CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH- COURT NO. I

SERVICE TAX APPEAL NO. 52227 OF 2019

[Arising out of Order-in-Original No. JOD-EXCUS-000-COM-023-18-19 dated 28.03.2019 passed by the Commissioner of Central Goods, Service Tax and Central Excise, Jodhpur]

M/s Oswal Cargo Movers **.....Appellant**
Old Lane, Gangashahar, Bikaner, (Rajasthan)

Versus

Commissioner of Central Goods And Service Tax, Customs and Central Excise, Jodhpur-I **.....Respondent**
G-105, New Industrial Area, Opposite
Diesel Shed, Basni, Jodhpur, Rajasthan-342001

APPEARANCE:

Shri B. L. Narsimahan, Shri Ashutosh Choudhary, Advocate for the Appellant

Shri Aejaz Ahmad, Authorized Representative for the Respondent

CORAM:

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

Date of Hearing/Decision:01.01.2025

FINAL ORDER NO. 50028/2025

JUSTICE DILIP GUPTA:

M/s Oswal Cargo Movers[1] has sought the quashing of the order dated 28.03.2019 passed by the Commissioner confirming the demand of service tax and penalty by invoking the extended period of limitation under the proviso to section 73 (1) of the Finance Act, 1994[2].

2. The appellant claims that it was providing 'transportation of goods by road service' and the service tax was paid by the recipient of such service under reverse charge mechanism.

3. A show cause notice dated 05.10.2012 was issued to the appellant alleging that the appellant was actually providing 'cargo handling

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1 the appellant
2 the Finance Act

service' and not 'transportation of goods by road service' and, therefore, a demand was sought to be raised by invoking the extended period of limitation.

4. The Commissioner has, in the impugned order, found as a fact that the appellant was providing 'cargo handling service' and has also held that the extended period of limitation was correctly invoked by the department.

5. It is against the said order that this appeal has been filed by the appellant.

6. Shri B. L. Narsimahan, learned counsel for the appellant assisted by Shri Ashutosh Choudhary made submissions both on the merits as well as on the extended period of limitation.

7. As the entire demand that has been confirmed is under the extended period of limitation, it would appropriate to first examine this issue because if this issue is decided in favour of the appellant, it may not be necessary to examine the issue on merits.

8. The contention of learned counsel for the appellant is that the appellant genuinely believed that it was rendering 'transportation of goods by road service' and the recipient of the service was discharging the service tax liability under the reverse charge mechanism.

9. Shri Aejaz Ahmad, learned authorized representative appearing for the department, however, submitted that the Commissioner was justified in holding that the extended period of limitation was correctly invoked. Learned authorized representative pointed out that the correct facts had not been pointed out by the appellant and it is only when the audit was conducted that the department came to know that the

appellant was actually providing 'cargo handling service' and not 'transportation of goods by road service'.

10. It would, therefore, be appropriate to first reproduce the provisions of section 73(1) of the Finance Act, as they stood at the relevant time, 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 eighteen months 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 "eighteen months", the words "five years" had been substituted."

11. To examine whether the extended period of limitation was correctly invoked by the department, it would be necessary to reproduce the relevant portions of the show cause notice dealing with this aspect. They are as follows:

> "9. From the above, it appears that the assessee has evaded the payment of service tax amounting to Rs. 2,13,13,659/- (Service Tax Rs. 2,06,92,871/- +

> Education Cess Rs. 4,13,857/- + Secondary & Higher Education Cess Rs. 2,06,931/-) on Rs. 17,38,61,484/- received against 'Cargo Handling Services' provided by them during the period from 01.04.2007 to 31.03.2011 (as detailed in Annexure "A" to this notice). **The assessee appears to have suppressed the material facts from the Department with intent to evade payment of Service Tax. This fact came to light only during the course of audit. Thus, it appears that the said Service Tax is recoverable under proviso to Section 73 (1) of the Finance Act, 1994 invoking extended period of limitation for reason of suppression of facts Interest under Section 75 of the Act** also appears recoverable from them at the appropriate rate. The assessee also appears liable to penalty under Section 76 of the Act for contravening the provisions of Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 and under Section 78 of the Act for suppressing the material facts from the department with intent to evade payment of Service Tax in contravention of the provisions of Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994."
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> **(emphasis supplied)**

