

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

Decided on: 29.11.2017

+ **CEAC 25/2017 & C.M. No.31344/2017**

BHARAT HOTELS LIMITED

.... Petitioner

Through: Mr. Sanjeev Anand with Mr. Anil Sood and
Mr. Akshay Kapoor, Advocates, for petitioner.

versus

COMMISSIONER, CENTRAL EXCISE (ADJUDICATION)

.... Respondent

Through: Mr. Sanjeev Narula, Sr. Standing Counsel with
Ms. Anunita Chandra, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The appellant challenges an order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) (hereinafter referred to as "Appellate Tribunal"), upholding imposition of penalty for non-compliance with provisions of the *Finance Act, 1994* (also herein referred to as "the Act"), in respect of payment of service tax in respect of management, maintenance and repair services and *mandap keeper* services provided by it.

2. The appellant is a public limited company registered under the *Companies Act, 1956* having its registered office at Barakhamba Lane, Connaught Place, New Delhi; it is engaged in the business of running five-star hotels at various locations all over India. As a part of its business activities, the appellant has been providing and continues to provide services

such as Mandap Keeper services, Health Club Spa services, Beauty Parlour services, Rent-a-Cab services, Franchisee services, Management, Maintenance or Repair services, Business Auxiliary services, Dry Cleaning and Internet service.

3. The substantial question of law for consideration in the appeal is whether the Appellate Tribunal fell into error in holding that invocation of the extended period under proviso to Section 73(1) of the Act in respect of two services, i.e. management, maintenance and repair services and *mandap keeper* services is justified in the facts and circumstances of the case.

4. The facts of the case are that on 11.03.2005, an enquiry was initiated by the Service Tax Department/Commissioner, Service Tax, Delhi regarding non-payment of service tax by the appellant on the Franchisee Services under reverse charge mechanism. This service was being received by the appellant from M/s. Inter-Continental Hotel Corporation, USA, for which it paid a franchisee fee. The enquiry was subsequently transferred to the Directorate General of Central Excise Intelligence, R.K. Puram, New Delhi (hereinafter referred to as “the DGCEI”), who expanded the scope of the enquiry from Franchisee Fee to Mandap Keeper, Management Repair & Maintenance, Business Exhibition Services and Club Membership Services provided by the appellant in all its units throughout India. During the enquiry, the appellant informed the authority that they were already registered with the Service Tax Department and had paid service tax amounting to ₹ 7,66,681/- for the Franchisee services. The revenue also -(i) took notice of the fact that the appellant was not paying service tax on the gross receipt of revenue under Mandap Keeper Service during the period 2004-05 and 2005-06; (ii) informed the appellant that they were liable to pay

service tax on the management, maintenance and repair services provided by it in its hotel complex and World Trade Centre and World Trade Tower owned by it during the period 2005-08.

5. During the enquiry itself, the appellant paid service tax amounting to ₹ 1,84,01,238/- along with interest towards franchisee services, mandap keeper service and management, maintenance and repair services. Thereafter, in accordance with the abovementioned enquiry, a Show Cause Notice dated 24.10.2008 (hereinafter referred to as “the SCN”) was issued to the appellant with respect to its Delhi Unit which called upon the appellants to show cause as to why: -

- (i) The provision of Section 73(i) of the Act should not be invoked for demand & recovery of Service Tax within 5 years from the relevant date for the reasons cited in the SCN.
- (ii) Service Tax amounting to ₹ 1,96,44,277/- (Rupees One Crore ninety six lacs forty four thousand two hundred seventy seven only) should not be demanded & recovered under Section 73 read with Section 68 of the Act & Rule 6 of the Service Tax Rules, 1994.
- (iii) The interest should not be charged & recovered from them under Section 75 of the said Act.
- (iv) Penalty under Sections 76, 77, 78 of the Act *ibid* not be imposed for various omissions as mentioned above.
- (v) The amount already deposited by them towards the interest & service tax liabilities during the given period should not be appropriated.

