IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Appeal No. ST/89484/2013

(Arising out of Order-in-Original No.19/ST/2013/C dt.23.8.2013 passed by the Commissioner of Central Excise, Nagpur)

M/s. SAS Developers & Engineers : **Appellant**

VS

Commissioner of Central Excise, Nagpur : **Respondent**

Appearance

Shri Sachin Chitnis, Advocate for Appellant

Shri M.P. Damle, Asstt.Commr. (A.R) for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of hearing : 13/06/2018
Date of pronouncement : 9/08/2018

ORDER NO. A/87074/2018

Per : **Sanjiv Srivastava**

Appeal is directed against Order-in-Original No. 19/ST/2013/C dt.23.8.2013 passed by the Commissioner of Central Excise, Nagpur, confirming demand of Service Tax of Rs.2,56,65,366/- under Section 73 of Finance Act, 1994 read with interest under Section 75 and penalties under Section 76, 77 and

78 of the Finance Act, 1994 and appropriated amounts already paid.

2. The facts relating to the present appeal are as enumerated below:

(i) The appellants are a Partnership firm and owners of a building named "Landmark". They entered into Business Agreement dated 2.8.2003 with Pantaloons. As per the said agreement, the appellants provided necessary space for a departmental store-cum-coffee shop in part of that premises. For providing the same Pantaloons agreed to pay the appellant firm an amount calculated as percentage on the basis of net sales during the year.

(ii) Another agreement was entered into between the appellant and M/s. Trent Ltd. for creating another store for retail sale of readymade garments and other household items, accessories in same premises. In terms of this agreement also the appellants were to be given a percentage of net sales depending upon the total sales turnover.

(iii) After considering the said two agreements department was of the view that the consideration received in terms of the said agreement was nothing but rent for provision of the space for setting up the said stores and hence taxable under the category of "Renting of Immovable Property" w.e.f. 1.6.2007.

(iv) Accordingly notice dt.18/22.10.2012 was issued demanding service tax to the tune of Rs.2,56,65,366/- along with interest and for imposition of penalty under Sections 76,77 and 78.

(v) The show cause notice was adjudicated by the Commissioner confirming the demand of the service tax along with interest and imposition of penalties.

(vi) Against the said order of Commissioner present appeal has been filed.

3. Heard Shri Sachin Chitnis, Ld. Counsel appearing for appellant and Shri M.P. Damle for the Revenue.

4. Arguing for the appellant Ld. Counsel took us through the various provisions in the agreement and submitted that they were not providing any taxable service under the category of "Renting Immovable Property". The agreements entered by them with M/s Pantloon & M/s Trent were for profit sharing. As per these agreements both the parties where sharing certain portion of their profit with them in lieu of various business activities under taken by them for assisting the said party's for conducting the business of retail sale from the said premises.

4.1 He emphasized on the following clauses in the agreement with Pantaloons to show various business activities undertaken by them for conduct of retail business by Pantloons from the said premises.

"3. <u>CONSIDERATION :</u>

a] In consideration of the Business Arrangement and in consideration of all services to be rendered by SAS to the Company under the Business Arrangement at the said premises, SAS shall be paid fees to be computed as follow:

Slab	***For Annual Net Retail Sales recorded at the said Premises***	***Amounts Payable in SAS***
A	*On Net Retail Sales of all products sold from the said premises between 0 to 30 Crores*	*4.5% of Net Retail Sales of such products*
B	*On further Net Retail Sales of all products sold from the said premises between Rs.30 Crores to Rs.50 Crores*	*4.75% of Net Retail Sales exceeding to Rs.50 Crores.*

5. OBLIGATIONS OF SAS:

(A) Without affecting the generality of what is stated in this Agreement, SAS shall whenever required by the company, provide advisory assistance to the company in the following fields:

(i) Selection of range of products;

(ii) Pricing of range of the said products;

(iii) Personnel policies of the retail business;

(iv) Security arrangement, both inside and outside the subsisting space;

(v) Interaction and liaison with the Builder, Licensor, Owner's Association, if any, in connection, with seeking their permission and/or approval for any matter or otherwise;

(vi) Advice relating to marketing strategies;

(vii) Procurement policies;

(viii) Documentation and information systems.

b] SAS shall, whenever required by the company provide all such assistance to the company, as may be reasonably required by the company for successfully running the said business.

