

(2021) 08 CESTAT CK 0018

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 51379 Of 2017

M/s. Emaar MGF Land Ltd.

APPELLANT

Vs

Commissioner Of Central Excise And CGST, Delhi-South

RESPONDENT

Date of Decision : 11-08-2021

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzzh), 65(105)(zzzza), 70, 73, 73(A), 73(B), 73(1), 73(2), 73(6), 75, 77(2), 78
Cenvat Credit Rules, 2004 — Rule 2(I), 2(0), 2(P), 3, 3(1), 14, 15(3)
Central Excise Act, 1944 — Section 11A, 11AA, 11A(1)

Citation : (2021) 08 CESTAT CK 0018

Hon'ble Judges : Delip Gupta, J;P.V. Subba Rao, Technical Member

Bench : Division Bench

Advocate : Narender Singhvi, J.P. Singh, Vivek Pandey

Final Decision : Allowed

Judgement

'''

1. M/s Emaar MGF Land Ltd., the appellant has sought the quashing of the order dated 31.03.2017 passed by the Commissioner of Service Tax,"'''

Delhi-I, the Commissioner by which the recovery of CENVAT credit of Rs. 2,44,48,095/- with interest and penalty has been confirmed under the,"'''

proviso to section 73(1) of the Finance Act, 1994, the Finance Act."'''

2. The appellant claims to be engaged in providing various services like works contract service, real agent service, site formation and clearing service,"'''

architect service, commercial and industrial construction service and goods transport agency service. It availed CENVAT credit on inputs, capital"'''

goods and input services under the provisions of the CENVAT Credit Rules, 2004, the Credit Rules."'''

3. The appellant undertook certain construction projects and entered into two separate agreements with each purchaser of the flat. The first,,, agreement was in respect of construction of the flat/unit. The second agreement was in respect of sale of land. The first agreement has been,,, described as "construction agreement", wherein the appellant agreed to design and promote the residential project of various apartments. The,,, second agreement has been described as "agreement for sale" executed between the appellant and the purchaser, wherein when the purchaser,,, requested the vendor to convey an undivided share in the land, the title is conveyed subject to terms of the agreement.",,, 4. According to the appellant, as the agreements involved supply of material with provision of services, it started paying service tax thereon as,,, "works contract service", introduced under section 65(105)(zzzza) of the Finance Act from 01.06.2007. The service tax was paid in terms of the,,, Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, the Composition Scheme.",,, 5. During the period from July 2008 to January 2009, the appellant discharged service tax of Rs. 5,31,67,272/- on works contract service, out of which,,, Rs. 2,44,48,096/- was deposited by utilization of CENVAT credit. It is stated by the appellant that since the Composition Scheme did not bar availment,,, of credit on capital goods and input services, the appellant availed credit on the same and the payment of service tax was also accepted by the,,, Department without any objection.,,, 6. However, based on audit objections raised by the Department, a show cause notice dated 17.04.2014 was issued to the appellant, proposing to deny,,, the CENVAT credit of Rs. 2,44,48,095/- by alleging that the activity of construction of residential complexes by a builder became taxable only after,,, the insertion of an Explanation in the definition of taxable service of "construction of complex service" under section 65(105)(zzzh) of the,,, Finance Act and this service was not taxable prior to such date. Consequently, credit could not have been availed by the appellant during the relevant,,, period and the same was recoverable with interest and imposition of penalty. The demand proposed in the show cause notice is as follows:,,, "21. Now, therefore, M/S Emaar MGF Land Ltd, ECE House 28 K G Marg, New Delhi 10001, are required to show cause to the",,,

Commissioner of Service Tax, New Delhi having office located at 17 -B, 1.A.E.A. House, Mahatma Gandhi Road, IP Estate, New Delhi",,,

Within 30 days of the receipt of this notice as to why:-,,,

(A) An amount represented as service tax to the tune of Rs. 2,44,48,095/- (Rs. Two crore forty four Lakh forty eight thousand and ninety",,,

five only) as explained in Para 10 above should not be demanded and recovered from them under Section 73(A) of the Act;,,,

(B) The interest on Service Tax amounting to Rs. 2,44,48,095/- (Rs. Two crore forty four Lakh forty eight thousand and ninety five only)",,,

should not be demanded and recovered under Section 73(B) of the Act;,,,

(C) Cenvat credit of Rs. 2,44,48,095/- irregularly availed on the services that were not used in provision of any output service during",,,

period July 2008 to January 2009 should not be demanded and recovered under Rule 14 of the Cenvat Credit Rules read with Section 73 of,,,

the Act;,,,

(d) Interest under section 75 of the Act should not be demanded and recovered on Cenvat credit of Rs. 2,44,48,095/- irregularly availed on",,,

the services that. were not used in provision of any output service during period July 2008 to January 2009;,,,

