CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. I

SERVICE TAX APPEAL NO. 50776 OF 2018

(Arising out of Order-in-Appeal No. 97/ST/DLH/2017 dated 22.12.2017 passed by the Commissioner of Central Tax (Appeals–I), GST & CE, Delhi)

M/s. Omaxe Buildhome Limited **.....Appellant**
12, Local Shopping Centre,
Kalkaji, New Delhi-110019

VERSUS

Commissioner of GST Delhi-East, **.....Respondent**
Central Revenue Building, IP Estate,
New Delhi-110002

APPEARANCE:

Shri Monish Panda and Shri Anmol Jasal, Advocates for the Appellant

Shri Manoj Kumar, Authorized Representative for the Department

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 28.05.2025
DATE OF DECISION: 27.11.2025

FINAL ORDER NO. 51801/2025

JUSTICE DILIP GUPTA:

This appeal has been filed by M/s. Omaxe Buildhome Limited[1] for quashing the order dated 22.12.2017 passed by the Commissioner (Appeals-I), CGST and Central Excise, Delhi[2], by which the appeal filed by the appellant against the order dated 23.12.2016 passed by the Additional Commissioner has been dismissed and the order of the Additional Commissioner has been upheld.

2. The appellant is engaged in the business of construction related activities. As a developer of residential properties, the appellant launches

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1. **the appellant**
2. **the Commissioner (Appeals)**

projects for development of residential complex for sale at the pre-construction stage itself and invites applications for allotment from interested parties. The interested parties make their applications for allotment with earnest money. After receipt of applications, the appellant processes the same and issues allotment letters to successful prospective buyers. The earnest money of unsuccessful buyers is refunded. The appellant executes a buyer agreement with the successful allottee. According to the appellant, the said buyer agreement executed by the appellant is only an agreement to sell in future and does not convey any title in property to the buyer and such title is conveyed only when the conveyance deed is entered into after completion of construction. In terms of the buyer agreement, the appellant recovers various charges from the buyer, which have been broadly divided into:

(a) Basic Sale Price;

(b) Preferential Location Charges; and

(c) Other charges including car parking charges

3. On the amount received towards basic sale price, the appellant discharged service tax under the category of "construction of complex services" made taxable under section 65(105)(zzzh) of the Finance Act, 1994[3].

4. The appellant claims that in respect of the amount received towards car parking charges, which are separately identified in the agreement itself, the appellant had not paid any service tax as the same was excluded from the scope of service tax. The appellant further claims that such exclusion was removed with the introduction of negative list from July, 2012 and so the appellant started paying service tax on car parking charges from July,

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3. the Finance Act

2012. It is for this reason that the demand in the instant appeal is limited to the period from July, 2010 to June, 2012.

5. The audit of the appellant was carried out for the period from 2007 to 2012 and it was pointed out that the car parking charges received by the appellant are chargeable to service tax under the category of "construction of complex services" under section 65(105)(zzzh) of the Finance Act.

6. Subsequently, a show cause notice dated 18.03.2014 was issued to the appellant proposing demand of service tax of Rs. 34,36,374/- on car parking charges under the category of "construction of complex services", by invoking the extended period of limitation.

7. The appellant filed a reply to the show cause notice and denied the allegations. The appellant also stated that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

8. The adjudicating authority confirmed the demand proposed under the show cause notice and upheld the invocation of the extended period of limitation. However, the liability was recomputed to Rs. 31,00,813/-. The adjudicating authority also imposed an equivalent amount of penalty of Rs. 31,00,813/- under section 78 of the Finance Act and Rs. 10,000/- under section 77 of the Finance Act.

9. The appellant preferred an appeal before the Commissioner (Appeals) which appeal was dismissed.

10. It is against this order of the Commissioner (Appeals) that the present appeal has been filed.

11. Apart from making submissions on merit that the appellant was not liable to pay service tax on car parking charges, Shri Monish Panda, learned counsel for the appellant assisted by Shri Anmol Jasal submitted that the

extended period of limitation could not have been invoked in the facts and circumstance of the case.

12. Shri Manoj Kumar, learned authorized representative appearing for the department, however, submitted that the extended period of limitation was correctly invoked.

13. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

14. To appreciate this submission, it would be pertinent to refer to the relevant portion of the show cause notice dealing with the aspect of invocation of the extended period of limitation. It is reproduced below:

> "**3. From the foregoing it appears that M/s. Omaxe Build Home Private Limited**, 12, Local Shopping Centre, Kalkaji, New Delhi 110019, **has contravened the following provisions of Chapter V of the Finance Act, 1994, as amended and the provisions of Service Tax Rules, 1994, as amended that the assessee failed to do self assessment of service tax on services provided by him, quantify and pay to the Government exchequer and filed proper and correct ST-3 returns in good faith in the following manner:*******
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> **4. Whereas, it further appears that the assessee by doing so, has intentionally and willfully suppressed the facts of providing impugned taxable services** and collection of impugned value of such taxable services and did not pay the Service Tax as applicable on such services on the taxable value and did not file prescribed ST-3 returns accordingly. Thus, by not disclosing the entire facts to the Department, the said value has escaped the assessment for Service Tax liability, resulting into contravention of various provisions of the said Act and the said Rules aforesaid with the intention to evade payment of impugned Service Tax. **But for this audit the said value which**

> **has escaped leviability of Service Tax would not have come to the notice of the department.** Thus, it appears that the proviso to Section 73(1) of the Act ibid and can be invoked and thus, demand and recovery can be made for non-levy and non-payment of Service Tax for five years from the relevant date."
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> **(emphasis supplied)**

15. The impugned order records the following findings:

> "**15.The case was detected on audit of Appellants' records. Had the audit not been carried out, loss to exchequer would not have been unearthed. The onus on Appellants to pay correct taxes in self assessment scheme has clearly not been discharged & Appellants have not explained the intent to evade tax if they clearly believed that charges for parking were not taxable.** It can't be any thing other than intention to evade. There was no information provided to department on various charges received & the information on parking charges was definitely suppressed from the department. Therefore, invocation of extended period for demand and imposition of penalty under Section 78 is justified. AA has also justifiably explained imposition of penalty under Section 77. Therefore, there is no reason to interfere with the findings in the impugned orders on these issues."
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> **(emphasis supplied)**

16. Learned counsel for the appellant submitted that the appellant bonafide believed that no service tax was payable on parking charges and that the issue involved was purely interpretational and legal in nature relating to taxability of construction complex services, which service was introduced only in 2010. Learned counsel, therefore, submitted that it cannot be alleged that there was any intention on the part of the appellant to evade payment of tax. Learned counsel also pointed out that the appellant had been maintaining proper records of the service tax paid and

had also been filing the returns regularly which returns contained all the details relating to the services rendered and taxes paid by the appellant. Learned counsel, therefore, submitted that the extended period of limitation could not have been invoked to confirm the demand and impose penalty.

17. In order to appreciate the contentions that have been advanced relating to invocation of the extended period of limitation, it would be appropriate to refer to section 73 of the Finance Act, as it stood prior at the relevant time. This section deals with recovery of service tax not levied or paid or short levied or short paid or erroneously refunded. The period involved in this appeal is from July, 2010 to June, 2012. Section 73 of the Finance Act, as it stood prior to 28.05.2012, is reproduced below:

> "**73(1)** Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
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> **PROVIDED** that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-
> (a) fraud; or
> (b) collusion; or
> (c) wilful mis-statement; or
> (d) suppression of facts; or
> (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,
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> by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "six months", the words "five years" had been substituted."

18. With effect from 28.05.2012 upto 14.05.2016, the period of "six months" mentions in sub-section (1) section 73 of the Finance Act was substituted by "one year".

19. The proviso to section 73(1) of the Finance Act stipulates that where any service tax has not been levied or paid by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or the Rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax, the provisions of the said section shall have effect as if, for the word "six months" or "one year", the word "five years" has been substituted.

