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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : 22.10.2024*

\+ **SERTA 18/2024**

COMMISSIONER CGST DELHI SOUTH

.....Appellant

Through: Mr Akshay Amritanshu, SSC, Mr Samyak Jain, Ms Swati Mishra, Ms Drishit Saraf and Ms Pragya Upadhyay, Advocates.

versus

AIR INDIA LTD

.....Respondent

Through: Mr Yogendra Aldak, Mr Kunal Kapoor, and Mr Sumit Khadaria, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (*ORAL*)

CM APPL. 52737/2024 (condonation of delay of 37days in filing)

1. For the reasons stated in the application, the delay of thirty-seven days in filing the appeal stands condoned.

2. The application stands disposed of.

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3. The Revenue has filed the present appeal under Section 35G of the Central Excise Act, 1944 as applicable to the Finance Act, 1994 (hereafter *the Act*) assailing the final order No. 50245/2024 dated 19.01.2024 (hereafter *the impugned order*) passed by the learned Customs Excise & Service Tax Appellate Tribunal (hereafter *the CESTAT*) in Service Tax Appeal No. 51541/2017 captioned *Air India Limited v. Commissioner of Service Tax, New Delhi.*

4. The principal controversy involved in the present appeal concerns the question whether the Revenue is justified in invoking the provision of Section 73(1) of the Finance Act, 1994 for seeking assessment of the service tax liability in respect of the tax period from the year 2007-2010.

5. The respondent (hereafter *assessee*) was registered with the Service Tax Commissionerate, Delhi as an Input Service Distributor under Section 65(105) (zzzb) of the Act. The audit of the assessee (then known as M/s. National Aviation Company of India Limited and now known as Air India) was conducted by the Central Excise Revenue Audit (CERA) for the period 2007-08 and 2009-10. During the course of the audit, it was observed that the assesee had availed CENVAT credit of ₹10,50,31,271/- and a cess of ₹25,46,174/- and utilised the same for the period 2007-2009. However, it was found that the supporting documents for availing the CENVAT Credit were not available with the assessee. On the aforesaid basis, it is alleged

that the assessee had wrongly availed CENVAT credit.

6. In the aforesaid circumstances, the concerned Custom Authority issued the Show Cause Notice dated 25.09.2012 (hereafter *the SCN*), *inter alia*, referring to Rule 9 of the CENVAT Credit Rules, 2004 (hereafter *the CENVAT rules*), which prescribes the document accounts to be maintained by the assessee for availing the CENVAT credit. It is alleged that since the assessee had failed to produce the supporting document before the CERA audit team, it appeared that the assessee had availed CENVAT credit on input services without fulfilling the conditions as prescribed under Rule 9 of the CENVAT Rules. Paragraph nos. 6 and 10 of the show cause notice are relevant and same are set out below:-

> "6. Whereas the assessee failed to submit supporting documents viz copy of input invoice proofs of payment of service tax along with copy of ST-3 return to substantiate their claim. Thus it appears that the cenvat credit amounting to Rs.10,75,77,445/- has been wrongly availed by the assessee during the period 2007-10 and is recoverable from them.
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> *** ***
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> 10. Whereas the assessee has failed to produce the supporting documents before the CERA audit team, and this office in spite of this office letters dated 02.05.2011, 01.03.2012, 29.05.2012 and 17.08.2012. Thus, it appears that the assessee availed the cenvat credit on input service without fulfilling the conditions prescribed in this regard under Rule 9 of the CCR, 2004 ibid.

> This fact would not have come to the notice of the Department if the audit of the assessee had not been conducted. Therefore, provision of proviso to Section 73 (1) of the Act ibid can be invoked against the assessee, and demand & recovery can be made for wrong availment of CENVAT Credit for the extended period of five years from the relevant date."

7. Thereafter, pursuant to the said SCN, the Commissioner of Service Tax passed an Order-in-Original dated 08.06.2017, directing the recovery of CENVAT credit amount of ₹10,75,77,445/- (Rupees Ten Crores Seventy Five Lacs Seventy Seven thousands Four hundred and Forty Five only) under Rule 14 of the CENVAT Rules read with Section 73 of the Act. In addition, the Commissioner of Service Tax also imposed the penalty of an equal amount of ₹10,75,77,445/- under Section 78 of the Act.

8. The assessee successfully appealed the said decision before the learned CESTAT, *inter alia*, on the ground that the SCN issued was beyond the specified period.

9. Thus, Section 73(1) of the Act as applicable at the material time is relevant and the same is set out below:-

> **"73. Recovery of service tax not levied or paid or short levied or short-paid or erroneously refunded.**
> (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, 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 provision of this Chapter or of the rules made thereunder with intent to evade payment of service tax."

