2023/DHC/001092

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 15.02.2023

\+ **SERTA 7/2022 and CM Nos. 20068/2022, 2956/2023 & 5187/2023**

PRINCIPAL COMMISSIONER, CGST, DELHI-SOUTH ..... Appellant

versus

M/S EMAAR MGF LAND LTD. ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Satish Kumar, Senior Standing Counsel with Ms Vaishali Goyal, Mr Dhruv and Mr Atri Mandal, Advocates.

For the Respondent : Mr V. Lakshmikumaran, Mr Karan Sachdev, Mr Yogendra Adlak, Mr Kunal Kapoor, Mr Agrim Arora and Ms Masooma Rizvi, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The Revenue has filed the present appeal under Section 35G of the Central Excise Act, 1944 (as applicable to service tax matters by virtue of Section 83 of the Finance Act, 1994) impugning an order dated 11.08.2021 [Final Order No.ST/A/51725/2021-CU(DB)] passed by the

Customs, Excise and Service Tax Appellate Tribunal (hereafter '**the Tribunal**') in Service Tax Appeal No.51379/2017.

2. The respondent, M/s Emaar India Ltd. (formerly known as 'Emaar MGF Land Limited'), had filed the aforementioned appeal before the learned Tribunal impugning an order-in-original dated 31.01.2017 passed by the Commissioner, Service Tax (hereafter '**the Commissioner**'), whereby the Commissioner had confirmed a demand of ₹2,44,48,095/- (Rupees two crores forty four lacs forty eight thousand and ninety five only) and had ordered recovery of the said amount, as being inadmissible Cenvat Credit under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73(2) of the Finance Act, 1994 (hereafter '**the Act**'). In addition, the Commissioner had ordered recovery of interest under Section 75 of the Act. The Commisioner had also imposed penalty of an equivalent amount of ₹2,44,48,095/- under Section 78 of the Act and a penalty of ₹10,000/- for failing to file the correct ST-3 returns, disclosing the taxable income and Cenvat Credit in accordance with the provisions of Section 70 of the Act.

3. The aforesaid order-in-original was passed pursuant to a show cause notice dated 17.04.2014 issued by the Commissioner. The Tribunal found that the show cause notice was beyond the period as prescribed under Section 73(1) of the Act. The Commissioner had sought to recover the Cenvat Credit claimed by the respondent in respect of service tax liability for the period of July 2008 to January 2009. The learned Tribunal held that the extended period of limitation

of five years was unavailable as there was no suppression of facts or any intention to evade tax.

4. The learned Tribunal also rejected the Revenue's contention that any liability could be imposed under the provisions of Section 73A of the Act, as proceedings under the said Section had been dropped by the Commissioner, and the Revenue had not preferred any appeal against the order-in-original dated 31.01.2017.

5. The controversy in the present case, essentially, relates to whether the services rendered by the respondent during the relevant period were taxable under the Act. At the material time, the respondent was engaged in undertaking construction activities for development of residential complexes and flats in southern India. The respondent claims that it had entered into two separate agreements with the purchaser of each flat. The first type of agreement was in respect of construction of the flat/unit and the other was an agreement for sale of the land. The first agreement was termed as 'Construction Agreement', whereby the respondent had agreed to design and promote a residential project comprising of apartments of various sizes but of standard specifications in a development known as 'Esplanade Project'. The second agreement for sale of land was in respect of an undivided share in the land proportionate to the size of the flat/apartment.

6. The respondent claimed that the said activity fell within the scope of the taxable service under Section 65(105)(zzzza) of the Act, '*Works Contract*' Service, which was taxable under the Act with effect from

01.06.2007. Accordingly, the respondent recovered service tax aggregating to ₹5,30,67,272/- from flat buyers for the period of July 2008 to January 2009. The respondent deposited a sum of ₹2,86,19,177/- and discharged the balance liability by utilizing the Cenvat Credit of ₹2,44,48,095/-.

7. According to the Revenue, the services rendered by the respondent falls under the definition of Service of '*Construction of Complex*' as defined under Section 65(105)(zzzh) of the Act, which was chargeable to tax with effect from 01.07.2010 by virtue of the Explanation to Section 65(105)(zzzh) of the Act as introduced by the Finance Act, 2010. Thus, according to the Revenue, the services rendered by the respondent were not taxable at the material time, and it could not claim any Cenvat Credit in respect of input services for discharging its liability. Consequently, the respondent was required to refund the same along with interest. The Revenue claimed that the respondent could not have collected the service tax in respect of services that were not taxable. Nonetheless, it was obliged under the provisions of Section 73A of the Act to deposit any amount collected as service tax.

