IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41586 of 2019

(Arising out of Order-in-Appeal No. 189/2019 (CTA-II) dated 27.06.2019 passed by the Commissioner of G.S.T. and Central Excise (Appeals-II), Newry Towers, 2054/1, II Avenue, 12th Main Road, Anna Nagar, Chennai – 600 040)

M/s. India Yamaha Motor Private Limited, **: Appellant**
Plot No. VV-1, SIPCOT Industrial Park,
Vallam Vadagal Village, Sriperumbudur Taluk,
Kancheepuram, Tamil Nadu – 602 105

VERSUS

The Commissioner of G.S.T. and Central Excise, **: Respondent**
Chennai Outer Commissionerate,
Newry Towers, No. 2054/1, II Avenue,
12th Main Road, Anna Nagar,
Chennai – 600 040

APPEARANCE:

Shri. Tanuj Hazari, Advocate for the Appellant

Ms. Sridevi Taritla, Authorized Representative (A.R.) for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 41647 / 2019

DATE OF HEARING: 08.11.2019

DATE OF DECISION: **05.12.2019**

A Show Cause Notice/Statement of Demand dated 14.03.2018 was issued *inter alia* alleging that the appellant had contravened the provisions of Rule 2 (l), Rule 3 and Rule 9 (6) of the CENVAT Credit Rules, 2004 and thereby had wrongly availed CENVAT Credit of Service Tax paid on the rental premises of Rs. 1,41,323/- ; that therefore, the same was required to be recovered since the rental premises on which the CENVAT Credit

was availed was other than the factory premises which was not related to manufacture, etc. A copy of the Show Cause Notice/Statement of Demand is part of the documents in the Appeal Memorandum, a perusal of which makes it clear that the period involved was from 04/2015 to 06/2015.

2. The appellant responded to the above Statement of Demand vide its reply dated 03.04.2018 wherein it was *inter alia* contended that the CENVAT Credit was availed by it on the rental charges paid in respect of the premises which was used as an office space by the appellant itself; that as per law, the CENVAT Credit in respect of rented premises, whether factory or outside, could be availed if the services of rental were in relation to the manufacture of goods; that the appellant had used the rental premises as its office space which was required for undertaking the manufacturing activities; that the rental agreement in respect of the impugned rental premises was terminated after setting up of the appellant's factory, etc. The appellant also raised a serious dispute with regard to the Show Cause Notice being barred by limitation.

3. The Adjudicating Authority, however, vide Order-in-Original No. 04/2019-Adj dated 28.01.2019 confirmed the demand. The appellant also having not met with success in its first appeal before the Commissioner of G.S.T. and Central Excise (Appeals-II), Chennai, has filed the present appeal.

4. When the matter was taken up for hearing, Shri. Tanuj Hazari, Ld. Advocate, appeared for the assessee-appellant and Ms. Sridevi Taritla, Ld. Departmental Representative, appeared for the Revenue-respondent.

5.1 Ld. Advocate for the appellant would submit at the outset that the Statement of Demand having been issued without even invoking the larger period, as if it was for the normal period, has not at all spelt anything about suppression, fraud, etc., and that the period involved being 04/2015 to 06/2015, the Statement of Demand

dated 14.03.2018 issued nearly after three years is hopelessly barred by limitation.

5.2 Ld. Advocate also submitted on merits that the rented premises was used as an office space, which fact was never denied by the Revenue; that the said premises having been used by the appellant "in relation to" the manufacture of final products and clearance of final products, the demand raised on the wrong interpretation of law is unsustainable.

6. *Per contra*, Ld. Departmental Representative for the Revenue relied on the findings of the lower authorities. She would also submit that the appellant has not satisfied the eligibility test as to availing the CENVAT Credit and that the appellant having not established the nexus, the impugned order does not call for any interference.

