

2014 (3) ECS (143) (Tri - Del.)

In The Customs, Excise & Service Tax Appellate Tribunal

West Block No. 2, R.K. Puram, New Delhi-110066

M/S. LAKHAN SINGH & CO.

Vs.

CCE, JAIPUR

Date of Hearing: 16.8.2011

Date of Pronouncement: 15.12.2011

Service Tax Appeal No. 94-95 of 2007

[Arising out of common Order-in-Appeal No. 107-108(GRM) ST/JPR-1/2006 dated 28.11.2006 passed by the Commissioner (Appeals), Customs & Central Excise, Jaipur]

Appearance:

Shri Bipin Garg & Sh. Mayank Garg, Advocates

Shri K.K. Jaiswal, SDR

For the Appellant

For the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Hon'ble Shri Mathew John, Technical Member

Misc Order No. ST/233/11 dated 15.12.2011

FO Order No 58310-58311/2013

"If ignorance of law is not a defence a wrong understanding of law can be a much lesser defence. (Para 8.5)

At least 15 out of the 22 items of work specified are about loading of cargo. Some of the other items of work also have nexus to such cargo handling. The definition of the relevant entry in Finance Act, 1994 covers loading as also of unloading of cargo. By a simple understanding of the matter the activity will be covered by the definition. By simple understanding of the definition if the service is covered it is necessary that the service provider discloses the facts to the department and seeks clarification. If the person concerned just waits for the department to come and knock at his door it is a mental state demonstrating suppression with intention to evade. (Para 10)

In this case the noticee did not take out registration and disclose his contract to the department and we are of the view that it amounts to suppression."(Para 11)

Per: Mathew John:

In this proceedings two appeals are being decided because the two matters arise on account of service tax for service rendered under identical contracts entered into by the Appellants with M/s Chambal Fertilizers and Chemicals Ltd., Kota ("CFCL" for short)

2. During the period Aug 2002 to July 2004, the Appellants were providing certain services to CFCL. The services were rendered through the employees of the Appellants working in the factory premises of M/s Chambal Fertilizers and Chemicals Ltd. The different items of work done are listed below:-

S. No.	Job Description	Job Code	Unit	Unit Rate
1.	UREA PRODUCT HANDLING & BAGGING	Bagging and stitching-including checking	570101101100 METRIC TONN	3.01
2.	UREA PRODUCT HANDLING & BEGGING	Wagon Loading- Receiving bags in wagon loading platform through the loader, and loading it into the wagons including the Tally checking.	570102101101 METRIC TONN	6.30
3.	UREA PRODUCT HANDLING & BAGGING	Wagon Loading-Manual direct loading of the wagons wherever the wagon loaders are not reaching-including the tally checking	570102102101 METRIC TONN	6.74
4.	UREA PRODUCT HANDLING & BAGGING	Wagon Loading- Stacking of filled bags on the wagon loading platforms-and loading into the wagons including tally checking	570102103101 METRIC TONN	12.82

5.	UREA PRODUCT HANDLING & BAGGING	Wagon Loading - Loading of the wagon from a distance of 50 feet and above - in case the wagon loading are not available due to maintenance etc . including tally checking.	570102104101 METRIC TONN	15.83
6.	UREA PRODUCT HANDLING & BAGGING	Truck Loading - Loading of trucks/tractors directly-through the truck loader including tally checking	570103101101 METRIC TONN	4.03
7.	UREA PRODUCT HANDLING & BAGGING	Truck Loading - Loading of trucks/tractors directly through the loading chutes	570103101102 METRIC TONN	5.41
8.	UREA PRODUCT HANDLING & BAGGING	Truck Loading-Stacking of filled bags on the loading platforms- and loading to trucks including the tally checking	570103102101 METRIC TONN	10.35
9.	UREA PRODUCT HANDLING & BAGGING	Unloading of Wagons/ Trucks - Unloading of the bags from the trucks/ wagons and stacking- on the platform or transferring into another truck/wagon as directed by the shift in-charge	570104101101 METRIC TONN	5.52
10.	UREA PRODUCT HANDLING & BAGGING	Unloading of Wagons/ Trucks - Reloading of the filled bags to the wagon/ trucks - including tally checking	570104102101 METRIC TONN	5.52

