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

% ***Judgment delivered on: 03.02.2025***

\+ W.P.(C) 16771/2022 & CM APPL. 52965/2022 (Interim Relief)

CREATIVE TRAVELS PVT LTD .....Petitioner

Through: Mr. J.K Mittal, Ms. Vandana Mittal and Mr. Mukesh Choudhary, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Manish Kumar, SPC for Resp./ UOI.
Mr. Aditya Singla, SSC with Mr. Umang Misra, Adv.
Mr. Kishore Kunal, Amicus Curiae with Mr. Anuj Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The writ petitioner impugns the **Show Cause Notice**[1] dated 17 October 2019 issued by the respondents in purported exercise of powers conferred by the First Proviso to Section 73(1) of the **Finance Act, 1994**[2].

2. Apart from Mr. Mittal, learned counsel who represented the writ petitioner and Mr. Singla, learned counsel who appeared for the respondents, we also had the benefit of hearing Mr. Kunal, learned

[1] SCN
[2] Act

counsel, who had been appointed by the Court as the Amicus.

3. With the aid of the learned amicus, we have gone through the detailed and chronological list of dates as well as the compilation of judgments which have been placed for our consideration. For the purposes of analysing the challenge which stands raised, we deem it apposite to take note of the following undisputed facts which emerge from the record.

4. The challenge to the impugned SCN of 17 October 2019 constituted the fifth of a series of SCNs which had been issued by the respondents holding the petitioner exigible to tax under the service tax regime that prevailed. The levy of service tax was asserted to stand attracted in respect of amounts expended by the petitioner for meeting operational costs of overseas offices as well as for payments received for arranging and operating outbound tour services. It was the case of the petitioner that the aforesaid services would not fall within the ken of Section 65(105)(n) of the Act and that consequently, the amount so expended or received was exempt.

5. For purposes of clarity, Mr. Kunal has placed for our consideration the series of SCNs which appear to have been issued to the writ petitioner raising identical allegations. The details of those SCNs are extracted hereinbelow:

SN.	Period in Impugned SCN	Date of filing ST-3 Return	Normal Limitation u/s 73(1)**	Extended Limitation u/s 73(4) (5 Years)	Demand (Rs.)
1.	April 2014 to September 2014	22 Oct 2014 (Original)	22 Apr 2016 (18 months)	22 Oct 2019	24,11,129
2.	October 2014 to March 2015	24 Apr 2015 (Original)	24 Oct 2016 (18 months)	24 Apr 2020	
3.	April 2015 to September 2015	23 Oct 2015 (Original)	20 Jul 2017 (18 months)		

		20 Jan 2016 (Revised)		20 Jan 2021	24,71,439
4.	October 2015 to March 2016	22 Apr 2016 (Original)	22 Oct 2017 (18 months)	22 Apr 2021	
5.	April 2016 to September 2016	25 Oct 2016 (Original) 27 Oct 2016 (Revised)	27 Apr 2019 (30 months)	27 Oct 2021	23,19,379
6.	October 2016 to March 2017	25 Apr 2017 (Original) 22 July 2017 (Revised)	22 Jan 2020 (30 months)	22 Jul 2022	
7.	April 2017 to June 2017	15 Aug 2017 (Original) 27 Sep 2017 (Revised)	27 Mar 2020 (30 months)	27 Sep 2022	8,83,302
Total					**80,85,249**

6. It would be relevant to note that while the impugned SCN was issued for the period of April 2014 to June 2017, the time periods at serial numbers 6 and 7 of the chart handed over by the learned amicus i.e. the period of October 2016 to June 2017 would fall within the general period of limitation, and would thus be covered by the judgment of the **Customs, Excise and Service Tax Appellate Tribunal**[3].

7. The principal question which was canvassed for our consideration was whether the extended period of limitation and which rests on an allegation of service tax having been not levied or paid or having been short-levied or short-paid by reason of fraud, collusion, wilful misstatement or suppression of facts, could be said to have been attracted.

