

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

**Service Tax Appeal No. 50010 of 2017**

(Arising out of Order-in-Original No. DLI/SVTAX/001/com/025/16-17 dated 27.05.2016 passed by Commissioner of Service Tax, Delhi)

**Vigasa Industries Private Limited**

47-B, Pusa Road, Karol Bagh,  
New Delhi- 110005

**...Appellant**

VERSUS

**The Commissioner of Service Tax,**

**Audit-1, Delhi**

17-B, IAEA House, IP Estate, MG Marg,  
New Delhi – 110002

**...Respondent**

**APPEARANCE:**

Shri Srinivas Kotni and Shri Akshay Kumar, Advocates for the appellant

Shri S. K. Ray, Authorized Representative for the Respondent

**AND**

**Service Tax Appeal No. 50235 of 2017**

(Arising out of Order-in-Original No. DLI/SVTAX/001/com/025/16-17 dated 27.05.2016 passed by Commissioner of Service Tax, Delhi)

**Commissioner of Service Tax,  
Delhi-I**

**...Appellant**

VERSUS

**M/s. Vigasa Industries Private Limited,**

16/32, 2<sup>nd</sup> Floor, Old Rajinder Nagar,  
New Delhi- 110005

**...Respondent**

**APPEARANCE:**

Shri S. K. Ray, Authorized Representative for the department

Shri Srinivas Kotni and Shri Akshay Kumar, Advocates for the respondent

**CORAM:**

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**

**HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 21.05.2024**

**Date of Decision: 01.10.2024**

**FINAL ORDER NO's. 58750-58751/2024****JUSTICE DILIP GUPTA:**

The Commissioner of Service Tax Audit-1, Delhi<sup>1</sup> by order dated 27.09.2016 confirmed the demand of service tax of Rs. 6,98,240/- for the period 2012-13 to 2013-14 with interest. However, the demand for the extended period of limitation was dropped. The Commissioner also appropriated an amount of Rs. 11,00,000/- deposited by the appellant during investigation towards the liability for the period prior to 2012-13, which period was covered under the extended period of limitation. The Commissioner also imposed penalty under sections 76 and 77 of the Finance Act 1994<sup>2</sup>, but refrained from imposing penalty under section 78 of the Finance Act.

2. **Service Tax Appeal No. 50010 of 2017** has been filed by Vigasa Industries Private Limited<sup>3</sup> to assail that part of the order dated 27.09.2016 that appropriates the amount of Rs. 11,00,000/- for the period prior to 2012-13.

3. **Service Tax Appeal No. 50235 of 2017** has been filed by department to assail that part of the order dated 27.09.2016 that has dropped the demand for the extended period of limitation.

4. The issue that arises for consideration in the appeal filed by the appellant is whether the amount of Rs. 11,00,000/- deposited by the appellant under protest during investigation could have been appropriated by the Commissioner in the impugned order for the period covered by the extended period of limitation, which demand was dropped by the Commissioner for the reason that the extended

---

1. the Commissioner  
2. the Finance Act  
3. the appellant

period of limitation could not have been invoked. Another issue that would arise for consideration is whether the extended period of limitation under the proviso to section 73(1) of the Finance Act could have been invoked.

5. Shri Srinivas Kotni, learned counsel for the appellant assisted by Shri Akshay Kumar submitted that:

- (i) The Commissioner could not have appropriated the amount of Rs. 11,00,000/- towards a claim which was barred by time. In support of this submission, learned counsel placed reliance upon the decision of the Tribunal in **A.S. Abdul Khader vs. Commissioner of C. Ex., Cus. & S.T., Hyderabad-II<sup>4</sup>**;
- (ii) Payment of any amount under protest cannot be considered as acceptance of the liability. In support of this contention, learned counsel placed reliance upon the decision of the Tribunal in **Federation of Andhra Pradesh Chamber of Commerce and Industry vs. C.C.E., Cus. & S.T., Hyderabad-II<sup>5</sup>**; and
- (iii) The amount deposited during investigation has to be treated as a 'deposit' and cannot be treated as 'duty' or 'tax'. In support of this contention learned counsel placed reliance upon the decision of the Allahabad High Court in **Ebiz. Com Pvt. Ltd. vs. Commissioner of Central Excise, Customs and Service Tax and Ors<sup>6</sup>**.

