GAHC010109052020

2024:GAU-AS:8101-DB

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : C.Ex.App./6/2020

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, DIBRUGARH MILAN NAGAR, LANE-F, P.O. C.R. BUILDING, DIBRUGARH-786003.

…….Appellant

-Versus-

M/S NORTH EASTERN CABLES AND CONDUCTORS PRIVATE LIMITED (FORMERLY NORTH CABLES AND CONDUCTORS PVT. LTD.), JORHAT, ASSAM.

…….Respondent

– B E F O R E –
HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE SUMAN SHYAM

For the Appellant : Mr. S.C. Keyal, Senior Standing Counsel, Central Board of Indirect Taxes & Customs.

For the Respondent : Mr. G.N. Sahewalla, Senior Advocate assisted by Mr. H.K. Sarma, Advocate.

Date of hearing : 16.08.2024

Date of Judgment : 19.08.2024

JUDGMENT & ORDER (CAV)

(Vijay Bishnoi, CJ)

Heard Mr. S.C. Keyal, learned Senior Standing Counsel, Central Board of

Indirect Taxes & Customs appearing for the appellant. Also heard Mr. G.N. Sahewalla, learned senior counsel assisted by Mr. H.K. Sarma, learned counsel for the respondent.

2. This central excise appeal is filed by the appellant/Revenue being aggrieved with the final order No.76932/2019 dated 04.12.2019 passed by the Customs, Excise and Service Tax Appellate Tribunal (in short, CESTAT), East Regional Bench, Kolkata in Service Tax Appeal No. 76119/2014 (arising out of Order-in- Original No.01/ST/ADJ/Commr./Dib/14-15 dated 23.05.2014 passed by the Commissioner of Central Excise and Service Tax, Dibrugarh), whereby the appeal filed by the respondent was allowed with consequential relief and the impugned demand was set aside.

3. The appeal was admitted vide order dated 15.09.2021 passed by this Court and the following substantial question of law was framed for adjudication:

> "*Whether under the peculiar facts and circumstances of the case CESTAT, Kolkata was correct in holding that the demand of CENVAT Credit of Central Excise Duty utilized by the assessee was barred by limitation?*"

4. The brief facts of the case are that the respondent M/s North Eastern Cables and Conductors Private Limited (hereinafter referred to be as "the respondent Company"), having its Service Tax Registration under Jorhat Division, had provided services under the category of "Erection, Commissioning or Installation Services" to various organizations like Electricity Board etc. under the specific contract. Apart from that, the respondent Company had also supplied materials like RCC Poles, conductors, angles etc. under separate and independent contract.

5. According to the appellant, the supply of materials is not covered under the purview of Service Tax Act but the Erection, Commissioning or Installation part is liable to Service Tax. It was alleged by the appellant that the respondent Company had violated Rule 3 and Rule 6 of the CENVAT Credit Rules, 2004 (hereinafter to be referred to as "the Rules of 2004") by availing and utilizing the CENVAT Credit of Central Excise Duty amounting to Rs.1,30,84,835.00 only on inputs used for rendering exempted service as defined under Rule 2(e) of the Rules, 2004.

6. It is not in dispute that the periodic returns ST-3 had been submitted by the respondent Company wherein the details regarding total credit, credit utilized as well as credit reversed had been mentioned.

7. On the basis of an audit objection, the Commissioner, Central Excise and Service Tax, Dibrugarh had issued a demand-cum-show-cause notice (SCN) to the respondent Company on 04.11.2013 and asked the respondent Company to show cause as to why, an amount of Rs.1,30,84,835/- wrongly utilized by it should not be demanded and recovered along with the interest. It was also mentioned as to why interest to the tune of Rs.1,19,16,571/- be not demanded and recovered from it and why penalty should not be imposed upon it.

