

IN THE GAUHATI HIGH COURT

(High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Writ Petition (C) No.6776/14

- 1) M/s Bordubi Engineering Works, a Partnership Firm duly registered under the Indian Partnership Act, 1932 having its principal place of business Bordubi Road, P.O. Hoogrijaan, District: Tinsukia, Assam represented by its Managing Partner, Shri Charanjeet Singh, son of Avtar Singh.

..... **Petitioner**

- Versus -

- 1) Union of India, represented by the Secretary to the Ministry of Finance, New Delhi.
- 2) The Commissioner, Central Excise & Service Tax Milan Nagar Lane, "F", P.O. C.R. Building, Dibrugarh-786003.
- 3) The Additional Commissioner, Central Excise & Service Tax, Milan Nagar Lane "F", P.O. C.R. Building, Dibrugarh-786003.
- 4) The Superintendent (A/E), Central Excise Hqs Office of the Commissioner, Central Excise & Service Tax, Milan Nagar Lane "F", P.O. C.R. Building, Dibrugarh-786003.

..... **Respondents**

Writ Petition (C) No.6777/14

- 1) M/s Bordubi Engineering Works, a Partnership Firm duly registered under the Indian Partnership Act, 1932 having its principal place of business Bordubi Road, P.O. Hoogrijaan, District: Tinsukia, Assam represented by its Managing Partner, Shri Charanjeet Singh, son of Avtar Singh.

..... **Petitioner**

- Versus -

- 1) Union of India, represented by the Secretary to the Ministry of Finance, New Delhi.
- 2) The Commissioner, Central Excise & Service Tax
Milan Nagar, Lane “F”, P.O. C.R. Building,
Dibrugarh-786003.
- 3) The Additional Commissioner, Central Excise & Service Tax, Milan Nagar Lane “F”, P.O. C.R. Building, Dibrugarh-786003.
- 4) The Superintendent (A/E), Central Excise Hqs
Office of the Commissioner, Central Excise & Service Tax, Milan Nagar Lane “F”, P.O. C.R. Building, Dibrugarh-786003.

..... **Respondents**

Writ Petition(C) No.6778/14

- 1) M/s Bordubi Engineering Works, a Partnership Firm duly registered under the Indian Partnership Act, 1932 having its principal place of business Bordubi Road, P.O. Hoogrijaan, District: Tinsukia, Assam represented by its Managing Partner, Shri Charanjeet Singh, son of Avtar Singh.

..... **Petitioner**

- Versus -

- 1) Union of India, represented by the Secretary to the Ministry of Finance, New Delhi.
- 2) The Commissioner (Appeal) Customs & Central Excise, Customs House, Nilamani Phukan Road, Christian Basti, Guwahati-5.

- 3) The Commissioner, Central Excise & Service Tax
Milan Nagar, Lane “F”, P.O. C.R. Building,
Dibrugarh-786003.
- 4) The Additional Commissioner, Central Excise &
Service Tax, Milan Nagar Lane “F”, P.O. C.R.
Building, Dibrugarh-786003.
- 5) The Joint Commissioner, Central Excise &
Service Tax, Milan Nagar Lane “F”, P.O. C.R.
Building, Dibrugarh-786003.
- 6) The Superintendent, Central Excise Hqs,
Office of the Commissioner, Central Excise &
Service Tax, Milan Nagar Lane “F”, P.O. C.R.
Building, Dibrugarh-786003.

..... **Respondents**

B E F O R E

HON’BLE MR. JUSTICE T. VAIPHEI, CHIEF JUSTICE (ACTING)
HON’BLE MRS. JUSTICE RUMI KUMARI PHUKAN

For the petitioner: Mrs. M. Hazarika, Sr. Advocate
 Mr. M. Sharma,
 Ms. E. Bharali, Advocates

For the respondents: Mr. SC Keyal, ASGI.

Date of Hearing : 27.1.2016

Date of Judgment: **03.02.2016**

JUDGMENT & ORDER (CAV)

This batch of three writ petitions involving virtually a common question of fact and of law were heard together and are now being disposed of by this common judgment. In WP(C) No. 6776 of 2014, the petitioner, which is private engineering firm, is questioning the validity of the notice dated 16-1-2014 issued by the respondent No. 3 requiring it to show cause as to why the