6. ***OTHER RIGHTS AND OBLIGATIONS****:*

a] The parties to this Agreement agree to prepare and sign an inventory of items provided by them in respect of the said premises within 7 days from 02-08-2003.

b] SAS shall be entitled to transfer or assign its right, title and interest in the said premises, only after obtaining the prior written consent of the company. SAS shall not undergo any change in its constitution or change in its partners.

c] The parties shall jointly work out a sales strategy for successful and profitable running of the business.

d] The company and SAS covenants with each other to perform the terms and conditions of this agreement.

e] The parties will in all matters act loyally and faithfully to the Business Arrangement.

f] The parties will not in selling the goods make any representation or give any warranties other than those permitted by the company.

g] SAS Agrees to immediately bring to the attention of them company improper or wrongful use of the company's trademarks, Emblems, designs or other intellectual or commercial monopoly rights which may come to the knowledge of SAS in and about the execution of its duties and use every effort to safeguard the property rights and

h] The parties agree not part with any information/data provided by the company, to any other party.

i] The parties agree not to store Hazardous goods. The company hereby specifically agrees and undertakes that no hazardous goods of any kid will be stored along side the product and other articles of the company so as to render any insurance policy void or voidable.

4.2 Similarly he emphasized on the following clauses of the agreement with M/s. Trent Ltd to highlight the activities, obligations etc of the appellant and also the consideration received by them.

"***3. <u>CONSIDERATION:</u>***

a] In consideration of the Business Arrangement and in consideration of all services to be rendered by SAS to the Company under the Business Arrangement at the said premises, SAS shall be paid fees to be computed as follows :

Slab	***For Annual Net Retail Sales Recorded at the said Premises***	***Amounts Payable to SAS***
A	*On Net Retail Sales of all products sold from the said premises between 0 to Rs.4.7 Crores*	*4.5% of Net Retail Sales of such Products*
B	*On further Net Retail Sales of all products sold from the said premises between Rs.4.71 Crores to Rs.7.85 Crores*	*5.5% of Net Retail Sales exceeding Rs. 4.71 Crores but up to Rs.7.85 Crores*
C	*On further Net Retail Sales of all products sold from the said premises between Rs.7.86 Crores to Rs.11.75 Crores*	*5.5% of Net Retail Sales exceeding Rs.7.86 Crores but up to Rs.11.75 Crores*
D	*On further Net Retail Sales of all products sold from the said premises exceeding Rs.11.75 Crores*	*7% of Net Retail Sales exceeding Rs.11.75 Crores*

"5. OBLIGATIONS OF SAS:

a] Without affecting the generality of what is stated in this Agreement, SAS shall whenever required by the company, provide advisory assistance to the company in the following fields:

(i) Selection of range of products;

(ii) Pricing of range of the said products;

(iii) Personnel policies of the retail business;

(iv) Security arrangement, both inside and outside the subsisting space;

(v) Interaction and liaison with the Builder, Licensor, Owner's Association, if any, in connection, with seeking their permission and/or approval for any matter or otherwise;

(vi) Advice relating to marketing strategies;

(vii) Procurement policies;

(viii) Documentation and information systems.

b] SAS shall, whenever required by the company provide all such assistance to the company, as may be reasonably required by the company for successfully running the said business.