(e) Penalty under Rule 15(3) of the Cenvat Credit Rules, 2004 read with section 78 of the act should not imposed for willfully contravening",,,

provisions of the CC Rules, 2004 by wrongly availing cenvat credit on services that were not used in provision of any taxable output service",,,

during period July 2008 to January 2009, with intent to evade payment of service tax;,,,

(e) Penalty for not filing the ST-3 returns covering the period July 2008 to January, 2009 with proper disclosures should not be imposed",,,

under Section 77(2) of the Finance Act, 1994.â??",,,

7. The appellant submitted a reply dated 23.11.2016 to the show cause notice and denied the allegations.,,,,

8. The Commissioner, by order dated 31.03.2017, confirmed the demand and ordered for recovery of the CENVAT credit denied amounting to Rs.",,,

2,44,48,095/- with interest and penalty under rule 15(3) of the Credit Rules, as well as imposition of penalty of Rs. 10,000/- under section 77(2) of the",,,

Finance Act. The relevant portion of the order passed by the Commissioner is

reproduced below:,,,

5.14.2 I find that service tax amounting to Rs.5,31,67,272/- was collected by the noticee on construction of flats from the buyers in,,,

southern parts of India during July, 2008 to January 2009. As discussed supra, no service tax was leviable on the activity of construction of,,,

residential complex for sale to buyers by the noticee before 01.07.2010. Therefore this amount of Rs.5,31,67,272/- collected as service tax",,,,

was required to be deposited with the Govt. Exchequer in terms of the provisions of Section 73A of the Act, ibid.",,,,

5.14.3 However, I find that while making payment of such wrongly collected amount of service tax, the noticee utilized Cenvat credit of",,,,

Rs.2,44,48,095/- which was availed by them on the construction of such flats. Since these services provided by the noticee at the material",,,,

time were exempt, they were not entitled for any cenvat credit of input services under the provisions of Rule 3(1) read with Rule 2(0) and",,,,

2(P) of Cenvat Credit Rules, 2004 at the material time.",,,,

*****",,,,

5.14.8 As discussed supra, I find that construction of flats for sale to buyers before 01.07.2010 was not a taxable output service, being",,,,

exempt from service tax and consequently the input services used in construction of the said flats do not qualify as "input service" for the",,,,

purpose of availing Cenvat credit under the provisions of Cenvat Credit Rules, 2004. Accordingly, the amount of Rs.2,44,48,095/- availed",,,,

by the noticee as Cenvat credit and utilized while, making payment of service tax of Rs.5,31,67,272/- on construction of flats for sale to",,,,

buyers, is in contravention of provisions of Rule 3 read with Rule 2 (I) and 2 (p) of the Cenvat Credit Rules, 2004. I therefore conclude that",,,,

such utilization of inadmissible credit resulted into short payment of the amount payable under Section 73(A) to that extent and this",,,,

inadmissible Cenvat credit is recoverable from the noticee in terms of Rule 14 of the Cenvat Credit Rules, 2004.",,,,

6. Now, coming to the issue of demand of service tax amounting to Rs.2,44,48,095/-, I find that this is the same amount of which the noticee",,,,

had availed inadmissible Cenvat credit and utilized the same for payment of service tax. Simultaneous denial of Cenvat credit amounting to",,,,

Rs.2,44,48,095/- with proposal for recovery of same and also demand of service tax amounting to Rs.2,44,48,095/- would result in double-","

taxation at the hands of the noticee. Since the incidence of availing the Cenvat credit is appearing first, I therefore observe that the Cenvat","

credit availed and utilized by the noticee is liable to be disallowed and recovered under the provisions of Rule 14 of Cenvat Credit Rules,"

2004. I also note that the authorized representative appearing for hearing also contended that the credit being demanded can at best be,"

disallowed and no simultaneous recovery of the same can be made. I agree with these contentions of the noticee.,"

8.2 I find that the extended time period of five years is invocable under the provisions contained in proviso to Section 73(1) of the Finance,"

Act, 1994 as amended in specified cases. I find that the noticee did not pay the entire amount of Service Tax to the Govt. Exchequer","

8.6 I am of the view that it is possible to invoke extended period in the case of Service Tax even in situation where there is no intent to evade,"

payment of tax. Even if it is presumed that the noticee has not contravened any provisions with intent to evade payment of Service Tax, yet","

the noticee has failed to comply with the obligations cast upon it by the Legislature. There is no requirement that there should be,"

suppression with intention to evade. Mere suppression is adequate for the purpose of the recovery of tax for the extended period as well as,"

for imposing penalty. In any case, the noticee, in this case, has willfully contravened the provisions of the Finance Act, 1994, Service Tax","

Rules, 1994 and CENVAT Credit Rules, 2004."