6. The SCN alleged the non-payment of service tax by the appellant for

various services like club membership services, business exhibition services etc.; however, for the purpose of this appeal, only Mandap Keeper Services and Management, maintenance and repair services are relevant. The relevant paragraphs of the SCN as are excerpted below:

“ *I. Mandan Keeper's Service: (Para 12.3 of SCN)*

The practice followed by the appellant for calculation of Service Tax was examined on the basis of some invoices issued by the appellant during the relevant period and it was found that:

- i. In case of bill for food the service tax is at rate giving 40% abatement to the existing applicable rate. For example, instead of giving 40% on the gross value and charging service tax on it at applicable rate, they were taking the gross value and charging service tax @ 60% of the applicable rate. This does not appear to be correct.*
- ii. Separate Bills for sale of beverages & liquor in the banquet functions were shown and no service tax was paid on that.*
- iii. The functions wherever the audio & video equipment were provided from outside another bill was raised and no service tax was being levied on that.*
- iv. The hotel also levies service charge @ 10% of the bill value which is in the nature of tip and is distributed amongst the staff and is added in the food bill itself. No service tax was being paid on this amount as well.*
- v. The banquet halls were being provided on rent and a separate bill was raised for catering. The hotel was discharging service tax on the rental value under mandap keeper (rental) taking no abatement on the same while taking abatement on the food bill at the same time.*
- vi.*

When investigation was initiated, the appellant started

accepting the stand taken by DGCEI and started paying service tax on the above stated components.

II. Management, Maintenance or Repair Services: (Para 14.1 of SCN)

The appellant is providing maintenance services to shopping arcade in their complex, the two properties World Trade Centre and World Trade Tower owned by them and charges them for the same under various expenses heads but at the time the enquiry was initiated, they were not paying any service tax on the services provided under this head. However, the service tax liability @ 12.36% is being discharged by the appellant on gross amount charged since 2007.

(Para 15.2) ...”

7. The appellant replied to the SCN resisting the payment for previous periods as barred by limitation. The Commissioner, Central Excise (Adjudication), New Delhi through order dated 28th/29th December, 2011 confirmed the demand of service tax of ₹1,68,31,739/- payable on franchisee services, mandap keeper services, management, maintenance and repair services, business exhibition services and club services along with interest and penalties. The Commissioner also ordered appropriation of the amount of ₹1,07,02,011/- of service tax already paid, leaving the balance demand of ₹61,29,728/-.

8. The appellant appealed, under Section 86 of the Act the order of the Commissioner, Central Excise (Adjudication) before the Appellate Tribunal. The Appellate Tribunal directed the dropping of demands on account of franchisee services, club membership services and exhibition services, and upheld the service tax liability in respect of management, maintenance and

repair services and mandap keeper services in the impugned order. The Appellate Tribunal also gave a direction that adjustment/refund of the excess service tax paid by the appellant be dealt with in terms of Section 11B of the *Central Excise Act, 1944* (“Excise Act”) as made applicable to service tax. The present appeal seeks setting aside of the impugned order and the order dated 28th/29th December, 2011 passed by the Commissioner, Central Excise (adjudication), New Delhi, and refund and/or adjustment of service tax paid by the appellant from the respondent.

Appellant’s Contention:

9. The appellant submitted that during the period 2004-05 and 2005-06, it relied on Notification No. 12/2003 dated 20.06.2003 issued by the Central Government and judicial pronouncements of the Supreme Court, raised bills for Mandap Keeper Services in the manner described below and did not pay any service tax on the charges for food, beverages, liquor and mineral water. The manner in which the bills were raised was *firstly*, lump sum composite bill for hall rentals inclusive of food charges; *secondly*, lump sum composite bill for food charges inclusive of hall rentals and *lastly*, hall charges and charges for food and beverages, liquor, mineral water separately charged in the invoices.

10. The appellant urges that it was acting under a *bona fide* belief that the sale of the abovementioned items would attract VAT and not service tax. The appellant further submitted that the appellant had, during the enquiry itself, paid service tax on the sale of the abovementioned items for the period 2004-05 and 2005-06 with interest and also started paying service tax on these items regularly from April 2006.

