

HIGH COURT OF CHHATTISGARH, BILASPURTAXC No.3 of 2020

1. The Principal Commissioner, CGST And Central Excise, GST Bhavan, Dhamtari Road, Tikrapara, Raipur Chhattisgarh.

---- Appellant

Versus

1. Mammen Engineering Works

Address No.1 : A-7, Ashirwadpuram Colony, Dhirampur, Raigarh, Chhattisgarh.

Address No.2 : S-121, J.P. Nagar, Stage-2, RSPO, Tiruvalla - 689111, Kerala.

---- Respondent

For Appellant Mr. A.S. Kachhawaha & Ms Pushpa Dwivedi,
Advocate

For Respondent Mr. Anurag Tripathi, Advocate

Hon'ble Mr. Justice Goutam Bhaduri &
Hon'ble Mr. Justice Radhakishan Agrawal

Judgment on Board

Per Goutam Bhaduri, J.

20-2-2024

1. The present appeal is filed against the order dated 1-8-2019 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for short 'the Tribunal') in Service Tax Appeal No.51270 of 2015-DB whereby the case of the respondent herein was remitted afresh to the Commissioner to calculate the service tax liability for the period prescribed under Section 73 (1) of the Finance Act, 1994 (for short 'the Act') without invoking the

proviso that seeks to extend the period of limitation. Being aggrieved by such order the present appeal by the Department.

2. (i) The facts of the case, in brief, are that an appeal was preferred by the respondent herein Mammen Engineering Works before the Tribunal against the order dated 17-12-2013 passed by the Commissioner, Central Excise & Customs, Raipur, whereby the demand of service was confirmed and the interest & penalty was further levied.
- (ii) Admittedly, the respondent is a sub contractor, who had received payment of ₹ 19,30,94,411=00 for fabrication, erection and commissioning work of the main contractors namely; M/s Gannon Dunkerley & Co. Limited, New Delhi and M/s Viraj Steel & Energy Limited, New Delhi. According to it, they did not pay the service tax on the plea that same was required to be paid by the main contractor and the main contractor had also discharged the tax liability and had given a certificate to the respondent.
- (iii) According to the respondent, during the course of audit it came to fore that in the service tax return ST-3 the respondent has not shown or paid the service tax, therefore, since the liability to pay the service tax was on the respondent according to Section 71A and the circular issued by the Central Government the respondent was duty bound to show the payment of service tax or its entry in the return.

(iv) The show cause notice dated 19-10-2012 was issued that for the financial year 2007-08, 2008-09, 2009-10 and 2010-11 and the trial balance sheet for the financial sheet for financial year 2011-12 (up to December, 2011) the respondent as a sub contractor received the payment from the main contractor but had not paid the service tax. Consequently, as per the circular dated 4-1-2008 issued by the Central Board of Excise and Customs the extended period of limitation was invoked.

(v) The respondent replied to the said show cause notice stating that the main contractors had already made payment of service tax, therefore, they did not collect the service tax from the main contractor and the levy of tax was not justified. It was further stated that had there been payment of service tax there would have been double taxation and the work order also contains stipulation that the main contractor would bear the service tax payment. It was also stated that the respondent has paid the service tax regularly but for the works under the sub contract, it had not paid the service tax for a *bona fide* reason that the issue was under consideration in a reference matter about the liability of payment of service tax coupled with the fact that the same was actually deposited by the main contractor.

(vi) The Commissioner held it against the respondent, which was challenged before the Tribunal and the Tribunal has passed the order impugned by remitting back the case to the

Commissioner to recalculate for the period prescribed under Section 73(1) of the Act without invoking the proviso that seeks to extend the period of limitation. Being aggrieved by such order, this appeal by the Department.

