CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. I

SERVICE TAX APPEAL NO. 51722 OF 2018

[Arising out of the Order-in-Appeal No. 175(SM)ST/JPR/2018 dated 13.03.2018 passed by The Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jaipur.]

M/s Rangoli Division, **...Appellant**
A Unit of Megha Colonizers,
401.3th Floor Apex Mall, Lal Kothi,
Tonk Road, Jaipur-302015

VERSUS

Commissioner (Appeals) **...Respondent**
Central Excise & Central Goods &
Service Tax, Jaipur, NCRB, Statue Circle,
Jaipur-302005

APPEARANCE

Ms. Sukriti Dass and Ms. Masuma Rizvi, Advocates for the appellant.
Shri P.K. Sinha, Authorized Representative for the Department

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

Date of Hearing: 25.08.2023
Date of Decision: 19.09.2023

FINAL ORDER NO. 51318/2023

JUSTICE DILIP GUPTA:

M/s. Rangoli Division, Jaipur[1] has sought the quashing of the order dated 12.03.2018 passed by the Commissioner (Appeals) by which the order dated 30.09.2014 passed by the Additional Commissioner confirming the demand of service tax with interest and penalty has been upheld and the appeal has been dismissed.

2. The appellant is engaged inter alia in providing construction services in respect of commercial or industrial buildings, and

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1. **appellant**

construction of residential complex which are taxable under section 65(105)(zzq) and section 65(105)(zzzh) of the Finance Act, 1994[2]. The Finance Act, 2010, which was effective from 01.07.2010, added an Explanation to section 65(105)(zzzh) and provided that construction of a complex intended for sale by a builder shall be deemed to be a service provided by the builder to the buyer. Thus, such services rendered by builders to prospective buyers were also subjected to levy of service tax.

3. It is in this context that the Government issued a Notification No. 36/2010-ST dated 28.6.2010[3], corrected by Corrigendum dated 29.6.2010, providing exemption from payment of service tax on the advances received before 01.07.2010 towards the services taxable under section 65(105)(zzq) and section 65(105)(zzzh) of the Finance Act, i.e., commercial or industrial construction services, and construction of complex services.

4. The appellant claims that it received an amount of Rs. 2,71,61,037/- as advances towards construction of residential complex through various cheques from the buyers of dates prior to 01.07.2010 and these cheques had also been received prior to 01.07.2010. The appellant further asserts that it issued receipts cum invoices detailing the name, property details, cheque details towards all these payments prior to 01.07.2010. According to the appellant, this fact is also clear from the ledger entries of the buyers, though the cheques were subsequently deposited in the bank and cleared after 30.06.2010 but none of the cheques were dishonoured.

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2. the Finance Act
3. the Notification

5. The records of the appellant were audited by the Central Excise Officers, Jaipur-I on 21.11.2011 and by an Internal Audit Report dated 28.02.2012 it was noted that on the amount received by the appellant as advances through cheques dated 30.06.2010, which were honoured on or after 01.07.2010, service tax would be leviable since the date of honouring of cheques would be the relevant date for receipt of payment. Thus, the exemption granted by the Notification would not be available to the appellant. Such amount of advances received were, therefore, liable to be included in the gross value for payment of service tax amounting to Rs. 6,99,397/- after allowing abatement of 75% under a Notification dated 01.03.2006.

6. The appellant, by letter 24.04.2012, submitted a reply to the Audit Report dated 28.02.2012 contending that though the advance amount was received through cheques dated 29.06.2010/ 30.06.2010, but since the receipts were also issued prior to 01.07.2010, the date of receipt of cheques should be considered as date of payment by customer, particularly when the cheques had not been dishonoured.

7. A show cause notice dated 19.03.2013 was, however, issued to the appellant proposing to deny the benefit of the exemption Notification and a demand was made to recover service tax amounting to Rs. 6,79,025/- with interest for the period from July 2010 to September 2010 and penalty under sections 76 and 78 of the Finance Act. The show cause notice also invoked the extended period of limitation provided under the proviso to section 73(1) of the Finance Act on the ground of suppression of facts by appellant, which

was detected during the course of audit and which would have otherwise escaped payment of service tax.

