

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH,
COURT NO. III

SERVICE TAX APPEAL NO. 51659 OF 2017

[Arising out of the Order-in-Original No. DLI/SVTAX/003/COM/71/16/17 dated 21/06/2017 passed by Commissioner of Service Tax, Delhi – III Commissionerate, New Delhi – 110 066.]

M/s Linehaul Express India Pvt. Ltd.

.....Appellant

A-406, Building No. 10, Road No. 4,
Street No. 8, Mahipalpur Extension,
New Delhi – 110 037.

Versus

**Commissioner of Service Tax,
Delhi – III, Commissionerate,**

....Respondent

EIL Annexe, Vth Floor,
Bhikaji Cama Place,
New Delhi – 110 066.

APPEARANCE:

Shri A.K. Batra, Chartered Accountant for the appellant.
Shri S.K. Meena, Authorized Representative for the Department

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50795/2025

DATE OF HEARING : 18.02.2025

DATE OF DECISION: 26.05.2025

P.V. SUBBA RAO

The order dated 21.06.2017 passed by the Principal Commissioner¹ deciding the proposals made in three show cause notices covering the period April 2007 to March 2014 is assailed by mass **Linehaul Express India Ltd²** in this appeal. We have

1. impugned order
2. appellant

heard the submissions advanced by the learned counsel for the appellant and the learned authorized representative of the Revenue and perused the records.

2. The appellant is a private limited company registered with the service tax department for providing courier services. Its records for the period 2007–2008 to 2011–2012 were audited in December 2012. It was felt that the appellant had not paid service tax, on certain services provided by it and certain services which were received by it (under reverse charge). Show cause notice³ dated 12.06.2013 was issued to the appellant covering period 01.4.2007 to 31.3.2012 (first SCN). This was followed up by two periodical SCNs dated 22.5.2014 (second SCN) and 22.5.2015 (third SCN) covering the financial years 2012–2013 and 2013–2014, respectively. The proposals in these three SCNs were decided by the Commissioner through the impugned order, confirming service tax demand of Rs. 1,85,04,707/- under section 73 Finance Act, 1994⁴, along with interest under section 75 of the Act. Penalties were also imposed under sections 76, 77 and 78 of the Act on the appellant.

3. The three issues in dispute are:

- (i) Non-payment of service tax on commission received by the appellant from M/s. Cathay Pacific Airways.
- (ii) Non-payment of service tax on foreign currency expenditure incurred by the appellant.

3. SCN

4. Act

(iii) Non-payment of service tax on income received in foreign currency by the appellant.

4. The appellant had received commission from M/s. Cathay Pacific Airways for handling cargo including booking cargo, collecting the cargo for transportation to aircraft, getting the cargo loaded on the aircraft, collecting the amount of air freight from its customers and remitting the amount to M/s. Cathay Pacific Airways. These services which the appellant had rendered for a commission were held to be in the nature of 'business auxiliary services', as defined under section 65(19) and chargeable to service tax under 65(105)(zzb) of the Act.

5. The appellant is a courier company and has arrangements with other Courier companies abroad to conduct its business. It books consignments from its customers both in India and abroad. In conducting its business, it receives three types of services from its counterparts for which it remitted foreign currency to them. The first activity is picking up packets and parcels from the consignors outside India for delivery in India and the second is delivering packets or parcels to consignees outside India and the third activity is picking packets and parcels from outside India and delivering them to consignees outside India. These services were treated as business services rendered by the counterparts of the appellant, chargeable to service tax under reverse charge under section 66A of the Finance act.

6. The appellant also rendered services to its foreign counterparts two types of services, viz., picking up parcels or packets from the clients of the foreign counterparts in India (for delivery outside India) and delivering packets or parcels booked by the clients of the foreign counterparts to destinations in India. The details of the demands on the three activities in the three SCNs is as below:

Issue	Particulars	SCN I	SCN II	SCN III	Remarks
	Period	2007-08 to 2011-12	2012-13	2013-14	
I	Demand on commission under 'BAS'	26,50,496/-	--	--	Not in dispute The appellant has paid the tax, after claiming cum-tax benefit, along with interest and the same has been appropriated vide impugned order.
II	Demand on import of services under 'BAS' and as per Rule 4 of POPS for the period w.e.f. 01.07.2012	71,43,906/-	22,10,225/- (Refer page 240 of the appeal memo)	30,40,245/- (Refer page 112 of the appeal memo)	In dispute
III	Demand on foreign income under 'BAS'	18,42,375/-	6,70,095/- (Refer page 241 of the appeal memo)	13,44,315/- (Refer page 112 of the appeal memo)	In dispute in SCN I SCN II & III – Tax (after cum-tax) along with interest was paid. However, appropriation was made only w.r.t. SCN III.