3. Learned counsel for the appellant/Department would submit that as per Section 71A of the Act to pay service tax is mandatory and Section 73 which is akin to Section 11A of the Central Excise Act, 1944 (for short 'the Act, 1944') extend the period of limitation in case of fraud collusion willful misstatement or suppression of facts contravention of any provisions. He would further submit that under these circumstances when the statute mandates to file return which was embodied in the circular of the Department, while giving ST-3 return, which is a return to be filed by the respondent, the respondent should have disclosed the payment of service tax and having not done so there has been willful defiance. Consequently, they could not escape the liability of extended period of limitation under Section 73 of the Act. In support of his contention, he would place reliance upon the decision rendered by the Supreme Court in the matter of *Commissioner of Central Excise, Visakhapatnam v Mehta and Company*¹ to submit that ignorance will not give any privilege to the respondent and, therefore, the appeal is to be admitted on the substantial question of law that the extended period of limitation would be applicable and the order of the Tribunal is liable to be set aside.

¹ (2011) 4 SCC 435

4. Learned counsel for the respondent, *per contra*, would submit that the payment of service tax by a sub contractor was under adjudication as different views of different Tribunals were existing. He would further submit that ultimately this was decided in the case of ***Commissioner of Service Tax v M/s Melange Developers Private Limited***² and the show cause notice which was issued in 2012 did not take care of this issue and the *bona fide* of the respondent can be shown by the fact that the main contractor had already paid the service tax, which the Commissioner has accepted, therefore, when the interpretation of law itself was in issue, non disclosure of payment of service tax in ST-3 by the sub contractor cannot be said to be deliberate, as otherwise it was a *bona fide*. Consequently, the proviso clause to Section 73 of the Act could not have been invoked.
5. We have heard learned counsel appearing for the parties and perused the documents.
6. Perusal of the order of the Commissioner would show that it is an admitted fact that copies of certificates certifying payment of Service Tax by the main contractor were placed on record, which are as under :

² Service Tax Appeal No.50399 of 2014 (decided on 23-5-2019)

Sl. No.	Certificate No. & date	Name of the party (main contractor)	Work order No.
1	Ref.D/CE/MSS/09610 dated 10.01.2012	M/s Gannon Dunkerley & Co. Ltd., New Delhi	D/CE/810/03899 Dtd 1.07.2006, D/CE/0919 Dtd 19.12.2007, D/CE/03568 Dtd 21.07.2008.
2	Ref.D/CE/MSS/004521 dated 11.01.2012	M/s Gannon Dunkerley & Co. Ltd., New Delhi	D/MED/MW/241/1619 dt 19.06.2008
3	Ref.D/CE/MSS/004522 dated 11.01.2012	M/s Gannon Dunkerley & Co. Ltd., New Delhi	D/MED/MW/246/3225 dt 16.09.2009, D/MED/MW/241/1619 Dtd 19.06.2008.
4	Ref.D/CE/MSS/004523 dated 11.01.2012	M/s Gannon Dunkerley & Co. Ltd., New Delhi	D/MED/MW/246/3225 dt 16.09.2009, D/MED/MW/269/148 dt 07.04.2010, D/MED/MW/270/340 dt 08.04.2010, D/MED/MW/241/1619 dt 19.06.2008.

7. Section 71A of the Act speaks about filing of return by certain customers. The same is quoted below for ready reference “

SECTION 71A. Filing of return by certain customers.-

Notwithstanding anything contained in the provisions of section 69 and section 70, the provisions thereof shall not apply to a person referred to in the proviso to sub-section (1) of section 68 for the filing of return in respect of service tax for the respective period and service specified therein and such person shall furnish return to the Central Excise Officer within six months from the day on which the Finance Bill, 2003 receives the assent of the President in the

prescribed manner on the basis of the self-assessment of the service tax and the provisions of section 71 shall apply accordingly.

8. Section 71A along with Section 73 of the Act, which touches upon recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded, thirty months time was provided, which was earlier one year. It was made to eighteen months and subsequently was made to thirty months. Relevant part of Section 73 of the Act is quoted below for ready reference :

SECTION 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, Central Excise Officer may, within thirty months 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 “thirty months”,
the words “five years” had been substituted.