11.	UREA PRODUCT HANDLING & BAGGING	Empty Bags Handling - Empty Bags Unloading from the Trucks, inspection and stacking in the empty bags storage on the area specified by the Shift in-charge/Plant in-charge-HDPE/PP bags (500 bags per bale)	570105101101 PER BALE	1.25
12.	UREA PRODUCT HANDLING & BAGGING	Empty Bags Handling - Empty Bags lifting from the Main store to the sub store in Bagging floor - and distribute to the running slats with the help of EOT Cranes/ Hoist/Manually)-(100 Bags per bale)	570105102101 PER BALE	2.00
13.	UREA PRODUCT HANDLING & BAGGING	Tarpaulin/Dunnages - Unloading of tarpaulins and dunnages - New	570106101101 PER BUNDLE	1.35
14.	UREA PRODUCT HANDLING & BAGGING	Tarpaulin/Dunnage - Unloading of tarpaulins and dunnages - used tarpaulins received from the unloading stations, segregating the damaged tarpaulins properly folding of tarpaulins and stacking neatly in the space specified and disposing the damaged tarpaulins to specified areas.	570106101102 Each	1.35
15.	UREA PRODUCT HANDLING & BAGGING	Miscellaneous Jobs - Wagon cleaning and removing debris from the track area and dunnage and wall sheet spreading	570107101101 Per Wagon	14.84
16.	UREA PRODUCT HANDLING & BAGGING	Miscellaneous Jobs - Tarpaulin covering and tying of rope on all sides for open Wagon.	570107102100 Per Wagon	10.38

17.	UREA PRODUCT HANDLING & BAGGING	Miscellaneous Jobs - Rivet/bolt removal from door, door opening- and closing the door after loading riveting back, tying the seal card, applying lac and putting CFCL siding seal for covered wagons.	570107103101 Per Wagon	10.38
18.	UREA PRODUCT HANDLING & BAGGING	Miscellaneous Jobs- Housekeeping and cleaning of bagging plat, building, silo, conveyor, screenhouse surrounding conveyor, conveyor pantry, shifting of urea lamps, torn bags, packing material etc. to the location marked by CFCL's representative and other related jobs- Godempan-II bagging area.	570107104101 Months	88124
19.	UREA PRODUCT HANDLING & BAGGING	Miscellaneous Jobs- Housekeeping and cleaning of bagging plat, building, silo, conveyor, screenhouse surrounding conveyor, conveyor pantry, shifting of urea lamps, tom bags, packing material etc. to the location marked by CFCL's representative and other related jobs- Godempan-II bagging area.	570107104102 Months	39164
20.	UREA PRODUCT HANDLING & BAGGING	Miscellaneous Jobs- Housekeeping and cleaning of track to keep track free from coal/ debris	570107104103 Days	920.00

21.	UREA PRODUCT HANDLING & BAGGING	Miscellaneous Jobs- Manpower assistance for misc. petty jobs.	570107105101 Mandays	66.75
22	UREA PRODUCT HANDLING & BAGGING	Miscellaneous Jobs- Standardizing of urea spillage - changing of cut and tom bag material to the new bags weighing to 50 kgs as required.	570107106101 Metric Tonn	26.70

2. Revenue was of the view that the above services rendered by the Appellants would fall under the entry of 'Cargo Handling Services' as defined in Finance Act, 1994 and the Appellants had to pay service tax. Since the Appellants were not paying such service tax on such services rendered during the period 16.8.2002 to 19.7.2004, a Show Cause Notice was issued on 27.7.2005 demanding Service Tax and proposing imposition of penalty under various Sections of the Act. The Show Cause Notice was adjudicated by the Additional Commissioner confirming Service Tax amount of Rs.16,53,889/- along with interest. Further, penalties under Section 75A, 76, 77 and 78 of the Finance Act, 1994 were imposed. Aggrieved by the order, the Appellants filed Appeal with the Commissioner (Appeals) who rejected their Appeals.
3. The argument of the Appellants is that they were supplying only manpower for doing certain type of work inside the factory for CFCL. They contest that activity of packing, unpacking, loading and handling goods within the factory premises will not be covered by the entry for 'Cargo Handling Services' because at that stage where such activity was being done they were just handling goods and not "cargo". For this argument they rely on the decision of the Rajasthan High Court in the case of S.B. Construction Company Vs. Union of India - 2006 (4) STR 545 (Raj.). They have also quoted other decisions by the Tribunal like :-
 - (1) J & J Enterprises Vs. CCE, Raipur - 2006 (3) STR 655 (Tri.-Del.);
 - (2) Renu Singh & Co. Vs. CCE, Hyderabad - 2007 (7) STR 397 (Tri.-Bang.);
4. The Counsel also argues that the labour force supplied by the Appellants were just supervising various points in an automated conveyer system for loading of cargo into wagons and trucks and has enclosed certain photographs of such handling system. But the description work as in table above does not prove the contentions. At the most the work specified at S. No. 6 and 7 can fit into this

category and the photographs submitted appear to relate to these activities.

5. Further, they also argue that the demand is time-barred because they were under the bonafide belief that the activity, they were doing, was not covered by the entry 'Cargo Handling Services' under Finance Act, 1994 and that is the reason why they did not take registration and pay service tax. They argue that mere failure to make declaration does not amount to mis-declaration or wilful suppression. They argue that a positive act to establish either wilful mis-declaration for wilful suppression is a must for invoking the extended period of limitation of five years prescribed under section 73 of Finance Act, 1994. They rely on the following decisions of the Apex Court:
 - (i) Pahwa Chemicals Private Limited Vs. CCE, Delhi 2005 (189) ELT 257 (SC);
 - (ii) CCE Vs. Chemphar Drugs and Chemicals 1989 (40) ELT 276 (SC).

