CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 3

Service Tax Appeal No. 50719 of 2018

[Arising out of Order-in-Appeal No. 98/ST/DLH/2017 dated 22.12.2017 passed by the Commissioner (Appeals) of Central Excise, Goods and Service, Delhi]

Imperia Structure Limited **: Appellant**
A-25, First Floor, Mathura Road, Mohan
Co-operative Industrial, New Delhi

Vs

Commissioner of Central Goods, Service Tax and Central Excise **: Respondent**
C.R. Building, I.P. Estate North Delhi-110015

APPEARANCE:
Present for the Appellant :Shri Atul Gupta, Shri Varun Gaba, Advocates
Present for the Respondent:Shri Rajeev Kapoor, Authorized Representative

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 50490/2025

Date of Hearing:16.12.2024
Date of Decision:16.04.2025

HEMAMBIKA R. PRIYA

The present appeal has been filed by M/s Imperia Structure Limited[1] to assail the order dated 22.12.2017 wherein the Commissioner has confirmed the service tax demand of Rs. 1,21,32,851/- along with interest and equal penalty.

2. The brief facts of the case are that the appellant was engaged in construction services, which included Commercial or Industrial Buildings and Civil Structures, Construction Services, Construction of

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1 **the appellant**

Residential Complexes and Maintenance & Repairs Services, Commissioning and Installation, Preferential Location or External/Internal Development of Complexes under the provisions of Finance Act, 1994. During the relevant period, the appellant availed the abatement under Notification No. 1/2006 dated 01.03.2006 as amended by Notification No. 29/2010. An audit of the Appellant's records was conducted for the period of 2010-2011 & 2011-2012 the department noted that for the period 2010-2011, the appellant had availed the abatement under Notification No. 1/2006 Service Tax dated 01.03.2006, and simultaneously availed CENVAT Credit of Service tax on input services used for providing such taxable services. The Department further observed that for the period 2011-2012, the appellant had wrongly availed the CENVAT Credit of Rs. 50,32,761/- with respect to Commercial or industrial construction & Construction of complex service. The department opined that for the period 2011-2012, the Appellant was engaged in providing taxable as well as exempted services, and as per the provisions of CENVAT Credit Rules, 2004, the Appellant was eligible to avail Credit only in respect of taxable services. Further, the appellant had not maintained separate accounts for taxable services & exempted services as required under Rule 6(3) of the CENVAT Credit Rules. Therefore, a show cause notice dated 11.12.2013 under Section 73(1) was issued to the Appellant proposing to recover the amount of Rs. 1,21,32,851, claimed as abatement by the Appellant for the period 2010-2011. The Adjudicating Authority vide the adjudication order dated 02.03.2017, appropriated the demand of Rs. 50,32,761/- already deposited by the Appellant and confirmed the demand of Rs. 1,21,32,851/- along with

imposition of penalty and interest. The appellant filed an appeal before the Commissioner (Appeals), who upheld the order-in-original vide the impugned order dated 22.12.2017. Hence, the appellant has filed the present appeal.

3. Learned Counsel for the appellant submitted that the appellant, for the provision of taxable services, availed various input services like security services, consulting engineering service, professional services etc., and had also availed the CENVAT credit for the input services. Learned counsel submitted that the Department had alleged that the appellant had availed CENVAT credit on input services and utilized the same in respect of exempted services and not exclusively in respect of taxable output services namely, preferential location & development services. He submitted that in terms of Rule 6(1) of the CENVAT Credit rules, denial of credit is only in respect of such quantity of input/input services which are 'used in' for provision of exempted services. Learned counsel submitted that a business activity cannot be carried out by segregating different activities of business, and contended that business being an integrated/continuous activity is not restricted to mere rendering of final services. Therefore, activities in relation to the business cover all the activities that are related to its functioning. Learned counsel stated that there are many general services that are used for the purpose of business such as telephone service, accounting service, auditing services etc., which cannot be termed as the services used for provisions of a particular service in the organization.