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9. It is also an admitted fact that in reply to the show cause notice the main defence raised by the respondent herein was that since the main contractor has already made payment of service tax, as such, the respondent did not collect service tax amount from the main contractor. It was stated that if the payment of service tax made by the respondent, the same would have resulted in double taxation. It was also stated that there was no suppression of fact with an intent to evade the payment of service tax.
10. It is an undisputed fact that the question about levy of service tax by the sub contractor was subjected to adjudication in the matter of *M/s Melange Developers Private Limited* (supra), which was decided on 23-5-2019 by the larger Bench of the Tribunal, wherein the issue was set at rest that the sub contractor was liable to pay service tax. Therefore, the said date in the facts of this case it was a doubtful issue as to who would be liable to pay the service tax. In the instant case the service tax was already deposited by the main contractor. The facts involved in this case that there was an interpretation issue about the liability.
11. The Supreme Court in the matter of *Commissioner, Central Excise and Customs v Reliance Industries*³ while dealing with the issue of suppression of facts, observed that if the appellant was

3 (2023) SCC OnLine SC 767

under a *bona fide* belief based upon certain judgment then in such case the said *bona fide* belief cannot be stated to be a suppression of fact and Court held thus at paras 8, 14 & 23 :

8) On the issue of time bar, the CESTAT has held that during the relevant period the Appellant could have entertained a bonafide belief that it had correctly discharged its duty liability in view of the view taken by the Tribunal in the case of IFGL Refractories Ltd.¹ which came to be reversed by this Court only on 9.8.2005. It is relevant to note here that insofar as the decision on time bar is concerned the view of the two learned members who constituted the division bench of CESTAT was unanimous.

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14) In the case of Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay², this Court, while dealing with a similar fact circumstance wherein the extended period of limitation under the abovementioned proviso had been invoked, held that since the expression "suppression of facts" is used in the company of terms such as fraud, collusion and willful misstatement, it cannot therefore refer to an act of mere omission, and must be interpreted as referring to a deliberate act of non-disclosure aimed at evading duty, that is to say, an element of intentional action must be present.

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23) We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bonafide 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 malafide 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 co-exist. In such cases of 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 bonafides. 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 bonafide manner.

12. While interpreting Section 11A of the Act, 1944, which is *pari materia* to Section 73 of the Act, the Supreme Court in the matter of *Continental Foundation Jt. Venture v Commissioner of Central Excise, Chandigarh-I*⁴ held thus at paras 9 & 10 :

9) We are not really concerned with the other issues as according to us on the challenge to the extended period of limitation ground alone the appellants are bound to succeed. Section 11A of the Act postulates suppression and, therefore, involves in essence mens rea.

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.

13. Applying the aforesaid principles of law to the instant case and for the reasons mentioned hereinabove, since the interpretational issue

4 2007 (216) ELT 177 (SC)

was disputed which was ultimately set at rest in 2019, it can very well be presumed that the same would not amount to suppression and the acts were *bona fide* whereby the proviso that seeks to extend the period of limitation under Section 73 of the Act can be pressed into motion. Consequently, the order of the learned Tribunal remitting back to the Commissioner to calculate the service tax liability for the period prescribed under Section 73(1) of the Act without invoking the proviso that seeks to extend the period of limitation appears to be justified. In the facts and circumstances of the case no question of law arises for consideration.

14. As a sequel, the present appeal, *sans* merit, is liable to be and is hereby dismissed. There shall be no order as to cost(s).

Sd/-

(Goutam Bhaduri)
Judge

Sd/-

(Radhakishan Agrawal)
Judge

Gowri

CASE NOTE

1. Assessee filed return according to *bona fide* belief based upon certain judicial precedent then in such case the *bona fide* belief cannot be stated to suppression of fact.

निर्धारिती ने कतिपय न्यायिक पूर्वनिर्णयों पर आधारित सद्भाविकता विश्वास के अनुसार अपना कर विवरणी प्रस्तुत किया है, तो ऐसे सद्भाविक विश्वास को तथ्य का छिपाया जाना नहीं कहा जा सकता है।

2. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty.

सही जानकारी प्रस्तुत किये जाने में लोप मात्र तथ्यों को छिपाया जाना नहीं है जबतक कि वह जानबुझकर शुल्क के भुगतान को रोकने के लिये न किया गया हो।