

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
HYDERABAD**

REGIONAL BENCH

**SERVICE TAX APPEAL NO. 30388 OF 2019**

(Arising out of Order-in-Original No. TTD-EXCUS-000-COM-01-19-20 dated 16.04.2019 passed by the Commissioner of Central Tax, Tirupati, GST Commissionerate, Tirupati)

**M/s Southern Power Distribution  
Company of Andhra Pradesh Ltd.,**  
Tirupati – 517503

**...Appellant**

**VERSUS**

**The Commissioner of  
Central Tax,**  
Tirupati, GST Commissionerate,  
Tirupati

**...Respondent**

**APPEARANCE:**

Shri Y. Sreenivasa Reddy, Advocate for the Appellant

Shri A. Rangdham, Special Counsel for the Department

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

**Date of Hearing: 06.05.2022**

**Date of Decision: 14.09.2022**

**FINAL ORDER NO. A/30087/2022**

**JUSTICE DILIP GUPTA:**

M/s. Southern Power Distribution Company of Andhra Pradesh Ltd.<sup>1</sup> has filed this appeal to assail the order dated 16.04.2019 passed by the Commissioner of Central Tax, Tirupati GST Commissionerate, Tirupati<sup>2</sup> by which the demand has been confirmed and an order for recovery from the appellant under the proviso to action 73(1) of the Finance Act, 1994<sup>3</sup> with interest and penalty.

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1.     the appellant  
2.     the Commissioner  
3.     the Finance Act

2. This appeal has been filed against demand of service tax on amount received by the appellant against activities performed during the period from 01.07.2012 to 30.06.2017, for which show cause notice dated 28.04.2018 was issued alleging suppression of facts with intent to evade payment of service tax.

3. The details of the demands confirmed in the impugned order and the reasons, in brief, are as follows:

Sl. No.	Activity/Consideration	Service Tax demanded (In Rs.)	Reason for levy of Service Tax
1.	Penalties from contractors	4,18,02,647/-	Collection of penalty for late delivery is a declared services as defined under section 66E(e) of the Finance Act.
2.	Wheeling Charges	14,47,746/-	Collection of wheeling charges is a declared service
3.	Cross subsidy surcharge	3,57,35,819/-	Collection of cross subsidy charges is a declared service
4.	Supervision/Incidental Charges	2,38,62,159/-	Service as defined under section 65B (44) of the Finance Act.
5.	Transformer & amp; Meter Testing Charges	38,55,243/-	Same
6.	Rental amounts collected from contractors	5,20,266/-	Same
	<b>Total</b>	<b>10,72,23,880/-</b>	

4. Shri Y. Sreenivasa Reddy, learned counsel for the appellant, mainly submitted that:

- (i) The issue of taxability of penalties/liquidated damages is covered by decisions of the Tribunal rendered in **M.P.**

**Poorva Kshetra Vidyut Vitran Co. Ltd. vs. Principal**

**Commissioner CGST and Central Excise Bhopal<sup>4</sup>,  
M/s. South Eastern Coalfields Ltd. vs. Commissioner  
of Central Excise and Service Tax, Raipur<sup>5</sup> and  
Madhya Pradesh Poorva Kshetra Vidyut Vitran  
Company Ltd. vs. CCE, Madhya Pradesh<sup>6</sup>;**

- (ii)** The activities of appellant, being in relation to distribution of electricity, are not leviable to service tax as was held by the Gujarat High Court in **Torrent Power Ltd. vs. Union of India<sup>7</sup>** and the Rajasthan High Court **Jodhpur Vidyut Vitran Nigam Ltd. vs. Union of India and others<sup>8</sup>**;
- (iii)** Wheeling charges and cross subsidy charges are related to transmission of electricity and outside the purview of service tax;
- (iv)** Service tax does not apply on supervisory charges and testing charges, and transformer and meter testing charges collected as per the statute;
- (v)** On rental charges, demands have been made by VAT authority treating the renting as deemed sale and hence, no service tax can be demanded; and
- (vi)** Demand for the extended period alleging suppression of facts with intent to evade service tax against a government company is against the settled legal position, and hence the demand is largely barred by limitation.