Thus the counsel argues that the demand is not sustainable both on account of merits and on account of time-bar.

4. The Ld. DR, on the other hand places reliance on the contract between the Appellants and the CFCL which shows details of work done as given in the table in para 1 above. He points out that the entries in the table specifying the jobs to be done as specified at S. No. 1 to 11 are clearly jobs relating to loading of "cargo" into wagons or trucks and there were separate rates specified for such items of work. Even items at S. No.13 to 17 are also relating to cargo. He argues that since most of the items of work specified in the contract are in relation to cargo handling and the contract is essentially for cargo handling.
5. We have considered arguments on both sides. Now, it is well settled by various decisions of the Tribunal and the different High Courts that handling of goods within a factory does not amount to "Cargo Handling" as defined in the Finance Act, 1994. However, it is seen that the items of work specified in the contract between the Appellants and CFCL at S. No. 1 to 11 involves handling of cargo into rail wagons and into trucks. Thus the argument of the Appellants that the entire service rendered by them is of manpower supply and the manpower so supplied was only assisting in proper functioning of an automatic system is not correct. Here the Counsel is just trying fit the facts of the case into the decision of the Rajasthan High Court in the case of S. B. Construction Co (Supra) and the decision of the Tribunal in J & J Enterprises quoted supra whereas the facts as disclosed by the contract hardly fits into the reasoning

of the said decision.

- b. Now, the issue is to be examined is whether the demand is time-barred. The decisions quoted are that in the case of Pahwa Chemicals (supra) and CCE Vs. Chemphar Drugs and Chemicals (supra).
7. For appreciating the decisions relied upon by the Appellants it is necessary to note that in both the above cases, the assesseees were registered with the Central Excise department and paying Central Excise duties. The officers of the department were making regular visits to the factory as per guidelines in force at that time. It is also relevant that these decisions relate to a period when the department was still assessing the returns filed and not to a period of self assessment as of now i.e after May 2000. The relevant facts of the cases quoted and a few other cases are examined below.
 - 7.1 Paras 2 and 3 of the decision in the case of Pahwa Chemicals are extracted below:
 - "2. We find that there is no dispute to the fact that the classification list had been approved by the Sector as well as Range Officer after carrying out verification. Between the Department and the Appellants there had earlier been dispute regarding classification of this product. On 31st October, 1991 Excise Preventive Officers had intercepted one consignment of the Appellants in transit and seized goods which contained labels of foreign brand name. All the RT-12 returns were being regularly filed. The invoices containing description of the goods have all been regularly approved by the Department.
 3. The Appellants have all along claimed that merely because they were affixing the label of a foreign party, they did not lose the benefit of Notification No. 175/86-C.E. as amended by Notification No. 1/93-C.E. The view taken by the Appellants had, in some cases, been approved by the Tribunal which had held that mere use of the name of a foreign party did not dis-entitle a party from getting benefit of the Notifications. It is only after Larger Bench held in Namtech Systems Limited v. Commissioner of Central Excise, New Delhi reported in 2000 (115) E.L.T. 238 (Tribunal) that the position has become clear. It is settled law that mere failure to declare does not amount to wilful mis-declaration or wilful suppression. There must be some positive act on the part of the party to establish either wilful mis-declaration or wilful suppression. When all facts are before the Department and a party in the belief that affixing of a label makes no difference does not make a declaration, then there would be no wilful mis-declaration or wilful suppression. If the Department felt that the party was not entitled to the benefit of the Notification, it

was for the Department to immediately take up the contention that the benefit of the Notification was lost."

7.2 Paras 2 to 4 of the decision relating to Chemphar Drugs read as under:

"2. The respondent manufactured patent and proprietary (P&P) medicines falling under T.I. 14E and also pharmacopoe preparations falling under T.I. 68 of the Central Excise Tariff of an aggregate value of Rs. 20,59,338.60 and cleared during the period of 1-4-1979 or 31-3-1980, the same without payment of duty, availing the benefit of exemption Notification No. 80/80.