OTHER RIGHTS AND OBLIGATIONS :

a] The Parties to this Agreement agree to prepare and sign an inventory of items provided by them in respect of the said premises within 7 days from 7th October, 2002.

b) SAS shall be entitled to transfer or assign its right, title and interest in the said premises, only after obtaining the prior written consent of the Company. SAS shall not undergo any change in its constitution or change in its partners. -

c] The Parties shall jointly work out a sales strategy for successful and profitable running of the business.

d] The Company and SAS covenants with each other to perform the terms and conditions of this Agreement

e] The parties will in all matters act loyally and faithfully to the Business Arrangement.

f] The parties will not in selling the goods make any representation or give any warranties other than those permitted by the Company.

g] SAS agrees to immediately bring to the attention of the Company improper or wrongful use of the company's trade marks, emblems, designs or other intellectual or commercial monopoly rights which may come to the knowledge of SAS in and about the execution of its duties and use every effort to safeguard the property rights and interest of the Company and assist the Company at the request of the Company, in taking all steps to defend such rights provided however all costs, charges and expenses shall be borne and paid by the Company alone and SAS shall not be responsible and/or liable to contribute anything towards the same.

h] The parties agree not to part with any information/data provided by the Company, to any other party.

i] The parties agree not to store Hazardous Goods. The Company hereby specifically agrees and undertakes that no hazardous goods of any kind will be stored along side the product and other articles of the company so as to render any insurance policy void or voidable."

4.3. Counsel on the basis of the above clauses submitted that from the reading of above clauses it is quite evident that the agreement was for provision of various services to conduct retail business from the said premises and not in nature of 'Renting of Immovable Property". Since the consideration received by them in terms of the said agreement was for providing various services and not towards renting of immovable property, demand of service tax under category of 'Renting of Immovable Property' is not maintainable.

4.4 He further submitted that in case, it is held that the service tax can be demanded under this category then also demand is barred by limitation as the notice has been issued much beyond the period prescribed. In the present case there is no reason for invoking the extended period as nothing was proposed and the agreements under consideration were not suppressed and the agreements under consideration were not entered for purpose of evasion of taxes by mis-representing the said agreements have been entered much prior to levy coming into force. In support of their contention they relied upon the following decisions:

(a) CCE V. Wonderax Laboratories – 2010 (255) ELT 60 (Del.)

(a1) Upheld by SC- 2010 (255) ELT 16 (SC)

(b) Photo Kina Chemicals Pvt. Ltd. – 2009 (235) ELT 83 (T)

(c) Coca-Cola India Pvt. Ltd. 2007 (213) ELT 490 (SC)

(d) Jamshedpur Beverages – 2007 (214) ELT 321 (SC)

(e) Toyo Engineering 2006 (201) ELT 513 (SC)

(f) Ballarpur Industries – 2007 (215) ELT 489 (SC)

(g) Champdany Industries Ltd. – 2009 (241) ELT 481 (SC)

(h) Shital International – 2010 (259) ELT165 (SC)

4.5 Finally he concluded stating that since there was no suppression, mis-statement, fraud, collusion etc. with intention to evade payment of tax penalty is not imposable on them.

5. Arguing on behalf of Revenue Ld. AR submits that:

5.1 The Agreement with M/s. Pantaloons and M/s. Trent are nothing but agreement for providing space for conducting the business of retail sale and hence appropriately and land/lease agreement for the same. Therefore the considerations received in terms of the said agreement should be treated as consideration for providing the space on rent and hence taxable under the category of 'Renting of Immovable Property.

5.2 Appellants are a partnership firm and they owned the building name 'Landmark' situated at Plot No. 5 & 6, Ramdas Peth, Wardha Road, Nagpur. They are engaged in business of building and providing the space for on rent to various parties.

5.3 They do not have any experience in retail business to be undertaken by the two companies namely M/s. Pantaloons and M/s. Trent Ltd. The said companies are having their own expertise

and marketing his strategies for conducting their business. He referred to clause 4(a) of the agreement with M/s. Pantaloons to show that the company shall be exclusively incharge of management and running of the business from the said premises. Similar clause exists in the agreement with M/s. Trent Ltd.

5.4 Since the entire role of the appellant as is coming out from the said agreement is to provide the space for conducting of the business. The said agreement should be treated as rent agreement leviable to service tax under the category of 'Renting of Immovable Property'. He accordingly supported the order imposing service tax in respect of the said services rendered by an agreement. On issue of limitation he submitted that the correct value of the services being provided by the appellant was not reflected in the ST.3 returns filed by them with intention to evade payment of taxes and hence there is they are responsible for suppressing and not disclosing the relevant facts to the department. Hence they failed to pay service tax for the period commencing from 2006-07 in respect of the said services and did not file the service tax returns in respect of the immovable property from 2008-09 onwards with an intention to evade payment of duty.