---

4. 2017 (4) G.S.T.L. 285 (Tri.-Hyd.)

5. 2017 (4) G.S.T.L. 193 (Tri.-Hyd.)

6. Civil Misc. Writ (Tax) Petition No. 578 of 2016 Decided on

6. Shri S. K. Ray, learned authorized representative appearing for the department, however, submitted that the Commissioner was justified in appropriating the amount of Rs. 11,00,000/- towards the liability and that the extended period of limitation was correctly invoked.

7. The first contention advanced by learned counsel for the appellant deserves to be accepted in view of the decision of the Tribunal in **A.S. Abdul Khader**. The Tribunal held as follows:

**“9. The department appears to be confused with ‘time-barred civil debt’ and ‘time-barred demand of duty/tax’, provided by statute.** The remedy to recover a civil debt is extinguished by the lapse of time. Thus in the case of time-barred civil debt, the remedy in law to recover the debt is extinguished although the right over the debt may still exist. The debtor can make payment of a time-barred debt on his own volition which may give rise to extension of limitation period and right of recovery to the creditor. The same analogy cannot be applied to recovery of duty/tax. The liability to pay tax is derived from Article 265 of the Constitution of India. **Acknowledgment of a time-barred civil debt (by making part payment) cannot be equated with the payment of tax/duty during proceedings. If tax is paid in excess, the law provides for refund.**

**10. In the present case, though appellant paid the amount, he has contested the liability both on merits and limitation.** On receipt of a show cause notice he has every right to defend the same. **The adjudicating authority held the demand/assessment for the year 2005-06 to be time-barred. When the demand is ‘time-barred’ it refers to a bar to a legal claim that arises from the lapse of a defined length of time. The essence is that the demand is disallowed or invalidated on the ground that the time limit for raising the**

**demand has expired. When the order of assessment holds the demand to be time-barred, in effect, the assessment for that particular year is held as cancelled.**

**11.** In the present case, even though the appellant paid the amount voluntarily prior to issuance of show cause notice, he has contested the demand. **At the level of adjudication itself, the demand in respect of the period 2005-06 was set aside as being time-barred. In such a case, the appellant can claim refund of service tax as well as the interest thereon.** It is submitted by the appellant that as he later received the service tax portion from the client, he is not claiming refund of the service tax portion. The appellant has confined refund claim for the interest portion only which is borne from his own pocket. **The demand for the period 2005-06 having been set aside, I am of the view, that the rejection of claim for refund of interest is improper.** Had the assessee not contested the demand after making the payment voluntarily, the argument of the department could have some force. So also, if the department had not issued a show cause notice the situation would have been different. The appellant has made payment at the earliest only with the intention to reduce his burden, in case the litigation goes against him. **When the demand is held as time-barred, the legal claim of the department on the said service tax (2005-06) is cancelled.** Therefore the interest portion has to be refunded to the appellant. The penalty has already been refunded to the appellant.”

**(emphasis supplied)**

8. In **Federation of Andhra Pradesh Chamber of Commerce and Industry**, the Tribunal held that any payment made under protest cannot be considered as acceptance of the liability.

9. In this view of the matter, the appropriation of an amount of Rs. 11,00,000/- towards a time barred claim is not justified.

10. The next issue that arises for consideration in the appeal filed

by the department is whether the extended period of limitation could have been invoked in the facts of circumstances of the case.