5. The appellant is a state-owned company established for the purpose of supply/distribution of electricity in certain parts of the State

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4. 2021 (2) TMI 821-CESTAT New Delhi  
 5. 2020 (12) TMI-CESTAT New Delhi  
 6. 2022 (4) TMI 773-CESTAT New Delhi  
 7. 2019 (1) TMI 1092-Gujarat High Court  
 8. 2021 (2) TMI-Rajasthan High Court

of Andhra Pradesh. As 100% of the shares of the company are held by the State of Andhra Pradesh, the appellant claims to be a 'Government Authority', as defined in clause 2(s) of the notification dated 20.6.2012. The activities of the appellant are regulated and controlled by the Electricity Regulation Commissions established both at Central and State levels under the Electricity Regulation Commissions Act, 1998. The appellant collects fee or any other charges as mandated under the Electricity Act, 2003<sup>9</sup> and the Regulations and Instructions framed by the State Electricity Regulation Commission.

6. The period of dispute is from July, 2012 upto June, 2017. Section 66D of the Finance Act provides for a negative list of services. This negative list comprises, amongst others, in sub-clause (k), 'transmission or distribution of electricity by an electricity transmission or distribution utility'. The issue involved in this appeal is not regarding the amount collected by the appellant for supply of electricity; the dispute is regarding the amount collected towards collection for penalties for liquidated damages, wheeling charges, cross subsidy charge, supervision/incidental charges, transformer and meter testing charges, and rental amount collected from contractors. These charges have been collected by the appellant in terms of the Electricity Act and the 2009 Regulations.

7. The Commissioner has confirmed the demand of service tax on the amount collected from the penalties under section 66E(e) of the Finance Act by holding that the same is a consideration received by the appellant 'for tolerating an act'. The Commissioner has confirmed the demand of service tax on wheeling charges and cross-subsidy

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9. the Electricity Act

charges treating them to be a declared service. The Commissioner has also confirmed the demand of service tax on supervision/incidental charges, transformer and meter testing charges and the rental amount collected from contractors by holding that the same is for a service contemplated section 65B(44) of the Finance Act.

8. According to the appellant, the amount has been collected in terms of the 2009 Regulations for the services bundled in the ordinary course of business for providing electricity. They are, therefore, required to be treated as a single service for providing services for transmission and distribution of electricity, which service is exempted under the negative list under section 66D(k) of the Finance Act.

9. In this connection it needs to be noted that prior to introduction of the negative list regime for service tax under the Finance Act, there was no specific clause in the charging provisions of the Finance Act requiring payment of service tax on the amount collected from the consumers in relation to transmission and distribution of electricity. The Government of India issued a Notification dated 27.02.2010 exempting taxable service provided to any person by any other person for transmission of electricity. Another Notification dated 22.06.2010 was issued exempting taxable service provided to any person by a distribution, licensee or franchisee for distribution of electricity. There was some confusion and notices were issued by the Department in respect of the activities relating to transmission and distribution of electricity for the period prior to the aforesaid notification. Various representations were received by the Government relating to the period prior to 27.02.2010 and 22.06.2010 as the transmission/distribution companies believed that service tax was not required to be

paid on activities **relating to** transmission and distribution of electricity. A Trade Notice dated 20.07.2010 was then issued by the Government of India that service tax shall not be required to be paid for the period prior to the issuance of the aforesaid two notifications on the services relating to transmission and distribution of electricity.

10. A question, however, arose as to whether the exemption granted for transmission and distribution of electricity would also include directly connected activities such as meter rents. The Government of India issued a Circular dated 07.12.2010 clarifying that supply of electricity meters to the consumers was an essential activity having direct and close nexus with transmission and distribution of electricity and was, therefore, covered by the exemption granted to transmission and distribution of electricity.

11. Thereafter, the negative list regime was introduced with effect from 01.07.2012. As noticed above, section 66D(k) includes 'transmission or distribution of electricity by an electricity transmission or distribution utility'.

12. The issue as to whether the charges collected in connection with transmission of electricity even after 01.07.2012 would be subjected to service tax, as according to the Department they would not be exempted under section 66D(k) of the Finance Act, came up for consideration before the Gujarat High Court in **Torrent Power**. After referring to the position prior to the introduction of the negative list and the notifications referred to above and the introduction of the negative list regime w.e.f. 01.07.2012, the Gujarat High Court observed as follows:

**"10. Insofar as the first phase is concerned, the respondents do not dispute that the related/ancillary services to transmission and distribution of electricity are exempt from payment of service tax. The dispute, therefore, relates to the period of the negative list regime and the CGST/SGST regime.**

11. Insofar as the second phase, namely, the negative list regime is concerned, with effect from 1.7.2012, section 65B of the Finance Act, 1994 came to be amended and service tax became leviable on all services, other than those services specified in the negative list. Admittedly, transmission and distribution of electricity by an electricity transmission or distribution utility, finds place in the negative list and, is therefore, not exigible to service tax.