5.5 Since they have suppressed this information from the department with intention to evade payment of taxes extended period has rightly been invoked against them. He placed reliance on the following decisions:

(a) Nizam Sugar Factory Vs. CCE, Hyderabad [1999(114)ELT429 (Tri.-LB)]

(b) *Tamilnadu Coop Textiles Processing Mills Ltd. Vs. CCE Salem [2007 (207) ELT 593 (Tri.)]*

(c) *Bharat Earth Movers Ltd. Vs. CCE [2001(136) ELT 225 (Tri)]*

(d) *Kores India Ltd. Vs. CCE, Chennai [2001 (152) ELT 395 (Tri.Che)]*

(e) *Amco Batteries Ltd. Vs. Vs. CCE [1999 (112) ELT 665 (Tribunal)]*

(f) *Central Coalfields Ltd. Vs. CCE [1999 (106) ELT 476 (Tri.)]*

5.6 He submits that since tax has been not paid at the time demand for interest is leviable against the appellant.

5.7 Since they have evaded payment of taxes by deliberately suppressing the facts penalty under Section 78 of the Finance Act, 1994 is justifiable.

5.8 Since they have not filed proper ST-3 Returns penalty under Section 77 is justified in terms of decision in case of *Stellar Travels Pvt. Ltd. Vs. CCE Mumbai* reported in 2002 (146) ELT 388 (Tri.) and also in view of non-payment of service tax penalty under Section 76 rightly imposed.

6. We have gone through the submissions made by both and also written submissions filed. The issues for consideration in the present appeal can be listed as follows:

"(i) Whether the agreements between the appellant and M/s. Pantaloons and M/s. Trent Ltd. can be treated as agreement for renting of space or are these agreements only for profit sharing.

(ii) Whether service tax can be levied in respect of the services provided by the appellant under these agreement under the category of renting of immovable property.

(iii) Whether appellants have evaded payment of service tax by resorting to suppression, mis-statement, fraud etc. and to justify the demand by invoking extended period of limitation.

(iv) Whether penalties under Section 76,77,& 78 are justifiable on the appellants."

7. For determination of the issues it is necessary to have looked into the agreement. The relevant provisions of the said agreement with M/s Pantloon (Company) are reproduced below:

> *"3. SAS is the owner of the building being Landmark, situate at Plot No. 5 & 6 Ramdaspeth, Wardha Road, Nagpur [hereinafter collectively referred to as the said premises] and has absolute authority to enter into any arrangement with Company in respect of the said premises.*
>
> *4. SAS has represented to the Company that he has neither entered into any Agreement for sale and transfer of the said premises nor has he received any earnest or other money in respect thereof from any party and have not done or suffered to be done any act, matter, deed or thing whereby any right, title, interest or claim would be created in favour of any third person or party.*
>
> *5. The company is desirous of opening a Departmental Store-cum-Coffee Shop at the said premises for retailing of readymade garments/saris, household and gift items, accessories, shoes, toys and such other goods as may be decided by Pantaloon Retail (India) Ltd. from time to time and has therefore approached SAS to enter into a business arrangement in this connection.*
>
> *6. SAS has agreed to enter into the business arrangement of retailing of readymade garments/saris household and gift items, accessories shoes, toys and other goods, as may be decided by Pantaloon Retail (India) Limited*

from time to time, from the said premises on the terms and conditions contained herein."

