

(2024) 12 CESTAT CK 1222

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 50541, 51813 of 2017

Shri Arun Gupta @APPELLANT @Hash Commissioner, Central Excise & Service Tax @RESPONDENT

Date of Decision : 04-12-2024

Acts Referred:

Finance Act, 1994 — Section 70, 72, 73, 73(1), 73(1A), 73(6), 75, 78
Central Excise Act, 1944 — Section 11A, 11AA
Central Excise Rules, 2002 — Rule 6, 6(1), 12(3), 12(4)

Citation : (2024) 12 CESTAT CK 1222

Hon'ble Judges : Dilip Gupta, President (J); Hemambika R. Priya, Member (T)

Bench : Division Bench

Advocate : Ankur Upadhyay, Harshvardhan

Final Decision : Allowed

Judgement

Dilip Gupta, J

1. Service Tax Appeal No. 50541 of 2017 has been filed by Arun Gupta, the Appellant to assail the order dated 16.11.2016 passed by the Commissioner (Appeals) confirming the order dated 30.08.2010 passed by the Joint Commissioner confirming the demand of service tax upon the appellant with interest and penalty. The period involved in this appeal is from April 2008 to March 2012 and the show cause notice is dated 12.03.2013.

2. Service Tax Appeal No. 51813 of 2017 has also been filed by the aforesaid appellant to assail the order dated 17.08.2017 passed by the Commissioner (Appeals) upholding the order dated 29.04.2016 passed by the Assistant Commissioner that confirms the demand of service tax with interest and penalty. The period involved in this appeal is from April 2012 to March 2013 and the show cause notice is dated 22.10.2014.

3. In Service Tax Appeal No. 50541 of 2017, the demand for the period April 2008 to 2012 has been raised under three categories of service namely "rent-a-cab service", "renting of immovable property"

and luggage booking under "business support service".

4. Though number of submissions were advanced by Shri Ankur Upadhyay, learned counsel for the appellant for setting aside the demands raised under the aforesaid three heads of service but learned counsel for the appellant submitted that the impugned order deserves to be set aside for the sole reason that the show cause notice was issued beyond the period stipulated in the proviso to section 73(1) of the Finance Act 1994, the Finance Act, as it stood at the relevant time. In this connection, learned counsel pointed out that in respect of the aforesaid three services, earlier a show cause notice dated 01.10.2009 was also issued to the appellant for the period 2004-05 to March 2008. Thus, when all facts were in the knowledge of the department in 2009, powers under the proviso to section 73(1) of the Finance Act could not have been invoked in the present show cause notice that was issued on 12.03.2013 for the subsequent period from April 2008 to March 2012. In support of this contention, learned counsel placed reliance upon certain judgments to which reference shall be made at the appropriate stage.

5. Likewise, in Service Tax Appeal No. 51813 of 2017, learned counsel for the appellant contended that the show cause notice that was issued on 22.10.2014 demanding service tax under the aforesaid three heads for the period from April 2012 to March 2013 would also be barred by limitation as the extended period of limitation contemplated under the proviso to section 73 (1) of the Finance Act could not have been invoked.

6. A perusal of the show cause notice dated 01.10.2009 issued to the appellant does show that service tax has been proposed under the aforesaid three heads namely "rent-a-cab service", "renting of immovable property" and luggage booking under "business support service" from M/s. Hans Travels.

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7. To examine the contention raised by learned counsel for the appellant in connection with the invocation of the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act, it would be pertinent to refer to the allegations made in the show cause notice dated 12.03.2013 that was issued to the appellant. Paragraphs 9 and 12 of the show cause notice are reproduced below:

"9. In view of above forgoing paras it appears that the Noticee have received total amount of Rs. 3,77,21,441/- (for the period 2008-09 to 2011-12) on the various taxable services provided by them under various notified categories such as Business Support services, Rent a Cab Service and Renting of Immovable property service. On these services total Service Tax liability comes to Rs. 41,15,365/- (including Ed. Cess and H.Ed. Cess) as per applicable rates (Detail are enclosed in the duty calculations chart marked as Annexure-II) it appears to be recoverable from them in terms of provisions of Section 73(1) of the Act. Interest is also recoverable under Section 75 of the said Act for the aforesaid tax

liability.

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12. The Noticee was requested to submit the balance sheet for the year 2008-09 to 2011-12 by issuing several letter and reminders. But despite of issuing several letters and reminders they have not submitted the desired documents and thus suppressed the facts from the department and thus they have render them self liable for penalty under Section 78 of the Finance Act, 1994."