10. In terms of Section 73(1) of the Act, a notice could be issued to a person chargeable with service tax if he was not levied or had not paid, or was short-levied or had short-paid service tax, requiring the said person to show cause why he should not pay the amounts specified in the said notice. However, the said notice was required to be issued within the period of one year. This period was extended if the conditions under the proviso to Section 73(1) of the Act were satisfied.

11. Concededly, the SCN was issued beyond the period as specified in main provision of Section 73(1) of the Act. It is the case of the Revenue that it is covered under the proviso to Section 73(1)

of the Act, which provides for the extended period of limitation in cases where the service tax 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) wilful mis-statement; or (d) suppression of facts; or (e) contravention of any provisions of Chapter V of the Act or of the rules made thereunder with intent to evade payment of service tax.

12. According to the Revenue, assesses case falls in the exception where tax has been short levied "on account of suppression of facts".

13. The learned CESTAT did not accept the Revenue's contention and noted that it was the case where the allegation against the assessee is merely that it had not produced the documents to substantiate its claim during the course of audit and, therefore, the extended period of limitation in terms of the proviso to Section 73(1) of the Act would not be applicable.

14. In addition, the learned CESTAT also noted that the SCN did not make any such allegation to the effect that the respondent had supressed any material fact. The learned CESTAT referred to the decision of the Supreme Court in ***Collector of Central Excise v. H.M.M. Limited: 1995 (76)ELT 497 (SC)*** and noted the following passage:-

> "2. ..... Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful mis-statement or

suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to 5 years as provided by the said proviso. Therefore, in order to attract the proviso to Section 11A(1) it must be alleged in the show cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful mis-statement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with Intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was guilty of wilful mis-statement or suppression of fact. In the absence of such averments in the show cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11A(1) of the Act. The Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for the assessee contended that in the absence of any such allegation in the show cause notice the assessee was not put to notice regarding the specific allegation under the

proviso to that sub-section. The mere non-declaration of the waste/byproduct in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, mis-conduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention. If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment

> of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty."

15. On the strength of the said decision, the learned CESTAT held that the SCN must allege that the amount of tax has not been paid for the reasons of fraud, collusion or wilful mis-statement or suppression of facts to sustain a notice beyond the period as prescribed under Section 73(1) of the Act. If there is no averment made to the said effect, it would not be apposite to sustain a notice seeking to invoke the extended period of limitation.

16. There is no cavil with the aforesaid proposition. However, the Revenue submits that the said allegations are necessarily be read into the SCN as there was a specific allegation that the assessee had not complied with the provisions of maintaining the record, which according to the Revenue is mandatory to claim the CENVAT credit.

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.

18. We consider it relevant to also refer to the decision of the Supreme Court in ***Pushpam Pharmaceutical Co. v. CCE***[1] which was rendered in the context of Section 11A of the Central Excise Act, 1944. The said provision is *pari materia* to the proviso to Section 73(1) of the Act as was in force at the material time. The Supreme Court in its decision observed as under:

> "4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

19. In ***Anand Nishikawa Co. Ltd. v. CCE***[2] the Supreme Court referred to its earlier decision in ***Pushpam Pharmaceutical Co. v.***

[1] 1995 Supp (3) SCC 462
[2] (2005) 7 SCC 749

CCE[1] and observed as under:

> "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]

20. In ***Uniworth Textiles Ltd. v. CCE***[3], the Supreme Court considered the import of proviso to Section 28 of the customs Act, 1962 which also provided for extension of time period for issuing a notice where there was wilful misstatement or suppression of facts by the importer or the exporter or the agent of employee of the importer or exporter. The said proviso reads as under:

> "Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted."

21. The Supreme Court referred to the observations made by it in its earlier decision in ***Pushpam Pharmaceutical Co. v. CCE***[1] and held as under:

> "27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay, 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 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

[3] (2013) 9 SCC 753

> 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 11A of the Act."

22. In ***Bharat Hotels Ltd. v. Commissioner of Central Excise (Adjudication)***[4] this Court had, in the context of Section 73(1) of the Act, held as under:

> "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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> [Emphasis supplied]

23. This Court in an earlier decision in ***Principal Commissioner, CGST, Delhi-South v. M/s EMAAR MGF Land Ltd.***[5] concurred with the learned CESTAT that the extended period of limitation was not correctly invoked as the intent to evade tax was neither established nor evident in the given facts.

24. In view of the above, we find no infirmity with the decision of the learned CESTAT in rejecting the Revenue's contention that it was entitled to invoke the extended period of limitation in terms of the proviso to Section 73(1) of the Act.

25. No substantial question of law arises in the present appeal.

26. The present appeal is unmerited and, accordingly, is dismissed.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

OCTOBER 22, 2024
M *Click here to check corrigendum, if any*

[4] 2018 (12) TSTL 368 (Del.)
[5] Neutral Citation:2023/DHC/001092