

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT No.-I

Service Tax Appeal No.51920 of 2015

(Arising out of Order-in-Original No.40/Commr./LKO/ST/2014-15 dated 24/02/2015 passed by Commissioner of Central Excise & Service Tax, Lucknow)

M/s Reciprocal Infrastructure Pvt. Ltd.Appellant

(B-46, Vibhuti Khand, Gomti Nagar, Lucknow-226010) *VERSUS*

**Commissioner of Customs, Central Excise
& Service Tax, Lucknow**

....Respondent

(Lucknow)

APPEARANCE:

Shri B.L. Narasimhan for the Appellant

Shri B.K. Jain Authorised Representative for the Respondent

**CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

FINAL ORDER NO. 70123/2022

DATE OF HEARING : 01 August, 2022

DATE OF DECISION : 08 August, 2022

JUSTICE DILIP GUPTA:

This appeal is directed against the order dated 24 February, 2015 passed by the Commissioner, Central Excise & Service Tax, Lucknow. The demand of service tax has been confirmed by invoking the proviso to section 73 (1) of the Finance Act 1994¹ with interest and penalty.

¹ . The Finance Act

2. A perusal of the impugned order shows that it has dealt with three services, namely 'works contract services', 'work of demolishing' and 'inadmissible CENVAT credit'. The details of these three services are as follows:

Works Contract Services

S. No.	Year	Total S. Tax payable under works contract services	Service Tax already paid by them under 'Supply of tangible goods services' & 'Business Support Services'	Differential Service Tax recoverable under WCS
1.	2008-09 (Oct' 08-Mar'09)	4566249	281665*	4284584
2.	2009-10	6815832	1560307	5255525
3.	2010-11	8220293	2172705	6047588
4.	2011-12	4798100	3100427	1697673
5.	2012-13	3891543	3884130	7413
Total		28292017	10999234	1,72,92,783/-

Demolishing

Financial Year	Receipt (Demolition charges)	Rate of S. Tax	Service Tax payable
2011-12	1,10,00,000/-	10.30%	11,33,000/-
2012-13	5,00,000/-	12.36%	61,800/-
Total	1,15,00,000/-	-	11,94,800/-

Inadmissible CENVAT Credit

S. No.	Date of Credit	Name of Party	Inadmissible Credit (Including Cess)	Reason for inadmissibility
1.	22.12.2008	Vishal & Associates	3151	Original Invoice not available. Photocopy does not contain invoice no. & ST registration. / Invoice issued in name of Mr. Jairam Jalan, prop. Reciprocal Impex Ltd. i.e. not in the name of registered assessee.
	08.02.2009		618	
	18.08.2009		721	
	01.09.2009		3708	
	02.01.2011		6379	
	11.01.2011		7354	
	04.01.2012		7004	

2.	27.07.2009	Concept People	717	Original/Photocopy of invoice not available.
3.	31.07.2009	Bichitra Security Guard Agency	578	Photocopy invoice without ST registration ST-2.
4.	01.10.2009	Amit Agrawal & Company	3090	Original/Photocopy of invoice not available
5.	26.04.2010	Macons Engineers	1442	Invoice is raised in the name of M/s Reciprocal Infrastructure Bareilly, which is neither their registered office nor branch office.
6.	01.10.2010	Schwing Stetter (India) Pvt. Ltd.	824	Original/Photocopy of invoice not available
7.	13.12.2010	Anandsri Enterprises	199	Original/Photocopy of invoice not available
	16.12.2010		81	
	16.12.2010		74	
8.	31.12.2010	Krishna Security Services	7816	Invoices don't bear ST Registration. ST2 not provided. Original invoice dt. 07.07.2011 not available.
	31.12.2010		1513	
	11.02.2011		7816	
	07.03.2011		7570	
9.	29.03.2011	S R Engines	87.55	Original/Photocopy of invoice not available
10.	19.04.2011	Consulting Chamber	515	The invoice appears to be raised for their own construction works at Faizabad Road.
11.	28.04.2011	Krishna Security Services	5043	Original/Photocopy of invoice not available
12.	13.05.2011	Schwing Stetter (India) Pvt. Ltd.	1545	Original/Photocopy of invoice not available
13.	26.05.2011	Shubham Engineers	11547	Original/Photocopy of invoice not available
14.	01.10.2011	Shri Ram Security Service	2008	Original/Photocopy of invoice not available
	09.10.2011		432	
	03.11.2011		924	
	03.12.2011		3621	
	03.01.2012		5776	
	03.02.2012		6074	
	01.03.2012		6495	
15.	05.11.2011	Consulting Chamber	463	Original/Photocopy of invoice not available
16.	25.02.2012		103	

	15.03.2012	S R Engines Sales & Services	88	Original/Photocopy of invoice not available
	19.03.2012		968	
	26.03.2012		968	
Total			119755	

3. The sole submission advanced by Shri B.L. Narasimhan learned counsel for the appellant is that the extended period of limitation under the proviso to section 73 (1) of the Finance Act could not have been invoked. He has, however, very fairly stated that the demand of service tax for the period which is within the normal period of 18 months from the relevant date may be confirmed.

4. It transpires from the aforesaid charts that the service tax liability which is within the normal period is of Rs.7,413/- for the works contract, Rs.61,800/- for demolishing and Rs.2,127/- for inadmissible CENVAT credit. The show cause notice seeks to invoke the extended period of limitation under the proviso to section 73 (1) of the Finance Act in the following terms:-

"3.11 Now, it appears that the party has short paid service tax on Works Contract Service and they are liable to pay service tax Rs.1,72,92,783/- on works contract services, as discussed in foregoing paras, during the period from 2008-09 (Oct'08-Mar'09) to 2012-13 and the same is recoverable under proviso to Section 73(1) of the Finance Act, 1994. They are also liable to pay interest at appropriate rates under Section 75 of the Act *ibid*.