3. CONSIDERATION :

a] In consideration of the Business Arrangement and in consideration of all services to be rendered by SAS to the Company under the Business Arrangement at the said premises, SAS shall be paid fees to be computed as follow:

Slab	***For Annual Net Retail Sales recorded at the said Premises***	***Amounts Payable in SAS***
A	*On Net Retail Sales of all products sold from the said premises between 0 to 30 Crores*	*4.5% of Net Retail Sales of such products*
B	*On further Net Retail Sales of all products sold from the said premises between Rs.30 Crores to Rs.50 Crores*	*4.75% of Net Retail Sales exceeding to Rs.50 Crores.*

(e) The total annual fees receivable by SAS under this Business Arrangement for each year commencing from April to March, shall be calculated on the basis, as stated in clause 3[a] above, and shall be computed on the audited figures of the actual annual Net Retail Sales of the said business form the said premises. The difference in the amounts so determined and aggregate of the fees already paid for the year to SAS at the end of each month period of that year. , shall be paid refunded to/by SAS within 7 days from the end of the year, i.e.by 31st March of each year."

4. OBLIGATIONS OF THE COMPANY:

a] The company shall punctually pay all charges and taxes with regard to the running of the business, including the charges for telephone [as per bills received from the service provider] electricity [as per the meter reading which meter is installed in the premises of the company and bills received from the provider] and all other agreed outgoings including maintenance charges, till the expiry of the period of this arrangement or its sooner determination, within 7 days of receipt of such bills.

b] The company shall be exclusively in charge of the management and running of the said business form the said premises. Accordingly, the Company shall employ adequate staff of the requisite competence and skill required for conducting the business. It. is clearly agreed and understood that the sole responsibility for the employment of such staff and payment, of remuneration »s also terminal benefits, if any, shall be that of the company and that SAS shall not be responsible or liable in any manner, directly or indirectly, for such employment or expenses incurred thereof.

c] The company agrees to observe and comply diligently as its sole responsibility with the provisions of the shops and establishments act and other applicable provisions and rules and regulations for conducting the said business."

7.1 Similar clauses are there in the agreement entered into with M/s Trent Ltd. On perusal of the above clauses it is quite evident that appellants have provided the space to the said companies for conducting report of business and for provisions of the said space. They are receiving certain "Fees", the said "Fees" cannot be anything other than as charges for provision of the space, hence is in nature of rent. The submission made viz-a-viz the other activities being undertaken by the appellant in terms of the said agreement do not justify to consider the amount received as anything other than rent because in view of the clause (4(b) of the agreement which specifically provides that "The company shall be exclusively in charge of the management and running of the said business from the said premises". Thus, the conduct of retail business from the said premises was so responsible of the company which had necessary expertise in doing so. This is also supported

by the fact that appellants are neither having necessary expertise/experience in the field of retail sales of the said product. We hold that the entire amounts received in terms of these agreements are nothing but rent for providing space for conducting the said retail business.

8. With effect from 1.6.2007 service tax has been imposed on 'Renting of Immovable Property'. Section 65(90a) of the Finance Act, 1994 which is reproduced below:

> *"Section 65(90a) of the Finance Act, 1994: "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include –*
>
> *(i) renting of immovable property by a religious body or to a religious body; or*
>
> *(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.*
>
> *[Explanation 1. – For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings;]*
>
> [*Explanation 2.- For the removal of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;]"*

8.1 In terms of the above definition the renting includes not mere renting but any similar arrangements in respect of immovable property for use in furtherance of business or commerce. Both the agreements under consideration are in terms of above phrase covered by the said definition of renting of immovable property. Accordingly they are leviable to service tax under said entry. Appellants have advanced the argument that the agreements entered into by them were business arrangement and that they have entered into partnership/ joint venture with the said companies for conducting the business and not into rent agreement. Thus the said agreements were nothing but profit sharing agreements. The said argument do not merit acceptance because the participation of the appellant in business activity is limited to provision of the space. Even if were the movement it is considered that this arrangement created the partnership/Jt. Venture then also the argument will not survive because appellants would definitely be a different legal entity from the said partnership or the joint venture and in that case they would have provided these space on rent to the said partnership/joint venture. Accordingly, there appears to be no merit in submission made viz-a-viz leviability of service tax.