20. The Supreme Court in **Pushpam Pharmaceutical Co.** vs. **Commissioner of Central Excise, Bombay**[4], in the context of section 11A of the Central Excise Act, 1944, which is identical to section 73(1) of the Finance Act, 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 Central Excise Act. 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 "suppression of facts" 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 observations are as follows:

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4. 1995 (78) E.L.T. 401 (SC)

> "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."
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> **(emphasis supplied)**

21. This decision was relied upon by the Supreme Court in **Anand Nishikawa Company Ltd.** vs. **Commissioner of Central Excise**[5] and the observations are as follows:

> "26……..This Court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay, while dealing with the meaning of the expression "suppression of facts" 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 willful to evade payment of duty.** The Court, further, held:-

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5. 2005 (188) E.L.T. 149 (SC)

> "In taxation, it ("suppression of facts") 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."
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> 27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], 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 11A of the Act."
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> **(emphasis supplied)**

22. In **Easland Combines, Coimbatore** vs. **Collector of Central Excise, Coimbatore**[6] the Supreme Court observed that for invoking the extended period of limitation, duty should not have been paid because of fraud, collusion, wilful statement, suppression of fact or contravention of any provision. These ingredients postulate a positive act and, therefore, mere failure to pay duty which is not due to fraud, collusion or wilful misstatement or suppression of facts is not sufficient to attract the extended period of limitation.

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6. (2003) 3 SCC 410

23. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in **Uniworth Textiles Ltd.** vs. **Commissioner of Central Excise, Raipur**[7] and the relevant portion of the judgment is reproduced below:

> "12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. **The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable.** If that were to be true, we fail to understand which form of nonpayment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. **In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.**"
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> **(emphasis supplied)**

24. The Supreme Court in **Continental Foundation Joint Venture** vs. **Commissioner of Central Excise, Chandigarh**[8] also observed in connection with section 11A of the Central Excise Act, that suppression means failure to disclose full information with intention to evade payment of duty and the observations are as follows:

> "10. **The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as "fraud" or**

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7. 2013 (288) E.L.T. 161 (S.C.)
8. 2007 (216) E.L.T. 177 (S.C.)

> **"collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty.** Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with knowledge that the statement was not correct."
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> **(emphasis supplied)**

25. The Delhi High Court in **Bharat Hotels Limited** vs. **Commissioner of Central Excise (Adjudication)**[9] also examined the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Finance Act, 1994[10] and held as follows:

> "27. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word "suppression" in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in Uniworth (supra), "misstatement or suppression of facts" does not mean any omission. It must be deliberate. **In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid excise duty.**
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> **Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a scenario where there is a mere omission or**

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9. 2018 (12) GSTL 368 (Del.)
10. the Finance Act

> **mere failure to pay duty or take out a license without the presence of such intention."**
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> *****
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> **The Revenue has not been able to prove an intention on the part of the Appellant to avoid tax by suppression of mention facts. In fact it is clear that the Appellant did not have any such intention and was acting under a bonafide belief.**"
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> **(emphasis supplied)**

26. It would also be appropriate to refer the decision of the Delhi High Court in **Mahanagar Telephone Nigam Ltd.** vs. **Union of India and others**[11]. The Delhi High Court observed that merely because MTNL had not declared the receipt of compensation as payment for taxable service, does not establish that it had wilfully suppressed any material fact. The Delhi High Court further observed that the contention of MTNL that receipt was not taxable under the Act is a substantial one and no intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return. The relevant portion of the observations are:

> "28. In terms of the proviso to Section 73(1) of the Act, the extended period of limitation is applicable only in cases where service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, or collusion, or wilful misstatement, or suppression of facts, or contravention of any provisions of the Act or the Rules made thereunder with an intent to evade payment of service tax. **However, the impugned show cause notice does not contain any allegation of fraud, collusion, or wilful misstatement on the part of MTNL. The impugned show cause notice alleges that the extended period of limitation is applicable as MTNL had suppressed the material facts and had contravened the provisions of the Act with an intent to evade service tax.** Thus, the

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11. W.P. (C) 7542 of 2018 decided on 06.04.2023

main question to be addressed is whether the allegation that MTNL had suppressed material facts for evading its tax liability, is sustainable.