3. Under the provisions of sub-clause (ii) of clause 2 of Notification No. 80/80, dated 19th June, 1980 and sub-clause (iii) of clause (a) of Notification No. 71/78, dated 1-3-1978 the manufacturer would not be eligible for exemption under the two notifications in respect of clearances of patent or proprietary medicines from 1st April, 1980 since the notification would not apply to a manufacturer who manufactures excisable goods falling under more than one item of the First Schedule of the Act, and the aggregate value of the clearances of all such excisable goods by the manufacturer or on his behalf are cleared for home consumption from one or more factories during the preceding financial year had exceeded Rs. 20 lakhs.
4. The factory had cleared during the period from 1st April, 1980 to 29th October, 1980 (P&P) medicines falling under T.I. 14E valued at Rs. 4,32,050.09. The Central Excise duty payable on the goods removed was Rs. 55,802.01. The respondent filed a declaration for exemption under Notification No. 71/78 dated 1-3-1978, and furnished particulars of only the value of P & P medicines manufactured and cleared by it during the preceding financial year i.e. 1979-80, and the respondent did not furnish the particulars of the value of the goods cleared under Tariff Item 68 during the financial year 1979-80. It was noticed that the manufacturer did not file any declaration under Notification No. 111/78 dated 9-5-1978 claiming exemption from the licensing control.
5. However, on 30th July, 1980 the firm filed a classification list in respect of P & P medicines claiming exemption under Notification No. 80/80. A show-cause notice was issued to the respondent who was asked to explain as to why excise duty in respect of Patent and Proprietary medicines manufactured and cleared by it should not be demanded under proviso (a) to Rule 10(1) of the Central Excise Rules and why penalty should not be imposed on it under Rule 173Q of the Central Excise Rules, 1944 for having cleared the goods without payment of duty in contravention of Rule 173Q (a) and (d)

of the Central Excise Rules.

7.3 In the context of the above facts the findings of the Honourable Court in para 8 of the order is reproduced below:

“8. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence.” (emphasis supplied)

7.4 Another case which is usually quoted (not quoted in this case) to canvass limitation is that of PADMINI PRODUCTS Vs CCE-1989 (43) E.L.T. 195 (S.C.). In that case the facts were as under:

The revenue had issued trade notices indicating that agarbatties were handicrafts and were eligible to the exemption contained in the Notification No. 55/75, dated 1st March, 1975.

“The appellants at all relevant times were manufacturing agarbatis, dhoop sticks, dhoop coil, dhoop powder falling under Tariff Item

No. 68 of the erstwhile Central Excise Tariff. The relevant period involved in the present Civil Appeal is from the year 1979 to 1983-84. The appellants claimed exemption under Notification No. 55/75, dated 1st March, 1975. By the said notification, the Central Government had exempted goods of the description in the Schedule annexed to the notification and falling under Tariff Item 68 of the First Schedule to the Act from the whole of duty of excise leviable thereon. In the Serial No. 8 of the Schedule to the said notification, 'Handicrafts' were listed. It is, therefore, clear that 'handicrafts' were fully exempt from payment of duty of excise, according to the appellants. Under the Notification No. 111/78, dated 9th May, 1978, the appellants were exempted from licensing control. That is the case of the appellants."

- 7.5 The sentence underlined in the extracts of the case of Chemphar Drugs (Supra) and similar observations in the case of Padmini Polymers (Supra) are being pointed out generally to argue that if an assessee does not do anything to discharge his duty/tax liability and simply keeps quiet, it is not suppression. The interpretation canvassed is probably that unless the assessee has underground factories it cannot be considered as suppression. In the case of service tax it cannot probably be done under cellars. But it is quite often argued that the assessee was not aware of service tax or read the law and thought he did not have to take out registration or intimate department and if he acted so it cannot be a positive act of suppression.
- 7.6 Against this background let us examine some decisions wherein the Apex Court held that there was suppression. A few decisions are examined below.
- 7.7 Usha Rectifier Corpn. (I) LTD. Vs. CCE-2011 (263) E.L.T. 655 (S.C.)
(Information taken by Department from Balance Sheet- Supreme Court held that extended period was invocable)
- "2. The appellant herein is a manufacturer of electronic transformers, semi-conductor devices and other electrical and electronics equipments. During the course of such manufacture the appellant also manufactured machinery in the nature of testing equipments to test the final products of the assessee company costing Rs. 31,27,405/- as per Note 6 of the Schedule 'Q' page 15 of the balance sheet for the year ending December, 1987. The aforesaid position was further reiterated in the Director's report appearing at page No. 2 of the Annual Report for the year ending December, 1988."
- "12. Submission was also made regarding use of the extended period limitation contending inter alia that such extended period of

limitation could not have been used by the respondent. The aforesaid contention is also found to be without any merit as the appellant has not obtained L-4 licence nor they had disclosed the fact of manufacturing of the aforesaid goods to the department. The aforesaid knowledge of manufacture came to be acquired by the department only subsequently and in view of non-disclosure of such information by the appellant and suppression of relevant facts, the extended period of limitation was rightly invoked by the department."