8. On a perusal of the various SCNs which preceded the one which is presently impugned before us, we find that the subject matter

[3] Tribunal

of contestation had remained the same. The aforesaid SCNs had ultimately culminated in the passing of Orders-in-Original adverse to the writ petitioner. Undisputedly, traversing through the statutory mechanism of appeals, the matter ultimately reached the Tribunal. The Tribunal rendered its judgment on 30 September 2022 holding in favour of the writ petitioner on merits as would be manifest from the following passages which form part of its decision:

> "13. In the light of the submissions proffered by both sides, it is necessary for us to examine the provisions of Finance Act, 1994. The impugned taxable service is that 'provided or be provided'
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> *'(n) to any person, by a tour operator in relation to a tour;'*
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> in section 65 (105) of Finance Act 1994 with
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> *"'tour operator" means any person engaged in the business of planning, scheduling, organising or arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by anymore of transport, and includes any person engaged in the business of operating tours in a tourist vehicle or a contract carriage by whatever name called, covered by a permit granted under the Motor Vehicles Act, 1988 (59 of 1988) or the rules made there under.'*
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> in section 65(115) of Finance Act, 1994. As far as the present dispute is concerned, the expansion in the definition effected from 16th May 2008 is not relevant. Furthermore, the definition of
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> *"'tour" means a journey from one place to another irrespective of the distance between such places;'*
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> in section 65(113) of Finance Act, 1994 is also not germane.
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> 14. The change in the statutory provision has added elements to the activity that makes for being 'tour operator' and, in both the unamended and amended version, entirety of performance in India is the criterion for subjecting the consideration to tax. That is the only conclusion that can be arrived at from perusal of Export of Service Rules, 2005 which categorizes the scheme of export in terms of the enumeration of 'taxable service' in section 65(105) of Finance Act, 1994. The adjudicating authority has, instead, dilated on section 65(115) as the foundation of the demand and erroneously so.

15. We do not have to venture beyond the findings, viz.,

> *'29.16 In this connection, I observe that for treating an activity an export the assessee has to fulfil/ all the conditions of the Export of Services Rules, 2005. I find that rule 3(2) of the Export of Services Rules, 2005 has laid down the condition of receipt of the consideration in foreign currency whereas this condition has not been fulfilled in respect of outbound tours performed by the Indian tourists as the consideration for the same has been received in Indian rupees. Further, as regards the taxability of foreign tourists , as already discussed, the assessee has provided services of planning, scheduling, organizing or arranging tours (when may include arrangements for accommodation, sightseeing or other similar services) to the foreign tourists within India since at the time of the provision of aforesaid service the service provider and the service recipient, both were in India and the service also flew within the country and so the place of supply of service remained in*
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> *India and hence the services provided by them within India are well covered under 'Tour Operator service'. I find that it is a fact that the definition of the term 'Tour Operator' as amended vide Finance Act, 2004 has two parts as under;*
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> *"tour operator" means*
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> *3. any person engaged in the business of planning, scheduling, organizing or arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport,*
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> *4. and includes any person engaged in the business of operating tours in a tourist vehicle covered by permit granted under the Motor Vehicles Act, 1988 (59 of 1988) or the rules the rules made there under;'*

in the impugned order which has sweepingly rejected the claim of services rendered to customers paying in convertible foreign currency as beyond the pale of exemption with the specious finding that customer was present in India when the service was rendered. Insofar as service taxable under section 65(105)(n) of Finance Act, 1994 is concerned, it did not appear to have dawned on the adjudicating authority that Export of Service Rules, 2005 does not base the exemption on place of the customer. The assumption that payment, if any, was received in local currency from Indian tourists is also not evidenced by any details in the show cause notice or subsequent ascertainment in the impugned order which has, but for

> the tabular presentation of taxable value/tax and the final confirmation of demand, not referred to the service rendered or disaggregation of value of services ineligible to be considered as exports.
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> 16. As the consideration claimed to have been received in pursuance of exports has not been controverted in the impugned order, neither the issue of liability of interest on demand that has not fructified nor the contention relating to inapplicability of the decision of the Tribunal in Cox & Kings India Ltd has to be decided upon in this appeal.
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> 17. In view of our conclusions *supra*, we set aside the impugned order and allow the appeal of assessee while dismissing the appeal of Revenue."

9. It was in the aforesaid context that Mr. Mittal had contended that the invocation of the First Proviso to Section 73(1) of the Act was wholly untenable. Mr. Mittal submitted that the issue of whether the expenditure incurred for meeting operational costs of overseas offices and the payments received for arranging outbound tour services could be subjected to tax was the principal question on which the earlier four SCNs were based. The petitioner had taken the consistent position that those services would not fall within the ambit of the Act and had claimed exemption from taxation based on a notification issued by the respondents themselves. It was thus contended that it would be wholly impermissible for the respondents to assert that they were either unaware of the position as taken by the writ petitioner or that there was a suppression of material facts.