8.14 In view of the above discussions, I hold that the extended period as provided in proviso to Section 73 (1) of the Act has rightly been","

invoked in this case and the inadmissible Cenvat credit availed and utilized by the noticee is recoverable from them by applying provisions of,"

Rule 14 of CCR 2004 read with Section 73(2) of the Act, as applicable."

13. In view of the above discussions and findings, I make the following order:",,,
ORDER,,,

(i) I confirm that the proviso to Section 73 (1) of Finance Act, 1994 has been correctly invoked in this case for recovery of fraudulently",,,

availed Cenvat credit on input services used for providing exempted output services;,,,

(ii) I confirm the demand and order recovery of Rs.2,44,48,095/-(Rupees Two Crores Forty Four Lacs Forty Eight Thousand and Ninety",,,

Five only) being the inadmissible CENVAT credit under Rule 14 of the Cenvat Credit Rules, 2004 read-with Section 73(2) of the Finance",,,

Act, 1994 from the noticee, M/s Emaar MGF Land Ltd., New Delhi;,,,

(iii) I order for charge of Interest at the appropriate rate from the noticee under Section 75 of the Finance Act, 1994 read with Rule 14 of",,,

Cenvat Credit Rules, 2004 till the actual date of payment of dues at (ii) above;,,,

(iv) I impose penalty of Rs.2,44,48,095/- (Rupees Two Crores Forty Four Lacs Forty Eight Thousand and Ninety Five only) upon the noticee",,,

under the provisions of Section 78 of the Finance Act, 1994 read with Rule 15(3) of Cenvat Credit Rules, 2004;,,,

(v) I impose penalty of Rs.10,000/- (Rupees Ten Thousand only) under the provisions of Section 77(2) of the Finance Act, 1994 upon the",,,

noticee for failing to file their ST-3 returns correctly indicating all their taxable incomes and all their Cenvat credits in accordance with the",,,

provisions of Section 70 of the Act, ibid;,,,

(emphasis supplied),,,

9. This appeal has been filed to assail the order dated 31.03.2017 passed by the Commissioner.,,,

10. An application has also been filed by the Department stating therein that the pre-deposit for filing the appeal has to be made in cash only but the,,,

appellant has discharged this statutory requirement by utilizing the CENVAT credit and so the appeal should be dismissed for this reason alone.,,,

11. Shri Narender Singhvi, learned counsel appearing for the appellant, made the following submissions:",,,

(i) The appellant discharged service tax under "works contract service". It is an established position of law that when an assessee has,,,

discharged its output tax liability, it will be eligible to claim CENVAT credit, irrespective of the fact that the assessee was not liable to pay such output",,,

tax at all. In this connection, reliance has been placed on the following decisions:",,,

(a) C.C.E., Bangalore-V vs. Vishal Precision Steel Tubes & Strips Pvt. Ltd., 2017 (349) E.L.T. 686 (Kar.); and",,,

(b) Commissioner of Central Excise, Pune-III vs. Ajinkya Enterprises, 2013 (294) E.L.T. 203 (Bom.);",,,

(ii) During the period in dispute, the appellant paid service tax to the extent of Rs. 5,31,67,272/-, and availed credit of Rs. 2,44,48,095/-. The service tax",,,

paid by the appellant is much more than the amount of credit availed by it. Therefore, even if no service tax was payable by the appellant, there has",,,

been no loss to the Government exchequer. Thus, assuming without conceding that no service tax was payable by the appellant, since the service tax",,,

paid is a much amount than the credit availed, the payment of such tax itself is reversal of inadmissible credit and no further recovery can be made. In",,,

this connection reliance has been place on the decision of the Tribunal in CST, Delhi-IV vs. DLF Utilities Ltd., 2018 (6) TMI 133-CESTAT",,,

Chandigarh;,,,

(iii) No provision of law empowers the department to question payment of service tax, except in case of short-payment. When such payment of tax",,,

cannot be questioned, the consequential demand of CENVAT credit cannot be sustained;,,,

(iv) The extended period of limitation could not have been invoked nor interest or penalty could have been imposed; and,,,

(v) The services of the appellant are classifiable under 'works contract service' and so appellant had correctly paid service tax and rightly,,,

availed CENVAT credit.,,,

12. Shri J.P. Singh and Shri Vivek Pandey learned Authorized Representatives of the Department made the following submissions:",,,

