CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH – COURT NO. – III

SERVICE TAX APPEAL NO. 53148 OF 2015

[Arising out of Order-in-Original no. 11/ST/SVS/DL-III/2015 dated 29.05.2015 passed by the Commissioner of Service Tax- Delhi III Commissionerate, Delhi]

M/S. CURRIE & BROWN (I) PVT. LTD ..... APPELLANT
C-31, A/1 (Basement), IA No. 394/341/82,
Ch. Nathu Singh Market, Masoodpur,
Vasant Kunj, New Delhi 110070

VERSUS

COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX DELHI-III ... RESPONDENT
Block-11, 7th Floor,
CGO Complex,
New Delhi 110003

APPEARANCE:
Shri A. K. Batra and Ms. Sakshi Khanna, Chartered Accountants for the appellant

Shri Rakesh Kumar, Authorised Representative for the Revenue

CORAM:
HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 02/09/2026
DATE OF DECISION: 04/11/2026

FINAL ORDER NO. 51663 /2026

P V SUBBA RAO

M/s. Currie & Brown India Pvt. Ltd.[1] filed this appeal to assail the Order dated 29.5.2015[2] passed by the Commissioner deciding the proposals made in the Show Cause Notice dated 12.10.2011[3] issued to the appellant.

2. We have heard Shri A K Batra, learned counsel for the appellant and Shri Rakesh Kumar, learned authorised representative for the Revenue and perused the records.

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1 Appellant
2 Impugned order
3 SCN

3. The appellant was registered with the Service Tax Commissionerate, Delhi under STC No. AABCC9229PST001 dated 21.11.2008. The registration was obtained under the category of 'Consulting Engineer's Services' falling under Section 65(105)(g) of the Finance Act, 1994 (hereinafter 'the Act'). The Assessee is engaged in the provision of cost management, project management, and construction consultancy services across commercial, retail, leisure, infrastructure, hospital, residential, school, and high-tech office space sectors.

4. Pursuant to audit conducted on 07.03.2011, 08.03.2011 and 25.05.2011 for the period 2005-06 to 2009-10 by officers of the Service Tax Commissionerate, Delhi under Rule 5A of the Service Tax Rules, 1994, the following infractions were noticed:

- Non-payment of Service Tax on income from Real Estate Agent's Services provided to overseas associated enterprises, specifically Currie & Brown (Japan) Limited, in respect of the Unicharm Corporation project at Neemrana, Rajasthan.
- Non-payment of Service Tax on reimbursement of expenses incurred during the provision of services.
- Short payment of Service Tax due to debtors reconciliation difference amounting to Rs. 2,99,93,736/-.
- Wrong availment of CENVAT Credit amounting to Rs. 3,25,320/- on invoices not available with the Assessee for the year 2007-08.

5. The SCN was issued covering the period 2005-06 to 2009-10 invoking extended period of limitation under the proviso to

Section 73(1) of the Finance Act, 1994 on grounds of wilful suppression of facts with intent to evade payment of Service Tax.

6. The Commissioner passed the impugned order as follows:

(i) Confirming demand of service tax of Rs. 34,07,377/-

(ii) Confirming demand of service tax of Rs. 30,03,092/- on account of the difference in reconciliation of the figures in the balance sheet in respect of the debtors under section 73(1) of the Act.

(iii) Confirming demand of service tax of Rs. 1,72,323/-under the head of reimbursement of expenses debtors under section 73(1) of the Act.

(iv) Demanding interest on the above amounts under section 75 of the Act.

(v) Imposing penalty of Rs. 65,83,792/- under section 78 of the Act.

7. Thus, in this appeal, there are three issues of dispute on merits. The appellant had provided services to, inter alia, **M/s. Currie & Brown Japan**[4] taxability of which is the main issue of dispute. The second issue of dispute is the service tax demand on the alleged differences noticed after reconciliation of accounts of the debtors. The third issue of dispute is regarding the service tax on reimbursable expenses alleged to be short paid.

Submissions on behalf of the appellant

8. Learned counsel for the appellant made the following submissions:

(i) The first part of the demand confirmed against the appellant is of Rs. 34,07,377/- under the head Real

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4 C&B

Estate Agent Services on the amount which the appellant had received from its **M/s. Currie & Brown, Japan** in relation to the pre-cost management services including the professional project management and construction management in relation to the design, construction, completion and commissioning of a greenfield consumer products factory at Neemrana.