Service Tax amounting to ₹ 22,37,916, Education Cess amounting to ₹ 44,757/- and Secondary and Higher Education Cess amounting to ₹ 22,381/- totalling to ₹ 23,05,054/- should not be demanded and recovered from it and the order dated 27-6-2014 passed by the Additional Commissioner, Central Excise & Service Tax, Dibrugarh (respondent 3) confirming the demand and recovery of Service Tax from it and the imposition of a penalty of ₹ 23,05,054/-. In WP(C) No. 6777 of 2014, the same petitioner is challenging the notice dated 16-1-2014 issued by the same respondent requiring him to show cause as to why the Service Tax amounting to ₹ 22,80,518/- Education Cess amounting to ₹ 45,611/- and Secondary and Higher Education Cess totalling ₹ 22,805/- which come to a total of ₹ 23,48,934/- should not be demanded and recovered and of the order dated 27-06-2014 passed by the same respondent confirming the demand and recovery of Service Tax and the imposition of penalty of ₹ 23,48,934/-. In WP(C) No. 6778 of 2014, the same petitioner is questioning the legality of the order dated 30-11-2009 confirming the Service Tax amounting to ₹ 5,14,724/- and Education Cess amounting to ₹ 10,294, the total whereof comes to ₹ 5,25,018/- with a penalty of ₹ 5,25,018/- payable by it, the appellate order dated 30-6-2014 passed by the Commissioner (Appeals) requiring it to pay ₹ 5,11,882/- and an equally amount by way of penalty as well the order dated 10-10-2014 requiring it to pay the said amount following the dismissal of its appeal.

2. The case of the petitioner in WP(C) No. 6776 of 2014, which is representative of the remaining two writ petitions to be governed by this decision, is that it was awarded a work order (1) No. 400mm NB, 20 km long Natural Gas Pipeline from Chabua to W/50 near Duliajan, Assam by M/s Oil India Ltd. vide the letter of Award dated 6-5-2010. As per the instruction of the M/S Oil Ltd. ("Service Receiver" for short), the petitioner submitted its running bills charging service @ 4% service @ 12% from first to the fourth running bills whereafter, as advised by the Service Provider, the petitioner submitted its fifth running bill by charging Service Tax @ 12.36% (out of which the liability of the Service Provider was 50%). In the meantime, the Government of India in the Ministry of Finance issued a Circular dated 6-7-2012 in the matter of clarification of Taxation Rules, which provided that consequent upon the change introduced at the time of Budget, 2012 on the

point of Taxation Rules, 2011 together with revision of the Service Tax rate from 10% to 12%. As per this clarification, it was provided that works contract earlier paying Service Tax @ 4.8% under Works Contract (Composite Scheme for payment of Service Tax) Rules, 2007 are now required to pay the Service Tax @ 12% on 40% of the total amount charged, keeping the effective rate again at 4.8% (as only the manner of expression has been altered). On coming to know the said Circular, the petitioner sought clarification from the respondent No. 4 about the said Circular whereupon the latter asked them to submit some documents including the contract agreement entered into by them with the Service Receiver, copies of Invoice/Bills, copies of Service Tax Payment particulars, etc. The petitioner duly submitted those documents. One thing led to another whereafter the impugned notice was issued upon the petitioner. The respondent No. 3, after hearing the petitioner, passed the impugned order dated 27-6-2014 issued on 30-6-2014 confirming the demand of Service Tax amounting to ₹ 23,05,054/- with a penalty of 23,05,054/- as noticed earlier on the ground of suppression of fact. Aggrieved by this writ petition has been filed.

3. It is the contention of Mrs. M. Hazarika, the learned senior counsel for the petitioner, that when the revenue decides to invoke the extended period of limitation under Section 73(1) of the Act, the burden is cast upon them to prove wilful suppression of facts and in the instant case, the petitioner has been submitting its Service Tax returns regularly by showing the details and particulars of the exemption availed of by them, which were within their knowledge. According to the learned senior counsel, the respondent No. 3, while issuing the impugned order, has failed to consider the relevant fact that in terms of the Letter of Award, the burden of Service Tax was on the Service Receiver and the component of Service Tax paid by the Service Receiver was realized from the petitioner as Service Provider, which clearly indicates that it had nothing to gain by evading payment of the Service Tax. The learned senior counsel further contends that the petitioner neither suppressed any fact before the Revenue nor violated any provision of law and are, therefore, not liable to pay Service Tax as demanded by the Revenue. As the petitioner did not suppress any fact before the respondent authorities, maintains the learned senior counsel, it is not liable to pay any penalty imposed by the

respondent No. 3, and the impugned order as well as the show cause notice are illegal and cannot be sustained in law. Though Mr. S.C. Keyal, the learned Asst. Socitor General of India, has made a number of submission to support the impugned order and the show cause notice, he has no objection if the case is remanded to the respondent No. 3 for fresh decision as to whether the petitioner is guilty of suppression of fact with intent to evade payment of the Service Tax.