11. As regards the invocation of the extended limitation period for penalty liability, it was argued that the appellant had not suppressed any material facts or committed any fraud with the intent to evade payment of service tax and was in fact, under a *bona fide* belief that it was entitled to claim exemption from payment of service tax on sale of goods while providing services under the Notification No. 12/2003-ST. The appellant also submitted that the sale value of food, beverages, mineral water and liquor cannot be a subject of both VAT as well as Service Tax. The appellant relied on the judgment of the Supreme Court in *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes* 2008 (56) BLJR 1038, to say that payment of service tax and VAT are mutually exclusive. The relevant portion of the judgment as excerpted in the petition is reproduced below:

“Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy.”

12. The appellant also relied on a decision of the Appellate Tribunal and also submitted that the Commissioner and the Appellate Tribunal have wrongly alleged that non-inclusion of the 10% service tax charged by it in its payment of service tax amounted to suppression of material facts. The appellant has contended that the authorities have not considered the clarification given by the appellant that as an administrative policy it did not charge/recover service tax and yet deposited the 10% service charge out of its own revenue.

13. The appellant submitted that the maintenance and repair of immovable property became taxable only from 16.06.2005 under Section 65(105)(zzg) of the Act and that under a *bonafide* mistake it was unaware about this development which led to omission to charge of service tax from the occupants of shopping arcade in its hotel premises and also from the occupants of World Trade Centre and World Trade Tower buildings, owned by it, on the maintenance service provided to them. Consequently, it did not discharge its service tax liability under the taxable category of "Management, Maintenance and Repair Services" for the Financial Year 2005-06. However, it got its registration certificate amended and started discharging its service tax liability from the financial year 2006-07 after the payment of service tax under Section 65(105)(zzg) came to its knowledge. The appellant also paid the service tax for the financial year 2005-06, being ₹48,41,187/-. The appellant, therefore, submits that in view of the said payment, no SCN should have been issued. It appellant contended that the department, however, due to calculation error claimed that ₹49,37,872/- was payable towards service tax and even if the Department's calculation were to be taken as correct, SCN of ₹96,685/-, being the difference could have been issued but the Department had instead issued a show cause notice alleging non-payment of the entire amount of ₹49,37,872/-.

14. In this regard, the appellant referred to the case of *Commissioner of Central Excise v. Chemphar Drugs & Limiments* [1989 (40) ELT 276 (SC)] wherein the Supreme Court held that:

“In order to make a demand under Section 11A of the Central Excises and Salt Act for beyond a period of six months and up to a period of five years 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 to be established. Where department had full knowledge about the facts and the manufacturer's action or inaction is based on their belief that they were required or not required to carry out such action or inaction, the period beyond six months cannot be made applicable.”

15. The appellant also submitted that it is a settled law laid down by the Supreme Court that if there was a *bona fide* dispute between the parties in regard to the question as to whether service tax is payable or not, the authorities cannot apply extended period of limitation and cannot impose penal interest and penalties. Thus, for the above reasons, the appellant contended that the longer period of limitation could not be invoked under the proviso to section 73(1) of the *Finance Act* and penalty could not have been imposed on the appellant.

16. The appellant argued that there was neither any allegation nor any averment in the SCN as to how non-payment/short-payment of tax was by reason of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Act or Rules made thereunder, with intent to evade payment of duty nor there was any evidence or proof or finding in the impugned orders dated 29.12.2011 and 18.05.2017 that service tax was not paid on account of any fraud, collusion, wilful misstatement or suppression of fact and that there was intent to evade payment of tax by the appellant. It is the case of the Appellant that none of the ingredients of the proviso to Section 73(1) have either been spelt out or have been discussed and, therefore, in absence of satisfaction of none of the essential ingredients, suppression cannot be alleged by the department. The

appellant also mentions that despite it being a settled legal position that mere allegations in the SCN that the appellant has wilfully suppressed the facts from the Department does not discharge the duty vested in the Department to invoke proviso to Section 73 (1) of the Act; the Department has to establish with independent finding that there was wilful suppression on part of the Appellant. The appellant, therefore, submits that in the present case, the duty of the Department does not get simply discharged by making a statement that the Appellant has wilfully suppressed material facts.