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41. **In the facts of this case, the impugned show cause notice does not disclose any material that could suggest that MTNL had knowingly and with a deliberate intent to evade the service tax, which it was aware would be leviable, suppressed the fact of receipt of consideration for rendering any taxable service.** On the contrary, the statements of the officials of MTNL, relied upon by the respondents, clearly indicate that they were under the belief that the receipt of compensation/financial support from the Government of India was not taxable. **Absent any intention to evade tax, which may be evident from any material on record or from the conduct of an assessee, the extended period of limitation under the proviso to Section 73(1) of the Act is not applicable.** The facts of the present case indicate that MTNL had made the receipt of compensation public by reflecting it in its final accounts as income. **As stated above, merely because MTNL had not declared the receipt of compensation as payment for taxable service does not establish that it had willfully suppressed any material fact.** MTNL"s contention that the receipt is not taxable under the Act is a substantial one. **No intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return.**"

(emphasis supplied)

27. It is, therefore, clear from the aforesaid discussion that the extended period of limitation can be invoked only if there is suppression of facts with intent to evade payment of service tax. It is also clear that the show cause notice must disclose material as to why there was a deliberate intent to evade payment of service tax and in the absence of such intention which is evident from the material and record or from the conduct of the assessee,

the extended period of limitation under the proviso to section 73(1) of the Finance Act cannot be invoked. The extended period of limitation cannot be invoked merely because the appellant had suppressed the material facts and had contravened to provisions of the Finance Act.

28. In the present case, as can be seen from the order, a conclusion has been drawn by the Commissioner (Appeals) that there was intent to evade payment of service tax merely because the appellant had contravened the provisions of the Finance Act while filing the self assessed returns of service tax.

29. Learned counsel for the appellant also contended that the appellant bonafide believed that it was not liable to pay service tax on the parking charges and such a belief of the appellant cannot be termed as malafide merely because the impugned order has ultimately held that the appellant was required to pay service tax on parking charges.

30. In this connection, it may be pertinent to refer to the decision of the Supreme Court in **Commissioner of C. Ex. & Customs** vs. **Reliance Industries Ltd.**[12]. The Supreme Court held that if an assessee bonafide believes that it was correctly discharging duty, then merely because the belief is ultimately found to be wrong by a judgment would not render such a belief of the assessee to be mala fide. If a dispute relates to interpretation of legal provisions, the department would be totally unjustified in invoking the extended period of limitation. The Supreme Court further held that in any scheme of self-assessment, it is the responsibility of the assessee to determine the liability correctly and this determination is required to be made on the basis of his own judgment and in a bonafide manner. The relevant portion of the judgment is reproduced below:

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12. 2023 (385) E.L.T. 481 (S.C.)

"23. **We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bona fide belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a mala fide belief particularly when such a belief was emanating from the view taken by a Division Bench of Tribunal. We note that the issue of valuation involved in this particular matter is indeed one were two plausible views could co-exist. In such cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking bona fides. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bona fide manner.**

24. **The extent of disclosure that an assessee makes is also linked to his belief as to the requirements of law.** *****. On the question of disclosure of facts, as we have already noticed above the assessee had disclosed to the department its pricing policy by giving separate letters. It is also not disputed that the returns which were required to be filed were indeed filed. In these returns, as we noticed earlier there was no separate column for disclosing details of the deemed export clearances. Separate disclosures were required to be made only for exports under bond and not for deemed exports, which are a class of domestic clearances, entitled to certain benefits available otherwise on exports. **There was therefore nothing wrong with the assessee's action of including the value of deemed exports within the value of domestic clearances.**"

(emphasis supplied)

31. The show cause notice also alleged that an assessee is required to correctly discharge the service tax liability in an era of self-assessment, but

the appellant did not include the amount of service tax towards parking charges.

32. This approach of the Commissioner cannot be countenanced. It is the duty of the officers scrutinizing the returns to examine the information disclosed by an assessee and the department cannot be permitted to take a plea that it is the duty of the assessee to disclose correct information and it is not the duty of the officers to scrutinize the returns.