8. The appellant filed a reply to the show cause notice and contended that the extended period of limitation could not have been invoked. Paragraph 8 of the reply filed by the appellant is reproduced below:

"8. Secondly the show cause notice is time barred as at the one hand the department was in knowledge of all the facts and on the other hand there are no grounds to allege any suppression or malafide intention of the Noticee with intention to evade payment of service tax. Even the show cause notice does not point out any instance which can show that the Noticee has suppressed anything from the department with malafide intention. In such circumstances that when the department came to know of the renting of buses by the noticee and the noticee had no malafide intention, the invocation of longer period of limitation for issuance of show cause notice is absolutely illegal. Since all the facts about the activities of the Noticee were in the knowledge of the department, it cannot be said the Noticee have suppressed the facts with intent to evade the payment of service tax. In such circumstances, the demand is barred by the limitation. Thus there was no suppression or mis-declaration nor any intention to evade payment of service tax on the part of the Noticee and therefore the demands are hit by limitation of time being, beyond period of one year. From all the undisputed factual position, the allegation of suppression of fact is not sustainable. Therefore the demands are hit by time bar and deserve to be quashed without going into the merit of the case."

(emphasis supplied)

9. The Joint Commissioner examined this issue and held that the extended period had been correctly invoked. The relevant portion of the order on this issue is reproduced below:

"30. xxxxxxxxxxxx.

I find that the fact about Noticee's activity of providing service would have not come to notice if the investigation against them had not been initiated by the department. The Noticee have willfully suppressed the material facts from the department with the intention to evade payment of service tax. During the course of investigation also, the Noticee did not cooperate with the department and did not respond to the letters and summons issued to him. The Noticee thus have contravened the following provision of the Finance Act 1994 readwith rules framed there under with intent to evade payment of service tax.

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31. Further in respect of suppression I find from the para 04 of the SCN dated 12.03.13 it is specifically mentioned that the noticee had deliberately suppressed the fact of taxable services and not paid the service tax on them intentionally. Therefore the extended period under section 73 had been rightly invoked. In his regard I also find support from the Judgment of the Honb'le Supreme Court in the matter of Commissioner of Central Excise Vishakhapatnam V/S M/s Mehta & Co. 2011-TIOL-17- SC-CX, Civil Appeal No. 1090 of 2009 which has held that a show cause notice issued within five years from the date of knowledge is valid. Therefore the case laws cited by the noticee are not acceptable in the instant case. The noticee has taken the plea that the matter came to knowledge of the department in 2003. However, I find that the show cause notice covered the period from 2008-09 to 2011-

12 accordingly by application of the above Judgment of Honb'le Supreme Court the show cause notice is rightly issued in accordance with the provisions of section 73(1) of the Finance Act, 1994."

(emphasis supplied)

10. The Commissioner (Appeals) also examined this issue in paragraph 6 of the order dated 16.11.2016 and found no infirmity in the order passed by the Joint Commissioner. The relevant portion of the order is reproduced below:

"6. As regards limitation, I find that the demand notice was issued on 12.03.2013 and covers the financial year 2008-09 to 2011-12. I find no infirmity with the issue of the demand and the period covered is well within 5 years. I have also considered the case laws relied upon by the appellants but find that the ratios of these cases are not in conformity of the circumstances of the appellants's case."

(emphasis supplied)

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11. The show cause notice dated 22.10.2014 was issued to the appellant under section 73(1A) of the Finance Act. Neither the adjudicating authority nor the Commissioner (Appeals) have examined the issue relating to invocation of the extended period of limitation.

12. In order to appreciate the contention that has been made by the learned counsel for the appellant, 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:

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."

13. 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.

14. 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;"

15. 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.

16. It is correct that section 73 (1) of the Finance Act does not mention that suppression of facts has to be "wilful? since "wilful? precedes only misstatement. It has, therefore, to be seen whether even in the absence of the expression "wilful" before "suppression of facts" 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 "wilful? and there should also be an intent to evade payment of service tax.

17. 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, 1995 (78) E.L.T. 401 (SC). It is as follows:

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

(a) fraud; or

(b) collusion; or

(c) any 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."

18. 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 said proviso to pari materials the proviso to section 73(1) of the finance 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 "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."

(emphasis supplied)

19. 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:

"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 :-

"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." 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.”

(emphasis supplied)

20. 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:

“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.”

21. 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:

“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.”

(emphasis supplied)

22. 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:

“27. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word “suppression” in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. “fraud, collusion, wilful misstatement”. As explained in Uniworth (supra), “misstatement or suppression of facts” does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid excise duty.