10. While, and from the chart which has been placed for our consideration by Mr. Kunal, we find the impugned SCN would fall within the extended period of limitation otherwise constructed in terms of the First Proviso to Section 73(1), the principal issue which arises is whether that provision could itself have been said to be

attracted.

11. Mr. Kunal, the learned amicus, submitted that once it was the conceded position of the respondents of the same and identical issue forming subject matter of the earlier SCNs' proceedings and the adjudication which was undertaken in connection therewith, it would perhaps not be permissible for the respondents to assert a wilful suppression of facts and which constitutes the trigger for the application of the First Proviso to Section 73(1).

12. The learned amicus in this respect drew our attention to the following principles which had come to be laid down by the Supreme Court in **P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise**[4] and which are extracted hereinbelow:

> "**12.** We have indicated above the facts which make it clear that the question whether M/s Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise Authorities at different stages, when the classification was filed, when the first show-cause notice was issued in 1985 and also at the stage when the second and the third show-cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle it with the liability of duty for the larger period by invoking proviso to Section 11-A(1) of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed pro forma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further they had dropped the proceedings accepting that M/s Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard to M/s Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11-A(1) of the Act for making the demand for the extended period."

[4] (2003) 3 SCC 599

13. The view that came to be expressed by the Supreme Court in *P&B Pharmaceuticals* was again reiterated in **Larsen & Toubro Ltd. v. Collector of Central Excise**[5] and we thus deem it appropriate to reproduce the following paragraphs from that decision:

> "**14.** Acts of fraud or suppression, it is well settled, must be specifically pleaded. The allegations in regard to suppression of facts must be clear and explicit so as to enable the noticee to reply thereto effectively. It was not the case of the Revenue that the activities of the appellant were not known to it.
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> **15.** Admittedly, when the first show-cause notice was issued, the extended period of limitation was not resorted to. A notice should ordinarily be issued within a period of six months (as the law then stood) i.e. within the prescribed period of limitation but only in exceptional cases, the said period could be extended to 5 years. When in the original notice, such an allegation had not been made, we are of the opinion that the same could not have been made subsequently as the facts alleged to have been suppressed by the appellant were known to them.
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> **xxxx xxxx xxxx**
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> **17.** Yet again in *Nizam Sugar Factory* v. *CCE* [(2006) 11 SCC 573 : (2006) 197 ELT 465] the ratio rendered in *P&B Pharmaceuticals Ltd.* [(2003) 3 SCC 599 : (2003) 153 ELT 14] has been reiterated stating: (*Nizam Sugar Factory case* [(2006) 11 SCC 573 : (2006) 197 ELT 465] , SCC p. 577, para 11)
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> > "*11*. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show-cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the appellant assessee."
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> > In the said decision, this Court followed the earlier judgment of the Division Bench of this Court in *ECE Industries Ltd.* v. *CCE* [(2004) 13 SCC 719 : (2004) 164 ELT 236] , wherein it was categorically stated: (*Nizam Sugar Factory case* [(2006) 11 SCC 573 : (2006) 197 ELT 465] , SCC pp. 575-76, paras 6 & 8)
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> > > "*6*. The appellant was served with a second SCN by the Collector on 16-7-1987 alleging that the appellant

[5] (2007) 9 SCC 617

> was supplying carbon dioxide to another unit as per agreement dated 19-3-1983; that they had not taken necessary licence; had not followed the procedure prescribed under the Rules; and had not discharged duty liability. The said SCN covered the period of Assessment Years 1982-1983 to 1986-1987. The appellant responded to the second SCN and took the plea that the SCN under consideration was practically a repetition of the allegations contained in the SCN dated 28-2-1984 and for the period April 1982 to September 1982 the Department had raised demands under two different SCNs. It was pointed out that carbon dioxide in the impure form was not marketable as it also contained carbon monoxide in lethal proportions. It was contended that they were under bona fide belief that since such impure carbon dioxide was not exigible to payment of duty, they were not required to file either classification list or the price list or take out licence. It was submitted that resorting to extended period of limitation under Section 11-A(1) was not justified in the circumstances of the case. The appellant was served with the third SCN on 12-9-1988 for the period 16-3-1988 to 27-6-1988 on the same allegations. The assessee filed its reply in terms of the earlier replies i.e. reply to SCN dated 16-7-1987. The adjudicating authority did not accept the appellant's contention and the demands raised in the SCN were confirmed.
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> *8*. Without going into the question regarding classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in *P&B Pharmaceuticals (P) Ltd.* v. *CCE* [(2003) 3 SCC 599 : (2003) 153 ELT 14] has taken the view that in a case in which a show-cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the Department."