33. In this connection, reference can be made to the decision of the Tribunal in **M/s. Raydean Industries** vs. **Commissioner CGST, Jaipur**[13]. The Tribunal, in connection with the extended period of limitation, observed that even in a case of self-assessment, the department can always call upon an assessee and seek information and it is the duty of the proper officer to scrutinize the correctness of the duty assessed by the assessee. The Division Bench also noted that departmental instructions issued to officers also emphasise that it is the duty of the officers to scrutinize the returns. The relevant portion of the decision of the Tribunal in **Raydean Industries** is reproduced below:

> "24. **It would be seen that the ER-III/ER-I returns filed by the applicant clearly show that the applicant had categorically declared that it had cleared the final products by availing the exemption under the notification dated 17.03.2012. The applicant had furnished the returns on the basis of self assessment. Even in a case of self assessment, the Department can always call upon an assessee and seek information.** It is under sub-rule (1) of rule 6 of the Central Excise Rules, 20028 that the assessee is expected to self assess the duty and sub-rule (3) of rule 12 of the 2002 Rules provides that the proper officer may, on the basis of information contained in the return filed by the assessee under sub-rule (1),

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13. Excise Appeal No. 52480 of 2019 decided on 19.12.2022

and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee. Sub-rule (4) of rule 12 also provides that every assessee shall make available to the proper officer all the documents and records for verification as and when required by such officer. **Hence, it was the duty of the proper officer to have scrutinized the correctness of the duty assessed by the assessee and if necessary call for such records and documents from the assessee, but that was not done. It is, therefore, not possible to accept the contention of the learned authorized representative appearing for the Department that the appellant should have filed a proper assessment return under rule 6 of the Rules.**

25. **Departmental instructions to officers also emphasise upon the duty of officers to scrutinize the returns.** The instructions issued by the Central Board of Excise & Customs on December 24, 2008 deal with "duties, functions and responsibilities of Range Officers and Sector Officers". It has a table enumerating the duties, functions and responsibilities and the relevant portion of the table is reproduced below:

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26. The Central Excise Manual published by CBEC on May 17, 2005, which is available on the website of CBEC, devotes Part VI to SCRUTINY OF ASSESSMENT.

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27. **It is thus evident that not only do the 2002 Rules mandate officers to scrutinise the Returns to verify the correctness of self assessment and empower the officers to call for documents and records for the purpose, Instructions issued by the department also specifically require officers at various levels to do so.**"

(emphasis supplied)

34. The view that has been taken by the Commissioner was also not accepted by the Tribunal in **G.D. Goenka** and the observations are as follows:

> "**16. Another ground for invoking extended period of limitation given in the impugned order is that the appellant was operating under self-assessment and hence had an obligation to assess service tax correctly and take only eligible CENVAT credit and if it does not do so, it amounts to suppression of facts with an intent to evade and violation of Act or Rules with an intent to evade. We do not find any force in this argument because every assessee operates under self-assessment and is required to self-assess and pay service tax and file returns.** If some tax escapes assessment, section 73 provides for a SCN to be issued within the normal period of limitation. This provision will be rendered otiose if alleged incorrect self-assessment itself is held to establish wilful suppression with an intent to evade. **To invoke extended period of limitation, one of the five necessary elements must be established and their existence cannot be presumed simply because the assessee is operating under self-assessment.**"
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> **(emphasis supplied)**

35. In this connection, it may be pertinent to refer to the decision of the Tribunal in **M/s. India Glycols Limited** vs. **Commissioner of CGST & Central Excise**[14]. The Tribunal held:

> "39. What, therefore, transpires from the aforesaid decisions is that there can be a difference of opinion between the department and Revenue and an assessee may genuinely believe that it is not liable to pay duty. On the other hand, the department may have an opinion that the assessee is liable to pay duty. The assessee may, therefore, not pay duty in the self-assessment carried out by the assessee, but this would

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14. Excise Appeal No. 52129 of 2019 decided on 20.08.2024

> not mean that the assessee has wilfully suppressed facts. To invoke the extended period of limitation, one of the five necessary elements must be established and their existence cannot be presumed merely because the assessee is operating under self assessment. If some duty escapes assessment, the officers of the department can always call upon the assessee to submit further documents and he may also conduct an enquiry. **In fact when the audit was conducted, the officers of the audit team would have scrutinized the records and, therefore, notice should have been issued within the stipulated time from the date the audit was conducted. Even otherwise merely because facts came to light only during the audit does not prove that there was an intent on the part of the assessee to evade payment of duty.**"
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> **(emphasis supplied)**