7. Of the three issues, the appellant does not dispute the demand of service tax on commission received from M/s. Cathay Pacific under 'Business Auxiliary Service' and paid the tax (after claiming cum tax benefit, i.e., treating the commission received by it as inclusive of the tax) along with interest. The amount so paid has been appropriated in the impugned order.

8. The appellant is disputing the second demand of service tax (under reverse charge) on the payments which it had made to the foreign counterparts.

9. The appellant is disputing the third demand of service tax on the amounts which it had received for the services which it rendered to its foreign counterparts on the ground of limitation.

10. Learned counsel for the appellant submits that as far as the demands made in the second and third SCNs on this count are concerned, they were within the normal period of limitation and the appellant is not disputing the taxability and has already paid the service tax. However, in the impugned order, tax of Rs.13,44,315/- paid in respect of the third SCN was not appropriated in the impugned order and only Rs. 6,70,095/- paid with respect to the second SCN was appropriated.

11. As far as the first SCN is concerned, the demand from April 2007 to March 2011 was time barred and only demand for the period April 2011 to March 2012 was within the normal period of limitation. According to the learned counsel for the appellant, extended period of limitation was wrongly invoked in this case.

12. Learned counsel for the appellant also disputes the interest on the disputed amounts of service tax demanded. He further submits that penalties were wrongly imposed on the appellant.

13. Thus, the issues to be decided by us are:

- a) Taxability of the amounts paid by the appellant to its foreign counterparts as "Business Auxiliary Services" received under reverse charge mechanism.
- b) Non-appropriation of the amounts paid by the appellant on the foreign income received in respect of the second SCN.
- c) The question of limitation in the first SCN and whether the invocation of extended period of limitation under the proviso to section 73(1) was justified.
- d) Demand of interest under section 75 of the Act.
- e) Imposition of penalties under sections 76,77 and 78 of the Act

Limitation

14. Before proceeding to examine the merits of the case, we proceed to decide the question of limitation. Section 73 of the Act provides for recovery of the service tax not paid or short paid. This is the remedy available to Revenue if service tax is not paid or short paid within limitations including the limitation of time.

15. Even if tax is payable, but if the period of limitation has expired, while the charge of the tax remains, the remedy is no longer available to the Revenue. It will be like a time-barred debt. After the limitation period, if the assessee pays the service tax whose charge is not in dispute, it will be like a repayment of a time-barred debt. The assessee cannot claim refund of the tax which was undisputedly due from it even if the Revenue failed to issue a demand within limitation prescribed under section 73.

16. In this case, the appellant does not dispute the demand of service tax on the commission which it received from M/s.

Cathay Pacific and has also paid it along with interest. To this extent, limitation will not have any bearing on the tax paid.

17. Insofar as the amounts received by the appellant from its foreign counterparts is concerned, the appellant paid service tax and is not disputing it on merits but is only disputing it on the grounds of limitation insofar as the demand made under the first SCN is concerned. It is not disputing and has already paid service tax demanded in the second and third SCNs.

18. Insofar as the demand of service tax on the amounts which the appellant had paid to its foreign counterparts for their services is concerned, the appellant is disputing both on the taxability and the limitation.

19. The relevant portion of section 73 of the Act reads as follows:

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 thirty 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, 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 "thirty months", 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 thirty months or five years, as the case may be.

20. The dispute in this case is whether the proviso to section 73(1) was correctly applied in the first SCN. It is undisputed that the appellant was registered with the service tax and had been filing its returns as required. According to section 70 of the Act, every assessee is required to self assess service tax and file returns. This section reads as follows:

SECTION 70. Furnishing of returns. —

- (1) Every person liable to pay the service tax **shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise**, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed.
- (2) The person or class of persons notified under sub-section (2) of section 69, shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.

