New Age Laminators Private Limited Vs Commissioner of Central Goods And Service Tax & Central Excise &-Alwar

Court: Customs, Excise And Service Tax Appellate, New Delhi

Date of Decision: Jan. 9, 2025

Acts Referred: Finance Act, 1994 â€" Section 66C, 72, 73, 73(1), 78, 94(2)
Central Excise Act, 1944 â€" Section 11, 11A, 11AC, 11AC(1)(c)
Cenvat Credit Rules, 2004 â€" Rule 3, 4, 4(7), 9, 9(c), 15

Hon'ble Judges: Dr. Rachna Gupta, Member (J); Hemambika R. Priya, Member (T)

Bench: Division Bench

Advocate: G.G. Gupta, R. S. Sharma, S. K. Meena

Final Decision: Allowed

Judgement

Hemambika R. Priya, J

1. The present appeal has been filed by M/s New Age Laminators Private Limited, the appellant to assail the order-in-appeal No. 394

(SM)CE/JPR/2018 dated 07.09.2018 wherein the Commissioner has confirmed the demand of Cenvat credit of Rs. 1,16,924/- and service tax demand

of Rs. 5,75,134/-; imposed penalty of Rs. 1,16,924/- under Rule 15 of the Cenvat Credit Rules, 2004 & Rs. 5,75,134/- under Section 78 of the Finance

Act, 1994.

2. The brief facts of the case are that the Appellant are engaged in manufacture of HDPE Laminated Paper bags and PP Laminated paper bags.

While auditing the records of the Appellants, the Central Excise Audit offers, observed as follows:-

(i) the Appellant had wrongly availed Cenvat credit amounting to Rs.1,16,924/- in contravention of Rule 3, 4 & 9 of the Cenvat Credit Rules, 2004 as

(a) the appellant has taken Cenvat Credit on the strength of documents, which were not in the name of the Appellant; (b) the Appellant has also taken

Cenvat Credit on the documents, which are older than six months as on 01.09.2014; (c) the Appellant had availed Cenvat Credit on vehicle repair,

maintenance & Insurance and Hotel service.

(ii) The appellant had not paid service tax of Rs. 5,75,924/- under reverse charge on sales commission paid to foreign agents for the period Sept. 2013

to Sept., 2014.

Therefore, the SCN dated 30.08.2016 was issued to the Appellant proposing recovery of such inadmissible Cenvat credit of Rs.1,16,924/-and also for

demand of Service tax of Rs.5,75,134/- along with applicable interest and alleging penalty under Rule 15 of the Cenvat Credit Rules, 2004 and under

section 78 of the Finance Act, 1994. The subject show cause notice was adjudicated by the Assistant Commissioner of Service Tax Division, Bhiwadi

vide Order-In-Original No. 17/CE/2017-18 dated 29.11.2017, wherein adjudicating authority has confirmed the demand of Cenvat credit of Rs.

1,16,924/- and service tax demand of Rs.5,75,134/-; imposed penalty of Rs.1,16,924/- under Rule 15 of the Cenvat Credit Rules, 2004 & Rs.5,75,134/-

under Section 78 of the Finance Act, 1994. Aggrieved by the said O-1-O, the Appellant has filed an appeal before Commissioner Appeals, Jaipur. The

Commissioner vide Order-in-Appeal No. 394(SM)/CE/JPR/2018 dated 31.08.2018, upheld the Order-in-Original and rejected the Appeal filed by the

appellant. Aggrieved by the said Order-in-Appeal, the Appellant has filed the present Appeal before this Tribunal.