The relevant portion of the demand-cum-show cause notice is reproduced hereunder:

> "*Whereas, it appears that the noticee had availed an amount of Rs.9,85,58,079.00 as Service Tax, Rs.19,71,958.00 as Education Cess and Rs.8,06,968.00 as Secondary & Higher Education Cess as Cenvat Credit of Central Excise Duty on inputs which was exclusively used for provision of exempted service, i.e. supply of materials during the period of Oct, 2009 to March, 2011. The noticee had also utilized an amount of Rs.1,27,03,718.00 as Service Tax, Rs.2,54,080.00 as Education Cess and Rs.1,27,037.00 as*

Secondary & Higher Education Cess out of the above amount of Cenvat Credit during the period Oct, 2009 to March, 2010 for payment of service tax on taxable service i.e. Erection, Commissioning or Installation services and the balance amount of Cenvat Credit of Rs.8,58,54,361.00 as Service Tax, Rs.17,17,878.00 as Education Cess and Rs.6,79,931.00 as Secondary & Higher Education Cess were reversed on 31.03.2011.

Whereas, it also appears from the above that the noticee had been taking ineligible Cenvat Credit w.e.f. Oct, 09 and after partially utilizing the Cenvat Credit, reversed an amount of Rs.8,82,52,170.00 on 31.03.11 but interest thereon is not yet paid. Rule 14 of the Cenvat Credit Rules, 2004 stipulates that where Cenvat Credit had been taken and utilized wrongly the same along with interest shall be recovered under Section 75 of the Finance Act, 1994. Whereas, the noticee had reversed the principal amount on their assessment and the interest thereon of Rs.1,19,16,571.00 stands recoverable from them. (Enclosed as Annexure B)

SUMMARY OF CENVAT CREDIT AVAILED, UTILIZED AND REVERSED

Cenvat Credit	*S. Tax*	*Ed. Cess*	*S&HE Cess*	*Total*
Availed during 01.10.09 to 31.03.11	*98558079.00*	*1971958.00*	*806968.00*	*101337005.00*
Utilized during 01.10.09 to 31.03.11	*12703718.00*	*254080.00*	*127037.00*	*13084835.00*
Reversed as on 31.03.11	*85854361.00*	*1717878.00*	*679931.00*	*88252170.00*

Whereas, it appears that the utilization of Cenvat Credit of Rs.1,27,03,718.00 as Service Tax, Rs.2,54,080.00 as Education Cess and Rs.1,27,037.00 as Secondary & Higher Education Cess aggregating to Rs.1,30,84,835.00 (Rupees One Crore Thirty Lakh Eighty Four Thousand Eight Hundred Thirty Five) only for payment of service tax is not permissible in terms of the provisions of the Cenvat Credit Rules, 2004 and the same is liable to be recovered under Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of the Finance Act, 1994 along with interest thereon under Section

75 ibid invoking extended period of 5(Five) years of contravention of Rule 14 of the Cenvat Credit Rules, 2004 with intent to evade payment of Service Tax and hence they are also liable to penal action under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.

In view of the above, the noticee is hereby called upon to show cause(s) to the Commissioner of Central Excise and Service Tax, Milan Nagar, "F" Lane, P.O. C.R. Building, Dibrugarh-785003 within 30(Thirty) days from the date of receipt of this notice as to why:

(a) The ineligible Cenvat Credit of Rs.1,27,03,718.00 as Service Tax, Rs.2,54,080.00 as Education Cess and Rs.1,27,037.00 as Secondary & Higher Education Cess aggregating to Rs.1,30,84,835.00 (Rupees One Crore Thirty Lakh Eighty Four Thousand Eight Hundred Thirty Five) only wrongly utilized by them should not be demanded and recovered from them along with interest as the prevailing rate in terms of proviso to Section 73(1) and Section 75 of the Finance Act, 1994 respectively.

(b) Interest of Rs.1,19,16,571.00 arising out of reversal of ineligible credit of Rs.8,82,52,170.00 should not be demanded and recovered from them in terms of Section 75 of the Finance Act, 1994; and

(C) Penalty should not be imposed upon them in terms of provisions of Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.

The noticee is also asked to produce all the evidences upon which they intend to rely in support of their defence at the time of showing cause. They should also mention in their written reply/explanation whether they would like to avail the opportunity to be heard in person or through their legal representative before the case is adjudicated.

If, no cause is shown within the stipulated period of 30(thirty) days from the date of receipt of this notice or they do not appear before the adjudicating authority for personal hearing on the appointed day, the case will be decided ex-parte on the basis of the available records without any further reference to them.