(ii) The department treated the services rendered by the appellant to **Currie & Brown Japan** as **Real Estate Agent Service** while it is correctly classifiable under **Consulting Engineer Service.** As per the Export of Service Rules, 2005, **Consulting Engineer Services** fall under Category III and the service having been provided to C&B, Japan, should be treated as export of service and no service tax has to be paid. On the other hand, department classified the service as **Real Estate Agent Service** which falls under Category I and the place of provision would be the location of the real estate, i.e., in India and service tax has to be paid.

(iii) Real Estate Agent Service was defined under the Act as follows:

> **With effect from 16.5.2008**
>
> Any service provided or to be provided by any person, by a real estate agent in relation to real estate.
>
> **From 16.6.2005 to 15.5.2008**

Any service provided or to be provided to a client by a real estate agent in relation to real estate.

From 16.10.2008 to 15.6.2005

Any service provided to a client by a real estate agent in relation to real estate.

(iv) 'Real Estate Agent' has been defined under Section 65(88) of the Act as a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting of real estate and includes a real estate consultant.

(v) 'Real estate consultant' means a person who provides, in any manner, either directly or indirectly, advice, consultancy or technical assistance in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management of real estate.

(vi) Thus, the very essence of a real estate agent service lies in the agent's role in identifying prospective buyers and sellers and facilitating transactions. The appellant had not provided any such service to **Currie & Brown, Japan.**

(vii) The services provided by the appellant were:

- Preparation & submission of BOQs including preambles for civil works, external development work & miscellaneous works based on the drawings &specifications including backup documents & quantity take-off sheets.

- Preparation & submissions of BOQs for MEP & related works based on the drawings & specifications including back-up documents & quantity take-off sheets.
- Preparation and submission of detailed quantities for Steel Rebars based on drawings.
- Verification of specification.
- Preparation of analysis of rates/provision of document supporting price for each item in the BOQs.

(viii) The above services were technical, engineering related and pertain solely to the quantification, verification and cost evaluation of works to be carried out for a project undertaken by M/s. Unicharm Corporation, USA at Neemrana. They did not involve any advice, consultancy or facilitation connected with the sale, purchase, leasing, renting, etc. of the property and hence they cannot fall within the definition of real estate agent service.

(ix) The burden of establishing that the services fall within 'real estate agent' services lies on the department. Reliance is placed on **SITQ India Pvt. Ltd. vs Commissioner of Service Tax, New Delhi**[5]**.**

(x) Reliance is also placed on CBEC's circular No. 53/CE (Service Tax) 97 dated 4.7.1997 which explained the scope of Consulting Engineer Services. Consulting

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Engineer, as per section 65 (31) of the Act, means 'any professionally qualified engineer or any body corporate or any other firm who, either directly or indirectly, provides any advice, consultancy or technical assistance'.

(xi) Even if it is considered that the services may fall under both categories, 'consulting engineer service' is more specific and must prevail over real estate agent service.

(xii) The demand of service tax on the reconciliation of debtors value as per the statement prepared by the department is against the principles of accounting and facts on record. The opening and closing balances of the debtors in the balance sheet were considered as inclusive of service tax and the amounts billed and amounts received as exclusive of service tax. Thus, there was a mismatch between the two values resulting in differences.

(xiii) Further, accounting adjustments such as bad debts written off, provisions for doubtful debts, foreign exchange fluctuation (gain/loss), year-end adjustments and other accounting provisions have been ignored.

(xiv) If the above are taken into account, the differential tax liability works out to only Rs. 12,896/- which has been paid through a challan but the amount has not been appropriated by the Commissioner in the impugned order.

(xv) The demand on the reimbursement of expenses cannot be sustained in view of the judgment of the Supreme Court in **Intercontinental Consultants and Technocrats Pvt. Ltd. vs Commissioner.**

(xvi) Extended period of limitation has been invoked in the SCN dated 12.10.2011 covering the period April 2006 to March 2010. The last date for filing the return for the last six month period ending 31.3.2010 was 1.7.2010 as per section 73 (6) and therefore, the demand could have been raised only within 12 months from that date, i.e., up to 30.6.2011. The SCN was issued beyond this period. Hence, the entire demand was beyond the normal period of limitation. There was no fraud or collusion or wilful mis-statement or suppression of facts or violation of act or rules with an intent to evade.

