

Complete text of the judgment on the aforesaid issue argued by APRA & Associates LLP is reproduced below: -

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH, COURT NO. I

SERVICE TAX APPEAL NO. 52064 OF 2018

[Arising out of the Order-in-Appeal No. 120/Central Tax/Appl-II/Delhi/2018 dated 31/01/2018 passed by The Commissioner of Central Tax (Appeals – II Delhi, New Delhi – 66.]

M/s International Air Charter

42, Shakti Apartments, Ashok Vihar, New Delhi – 110 052.... Appellant

VERSUS

Commissioner of Central Tax (Appeals – II),

Delhi, UG Floor, EIL Annexe Building, Bhikaji Cama Place, New Delhi – 66....

Respondent

APPEARANCE:

Shri Atul Kumar Gupta, Fellow Chartered Accountant – for the appellant

Shri S.K. Meena, Authorized Representative (DR) – for the Department

CORAM: HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51662/2023

DATE OF HEARING: 13.12.2023

JUSTICE DILIP GUPTA:

International Charter [the appellant].

2. The appellant was engaged in providing non-scheduled operation of aircraft for the period upto 30.11.2009 by making the services of aircraft available to various entities for travelling to places in India pre-fixed and pre-intimated on payment of charges, based on duration and destination. The appellant believed that the services provided were neither 'scheduled air transportation of passengers' nor 'supply of tangible goods for use' and, therefore, did not pay the service tax. According to the appellant, the services provided were for 'air transportation of passengers'.

3. However, a show cause notice dated 23.10.2013 was issued to the appellant proposing a demand of service tax under the category of 'supply of tangible goods'. The show cause notice also invoked the extended period of limitation contemplated under the proviso to section 73 (1) of the Finance Act, 1994 [the Finance Act]. The appellant filed a reply to the show cause notice and denied the allegations made therein. The Additional Commissioner, by order dated 22.05.2017, confirmed the demand of service tax after holding that the extended period of limitation was correctly invoked. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals) which was dismissed by order dated 30.01.2018.

4. Shri Atul Kumar Gupta, learned consultant appearing for the appellant submitted that the extended period of limitation could not have been invoked in the facts and circumstances of the case and, therefore, the impugned order deserves to be dismissed for this reason alone. In support of his contention, learned consultant placed reliance upon the following two decisions of this Tribunal :-

(i) **EIH Ltd. versus Commissioner of Central Excise, Delhi – I [2019 (24) G.S.T.L. 592 (Tri. – Del.)]** ;

(ii) **Commissioner of Service Tax, New Delhi versus Charter Services P. Ltd. [2017 (5) G.S.T.L. 107 (Tri. – Del.)]**

5. Shri S.K. Meena, learned authorized representative appearing for the department has, however, supported the impugned order and submitted that it does not call for any interference in this appeal.

6. The submissions advanced by learned consultant for the appellant and the learned authorized representative appearing for the department have been considered.

7. The sole contention that has been advanced by the learned consultant for the appellant is that the extended period of limitation could not have been invoked. The show cause notice alleges that as the appellant had intentionally and willfully suppressed facts regarding providing taxable services and did not file the ST-3 returns, it appeared that the appellant had intentionally evaded payment of service tax and the facts would not have come to the notice of the department if the investigation not been conducted.

8. The appellant filed a detailed reply to the show cause notice and submitted that the appellant was under a bonafide belief that it was not liable to pay service tax since the services provided by the appellant were “air transport of passenger service”. The appellant also contended that mere suppression of facts is not enough for invocation of the extended period as suppression has to be willful with an intent to evade payment of service tax.

9. This submission of the appellant did not find favour of the Additional Commissioner. The Additional Commissioner held that there is no requirement in law that suppression has to with intention to evade payment of service tax and mere suppression is enough for invoking the extended period of limitation.

10. The Commissioner (Appeals) has merely confirmed the order passed by the Additional Commissioner without even examining the contention advanced by the appellant that the extended period of limitation could have been invoked only if there was suppression of facts with intent to evade payment of service tax.

11. The finding recorded that suppression of facts is enough to invoke the extended period of limitation under the proviso to section 73 (1) of the Finance Act and there is no necessity of any intent to evade payment of service tax, is against the well settled principles.

12. Even assuming that there was suppression, it has to be examined whether suppression was wilful 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.

13. Before advertent 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.”

14. 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 “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)

15. 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)

16. 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.”

17. 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)

18. 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.**

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.”

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.”

(emphasis supplied)

19. Very recently 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.

XXXXXXXXXX

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)

20. 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.

21. 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.**

(emphasis supplied)

22. The impugned order dated 31.01.2018 passed by the Commissioner (Appeals) is, accordingly, set aside and the appeal is allowed.

(Dictated and pronounced in open court.)

AUTHOR



CA. Atul Kumar Gupta, a staunch leader has risen to the highest echelon of the accounting profession to acquire the position of President of The Institute of Chartered Accountants of India for the year 2020-21. He has served the Accountancy Profession for more than two decades and is widely respected for his strong organisational skills and deep insight in the affairs of profession. A commerce and a law graduate by education, he also

served as Chairman of NIRC of Institute of Cost Accountants of India and Institute of Chartered Accountants of India. He served various committees of ICAI as Chairman including Board of Studies, Indirect Taxes, National Economic Advisory, Digital Accounting and Assurance Board, Cost Optimisation Group, Accounting Standard for local Bodies and many more.

With deep interest in the research, he is credited for the project of preparation of accrual-based financial statements of the Indian Railways (third largest Railway of world). With his diverse and deep knowledge, he has served in various governmental bodies in the past. He has also been a member of Government Accounting Standards Advisory Board (GASAB), Insurance Regulatory & Development Authority (IRDA), SEBI's Primary Market Advisory Committee. On the International front, presently he is on the Board of International Federation of Accountants (IFAC), XBRL International.

On Professional front, he deals with Goods and Service Tax matters (Earlier Service tax) and represents assessee on various fronts including CESTAT, AAR, NAPA & GST Council. He remained instrumental in drafting of GST law when chaired the Indirect Taxes Committee of ICAI. His Being thoroughly conversant with the professional concerns and demands of his times, CA. Gupta has authored more than 15 editions of books on Service tax and GST and has published numerous articles in leading newspapers, magazines and professional newsletters, E-Book and delivered lectures in about 1800 seminars and conferences on Indirect Taxes, Train and Trainer and other topics of Professional Interest.



+91 98101 03611, +91-0124-4477824



atulservicetax@gmail.com



C-9, Block C, Sushant Lok 1, Gurugram 122002 (Haryana) India