7.8 CCE Vs Bajaj Auto Ltd -2010 (260) E.L.T. 17 (S.C.)

"2.The issue in this appeal relates to the valuation of aluminum castings manufactured by M/s. Anurang Engineering Co. Ltd. (for short 'Anurang') which in turn is based on the purchase price of aluminum ingots supplied by M/s. Bajaj Auto Ltd., Waluk, Aurangabad (for short 'Bajaj'). Anurang, who is Respondent No. 4 in this appeal, is engaged in the manufacture of aluminium castings, commonly known as "handle bar body", "crank case clutch", and castings used as motor vehicle parts, classifiable under Chapter sub-heading 8708.00 and 8714.00 of the Central Excise Tariff Act, 1985. Bajaj, the Respondent No. 1, was supplying inputs - aluminum ingots after purchasing the same from other manufacturers to Anurang for the relevant period under the cover of invoices issued under Rule 57F(2) and Rule 57(3) of the Central Excise Rules, 1994, after reversing the MODVAT credit availed on the said input.

3. A show cause notice dated 5-3-2001 was issued by the Commissioner of Customs and Central Excise, Aurangabad, in which it was alleged that Anurang was receiving inputs from Bajaj at an undervalued landed cost by not including expenses on account of sales tax, octroi, freight, insurance, loading unloading charges and handling charges, and that Bajaj was charging only the basic price of such inputs equal to the basic price charged by the original manufacturers of the said inputs to Bajaj, and since the additional cost of loading-unloading, freight etc. was not included in the input supplied to Anurang, there was consequent reduction in the landed cost of such inputs. It was also alleged that the price charged by Bajaj was depressed price although the same was coloured as negotiated price and the price indicated in the purchase orders was influenced by the supply of inputs by Bajaj at a lower landed cost and by this business arrangement, Bajaj had compensated Anurang for depressed prices of Anurang's finished goods supplied to Bajaj."

"16 .In our view, on a reading of the relevant provision the extended period of limitation as provided by the proviso to Section 11A(1) of the Act, can only be invoked when there is a conscious act of

either fraud, collusion, wilful mis-statement, suppression of fact, or contravention of the provisions of the Act or any of the rules made there under on the part of the person chargeable with duty or his agent, with the intent to evade payment of duty. In the present case, the Tribunal while considering this issue has not stated whether or not there were any such circumstances which would not allow the revenue to invoke extended period of limitation. It only observes in its order since both the assesseees are situated under the jurisdiction of the same division and as such it cannot be reasonable to conclude that the revenue was not aware of the transactions. Since this is not what is envisaged under the proviso to Section 11A(1) of the Act, we cannot agree with the reasoning and the conclusion reached by the Tribunal." (Emphasis supplied)

- 7.9 British India Corporation Ltd., Dhariwal v. Collector). 1986 (25) E.L.T. 727 (Tribunal)-Affirmed by Supreme Court vide [British India Corporation Ltd. v. Commissioner - 2010 (255) E.L.T. A78 (S.C.)

In this case the Tribunal held that for invoking the special time-limit of five years, mentioning of the words 'fraud' or 'suppression' is not necessary but a mere allegation in the show cause notice pointing to the same is sufficient.

The Tribunal also observed that frequent visits by the Central Excise officers and the D3 intimations could not be said to be the ground for non-indication of fraud or suppression. Moreover in view of the fact that classification declaration lists had not been filed by the assessee, the special period of limitation shall be applicable.

- 7.10 There are more such cases like the following:

- (i) Box & Carton India Pvt. Ltd. v. Commissioner - 2010 (255) E.L.T. A13 (S.C.)
- (ii) (ii) Modipon Fibre Company Vs. CCE-2007 (218) E.L.T. 8 (S.C.)

(This decision is also worth studying because the ruling is to the effect that Suppression is not about making a false declaration but also about not declaring what should be declared.)

8. In view of the above facts in each case certain relevant points are to be noted.

- 8.1 First point is the observation of the Apex Court in the case of Para 8 of Chemphar Drugs (supra) as under:

"Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."

- 8.2 If there cannot be general rule, the rule of "positive act of suppression" itself cannot be a general rule for reasons as explained below.
- 8.3 Suppression with intent to evade payment of duty is seldom done by actions leaving trails and therefore the "positive act" that the Apex Court was referring to is not something which can always be demonstrated through existence of a physical thing or document. It is about a state of mind. This is to be judged from the facts of the case.
- 8.4 All the cases pointed out were with reference to a registered assessee and before self-assessment system came into existence. With the scheme of self-assessment the onus on the part of the assessee to disclose information to the department has become all the more important. The first step in such disclosure is taking registration. The second step is in filing returns filling all columns in the return in a bonafide manner and not in a clever manner.
- 8.4 Section 11A of Central Excise Act and section 73 of the Finance Act, 1994 tries to strike a balance between the requirement to collect tax through a self-assessment scheme and the requirement not to slap an unforeseen levy on a bonafide assessee. (The mention about self-assessment is made in the context that when self-assessment was introduced, section 11A was amended to change the normal period. The time limit for issuing a demand for short levy in cases not involving suppression, was increased from 6 months to 12 months.). The fact to be noted is that the legislature has consciously tilted the balance between these two requirements in favour of Revenue as may be seen from the fact that even an assessee making all disclosures (even having an approved classification list in the earlier regime of excise levy) is liable to pay demand of short levied duty for a past period of one year if a new interpretation is found to be correct. The provision is not that demand due to such interpretation will apply only from the date the changed interpretation is notified to the assessee. This tilt is justified because the interest of a sovereign which trusts its subjects to comply with its laws and pay tax has to be safeguarded and it cannot be totally left to the changing minds of the servants of the sovereign. Considering these aspects the matter how bonafide the assessee was, in the facts of a particular case, in not paying the tax due to the sovereign is to be judged.
- 8.5 If ignorance of law is not a defence a wrong understanding of law can be a much lesser defence.
- 8.6 It can be seen from all the decisions of the Apex Court that the question of suppression is examined basically with reference to two issues- one whether the department had an opportunity to know