(xvii) The appellant was registered on 21.11.2008 and it had been filing ST-3 returns regularly. It maintained its books of accounts and had cooperated fully with the audit conducted on 7.3.2011, 8.3.2011 and 25.5.2011. The dispute, at best, is one of interpretation. On this ground alone also, the demand needs to be set aside.

(xviii) If the matter is still decided against the appellant, cum-tax benefit should be extended.

9. Learned authorised representative for the Revenue vehemently supported the impugned order and asserted that it calls for no interference. He submitted as follows:

(i) The service provided by the appellant to C&B, Japan with respect to the project of Unicharm Corporation, Neemrana, Rajasthan, squarely falls under the definition of real estate agent service.

(ii) 'Real Estate Agent's Services' as defined under Section 65(105)(v) of the Finance Act, 1994, which reads as follows:

"taxable service means any service provided or to be provided to any person, by a real estate agent in relation to real estate"

(iii) 'Real Estate Agent' has been defined under Section 65(88) of the Act as: a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting of real estate and includes a real estate consultant.

(iv) 'Real Estate Consultant' has been defined under Section 65(89) of the Act as: a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management of real estate.

(v) The services rendered by the appellant to C&B Japan with respect to the project squarely falls under the definition of real estate consultant as above. Therefore, the service falls under the definition of real estate agent service.

(vi) Section 65A of the Finance Act, 1994 provides the statutory rule for classification: Sub-clause (a): The sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description. Sub-clause (b): Composite services shall be classified as if they consisted of a service which gives them their essential character. Sub-clause (c): If a service cannot be classified in the manner specified in (a) or (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.

(vii) The services provided by the Assessee—pre-cost management, BOQ preparation, quantity take-off, feasibility assessment—are all in relation to a construction project on immovable property situated in India. The definition of 'Real Estate Consultant' under Section 65(89) specifically covers technical assistance in relation to evaluation, design, supervisions, construction, implementation and development of real estate. This provides the most specific description of the Assessee's activities, and therefore Section 65(105)(v) prevails over the more general Section 65(105)(g) (Consulting Engineer's Services) as per the mandate of Section 65A(1)(a)which is apparent from the definitions of real estate consultants and the language of the

agreement the bedrock of jurisprudence to decide the classification issue in service Tax matters.

(viii) A perusal of the ledger account for the year 2008-09 reveals that the Assessee had bifurcated the amount received from C&B Japan into two parts: towards (i) Consultancy Receipts and (ii) Service Tax amount. This bifurcation itself establishes that the Assessee was well aware that the services rendered by it were taxable and that they did not qualify as export of services. Despite this knowledge, the Assessee deliberately claimed the benefit of export of services without disclosing the correct facts to the Department.

(ix) The question of bonafide belief after the above factual matrix destroys the above plea by the appellant. In fact the Appellant had all the space to enquire with the Department when the description of the service as per sec 65 A of the Act is clear and categorical. Therefore, extended period has rightly been invoked and the penalty was correctly imposed.

(x) Under Rule 3(1)(i) of the Export of Services Rules, 2005, 'Real Estate Agent's Services' are specifically listed as a Category I service. Under Category I, services qualify as 'export' only if they are provided in relation to an immovable property situated outside India. Since the services of the Assessee are in relation to immovable property situated in India (the Neemrana factory), the same

does not qualify for exemption as 'export of services' and Service Tax is fully payable thereon.

(xi) Reimbursable expenses are includable in the assessable value Section 67(1) of the Act and Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006. The appellant had deposited the amount and has not challenged these expenses before the adjudicating authority.

(xii) During the course of audit, while going through reconciliation of debtors as per books of accounts with actual as per figures given in the Financial Data there was a difference in debtors amounting to Rs. 2,99,93,736/- The Assessee was requested to explain the said difference but failed to do so. As per the mercantile system of accounting, the closing debtor balance at year-end must equal: Opening Debtors + Billings – Receipts. The difference indicates unreported income on which Service Tax has not been paid. Accordingly, the demand has been confirmed on this account in the impugned order treating the difference as cum-tax receipts.