12. The first question that arises for consideration is whether services relating to transmission and distribution of electricity fall within the ambit of clause (k) of section 66D of the Finance Act and, are therefore, exempt. In this regard, it may be noted that prior to the coming into force of the negative list regime, goods and services were exempted by virtue of notifications issued in exercise of powers under sub-section (1) of section 93 of the Finance Act. By virtue of Notification No. 11/2010 dated 27.2.2010, the Central Government exempted transmission of electricity from the whole of service tax leviable thereon under section 66 of the Finance Act; and by virtue of Notification No.32/2010-Service Tax dated 22.6.2010, distribution of electricity came to be exempted from the whole of service tax leviable thereon under section 66 of the Finance Act. Thus, what was exempt under those provisions was transmission and distribution of electricity, despite which, during the pre-negative list regime, the respondents have considered services related to transmission and distribution of electricity as exempted from service tax by virtue of those notifications. Insofar as electricity meters are concerned, vide circular No.131/13/2010-ST dated 7.12.2010, it was clarified that supply of electricity meters for hire to consumers being an essential activity, having direct and close nexus with transmission and

distribution of electricity, the same is covered by the exemption for transmission and distribution of electricity extended under relevant notifications.

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**14. It may be noted that insofar as the exemptions prior to the negative list regime as well as post the negative list regime are concerned, it is the transmission and distribution of electricity that has been exempted by virtue of notifications.**

During the negative list regime, transmission and distribution of electricity has been placed in the negative list. Therefore, in all the three phases, what was exempted was "transmission and distribution of electricity". **However, while for the prenegative list phase, the respondents considered the services related to transmission and distribution of electricity as exempt under the exemption notifications, for the negative list regime and the GST regime, they seek to exclude such services from the ambit of transmission and distribution of electricity.** \*\*\*\*\* **The respondents having themselves considered the services in question as being covered by the exemption for transmission and distribution of electricity as such services were essential activities having a direct and close nexus cannot be now permitted to take a U-turn and seek to exclude such services without pointing out any specific change in the nature of the exemptions, except that they are provided under different statutory provisions. In the opinion of this court, the meaning of "transmission and distribution of electricity" does not change either for the negative list regime or the GST regime. If that be so, the services which stood included within the ambit of transmission and distribution of electricity during the pre-negative list regime cannot now be sought be excluded by merely issuing a clarificatory circular, that too, with retrospective effect. By the clarificatory circular, the respondents seek to give a different interpretation of the very same services as against the clarification issued for the prenegative list regime.**



15. Thus, from the very manner in which the respondents have treated the services related to transmission and distribution of electricity during the pre-negative list regime, such services would stand covered by the exemption granted to transmission and distribution of electricity by virtue of inclusion of such services in the list of negative services under section 66D (k) of the Finance Act as well as by virtue of exemption notification issued under the CGST Act."

(emphasis supplied)

13. The Gujarat High Court also examined whether services provided will fall within the ambit of bundled services as contemplated under Section 66F(3) of the Finance Act and observed that for the phase relating to the negative list, the services in question would fall within the ambit of bundled services and would have to be treated in the same manner as the service which gives the bundle its essential character, namely transmission and distribution of electricity. The service would, therefore, be exempted from payment of service tax. The relevant portion of the order is reproduced below:

"20. The facts of this case are required to be examined in the light of the above statutory provisions. **In this case, we are concerned with transmission and distribution of electricity being the main services and application fee for releasing the connection for electricity; rental charges against metering equipment; testing fee for meters/transformers, capacitors etc.; labour charges from customers for shifting of meters or shifting of service lines; charges for duplicate bills provided by DISCOMS to consumers being related services.** The question is whether an element of provision of these services is combined with an element or elements of provision of the main service of transmission and distribution of electricity. **As noticed earlier, the respondents have themselves treated such related/ancillary services**

**as part of the main service of transmission and distribution of electricity for the pre-negative list regime.** Apart, therefrom, considering this issue independently, reference may be made to certain provisions of the Electricity Act. Sections 43 and 45 of the Electricity Act.