3. Learned Counsel for the appellant submitted that the period in dispute is September 2013 to September 2014 whereas the SCN was issued on

06.01.2017. He submitted that the amount of commission paid to commission agents was declared in the shipping bills. The copies of shipping bills

were regularly submitted to the jurisdictional Assistant Commissioner after export of goods as proof of export. Thus, all facts were in knowledge of

the Department. Further, all excise returns for the period 2013-14 and 2014-15 were filed within the due date of filing the returns and the credit

availed was shown in the returns filed. Thus, the demand issued beyond a period of one year from the date of filing returns is time-barred and the

invocation of extended period does not arise in the facts of the present case. There was no suppression of facts with intent to evade payment of

Service tax/excise. Hence the extended period for demand under proviso to Section 73(1) of the Finance Act, 1994 and Section 11A of Central Excise

Act, is not applicable and the demand is not sustainable on this ground alone. Further, the extended period cannot be invoked in case of Appellant as

there is no wilful suppression of facts by the Appellant with intent to evade payment of tax. Since the appellant was entitled to avail input credit of

service tax paid under reverse charge as also clarified by CBIC vide serial no.5 of Circular No. 943-04-2011-CX dated 29.4.2011 being a case of

Revenue Neutrality extended period for demand under Section 73 was not permissible to be applied as held by Hon'ble Supreme Court in case of M/s

Nirlon Ltd. Vs. CCE Mumbai vide Judgment dated 23.04.2025 in Civil Appeal No. 7642 of 2004. In support the Ld. Counsel for the appellant relied

upon the following judgements:-

Ã¢â‚¬Â¢ M/s GD Goenka Private Limited Vs Commissioner CGST Delhi South, Vide Final Order No. 51088/2023 dated 21.08.2023

Ã¢â‚¬Â¢ Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay, 1995(78) ELT 401 (SC)

Ã¢â‚¬Â¢ Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay., 1995 (75) ELT 721 (SC)

Ã¢â‚¬Â¢ Collector of Central Excise Vs. H.M.M. Ltd., 1995 (76) ELT 497 (SC)

Ã¢â‚¬Â¢ Easland Combines, Coimbatore Vs. CCE Coimbatore., (2003) 3 SCC 410

Ã¢â‚¬Â¢ Uniworth Textiles Limited Vs. Commissioner of Central Excise, Raipur., 2013 (288) ELT 161 (SC)

Ã¢â‚¬Â¢ Continental Foundation Joint Venture Vs. CCE Chandigarh., 2007 (216) E.L.T. 177 (SC)

3.1 Ld Counsel contended that suppression of facts should be deliberate and in taxation laws it can have only one meaning, namely that the correct

information was not disclosed deliberately to escape payment of tax. Since the basic ingredients for invoking extended period under Section 73 of

Finance Act, 1994 and Section 11 of Central Excise Act do not, therefore, stand satisfied; the demand is liable to be dropped on this ground alone.

Since there was no suppression of facts and there was no intent to evade payment of Service tax, the extended period for demand is not justified.

There is no positive act of suppression on the part of the Appellant. The Appellant acted in bona fide belief and it is not a case of fraud, collusion,

wilful mis-statement or suppression of facts or contravention of the provisions with intention to evade tax. The entire demand is beyond the normal

period of limitation is therefore, not sustainable in the present case.

4. Learned counsel for the appellant submitted that the period involved is September 2013 to September 2014 and during the said period, the Place of

Provision of Service by an intermediary located outside India was not in taxable territory and hence was there is no liability to pay service tax under

reverse charge on said activity undertaken by service provider located outside India. The Place of Provision of Services Rules, 2012 were framed for

the purpose of determination of the place of provision of services, in exercise of the powers conferred by sub-section (1) of section 66C and clause

(hhh) of sub-section (2) of section 94 of the Finance Act, 1994. Rule 9 of aforesaid Rules determines place of provision of ""intermediary service"" as

under:

Ã¢â‚¬Å“9. Place of provision of specified services - The place of provision of following services shall be the location of the service provider-

(c) Intermediary services;

A clarificatory amendment which has retrospective effect was also made by the Government vide Notification No.14/2014-ST dated

11.7.2014 in Place of Provision of Services Rules, 2012Ã¢â‚¬â€‹

In support of his submissions, Ld. Counsel for the appellant relied upon the following judgements: -

Ã¢â‚¬Â¢ Pernod Ricard India (P) Ltd. Vs. The State of Madhya Pradesh & ORS., 2024 INSC 327 CIVIL APPEAL Nos. 5062-5099 of 2024

Ã¢â‚¬Â¢ Commissioner of C. Ex. & S.T., Bangalore Vs Fosroc Chemicals (India) Pvt. Ltd., 2015(318) ELT-24(Kar.)