(xiii) Extended period of limitation has been correctly invoked in this case as the appellant had deliberately mis-classified the service which it rendered to C&B Japan, did not include the reimbursable expenses in the assessable value as it was required to and also failed to file the correct ST-3 returns.

(xiv) The appeal may be dismissed and the impugned order may be upheld.

10. We have considered the submissions advanced by both sides and perused the records.

11. The appellant has contested the impugned order both on merits and on limitation. We first deal with the merits and then with the limitation.

12. The first issue to be decided on merits is whether the service provided by the appellant to C&B Japan was consulting engineer service or real estate agent service. The undisputed legal position is that since the real estate was in India, if the service was 'real estate agent service' it would deemed to have been provided in India and service tax had to be paid but if the service was consulting engineer service, the service recipient, C&B being located in Japan, the place of provision of service will be Japan and no service tax had to be paid.

13. The nature of the services rendered by the appellant to C&B Japan, with respect to the real estate in Neemarana, Rajasthan are also not in dispute. These were:

1. Preparation & submission of BOQs including Preambles for Civil Works, External Development & Miscellaneous works based on the drawings and specifications including back up documents & quantity take-off sheets.
2. Preparation & submission of BOQ for MEP & related Works based on the drawings & specification s including back-up documents & quantity take off sheets.
3. Preparation and submission of detailed quantities for steel rebars based on drawings.

4. Verification of specification.

5. Preparation of analysis of rates/provision of document supporting price for each item in the BOQs.

14. The case of the Revenue is that the above services were in the nature of real estate agent services and the case of the appellant is that they were consulting engineer services. The relevant definitions are as follows:

> **"Section 65. Definitions**. –
> In this Chapter, unless the context otherwise requires, --
> …….
> (31) "**consulting engineer**" means any professionally qualified engineer or any body corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to any person in one or more disciplines of engineering;
> …..
> (88) **"real estate agent"** means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting of real estate and **includes a real estate consultant**;
> (89) **real estate consultant"** means a **person who renders in any manner, either directly or indirectly**, **advice, consultancy** or technical assistance, in relation to **evaluation, conception, design, development, construction, implementation, supervision**, maintenance, marketing, acquisition or management, **of real estate**;
> ….
> (105) **"taxable service" means any service provided or to be provided**,-
> …..
> (g) to any person, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering including the discipline of computer hardware engineering.
> ……
> (v) to any person, by a real estate agent in relation to real estate;
> **Explanation**.— For the purposes of this sub-clause, it is hereby declared that services provided by a consulting engineer in relation to advice, consultancy or technical assistance in the disciplines of both computer hardware engineering and computer software engineering shall also be classifiable under this sub-clause;"

15. The services provided by a real estate agent are covered under section 65(105) (v) and the term real estate agent included real estate consultant. Real estate consultant, as per section 65(89) means **person who renders** in any manner,

either directly or indirectly, **advice, consultancy** or technical assistance, in relation to **evaluation, conception, design, development, construction, implementation, supervision**, maintenance, marketing, acquisition or management, **of real estate.** The services provided by the appellant to C&B were with respect to the real estate in Neemrana. The nature of the services, as listed above were in relation to design, development and construction on that real estate. Learned counsel's submission was that the consultancy was not with respect to buying or selling of real estate. We, however, note that that buying selling leasing, etc. is not necessary for the service to be part of real estate agent service. It could be any advice, consultancy or technical advice rendered directly or indirectly, in relation to **evaluation, conception, design, development, construction, implementation, supervision**, maintenance, marketing, acquisition or management of a real estate. Therefore, the services can be classified as the services provided by a real estate consultant and hence as real estate agent services.

16. On the other hand, the services rendered by the appellant can also be classified under consulting engineer service which means rendering **any advice, consultancy or technical assistance** in any manner to any person in one or more disciplines of engineering.