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22. Thus, any line which is used for carrying electricity for any purpose as well as any apparatus connected to any such line for the purpose of carrying electricity is mandatorily required to be provided to the consumer by the licensee. Moreover, any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity, except for electric meter and any electrical equipment, apparatus or appliance under the control of a consumer fall within the ambit of electrical plant as defined under section 2(22) of the Electricity Act. Sub-section (2) of section 43 of the Electricity Act casts a duty upon the licensee to provide if required electric plant or electric line for giving electric supply to the premises. Therefore, providing electric line and electric plant are elements of service which are naturally bundled in the ordinary course of business, with the single service of transmission and distribution of electricity which gives the bundle its essential character. The only related service which does not fall within the ambit of the definitions of electric line and electric plant is the meter used for ascertaining the quantity of electricity supplied to any premises. However, insofar as installation of electricity meter and hire charges collected in respect of electricity meters are concerned, by the circular dated 7th December, 2010, the Government of India has clarified that supply of electricity meters for hire to the consumers is an essential activity having direct and close nexus with transmission and distribution of electricity and therefore, is covered by the exemption for transmission and distribution of electricity extended under the relevant notifications. **Evidently therefore, all the services related to transmission and distribution of electricity are naturally bundled in the ordinary**

course of business of the petitioner and are required to be treated as provision of the single service of transmission and distribution of electricity which gives the bundle its essential character.

23. Besides, a perusal of the GERC Regulations indicates that the services which are sought to be taxed now are the services, which the petitioner is required to mandatorily provide at the rate prescribed by GERC, a statutory authority constituted under the provisions of the Electricity Act. In the opinion of this court, all these services are essential activities which have a direct and close nexus with transmission and distribution of electricity. In terms of the earlier clarification dated 7.12.2010 issued vide Circular No.131/13-2010-ST, the Government of India had clarified that an activity, which is an essential activity having direct and close nexus with transmission and distribution of electricity would be covered by the exemption for transmission and distribution of electricity extended under the relevant notifications. Therefore, the taxability of the related/ancillary services are required to be given same treatment as is given to the single service, which gives such bundle its essential character, namely, transmission and distribution of electricity.

25. Thus, insofar as the phase relating to the negative list regime is concerned, the services in question would fall within the ambit of bundled services as contemplated under subsection (3) of section 66F of the Finance Act, and would have to be treated in the same manner as the service which gives the bundle its essential character, namely, transmission and distribution of electricity and, would therefore, be exempt from payment of service tax."

(emphasis supplied)

14. It is clear from the aforesaid judgment of the Gujarat High Court that the activities that are related/ancillary to transmission and distribution of electricity would be exempt from payment of service tax

since transmission and distribution of electricity is exempted. It is also clear from aforesaid decision that all services related to transmission and distribution of electricity are bundled services, as contemplated under section 66F(3) of the Finance Act, and are required to be treated as a provision of a single service of transmission and distribution of electricity, which service is exempted from payment of service tax.

15. The aforesaid judgment of the Gujarat High Court was followed by the Rajasthan High Court in **Jodhpur Vidyut Vitran Nigam Ltd.**

16. A Division Bench of the Tribunal in **M.P. Poorva Kshetra Vidyut Vitran Co. Ltd.** also followed the aforesaid judgment of the Gujarat High Court and held that all services related to transmission and distribution of electricity are exempted from service tax.

17. Each of the heads under which the demand has been confirmed can now be examined.

### **Collection of penalties or liquidated damages**

18. Service tax has been confirmed on the amount of penalty and liquidated damages collected by the appellant towards late supply of service or goods on the ground that the said amount is collected for 'agreeing to tolerate the act' of late supply of goods by the suppliers and hence would fall under the category of 'declared service' under section 66E(e) of the Finance Act. It is the submission of the learned counsel for the appellant that this amount is not collected under separate agreements and by mere collection of these penalties, the failure of the suppliers is not tolerated. Further, action of cancelling the agreements, barring them from further participation in the contracts and other legal actions are initiated against the client.

19. It has, therefore, to be examined whether the appellant is providing a 'declared service' contemplated under section 66E(e) of the Finance Act, which service became taxable w.e.f 01.07.2012.

20. Section 65B(44) of the Finance Act defines 'service' to mean any activity carried out by a person for another for consideration, and includes a declared service, but does not include what is mentioned in 'a, b and c'. The relevant portion of the definition of 'service' is reproduced below:

**"Section 65B(44)** "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment; (c) fees taken in any Court or tribunal established under any law for the time being in force."