This notice is issued without prejudice to any other action that may be taken against the noticee at any time under the Finance Act, 1994 and Rules made thereunder or by any other law that are for the time being in force in India."

8. After receiving the above notice, the respondent submitted its reply.

The relevant portion of the reply filed submitted by the respondent is

reproduced hereunder:

"***2.0. Reply of the noticee:-*** *The noticee vide their letter Ref. No.NECON/CE/SCN/01/2013-14 dated 7th December, 2013 have submitted their reply wherein they have inter alia stated that :*

2.1. *The Noticee has been submitting the ST-3 Returns along with relevant records & documents as enclosure to the Returns since obtaining the registration. No fact has ever been suppressed or mis-reported.*

2.2 . *The credit under dispute was taken with bonafide belief that the same are eligible for credit under cenvat credit rules & the credits so taken and utilized were duly reflected in the relevant returns as well as submission of said returns were duly made to the proper office enclosing all the relevant documents where the details of the credits were reflected and the credits were in the knowledge of the dept, and no objection was raised by the deptt. Nor the deptt. has ever said that the credits were irregular until the Audit raised objection vide audit report No.137/HQRSAUDIT/A/DIB/11-12 (audited on 27.03.2012 to 28.03.2012). The objection in question was raised on 28.03.2013 i.e., after 02 years 11 months 01 days.*

2.3. *After the audit, the aforesaid demand in question made on 04.11.2013 vide the subject SCN, Audit undertaken on 28.03.2012 and demand made on 04.11.2013 i.e., after a gap of about twenty months. SCN should have been issued within one year period from the date of visit of auditors to the applicant's premises. Demand barred by limitation-Sec.11A of CE Act, 1944 (para 7) [2009 (246) ELT.794 (Commissioner Appeal) Pune-II. In Re; VANAZ Engineer Ltd.*

2.4. *The proper office has already accepted the ST-3 return as correct and complete and not raised any objection years together so the matter already attained the finality. Therefore the audit objection in question has no legality as per Section 11A of Central Excise Act, 1944 or as per Section 73 of the Finance Act, 1994 when all the facts and circumstances were brought to the notice of the deptt. like that of broad day light.*

2.5. *The records of duties not levied or not paid of short levied or short paid or erroneously refunded, whether or not such non-levy, or non-payment, short levy or short payment or erroneous refund, as the case may be, was on the basis of approval or acceptance or assessment relating to rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a central Excise officer may within "one year" from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short paid or to whom the refund has erroneously been made, requiring him to show cause why he should*

not pay the amount specified in the notice. The notice is therefore time barred.

2.6 *The "Intention" is clear enough that the notice already declared all relevant particulars in the ST-3 returns and submitted all the relevant records and documents along with the return. And in the SCN no allegation of fraud/collusion/willful mis-statement suppression of facts were brought against the notice and, only the allegation of contravention of rule 14 of cenvat credit rules, 2004 with intent to evade payment of Service Tax" is brought against the notice which is also not correct.*

2.7 *. (a) The contravention of rule 14 as aforesaid alleged has happened. But only contravention has nothing to do in case of extended period. It is very much necessary that the "intention to evade payment of duty" must be present. Here in the instant case, as all the particulars were already declared, the intention to evade payment of duty is absent. Hence, extended period is not invokable. Therefore the SCN in question is not sustainable and liable to be quashed and set aside.*

(b)(i) The notice under Section 11 A must be issued within one year of the relevant date of submission of ST-3 return in question. The instant notice issued beyond one year; hence stands as time barred; (ii) As per Section 73 of Service Tax Act, when there is no suppression, mis-statement, fraud, collusion etc. no notice can be issued after one year or eighteen months as the case may be and question of penalty does not arise at all.

2.8. *SCN based on Audit objection:-*

(a) Larger period of limitation not invokable when SCN is issued based on audit objection [Aditya College of Competitive Exam Vs. CCE; Visakhapattanam-2009 (16) STR. 154 (Tri Bong)].

(b) Demand based on audit objection and limitation : The tribunal held that when audit objections raised that impugned services were liable to tax, therefore, department cannot allege suppression of facts and invoke larger period of limitation of demand [Vikram Ispat Vs Commissioner-2007(8) STR.559 (Tri-Mumbai)].