21. It is possible that the assessee may not file a return or may incorrectly self-assess the service tax. Section 72 of the Act

provides for the officer to conduct best-judgment assessment in such cases. It reads as follows:

SECTION 72. Best judgment assessment. — If any person, liable to pay service tax, —

1. (a) fails to furnish the return under section 70;
2. (b) having made a return, **fails to assess the tax in accordance with the** provisions of this Chapter or rules made thereunder, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, **make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.**

22. If the assessee does not pay service tax or short pays it, a notice under section 73 can be issued. According to the Revenue, in the first SCN, the extended period of limitation was correctly invoked and according to the appellant, it was not correctly invoked as none of the elements necessary to invoke extended period of limitation viz., fraud or collusion or wilful misstatement or suppression of facts or violation of act or rules with an intent to evade payment of service tax were present in the case.

23. The reasons for invoking extended period of limitation given in the first SCN are that the appellant had violated Sections 69, 70, 71A, 73, 66, 66A and 91 of the Act inasmuch as they failed to pay service tax correctly and hence it appears that the appellant had intentionally and wilfully suppressed the facts of providing and receiving taxable services and therefore, extended

period of limitation was correctly invoked. The relevant portion of the SCN is as below:

"6. Whereas, it further appears that the assessee by doing so, has intentionally and willfully suppressed the facts of providing and receiving impugned taxable services and calculation of impugned value of such taxable services and did not pay the service tax as applicable on such services. Thus, by not disclosing the facts and receiving impugned taxable services resulting into contravention of various provisions of the said Act and the said Rules aforesaid with intention to evade payment of impugned service tax, the fact of providing and receiving these services would not have come to the notice of the department but for the audit conducted by the department. Thus, it appears that the proviso to Section 73 (1) of the Act *ibid* can be invoked and thus, demand can be made within five years from the date of non-payment of service tax".

24. The appellant contested the invocation of extended period of limitation before the Commissioner who recorded the appellant's submission in paragraph 7.19 as follows:

"7.19 **In the present case, the department has invoked the** extended period on the ground that, Noticee had willfully suppressed the fact from the department with an intention to evade payment of service tax. The Noticee had not suppressed any fact as the department had knowledge about all the facts. The Noticee had submitted all the documents, pertaining to the issue raised in the Notice, to the department during the audit proceedings. Thus, conditions of Section 73 of the Finance Act, 1994 are not satisfied for invoking extended period of 5 years as department had full knowledge of the facts of the Noticee and it cannot be said that Noticee had willfully suppressed the facts and figures from the department. Hence department cannot invoke extended period of 5 years in the present case".

25. The Commissioner recorded in the impugned order that extended period of limitation was correctly invoked. The relevant findings are as follows:

"4.5.2 A perusal of the above framed provisions of Section 73 (1) of the Act, evidences inter-alia 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 this Chapter or of the rules made thereunder with intent to evade payment of service tax, SCN may be served upon a person chargeable with the service tax within five year from the relevant date ;

4.5.3 Further, as alleged in the impugned SCN No. 1 that, had it not been for the investigation conducted by the Audit Branch of the Service tax Commissionerate, New Delhi, the non-payment of service tax would have gone unnoticed. Therefore, the extended period of five years as provided for in the Section 73 of the Act is invokable in this case for suppressing the material facts from the department.

4.5.4 Section 73 of the Act, *ibid*, as amended provides that, where any service tax has not been levied or paid or has been short-levied or short-paid by reasons of fraud, collusion, willful misstatement, suppression of facts, or contravention of any of the provisions of this Chapter or of the rules made there-under with intent to evade payment of service tax, the Central Excise Officer may, within a period of 5 years from the relevant date serve notice on the person chargeable with the service tax, which has not been levied or paid.

4.5.5 The various case laws referred by the Noticee are not applicable to the present case as the facts and circumstances are different. It is needless to recapitulate that this case has arisen out of the investigation conducted by the officials of the Department. Had they not investigated the case, the evasion of tax would not have been unearthed. Thus, it is evident that the Noticee did not disclose the material facts by itself through the prescribed returns, whereby the said values have escaped appropriate assessment for levy and payment of service tax.

4.5.6 Thus, the Noticee has contravened Rule 6 of the Rules, read with Sections 66/66B, 67, 68 and 70 of the Act. It is clear that the Noticee has suppressed the facts from the department by not disclosing all the material facts required for verification with an intention to evade payment of service tax. Accordingly, I hold that the extended period of limitation is applicable in terms of proviso to Section 73 (1) of the Act in the SCN No. I.