17. It was argued that the Adjudicating Commissioner and the Appellate Tribunal failed to appreciate that there was a reasonable cause for its actions/inactions complained of by the department and thus in view of Section 80 of the *Finance Act* no penalty could be imposed on the appellant. The appellant highlighted that no specific action or omission was evident in the allegations in the SCN with respect to Mandap Keeper Service and Management, Maintenance and Repair Services. The relevant parts of the SCN is excerpted below:

“INVOCATION OF EXTENDED PERIOD

16. Invocation of extended period under Section 73 of Finance Act, 1994 for demand of Service tax short paid. Review of the documents revealed that M/s. BHL has wilfully suppressed the material facts with an intent to evade payment of service tax.

a) Mandap Keeper Service: A review of the Service Tax returns (RUD 12) filed by M/s. BHL for the period 2004-05 and 2005-06 showed that they have not paid service tax on the total value of the service by resorting to separate invoicing for beverage, liquor without adding it to gross value. Further although they charge 10% service charge, they never added it for computation of value and suppressed the material facts.

Further although they hire convention equipment they never show it as included in the gross value and used to issue separate invoice for it to the client. They have been asked/requested time and again to produce the documents substantiating their stand and to compute correct taxable value, but they failed to do so prolonging the investigation for a long period only with an intent to keep the short-paid tax with them for their primary benefit. They did all this to fight competitors in their business and thus wilfully suppressed the material information from department with an intent to evade the service tax liability. Even despite being pointed out they have neither deposited full service tax liable on them nor have furnished the documents asked from them time & again. Thus, it appears that they have concealed the same from the department in order to avoid service tax payment.

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c) Maintenance & Repair Service: They have concealed the facts of actual receipt of payments on account of maintenance and repair of premises they have been undertaking in their hotel occupied by shopping organization. Further the maintenance charges for two building were never properly disclosed with intent to evade tax.

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20. Whereas it appears from the foregoing facts that the party has wilfully suppressed the value of taxable service and by not discharging the due Service Tax Liability as such the provisions of extended period as provided under Section 73 of the said Act is invokable in their case and Service Tax liability of Rs.1, 96,44,277/- (Rupees One Crore ninety six lacs forty four thousand two hundred seventy seven only) is recoverable from them as detailed above."

18. The respondent argued that in respect of Mandap Keeper Service and Management, Repair and Maintenance Service, the appellants did not discharge the service tax liability and the same was paid only after the

inquiry was initiated by the revenue. The revenue submitted that there was no legal interpretation or *bona fide* doubt with reference to these services and that the appellants, being an organized corporate entity, cannot take a plea of ignorance of legal provisions or *bona fide* belief in this regard. The very fact that the appellant paid up the amounts during investigations and inquiry, revealed that it acknowledged its liability.

19. Counsel for the revenue argued that the plea of *bona fides* cannot be urged by the appellant, because it nowhere showed by its conduct that it was in fact ignorant of the tax liability cast on it. Urging the Court to reject the plea regarding validity of the extended period for imposition of penalty, the counsel submitted that the Court should be cognizant of the fact that the appellant is a large corporate house, with an army of advisers and consultants and its plea of ignorance of its tax liability cannot be accepted at face value; rather the onus to show that it did not act mala fide was upon it, rather than otherwise.

20. The only question of law that arises in the present appeal is whether the Central Excise and Sales Tax Appellate Tribunal (CESTA) fell into error in holding that the eviction of the extended period under proviso to Section 73(1) of the *Finance Act* in respect of two services, i.e. management, maintenance and repair services and Mandap Keeper services is justified in the facts and circumstances of the case. At the outset, the relevant section in question, i.e., Section 73 of the *Finance Act* (as applicable in 2008) needs to be stated. The section is reproduced below for 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 one year 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 misstatement; 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 “one year”, the words “five years” had been substituted.

Explanation- Where the service of the 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.”