about all the relevant matters and secondly whether the assessee had reasonable cause with reference to clarifications issued by the department or decisions given by the court to bonafidely believe that he was not liable to pay the disputed tax.

9. In the case of service tax there are two additional factors involved. Firstly the matter quite often involves intangibles, which can be seen mainly through concerned contracts or through the outcomes of service. The next issue is that because the levy is not administered by taxing all services and exempting specified services but by a system of taxing specified services. These factors, can in the facts of some cases, persuade a judicial mind to conclude that there was no wilful suppression.
10. Now let us consider the facts of the present case. At least 15 out of the 22 items of work specified are about loading of cargo. Some of the other items of work also have nexus to such cargo handling. The definition of the relevant entry in Finance Act, 1994 covers loading as also of unloading of cargo. By a simple understanding of the matter the activity will be covered by the definition. The question whether loading through automated systems would be covered arises out of a legal interpretation. By simple understanding of the definition if the service is covered it is necessary that the service provider discloses the facts to the department and seeks clarification. If the person concerned just waits for the department to come and knock at his door it is a mental state demonstrating suppression with intention to evade. It is not necessary that such state of mind is demonstrated by an act like displaying a board or having a letter head holding out his activity to be just trading (just as an example of an activity not subjected to service tax) with no mention of his main activity of cargo handling, though such an act will show a higher level of culpability. In such a situation also it can be argued in defence of the assessee that there was no positive act since he did not state anywhere that he was not doing "cargo handling". A reading of the decisions with due regard to the facts of each case would show that the Apex court was not talking of this type of positive act.
11. In this case the noticee did not take out registration and disclose his contract to the department and we are of the view that it amounts to suppression, in view of our views explained above. We do agree that if there was a public notice issued by government or a decision of any Court or Tribunal holding that the activity was not taxable and if the assessee was acting according to such clarification or ruling then the situation should have been adjudged differently.
12. So in our view the extended period of five years applicable for cases involving suppression with intend to evade payment of tax, is

applicable in this case.

13. It is seen that in this case penalty equal to duty evaded is imposed under section 78 of the Finance Act. But no option was given to the assessee to pay 25% of the tax amount as penalty within 30 days of receipt of the order. Following the decision of the Delhi High Court in *K. P. Pouches Vs. UOI*, such option is given now. Further the penalty under section 76 and 78 are for almost the same offence which principle is recognized by amendment done in section 78 by Finance Act, 2008. It is proper to extend this principle for the past period also. Similarly the penalty under section 75A and 77 also are for almost the same offence. In fact section 75A was omitted from 10-09-2004 and was not in existence when the not in existence when the SCNs were issued. So the penalty under section 75A also is waived. Penalty under section 77 is to be paid.

PER: ARCHANA WADHWA

14. I have gone through the order proposed by my learned brother and with due respect, I differ with the same. As detailed facts already stands recorded in the said order proposed by my learned brother, the same are not being repeated.
15. As regards the merits of the case, I find that the appellants have taken a categorical stand before the authorities below that they have only provided labour/ labourers to do the work of sealing of bags and loading and unloading of wagons. As such, they are man power supplier agency and the entire loading and unloading or packing work is fully mechanized. They have further submitted that automatic filling machine and conveyor carries bags and loader machines are in the ownership of CFCL and they have no control on the said machinery. Packing and loading activity was, in fact, continuous process to the manufacturing of Urea and the labourer provided by the appellant were just overseeing and guiding these activities. Automatic machine itself fills the bags, the conveyor carries bags upto and into the railway wagon and or through loader machine the bags were loaded on the trucks. It is only when the loader machines are not reaching to the trucks, the work was carried out manually. They have specifically contested that they have only supplied the man power to do above job and mere man power supply would not come into the category of "cargo handling services". It stands contended by them that if the labour is provided for carrying construction activity, the same would not be covered by the construction category. They have specifically relied upon the Board's circular No.B-11/1/2002-TRU dt.1.8.02 clarifying that individual undertaking who hires labourers for loading of goods in their individual capacity will not come under the purview of service

tax as cargo Handling Agency.