8. The appellant deposited service tax of Rs. 6,99,397/- with interest of Rs. 2,71,059/- under protest by a challan dated 09.11.2012. The appellant also filed a detailed reply dated 16.07.2013 contesting the demand on merits as well as on limitation.

9. The Additional Commissioner, by the order dated 13.10.2014, denied the benefit of the exemption Notification to the amount received as advances through cheques dated 29.06.2010/30.06.2010 and confirmed the service tax demand with interest and imposed penalty amounting to Rs. 6,99,373/- under section 78 of the Finance Act. The order also justified the invocation of the extended period of limitation.

10. The appellant filed an appeal before the Commissioner (Appeals) against the order dated 13.10.2014 submitting that the exemption was correctly claimed under the Notification and in any case, the extended period of limitation could not have been invoked in the facts and circumstances of the case.

11. The Commissioner (Appeals), by the impugned order dated 13.03.2018, upheld the order dated 13.10.2014 passed by the Additional Commissioner on merits as well as on limitation.

12. This appeal has been filed to assail the order passed by the Commissioner (Appeals).

13. Ms. Sukriti Dass and Ms. Masuma Rizvi, learned counsel appearing for the appellant made the following submissions:

(i) The date of receipt of cheque is the relevant date for availing benefit under the Notification. Hence, the

appellant is entitled to the benefit of exemption as it received the cheques prior to the cut-off date 01.07.2010. In support of this contention learned counsel placed reliance upon the decisions of the Supreme Court in **Commissioner of Income Tax, Bombay South, Bombay** vs. **Ogale Glass works Ltd., Ogale Wadi**[4] and **K. Saraswathy Alias K. Kalpana** vs. **P.S.S. Somasundaram Chettiar**[5]**;**

(ii) The Commissioner (Appeals) denied the benefit of the Notification on an assumption and held that receipt of cheques on 30.6.2010 is an afterthought with an intention to avoid payment of tax. Such an observation is based on mere assumptions and presumptions without any evidence on record to demonstrate that the cheques were received by the appellant after 30.06.2010 with a motive to evade payment of service tax. Statements of the buyers were not even recorded for corroboration that the receipts of cheques were shown prior to 1.7.2010 in order to escape payment of service tax. The department, therefore, failed to discharge the onus to prove its allegation;

(iii) The extended period of limitation could not have been invoked in the facts and circumstances of the case. The demand was raised in the show cause notice dated 19.03.2013 for the period from July 2010 to September 2010 by invoking the extended period of limitation under the proviso to section 73(1) of the

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4. (1955) 1 SCR 185
5. (1989) 4 SCC 527

Finance Act. The entire demand falls beyond the normal time limit of one year and is time barred and thus liable to be set aside;

(iv) The appellant had been filing the ST-3 returns with adequate disclosures and nothing was suppressed from the department. Since the amount that was received before 30.6.2010 as advances was not taxable under the Notification, the same was not disclosed in the returns. Once there is no requirement under law to disclose such receipts, it cannot be considered as suppression of facts. Even otherwise, the department was well aware of the relevant facts and figures as the audit was conducted, but the show cause notice was issued with inordinate delay and in support of this contention learned counsel for the appellant placed reliance upon the following decisions:

(a) In **Mahanagar Telephone Nigam Ltd.** vs. **Union of India and Ors.**[6];

(b) In **Commissioner, Service Tax** vs. **Spicejet Ltd**[7]**;** and

(c) In **GD Goenka Private Limited** vs. **The Commissioner of Central Goods and Service Tax, Delhi**[8].