12. The appellant filed a reply to the show cause notice contending that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

13. The Commissioner did not accept the submission of the appellant and held that the extended period of limitation was correctly invoked. The relevant portion of the order passed by the Commissioner on this issue is reproduced:

> "33. Regarding invocation of extended period under proviso to section 73(1) of the Finance Act, 1994 for recovery of service tax, I observe that proviso to section 73(1) is invokable when there has been short payment or non-payment of tax on account of fraud, collusion, willful mis- statement,

> suppression of facts or contravention of any of the provisions of "this Chapter" (chapter V of Finance Act, 1994) or of the rules made there-under with intent to evade payment of service tax are present. **I find that the noticee is a service tax registrant since long and well aware of the provisions of law. I find that despite clarification issued by the Board** has vide Circular No.232/2/2006-EX.4 dated 12.11.2007, **the noticee neither sought any clarification from the department not paid due amount of service tax. This proves deliberate deviance on the part of the noticee with intent to evade payment of service tax. Tender as referred in foregoing para was issued for a composite work but the division of the same by the noticee indicates towards their ill intention to evade payment of service tax. These are sufficient grounds to invoke provisions of extended period for recovery of service tax.** In the case of Union of India v. Rajasthan Spinning & Weaving Mills [2009(238) ELT.3(S.C.)], the Hon'ble Supreme Court observed that in case the non-payment of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gets extended to five years."
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> **(emphasis supplied)**

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

15. It transpires from the records that in some of the cases, consignment notes were issued to Mahip Associates and in the invoices, the appellant had clearly indicated the service tax would be paid by the recipient. These facts have been stated to only show that the belief of the appellant that it was providing 'transportation of goods by road service' was a bonafide belief.

16. The issue, therefore, that arises for consideration is whether in such a situation, the extended period of limitation can be invoked. It has to be remembered that mere suppression of facts is not enough. There has to be a deliberate attempt to evade payment of excise duty. The show cause notice must specifically deal with this aspect and the adjudicating authority is also obliged to examine this aspect in the light of the facts stated by the assessee in reply to the show cause notice.

17. The provisions of section 11A (4) of the Central Excise Act, which are pari materia to the provisions of section 73(1) of the Finance Act, came up for interpretation before the Supreme Court in **Pushpam Pharmaceuticals Company** vs. **Collector of Central Excise, Bombay**[3]. The Supreme Court observed that section 11A(4) 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 that the act must be deliberate to escape payment of duty. The relevant observations are:

> "2. ****** The Department invoked extended period of limitation of five years as according to it the duty was shortlevied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs.
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> 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

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3. 1995 (78) E.L.T. 401 (S.C.)

> 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)**

18. 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**[4] 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 7 (2005) 7 SCC 749 11 E/52953/2018 not open to CEGAT to come to

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4. (2005) 7 SCC 749

> a conclusion that the appellant was guilty of "suppression of facts."
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> **(emphasis supplied)**

19. In **Easland Combines, Coimbatore** vs. **Collector of Central Excise, Coimbatore**[5] the Supreme Court observed that for invoking the extended period of limitation, duty should not have been paid because of fraud, collusion, wilful statement, suppression of fact or contravention of any provision. These ingredients postulate a positive act and, therefore, mere failure to pay duty which is not due to fraud, collusion or wilful misstatement or suppression of facts is not sufficient to attract the extended period of limitation.

20. 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 nonpayment 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**

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5. 22. (2003) 3 SCC 410
6. 2013 (288) E.L.T. 161 (S.C.)