21. 'Declared services' have been defined in section 66E and sub-section(e) of section 66E, which is involved in this appeal, is as follows:

**"66E. Declared services**

The following shall constitute declared services, namely: -

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**(e)** agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;"

22. Liability has been fastened upon the appellant under section 65B read with section 66E(e) of the Finance Act for the period from July 2012 till June 2017 for the reason that by collecting the said amount

the appellant agreed to the obligation to refrain from an act or to tolerate the nonperformance of the terms of the contract by the other party.

23. Section 65B (44) defines 'service' to mean any activity carried out by a person for another person for consideration, and includes a declared service. Under section 66E (e), a declared service shall constitute agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act. Section 66 B provides that service tax shall be levied at the rate of 12 per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed. Section 66D contains a negative list of services, while section 66E contains a list of declared services.

24. It is in the light of what has been stated above that the provisions of section 66E(e) have to be analyzed. Section 65B(44) defines service to mean any activity carried out by a person for another for consideration and includes a declared service. One of the declared services contemplated under section 66E is a service contemplated under clause (e) which service is agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. There has, therefore, to be a flow of consideration from one person to another when one person agrees to the obligation to refrain from an act, or to tolerate an act, or a situation, or to do an act. In other words, the agreement should not only specify the activity to be carried out by a person for another person but should specify the:

- (i) Consideration for agreeing to the obligation to refrain from an act; or
- (ii) Consideration for agreeing to tolerate an act or a situation; or
- (iii) Consideration to do an act

25. It also needs to be noted that section 65B(44) defines 'service' to mean any activity carried out by a person for another for consideration. Explanation (a) to section 67 provides that 'consideration' includes any amount that is payable for the taxable services provided or to be provided. The recovery of liquidated damages/penalty from the other party cannot be said to be towards any service per se, since neither the appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss. The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the appellant is that the other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance.

26. Two Division Benches of the Tribunal in **M.P. Poorva Kshetra Vidyut Vitran Co. Ltd.** and **South Eastern Coalfields** have held that the amount recovered towards penalties/liquidated damages cannot be included as 'consideration' towards any service or declared service.

### **Wheeling charges and Cross Subsidy Charges**

27. Service tax has been confirmed on **wheeling and cross subsidy** charges on the ground that they are consideration towards provision of 'declared service' as defined under section 66E(e) of the

Finance Act. The appellant collects this amount as per the Regulations framed by the State Electricity Regulation Commission under the Electricity Act from time to time to cover the subsidies granted to the consumers.

28. 'Wheeling' is nothing but transmission of electricity undertaken by the appellant Discom using its infrastructure as the power producer is not permitted to transmit electricity. Transmission is not leviable to service tax. Even assuming that the 'wheeling charges' are collected as charges for permitting the power producer to transmit its electricity using the infrastructure of the appellant, since it is an activity related to transmission of electricity and also that the main activity of transmission is done by the appellant, 'wheeling charges' would not be leviable to service tax in view of the decision of the Gujarat High Court in **Torrent Power**. The appellant **had not agreed to tolerate any act of any person** by transmitting electricity through its network. Therefore, wheeling service would not be leviable to service tax and it cannot be termed as a declared service as it does not fall within the meaning of section 66E(e) of the Finance Act.

29. Collection of **cross subsidy charges** is provided under the Electricity Act and the Regulations to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee. It is also in relation to transmission and distribution of electricity and cannot be treated as a 'declared' service since it is not for agreeing to tolerate an act of any other person. The cross-subsidy surcharges are determined under sections 39, 40 and 42 of the Electricity Act and are collected from the consumers who opt for Open



Access power purchases. It is not generated out of any service provided by the appellant and, therefore, service tax cannot be levied.

**Supervisory charges and Testing charges, and Transformer and Meter Testing Charges**

30. The appellant collects supervision charges in relation to service connection or any other works as a part of the amount paid by it to the contractors to ensure that the network being provided is as per the standards fixed under the Electricity Act and Regulations framed thereunder. Under rule 45 of Indian Electricity Rules, 1956, no electrical insulation work shall be carried out for the purpose of distribution of electricity except by the licensed contractor under the direct supervision of a Department person to ensure that the quality of line/ instrument and safety checks for protection/ safety of consumers. These charges have been considered at length by Division Bench of the Tribunal in the decision rendered on 14.01.2021 in **M.P. Poorva Kshetra Vidyut Vitran Co. Ltd.**. It has been held that the amount collected towards these charges cannot be subjected to levy of service tax. The same would be the position for the other charge under this head.