14. Shri P.K. Sinha, learned authorised representative appearing for the department, however, supported the impugned order and submitted that it does not call for any interference in this appeal. Learned authorised representative submitted that the appellant was clearly not eligible to the benefit of the Notification as all the cheques

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6. 2023 (4) TMI 2016
7. Service Tax Appeal No. 52591 of 2016 dated 03.07.2023
8. Service Tax Appeal No. 51787 of 2022 dated 21.08.2023

were deposited in the bank after the cut of date i.e, 01.07.2010 and the cheques were realized/credited to the government account after 01.07.2010. Thus, the service tax was liable to be levied on the appellant. Learned authorised representative also submitted that the extended period of limitation was correctly invoked in the facts and circumstances of the case.

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

16. The issues that arise for consideration in this appeal are as to whether the appellant was entitled to claim exemption from payment of service tax under the Notification made effective from 01.07.2010 in respect of advance payment received through cheques issued on or before 30.06.2010 but realized after 01.07.2010, and whether the extended period of limitation could have been invoked in the facts and circumstances of the case.

17. It would be appropriate to reproduce the relevant portion of the show cause notice dated 19.03.2013 containing the allegations and it is reproduced below:

> "2. **Whereas during the course of audit by the officers of Central Excise Commissionerate, Jaipur-I, it was observed that the assessee has provided service of Construction of Residential Complex to their client. The assessee has received advance payment of Rs.2,71,61,037/- by Cheque on 30.06.2010 from their client, which were honoured on or after 01.07.2010. The date of honouring of cheque is the relevant date for, receipt of payment. As per details given in Annexure 'A' to this Notice wherein most of the cheques received on 30.06.2010 were realised after B to 80 days from the date of presentation**

> **the cheques:** The dates of presentation of cheque's and realization in the bank are mentioned in the Annexure A' to the notice. **But the assessee has not included the advance payments received in month of July, 2010 to September, 2010 in the gross value for the purpose of levy of service tax** in terms of Notification No. 36/2010-ST dated 28.06.2010 as corrected vide Corrigendum dated 29.06.2010 read with CBEC, New Delhi under its letter F. No. 137/10/2000-CX.4, dated 10.06.2001. It appears that the assessee has not paid Service Tax amounting to Rs. 699397/- (Rs. 679025/- Service Tax + Rs. 13581/- Ed. Cess + 6790/- SHS Ed. Cess) during the period June / July, 2010-2011."
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> **(emphases supplied)**

18. The show cause notice also invoked the extended period of limitation and the relevant portion is reproduced below:

> "9. Further, the receipt of advance deposits against Commercial or Industrial Buildings and Civil Structure, Construction of Residential Complex from the recipients of the Service and **the facts regarding non payment of Service Tax,** amounting to Rs. 6,99,397/- (Service Tax Rs. 6,79,025/- + Edu. Cess Rs. 13,581/- + SHE Cess 6,790/-) **by the assessee during July, 2010 to September -2010 were not brought into the notice of the department as the assessee has never disclosed these facts and had the audit not been conducted, the examination of the records of assessee the evasion would not have come to the notice of the department Therefore, it appeared that the assessee had suppressed this fact from the department with intent to evade payment of service tax and as such the proviso to Section 73(1) of the Finance Act, 1994 for extended period appeared to be invokable in the instant case. xxxxxxxxx**"
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> **(emphasis supplied)**

19. The relevant portion of the order passed by the Additional Commissioner denying the benefit of the Notification is reproduced below:

> "23. A perusal of the above notification read with the corrigendum makes it clear that the said notification, inter alia exempt service on construction of residential complex service to the extent of Service tax calculated on consideration received before 01.07.2010. In the facts of the present case, the Noticee received payment towards construction of residential complex service vide cheques dated 30.06.2010. **The SCN has proposed to deny exemption on the basis of the reasoning that in case of cheques the date of honouring of cheques is relevant date for receipt of payment.** In this regard, the SCN has placed reliance on CBEC letter F. No. 137/10 2000-CX.4 dated 16.07.2001, wherein it was clarified that,
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> "AS PER RBI INSTRUCTIONS, WHEN THE PAYMENT IS MADE EITHER IN CASH OR BY THE DEMAND 'DRAFT, IMMEDIATE CREDIT HAS TO BE TAKEN. WHEN A CHEQUE IS TENDERED, THE MONEY STILL REMAINS IN ASSESSEE'S ACCOUNT AND IS NOT TRANSFERRED TO THE BANK. WHEN THE CHEQUE IS CLEARED BY THE CLEARING HOUSE OF THE BANK, THE MONEY GETS DEPOSTED IN THE BANK. TILL THE DATE OF CLEARANCE THE MONEY IS NOT CREDITED TO THE DESIGNATED BANK. I.E. THE MONEY IS NOT CREDITED TO THE GOVERNMENT OF INDIA ACCOUNT AS PROVIDED UNDER RULE 6 OF SERVICE TAX RULES. IN VIEW OF THIS, THE PAYMENT OF DUTY BY CHEQUE MAY NOT BE TREATED AS DISCHARGE OF DUTY BY DUE DATE UNLESS THE CHEQUE IS ENCASHED AND THE AMOUNT IS CREDITED IN THE ACCOUNT OF GOVT. OF INDIA."
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> 24. I find that as per Notification No. 36/2010-ST dated 28.06.2010 as amended, Service Tax equal to Service Tax calculated on a value which is equivalent to the amount of advance payment received before the said appointed date is exempted. Here Service Tax equal to Service tax calculated on a value which is equivalent to the amount of advance payment received

> is exempted and not the value of cheques received is exempted."
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> **(emphasis supplied)**

20. Regarding the invocation of the extended period of limitation, the Additional Commissioner observed as follows:

> "25. Having held as above, I now look into the allegation as to whether the assessee had suppressed the facts from the department rendering them liable to pay Service Tax under proviso to Section 73(1) of the Finance Act, 1994. **I find that the assessee had never disclosed the fact of receiving advance against the taxable service to the department. Had the department not initiated the audit against them, the nonpayment of Service Tax on these amounts would not have been detected. I further find that the Service Tax is paid on self assessment system and as per the self assessment system it is the responsibility of the Service Provider to comply with the provisions of Finance Act, 1994 and if the assessee has any doubt they should approach the department for clarification so that they could not be alleged to be involved in suppression of facts with intent to evade tax, but they chose not to do so.**"
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> **(emphasis supplied)**

21. The relevant portion of the order passed by the Commissioner (Appeals) denying the benefit of the Notification is as follows:

> "10. A plane look on the pattern of deposit reveals that though receipt date of all the cheques is 30.06.10, yet the deposit-dates in bank are different and the same have been deposited in 15 spans, which have been credited at later dates. For instance, 8 cheques have been deposited on 03.7.2010 for the first time and the last cheque has been deposited on 18.9.2010. **It is not comprehendible that cheques of so high denomination kept for months together without depositing in the bank and losing interest thereon. Thus, from the pattern, it infers that**

> **receipt of cheque on 30.6.2010 is a clear after-thought and the appellant has taken the cheques of 30.6.2010 in later dates, with an intention to avoid service tax."**
>
> **(emphasis supplied)**

22. Regarding the invocation of the extended period of limitation, the Commissioner (Appeals) observed as follows:

> "13. **Regarding imposition of the extended period of limitation, the appellant has misinterpreted the version. The extended period of limitation has not been imposed on the ground that the Applicant did not approach the department seeking clarification. The inference is that the facility of approaching the department was always available to the appellant for any clarification. I find that the matter came to notice of the department as a result of Audit and had the Audit not been conducted, the non-payment of service tax would not have been detected. Thus, extended period provisions have rightly been invoked.** Demand alongwith interest has been rightly confirmed and Penalty has been rightly imposed. The show cause notice has been issued as per statute."
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> **(emphasis supplied)**

23. Learned counsel for the appellant submitted that as the entire period is covered by the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act, this issue may be examined first because if this issue is decided in favour of the appellant, it would not be necessary to examine whether the appellant was justified in claiming the benefit of the Notification.