9. Now coming to be issue of limitation there is no doubt that appellants had not disclosed the facts with regards to said two agreements to the department the other these facts which were in the knowledge where exclusively no disclosed hence suppressed. Accordingly, there is no denial that extended period has to be

invoked for demanding the tax short paid. Honourable apex court in the case of Madras Petro-Chem Ltd. [1999] 108 ELT 611 (SC) relied upon by the Revenue would squarely apply. In the said decision, the Honourable apex court had held as follows:

"14. The proposition of law as laid down is not in dispute. We find in the present case as aforesaid, a clear finding was recorded that the petitioner was aware and was obliged to file RG 1 Register, gate passes and also of clearances in the RT 12 returns by disclosing the particulars which was not done in the present case. The finding recorded in this case, especially in the background that this was a case of self removal procedure in which there is obligation cast on the assessee to make proper and correct declaration and entries in the production register RG 1. Further finding was that it was not by inadvertence. There could be no other inference if it was not by inadvertence, then deliberate, then it is not in the realm of inaction of the assessee but with the objective of a gain, which in other words would be conscious withholding of the information. Thus unhesitantly we conclude, on the facts of this case, proviso to section 11 would be applicable, hence, show-cause notice is held to be within time."

9.1 Applying the above ratio to the facts of the case before us, the invocation of extended period of time to confirm the tax demand cannot be faulted at all and we hold accordingly. The Honourable High Court of Gujarat in Salasar Dyeing and Printing Mills P. Ltd. v. Commissioner of Central Excise and Customs, Surat-I [2013] 290 ELT 322 (Guj) has held that:

"15. Upon reading the relevant provisions contained in section 11A of the Act, it becomes clear that in the case of duty which has not been levied or paid, or has been short-levied or short-paid or erroneously refunded by reason of fraud,

collusion, wilful misstatement, suppression of facts, etc., period of service of notice on the person chargeable with such duty would be five years instead of one year provided in normal circumstances. Nowhere does this provision refer to the period of service of notice after fraud, collusion, wilful misstatement or suppression, etc., comes to the knowledge of the Department. In simple terms, the Department could recover unpaid duty up to a period of five years anterior to the date of service of notice when the case falls under the proviso to sub-section (1) and such omission is on account of fraud, collusion, wilful misstatement, etc."

9.2 Further Hon'ble Apex Court has in case of C.C.E.,Visakhapatnam vs M/S.Mehta & Co [2011 (2) SCR 874] has held-

"22. Consequently, we propose to look into the first issue in the light of the background facts as stated hereinbefore. The specific case of the appellant is that the respondent having manufactured the excisable goods covered under different chapter headings, removed them without payment of proper duty of excise and that from the aforesaid action it is explicit that there was an intention on the part of the respondent to evade payment of duty particularly when the contract clause between the respondent and M/s. Adyar Gate Hotel Ltd. clearly mentioned that the contractors quoted rate would also include excise duty.

23. Although, the respondent has pleaded that it was done out of ignorance, but in our considered opinion there appears to be an intention to evade excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A (i) of the Act would get attracted to the facts and circumstances of the present case.

24. The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also

the summons issued, the hotel furnished its reply setting out the details of the work done by the appellant amounting to Rs. 991.66 lakhs and at that stage only the department came to know that the work order was to carry out the job for furniture also. A bare perusal of the records shows that the aforesaid reply was sent by the respondent on receipt of a letter issued by the Commissioner of Central Excise on 27.2.1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15.5.2000, the demand made was clearly within the period of limitation as prescribed, which is five years."

9.4 In case of Usha Rectifier Corpn (I) Ltd. Vs. Commissioner of Central Excise [(2011) 11 SCC 571] held as follows-

"12. Submission was also made regarding use of the extended period limitation contending inter alia that such extended period of limitation could not have been used by the respondent. The aforesaid contention is also found to be without any merit as the appellant has not obtained L-4 licence nor they had disclosed the fact of manufacturing of the aforesaid goods to the department. The aforesaid knowledge of manufacture came to be acquired by the department only subsequently and in view of non-disclosure of such information by the appellant and suppression of relevant facts, the extended period of limitation was rightly invoked by the department."

