to impose penalty of an equal amount under Section 78. We find that Hon'ble Supreme Court in Cosmic Dye Chemical v. CCE, Bombay reported in 1995 (75) E.L.T. 721 (S.C.) held as below:-

> Now so far as fraud and collusion are concerned, it is evident "6. that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Misstatement or suppression of fact must be wilful."

28. Very recently, the Delhi High Court in **Mahanagar Telephone Nigam Ltd.** vs. **Union of India and others**[13] after referring to the decisions of the Supreme Court in **Pushpam Pharmaceutical**, **Anand Nishikawa, Cosmic Dye Chemical**, **Uniworth Textile Limited** and **Bharat Hotels Limited** observed as follows:

> "41. **In the facts of this case, the impugned show cause notice does not disclose any material that could suggest that MTNL had knowingly and with a deliberate intent to evade the service tax, which it was aware would be leviable, suppressed the fact of receipt of consideration for rendering any taxable service.** On the contrary, the statements of the officials of MTNL, relied upon by the respondents, clearly indicate that they were under the belief that the receipt of compensation/financial support from the Government of India was not taxable. **Absent any intention to evade tax, which may be evident from any material on record or from the conduct of an assessee, the extended period of limitation under the proviso to Section 73(1) of the Act is not applicable.** The facts of the present case indicate that MTNL had made the receipt of compensation public by reflecting it in its final accounts as income. **As stated above, merely because MTNL had not declared the receipt of compensation as payment for taxable service does not establish that it had willfully suppressed any material fact. MTNL's contention that the receipt is not taxable under the Act is a substantial one.** No intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return."
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> **(emphasis supplied)**

29. As noticed above, these factors have not been examined by the Commissioner in the impugned order and a conclusion has merely been drawn that because there was suppression of facts by the

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**13. W.P. (C) 7542/2018 decided on 06.04.2023**

appellant, the suppression was with an intent to evade payment of service tax.

30. The impugned order holding that the extended period of limitation has been correctly invoked, therefore, cannot be sustained and is set aside.

31. It would, in such circumstances, not be necessary to examine the issues on merits that have been raised by the learned counsel for the appellant.

32. Thus, for all the reasons stated above, the order dated 21.08.2018 passed by the Commissioner is set aside and the appeal is allowed.

(Order pronounced on **03.07.2023**)

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

**(HEMAMBIKA R. PRIYA)**
**MEMBER (TECHNICAL)**

Shreya/JB