4.5.7 I find that the Noticee have not contested the figures and amount quantified by the department anywhere in their reply except service tax on commission during FY 2007-2008 to 2011-2012 and foreign income on account of exports during FY 2013-2014 (which has been deposited by them as cum-duty amount). Accordingly, I hold the total demand as raised in all the three show cause notices is recoverable under Section 73 of the Finance Act, 1994”.

26. What is evident from the above is that, according to the Revenue, the appellant had received some services and rendered some services and had not paid service tax on them. The non-payment of service tax came to light during the audit and if the audit was not conducted, this fact would not have come to light. Since the non-payment of service tax was contrary to the legal provisions, according to the Revenue, the appellant violated the provisions of the Act and Rules. Therefore, the intention of the appellant is evident and hence extended period of limitation was invoked.

27. We find that the grounds to invoke extended period of limitation while raising a demand under service tax are similar to the one under section 11A of the Central Excise Act, 1944. The question is whether the intent to evade has to be established or it can be presumed. If the appellant had not paid tax and had

also violated some provisions of the Act or Rules, can it be presumed that the violation was with the intent to evade or the intent has to be established. A plain reading of the proviso to section 73 and numerous decisions make it clear as crystal that the intent has to be established. Any assessee can make mistakes in self-assessment of service tax. The assessee has to file returns and the remedy against any incorrect self-assessment of service tax is the best judgment assessment under section 72. While it is the duty of the assessee to file the returns, it is the duty of the officer receiving the return to scrutinise them and it is his prerogative to call for any records and accounts to check if the service tax is correctly paid. If it is not correctly assessed or paid, he can raise a demand under section 73.

28. In other words, what the audit much later, should have been done by the officer receiving the returns. If he failed to do so and in the process, the demand gets time-barred, the responsibility for it rests at his doorstep. The failure of the officer to scrutinise the returns and call for records in time and raise a demand does not establish the intent of the appellant to evade. We proceed to examine the judicial precedents on the question of invoking extended period of limitation.

29. It would be useful to reproduce the proviso to section 11A of Central Excise Act, 1944⁵, as it stood when the Supreme Court explained "suppression of facts" in **Pushpam Pharmaceutical**

5. the Central Excise Act

6. 1995 (78) E.L.T. 401 (S.C.)

Co. versus Commissioner of Central Excise, Bombay⁶. It is as follows:

“**11A.** Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of-

- (a) fraud; or
- (b) collusion; or
- (c) any willful 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 by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, 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.”

30. 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 Central 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 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

6. 1995 (78) E.L.T. 401 (S.C.)

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 than 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."

(emphasis supplied)

31. This decision was relied upon by the Supreme Court in **Anand Nishikawa Company Ltd. versus Commissioner of Central Excise**⁷ and the observations are as follows:

“26. This Court in the case of Pushpam Pharmaceutical Company versus 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:-

“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.”

32. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. versus 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

7. 2005 (188) E.L.T. 149 (S.C.)

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 proviso to Section 11A of the Act.”

(emphasis supplied)

33. In **Easland Combines, Coimbatore vs. Collector of Central Excise, Coimbatore**⁸ the Supreme Court observed that for invoking the extended period of limitation, duty should not have been paid because of fraud, collusion, willful 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 willful misstatement or suppression of facts is not sufficient to attract the extended period of limitation.

34. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in **Uniworth Textiles Ltd. versus Commissioner of Central Excise, Raipur**⁹ 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-**

8. (2003) 3 SCC 401

9. 2013 (288) E.L.T. 161 (S.C.)

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 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)

35. The Supreme Court in **Continental Foundation Joint Venture versus Commissioner of Central Excise, Chandigarh**¹⁰ 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 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

10. 2007 (216) E.L.T. 177 (S.C.)

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)

36. The Delhi High Court in **Bharat Hotels Limited** versus **Commissioner of Central Excise (Adjudication)**¹¹ also examined the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Finance Act, 1994¹² 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 can notes a positive act of the assessee to avoid excise duty.**

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

11. 2018 (12) G.S.T.L. 368(Del.)

12. the Finance Act

failure to pay duty or takeout a license without the presence of such intention.”