16. Learned Advocate appearing for the appellants during the course of hearing had also referred to the Tribunal's decision in the case of JJ Enterprises vs. CCE, Raipur-2006 (3) STR 655 (Tri.-Del.) laying down that packing, unpacking, loading of cement by automatic/mechanised process with role of man power to oversee and guide the activity would not amount to rendering cargo handling services liable to service tax. Accordingly the Tribunal had observed that the noticee who was neither owner nor lessee of machines, their role being limited to supply of manpower, cannot be held to be rendering of services of cargo handling. Learned Advocate also referred to the judgement of Hon'ble Rajasthan High Court in the case of S.B.Construction Company vs. Union of India-2006 (4) STR 545 (Raj.), wherein it stands held that handling of coal from the Railway wagons to the site of thermal power station with the aid of wagon tipping system to be fed in boiler bunkers through conveyor system, cannot be held to be cargo handling services.
17. I find that the lower authorities have not taken into account the detailed submissions made by the appellants, as reproduced above. The order of the Commissioner (Appeals) is silent on the applicability of the Board's Circular relied upon by the appellants and applicability of the Tribunal's decision referred supra. As such, I am of the view that the matter should go back to the original adjudicating authority for their fresh decision on merits, in the light of the Board's Circular as also the decisions of the Tribunal and Hon'ble Rajasthan High Court. The order is required to be passed after considering the detailed activities undertaken by the appellants, as appearing in the contract.
18. In any case, I find that the show cause notice stands issued on 27.7.05 for the period August, 2004 to July, 2004 and as such is barred by limitation. On going through the order of the Joint Commissioner, I find that he has not discussed the issue of limitation. It is only in the context of imposing penalty under section 78 of the Finance Act that he has observed that the assessee had wilfully suppressed the fact for providing services to the customers with intention to evade payment of service tax and as such they are liable to penalty under the said section. Similarly, I find that the Commissioner (Appeals) has also not given any finding on the issue of time bar, though this specific ground, was raised in the memo of appeal.
19. Learned Advocate appearing for the applicant has strongly contested the demand on the point of limitation by submitting that the extended period of limitation is available to the Revenue in case fraud, collusion, mis-statement or suppression of facts or

contravention of any provisions with intention to evade payment of duty. Neither of the lower authorities have referred to any evidence attributable to the appellants so as to give finding of suppression or mis-statement against them with intention to evade payment of duty. It stands strongly contended before us that merely non intimation to the Revenue about existence of the appellant and about the fact of providing services cannot be held to a ground for invoking longer period inasmuch as the same is not specified ground in the provision of section 73 of Finance Act. In any case, it stands contended by referring to Hon'ble Supreme Court's decision in the case of *Pahwa Chemicals Private Limited vs. CCE, Delhi-2005* (189) ELT 257 (SC) as also in the case of *CCE vs. Chemphar Drugs & Liniments-1989* (40) ELT 276 (SC) as also to the decision of Supreme Court in the case of *Padmini Products vs. CCE-1989* (43) ELT 195 (SC) holding that mere non intimation and non disclosure to the Revenue will not be sufficient to invoke the extended period unless such non information is conscious or deliberate or withholding information was with intention to evade payment of duty. I find that apart from the fact that the service tax was new subject at the relevant time and there was lot of confusion in the field, the Tribunal's judgement in the case of *J & J Enterprises* and the Rajasthan High Court's decision in the case of *S.B. Construction Company* referred supra laying down that mere supply of labourer does not amount to providing cargo handling services were sufficient for the appellant to entertain a bonafide belief. Further services of man power supply and cargo handling are overlapping and the person who is not an expert in the legal field can be under the impression that he has only provided man power to their customers and has not undertaken any taxable service. It is also seen that the appellants had subsequently got themselves registered under the category of business auxiliary services and started paying service tax accordingly. Revenue has accepted the appellants' registration under the business auxiliary services. In view of the above discussion, and in view of the fact that the lower authorities have not discussed the point of limitation in the light of the law declared by Hon'ble Supreme Court as also various other decisions and has not referred to any evidences reflecting upon the appellants' malafide, and keeping in view that the matter stands remanded on merits, I deem it fit to remand the matter back to the original adjudicating authority for reconsideration of the appellants' plea of demand being barred by limitation.

20. Accordingly, I am of the view that the impugned orders are liable to be set aside and the appeal to be remanded for fresh decision on merits as also on limitation. As the matter is being remanded to the

original authority for reconsideration on merits, the issue of penalty is also to be re-adjudged by him depending on the outcome of the order on merits and on limitation.