17. Thus, if the advice, consultancy or technical assistance rendered by a person was related to one or more disciplines of engineering, say, civil engineering and they are in relation to a real estate, such services fall within both the definitions. Such

cases where the service prima facie falls under two or more clauses of section 65(105) need to be interpreted following the principles laid down in section 65A(2) of the Act which reads as follows:

> **"65A. Classification of taxable services** – (1) For the purposes of this chapter, classification of taxable services shall be determined according to the terms of the sub-clauses (105) of section 65;
>
> (2) When for any reason , a taxable service is prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-
>
> (a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
>
> (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;
>
> (c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merits consideration;
>
> (3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.

18. This section provides for three methods of classification. As per section 65 (2)(a) the service which provides a more specific description to be preferred to a more general description. This does not help in resolving the dispute in this case because if one looks at from the engineering point of view, the services rendered were related to civil engineering but if one looks at them from the point of view of real estate, the services were with respect to the specific real estate.

19. Next, as per section 65(2) (b), in case of composite services, the one which gives the essential character of the service should be applied. This clause will also not help resolve

the difference in the case because there was no composite service in this case.

20. As per section 65(2) (c), if neither of the above provisions can resolve the classification, the sub-clause of section 65(105) which occurs first among the sub-clauses which equally merit consideration shall be the classification. Applying this rule, section 65(105) (g) 'Consulting Engineer Services' should be adopted as it occurs before section 65(105) (v) 'Real Estate Agent service'.

21. **Adopting section 65(2) (c), the services rendered by the appellant to C&B Japan deserve to be classified as 'Consulting Engineer Services' under section 65(105)(g). Consequently, the place of provision of service is the location of the service recipient, viz., Japan. Consequently, no service tax has to be paid on these services.**

22. The second dispute on merits is related to the short payment of service tax on reimbursable expenses amounting to Rs. 33,570/- as per Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006. The appellant had paid service tax on the reimbursable expenses but had, according to the Revenue, short paid service tax on such expenses.

23. Learned counsel for the appellant submits that the entire period of dispute is before 14.5.2015.

24. During the relevant period, while Section 67 of the Act provided for service tax only on the consideration received for the services, Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006, provided for levy of service tax on the reimbursable expenses also. This Rule was held to be *ultra vires*

of the Act by the Delhi High Court in **Intercontinental Consultants and Technocrats Pvt. Ltd. vs Union of India**[6] which decision was upheld by the Supreme Court in **Union of India vs Intercontinental Consultants and Technocrats Pvt. Ltd.**[7]**.** Thereafter, section 67 of the Act was amended with effect from 14.5.2015 making service tax payable on the reimbursable expenses also. Thus, no service tax was payable on reimbursable expenses before 14.5.2015. Since the entire period of dispute was before 14.5.2015, no service tax was payable on the reimbursable expenses. The demand on this count, therefore, needs to be set aside.

25. The third point of dispute on merits is the short payment of service tax on differential value as per debtors reconciliation. The case of the Revenue is that in the mercantile system of accounting followed by the appellant, opening balance + billed amount- realised amount must be equal to closing balance. Applying this formula, the officers found that the appellant had short paid service tax of Rs. 33,39,950/- on the differential value.

26. The submission of the learned counsel is that the Commissioner considered the opening and closing balance as per the balance sheet as inclusive of service tax and the amount billed and amount received as exclusive of service tax which resulted in the mismatch of the values and created an perceived short payment.

27. It is further the submission of the learned counsel that several legitimate accounting adjustments such as writing off of bad debts, provisions for doubtful debts, foreign exchange

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6 2013(29) STR 9(Del.)
7 2018(10) GSTL 401 (SC)

fluctuations (gain/loss) and year-end adjustments were ignored by the Commissioner in arriving at the conclusion that there was short payment of service tax.

28. According to the learned counsel revised reconciliation statement duly considering all items was prepared and certified by the Chartered Accountant and the differential service tax liability thereon worked out to Rs. 12,896/- which was paid through a challan.