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Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a scenario where there is a mere omission or mere failure to pay duty or take out a license without the presence of such intention.”

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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)

23. The Delhi High Court in Mahanagar Telephone Nigam Ltd. vs. Union of India and others, W.P. (C) 7542 of 2018 decided on 06.04.2023, 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 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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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)

24. 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.

25. 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, Service Tax Appeal No. 51787 of 2022 dated 21.08.2023 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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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 selfassessment, cannot, by any stretch of imagination, be termed deliberate and wilful suppression of facts.

16. Another ground for invoking extended period of limitation given in the impugned order is that the appellant was operating under selfassessment 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 selfassessment 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 selfassessment 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."

(emphasis supplied)

26. The Tribunal in *M/s. Kalya Constructions Private Limited vs. The Commissioner, Central Excise Commissionerate, Udaipur*, Service Tax Appeal No. 54385 of 2015 decided on 15.11.2023 observed as follows:

"11. Both the SCNs further state that had the audit not conducted scrutiny of the records, the short paying the service tax would not have come to notice. It is a matter of fact that all the details were available in the records of the appellant. The appellant was required to furnish returns under section 70 with the Superintendent of Central Excise which it did. It is for the Superintendent to scrutinize the returns and ascertain if the service tax had been paid correctly or not. If the assessee either does not make the returns under section 70 or having made a return, fails to assess the tax in accordance with the provisions of Chapter or Rules made thereunder, the Superintendent of Central Excise can make the best judgment assessment under section 72. For this purpose, he may require the assessee to produce such accounts, documents or other evidence, as he may deem necessary. Such being the legal position, if some tax has escaped assessment which came to light later during audit, all it shows is that the Superintendent of Central Excise with whom the returns were filed had either not scrutinized the returns or having scrutinized then found no error in self assessment but the audit found so much later. Had the Superintendent scrutinized the returns calling for whatever accounts or records were required, a demand could have been raised within the normal period of limitation. The fact that the alleged short payment came to light only during audit does not prove the intent to evade payment of service tax by the appellant, but it only proves that the Range Superintendent had not done his job properly. For these reasons, we find that the demand for the extended period of limitation cannot be sustained."

(emphasis supplied)

27. The Tribunal in *Sunshine Steel Industries vs. Commissioner of CGST, Customs & Central Excise, Jodhpur*, (2023) 8 Centax 209 (Tri.-Del.) also observed as follows:

"20. The Department cannot be permitted to invoke the period of limitation by merely stating that it is a case of self-assessment as even in a case of self-assessment, the Department can always call upon an assessee and seek information. It is under sub-rule (1) of rule 6 of the Central Excise Rules, 2002 that the assessee is expected to self-assess the duty and sub-rule (3) of rule 12 of the Rules provides that the proper officer may, on the basis of information contained in the return filed by the assessee under sub-rule (1), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee. Sub-rule (4) of rule 12 also provides that every assessee shall make available to the proper officer all the documents and records for verification as and when required by such officer. Hence, it was the duty of the proper officer to have scrutinized the correctness of the duty assessed by the assessee and if necessary call for such records and documents from the

assessee, but that was not done. It is, therefore, not possible to accept the contention of the learned authorized representative appearing for the Department that the appellant should have filed a proper assessment return under rule 6 of the Rules.”

(emphasis supplied)

28. Civil Appeal No. 4246 of 2023 (Commissioner of CGST, Customs and Central Excise vs. Sunshine Steel Industries) filed by the department to assail the aforesaid decision of the Tribunal in Sunshine Steel Industries was dismissed by the Supreme Court on 06.07.2023 and the judgment is reproduced below:

“Delay condoned.

2. Heard learned counsel for the appellant.

3. This Court is not inclined to interfere with the impugned order of the High Court (Sic).

4. The appeal is dismissed.

5. Pending applications, if any, are disposed of.”

29. In Commissioner of C. Ex. & Customs vs. Reliance Industries Ltd., 2023 (385) E.L.T. 481 (S.C.), the Supreme Court held that if an assessee bonafide believes that it was correctly discharging duty, then merely because the belief is ultimately found to be wrong by a judgment would not render such a belief of the assessee to be malafide. If a dispute relates to interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation. The Supreme Court further held that in any scheme of self-assessment, it is the responsibility of the assessee to determine the liability correctly and this determination is required to be made on the basis of his own judgment and in a bona-fide manner. The relevant portion of the judgment of the Supreme Court is reproduced below:

“23. We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bona fide belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a mala fide belief particularly when such a belief was emanating from the view taken by a Division Bench of Tribunal. We note that the issue of valuation involved in this particular matter is indeed one where two plausible views could coexist. In such cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee’s view to be lacking bona fides. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bona fide manner.