36. The Tribunal in **Sunshine Steel Industries** vs. **Commissioner of CGST, Customs & Central Excise, Jodhpur**[15] observed that the department cannot be permitted to invoke the extended period of limitation by merely stating that it is a case of self-assessment. The relevant observations are:

> "20. **The Department cannot be permitted to invoke the period of limitation by merely stating that it is a case of self-assessment as even in a case of self-assessment, the Department can always call upon an assessee and seek information.** It is under sub-rule (1) of rule 6 of the Central Excise Rules, 2002 that the assessee is expected to self-assess the duty and sub-rule (3) of rule 12 of the Rules provides that the proper officer may, on the basis of information contained in the return filed by the assessee under sub-rule (1), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee. Sub-rule (4) of rule 12 also provides that

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15. (2023) 8 Centax 209 (Tri.-Del.)

> every assessee shall make available to the proper officer all the documents and records for verification as and when required by such officer. **Hence, it was the duty of the proper officer to have scrutinized the correctness of the duty assessed by the assessee and if necessary call for such records and documents from the assessee, but that was not done. It is, therefore, not possible to accept the contention of the learned authorized representative appearing for the Department that the appellant should have filed a proper assessment return under rule 6 of the Rules.**"
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> **(emphasis supplied)**

37. **Civil Appeal No. 4246 of 2023** (Commissioner of CGST, Customs and Central Excise vs. Sunshine Steel Industries) filed by the department before the Supreme Court to assail the aforesaid decision of the Tribunal in **Sunshine Steel Industries** was dismissed by the Supreme Court on 06.07.2023 and the judgment is reproduced below:

> "Delay condoned.
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> 2. Heard learned counsel for the appellant.
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> 3. This Court is not inclined to interfere with the impugned order of the High Court (Sic).
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> 4. The appeal is dismissed.
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> 5. Pending applications, if any, are disposed of."

38. The Commissioner (Appeals) also held that the appellant had not disclosed complete details in the returns that had been filed and it was only during audit that such facts were revealed.

39. It was for the officers scrutinizing the returns filed by the appellant to have required the appellant to produce the relevant documents.

40. In this connection, it would also be relevant to refer to the decision of the Tribunal in **M/s. Kalya Constructions Private Limited** vs. **The**

Commissioner, Central Excise Commissionerate, Udaipur[16], wherein it was observed:

> "11. **Both the SCNs further state that had the audit not conducted scrutiny of the records, the short paying the service tax would not have come to notice. It is a matter of fact that all the details were available in the records of the appellant. The appellant was required to furnish returns under section 70 with the Superintendent of Central Excise which it did. It is for the Superintendent to scrutinize the returns and ascertain if the service tax had been paid correctly or not. If the assessee either does not make the returns under section 70 or having made a return, fails to assess the tax in accordance with the provisions of Chapter or Rules made thereunder, the Superintendent of Central Excise can make the best judgment assessment under section 72. For this purpose, he may require the assessee to produce such accounts, documents or other evidence, as he may deem necessary.** Such being the legal position, if some tax has escaped assessment which came to light later during audit, all it shows is that the Superintendent of Central Excise with whom the returns were filed had either not scrutinized the returns or having scrutinized then found no error in self-assessment but the audit found so much later. Had the Superintendent scrutinized the returns calling for whatever accounts or records were required, a demand could have been raised within the normal period of limitation. **The fact that the alleged short payment came to light only during audit does not prove the intent to evade payment of service tax by the appellant, but it only proves that the Range Superintendent had not done his job properly. For these reasons, we find that the demand for the extended period of limitation cannot be sustained.**"
>
> **(emphasis supplied)**

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16. Service Tax Appeal No. 54385 of 2015 decided on 15.11.2023

41. The aforesaid decision of the Tribunal clearly holds that if facts come to the notice only when audit is carried out, does not mean that there was an intent to evade payment of service tax.

42. Thus, for all the reasons stated above, the Commissioner (Appeals) was not justified in holding that the extended period of limitation was correctly invoked.

43. The impugned order dated 22.12.2017 passed by the Commissioner (Appeals) upholding the invocation of the extended period of limitation under the proviso to section 73(1) of the Finance Act, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order Pronounced on **27.11.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Shreya