8. In the given context, the Revenue has projected the following questions for consideration of this Court:

> "I) Whether the availment of Cenvat credit and its utilization for payment of service tax on construction of flats for sale to buyers even though the activity to develop residential colonies and commercial properties were exempt from service tax

vide Notification No.24/2010 dated 22.06.2010, is in contravention of provisions of Rule 3 read with Rule 2(1) and 2(p) of the Cenvat Credit Rules, 2004?

II) Whether the extended period of limitation is invokable correctly or not.

III) Whether the extended period of limitation is invokable correctly or not especially when admittedly the service tax has been collected on exempted service and not deposited with the government?

IV) Whether the extended period of limitation is invokable correctly or not especially when admittedly the service tax has been collected on exempted service and not shown in ST returns?

V) Whether the learned CESTAT is correct in ignoring the specific findings in order-in-original that the respondent has collected service tax on exempted service and has not deposited the same in cash?

VI Whether the learned CESTAT is correct in ignoring the specific findings in order-in-original that the respondent has collected service tax on exempted service and has not deposited the same in cash?

VII. Any other question of law."

9. Undisputedly, a person can claim service tax paid on input services in discharge of its liability to pay service tax in respect of output services. Thus, in cases where the output services are not taxable, the question of claiming any Cenvat Credit does not arise.

10. The impugned order is premised on two grounds. First, that the proceedings under Section 73 of the Act could not be initiated as it was

beyond the period of limitation as stipulated in that section. The learned Tribunal had noted that the questions whether the respondent was required to deposit the entire amount collected as service tax with the authorities in cash in terms of Section 73A of the Act, did not arise, as the Commissioner had dropped the proceedings under Section 73A of the Act and had confined the demand under Section 73(1) of the Act for recovery of the Cenvat Credit, which according to the Commissioner had been wrongfully availed.

11. It is apparent that if the Revenue's contention that services rendered by the respondent were not chargeable to service tax at the material time is accepted; the respondent had no liability to deposit any service tax with the authorities. Consequently, Section 73 of the Act would not apply. Section 73 of the Act is applicable only in cases where any service tax had not been levied or paid or had been short paid or erroneously refunded. *Prima facie*, if an assessee is not liable to pay any tax, no demand can be made for wrongful availment of input tax credit for discharge of a non-existent liability to pay tax

12. However, if a person collects any amount representing it as service tax, which is otherwise not to be collected, he is obliged to deposit that amount – in terms of Section 73A(2) of the Act – to the Credit of the Central Government. This amount is required to be credited to the Consumer Welfare Fund referred to in Section 12C of the Central Excise Act, 1944. The amount so deposited cannot be considered as deposit of tax; it is the deposit of an amount, which although collected as service tax, is not service tax.

13. It is important to note that in the present case, the learned Commissioner had dropped the demand of ₹2,44,48,095/- under Section 73A of the Act. As noted above, the Revenue had not filed any appeal against the order-in-original and had accepted the said order. Thus, no demand can now be raised on the ground that the respondent had not deposited the entire amount collected from its customers as service tax, under Section 73A(2) of the Act. If the Revenue's contention is accepted that the services rendered by the appellant were not chargeable to tax at the material time, the Revenue may have been justified in demanding that any amount recovered from purchasers as service tax be deposited to the credit of the Central Government under Section 73A(2) of the Act. However, as stated above, that question does not arise as the Revenue had accepted the order, dropping the proceedings under Section 73A of the Act.

14. The learned Tribunal rightly found that the proposal and the show cause notice to recover a sum of ₹2,44,48,095/- under Section 73A of the Act and the interest thereon under Section 73B of the Act, was not confirmed by the learned Commissioner in his order-in-original. Accordingly, the learned Tribunal held that, in the absence of a cross-appeal by the Department, it would not be possible to confirm any demand under Section 73A of the Act.

15. We find no infirmity with the aforesaid view and thus, Question Nos. (V) and (VI), as projected by the Revenue and as noted in paragraph no. 8 above , are answered in the negative.

16. As observed above, *prima facie*, the question whether the respondent has wrongfully availed the Cenvat Credit would arise only if the respondent had a liability to pay service tax and had wrongfully reduced the same by claiming the Cenvat Credit. However, the said question does not arise for consideration in the present appeal. Whereas the learned Commissioner has held that the Cenvat Credit had been erroneously claimed and was liable to be recovered under Section 73(1) of the Act, the learned Tribunal had confined its examination to the jurisdiction of the Commissioner to make any such demand under Section 73(1) of the Act as being barred by limitation.

17. According to the Revenue, the extended period of limitation as provided under Section 73 of the Act was available in this case as the respondent had not filed the correct return. It is the Revenue's case that under the scheme of self-assessment of service tax, in terms of the provisions of Section 70 of the Act, the assessee is required to assess its own tax and furnish the correct details. Since the respondent in this case had not correctly disclosed that services rendered by it were not taxable, the extended period of limitation of five years would be available notwithstanding that the respondent had no intention to evade any tax.