9.5 Hon'ble Allahabad High Court has in case of Commissioner of Central Excise vs Rathi Steels [2015-TIOL-1416-HC-ALL-CX] held has held that-

"The assessee, in response to the show-cause notice had stated that there is no provision in Central Excise Law to disclose the details of the credit or to submit the duty

paying documents, which in our opinion is false and an attempt to deliberately contravene the provisions of the Act, 1944 and the rules made thereunder with an intent to evade the duty.

In our opinion, the facts of the present case clearly suggest willful suppression of material facts by the assessee as well as contravention of the provisions of the Act and rules framed thereunder with an intent to evade the demand of duty as would be covered by Clauses IV and V of Section 11 A (1) of the Act, 1944. Therefore, the invocation of the extended period of limitation in the facts of the present case is fully justified. Reference may be had to the judgment of the Apex Court in the case of Usha Rectifier Corporation (I) Ltd. (Supra), where-under the Apex Court has held that where the assessee had not disclosed the fact of manufacturing of the goods to the department and the knowledge of manufacture came to be acquired by the department only subsequently and in view of non-disclosure of such information by the assessee and suppression of relevant facts would rightly result in invocation of extended period of limitation. (Reference paragraph no.12).

Similarly in the case of Commissioner of Central Excise, Visakhapatnam vs. Mehta & Company (Supra), the Apex Court has explained that where the excisable goods are removed without payment of proper duty of excise, it is explicit that there was an intention on the part of the assessee to evade the payment of duty. (Reference paragraph no.22) The Division Bench of the Gujarat High Court in the case of Commissioner of Central Excise vs. Neminath Fabrics Pvt. Ltd.(Supra) has explained that proviso to Section 11 comes into play only when suppression etc. is established or stands admitted. (Reference paragraph no. 18).

So far as the judgment of the Apex Court in the case of Continental Foundation Joint Venture (Supra) relied upon by the learned counsel for the assessee is concerned, the same is clearly distinguishable in the facts of the present case. In the said case, there were various circulars of department operating at different points of time and there was scope for entertaining a doubt about the views expressed by the authorities themselves. It is in this background that the Court had gone to hold that there had been no deliberate suppression.

Similarly the judgment of the Apex Court in the case of Jai Prakash Industries Ltd. (Supra) relied upon by the learned counsel for the assessee is also clearly distinguishable in the facts of the present case. In the said case, there were divergent views of the various High Courts, the issue as to whether crushing of bigger stones or boulders into smaller pieces amounts to manufacturer. In these facts, it was held that if the assessee had not taken licence or he did not pay the duty, the extended period of limitation could not be invoked.

For the reasons recorded above, we find that the Tribunal under the order impugned is not justified in recording a finding that the extended period of limitation cannot be invoked, inasmuch as from what has been recorded by us herein above, it is crystal clear that there has been suppression of material fact as well as contravention of the provisions of the Act, 1944 and the rules framed thereunder at the hands of the assessee with an intent to evade the demand of excise duty. Therefore, extended period of limitation had rightly been invoked in the facts of the present case."

9.6 Reliance placed by the notice on the cases of *Coca-Cola India Pvt. Ltd.* 2007 (213) ELT 490 (SC) and *Jamshedpur Beverages*

– 2007 (214) ELT 321 (SC) to argue with regards to Revenue Neutrality do not hold good as Revenue Neutrality cannot be a global concept but needs to be seen viz-a-viz one individual by the appellant. Nobody can argue that since an amount to be paid by him will be available as credit to somebody else hence the issue is revenue neutral cannot accepted. In view of decision of Larger Bench of this Tribunal in the case of *Jay Yuhshin Ltd. Vs. Commissioner of Central Excise (Tri.-LB)* 2000 (119) ELT 718 the ground of revenue neutrality needs to be rejected.