21. The meaning of the words ‘wilful misstatement’ and ‘suppression of facts’ has been a subject matter of judicial scrutiny in various Supreme Court

Judgments which are necessary to be discussed before proceeding to the merits of this case. However, these words have been interpreted as given in Sections 28 of the *Customs Act, 1962* (hereinafter referred to as “the Customs Act”) and 11A of the *Excise Act, 1944* (hereinafter referred to as “the Excise Act”). In order to determine if the same interpretation extends to Section 73 of the Act, the following decisions of the Supreme Court have to be looked at. In the case of *Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur* [(2012) 9 SCC 753] the Supreme court discussed its previous judgments to determine the applicability of the proviso to Section 28 of the *Customs Act* for extension of limitation period for issuing notice for payment of duties that have not been levied, short-levied or erroneously refunded. The relevant paragraphs of the judgment are excerpted below:

“9. The show cause notice was issued on 02.08.2001, more than six months after the Appellant had imported furnace oil on behalf of Uniworth Ltd. in January, 2001. This time period of more than six months is significant due to the proviso to Section 28 of the Act. The Section, at the relevant time, read as follows:

28. Notice for payment of duties, interest, etc.

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so

short-levied or part 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:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this Sub-section shall have effect as if for the words "one year" and "six Months", the words "five years" were substituted.

Explanation.- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.(Emphasis supplied)

10. The Section imposes a limitation period of six months within which the concerned authorities must commence action against an importer/assessee in case of duties not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in some specific circumstances, viz. collusion, wilful misstatement or suppression of facts. Since the said show-cause notice was issued after the elapse of six months, the revenue, for its action to be legal in the eyes of law, can only take refuge under the proviso to the section.”

22. Section 28 of the Customs Act like Section 73 of the Act (in this case) relates to notice for payment of duty that has not been levied, short-levied or erroneously refunded. The proviso to Section 28 of the *Customs Act* and the proviso to Section 73(1) of the Act, both set out conditions for extension of limitation period for issuing of a Show Cause Notice. The difference between the two sections lies in the insertion of conditions of ‘fraud’ and ‘contravention of any of the provisions of this Chapter or of the rules made

thereunder with intent to evade payment of service tax’ in Section 73 of the *Finance Act, 1994*. In *Uniworth* (supra), the Supreme Court discussed the interpretation of the proviso of a similar provision in Section 11A of the *Excise Act* and held that it is *parimateria* to the proviso to section 28 of the *Customs Act*. The relevant paragraphs are excerpted below:

“13. This Court, in Pushpam Pharmaceuticals Co. v. Collector of Central Excise, Bombay [1995 Supp (3) SCC 462], while interpreting the proviso of an analogous provision in Section 11A of The Central Excise Act, 1944, which is parimateria to the proviso to Section 28 discussed above, made the following observations:

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18. We are in complete agreement with the principle enunciated in the above decisions, in light of the proviso to Section 11A of the Central Excise Act, 1944. However, before extending it to the Act, we would like to point out the niceties that separate the analogous provisions of the two, an issue which received the indulgence of this Court in Associated Cement Co. Ltd. v. Commissioner of Customs [(2001) 4 SCC 59]3, at page 619 in the following words:

53. ... Our attention was drawn to the cases of CCE v. Chemphar Drugs and Liniments [(1989) 2 SCC 12]7, Cosmic Dye Chemical v. CCE [(1995) 6 SCC 117], Padmini Products v. CCE [(1989) 4 SCC 275], T.N. Housing Board v. CCE [1995 Supp (1) SCC 50] and CCE v. H.M. M. Ltd. (supra). In all these cases the Court was concerned with the applicability of the proviso to Section 11-A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show-cause notice in the case of non-levy or short-levy to five years from a normal period of six months....

54. While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11-A to be invoked, the intention to evade payment of duty must be shown. This has been clearly brought out in *Cosmic Dye Chemical* case where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial. While disagreeing with the aforesaid interpretation this Court at p. 119 observed as follows: (SCC 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 constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful.

The aforesaid observations show that the words "with intent to evade payment of duty" were of utmost relevance while construing the earlier expression regarding the misstatement or suppression of facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso could be invoked.

55. Though it was sought to be contended that Section 28 of the Customs Act is in parimateria with Section 11-A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring

in proviso to Section 11-A of the Excise Act which are missing in Section 28(1) of the Customs Act and the proviso in particular....