4.1 He further submitted that service provided by commission agent located outside India to exporter to cause sale of goods exported was exempt

from service tax under Notification No. 42/2012-ST dated 29.6.2012, subject to following prescribed procedure. Hence there was no intent to evade

payment of tax and it was merely procedural lapse. It is well-settled that substantial benefit cannot be denied on procedural lapse. The Ld Counsel

relied on the decision of the Supreme Court dated 20th November 2008 in case of Sambhaji & Ors. Versus Gangabai & Ors.

5. Learned counsel for the appellant submitted that the availment of input credit of tax paid on Mobile communication bills which were not in name of

appellant but in name and address of Directors cannot be denied merely on this ground. There is no dispute about receipt of input services and use by

the appellant and payment of bills has also been done by the appellant. There is no requirement under the CENVAT Credit Rules that the bill should

be in name of manufacturer. There is no contravention of Rule 3 of CENVAT Credit Rules and all services were used by the appellant directly or

indirectly in manufacture and are covered within ambit and scope of definition of ""input service"". It is well-settled that substantial benefit cannot be

denied on procedural lapse. Reliance was placed on the decision of the Supreme Court dated 20th November 2008 in case of Sambhaji & Ors. Versus

Gangabsal & Ors. The demand on ground that credit on bills pertaining to period prior to 01.09.2014 was availed after 6 months from the date of

invoice is also not sustainable as there is no bar/ restriction on the availment of CENVAT credit services received prior to 1.9.2014 against bills which

are above 6 months and below one year from the date of issue of bills or invoices. Even the time period of 6 months was subsequently amended to

one year and this amendment is applicable with retrospective effect as it is a clarificatory amendment.

6. Learned counsel submitted that since the demand of service tax and CENVAT Credit itself is not sustainable, the demand of interest is also not

justified. The imposition of penalty does not arise in the present case is not a case of non-payment or evasion of tax/duty by reason of fraud, collusion

or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Finance Act, 1994/Central Excise Act with intent

to evade or of the rules made thereunder with intent to evade payment of duty. Hence the penal provisions sunder Rule 15 and Section 11AC of

Central Excise Act, 1944 and Section 73 of the Finance Act, 1994 are not applicable on facts and circumstances of the case. Even Proviso to Section

11AC(1) (c) provides that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period

beginning with the 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty

shall be fifty per cent of the duty so determined. Hence penalty equal to tax is not imposable.

7. Learned Authorised Representative for the department submitted that the Appellant had never disclosed the facts to the Department, these came to

the notice of the Department only at the time of Audit. The Appellant is working under self-assessment system. They are bound by service tax law to

correct assess their service tax liability and thereafter file their ST-3 returns properly They have willfully suppressed the facts from the department

with intention to evade the payment of service tax. Therefore, extended period and penalty under section 78 is invokable. As per Rule 4(7) of the

CENVAT Credit Rules, 2004, inserted vide Notification No. 21/2014-CE(NT) dated 11.07.2014 w.e.f 01.09.2014, a manufacturer shall not take

CENVAT Credit after six months of the date of issue of any documents specified in sub-rule(1) of Rule 9. Hence, the CENVAT credit availed by the

Appellant on the strength of the documents which were older more than six months as on 01.09.2014 is not admissible to them. The definition of

intermediary was amended w.e.f. 01.10.2014 by including a person who arranges or facilitates supply of goods as Intermediary. Thus after 01.10.2014

the place of provision of service in respect of person who causes sale or purchase of goods or arranges goods shall be determined as per Rule 9(C).