24. The issue of limitation is, accordingly, being examined first.

25. The department had conducted an audit of the records of the appellant on 21.11.2011, yet the show cause notice was issued on 19.03.2013 i.e. almost after a period of one year and four months

from the date the audit was conducted by the department. All that has been stated by the Commissioner (Appeals) in the impugned order is that the matter came to the notice of the department as result of the audit and had the audit not been conducted, non payment of service tax would not have been detected. There is no finding by the Commissioner (Appeals) that this fact had been suppressed by the appellant with an intent to evade payment of service tax.

26. 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 wilful 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. Learned counsel submitted that the appellant actually believed that since the cheques were presented prior to 01.07.2010 and were not dishonoured, the dates of the cheques would be the relevant date and so the appellant was not required to pay service tax in view of the exemption granted by the Notification.

27. In order to appreciate this contention it would be 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:
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> **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."

28. 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.

29. 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,-
>
> (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-
>
> (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;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;"

30. The proviso to section 73(1) of the Finance Act stipulates that where any service tax has not been levied or paid by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or the Rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax, the provisions of the said section shall have effect as if, for the word "one year", the word "five years" has been substituted.

31. The appellant believed that it was not required to pay service tax on the amount covered by the cheques since they were not only of a date prior to 01.07.2010 but were also received prior to 01.07.2010 for which the requisite receipt cum invoices toward payments were issued prior to 01.07.2010. To support this belief, learned counsel placed reliance upon the judgment of the Supreme Court in **Ogale Glass Works,** which was subsequently followed by the Supreme Court in **K. Saraswathy**. The relevant paragraph 5 of the judgment of the Supreme Court in **K. Saraswathy** is reproduced below:

> "**It is contended before us on behalf of the appellant that the cheque for Rs.6,02,000 was tendered in Court on 29 May, 1980 and that it was duly honoured by the Bank and money was realised under the cheque, and therefore it must**

> **be taken that payment had been effected by the appellant on 29 May, 1980** within the time stipulated by this Court in its order dated 29 November, 1979. **In Commissioner of Income Tax, Bombay South, Bombay v. Messrs Ogale Glass Works Ltd. Ogale Wadi, A.I.R. 1954 S.C. 429 it was laid down by this Court that payment by cheque realised subsequently on the cheque being honoured and encashed relates back to the date of the receipt of the cheque, and in law the date of payment is the date of delivery of the cheque.** Payment by cheque is an ordinary incident of present-day life, whether commercial or private, and unless it is specifically mentioned that payment must be in cash there is no reason why payment by cheque should not be taken to be due payment if the cheque is subsequently encashed in the ordinary course."
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> **(emphasis supplied)**

32. In view of the aforesaid decision of the Supreme Court, the appellant may have been under a bonafide belief that even though the cheque may have been of a date prior to 01.07.2010 and encashed after 01.07.2010, but the date of the cheque would be the date of payment if the cheque was not dishonoured. It is not the case of the department that the cheque was dishonoured. Such being the position, the appellant may be justified in bonafide believing that it was not liable to pay service tax in terms of the Notification. There would, in such circumstances, be no suppression of facts.

33. Even assuming that there was suppression, it has to be examined whether suppression was 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.

34. 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[9].** 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
>
> 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."

35. 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 if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from

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9. 1995 (78) E.L.T. 401 (SC)

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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> **(emphasise supplied)**

36. This decision was referred to by the Supreme Court in **Anand Nishikawa Company Ltd.** vs. **Commissioner of Central Excise**[10] and the observations are as follows:

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10. 2005 (188) E.L.T. 149 (SC)

> "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)**

37. 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[11] 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."

38. The Supreme Court in **Continental Foundation Joint Venture Holding** vs. **Commissioner of Central Excise, Chandigarh-I**[12] 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)**

39. The Delhi High Court in **Bharat Hotels Limited** vs. **Commissioner of Central Excise (Adjudication)**[13] 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;

> "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

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11. 2013 (288) E.L.T. 161 (SC)
12. 2007 (216) E.L.T. 177 (SC)
13. 2018 (12) GSTL 368 (Del.)