(c) That as per provision 73(i) of Service Tax Act, demand in normal case should be made within one year or eighteen months of the availment as the case may be and not after. The judgments quoted above have said that after detection by audit or basing on audit objection a demand cannot be made on extended period. Hence the instant SCN in question stands as barred by limitation of time and liable to be quashed and set aside ..... "

9. From the above extracted portions of the reply, it can be assumed that the respondent Company had not contested the demand on merits but contested the show-cause notice only on the ground that it was beyond the period of limitation.

10. Considering the reply filed on behalf of the respondent, the Commissioner, Central Excise and Service Tax, Dibrugarh, vide order dated 23.05.2014, had rejected the objections raised by the respondent Company regarding limitation and confirmed the demand of ineligible CENVAT Credit as Service Tax along with the interest and penalty .

The relevant portions of the order impugned, passed by the Commissioner, Central Excise and Service Tax, Dibrugarh, is reproduced hereunder:

> *"4.6. ……The said noticee claimed that they had submitted ST-3 Returns along with relevant records & documents and no facts was suppressed or mis-reported. Moreover, they have submitted that "credit under dispute was taken with bonafide belief that the same are eligible for credit under cenvat credit rules & the credits so taken and utilized were duly reflected in the relevant returns as well as submission of said returns were duly made to the proper office enclosing all the relevant documents where the details of the credits were reflected and the credits were in the knowledge of the dept. and no objection was raised by the deptt. nor the deptt. has ever said that the credits were irregular until the Audit raised objection vide audit report No.137/HQRSAUDIT/A/DIB/11-12 (audited on 27.03.2012 to 28.03.2012). The objection in question was raised on 28.03.2012 i.e., after 02 years 11 months 01 days". In this regard, I find that mere submission of Returns may not be a sufficient obligation for a service provider to avoid mis-statement or suppression of fact. There may be some elements of mis-statement or suppression of fact which may happen even after regular submission of ST-3 Returns. Hence, the department is required to investigate or to audit an assessee under the umbrella of the department. Besides, I find that the said noticee had taken and utilized ineligible cenvat credit violating the provision of Cenvat Credit Rules, 2004. They even did not reverse the wrongly taken Cenvat Credit until audit*

had pointed out. After the completion of audit they reversed the amount of Cenvat Credit which was not utilized upto the date of audit. Had the audit not unearthed the fact, it would have remained hidden. Therefore, I find that there was an element of mis-statement and contravention of Service Tax Rules with intent to evade payment of Service Tax. Had the audit not pointed out, they would have utilized the whole amount instead of reversing the ineligible cenvat Credit which was wrongly taken and thereby they might have evaded payment of Service Tax for providing taxable services. So, the ineligible Cenvat Credits that were utilized for payment of Service Tax for providing taxable service under the category of "Erection, Commissioning or Installation Services" is required to be recovered in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73(1) and 75 of the Finance Act, 1994 invoking extended period. I, therefore find that the allegation in this regard is sustainable and maintainable. The amount of Cenvat Credit of Rs.1,30,84,835.00 (Rupees One Crore Thirty Lakh Eighty Four Thousand Eight Hundred Thirty Five) only wrongly taken and utilized by them towards the payment of Service Tax, Education Cess and Secondary & Higher Education Cess is required to be confirmed along with interest thereon in terms of Sections 73(2) and 75 of the Finance Act, 1994. Therefore, I find, no such time-barred factor in this case as claimed by the said noticee.

……..

……

5.1. I confirm the demand of ineligible Cenvat Credit of Rs.1,27,03,718.00 as Service Tax, Rs.2,54,080.00 as Education Cess and Rs.1,27,037.00 as Secondary & Higher Education Cess aggregating ***Rs.1,30,84,835.00 (Rupees One Crore Thirty Lakh Eighty Four Thousand Eight Hundred Thirty Five) only*** *wrongly utilized by them in terms of Section 73(2) of the Finance Act, 1994 along with applicable interest on* ***Rs.1,30,84,835.00*** *in terms of Section 75 ibid.*