29. Learned authorised representative for the Revenue vehemently argued that in a mercantile system of accounting, the opening balance, billings and receipts and closing balance must tally. We agree but the figures must be correctly considered. We find from page 46 and 47 of the impugned order, the appellant's submission before the commissioner was that among the receipts during the year, Revenue has not considered the receipts of service tax from the service recipients but while counting the billing of service tax was considered. The illustration recorded in the impugned order was, in a nutshell, as follows:

Actual	
Opening debtors:	Rs.1,10,000
Add. Billing (incl. Service tax)	Rs.1,10,000
Less. Receipts (other than S. tax)	Rs.1,50,000
Less. Receipts (S. tax)	**Rs. 15,000**
Closing	Rs. 55,000
Considered in the SCN	
Opening debtors:	Rs.1,10,000
Add. Billing (incl. Service tax)	Rs.1,10,000
Less. Receipts (other than S. tax)	Rs.1,50,000
Closing	Rs. 70,000

Thus, there appeared to be a difference of Rs. 15,000/- on reconciliation but this difference was only on account of the fact that the service tax amount of Rs. 15,000/- was not considered.

30. The Commissioner dismissed the submission stating '*On examination of the illustration given by the party, I find that there is no justification for subtractions of the amount of service tax at one place and addition on the other. Therefore, I do not find any merit in the claim of the party*'.

31. The view of the Commissioner is not correct. The service tax law does not stipulate any manner of maintenance of accounts apart from the statutory returns and records. If the department wants to establish a case of short payment based on reconciliation of the records, it is for the department to establish that the appellant had received a greater consideration than what it had declared. While so reconciling the records and accounts, it is not open to the department to ignore some figures or to seek justification for maintaining the assessee's records in any particular fashion.

32. The demand on this count deserves to be set aside.

33. Although the demand has been decided on merits, since the contest was also on the limitation, we now proceed to examine the limitation.

34. During the relevant period, an SCN to recover service tax under section 73(1) of the Act could be issued within the normal period of limitation was one year. However, if the non-payment or short payment of service tax was by reason of fraud or collusion or wilful mis-statement or suppression of facts or violation of the provisions of Act or Rules with an intent to evade payment of service tax, within the extended period of limitation of five years. The conditions for invoking extended period of

limitation is similar to the provisions under Section 11A of the Central Excise Act, 1944.

35. The case of the appellant is that it was registered with the service tax department and that it has been maintaining its accounts, it had self-assessed service tax as it felt was correct and had filed returns in form ST-3. Therefore, it is for the department to establish that there was any fraud or collusion or wilful misstatement or suppression of facts or violation of the provisions of the Act or Rules with an intent to evade.

36. The case of the Revenue on the question of limitation is that the appellant had deliberately, mis-classified the service which it had rendered to C&B Japan, had deliberately not included the value of the reimbursable expenses and that it had not reflected the correct value of the amounts received which came to light only on reconciliation of the records with the ST-3 returns. Therefore, extended period of limitation was correctly invoked.

37. We find that on the question of limitation, the case of the Revenue is that the appellant had not, in a nutshell, correctly self-assessed and paid service tax through the above. The question is how to deal with such cases where the assessee does not correctly self-assess the service tax. The answer to this lies in section 72 of the Act which reads as follows:

> **"Section 72. Best Judgment Assessment. If any person**, liable to pay service tax –
> (a) fails to furnish the return under section 70;
> (b) **having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules** made there under, **the Central Excise Officer, may require the person to produce such accounts, documents** or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, **shall by an order in writing, after giving the**

> **person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment**."

38. It is always possible that an assessee may not self-assess service tax correctly. Section 72 provides that in such cases, the officer has to re-assess the service tax calling for any records or accounts necessary. In this case, all data and records based on which the SCN was issued were in the records of the appellant. Had the Range officer scrutinised the returns, as he was required to, calling for any records or accounts, as he was empowered to, the facts based on which the SCN was issued would all have been known to them and the officer could have issued an SCN within time.

39. Extended period of limitation can be invoked only if one of the elements necessary to invoke extended period of limitation is established viz., fraud or collusion or wilful mis-statement or suppression of facts or violation of act or rules with an intent to evade as per the proviso to section 73(1) of the Act. It reads as follows:

> **"73. Recovery of Service tax not levied or paid or short levied or short paid or erroneously refunded** – (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 twelve 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 :
>
> ***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 there under with intent to evade payment of service tax,

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 "twelve months", the words "five years" had been substituted.

Explanation. — Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of 'twelve months' or five years, as the case may be."

40. The elements necessary to invoke extended period of limitation under section 73 of the Act are similar to the provisions for invoking extended period of limitation under section 11A of the Central Excise Act, 1944. The scope of these elements and as to when extended period of limitation can be invoked has been decided in a series of judgments.