4. It may be noted that the provision of Section 73(1) of Finance Act, 1994 is couched in the language exactly similar to Section 11-(A)(1) of the Central Excise Act, 1944. The scope and ambit of Section 11-(A)(1) of the Central Excise Act, 1994 came up for consideration before the Apex Court in ***Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara, (2005) 2 SCC 168*** and this is what the Apex Court had said:

“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 11-A(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 11-A(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 misstatement 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 11-A(1).

“24. In the case of *Cosmic Dye Chemical v. CCE*² this Court held that intention to evade duty must be proved for invoking the proviso to Section 11-A(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 misstatement 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 11-A.

“25. In case of ***Pushpam Pharmaceuticals Co. v. CCE***³ this Court has held that the extended period of five years under the proviso to Section 11-A(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. Applying the tests in the aforesaid judgments to the facts of the present case, we find that the demands raised by the department in the impugned three show-cause notices were time-barred. The first show-cause notice was dated 30-12-1987. It was in respect of the period 1-4-1986 to 30-11-1986. The second show-cause notice was dated 6-4-1988. Under the said notice, the department has demanded duty for the period 1-3-1984 to 28-2-1986. The last show-cause notice was dated 20-6-1988, for the period 1-4-1986 to 30-4-1987. Therefore, Section 11-A(1) was not applicable.

“27. The question is, whether in the present case, there was any wilful suppression of facts. On facts, as stated above, we find that the appellant had filed a classification list indicating Notification No. 234/86 dated 3-4-1986 as well as the chapter under which the goods fell. We have gone through the classification list. It indicates the claim for exemption. The classification list was duly approved by the department. So also monthly returns were filed by the appellant in the form of RT-12, in which there was a complete disclosure regarding the

² (1995) 6 SCC 117 : (1995) 75 ELT 71

³ 1995 Supp (3) SCC 462 : (1995) 78 ELT 401

nature of the goods. These returns were regularly assessed by the department. The material placed on record shows filing of gate passes, invoices and classification list. They indicated the names of the consignees. A mere reading of these names would indicate that sorbitol solution was sold to non-pharmaceutical companies like M/s Golden Tobacco Co. Ltd. Despite such disclosure, the department approved the classification list as well as RT-12 returns. There was no reopening of the approvals and assessments within the stipulated period. In the circumstances, the Judicial Member of the Tribunal was right in holding that no case was made out for invoking the extended period of limitation. As stated above, the end use was built in the exemption notification. Therefore, the department could have demanded duty within one year from the relevant date under Section 11-A(1). However, this was not done. In the absence of evidence of suppression of facts, the JM was right in setting aside the show-cause notices.

“28. In the case of **Jayant Vitamins Ltd. v. Union of India**¹ show-cause-cum-demand notice was issued by the department alleging non-user of bulk drugs for a specified purpose. In that matter, goods were cleared without payment of duty, as in the present case, on the basis of certificate from the Drugs Controller. In that case, same Notification No. 234/86 was relied upon by the assessee. However, on facts, the High Court found that the assessee had disclosed the relevant facts in the gate passes and, therefore, it was held that the department was not entitled to invoke the proviso to Section 11-A(1). In our view, the judgment of the Madhya Pradesh High Court in **Jayant Vitamins Ltd.**¹ is not on the applicability of Notification No. 234/86, as it is sought to be urged on behalf of the appellant. The said judgment is only on the point of limitation. It only states that the department was not entitled to invoke the proviso to Section 11-A(1) as the assessee had indicated in the gate passes the material facts. On this point, before concluding, we may mention that in the present case, we have come to the conclusion that there was no wilful suppression of facts on the part

¹ (1991) 53 ELT 278 (MP)

of the appellant as the appellant had filed the gate passes, invoices and monthly returns, which were all duly approved by the department from time to time. The invoices, gate passes and the monthly returns indicated the names of the consignees from which it was possible for the department to infer sale of sorbitol solution to non-pharmaceutical companies and yet no steps were taken by the department to raise the demand in time and, therefore, we hold that there was no wilful suppression of material facts for invoking the proviso to Section 11-(A)(1). The facts of the present case are not confined only to gate pass clearances. In such cases, it would not be proper for courts to rely on the evidence furnished only by gate passes.

29. In the circumstances, although on merits the department succeeds, these appeals need to be allowed as the impugned show-cause-cum-demand notices were time-barred and as no case is made out by the department for invocation of the proviso to Section 11-A(1) of the said Act.”