5.2. I impose interest of ***Rs.1,19,16,571.00 (Rupees One Crore Nineteen lakh Sixteen Thousand Five Hundred Seventy One) only*** *demanded under Section 75 of the Finance Act, 1994 arising out of reversal of cenvat credit of Rs.8,82,52,170.00 without utilizing the same towards the payment of Service Tax for providing taxable service for the reasons as discussed above.*

5.3. I impose penalty of ***Rs.1,30,84,835.00 (Rupees One Crore Thirty Lakh Eighty Four Thousand Eight Hundred Thirty Five) only*** *in terms of Section 78 of the Finance Act, 1994 read with Rule 15 of the Cenvat Credit Rules, 2004 for the reason as discussed above.*

11. Being aggrieved with the impugned order dated 23.05.2014 passed by the Commissioner, Central Excise & Service Tax, Dibrugarh, the respondent Company had filed an appeal before the CESTAT, Kolkata and the Tribunal after hearing both the parties allowed the appeal vide impugned order.

The operative portion of the impugned order is reproduced hereinunder:

"*7. We find that in the present case, since the credit amount is legally not eligible, the appellant is not contesting the demand on merits but only on limitation. The appellant has submitted that credit has been availed wrongly without any intent to evade payment of service tax. We find that in the course of adjudication, the appellant specifically submitted the plea that they disclosed details of availment of credit in the ST-3 returns and that there is no evidence to the contrary to prove that credit has been willfully availed to defraud the Revenue. In the instant case, we observe that the SCN has not shown any positive evidence to prove willful fraud or suppression to justify invocation of extended period of limitation.*

8. We take note of the decision of the Tribunal in the case of Ultra Tech Cement Ltd. v. CCE, Jaipur-II [2014 (48) taxmann.com99 (New Delhi-CESTAT), wherein it has been held that:

"*2. Without going into the merits of the case, I find that the Revenue has invoked the longer period of limitation by simplicitor observing that the appellant has not disclosed the nature of service in respect of which credit was availed. Commissioner (Appeals) has observed that the returns filed by the appellant only shows the total amount of credit by which it cannot be inferred that credit of certain inadmissible input services was availed.*

3. However, I find no justification in the above stand of the lower authorities. Admittedly, the credit was duly reflected in the returns, which were filed with the Revenue. In the absence of any column in returns requiring the nature of the input or input services, the non-disclosure of the same cannot attribute any mala fide to the assessee. The Hon'ble Gujarat High Court in the case of Prolite Engineering Co. v. Union of India 1990 taxmann.com 680 has observed that non-disclosure of information, which is not required to be disclosed or recorded by statutory provisions or prescribed proforma does not amount to suppression or concealment. By applying the ratio of the above decision, I hold the demand to be barred by limitation. Accordingly, assessee's appeals are allowed."

9. In view of the above discussions, we are of the considered view that the

appellant's case succeeds on limitation. Thus, the impugned demand is set aside and the appeal is allowed with consequential relief as per law."

12. Mr. S.C. Keyal, Senior Standing Counsel, Central Board of Indirect Taxes & Customs, appearing for the appellant has submitted that the learned CESTAT has erred in holding that the appellant had failed to show any positive evidence to prove willful fraud or suppression to justify invocation of extended period of limitation. It is contended that mere submission of Returns by the respondent Company cannot be deemed that it had discharged its burden.

13. It is submitted by Mr. Keyal that from the facts of the case, it is clear that the respondent Company had taken and utilized ineligible CENVAT Credit violating the provision of CENVAT Credit Rules, 2004 and reversed the same only when the audit objection was raised. It is submitted that this fact itself is sufficient to conclude that there was an element of misstatement with intent to evade payment of Service Tax and therefore, the Commissioner, Central Excise and Service Tax, Dibrugarh had rightly passed the order of recovery of an amount of Rs.1,30,84,835/- and was also justified in demanding interest of Rs.1,19,165/-. It is submitted that the Commissioner was also justified in imposing penalty to the tune of Rs.1,30,84,835/- upon the respondent Company. It is contended that the action of the Commissioner, Central Excise and Service Tax, was in accordance with law whereas the learned CESTAT had ignored the above aspect of the matter and illegally passed the impugned order dated 04.12.2019.

14. Mr. Keyal has submitted that in the above facts and circumstances of the case, the appeal filed by the appellant is liable to be allowed and the substantial

question of law, so framed, is liable to be answered in the negative.