Accordingly, the place of provision of service will be location of the service provider. Therefore, prior to 01.10.2014 the place of provision of services

in respect of persons who causes sales or purchase of goods or arranges goods is to be determined as per Rule 3 of POPS because the agents of the

Appellant were outside the scope of Intermediary at that time and place of provision of service is required to be decided in terms of Rule 3. In such

cases, the location of the receiver of the service i.e. service recipient would be the place of provision of service. In view of the above, ld. Authorized

Representative prayed that present appeal may be dismissed.

8. We have heard the LD Counsel to the appellant and Ld AR for the department. The issued before us for consideration are as follows:

i. Whether the demand of service tax vide SCN dated 06.01.2017 on payment made to commission agents on export of goods for period September

2013 to September 2014 under reverse charge, which is a case of Revenue Neutrality as the appellant was entitled to input credit, is time barred as

extended period under proviso to Section 73(1) of Finance Act, 1994 is not applicable?

ii. Whether the demand of service tax of Rs. 5,75,134/-on intermediary service provided by commission agents located outside India during the period

September 2013 to September 2014 is sustainable on merits?

iii. Whether demand for denial of CENVAT Credit of Rs. 116924/-availed during 2013-14 and 2014-15 is sustainable?

iv. Whether interest and penalty under Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944 and Section 78

of Finance Act, 1994 is sustainable

v. Whether the SCN is barred by time?

9. At the outset, we consider the submissions of the Ld Counsel that the extended period is not liable to be invoked. We note that the period in dispute

is September 2013 to September 2014, whereas the show cause notice was issued on 06.01.2017, by invoking the extended period alleging suppression

of material facts from the Department. It has also been submitted that the commission amount paid to commission agents was declared in the shipping

bills, which in turn was submitted as proof of export before the jurisdictional Assistant Commissioner after export of goods as proof of export. It has

also been contended that the excise returns for the period 2013-14 and 2014-15 were filed within the due date and the credit availed were reflected in

these returns. There was no suppression of facts with intent to evade payment of Service tax/excise. From the facts, we note that the non-payment of

tax was detected during the audit of the records of the appellant. This evidences the fact that the appellant was registered and was filing his returns

with the department. We note that the impugned order has held that as the appellant did not inform the department regarding commission paid to the

foreign agent and had audit not been conducted, the said fact would not have been revealed. The appellant had suppressed material fact with an intent

to evade payment of service tax. Such a finding recorded that suppression of facts is enough to invoke the extended period of limitation under the

proviso to section 73 (1) of the Finance Act and there is no necessity of any intent to evade payment of service tax, is against the well settled

principles. Suppression of facts has to be primarily examined whether it was wilful and with an intent to evade payment of service tax. We note that

the HonÃ¢â‚¬â„¢ble Supreme Court has held that suppression of facts has to be Ã¢â‚¬Å“wilfulâ€Ÿ and there should also be an intent to evade payment of service

tax. The HonÃ¢â‚¬â„¢ble Supreme Court in Pushpam Pharmaceuticals Company, examined whether the Department was justified in initiating proceedings

for short levy after the expiry of the normal period of six months by invoking the proviso to section 11A of the Excise Act. The HonÃ¢â‚¬â„¢ble Court

observed that the proviso to section 11A of the Excise Act carved out an exception to the provisions that permitted the Department to reopen

proceedings if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from the

relevant date under the circumstances mentioned in the proviso, one of which was suppression of facts. It is in this context that the Supreme Court

observed that since Ã¢â‚¬Å“suppression of factsâ€Ÿ has been used in the company of strong words such as fraud, collusion, or wilful default, suppression of

facts must be deliberate and with an intent to escape payment of duty. The relevant para is reproduced hereinafter:

Ã¢â‚¬Å“4. Section 11A empowers the Department to re- open proceedings if the levy has been short-levied or not levied within six months from

the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant

date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even

otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of court the context

in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as

fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has

to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct

information was not disclosed deliberately 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 render it suppression.Ã¢â‚¬â€‹ (emphasis supplied)

10. The above decision was referred by the HonÃ¢â‚¬â„¢ble Supreme Court in Anand Nishikawa Company Ltd. vs. Commissioner of Central

Excise [2005 (188) E.L.T. 149 (SC)] which observed as follows:

Ã¢â‚¬Å“26 Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦.This Court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay, while dealing with

the meaning of the expression Ã¢â‚¬Å“suppression of factsÃ¢â‚¬ in proviso to Section 11A of the Act held that the term must be construed strictly. It

does not mean any omission and the act must be deliberate and wilful to evade payment of duty.