(i) The order of recovery of CENVAT credit of Rs. 2.44 crores under the Credit Rules by invoking the extended period of limitation under the proviso,,,

to section 73(1) of the Finance Act is correct in law;,,,

(ii) However, in case the Tribunal disagrees with the finding of the Commissioner on the extended period, even then the demand under section 73A",,,

can be confirmed as no limitation period for demand under this section has been placed;,,,

(iii) Service tax collected from the customers for a non-taxable activity has to be paid entirely in cash to the government under section 73A of the,,,

Finance. In this connection, reliance has been placed on the decisions of the Tribunal in:",,,

(a) Jaipur IPL Cricket vs. Commissioner of Service Tax, Mumbai, 2015 (38) STR 1193 (Tri-Mumbai); and",,,

(b) Indu Eastern Province Projects Pvt. Ltd. vs. Commr. of Cus., C. Ex. & S.T., Hyderabad-IV, 2019 (28) GSTL 88 (Tri- Hyd);",,,

(iv) The appellant has also not made the correct pre-deposit in the appeal as it should have been made entirely in cash and, therefore, the appeal is",,,

liable to be dismissed on this count also;,,,

(v) The Commissioner clearly upheld the charge/allegation of the show cause notice that the noticee is required to pay service tax of Rs. 2.44 crores,,,

in cash to the government exchequer under section 73A of the Act. The Commissioner also upheld the charge of the show cause notice that,,,

CENVAT credit of Rs. 2.44 crores is recoverable under Credit Rules. Thus, there is a clear nexus and link between the demand of service tax of Rs.",,,

2.44 crores under section 73A and demand of reversal of CENVAT credit of Rs. 2.44 crores under Credit Rules read with the proviso to section,,,

73(1) of the Finance Act; and,,,

(vi) If the noticee had not utilized CENVAT credit Rs. 2.44 crores for payment of service tax on the output service and instead would have paid the,,,

entire tax in cash, there would have been no demand under section 73A of the Finance Act. Thus, both the demands are connected.",,,

13. The submissions advanced by the learned counsel for the appellant and the learned Authorised Representatives appearing for the Department,,,

have been considered.,,,,

14. The first issue that arises for consideration is whether the Commissioner was justified in holding that the extended period of limitation contemplated,,,

under section 73(1) of the Finance Act, 1994, the Finance Act was correctly invoked in the facts and circumstances of the case.",,,

15. 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.",,,

16. In order to appreciate this contention it would 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:,,,

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 "one year",,,

the words "five years" had been substituted.",,,

17. 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.",,,

18. 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;",,,

19. 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.",,,

20. Learned counsel for the appellant submitted that the payment of service tax by the appellant on works contract services and availment of,,,

CENVAT credit was duly reflected by the appellant in the ST-3 returns and once such necessary details were reflected in the statutory returns, it",,,

cannot be urged that the appellant had suppressed facts. Even otherwise, learned counsel submitted, that suppression has to be wilful with an intent to",,,

evade payment of service tax, if the extended period of limitation has to be invoked by the Department, but the Commissioner observed that it would",,,

be possible to invoke the extended period of limitation even in a situation where there is no intent to evade payment of service tax.,,,

21. Learned Authorised Representatives appearing for the Department have, however, supported the finding recorded by the Commissioner in the",,,

impugned order that the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act was correctly invoked.,,,

Learned Authorized Representatives also submitted that even if it is held that the extended period of limitation could not be invoked, then too, the",,,

demand could have been confirmed under 73A of the Finance Act as there is no

limitation provided under the said section.,,,

22. The Commissioner has not observed that the ST-3 returns filed by the appellant did not reflect the payment of service tax by the appellant on,,,

works contract services and availment of CENVAT credit thereon, nor any submission has been made on behalf of the respondent which may",,,

persuade the Bench to hold that the appellant had suppressed facts by the Department. Thus, the appellant had not suppressed facts from the",,,

Department.,,,

23. There is also substance in the contention advanced on behalf of the appellant that mere suppression of fact is not enough as it has also to be,,,

conclusively established that suppression was wilful with an intent to evade payment of service tax. The Commissioner in paragraph 8.6 of the order,,,