15. In support of the above contentions, Mr. Keyal has placed reliance on the decision of the Hon'ble Supreme Court rendered in ***M/s Modipon Fibre Company, Modinagar, UP vs. Commissioner of Central Excise, Meerut,*** reported in ***2007 0 Supreme (SC) 1391 [Appeal (Civil) No.8529-8531 of 2001 with Civil Appeal Nos.2008-2010 of 2002, decided on 25.10.2007].***

16. Per Contra, Mr. G.N. Sahewalla, learned senior counsel assisted by Mr. H.K. Sarma, learned counsel for the respondent Company has vehemently opposed the writ appeal and has submitted that it is not the case of the appellant that the respondent had not disclosed the details of the CENVAT Credit of Central Excise Duty as Service Tax, Education Cess, Secondary & Higher Education Cess. The Respondent Company has not suppressed anything in the Return. Every detail was with the Department. However, despite having all these details, till the audit objection was raised, no notice was issued to the respondent Company within the limitation period i.e. 18 (eighteen) months from the relevant date and the same was admittedly issued after the expiry of the said period.

It is contended that until and unless the Department is able to demonstrate that the Service Tax, not levied or not paid or short levied or short paid or erroneously refunded by the reason of fraud, collusion, willful misstatement, suppression of fact or contravention of any of the provisions of the Act or of the Rules with the intent to evade payment of Service Tax, the extended period of limitation i.e. 5 (five) years would not be available with the

Department.

17. Mr. Sahewalla has invited our attention towards the demand-cum-show-cause notice dated 04.11.2013 and has argued that in the said show-cause notice, it is nowhere mentioned that the respondent Company had willfully made a misstatement or suppressed the facts with the intention to evade payment of Service Tax and in such circumstances, the findings recorded by the Commissioner, Central Excise and Service Tax, Dibrugarh that there was an element of misstatement and contravention of Service Tax Rules with intent to evade payment of Service Tax is absolutely perverse. It is further argued that the learned CESTAT rightly came to the conclusion that the respondent had disclosed the details regarding availing of CENVAT Credit in ST-3 Returns. There is no evidence to the contrary to prove that the credit had been willfully availed to defraud the Revenue.

18. Mr. Sahewalla, learned senior counsel for the respondent Company has placed reliance on the decision of the Hon'ble Supreme in the following cases:

(i) ***Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut,*** reported in ***(2005) 7 SCC 749.***

(ii) ***Central Foundation Joint Venture Holding, Nathpa, H.P. Vs. Commissioner of Central Excise, Chandigarh-I,*** reported in ***(2007) 10 SCC 337.***

(iii) ***Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd.***, reported in ***(2007) 8 SCC 89***.

(iv) ***Uniworth Textiles Limited Vs. Commissioner of Central Excise, Raipur***, reported in ***(2013) 9 SCC 753***.

(v) ***Escorts Limited Vs. Commissioner of Central Excise, Faridabad,*** reported in ***(2015) SCC 109***.

(vi) ***Commissioner of GST and Central Excise Vs. Citibank N.A.,*** reported in ***(2023) 8 SCC 483.***

19. Mr. Sahewalla, learned Senior Counsel has, therefore, submitted that there is no force in the instant appeal filed on behalf of the appellant and the same is liable to be dismissed and the question of law, so framed, is to be answered in affirmative.

20. Heard the learned counsel appearing for the parties and also perused the material available on record.

21. It is not in dispute that the respondent Company had availed ineligible CENVAT Credit which was not permissible in terms of the provisions of CENVAT Credit Rules, 2004. It is also not in dispute that the total amount of ineligible CENVAT Credit which includes Service Tax, Education Cess, Secondary & Higher Education Cess comes to Rs.1,30,84,835/-.

22. As per Section 73 of the Service Tax (Finance Act, 1994), where any service tax is not levied or paid, short-levied or short-paid or erroneously refunded, a show-cause notice is required to be served upon the person chargeable with the Service Tax within a period of 18(eighteen) months from the relevant date. However, where any 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 willful misstatement or suppression of facts or contravention of any of the provisions of Chapter 5 of the Finance Act or of the Rules made thereunder with the intent to evade payment of Service Tax, then the limitation for serving notice upon the person chargeable with the Service

Tax is extended upto 5(five) years from the relevant date.