56. *The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions "misstatement" and "suppression of facts" are to be qualified by the word "wilful", as was done in the Cosmic Dye Chemical case while construing the proviso to Section 11-A, the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee. (Emphasis supplied)"*

23. It is important to note the proviso to Section 11A of the *Excise Act* at this stage. It states that:

"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 of 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.”

24. As noticed in the excerpted portions of the Supreme Court’s judgment, the material distinction between the provisos of Section 11A of the *Excise Act* and Section 28 of the *Customs Act* was contemplated in *Associated Cement Co. Ltd. v. Commissioner of Customs* (supra). The only material difference in the language of the two provisions is that the phrase ‘with intent to evade payment of duty’ is not used in Section 28 of the Customs Act. The Court held that the words ‘fraud’ and ‘collusion’ inherently imply the requirement of an intent, which in this case is the intent to evade payment of duty. With respect to misrepresentation and suppression of facts the Court held that the fact that these words are preceded by the word ‘wilful’ means that there should be an intention to evade payment of duty behind these acts. And, therefore, in *Uniworth* (supra), the judgments of the Supreme Court interpreting the proviso to Section 11A of the *Excise Act* were applied in the interpretation of the proviso to Section 28 of the *Customs Act*.

25. The meaning of the phrase *parimateria* has been explained in an American case in the following words: “Statutes are in *parimateria* which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the word *similis*. It is used in opposition to it—intimating not likeness merely but identity. It is a phrase applicable to public statutes or general laws made at different times and in

reference to the same subject.”¹ The provisos to Sections 11A of the *Excise Act*, 28 of the *Customs Act* and Section 73 of the *Finance Act*, refer to the same class of persons, i.e., persons from whom tax has been not been levied, or has been short-levied or erroneously refunded. The subject matter of these provisos is issuance of a Show Cause Notice in order to collect such tax. Further, there seems to be no difference in language of the proviso to Section 11A of the *Excise Act* and Section 73(1) of the *Finance Act*. Since, the pith and substance of both these provisions is the same, the various judgments of the Supreme Court discussing the interpretation of proviso to Section 11A of the *Excise Act* can be extended to interpret Section 73(1) of the *Finance Act*. Further, since proviso to Section 28 of the *Customs Act* is *parimateria* to proviso to Section 11A of the *Excise Act* (as held in *Uniworth*), the interpretation of proviso to Section 28 may also be extended to interpret the proviso to Section 73 of the *Finance Act*. *Uniworth (supra)* is also authority on the meaning of ‘wilful misstatement’ and ‘suppression of facts’; the Court held that:

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12. ... The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may

¹*United Society v. Eagle Bank*, (1829) 7 Connecticut 457, p. 470, as cited in CRAIES, Statute Law, p. 134 (7th Edition).

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 wilful 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.

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14. In Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara [(2005) 2 SCC 168], a three- judge bench of this Court, while referring to the observations extracted above, echoed the following views:

“23. Now coming to the question of limitation, at the outset, we wish to clarify that there are two concepts which are required to be kept in mind for the purposes of deciding this case. Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation. Under Section 11A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to Section 11A(1). Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful mis-statement or suppression of facts, or in contravention of any provision of the Act or Rules with the intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, we are concerned with the proviso to Section 11A(1).

24. In the case of Cosmic Dye Chemical v. Collector of Central Excise, Bombay [(1995) 6 SCC 117], this Court

held that intention to evade duty must be proved for invoking the proviso to Section 11A(1) for extended period of limitation. It has been further held that intent to evade duty is built into the expression "fraud and collusion" but mis-statement and suppression is qualified by the preceding word "wilful". Therefore, it is not correct to say that there can be suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for invoking the proviso to Section 11A.

25. *In case of Pushpam Pharmaceuticals Co. v. C.C.E. [1995 (78) ELT 401 (SC)], this Court has held that the extended period of five years under the proviso to Section 11A(1) is not applicable just for any omission on the part of the Assessee, unless it is a deliberate attempt 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 constitute suppression of fact."*

26. Again, the Supreme Court in *Continental Foundation Joint Venture Holding v. Commissioner of Central Excise, Chandigarh-I* (2007) 10 SCC 337, held that:

"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 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an

incorrect statement with the knowledge that the statement was not correct.””