(Archana Whadhwa)
Member (Judicial)

DIFFERENCE OF OPINION

- (i) (i) Whether the appellant has to be rejected on merits as held by learned Member (Technical) or the same is required to be remanded for reconsideration as held by Member (Judicial).
- (ii) (ii) Whether the invocation of longer period of limitation has to be upheld as observed by the learned Member (Technical) or the matter is required to be remanded for deciding the issue on merits afresh as held by Member (Judicial)
- (iii) (iii) Whether the penalty is to be imposed under section 78 has to be upheld to pay 25% of the same as held by the Learned Member (Technical) or the same is required to be decided afresh in the remand order.
- (iv) (iv) Whether the penalty is to be imposed under section 75A and 76 is to be set aside and penalty under section 77 is to be upheld as observed by the Learned Member (Technical) or penalty have to be re-adjudged by the adjudicating authority in the de novo proceedings.

Per: D.N. Panda:

21. While hearing the appeal originally both members disagreed in decision making. Learned Technical Member examining the work order, scope of the taxing entry as well as activity carried out by both the appellants, by an elaborate order came to the conclusion that they provided "Cargo Handling Service". He specifically tested the scope of activity that was required to be carried out by the understanding of the parties and decided merit of the case in Para 5 of his order at page 6. He held that employment of machine does not decide taxability of the activity enumerated in work order but its scope and provision of service bring that into the ambit of "Cargo Handling Service".
22. Apart from examining merit of the case thoroughly, learned Technical Member also examined the issue of time bar as well as applicability of penal provisions of law and concession, if any, permissible in imposing penalty in both the cases. He leniently held that grant of option for depositing 25% of tax towards penalty within 30 days of receipt of the appeal order shall serve useful purpose of law. He accordingly decided the matter on all aspects

against the appellants except grant of concession in penalty. While reaching to such conclusion, he was of the clear mind that when law was well known to the appellants who were not infants, there is no scope to grant any relief on time bar aspect since positive act of suppression surfaced on record. That barred the appellants from pleading time bar. He succinctly brought out how the appellants acted to the detriment of Revenue in Para 10 to 12 of the order.

23. While the decision of learned Technical Member is as above, learned Judicial Member recorded that the appellant's arguments were not considered by learned Commissioner (Appeals) for which both appeals were required to be remanded.
24. Shri Mayank Garg, learned Counsel appearing for both appellants submits that when learned Commissioner (Appeals) did not consider the grounds of appeal, learned Judicial Member has rightly directed the appeal to be remanded for reconsideration. It was further submitted that the appellants have merit in their appeals which was not considered by the learned Technical Member for which learned Judicial Member considered it proper to send the matter back for reconsideration. As goods were handled by machine and appellant was merely a man power supplier, there is no liability under the taxing entry "Cargo Handling". Summarily, learned Counsel supported the order recorded by learned Judicial Member.
25. Revenue supports the findings and conclusion of learned Technical Member. Learned D.R. says that there is crystal finding of suppression which was not differed by learned Judicial Member. That debarred the appellants from the time bar plea and taxable event having arisen on provision of "Cargo Handling" service the adjudication sustains as has been held by learned Technical Member.
26. Heard both sides and perused the record.
27. Appellate order of learned Commissioner (Appeals) reveals that grounds of appeal as that were before him were reproduced in the appellate order and he considered the same step by step. Also what that is law relating to "Cargo Handling" service, was examined by him testing the material facts and evidence on record. He applied his mind properly to reach to the conclusion that the activity carried out by the appellants was decisive to bring the same to the fold of "Cargo Handling" service instead of use of machine to provide that service to be decisive. He neatly brought out what was the scope of activity that was carried out by the appellants for which that attracted the taxing entry "Cargo Handling" service under law. Written contract of both parties demonstrated what was intended to be carried out.

When there is visibility of clear application of mind by learned Commissioner (Appeals), it cannot be said that he had not considered the material facts on record as well as grounds raised in appeal. His order cannot be said to be an outcome of empty formality. That was conclusive on the points raised before him. All these aspects have been well understood by learned Technical Member. He did not fail in his duty to consider entire material facts touching the contract as well as manner of performance of the same including object thereof as well as the law applicable.

28. In view of the aforesaid outcome, it is difficult to disagree with the learned Technical Member's conclusion. Accordingly, the questions referred are answered as under:

- 1) Appeals are liable to be rejected on merit.
- 2) Invocation of longer period of limitation is justified without warranting remand of the matters.
- 3) Penalty imposed under section 78 is upheld and concession in penalty as has been held by learned Technical Member is permissible subject to compliance of the direction given.
- 4) Penalties imposed under section 75A & 76 deserve to be set aside and penalty under section 77 is warranted.

With the aforesaid answers reference is returned to the original Bench directing the Registry to place the same before that Bench for majority order.

(Dictated & pronounced in the Open Court on 15.10.2013.)

Final Order

29. In view of the majority order, the following final order is passed:

- 1) Appeals are liable to be rejected on merit.
- 2) Invocation of longer period of limitation is justified without warranting remand of the matters.
- 3) Penalty imposed under Section 78 is upheld and concession in penalty as has been held by learned technical Member is permissible subject to compliance of the direction given.
- 4) Penalties imposed under section 75A and 76 deserve to be set aside and penalty under section 77 is warranted.