It would be apposite to quote the relevant provisions of Section 73(1) of the aforesaid Act which reads as under:

> "***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 '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) willful mis-statement; or*
>
> *(d) suppression of facts; or*
>
> *(e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax, by the person chargeable with 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.*
>
> *Explanation.- Where the service of notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of 'eighteen months' or five years, as the case may be.*

23. Now, the question comes as to whether the respondent Company, in its ST Return, had disclosed all the relevant information regarding availment of CENVAT Credit while submitting ST-3 Returns. If we look into the show-cause notice, it is clear that the respondent Company had provided every details regarding availment of CENVAT Credit in the ST-3 Returns. In the show-cause

notice, the details provided by the respondent in ST-3 Return, had been taken into consideration by the Commissioner, Central Excise & Service Tax. It is also to be noticed that in the said show-cause notice, it is nowhere mentioned that the respondent had misstated any fact with intent to evade the payment of Service Tax.

The findings recorded by the Commissioner, Central Excise & Service Tax to the effect that there was an element of misstatement and contravention of Service Tax Rules with the intent to evade payment of Service Tax is perverse, as the said finding is not based on any material available before it.

24. The Hon'ble Supreme Court in various pronouncements has categorically held that the fact of willful misstatement or suppression should specifically be mentioned in the show-cause notice.

In ***Continental Foundation Joint Venture Holding, Nathpa, H.P Vs. CCE, Chandigarh-I*** (supra), the Hon'ble Supreme Court has defined the expression "suppression" in para No.12, which reads as under:

> "*12. The expression "suppression" has been used in the proviso to Section 11-A 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 (sic evade) 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.*"

In ***CCE, Nagpur Vs. Ballarpur Industries Ltd.*** (supra), the Hon'ble

Supreme Court, relying on the decision in ***Continental Foundation Joint Venture Holding Vs. CCE*** (supra), has observed as under:

> "24. *In Continental Foundation Joint Venture Holding v. CCE, [(2007) 10 SCC 337] a show cause notice under Section 11-A of the 1944 Act was issued to the assessee invoking extended period of limitation on the grounds of suppression, fraud and collusion. The Division Bench of this Court, to which one of us, Kapadia, J., was the member, held that where various circulars, instructions/directions stood issued at different points of time and where there was no clarity in the views expressed by the authorities, extended period of limitation cannot be invoked. It was held that the word "suppression" in Section 11-A of the 1944 Act is accompanied by the words "fraud" or "collusion" and, therefore, the word "suppression" should be construed strictly. That, mere omission to give correct information did not constitute suppression unless that omission was made willfully in order to evade duty. That, suppression would mean failure to disclose full and true information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party would not constitute suppression. That, an incorrect statement cannot be equated with a willful mis-statement. The latter implies making of an incorrect statement with the knowledge that the statement made was not correct."*

In ***Commissioner of GST and Central Excise Vs. Citibank N.A.*** (supra), the Honb'le Supreme Court has observed as under:

> "***Whether the extended period of limitation is available in regard to the demand under show-cause notice dated 24-4-2013?***
>
> *110. The said show-cause notice relates to the period October, 2007 to June, 2012. The normal period within which the power under Section 73 of the Finance Act is exercised is 18 months from the relevant date. However, under the provisions of Section 73(4) if there is wilful suppression by a person then the period is enlarged to five years. The contention of the respondent was that there was no positive act by it. There was only mere inaction. It was further contended that the Department was aware of the receipt of interchange fee by the respondent as issuing bank. There were audits. These arguments have been rejected by the Commissioner by relying on the law laid down by this Court in Assn. of Leasing & Financial Service Companies Vs. Union of India, [(2011)2 SCC 352]. The aforesaid decision was rendered under Section 11-A of the Act. The relevant provisions of Section 11-A in this regard are pari materia with the corresponding provisions in Section 73 of the Act. Suppression is found*

in both statutes as a ground to extend the period. In the aforesaid judgment of this Court has held that the period begins with knowledge by the Department.