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)

37. It would also be appropriate to refer the decision of the Delhi High Court in **Mahanagar Telephone Nigam Ltd. vs. Union of India and others**¹³. The Delhi High Court observed that 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. The Delhi High Court further observed that the contention of MTNL that receipt was not taxable under the Act is a substantial one and no intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return. The relevant portion of the observations are:

“28. In terms of the proviso to Section 73(1) of the Act, the extended period of limitation is applicable only in cases where service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, or collusion, or wilful misstatement, or suppression of facts, or contravention of any provisions of the Act or the Rules made thereunder with an intent to evade payment of

13. WP (C) 7542 of 2018 decided on 6.4.2023

service tax. **However, the impugned show cause notice does not contain any allegation of fraud, collusion, or wilful misstatement on the part of MTNL. The impugned show cause notice alleges that the extended period of limitation is applicable as MTNL had suppressed the material facts and had contravened the provisions of the Act with an intent to evade service tax.** Thus, the main question to be addressed is whether the allegation that MTNL had suppressed material facts for evading its tax liability, is sustainable.

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."**

(emphasis supplied)

38. It is, therefore, clear from the aforesaid discussion that the extended period of limitation could have been invoked only if there was suppression of facts or violation of the provisions of the Act or Rules with intent to evade payment of service tax.

39. In the present case, as noticed above, the Principal Commissioner held that there was violation of Act or Rules which would not have come to light but for the audit and hence larger period of limitation could be invoked. In this connection, it may be pertinent to refer to the decision of the Supreme Court in **Commissioner of C. Ex. & Customs versus Reliance Industries Ltd.**¹⁴ The Supreme Court held that if an assessee bonafide believes that it was correctly discharging duty, then merely because the belief is ultimately found to be wrong by a judgment would not render such a belief of the assessee to be mala fide. If a dispute relates to interpretation of legal provisions, the department would be totally unjustified in invoking the extended period of limitation. The Supreme Court further held that in any scheme of self-assessment, it is the responsibility of the assessee to determine the liability correctly and this determination is required to be made on the basis of his own judgment and in a bona fide manner. The relevant portion

14. 2023 (385) E.L.T. 481 (S.C.)

of the judgment is reproduced below:

"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 where 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.

1. The extent of disclosure that an assessee makes is also linked to his belief as to the requirements of law. ***.** 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."

(emphasis supplied)

40. We, therefore, decide the question of limitation in favour of the assessee and against the Revenue. Extended period of limitation was wrongly invoked in the first SCN in this case. However, as already discussed above, this only affects the remedy available to the Revenue but does not alter the charge of the service tax. Therefore, the undisputed charge of service tax on the commission received by the appellant from M/s. Cathay Pacific remains and the amounts paid by the appellant stand appropriated in the impugned order. The appellant cannot claim any refund of this amount.

Taxability under Reverse charge of the amounts paid by the appellant to its foreign counterparts

41. The appellant had, undisputedly, availed the services of its foreign counterparts to deliver and pick up packets/parcels from outside India in respect of the appellant's clients and paid its foreign counterparts. The case of the Revenue is that this service is 'business auxiliary service' covered by section 65(19) and 65(105) (zzb) of the Act. Since the service provider is outside India, the appellant, as the service recipient, is liable to tax under reverse charge as per Section 66A.

42. Learned counsel for the appellant submits that the appellant and its foreign counterparts are acting on principal to principal basis for rendering services to the client and there is no principal to agent relationship. The foreign counterparts are not rendering the services on behalf of the appellant but are rendering the services in their individual capacity. He further submits that the entire service is rendered outside India because the packets are picked up, or, as the case may be, delivered outside India. He further submitted that before the Place of Provision of Service Rules, 2012 were framed, as per Rule 3(1) (ii) of the Taxation of Services Rules, 2006, since the services were rendered outside India, no tax was chargeable. Therefore, the appellant is not liable to pay service tax under reverse charge mechanism on the amounts which it paid to its foreign counterparts.