3.1 Learned counsel further submitted that in the instant case, the Appellant was availing several services like security service, real estate

agent services, consulting engineer service, legal consultancy service etc., and paying service tax and availing CENVAT Credit for the same as input services. He submitted that these services were for the entire organization and cannot be merely correlated with the 'Commercial or Industrial Construction Service' or 'Construction of Residential Complex Service. The services availed are covered under Rule 6(5) of the CENVAT Credit and the same has been accepted by the department. In support of his contention, he relied upon the following decisions:-

- **Commissioner of C. Ex., Goa Vs. V.M. Salgaonkar & Bros. Pvt. Ltd.[2]**
- **Reliance Life Insurance Co. Ltd. Vs. Commr. Of Service Tax, Mumbai[3]**
- **Lemon Tree Premier Vs. Commissioner of Central Tax, Hyderabad-IV[4]**
- **Tidel Park Ltd. Vs. Commissioner of Service Tax Chennai[5]**
- **Lemon Tree Hotels Pvt. Ltd. Vs. Commissioner of Service Tax-Channai[6]**
- **Linkwell Telesystems Pvt. Ltd. Vs. Commissioner of Central Tax, Secunderabad[7]**
- **Super Packs Vs. Commr. Of C. Ex. S.T. & Cus. Banglore -II[8]**
- **Alluglaze Vs. Commissioner of Central Excise, Mumbai - II[9]**

3.2 Learned counsel further submitted that Rule 6(5) of CENVAT Credit Rules, 2004, allowed full CENVAT of 16 input services even if such service were used for providing both taxable output services and exempted services. The credit would be disallowed only when these services are used exclusively in providing exempted service.

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2 2008 (10) S.T.R. 609 (Tri. - Mumbai)
3 2018 (363) E.L.T. 1050-(Tri.-Mumbai)
4 2024 (4) TMI 397-CESTAT Hyderabad
5 2010 (18) S.T.R. 642(Tri. - Chennai)
6 2018 (13) G.S.T.L. 305 - Chennai
7 2023 (383) E.L.T. 84 (Tri. - Hyd.)
8 2019 (370) E.L.T. 691 (Tri. - Bang.)
9 2017 (5) G.S.T.L. 262 (Tri. -Mumbai)

Notification No. 3/2011-C.E. (N.T.) dated 01.03.2011, w.e.f. from 01.04.2011, inserted that 'the taxable services, whose part of the value is exempted by providing that the exemption is available only on the condition, that no CENVAT credit on input and input service is used for providing such taxable service shall be available. Thus, by this amendment even the taxable services, on which abatement has been granted has been covered within the meaning of 'exempted services. Hence, the taxable services, on which abatement has been granted, would also be treated as 'exempted services." Learned Counsel further submitted that a perusal of Notification No. 1/2006, clearly evidences that an assessee can claim the benefit of abatement, if he has not availed CENVAT Credit on the input services which are specifically used for providing such taxable service i.e. Commercial or Industrial Construction' and 'Construction of Complex', CENVAT Credit on the same cannot be claimed under the said notification. The appellant had claimed the benefit of input services which are not directly linked with the provision of Commercial or Industrial Construction service or Construction of Residential Complex Service. Learned Counsel contended that services availed of security, real estate agent, repair & Maintenance, Management service, were used for provisioning of services of the entire organization, and these cannot be corelated with 'Commercial or industrial construction' or 'Construction of Residential Complex Service' only.

3.3 Learned Counsel submitted that the demand had been confirmed on the scrutiny of ST-3 returns, wherein the appellant had disclosed all the information in the ST-3 returns filed for the relevant period. Thus,

the allegation of suppression against the appellant is not maintainable. In support of his contention, the learned counsel relied on the following decisions:-

- **Johnson Mattey Chemical India P. Ltd. Vs. Commr. Of Central Excise Kanpur**[10]
- **Aneja Construction V. Commissioner of Service Tax**[11]
- **Central Warehousing Corporation V. Commissioner of Service Tax, Ahmedabad**[12]
- **SOTC Travels Services Ltd. Vs. Pr. Commissioner of C. Ex., Delhi-1**[13]

4. The learned Authorized Representative for the Revenue reiterated the findings of the lower authorities. Learned AR submitted that the appellant had never disclosed to the department that they had claimed abatement in respect of Commercial or industrial Construction & Construction of Residential Complex services and simultaneously availed Cenvat credit for the input services utilized for all output services and not exclusively in respect of the output Service namely Preferential location development services. However, they had not maintained any separate input credit account for input services utilized for the taxable service as well as other output services. Learned AR contended that from these actions, it was evident that the appellant had intentionally and willfully suppressed the said facts in respect of providing impugned taxable services and did not pay the Service Tax as applicable on such services. Thus, by not disclosing the entire facts to the Department, the value has escaped the assessment for Service Tax liability, resulting into contravention of various provisions of the

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10 2014 (34) S.T.R. 458 (Tri. - Del.)
11 2013 (32) S.T.R. 458 (Tri. - Ahmd.)
12 2016 (41) S.T.R. 106 (Tri. Ahmd.)
13 2021 (55) G.S.T.L 332 (Tri. - Del.)

said Act and the Rules with intention to evade payment of impugned service tax during the period 2010-2011.Consequently, the provisions of Section 73(1) of the said Act had been rightly invoked and the demand and recovery can be made for non-levy and non-payment of Service Tax for five years from relevant date.

