

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 22-03-2018****Judgment delivered on 09-08-2018****TAXC No. 138 of 2016**

1. Commissioner, Central Excise, Customs & Service Tax, Raipur, Chhattisgarh.

---- Appellant**Versus**

1. Chhattisgarh State Industrial Development Corporation Limited (In short CSIDCL) Commercial Complex, Jeevan Beema Marg, Pandari, Raipur, Chhattisgarh

---- Respondent

For Appellant
For Respondent

Shri Vinay Pandey, Advocate
Shri Ashok Patil, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra**Hon'ble Shri Justice Ram Prasanna Sharma****C A V Judgment**

The following judgment of the Court was delivered by
Prashant Kumar Mishra, J.

1. The present appeal by the Revenue was admitted on 19-12-2016 on the following substantial question of law :

“Whether the CESTAT was correct in holding that the extended period cannot be invoked as stipulated in proviso to Section 73 of the Finance Act, 1994 especially when the fact of rendering of taxable service by the Respondent came to the notice of the Appellant while conducting Audit of the books

and accounts of a third party and Respondent's liability for payment of Service Tax could be determined only after further enquiry, whereas the Respondent had failed to obtain Registration or pay Service Tax ?”

2. Thereafter, on the respondents filing cross objection, the maintainability of which was objected by the appellant, this Court framed the following additional substantial question of law on 22-3-2018 :

“Whether the cross-objection filed by the respondent is maintainable by virtue of Section 35G(9) of the Central Excise Act, 1944?”

3. The obtaining facts, briefly stated, are that the respondent Chhattisgarh State Industrial Development Corporation Limited (for brevity 'CSIDC') is engaged in rendering taxable service to the lessees within the industrial area near Raipur, however, it did not obtain registration under Section 65 of Chapter V of the Finance Act, 1944 (for brevity 'the Act, 1944'). During the audit of books and records of M/s G.R. Sponge & Power Limited, Raipur, the Central Excise Audit Team observed that the respondent had charged and collected Rs.3,25,936/- from the said factory towards the maintenance charges and street light charges vide bill No.87 dated 28-6-2006 without getting itself registered with the Service Tax Department nor paying any service tax. The respondent was charging and collecting maintenance charges and other taxable service charges from many other factories

also, therefore, the matter was investigated. During such further investigation the respondent was found to have collected different amounts in the following manner :

S.No.	Period	Amount Received	Rate of Service Tax	Service Tax Payable	E Cess/ SHE Cess Payable
1	1-7-03 to 31-3-04	5390000	8%	431200	-
2	1-4-04 to 31-3-05	10581000	10.20%	1058100	21162
3	1-4-05 to 31-3-06	7326000	10.20%	732600	14652
4	1-4-06 to 31-3-07	22606000	12.25%	2712720	54254
5	1-4-07 to 31-3-08	12493000	12.36%	1499160	29983/14992
	Total	56396000		6433780	120051/14992

4. A show notice was issued to the respondent on 8-7-2008 demanding service tax amounting to Rs.65,68,823/- (including cess) under Section 73 of the Act, 1944 along with interest under Section 75 of the Act, 1944 and for imposition of penalty under Sections 76, 77 and 78 of the Act, 1944.
5. Upon adjudication, the Commissioner, Central Excise, Raipur, passed an order-in-original on 15-1-2009 confirming the demand of service tax to the tune of Rs.50,58,361/- (including cess) along with interest, but dropped the demand of service tax prior to the period 16-6-2005. Penalty under Section 76 was also waived but penalty of Rs.2,000/- was imposed under Section 77 of the Act, 1944 for non filing of returns and failure to register itself within time. Further penalty of Rs.50,58,361/- was also imposed by the Commissioner under Section 78 of the Act, 1944 for suppression

of entire value of taxable service with intent to evade payment of service tax.

6. On appeal by the CSIDC, the CESTAT (Customs, Excise & Service Tax Appellate Tribunal) has passed the impugned final order, partly allowing the appeal confirming the demand of service tax along with interest pertaining to the normal period and dropping the demand of service tax pertaining to the extended period invoked under Section 73 of the Act, 1944. The CESTAT also set aside the penalty under Section 78 of the Act, 1944.
7. The Revenue has assailed the said part of the order whereby the benefit of extended period has been denied by the CESTAT whereas the respondent has filed cross appeal/cross objection to challenge the said part of the order by the CESTAT wherein its liability to pay tax has been upheld.
8. Arguing the appeal on the first substantial question of law, learned counsel appearing for the Revenue would contend that the CSIDC having not registered itself under Section 65 and having failed to make payment of service tax even after collecting the charges from industries, it is a case of wilful default, therefore, the benefit of extended period as stipulated in proviso to Section 73 of the Act, 1944 has rightly been invoked and the CESTAT committed serious error of law and jurisdiction by disallowing the service tax for the extended period.

9. Learned counsel appearing for the respondent/CSIDC, *per contra*, would argue that the present is not a case of wilful suppression of fact nor there was any intent to evade the service tax because the CSIDC being a Government undertaking it was under *bona fide* impression that it is not liable to pay service tax. Learned counsel would refer to the circular No.89/7/2006-ST dated 18-12-2006 issued by the Central Board of Excise and Customs clarifying that the fees collected by public authorities while performing statutory functions/duties under the provisions of a law is exempted from payment of service tax.
10. Countering the above submission, learned counsel appearing for the Revenue has referred to circular No.192/02/2016-Service Tax dated 13-4-2016 issued by the Department of Revenue (Tax Research Unit), Ministry of Finance, Government of India, wherein Entry No.5 dealing with services provided in lieu of fee charged by Government or a local authority, it is clarified that any activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to service tax.
11. The issue as to what would amount to wilful mis-statement or suppression of fact has been dealt with by the Supreme Court in **Uniworth Textiles Ltd. v CCE, Raipur**¹ wherein it has been held that mere non payment of duties is not equivalent to collusion or wilful mis-statement or suppression of facts, otherwise there would be no situation for which ordinary limitation period would apply.