**Rents collected from contractors**

31. With regard to the rent collected by the appellant from the contractors for allowing them to use the equipment of the appellant, the appellant admits the liability, but only for the period that falls within the period of limitation.

32. It has, therefore, to be seen whether the extended period of limitation has been correctly invoked in the present case. At the relevant time, the period of limitation was one year under section 73 of the Finance Act. The show cause notice mentions that the appellant had intentionally chosen not to assess the actual service tax liability by fraudulently suppressing facts and appeared to have evaded applicable service tax on such services. It has also been stated that the appellant had willfully mis-stated that the consideration received by the appellant for providing the services was not leviable to service tax.

33. The Commissioner has merely observed that the onus of making a proper assessment of liability rests with the assessee and in the scheme of self assessment, the Department comes to know of the facts only during the scrutiny of the statutory forms. The Commissioner has also observed that the appellant failed to declare the correct turn over in the ST-3 returns and suppressed the facts of the taxable amount towards the aforesaid services and thereby they had deliberately and willfully ignored payment of service tax. Thus, by willfully suppressing these facts, the appellant had contravened the provisions of the Finance Act.

34. Section 73(1) of the Finance Act, deals with recovery of service tax not levied or paid or short levied or short paid. The extended period of limitation can be invoked under the proviso to section 73(1) of the Finance Act, in which case notice can be served within five years. If the extended period of limitation is not invoked any demand of service tax would be time barred. One circumstance mentioned in the proviso to section 73(1) of the Finance Act, is when there has been a 'suppression of facts'.

35. In **Pushpam Pharmaceutical Co. vs. Commissioner of Central Excise, Bombay**<sup>10</sup>, 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 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 Supreme Court observed that since 'suppression of fact' had been used in the company of strong words such as fraud, collusion, or willful default, suppression of facts must be deliberate and with an intent to escape payment of duty.

36. The Supreme Court in **Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I**<sup>11</sup> also held 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

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10. 1995 (78) E.L.T. 401 (S.C.)

11. 2007 (216) E.L.T. 177 (S.C.)

under Section 11-A the burden is cast upon it to prove suppression of fact. **An incorrect statement cannot be equated with a willful misstatement.** The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

(emphasis supplied)

37. The Delhi High Court in **Bharat Hotels Limited vs. Commissioner of Central Excise (Adjudication)**<sup>12</sup> also examined at length the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Finance Act and held as follows;

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

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Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a scenario where there is a mere omission or mere failure to pay duty or take out a license without the presence of such intention.

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The Revenue has not been able to prove an intention on the part of the Appellant to avoid tax by suppression of mention facts. In fact it is clear that the Appellant did not have any such intention and was acting under a bonafide belief"

38. It is, therefore, clear that even when an assessee has suppressed facts, the extended period of limitation can be evoked only

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12. 2018 (12) GSTL 368 (Del.)

when 'suppression' is shown to be willful and with an intent to evade payment of service tax.

39. In the present case, the Department could not establish conclusively that the appellant had suppressed material facts with an intention to evade payment of service tax. Only a general statement has been made by the Commissioner that the appellant had willfully mis-stated that the consideration received by the appellant for providing the services was not leviable to service tax. Thus, it is not possible to sustain the demand made for the extended period of limitation.

40. The demand under this head for the normal period of imitation is sustained. The Department shall calculate the amount of service tax for the normal period of limitation as the demand made for the extended period of limitation cannot be sustained.

41. The impugned order dated 16.04.2019 passed by the Commissioner is, accordingly, set aside except in so far as it seeks to confirm the demand of service tax for the amount collected towards rent from the contractors for the normal period of limitation. The appeal is allowed to the extent indicated above.

(Order Pronounced on 14.09.2022)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

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

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
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**M/s Southern Power Distribution  
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**The Commissioner of  
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**...Respondent**

**APPEARANCE:**

Shri Y. Sreenivasa Reddy, Advocate for the Appellant

Shri A. Rangdham, Special Counsel for the Department

**CORAM:**

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT  
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)**

**Date of Hearing: 06.05.2022**

**ORDER**

Order Pronounced on **14.09.2022.**

**(JUSTICE DILIP GUPTA)  
PRESIDENT**

**(C.J. MATHEW)  
MEMBER (TECHNICAL)**