The Court, further, held:-

Ã¢â‚¬Å“In taxation, it (Ã¢â‚¬Å“suppression of factsÃ¢â‚¬) can have only one meaning that the correct information was not disclosed deliberately to

escape 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 render it suppression.Ã¢â‚¬â€‹

11. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee

to find wilful suppression. In the instant case, it is an admitted fact that all the transactions were declared in the financial records and the objection

arose on scrutiny of such financial documents by the audit team. The Department has not been able to establish any positive act of the appellant with

an intent to evade. As 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 11A of the Act. We also

note that these two decisions in Pushpam Pharmaceuticals and Anand Nishikawa Company Ltd. were followed by the Supreme Court in the

subsequent decision in Uniworth Textile Limited vs. Commissioner of Central Excise, Raipur [2013 (288) E.L.T. 161 (SC)]. Further, the

Supreme Court in Continental Foundation Joint Venture Holdingv s. Commissioner of Central Excise, Chandigarh [2007 (216) E.L.T.

177 (SC)] also held:

Ã¢â‚¬Å“10. The expression Ã¢â‚¬Å“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 11-A 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.Ã¢â‚¬â€‹

12. In the light of the above established principle of law, we note that the said notice has merely invoked the extended period without establishing any

positive act of suppression or intent to evade by the appellant. It has also been submitted that the appellant was regularly filing their returns, which has

not been denied by the department. The Principal Bench of the Tribunal had examined this issue at length in M/s G.D. Goenka Private Limitedv s.

The Commissioner of Central Goods and Service Tax, Delhi South [Final Order No. 51088/2023 dated 21.08.2023]and after referring to

the provisions of section 73 of the Finance Act, the Bench observed as follows: -

Ã¢â‚¬Å“25. To sum up:

a) The appellant assessee was required to file the ST 3 Returns which it did. Unless the Central Excise officer calls for documents, etc., it is

not required to provide them or disclose anything else.

b) It is the responsibility of the Central Excise Officer with whom the Returns are filed to scrutinise them and if necessary, make the best

judgment assessment under section 72 and issue an SCN under Section 73 within the time limit. If the officer does not do so, and any tax

escapes assessment, the responsibility for it rests on the officer.

c) Although the Central Excise Officer is empowered to scrutinise all the Returns call for records and if necessary, make the best judgment

assessment, if, as per the instructions of CBIC, the officer does not conduct a detailed scrutiny of same Returns and as a result is unable to

discover any short payment of tax within the period of limitation, neither the assessee nor the officer is responsible for such loss of revenue.

Such a loss of Revenue is the risk taken by the Board as a matter of policy.

d) Extended period of limitation cannot be invoked unless there is evidence of fraud or collusion or wilful misstatement or suppression of

facts or violation of the provisions of Act or Rules with an intent.

e) Intentional and wilful suppression of facts cannot be presumed because (a) the appellant was operating under self-assessment or (b)

because the appellant did not agree with the audit and claimed that CENVAT credit was admissible; or (c) because the appellant did not

seek any clarification from the Revenue; or (d) because the officer did not conduct a detailed scrutiny of the Returns and the availment of

CENVAT credit which is alleged to be inadmissible and was discovered only during audit.Ã¢â‚¬â€‹

13. We, therefore, find in favour of the appellant on the question of limitation, and hence it is not necessary to examine the remaining questions on the

merits of the case. Since the SCN stands time-barred, confirmation of demand proposed in the said SCN is not sustainable. Accordingly, the impugned

order is set aside and the appeal is allowed.

(Order pronounced in the open court on 09.01.2025)