5. In the case at hand, the stance taken by the petitioner all along is that the petitioner has been submitting its Service Tax returns regularly by showing the details and particulars of the exemption availed of by them, which were within their knowledge and further that the respondent No. 3, while issuing the impugned order, has failed to consider the relevant fact that in terms of the Letter of Award, the burden of Service Tax was on the Service Receiver and the component of Service Tax paid by the Service Receiver was realized from the petitioner as Service Provider, which clearly indicates that it had nothing to gain by evading payment of the Service Tax. In our opinion, the construction placed by the Apex Court on the provisions of Section 11-(A)(1) of the Central Excise Act in **Sarabhai M. Chemical** (*supra*) will also apply while construing the provisions of Section 73(1) of the Finance Act, 1994. So construed, the Revenue, before invoking Section 73(1) of the Finance Act, 1994, shall have to prove that there was wilful suppression of fact by the petitioner. After all, this provision cannot be applied just for any omission on the part of the petitioner unless it is a deliberate attempt to escape from payment of the Service Tax. For example, where the 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. As held by the Apex Court in **Sarabhai M. Chemical** (*supra*), there are two concepts which are required to be kept in mind for the purpose of deciding a case such as the one at hand. Reopening of approvals/assessment is different from raising of demand in relation to the extended period of limitation. Under Section 73(1) of the Finance Act, 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 73-(A)(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 misstatement 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. Viewed against the backdrop of the principles enunciated by the Apex Court in **Sarabhai M. Chemicals** (*supra*), we are of the firm view that the findings made by the respondent No. 3 suffer from the vice of non-application of mind. If we may say so, the respondent No. 3 does not appear to understand the difference between the scope and ambit of Section 73(1) and the proviso to Section 73(1) as evident from his findings at para 4.6 of his order, which reads as under:

“4.6 Regarding suppression of facts, I observe that the noticee have (*sic*) resorted to suppress the material facts from the department with intent to evade Service Tax. Had the Department not undertaken any investigation, the matter would have been in a dark corner and remained non-levy of tax. Moreover, although the said notice advanced various arguments against suppression of fact as mentioned above including the point that all the facts were within the knowledge of the department as regular returns were filed by them which indicating the payment of tax under the composite scheme, I have in opinion that mere submission of returns is not sufficient to avoid the ground reality that an assessee is free from resorting (to?) suppression/mis-statement of actual fact. Hence, there are other machinery of other department like Audit and Anti-evasion to monitor such elements of evasion. I,

therefore, find that the Show Cause Notice was issued rightly by invoking an extended period of five years of suppression of facts. The extended period of limitation for recovery of Service Tax is invocable in terms of the proviso to Section 73(1) of the Finance Act, 1994 for the situation as discussed in the above show cause notice. Further, since Section 78 of the Finance Act, 1994 is a natural corollary to the proviso to Section 73(1) *ibid*, mandatory penalty under Section 78 *ibid* is liable to be imposed on the said assessee.”

6. In our opinion, the respondent No. 3 did not record any findings regarding the allegation of the petitioner as to whether the burden of service tax was on the Service Receiver or whether the component of service tax paid by the Service Receiver was realized from the petitioner as Service Provider or whether the submissions of service tax returns regularly showing all the details and particulars are indicative of the fact that these facts are within the knowledge of the respondent authorities. These are vital facts which, if duly considered by the respondent No. 3, would have enabled him to come to the correct conclusions. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. The initial burden is on the department to prove that the situations visualised by the proviso existed. But once the department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the section, the burden shifts and then applicability of the proviso has to be construed liberally. When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word ‘evade’ in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word ‘intent’. In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law. Thus, where there was scope for doubt whether case for duty was made out or not the proviso to Section 11-A of the Act would not be attracted.

7. For what has been stated in the foregoing, this case requires fresh consideration by the respondent No. 3 in the light of the law enunciated by

the Apex Court as referred to earlier. We remand the case accordingly. The impugned order dated 27-6-2014 (Annexure-XI) of WP(C) No. 6776 of 2014, the impugned show cause notice dated 16-1-2014 (Annexure-X) and the impugned order dated 27-6-2014 (Annexure-XII) of WP(C) No. 6777 of 2014 and the impugned orders dated 30-11-2009 (Annexure-VI), dated 30-6-2014 (Annexure-VIII) and dated 10-10-2014 (Annexure-IX) of WP(C) No. 6778 are, therefore, quashed. The petitioner shall appear before the respondent No. 3 within two weeks from the date of receipt of this judgment for fresh proceeding in accordance with law. There shall be no order as to costs.

JUDGE

CHIEF JUSTICE (ACTING)

Alam