7. I have considered the rival contentions and gone through the documents placed on record.

8.1 Taking the first argument of the Ld. Advocate for the appellant, I find that the Show Cause Notice/Statement of Demand has been issued without any whisper as to invoking the larger period of limitation, much less any whisper as to suppression, fraud, etc. Admittedly, the proposal to raise the demand was for a much earlier period. If the proposal to raise the demand is for an earlier period beyond one year, then the authority has to invariably invoke the extended period of limitation and invoking the larger period could be possible only if there is suppression, fraud, etc., played by the assessee, to justify such invocation of larger period. In view of this, the appellant should succeed on this ground alone.

8.2 In this regard, I find it very useful to refer to a decision of the Hon'ble High Court of Delhi in the case of ***M/s. Bharat Hotels Ltd. Vs. Commissioner of C.Ex. (Adjudication)*** reported in ***2018 (12) G.S.T.L. 368***

(Del.) wherein the Hon'ble High Court after considering various judicial precedents has held as under :

> ***"24.*** *As noticed in the excerpted portions of the Supreme Court's judgment, the material distinction between the provisos of Section 11A of the Excise Act and Section 28 of the Customs Act was contemplated in Associated Cement Co. Ltd. v. Commissioner of Customs (supra) [2001 (128) E.L.T. 21 (S.C.)]. The only material difference in the language of the two provisions is that the phrase 'with intent to evade payment of duty' is not used in Section 28 of the Customs Act. The Court held that the words 'fraud' and 'collusion' inherently imply the requirement of an intent, which in this case is the intent to evade payment of duty. With respect to misrepresentation and suppression of facts the Court held that the fact that these words are preceded by the word 'wilful' means that there should be an intention to evade payment of duty behind these acts. And, therefore, in Uniworth (supra), the judgments of the Supreme Court interpreting the proviso to Section 11A of the Excise Act were applied in the interpretation of the proviso to Section 28 of the Customs Act.*
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> ***25.*** *The meaning of the phrase pari materia has been explained in an American case in the following words: "Statutes are in pari materia which relate to the same person or thing, or to the same class of persons or things. The word par must not be confounded with the word simlis. It is used in opposition to it - intimating not likeness merely but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject." [United Society v. Eagle Bank, (1829) 7 Connecticut 457, p. 470, as cited in CRAIES, Statute Law, p. 134 (7th Edition)]. The provisos to Sections 11A of the Excise Act, 28 of the Customs Act and Section 73 of the Finance Act, refer to the same class of persons, i.e., persons from whom tax has been not been levied, or has been short-levied or erroneously refunded. The subject matter of these provisos is issuance of a Show Cause Notice in order to collect such tax. Further, there seems to be no difference in language of the proviso to Section 11A of the Excise Act and Section 73(1) of the Finance Act. Since, the pith and substance of both these provisions is the same, the various judgments of the Supreme Court discussing the interpretation of proviso to Section 11A of the Excise Act can be extended to interpret Section 73(1) of the Finance Act. Further, since proviso to Section 28 of the Customs Act is pari materia to proviso to Section 11A of the Excise Act (as held in Uniworth), the interpretation of proviso to Section 28 may also be extended to interpret the proviso to Section 73 of the Finance Act. Uniworth (supra) is also authority on the meaning of 'wilful misstatement' and 'suppression of facts'; the Court held that :*

"…

12. ... The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment 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.

…….

14. In Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara [(2005) 2 SCC 168], a three-judge bench of this Court, while referring to the observations extracted above, echoed the following views :

"23. Now coming to the question of limitation, at the outset, we wish to clarify that there are two concepts which are required to be kept in mind for the purposes of deciding this case. Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation. Under Section 11A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to Section 11A(1). Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful misstatement or suppression of facts, or in contravention of any provision of the Act or Rules with the intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, we are concerned with the proviso to Section 11A(1).