¹ [2013 (288) ELT 161 (SC)]

Inadvertent non-payment is to be dealt within the normal limitation period and the burden is on Revenue to prove allegation of wilful mis-statement.

12. The Supreme Court in **Anand Nishikawa Co. Ltd. v Commissioner of Central Excise, Meerut**², referring to its earlier decision rendered in **Pushpam Pharmaceuticals Company v Collector of Central Excise, Bombay**³, held thus in paras 27 & 28 :

27. Relying on the aforesaid observations of this Court in the case of *Pushpam Pharmaceutical Co. v. CCE*, we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In *Densons Pultretaknik v. CCE*, this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful misstatement or "suppression of facts". This view was also reiterated by this Court in *CCE v. LMP Precision Engg.Co.Ltd.*

² (2005) 7 SCC 749

³ 1995 Supp (3) SCC 462

28. However, in the case of LMP Precision Engg. Co. Ltd., this Court came to the conclusion that the manufacturer was guilty of "suppression of facts". In that decision, manufacturer did not make any attempt to describe the products while seeking an approval of classification list and in that background of facts, it was held that it amounted to "suppression of facts" and therefore, excise authorities were entitled to invoke proviso to Section 11A of the Act. It also appears from that decision that this Court also held that if any classification was due to mis-interpretation of the classification list, suppression of facts could not be alleged. From this judgment, it is therefore clear that since the excise authorities had collected samples of the products manufactured by the appellant and inspected the products and the relevant facts were very much in the knowledge of the excise authorities and nothing could be shown by the excise authorities that there was any deliberate attempt of non-disclosure to escape duty, no claim as to "suppression of facts" could be entertained for the purpose of invoking the extended period of limitation within the meaning of proviso to Section 11A of the Act.

13. In the case at hand also, the CSIDC is an entity under the control of the Government of Chhattisgarh. It does not belong to an individual who would evade tax to corner profit in its business activity. The explanation put forth by the CSIDC that it was under *bona fide* impression that being an entity under the control of Government it was not liable to pay service tax appears to be reasonable explanation, therefore, mere non registration under Section 65 or non payment of service tax on the maintenance charges collected from industries would not amount to wilful suppression or mis-statement of fact, hence, the CESTAT has rightly held that the present is a case where the Revenue is not entitled to invoke the extended period of limitation. The first

substantial question of law is, thus, answered against the Revenue.

14. The additional question of law framed at the time of final hearing is about maintainability of the cross-objection filed by the respondent by virtue of Section 35G(9) of the Act, 1944, which provides for appeal to the High Court against an order passed in appeal by the Appellate Tribunal. Sub-section (9) of Section 35G provided that “save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.”
15. Bare reading of this provision, it is apparent that in appeal under Section 35G of the Act, 1944 the provisions of the CPC relating to appeals to the High Court shall apply, therefore, by necessary consequence the provisions contained in Order 41 Rule 22 of the CPC would also apply because the said provision otherwise applies to appeals to the High Court under the CPC.
16. The Hon'ble Supreme Court in **Bhanu Kumar Shastri v Mohanlal Sukhadia and Others**⁴, while dealing with the similar objection in an appeal against the order of High Court passed in an election petition has held thus in para 52 :

“52. Under section 116C of the Representation of the People Act the procedure in an appeal is that subject to the provisions of the Act and of the Rules, if any, made thereunder every appeal shall be heard

4 AIR 1971 SC 2025

and determined by this Court as nearly as may be in accordance with the procedure applicable to the hearing and determination of an appeal from the final order passed by a High Court in the exercise of its original jurisdiction and of the provisions of the Code of Civil Procedure and the Rules of the Courts shall as far as possible apply in relation to such appeal. There are no rules of this Court which have any bearing on this matter. The provisions contained in Order 41, R. 22 of the Code of Civil Procedure are attracted by the words of section 116C of the Representation of the People Act with the result that the respondent may support the decision and judgment on any ground decided against him. This Court in *Ramanbhai Ashabhai Patel v. Dabhi Ajitkumar Fulsinji* (1965) 1 SCR 712 = (AIR 1965 SC 669) negatived the contention that the respondent was not competent to challenge the correctness of a finding as he had not preferred an appeal and said "We cannot lose sight of the fact that normally a party in whose favour the judgment appealed from has been given will not be granted special leave to appeal from it. Considerations of justice, therefore require that this Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negatived in that judgment".

17. We have, thus, no hesitation in answering the second question that cross-objection filed by the respondent is maintainable, however, at the time of hearing of appeal respondent's counsel failed to persuade us to frame any other question of law touching upon its liability to pay service tax on the ground that the Corporation having providing services in the sovereign capacity, it is not liable to pay service tax. Even otherwise we have already dealt with the circular issued by the CBDT (Central Board of Direct Taxes) holding that the maintenance services and other services provided by the respondent CSIDC to the industries

within its industrial area, on payment of charges/ fees, is liable to pay service tax, therefore, even if the second question of law is answered in favour of the respondent, it does not effect the merits of the cross-appeal/cross-objection.

18. In the result, the appeal as well as the cross-appeal/cross-objection fail on merits. Accordingly, both the appeals are dismissed.

Sd/-

Judge
(Prashant Kumar Mishra)

Sd/-

Judge
(Ram Prasanna Sharma)

Gowri