4.1 Learned AR further submitted that from the wordings of Notification No. 01/2006-ST dated 01.03.2006 is very clear that the benefit of abatement is available only when service provider is not taking any CENVAT credit either on capital goods/inputs/input services. If the two notifications viz. Notification notifying Cenvat credit Rules and the Notification providing abatement are read harmoniously there is a need for reversal of common input services used for providing abated services in terms of Rule 6(3), However, such provisions would apply only w.e.f 01.04.2011. Prior to this, the law was that no credit of input service is allowed where abatement had been taken. Learned AR stated that the Appellant's intent to evade the payment of service tax was evident from the fact that they were availing credit of input services, in violation of the conditions of the Notification No. 01/2006 ST dated 01.03.2006. Learned AR stated that it is settled law that the language of the Notification is to be construed strictly. The Appellant was working under self-assessment system, and are bound by service tax law to correctly assess their service tax liability. The appellant has willfully suppressed facts from the department with an intent to evade the payment of service tax. Therefore, extended period and penalty under section 78 was invokable.

5. We have heard the learned counsel for the appellant and the learned Authorized Representative for the Department and perused the case records. The issue involved in the instant appeal is whether the abatement in respect of commercial or industrial construction & construction of residential complex services and simultaneously Cenvat Credit for the input services could be availed. There is a demand of service tax denying abatement under Notification No. 01/2006-ST for 2010-2011 & there is denial of CENVAT Credit for 2011-2012 when abatement is extended to appellants. The admitted facts of the case are as follows:-

(i) the appellant is registered for construction services including Commercial or Industrial Buildings and Civil Structures, Construction Services, Construction of Residential Complexes, and Maintenance & Repair services, Commissioning and Installation, Preferential Location or External/Internal Development of Complexes.

(ii) The appellant was providing both taxable and exempted services

(iii) The appellant claimed abatement under Notification No. 01/2006-ST dated 01.03.2006 in respect of Commercial or erection Services and Construction of Residential Complex Services.

(iv) The appellant availed Cenvat credit of service on input services used for providing taxable services.

(v) The appellant was regularly filing ST-returns

(vi) Post the audit, the appellant vide their letter dated 02.09.2013 informed the Department that they had deposited an amount of Rs. 19,74,400/- on 31.07.2013 and reversed unutilized Cenvat credit lying in balance amounting to Rs. 30,58,361/- total amount of Rs. 50,32,761/- for the year 2011.

6. The order-in-original has held that the appellant was not maintaining separate account of taxable and exempted services (abated services), and in such a situation, the appellant had to opt to avail Cenvat credit as per Rule 6(3) of the Cenvat Credit Rules, 2004. However, the Department noted that as no such option had been exercised as required in Rule 6(2), the demand was confirmed. The impugned order has also denied the benefit of abatement Notification No. 01/2006-ST for the period 2010-2011. In this regard, we note that this is a case where the appellant has availed Cenvat credit on input services and also availed abatement. The wording of the Notification is very clear. The appellants are eligible either to avail abatement or to avail CENVAT Credit. Notification No. 01/2006-ST dated 01.03.2006 provides that benefit of abatement shall not apply in cases where:-

(i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or

(ii) the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance

(Department of Revenue), No. 12/2003-Service Tax, dated 20th June, 2003.

7. From the wordings of Notification No. 01/2006-ST dated 01.03.2006 it is apparent that the benefit of abatement is available only when service provider is not taking any CENVAT Credit either on Capital Goods/inputs/input Services. Further, we note that Rule 6 of CENVAT Credit Rules, 2004 provides for certain obligations of a manufacturer of dutiable and exempted goods and provider of taxable and exempted services.

8. According to Rule 6(2), a separate account is required to be maintained in respect of input services, if the output services are taxable as well as exempted. Rule 6(3) considers a situation wherein when separate account is not maintained, in such a situation, either a flat amount as a percentage of exempted & taxable services is to be paid or an amount as prescribed under Rule 6(3A) is liable to be paid. The appellants have contested that the services on which they had taken credit were not used exclusively for providing the abated services and the services were in the nature of such services which could be used by them for their entire business operation. However, the wordings of the notification and the obligation prescribed under Rule 6 of the CCR, 2004 are clear and unambiguous. In case abatement is availed, then Cenvat credit cannot be availed, if they have availed Cenvat credit then abatement cannot be availed. We note that in terms of Section 93 of the Finance Act, 1994, exemption can be granted generally or subject to such conditions as may be specified in the notification. The Hon’ble High Court of Karnataka in its

decision **Shriram Properties Limited vs. Commissioner of Service Tax**[14] held as follows:-