3.12 And whereas, the party submitted their ST-3 returns for the period 2008-09 (Oct'08 -Mar'09) to 2012-13 without showing the taxable amount under 'Works Contract Service' and they have not paid any service tax on works contract by suppressing the value of taxable service and thus it appears that the party had suppressed the relevant value of taxable service from the department

with intent to evade payment of service tax. This modus operandi of suppression of facts was adapted with intent to evade payment of Service Tax which is otherwise legitimately payable by them to the government account. Thus, it appears that the party has contravened the provisions of Finance Act, 1994 and Service Tax Rules, 1994 and defrauding the exchequer of its legal dues.

3.13 The short paid service tax amounting to Rs.1,72,92,783/- on the value of taxable services under Works Contract Services is recoverable from them under proviso to Section 73(1) of the Finance Act, 1994 as the party has adopted modus operandi and are self assessing the service tax liability under different taxable services viz. Supply of Tangible Goods Services and Business Support Services willfully to evade service tax payment under Works contract services and have shown incorrect value of taxable services in their ST-3 returns and failed to deposit the correct service tax. Thus it is evident that the party has willfully suppressed this material information from the Department with intent to evade payment of service tax. The party by their above omission and commission has contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 by way of willful suppression of facts to evade payment of service tax during the years, as discussed in foregoing paras, therefore, proviso to Section 73(1) of the Act for extended period of time is invokable for recovery of service tax short paid by them and the party is also liable for penalty under Section 78 of the Finance Act, 1994.

4.2. The party has suppressed this material fact of rendering 'Site Preparation Services from the department and they even did not applied for registration to incorporate the said service in their Service Tax registration certificate. Thus, the party has violated the provisions of Section 69 of the Finance Act'1994 and therefore they appears to be liable for penalty under Section 77(1)(a) of the said Act.

4.3. And whereas, it appears that the party had neither filed ST-3 return for the 'Site Preparation Services' nor shown any amount received by them as demolition charges in any other head in their ST-3 returns filed to the department and as a result they have short paid service tax to the tune of Rs 11,94,800/-. Thus, it appears that the party has willfully suppressed the taxable value received for 'demolition services' from the knowledge of the department during the financial year 2011-12 and 2012-13 with intent to evade service tax payment. Therefore, proviso to Section 73(1) of the act for invocation of extended period is applicable for recovery of short paid service tax to the tune of Rs 11,94,800/- from the party. Therefore, for their above act of omission and commission, the party has rendered themselves liable for penalty under Section 78 of the Finance Act, 1994 for contravention of Section 68 of the Act ibid read with Rule 6 of the Service Tax Rules, 1994.

5.3 And whereas, it appears that the party has availed inadmissible CENVAT credit of capital goods / input services in contravention of Rule 9 of the CENVAT Credit Rules, 2004 with intent to evade payment of service tax. They availed CENVAT credit, which is not admissible to them for reasons like they availed CENVAT credit without having the original / photocopy of invoices, invoices issued to other parties, invoices which do not bear service tax registration no. etc. Thus, it appears that the party has suppressed the facts from the department with intention to evade service tax payment by way of availment of inadmissible CENVAT credit."

5. The appellant filed a detailed reply specifically contending that the extended period of limitation could not have been invoked in the facts and circumstances of the case. It was contended that the appellant had filed all the ST>Returns during the period from 2008-09 to 2012-13 and though a mistake may have been

committed in filing the return, but it was not with an intention to evade payment of service tax.

6. The impugned order does not deal at all with the invocation of the extended period of limitation. It was absolutely necessary for the adjudicating authority to form an opinion that the appellant had deliberately suppressed material information with an intention to evade payment of service tax. Unless the adjudicating authority had come to a conclusion that the extended period of limitation was rightly invoked in the show cause notice, it could not have confirmed the demand for any period beyond the normal period of limitation.

7. In **Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay**², the Supreme Court observed that section 11A of the Central Excise Act empowers the Department to reopen the proceedings if levy has been short levied or not levied within six months from the relevant date but the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. It is in this context that the Supreme Court observed:-

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

² . **1995 (78) E.L.T. 401 (SC)**

4. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or willful 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)

8. It is, therefore, clear that the suppression of facts should be deliberate and in taxation laws it can have only one meaning, namely that the correct information was not disclosed deliberately to escape payment of duty.

9. This decision of the Supreme Court in **Pushpam Pharmaceuticals** was followed by the Supreme Court in **Anand Nishikawa Co. Ltd. vs. Commissioner of Central Excise, Meerut**³ and the relevant paragraph is as follows:-

“27. Relying on the aforesaid observations of this Court in the case of **Pushpam Pharmaceuticals Co. v. CCE** we find that **“suppression of facts” can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty.** When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find willful suppression.

³ . (2005) 7 SCC 749

Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts."

(emphasis supplied)

10. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in **Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur⁴** and the relevant portion of the judgment is reproduced below:

"12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. **The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable.** If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere nonpayment 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)

⁴ . 2013 (288) E.L.T. 161 (SC)

11. The Supreme Court in **Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh**⁵ 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 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)

12. In view of the aforesaid decisions, the confirmation of demand for the period beyond the normal period of limitation by invoking the proviso to section 73(1) of the Finance Act cannot be sustained. However, as has been stated by learned counsel for the appellant, the confirmation of demand for the period within the normal period is sustained.

⁵ . **2007 (216) E.L.T. 177 (SC)**

13. The impugned order to the extent it has confirmed the demand for the extended period of limitation is set aside. The confirmation of demand for the normal period is, however, sustained. The appeal is allowed to the extent indicated above.

(pronounced in open court on **08.08.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR) Member
(Technical)

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