(which has been reproduced in paragraph 8 of this order) took a view that â??it is possible to invoke extended period in the case of service tax even,,,

in a situation where there is no intent to evade payment of service tax.â??.,,,

24. It is correct that section 73 (1) of the Finance Act does not mention that suppression of facts has to be â??willfulâ? since â??willfulâ? precedes,,,

only misstatement. It has, therefore, to be seen whether even in the absence of the expression â??wilfulâ? before â??suppression of factsâ? under",,,

section 73(1) of the Finance Act, suppression of facts has still to be willful 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 â??willfulâ? and there should also be an intent to evade payment of service,,,

tax.,,,

25. Before advertng 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 â??suppression of factsâ? in Pushpam Pharmaceutical Co. vs.",,,

Commissioner of Central Excise, Bombay, 1995 (78) E.L.T. 401 (SC). It is as follows:",,,

â??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 wilful misstatement; or,,,

(d) suppression of facts; or,,,

(e) contravention of any of the provisions of this Act or 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.â??,,,

26. 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 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 â??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;,,,

â??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.â?? (emphasise supplied),

27.Â This decision was referred to by the Supreme Court in Anand Nishikawa Company Ltd. vs. Commissioner of Central Excise, 2005 (188) E.L.T. 149 (SC) and the observations are as follows:

â??â??26â?|â?|â?|.. This Court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay, while dealing with the meaning of the expression â??suppression of factsâ? 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 :-

â??In taxation, it (â??suppression of factsâ?) 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.â??

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 â??suppression of factsâ? 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.â??

(emphasis supplied),,,

28. 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, 2013 (288) E.L.T. 161 (SC) and the observation are:",,,

â??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.â??",,,

29. The Supreme Court in Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I, 2007 (216) E.L.T. 177",,,

(SC) also held:,,,

â??10. The expression â??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.â??,,,

(emphasis supplied),,,

30. The Delhi High Court in Bharat Hotels Limited vs. Commissioner of Central Excise (Adjudication), 2018 (12) GSTL 368 (Del.) 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;,,,

â??27. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word â??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. â??fraud, collusion, wilful",,,

misstatementâ?. As explained in Uniworth (supra), â??misstatement or suppression of factsâ? 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.,,,

xxxx,,,

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.â??,,,

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.â??,,,

(emphasis supplied),,,

31. It would also be useful to refer to a decision of the Tribunal in Shiv-Vani Oil & Gas Exploration Services Ltd. vs. C. S. T., New Delhi, 2017 (47)",,,

STR 200 (Tri-Del.), wherein the Tribunal after making reference to the decision of the Supreme Court in Cosmic Dye Chemical vs. CCE, Bombay,",,

1995 (75) E.L.T. 721 (SC), observed that there should be an intent to evade payment of service tax if the extended period of limitation has to be",,,

invoked. The observations are as follows:,,,

â??8. Regarding the demand for extended period, we find the reason given by the Original Authority is not legally sustainable. In fact he",,,

recorded that in terms of proviso to Section 73 of Finance Act, 1994, the intention to evade payment of duty is not required to invoke",,,

extended period or to impose penalty. We find that for invoking extended period as well as for imposing penalty under Section 78, the legal",,,

provisions are identical. The words used like fraud, collusion, willful mis-statement, suppression of fact or contravention of any provisions",,,

of Chapter V of Finance Act, 1994 or of the Rules made thereunder with intent to evade the payment of Service Tax, will show that the",,,

ingredient of mala fide is a pre-requisite to invoke both the legal provisions (proviso to Section 73 and Section 78). The Original Authority,,,

recorded that it may be true that the assessee has not contravened any provisions with intend to evade payment of service tax, however, he",,,

proceeded to confirm the demand for extended period and to impose penalty of an equal amount under Section 78. We find that Honâ??ble,,,

Supreme Court in Cosmic Dye Chemical v. CCE, Bombay reported in 1995 (75) E.L.T. 721 (S.C.) held as below :-",,,

Now so far as fraud and collusion are concerned, it is evident â??6. that the requisite intent, i.e., intent to evade duty is built into these very",,,

Proposal in show cause

notice",Paragraph,Impugned order,"Paragraph of impugned order

Recovery of Rs. 2,44,48,095/-

under section 73A",21(a),No confirmation,NA

Interest on the aforesaid

amount under section 73B",21(b),No confirmation,NA

Recovery of Cenvat credit of

Rs. 2,44,48,095/- under Rule

14 read with section 73",21(c),Confirmed,13(i) and (ii)

Interest on the aforesaid

amount of Cenvat credit under

section 75",21(d),Confirmed,13(iii)

Penalty under Rule 15(3) read

with section 78 for wrong

availment of Cenvat credit",21(e),Confirmed,13(iv)

Penalty under section 77(2),21(e),Confirmed,13(v)

*should be 21(f). Inadvertently mentioned as 21(e) in the Show Cause Notice.,,,