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 paying excise duty. The terms ‘mis-statement’ and ‘suppression of facts’ are preceded by the expression ‘wilful’. The meaning which has to be ascribed is, deliberate action (or omission) and the presence of an intention. 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.

28. In the present case, the revenue argues that appellant wilfully suppressed the value of taxable services and thus did not discharge its liability of paying the service tax on same. The contention of the appellant is that the appellant was under a *bona fide* belief that the appellant was not liable for payment of Service Tax for the Mandap Keeping and Management, Maintenance and Repair Services. The appellant has supported the non-payment of service tax for Mandap Keeper Services by Notification No.12/2003-ST. It also states that, during the enquiry itself, it paid service tax on the sale of the abovementioned items for the period 2004-05 and

2005-06 with interest and had also started paying service tax on these items regularly from April 2006. The same has been also acknowledged by the DGCEI in the SCN.

29. As regards management, maintenance and repair Services the appellant claimed that it was unaware of the development under Section 65(105)(zzg) of the *Finance Act* and that when the same came to the knowledge of the appellant, the appellant promptly got itself registered for the said service and started discharging its service tax liability with respect to the said service from financial year 2006-07, and also paid service tax for the financial year 2005-06. The same has again been also acknowledged by the DGCEI in the SCN. The absence of any material disclosing intent to evade payment of service tax by the appellant is evident by the fact that it promptly made all the payments pertaining to service tax liability with respect to Mandap Keeper Service and Management, Maintenance and Repair Service as soon as the appellant became aware of the same (during the enquiry) and continued to pay service tax thereafter. The authorities are unanimous that to invoke the extended period under cognate provisions (such as Section 11A of the *Excise Act* or Section 28A of the *Customs Act*) the burden is cast upon it to prove suppression of fact. The Revenue has not been able to prove an intention on the part of the appellant to evade tax by suppression of material facts. In fact, it is clear that the appellant did not have any such intention and was acting under *bona fide* beliefs. For these reasons, it is held that the revenue cannot invoke the proviso to Section 73(1) of the *Finance Act* to extend the limitation period for issuing of SCN. The SCN was issued on 24.10.2008. The undischarged liability for payment of service tax with

respect to Mandap Keeper Service and Management, Maintenance and repair services alleged in the SCN is for the period 2004-06 and 2005-08 respectively. Since the proviso to Section 73(1) cannot be invoked the SCN had to be served within one year from the relevant date. Therefore, the SCN with respect to short-payment of service tax for Mandap Keeper Service for the years 2004-2006 is barred by limitation. The SCN with respect to short-payment of service tax for Management, Maintenance and Repair Services for the years 2005-2007 is also barred by limitation.

30. The SCN for the year 2007-2008 is, however, not barred by the limitation period of one year and the assessee is liable to pay service tax on the same. As regards penalty, the then applicable Section 80 of the *Finance Act* stated that:

“80. Penalty not to be imposed in certain cases

Notwithstanding anything contained in the provisions of Section 76, Section 77 or Section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.”

31. The provisions relating to penalty have been discussed by various benches of the Appellate Tribunals (*Sangam Palace v CCE*, 2006 (2) STR 537; *Eta Engineering Ltd. v. CCE*, 2006 (3) STR 429; *Vinaya Travels v Commissioner of Service Tax, Bangalore*, 2009 (13) S.T.R. 31 and *Majestic Mobikes v CCE* S.T.R. 609 (tri.)). In the present case, the appellant was under a *bona fide* belief that it was not liable to pay service tax for the Mandap Keeper Service and Management, Maintenance and Repair Services as discussed earlier. The conduct of the appellant of prompt payment of

service tax during the enquiry and after gaining knowledge about its liability to pay service tax, is sufficient reason to believe that the assessee did not have an intention to evade the payment of service tax. Therefore, no penalty can be imposed on the appellant.

32. For the above reasons, the question of law framed is answered in favour of the appellant; the appeal has to succeed and is accordingly allowed, without any order as to costs. The appellant is, however, under a liability to pay service tax for the period 2007-08 for the Management, Maintenance and Repair Services rendered by it. The appeal is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

NOVEMBER 29, 2017