111. While on suppression, I may notice the judgment of this Court again rendered under Section 11-A of Central Excise Act and reported in CCE V. Bajaj Auto Ltd. [(2010) 13 SCC 117]. In the said case, I need to notice the following paragraphs: (SCC pp.123-24, paras 15-19)

> *"15. Section 11-A of the Act empowers the Central Excise Officer to initiate proceedings where duty has not been levied or short-levied within six months from the relevant date. But the proviso to Section 11-A(1) provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty. The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it needs to be construed strictly. The initial burden is on the Department to prove that the situation visualised by the proviso existed. But the burden shifts on the assessee once the Department is able to produce material to show that the appellant is guilty of any of those situations visualised in the section.*
>
> *16. Interpreting this provision, this Court in CCE v. Chemphar Drugs and Liniments [(1989) 2 SCC 127 : 1989 SCC (Tax) 245] held: (when the period prescribed was six months prior to it being made one year by the Finance Act, 2000 with effect from 12-5-2000): (SCC p. 131, para 9)*
>
> > *"9. ... In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and*

circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."

17. In Cosmic Dye Chemical v. CCE [(1995) 6 SCC 117] it is held: (SCC p.119, para 6)

> *6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent i.e. intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "willful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."*

18. In Anand Nishikawa Co. Ltd. v. CCE [(2005) 7 SCC 749] this Court has observed: (SCC p. 759, para 27)

> "*27. ... 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 wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression."*

"*19. In our view, on a reading of the relevant provision the extended period of limitation as provided by the proviso to Section 11-A(1) of the Act can only be invoked when there is a conscious act of either fraud, collusion, wilful misstatement, suppression of fact, or contravention of the provisions of the Act or any of the Rules made thereunder on the part of the person chargeable with duty or his agent, with the intent to evade payment of duty. In the present case, the Tribunal [Bajaj Auto Ltd. Vs. CCE, 2006 SCC OnLine CESTAT 283] while considering this issue has not stated whether or not there were any such circumstances which would not allow the Revenue to invoke the extended period of limitation. It only*

observes in its order that since both the assessees are situated under the jurisdiction of the same division and as such it cannot be reasonable to conclude that the Revenue was not aware of the transactions. Since this is not what is envisaged under the proviso to Section 11- A(1) of the Act, we cannot agree with the reasoning and the conclusion reached by the Tribunal."

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179. As regards the Revenue's allegation of wilful suppression, the settled view of this court, is best explained from the following extract of a previous three- Judge Bench ruling, in Cosmic Dye Chemical v. Collector Of Central Excise , [(1995) 6 SCC 117] where it was observed – in relation to Section 11-A of the Central Excise Act, 1944, (which is in pari materia with Section 73 of the Finance Act, 1994) that: (SCC p.119, para 6)

"6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."

This decision was followed in Uniworth Textiles Ltd. v. Commissioner of Central Excise [(2013) 9 SCC 753] where it was stated that: (SCC p.762 para 12)

"12……The conclusion that mere nonpayment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of nonpayment would amount to ordinary default? Construing mere nonpayment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso."

180. Therefore, with regards to the Revenue's allegation of wilful suppression, I find no merit given that this was not the allegation or scope of the show-cause notices issued……".

25. So far as the judgment rendered by the Hon'ble Supreme Court in ***M/s Modipon Fibre Company, Modinagar*** (supra), on which learned counsel for the appellant has placed reliance, we are of the view that the same is distinguishable on facts because in that case, the Hon'ble Supreme Court has clearly recorded a finding that the assessee has filed a declaration without disclosing before the Department the required details whereas in the present case, the respondent has disclosed all the details in the ST-3 Returns. Hence, the above referred judgment is of no help to the appellant.

26. In view of the above, more particularly, in view of the fact that the respondent Company had disclosed all the details about availment of the CENVAT Credit in ST -3 Returns and there is no allegation by the Revenue of willful suppression and misstatement with intent to evade Service Tax in the show-cause notice, we do not find any illegality in the impugned order dated 04.12.2019 passed by the CESTAT. Hence, the substantial question, so framed in this appeal, is answered in the affirmative.

27. In view of the discussion made hereinabove, the instant excise appeal stands dismissed.

JUDGE CHIEF JUSTICE

Comparing Assistant