> 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."**
>
> **xxxx**
>
> **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)**

40. Very recently the Delhi High Court in **Mahanagar Telephone Nigam Ltd.** vs. **Union of India and others**[14], also observed as follows:

> "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 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**

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14. W.P. (C) 7542 of 2018 decided on 06.04.2023

> **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.
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> xxxxxxxxx
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> 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)**

41. It would transpire from the aforesaid decisions that mere suppression of facts is not enough and there must be a deliberate and wilful attempt on the part of the assessee to evade payment of duty. In the absence of any intention to evade payment of service tax,

which intention should be evident from the materials on record or from the conduct of the assessee, the extended period of limitation cannot be invoked. Thus, mere non disclosure of the receipts in the service tax return would not mean that there was an intent to evade payment of service tax.

42. This issue was also examined at length by this Bench in **M/s G.D. Goenka Private Limited** vs. **The Commissioner of Central Goods and Service Tax, Delhi South**[15] and after referring to the provisions of section 73 of the Finance Act, the Bench observed:-

> "13. There is no other ground on which the extended period of limitation can be invoked. Evidently, fraud, collusion, wilful misstatement and violation of Act or Rules with an intent all have the mens rea built into them and without the mens rea, they cannot be invoked. **Suppression of facts has also been held through a series of judicial pronouncements to mean not mere omission but an act of suppression with an intent. In other words, without an intent being established, extended period of limitation cannot be invoked.**
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> xxxxxxxxxxxxx
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> 14. In this appeal, the case of the Revenue is that the appellant had wilfully and deliberately suppressed the fact that it had availed ineligible CENVAT credit on input services. The position of the appellant was at the time of self-assessment and, during the adjudication proceedings and is before us that it is entitled to the CENVAT credit. Thus, we find that it is a case of difference of opinion between the appellant and the Revenue. **The appellant held a different view about the eligibility of CENVAT credit than the Revenue. Naturally, the appellant self-assessed duty and paid service tax as per its view. Such a self-assessment, cannot, by any** stretch of imagination, be termed deliberate and wilful suppression of facts.

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15. Service Tax Appeal No. 51787 of 2022 dated 21.08.2023

> 16. **Another ground for invoking extended period of limitation given in the impugned order is that the appellant was operating under self-assessment and hence had an obligation to assess service tax correctly and take only eligible CENVAT credit and if it does not do so, it amounts to suppression of facts with an intent to evade and violation of Act or Rules with an intent to evade. We do not find any force in this argument because every assessee operates under self-assessment and is required to self-assess and pay service tax and file returns.** If some tax escapes assessment, section 73 provides for a SCN to be issued within the normal period of limitation. This provision will be rendered otiose if alleged incorrect self-assessment itself is held to establish wilful suppression with an intent to evade. **To invoke extended period of limitation, one of the five necessary elements must be established and their existence cannot be presumed simply because the assessee is operating under self-assessment."**
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> **(emphasis supplied)**

43. In the present case, as noticed above, the Commissioner (Appeals) did not even record a finding that the appellant had any intention to evade payment of service tax since all that has been recorded in the impugned order by the Commissioner (Appeals) is that the correct facts came to the notice of the department only when the audit was conducted. In the absence of a finding that suppression of facts was with intent to evade payment of service tax, which is absolutely necessary, the extended period of limitation could not have been invoked. The entire demand confirmed by the Commissioner (Appeals) falls in the extended period of limitation.

44. The conclusion that follows from the aforesaid discussion is that the appellant may have been under a bonafide belief that it was not required to pay service tax on the amount collected through cheques

of dates prior to 01.07.2010 though encashed after 01.07.2010, but in any case there was no wilful suppression of facts by the appellant with intent to evade payment of service tax.

45. Such being the position, it is not necessary to examine whether the appellant was justified in claiming exemption from payment of service tax under the Notification.

46. The impugned order dated 12.03.2018 passed by the Commissioner (Appeals), therefore, deserves to be set aside and is set aside. The appeal is, accordingly, allowed.

(Order pronounced on **19.09.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Jyoti, Shreya