9.7 Further when vital facts for determination of the tax liabilities have been suppressed from the department invocation of extended period of limitation cannot be faulted with. Ingredients for invocation of extended period of limitation are suppression, fraud, mis-statement etc. which are a question of fact and not a question of law and needs to be examined separately viz-a-viz fact of the case in hand. If on such examination the authority concludes that some of all the facts have been suppressed leading to evasion for taxes, The extended period of limitation is required to be invoked, which we do in the present case. Since we have extensively dealt with all the arguments advanced by the Appellant for not invocation of extended period in terms of various decisions of the Apex Court and High Court's we are not recording our finding separately in respect of each decision cited by both appellant and revenue.

10. Since taxes has not been paid when the demand of interest cannot be set aside. It is a settled law that interest is an absolute liability cannot be waived in any circumstances. Reliance is placed

on decision of Hon'ble Bombay High Court in the case of *CCE & C. Aurangabad Vs. Padmashri V.V. Patil S.S.K. Ltd.* 2007(215) ELT 23 (Bom.)

11. Since in the present case tax has been evaded by resorting to fraud, suppression, mis-statement etc. penalty under Section 78 is justifiable and accordingly upheld. Similarly penalty under Section 76 is also upheld. In view of decision of Kerala High Court in case of *Assistant Commissioner of Central Excise Vs. Krishna Paduval* 2006 (1) STR 185 (Ker.) the relevant para 11 is reproduced below:

> ***"11.*** *The penalty imposable under S. 76 is for failure to pay service tax by the person liable to pay the same in accordance with the provisions of S. 68 and the Rules made thereunder, whereas S. 78 relates to penalty for suppression of the value of taxable service. Of course these two offences may arise in the course of the same transaction, or from the same act of the person concerned. But we are of opinion that the incidents of imposition of penalty are distinct and separate and even if the offences are committed in the course of same transaction or arises out of the same act, the penalty is imposable for ingredients of both the offences. There can be a situation where even without suppressing value of taxable service, the person liable to pay service tax fails to pay. Therefore, penalty can certainly be imposed on erring persons under both the above Sections, especially since the ingredients of the two offences are distinct and separate. Perhaps invoking powers under S. 80 of the Finance Act, the appropriate authority could have decided not to impose penalty on the assessee if the assessee proved that there was reasonable cause for the said failure in respect of one or both of the offences. However, no circumstances are*

either pleaded or proved for invocation of the said Section also. In any event we are not satisfied that an assessee who is guilty of suppression deserves such sympathy. As such, we are of opinion that the learned Single Judge was not correct in directing the 1st appellant to modify the demand withdrawing penalty under S. 76. Therefore, the judgment of the learned Single Judge, to the extent it directs the first appellant to modify Ext. P1 by withdrawing penalty levied under S. 76, is liable to be set aside and we do so. The cumulative result of the above findings would be that the Writ Petitions are liable to be dismissed and we do so. However, we do not make any order as to costs."

In case of Commissioner of Central Excise, Chandigarh Vs. Grewal Trading Co. 2010 (18) STR 350 (Tri.-Del.) upheld simultaneously penalties imposed under Section 76 & 78 of the Finance Act, 1994. The relevant para 5 is reproduced below:

"5. The period of dispute of this case is 2002 to 2005 and during this period, for non-payment of service tax with intent to evade the same, penalty were imposable under Section 78 and as well as 76 and there was no specific provision that when penalty under Section 78 is imposable, the penalty under Section 76 would not be imposable. I find that this issue stands decided in the Department's favour by Karnataka High Court in the case of CCE & ST, Bangalore v. First Flight Couriers Ltd. (supra) and also by the Division Bench of this Tribunal in the case of Bajaj Travels Ltd. v. CCE, Chandigarh (supra). In view of this, the impugned order setting aside the penalty under Section 76 is not sustainable and the same is set aside. The Assistant Commissioner's order with regard to imposition of penalty under Section 76 is restored. Revenue's appeal is allowed."

12. For failure to file proper returns penalty has been imposed under Section 77 we do not find any reason to differ from the same.

13. Accordingly appeal is dismissed.

(Pronounced in court on 9/08/2018)

(*Dr. D.M. Misra)*
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

SM.