> "7. The notification under Annex. -C which is one in exercise of the powers conferred under sub-s. (1) of s. 93 of the Finance Act, 1994 (32 of 1994) is one for the purpose of granting certain concessions to certain class of service providers. Sec. 93 of the Act reads as under :
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> > "93. Power to grant exemption from service-tax. The Central Government may, if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette, exempt generally or subject to such conditions as may be specified in the notification, taxable service of any specified description from the whole or any part of service-tax leviable thereon."
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> 8. The exemption itself in terms of this section can be one which is granted generally or subject to such conditions as may be specified in the notification, In the present case, the particular condition which the petitioner is aggrieved with is the condition of option given to a person like the petitioner to seek benefit of either the Cenvat credit of duty on service-tax input services or to avail benefit under the present notification.
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> 9. In fact, it may be noticed that the notification is one which provides for a different manner of arriving at the liability and after so quantifying, if it is found that the tax payable by a person is higher under the normal provisions of the Act, then to the extent of difference of liability as between the tax liability determined in terms of the notification and the liability actually payable, the person is provided the benefit of concession/exemption. Therefore, the concession of this nature in the first instance comes only if the method of determination of liability as suggested in the notification is less than the actual liability. In a given case, if the liability is much more or equal to the liability under the provisions of the Act as otherwise determined, then there is no benefit to a person under the present notification. In a notification of this nature, if the person is put to election that either he can opt for Cenvat credit of duty on service-tax input services or to avail benefit under the present notification which is an option which is extended to a

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14 (2007-TIOL-128-HC-KAR-ST)

> person which he can seek for, avail of or ignore, no grievance can be made that putting a person to such option is bad.
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> 10. The notification has never the effect of either enhancing the tax liability of the petitioner nor does it per se discriminate against the petitioner as a concession which is subject to a condition as under the present notification, in the sense that, a person claiming benefit under one particular provision is not entitled for benefit under the other, cannot be said to be a discriminatory provision."

9. The Hon'ble High Court has noted that in a notification of this nature, if the person is put to election that either he can opt for Cenvat credit of duty on service tax on input services or to avail the benefit of abatement under the notification is an option extended to an assessee to avail of or ignore. In the instant case, the appellant has chosen to avail abatement and take Cenvat credit. It was then incumbent upon him to follow the procedure as prescribed under Rule 6 of the CCR, 2004. Therefore, the denial of abatement for 2010-2011 is correct and the demand is sustained. We also note that the appellant has reversed the Cenvat credit availed for the year 2011-2012 which stands appropriated. Therefore, we find no reason to differ from these findings in the impugned order.

10. We now come to the issue of invocation of extended period. It has been contended before us that the demand was raised against the appellant based on the scrutiny of ST-3 returns, wherein all information had been duly disclosed by them. We are in agreement. This issue is no more res-integra. The finding recorded that suppression of facts is sufficient to invoke the extended period of limitation under the proviso to Section 73 (1) of the Finance Act and there is no necessity of any intent to evade payment of service tax, is

against the well settled principles. It has to be examined whether any suppression was wilful and coupled with an intent to evade payment of service tax. The Supreme Court and the Delhi High Court have held that suppression of facts has to be "wilful" and it has to be established that there was also an intent to evade payment of service tax.

11. In **Pushpam Pharmaceuticals Company vs Commissioner of Central Excise, Bombay**[15], 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 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

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15 [1995 (78) E.L.T. 401 (SC)]

> 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)**

12. This decision was referred to by the Supreme Court in **Anand Nishikawa Company Ltd.** vs. **Commissioner of Central Excise**[16] 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 wilful 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."
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> 27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. vs. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that **"suppression of facts" can have only one meaning that**

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16 [2005 (188) E.L.T. 149 (SC)]

> **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)**

13. From the aforesaid decisions, it is evident that mere suppression of facts is not sufficient, but there must be a deliberate and wilful attempt on the part of the assessee to evade payment of duty. In the absence of any intention to evade payment of service tax, which intention should be evident from the materials on record or from the conduct of the appellant, the extended period of limitation cannot be invoked. As the extended period is held to be not invokable, hence the penalty under section 78 is also liable to be set aside.

14. In view of the above discussions, the demand is upheld for the normal period only. The appeal is allowed to the extent indicated above and the impugned order is upheld partially.

(Order pronounced in the open Court on 16.04.2025)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.