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

21. The Supreme Court in **Commissioner of Central Excise and Customs** vs. **Reliance Industries Limited**[7] had an occasion to examine this aspect of the matter and the relevant observations are as follows:

> "**23. We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a *bona fide* belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a *mala fide* belief particularly when such a belief was emanating from the view taken by a Division Bench of Tribunal.** We note that the issue of valuation involved in this particular matter is indeed one were two plausible views could co-exist. **In such cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking *bona fides*. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a *bona fide* manner.**
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> **24. The extent of disclosure that an assessee makes is also linked to his belief as to the requirements of law.** In the present case the assessee who was required to self-assess his liability determined the assessable value on the basis of an interpretation given by CESTAT in its order dated 28-

7. 2023 (385) ELT 481

7-2000. It could not have foreseen that the view taken by CESTAT would be upset and overturned by the Supreme Court as it happened on 9-8-2005. The assessee's conduct during the material period *i.e.* between 2000 to 2005 cannot be considered to be *mala fide* when it merely followed the view taken by the Tribunal in *IFGL's* case (supra). On the question of disclosure of facts, as we have already noticed above the assessee had disclosed to the department its pricing policy by giving separate letters. It is also not disputed that the returns which were required to be filed were indeed filed. **In these returns, as we noticed earlier there was no separate column for disclosing details of the deemed export clearances. Separate disclosures were required to be made only for exports under bond and not for deemed exports, which are a class of domestic clearances, entitled to certain benefits available otherwise on exports.** There was therefore nothing wrong with the assessee's action of including the value of deemed exports within the value of domestic clearances.

25. We also take note of the fact that in the show cause notice itself it has been accepted by the revenue that the self-assessment procedure did not require an assessee to submit copies of all contracts, agreements and invoices. This being the admitted position in the notice we do not find any basis for agreeing with the findings of the Commissioner that certain relevant documents had not been filed and thereby suppressed from the scrutiny of the revenue officers. **An assessee can be accused for suppressing only such facts which it was otherwise required to be disclosed under the law.** The Counsel for the Revenue has, while pleading that facts was suppressed been unable to show us the provision or rule which required the assessee in this case to make additional disclosures of documents or facts. **The assertion that there was suppression of facts is therefore clearly not tenable.**"

(emphasis supplied)

22. It is, therefore, clear that the mere fact that the belief of the appellant was found to be incorrect by the authorities will not render such a belief of the assessee to be a malafide belief. The assertion that there was suppression of facts is, therefore, not tenable.

23. The Commissioner has also, in the impugned order, stated that in case there was any doubt, it was for the appellant to have sought a clarification from the department.

24. It is also not possible to accept this view expressed by the Commissioner. The Delhi High Court in **Mahanagar Telephone Nigam Limited** vs. **Union of India**[8] held otherwise, and the relevant observations of the Delhi High Court are as follows:

> "As noted above, the impugned show cause notice discloses that the respondents had faulted MTNL for not approaching the service tax authorities for clarification. The respondents have surmised that this would have been the normal course for any person acting with common prudence. However, it is apparent from the statements of various employees of MTNL that MTNL did not believe that the amount of compensation was chargeable to service tax and therefore, there was no requirement for seeking clarifications. **Further, there is no provision in the Act which contemplates any procedure for seeking clarification from jurisdictional service tax authority. Clearly, the reasoning that MTNL ought to have approached the service tax authority for clarification, is fallacious.**"
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> **(emphasis supplied)**

25. It is, therefore, not possible to uphold the findings recorded by the Commissioner that the extended period of limitation was correctly invoked in the show cause notice.

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26. It would, therefore, not be necessary to examine the contentions raised by the learned counsel for the appellant on the merits of the matter.

27. The impugned order dated 28.03.2019 passed by the Commissioner, therefore, deserves to be set-aside and is set-aside. The appeal is, accordingly, allowed.

(Order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y. / Shreya