43. We find that often in courier business that the same company will not have a presence everywhere in the world and so, it makes arrangements with others to either pick up or deliver packets/parcels. In such a case, the implied contract is between the client and the courier which booked the consignment. The client pays the courier and the courier undertakes to get the packet delivered to the consignee. The client has no relationship whatsoever with the other couriers through which the courier company booking the packet may deliver or receive the packet. Neither does the client pay any amount to any of these counterpart couriers nor do the

counterpart couriers have any obligation to the client. The courier company booking the consignment and receiving charges for the consignment has a contract – written or otherwise – with its counterparts to do part of its work and pays the counterpart couriers. In other words, the counterparts are rendering a service to the appellant in this case and are getting paid by the appellant. The service which they are rendering is doing some service on behalf of the appellant. It is incorrect to say that the counterpart companies are rendering the service on their own account. Converse is true when the appellant rendered services of picking up or delivering packets on behalf of foreign counterpart companies and was getting paid. Such services are the subject matter of the third part of demands in this appeal and the appellant agreed that it was rendering “business auxiliary service” and paid service tax on the service (but has now only contested it on the grounds of limitation for some period in the first SCN).

44. We have no manner of doubt that the appellant received business auxiliary services from its counterparts abroad and paid for such services. Therefore, the appellant was liable to pay service tax on the same. While the packets were received or delivered outside India by the counterparts, the service in doing so, was rendered to the appellant in India. We, therefore, find in favour of the Revenue and against the appellant on this count on merits. Learned counsel for the appellant also argued this demand on the ground of Revenue neutrality. It is his submission

that if the appellant had paid service tax on these services under reverse charge, it could have availed CENVAT credit of the amounts so paid and this would have reduced the service tax liability of the appellant. Therefore, the entire exercise is Revenue neutral. We find that Revenue neutrality does not remove any charge of tax. It is not part of any section or Rule. This concept evolved through judicial pronouncements only to determine if it can be presumed that the assessee had an intent to evade payment of tax and invoke extended period of limitation. The logic is if the assessee is entitled to CENVAT credit, there could not have been any intention to evade payment of tax and hence extended period of limitation could not be invoked. As we have already held in favour of the appellant on the question of limitation, Revenue neutrality is irrelevant to this case as the demand is being upheld only within the normal period.

Non-appropriation of the amounts paid by the appellant on the foreign income received in respect of the second SCN.

45. The appellant submits that the service tax which it had paid was not appropriated in the impugned order. We find that this fact must be verified by the Commissioner and if any tax has been paid, it must be appropriated.

Demand of interest under section 75 of the Act

46. The appellant contested the demand of interest under section 75 on the ground that the service tax itself is not liable.

We find that the charge of interest under section 75 applies automatically consequent upon the confirmation of demand. To the extent the demands are confirmed, the appellant is liable to pay appropriate interest.

Imposition of penalties under sections 76, 77 and 78 of the Act

47. We find that penalties were imposed under section 76, 77 and 78 of the Act. The requirement for imposing penalty under section 78 is the same as that for invoking extended period of limitation. Since we found in favour of the appellant on the question of extended period of limitation, we find that penalty under section 78 is not imposable. We find that the appellant had, albeit wrongly, believed some tax was not payable and had not paid. When pointed out, on two of the three disputed services, the appellant had paid service tax.

48. During the relevant period, section 80 of the Act read as follows:

80. Penalty not to be Imposed in Certain Cases.

Notwithstanding anything contained in the provisions of section 76, section 77, section 78 or section 79, **no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure.**

49. We find in the factual matrix of this case, that the appellant's failure in paying tax and complying with the provisions of the Act or Rules were due to reasonable cause, viz.,

it's incorrect understanding of the law. The Range officer could have taken corrective steps by scrutinising its returns and records and carrying out best judgment assessment under section 72 but the officer did not do so. We, therefore, find it fit to set aside all penalties invoking section 80 of the Act.

50. To sum up:

- a) The demand of service tax on the amounts received from M/s. Cathay Pacific is undisputed and is upheld and the amount already paid has been appropriated.
- b) The demand of service tax under reverse charge mechanism on the amounts paid by the appellant to its foreign counterparts is upheld but only within the normal period of limitation.
- c) The demand of service tax on the amounts received in foreign currency from the foreign counterparts is upheld within the normal period.
- d) All amounts paid by the appellant must be appropriated towards the demand.
- e) Interest is payable on the amounts of service tax payable as above, if the interest is not already paid.
- f) All penalties are set aside invoking section 80 of the Act.

51. The appeal is allowed and the impugned order is modified to the extent indicated above. The matter is remanded to the

Commissioner for the limited purpose of calculation and appropriation of any amounts already paid as tax or interest.

(Order pronounced in open court on 26/05/2025.)

(BINU TAMTA)
MEMBER (JUDICIAL)

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

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