18. Furthermore, extension of the period of limitation entails both civil and criminal consequences and, therefore, reasons therefor must be specifically stated in the show-cause notice, in absence whereof the court would be entitled to raise an inference that the case was not one where the extended period of limitation could be invoked.

[See *CCE* v. *Punjab Laminates (P) Ltd.* [(2006) 7 SCC 431]"

14. As is evident from the proposition which came to be propounded by the Supreme Court in *P&B Pharmaceuticals* and *Larsen & Toubro*, it was held that once necessary facts had already been brought to the notice of the authorities at different points in time, the same would clearly be a circumstance destructive of any allegation of the First Proviso to Section 73(1) being applicable. The Supreme Court held that once the stand of the assessee was known and formed the subject matter of earlier notices, it would be impermissible for the respondents to allege suppression of facts. When those principles are applied to the facts of the present case, it becomes apparent that it was wholly impermissible for the respondents to resort to the First Proviso to Section 73(1) of the Act.

15. Regard must also be had to the fact that most of the SCNs which had preceded the one impugned before us were based on a purported failure on the part of the petitioner to respond to earlier notices which had been issued seeking clarifications and responses. We fail to appreciate how a mere lapse on the part of an assessee to respond to such notices could have qualified the criteria which underlies and constitutes the foundation for the application of the First Proviso to Section 73(1). We so observe additionally in light of the undisputed position of the respondents being enabled by statute to either proceed ex parte or even frame a best judgment assessment in case an assessee were to fail to cooperate.

16. On a more fundamental plane, we take note of the following recitals which appear in the impugned SCN and which constituted the basis for the extended period having been invoked:

"5. Whereas the party did not disclose to the Department while filing their ST—3 returns that they paid representative fee/retention fee to their overseas representatives for marketing and support services and not paid service tax on the said amount under RCM based on proper exemption notification/rules, thereby wilfully suppressing facts about non-payment of service tax with intent to evade payment of Service Tax. Further, during the course of audit, the assessee also failed to give plausible explanation for non-payment of service tax on the same amount. The scope of service provided by the overseas representatives to assessee clearly indicates that the assessee is using such services to expand their business and adding customers in India. Therefore, extended period is invocable in terms of proviso to Section 73(l) of the Finance Act, 1994.

It appears that the assessee have not reflected the details of payment to their overseas representative in their ST-3 and have not assessed correct liability as per Rule 2(l)(d)(G) of Service Tax Rules, 2004 read with Notification No. 30/2012-BT dated 20.06.2012 thereby contravened the provisions of the Finance Act, 1994 and rules made thereunder with intent to evade payment of service tax.

Accordingly, the assessee's declaration in the self-assessment memorandum (Part B2 of Part B ST-3 returns) of having filled the particulars correctly and of also having assessed and paid the service tax correctly as per as per the provisions of the Finance Act, 1994 and rules made thereunder, appears to be wilful misstatement. Assessee has failed to discharge this onus. These acts of omission and commission on the part of the assessee resulted in non-payment of service tax as discussed under aforesaid paras. These acts of the assessee appear to have been done with intent to evade payment of service tax due. Further it appears that, had the audit not been initiated, the evasion of service tax would not have come to light. Thus, it appears that the assessee have intentionally and wilfully suppressed the fact of provision of taxable services from the department and violated various provisions of the Act/Rule with intent to evade payment of service tax payable by the assessee. Hence the proviso to sub section (1) of Section 73 of the Finance Act, 1994 for the extended period of limitation appears to be invocable for the purpose of issuing of show cause notice for the period 2014-15 to 2017-18 (Apr to June)."

17. As is ex facie apparent from a reading of the above, there is no material on the basis of which the allegation of a wilful suppression of facts is sought to be sustained. Regard must be had to the fact that the extended period of limitation cannot be justified by a mere

reproduction or incantation of the language of the statute. A wilful suppression of facts, and which may have allegedly lead to a failure to pay tax, would have to rest on material which constitutes proof of the allegation levelled.

18. We, consequently, and for all the aforesaid reasons allow the instant writ petition and quash the impugned SCN dated 17 October 2019.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

FEBRUARY 3, 2025/kk