24. In the case of Cosmic Dye Chemical v. Collector of Central Excise, Bombay [(1995) 6 SCC 117], this Court held that intention to evade

duty must be proved for invoking the proviso to Section 11A(1) for extended period of limitation. It has been further held that intent to evade duty is built into the expression "fraud and collusion" but misstatement and suppression is qualified by the preceding word "wilful". Therefore, it is not correct to say that there can be suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for invoking the proviso to Section 11A.

25. In case of Pushpam Pharmaceuticals Co. v. C.C.E. [1995 (78) E.L.T. 401 (S.C.)], this Court has held that the extended period of five years under the proviso to Section 11A(1) is not applicable just for any omission on the part of the assessee, unless it is a deliberate attempt 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 constitute suppression of fact."

26. *Again, the Supreme Court in Continental Foundation Joint Venture Holding v. Commissioner of Central Excise, Chandigarh-I [(2007) 10 SCC 337 = 2007 (216) E.L.T. 177 (S.C.)], held that :*

"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 the knowledge that the statement was not correct. "

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 paying excise duty. The terms 'misstatement' and 'suppression of facts' are preceded by the expression 'wilful'. The meaning which has to be ascribed is, deliberate action (or omission) and the presence of an intention. 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.

28. *In the present case, the Revenue argues that appellant wilfully suppressed the value of taxable services and thus did not discharge its liability of paying the Service Tax on same. The contention of the appellant is that the appellant was under a bona fide belief that the appellant was not liable for payment of Service Tax for the Mandap Keeping and Management, Maintenance and Repair Services. The appellant has supported the non-payment of Service Tax for Mandap Keeper Services by Notification No. 12/2003-S.T. It also states that, during the enquiry itself, it paid Service Tax on the sale of the above-mentioned items for the periods 2004-05 and 2005-06 with interest and had also started paying Service Tax on these items regularly from April, 2006. The same has been also acknowledged by the DGCEI in the SCN.*

29. *As regards management, maintenance and repair services the appellant claimed that it was unaware of the development under Section 65(105)(zzg) of the Finance Act and that when the same came to the knowledge of the appellant, the appellant promptly got itself registered for the said service and started discharging its Service Tax liability with respect to the said service from financial year 2006-07, and also paid Service Tax for the financial year 2005-06. The same has again been also acknowledged by the DGCEI in the SCN. The absence of any material disclosing intent to evade payment of Service Tax by the appellant is evident by the fact that it promptly made all the payments pertaining to Service Tax liability with respect to Mandap Keeper Service and Management, Maintenance and Repair Service as soon as the appellant became aware of the same (during the enquiry) and continued to pay Service Tax thereafter. The authorities are unanimous that to invoke the extended period under cognate provisions (such as Section 11A of the Excise Act or Section 28A of the Customs Act) the burden is cast upon it to prove suppression of fact. The Revenue has not been able to prove an intention on the part of the appellant to evade tax by suppression of material facts. In fact, it is clear that the appellant did not have any such intention and was acting under bona fide beliefs. For these reasons, it is held that the Revenue cannot invoke the proviso to Section 73(1) of the*

Finance Act to extend the limitation period for issuing of SCN. The SCN was issued on 24-10-2008. The undischarged liability for payment of Service Tax with respect to Mandap Keeper Service and Management, Maintenance and repair services alleged in the SCN is for the period 2004-06 and 2005-08 respectively. Since the proviso to Section 73(1) cannot be invoked the SCN had to be served within one year from the relevant date. Therefore, the SCN with respect to short payment of Service Tax for Mandap Keeper Service for the years 2004-2006 is barred by limitation. The SCN with respect to short payment of Service Tax for Management, Maintenance and Repair Services for the years 2005-2007 is also barred by limitation."

9. In view of the above, I have to necessarily hold that the Revenue has not been able to justify the invocation of extended period of limitation as there is not even an allegation as to suppression, fraud, etc., and hence, the demand cannot sustain. For this reason alone the impugned order is set aside.

10. The appeal is allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **05.12.2019**)

Sd/-

(P. DINESHA)
MEMBER (JUDICIAL)

Sdd