18. Before proceeding further, it would be relevant to refer to Section 73(1) of the Act. The same is set out below:

> "**SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded**. —

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within 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."

19. It is apparent from the above that the proviso to Section 73(1) of the Act is applicable only where it is found that the service tax has not been levied or paid or has been short levied or short paid or erroneously

refunded by reason of fraud; collusion; wilful mis-statement; or suppression of facts; or contravention of the provisions of the Act and the Rules made thereunder with the intention to evade payment of service tax. In the present case, there is no allegation of any fraud or collusion. It is also apparent from the order-in-original that the Commissioner had proceeded on the basis that the proviso would be applicable notwithstanding that there was no intent on the part of the respondent to evade any tax. The Commissioner had proceeded on the basis that the extended period of limitation was applicable on account of suppression of facts and "*wilful mis-statements*".

20. In the circumstances, the Tribunal had examined the question whether the proviso to Section 73(1) of the Act was applicable on account of any wilful mis-statement or suppression of facts. According to the respondent, the services rendered by it were covered under the taxable service of '*Works Contract*' Services. It had, accordingly, filed its return disclosing that its services were covered under Section 65(105)(zzzza) of the Act.

21. Clearly, there was no suppression as to the activities being carried out by the respondent. It is also relevant to note that the respondent's contention that its services were covered under the '*Works Contract*' Services is not insubstantial. In cases where another interpretation is plausible and an assessee proceeds to file a return on that basis, it would not be apposite to conclude that the assessee has made any mis-statement or suppressed any fact merely because the Revenue interprets the statutory provision differently. This is notwithstanding that the

Revenue may finally prevail in its interpretation of the statutory provisions and the assessee may not. Mis-statement and suppression of facts must necessarily be examined from the perspective of sufficient disclosure or statements of facts and not contentious interpretations of statutory provisions. Once an assessee has truly disclosed the facts, it would not be apposite to invoke the provisions of Section 73(1) of the Act only on the ground that the assessee has classified its services under a head which the revenue considers erroneous. However, if such classification is, *ex facie*, untenable and done with the intent of evading any liability, the provisio to section 73(1) of the Act, would be applicable. If the assessee's interpretation of the statutory provision is a reasonable one and the assessee has disclosed material facts, it would be erroneous to apply the proviso to Section 73(1) of the Act on account of mis-declaration or suppression of facts.

22. The learned Tribunal had found that there was no suppression of facts in the present case. The learned Tribunal also faulted the order-in-original inasmuch as the Commissioner had held that it was possible to invoke the extended period even where the assessee had no intent to evade payment of service tax.

23. In ***Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay: 1995 Supp (3) SCC 462***, the Supreme Court had interpreted the proviso to Section 11A of the Central Excise Act, 1944, which was similarly worded as the proviso to Section 73(1) of the Act, and observed as under:

> "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 course 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 added)

24. The aforesaid decision was followed by the Supreme Court in its later decision in ***Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut: 2005 (7) SCC 749.*** The learned Tribunal had, *inter alia,* referred to the aforesaid decisions as well as the decision of the Co-ordinate Bench of this Court in ***Bharat Hotels Limited v. Commissioner of Central Excise (Adjudication): 2018 (12) GSTL 368 (Del.)*** and had concluded that the proviso to Section 73(1) of the Act would be applicable on account of mis-statement or suppression of facts

only if the same was deliberate and for the purposes of evading payment of duty.

25. In ***Bharat Hotels Limited v. Commissioner of Central Excise*** (Adjudication) (*supra*), the Co-ordinate Bench of this Court observed as under:

> "26. 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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> xxxx
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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 added)

26. In ***Continental Foundation Joint Venture Holding, Nathpa H.P. v. Commissioner of Central Excise, Chandigarh: 2007 (216) E.L.T. 177 (SC)***, the Supreme Court held as under:

> "12. 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."

27. In view of the authoritative decisions rendered by the Supreme Court, the learned Tribunal held that the Commissioner had erred in holding that the respondent had suppressed information from the Department regarding payment of service tax.

28. We concur with the finding of the learned Tribunal that in the given facts, the proviso to Section 73(1) of the Act could not be applied. The respondent had filed its return of service tax on the basis that its services were taxable as '*Works Contract*' Services. It had availed the Cenvat Credit to the extent of ₹2,44,48,095/- and had paid the balance amount in cash in discharge of the liability, which was computed on the

aforesaid basis. There is no allegation that the respondent had concealed that it was carrying on the activity of construction and selling residential flats.

29. In view of the above, Question Nos. (II), (III) and (IV) as projected by the Revenue are answered in the negative; that is, in favour of the respondent and against the Revenue.

30. We find no reason to interfere with the impugned order. The appeal is, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

FEBRUARY 15, 2023
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