11. The findings recorded by the Commissioner in impugned order on this aspect are as follows:

"21. **It is an admitted fact that the Service Tax authorities had initiated the investigations on the basis of letter dated 04.10.2012** of Additional Commissioner (AE) of the Central Excise Commissionerate, Delhi-I. Along with said letter copies of the Balance Sheets for the period 2008-09 to 2010-11, statements recorded by Central Excise officers and cheque for a sum of Rs. 1,00,000/- were also forwarded to the Service Tax authorities. **Thereafter, the investigations continued for a period of about two years and even after such investigations, the demand for the period 2008-09 to 2011-12 was issued on the basis of Balance sheets which were available on record. The balance sheets for the period upto 2010-11 were available on the date of initiation of the investigations and in para 6 of the SCN-1 it has also been admitted that the balance sheet for the year 2011-12 was placed on record on 28.12.2012.** The demand for the year 2012-13 has been issued on the basis of best judgment provisions under Section 72.

22. **Thus, in this case, though the investigation continued for about two years, no new fact came to the fore.** The quantification of Service Tax liability could also not be done and at last the demand was issued on the basis of records available/best judgment. Though there is an allegation that the Noticee did not cooperate, however, it is also an admitted fact that the Noticee during this period had deposited a sum of Rs. 11,00,000/-. The Noticee, in their reply, have stated that they fully cooperated with the department and even without quantification of demand, as and when asked to deposit the amount, they deposited a sum of Rs. 11,00,000/- to safeguard Government revenue, if any.

23. I further find that for invoking extended period of

limitation, the SCN-1 has alleged that the Noticee were issued several summons but they did not provide details/documents sought by the department. **Thus, the case for invocation of extended period is based on the allegation that they did not provide/hide the information from the department. I find that non-furnishing of information is not a ground for invoking larger period of limitation. The extended period of limitation is not invocable for yet another reason that the facts were in the knowledge of the department in the year 2012 but no SCN was issued till April 2014. Accordingly, had the action, which has been taken in 2014, been taken earlier, the larger period of limitation prior to such SCN could have sustained. Since the normal period of limitation during the relevant period was eighteen months, thus, the demand for the period till 2011-12 is barred by limitation."**

**(emphasis supplied)**

12. In order to appreciate whether the extended period of limitation was correctly invoked, it would 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 eighteen 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 "eighteen months", 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 eighteen months 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 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 "eighteen months", the word "five years" has been substituted.

15. 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.

16. In **Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay**<sup>7</sup>, 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 reopen 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**

---

7. **1995 (78) E.L.T. 401 (S.C.)**

**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)**

17. This decision was referred to by the Supreme Court in **Anand Nishikawa Company Ltd. vs. Commissioner of Central Excise**<sup>8</sup>

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**

---

8. 2005 (188) E.L.T. 149 (SC)

**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)**

18. The burden of proving that the appellant had suppressed facts with an intent to evade payment of service tax was clearly upon the department. It was necessary for the department to illustrate any positive act on the part of the appellant. The investigation started in October 2012 and continued for a period of almost two years. The entire records, including the balance sheets were available with the department and no new facts came to the notice of the department when the show cause notice was issued on 22.04.2014. The department has failed to substantiate that the appellant suppressed material facts with an intention to evade payment of service tax.

19. There is, therefore, no error in the order passed by the Commissioner holding that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

20. In this view of the matter Service Tax Appeal No. 50010 of 2017 filed by the appellant to the extent it appropriates an amount of Rs. 11,00,000/- towards the time barred claim cannot be sustained and is set aside. The appeal is allowed to this extent.

21. Service Tax Appeal No. 50235 of 2017 filed by the department against that part of the order passed by the Commissioner that holds that the extended period of limitation under the first proviso to section 73(1) of the Finance Act could not have been invoked is dismissed.

(Order Pronounced on **01.10.2024**)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(HEMAMBIKA R. PRIYA)**  
**MEMBER (TECHNICAL)**

Jyoti