24. The extent of disclosure that an assessee makes is also linked to his belief as

to the requirements of law. *****. On the question of disclosure of facts, as we have already noticed above the assessee had disclosed to the department its pricing policy by giving separate letters. It is also not disputed that the returns which were required to be filed were indeed filed. In these returns, as we noticed earlier there was no separate column for disclosing details of the deemed export clearances. Separate disclosures were required to be made only for exports under bond and not for deemed exports, which are a class of domestic clearances, entitled to certain benefits available otherwise on exports. There was therefore nothing wrong with the assessee's action of including the value of deemed exports within the value of domestic clearances."

(emphasis supplied)

30. Very recently, in Commissioner CGST Delhi South vs. Air India Ltd.¹³, the Delhi High Court held:

"17. It is material to note that there is no allegation against the assessee of any statutory contravention with an intent to evade tax. The case of the Revenue is solely premised on the basis that there was suppression of facts on the part of the assessee. Clearly, not producing the documents, which may be necessary for substantiating a claim, does not fall in the exception of "suppression of facts". In any view of the matter, no express allegations were made in the SCN to the said effect."

31. What, therefore, transpires from the aforesaid decisions is that there can be a difference of opinion between the department and an assessee. An assessee may genuinely believe that duty is not leviable, while the department may believe that duty is leviable. The assessee may, therefore, not pay duty in the self-assessment carried out by the assessee, but this would not mean that the assessee has wilfully suppressed facts. To invoke the extended period of limitation, atleast one of the five necessary elements must be established and their existence cannot be presumed merely because the assessee is operating under self assessment. If some duty escapes assessment, the officers of the department can always call upon the assessee to submit further documents and he may also conduct an enquiry. In fact when an audit is conducted, the officers of the audit team scrutinize the records and, therefore, notice should be issued within the stipulated time from the date the audit was conducted. Even otherwise, merely because facts came to light only during the audit does not prove that there is an intent on the part of the assessee to evade payment of duty.

32. In the present case, as noticed above, all that has been stated in paragraphs 9 and 12 of the show cause notice is that the appellant received an amount for the period 2008-09 to 2011-12 for the three taxable services and since the appellant did not provide the required documents it suppressed facts from the department with intent to evade payment of service tax. Though the appellant specifically denied that any facts had been suppressed, much less with an

intention to evade payment of service tax, the Joint Commissioner merely observed that the fact of providing taxable service would not have come to the notice of the department had investigation not been initiated by the department and it is for this reason that the Joint Commissioner held that the appellant had willfully suppressed material facts from the department with intent to evade payment of service tax. The Commissioner (Appeals) held that there was no infirmity with the issue of demand as the period of demand was within five years.

33. It cannot be alleged by the department that facts were not in the knowledge of the department since earlier also a show cause notice dated 01.10.2009 had been issued by the department to the appellant for the period from 2004-05 to March 2008 proposing demand under the same head in the present appeal. There is, therefore, no reason as to why the show cause notice should have been issued beyond the normal period of limitation for the period from April 2008 to March 2012, nor there is any justification for issuing the show cause notice dated 22.10.2014 for the subsequent period from April 2012 to March 2013. It is, therefore, clearly a case where the facts were in the knowledge of the department and the department cannot allege that facts had been suppressed. In any case, even if it is assumed that facts were suppressed by the appellant then too no reason has been assigned in the orders passed by the Joint Commissioner or the Commissioner (Appeals) that such suppression was with an intent to evade payment of service tax. This apart, service tax has been demanded on the basis of profit and loss account and balance sheet, which are public documents which the department could have ascertained. The issue involved in this appeal also relates to interpretation of law. The decisions referred to above have clearly held that in such circumstances there can be no suppression of facts with an intent to evade payment of service tax.

34. The impugned orders dated 16.11.2016 and 17.08.2017 passed by the Commissioner (Appeals), therefore, deserve to be set aside on the sole ground that the extended period of limitation contemplated under the proviso to section 73 (1) of the Finance Act could not have been invoked in the facts and circumstances of the case.

35. The orders dated 16.11.2016 and 17.08.2017 passed by the Commissioner (Appeals) are, therefore, set aside and the two appeals are allowed with consequential relief(s), if any, to the appellant.

(Order Pronounced on 04.12.2024)