41. Section 11A of Central Excise Act, 1944[8], as it stood when the Supreme Court explained "suppression of facts" in **Pushpam Pharmaceutical Co.** vs. **Commissioner of Central Excise, Bombay**[9] was as follows:

"**11A.** Where any duty of excise has not been levied or paid or has been short-levied or short-pain or erroneously refunded, by the reason of-

(a) fraud; or
(b) collusion; or
(c) any wilful misstatement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Act of the rules made thereunder with intent to evade payment of duty

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant dated, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under

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8 Excise Act
9 1995 (78) E.L.T. 401 (SC)

Section 11AA and a penalty equivalent to the duty specified in the notice."

42. In **Pushpam Pharmaceuticals Company**, the Supreme Court 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:

"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."

(emphasis supplied)

43. This decision was relied upon by the Supreme Court in **Anand Nishikawa Company Ltd.** vs. **Commissioner of Central Excise**[10] 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:-

"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."

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."

(emphasis supplied)

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10 2005(188) ELT 149 (SC)

44. In **Easland Combines, Coimbatore** vs. **Collector of Central Excise, Coimbatore**[11] 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.

45. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in **Uniworth Textiles Ltd.** vs. **Commissioner of Central Excise, Raipur**[12] 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)**

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11 2003 (152) ELT 39 (SC)
12 2013 (288) E.L.T. 161 (S.C.)

46. The Supreme Court in **Continental Foundation Joint Venture** vs. **Commissioner of Central Excise, Chandigarh**[13] 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 "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)**

47. The Delhi High Court in **Bharat Hotels Limited** vs. **Commissioner of Central Excise (Adjudication)** [14] also examined the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Finance Act, 1994[15] 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

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13 2007(216) ELT 177(SC)
14 2018(12) GSTL 368(Del.)
15 the Finance Act

> 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 mere failure to pay duty or take out a license without the presence of such intention."**
>
> *****
>
> **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.**" **(emphasis supplied)**

48. 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**[16]. 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

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16 2023 (73) GSTL 310(Del.)

> 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 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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> *****
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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)**

49. It is, therefore, clear from the aforesaid discussion that the extended period of limitation could have been invoked only if there was suppression of facts with intent to evade payment of service tax. 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.**[17] The Supreme Court held that if an assessee bona fide believes that it was correctly

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17 2023 (385) ELT 481(SC)

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 bona fide manner. The relevant portion of the judgment is reproduced below:

> "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.**
>
> 1. **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)**

50. In this connection, reference can be made to the decision of the Tribunal in **M/s. Raydean Industries** vs. **Commissioner CGST, Jaipur** [18] . 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), and after such further enquiry as he may consider necessary, scrutinize the

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18 Excise Appeal No. 52480 of 2019 decided on 19.12.2022

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.**

2. **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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3. 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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4. **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)**

51. 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 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.**"
>
> **(emphasis supplied)**

52. The Tribunal in **Sunshine Steel Industries** vs. **Commissioner of CGST, Customs & Central Excise, Jodhpur** [19] 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 every assessee shall make available to the proper officer all the documents and records for verification as and when

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19 (2023) 8 Centax 209 (Tri.-Del.)

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.**"

(emphasis supplied)

53. **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.

2. Heard learned counsel for the appellant.

3. This Court is not inclined to interfere with the impugned order of the High Court (Sic).

4. The appeal is dismissed.

5. Pending applications, if any, are disposed of."

54. In this case, we find that the appellant had been filing ST-3 returns and if the appellant had not self-assessed and paid service tax correctly, it was for the central excise officer (Range Superintendent) to have scrutinised the returns and raised the demand within time. Even if there was a demand sustainable on merits and if no SCN is issued within time and there is no evidence of fraud or collusion or wilful misstatement or suppression of facts or violation of Act or Rules with an intent to

evade, the demand cannot be sustained. The responsibility for time bar rests at the doorstep of the Range officer who failed to scrutinise the returns in time.

55. Thus, we find in favour of the appellant both on merits and on limitation.We allow the appeal and set aside the impugned order with consequential relief to the appellant.

[Order pronounced on **04/11/2026**]

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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

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