# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

## NEW DELHI

PRINCIPAL BENCH- COURT NO. I

## SERVICE TAX APPEAL NO. 706 OF 2011

(Arising out of Order-in-Original No. 05-09/SJS/CST(Adj)/2011 dated 31.01.2011 passed by Commissioner, Service Tax (Adjudication), Delhi)

**Commissioner of Service Tax, Delhi** **.....Appellant**
IAEA House, 17-B, I.P. Estate,
New Delhi

versus

**M/s. ITC Ltd, Gurgaon** **.....Respondent**
ITC Green Centre, Plot No. 10,
Sector 32, Gurgaon

**APPEARANCE:**

Ms. Jaya Kumari, Authorized Representative of the Department

Shri Tarun Gulati, Senior Advocate and Ms. Mallika Joshi, Advocate for ITC Ltd.

**AND**

## SERVICE TAX APPEAL NO. 1086 OF 2011

(Arising out of Order-in-Original No. 05-09/SJS/CST(Adj)/2011 dated 31.01.2011 passed by Commissioner, Service Tax (Adjudication), Delhi)

**M/s. ITC Ltd, Gurgaon** **.....Appellant**
ITC Green Centre, Plot No. 10,
Sector 32, Gurgaon

versus

**Commissioner of Service Tax, Delhi** **..... Respondent**
IAEA House, 17-B, I.P. Estate,
New Delhi

**APPEARANCE:**

Shri Tarun Gulati, Senior Advocate and Ms. Mallika Joshi, Advocate for ITC Ltd.

Ms. Jaya Kumari, Authorized Representative of the Department

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

**DATE OF HEARING: 15.10.2024**
**DATE OF DECISION: 15.04.2025**

**FINAL ORDER NO's. 50480-50481/2025**

**JUSTICE DILIP GUPTA:**

The order dated 31.01.2011 passed by the Commissioner, Service Tax (Adjudication), Delhi[1] has led to the filing of Service Tax Appeal No. 706 of 2011 by the department and Service Tax Appeal No. 1086 of 2011 by M/s. ITC Ltd., Gurgaon[2].

2. The following five issues were framed by the Commissioner for decision in the order dated 31.01.2011:

**(i)** Taxability of the services provided outside India before 18.04.2006.

**(ii)** Taxability of services provided by the service provider situated outside India and received by the service recipient in India prior to 01.01.2005.

**(iii)** Classification of services in relation to Starwood Preferred Guests Program[3] and Frequent Flyer Program[4].

**(iv)** Payment of service tax on "manpower recruitment or supply agency services"; and

**(v)** Service tax computed on higher of the two values of the expenditure made in foreign currency.

3. The **first issue** was answered by the Commissioner in favour of ITC. The Commissioner held that it is only w.e.f. 18.04.2006, when section 66A of the Finance Act, 1994[5] was inserted, that services provided by a person who has established a business or has a fixed establishment from which the service is provided in a country other than India, and received by a person who has his place of business or fixed establishment in India became taxable and such taxable service shall be treated as if the

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1. **the Commissioner**
2. **ITC**
3. **SPGP**
4. **FFP**
5. **the Finance Act**

recipient had himself provided service in India. Thus, no service tax could have been levied on the service provided prior to 18.04.2006.

4. In respect to the **second issue**, the Commissioner noticed that though rule 2(1)(d)(iv) of the Service Tax Rules, 1994[6] was notified w.e.f. 16.08.2002 but the Notification issued under section 68(2) of the Finance Act was made applicable w.e.f. 01.01.2005 for services provided by non-residents not having an office/establishment in India, provided such services were received in India. The Commissioner, therefore, held that ITC was liable to pay service tax only from 01.01.2005. The relevant findings on this issue are:

> "3.3 ***** **There were services that were received by the Noticees from the service providers who were situated outside India and had no office or establishment in India. In those cases the service tax has been demanded under Rule 2 (1) (d) (iv).** In such situations also the Noticees have maintained that the liability to pay the service tax for the service provided by the service provider situated outside India was from 18th April, 2006, when the charging provision in Section 66A was enacted. However, the correct legal position is different.
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> 3.3.1 **Rule 2 (1) (d) (iv) was notified with effect from 16.08.2002** and when a person received a service from a service provider not situated in India or not having an establishment or office in India, then the service recipient was made liable to pay service tax. **However, the said Rule was framed by the Central Government under Section 94 of the Act'94 without notifying the services under Section 68 (2), in respect of which a person other than the person providing the service could be made liable to pay service tax.** As mentioned above, under Section 68(2) the Central Government has the power to make a person, other than the person providing the service, liable to pay service tax. However, before the

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**6. the 1994 Rules**

Central Government exercises the said power it has to notify the services with respect to which a person other than the person providing the service could be made liable to pay the service tax. Since, in August 2002, the notification under Section 68 (2) was not issued hence Rule 2 (1) (d) (iv) was not effectively enforceable. **Notification No. 36/2004-ST dated 31.12.2004 was issued under Section 68 (2), notifying the services in respect of which a person other than the person providing the services was to be made liable to pay service tax. The Notification was made applicable w.e.f. 01.01.2005. Accordingly, with respect to services provided by a non resident, not having office/establishment in India and if such services were received in India, the service tax liability arose with effect from 01.01.2005, on reverse charge basis, on the recipient of service in India.** ***** **Accordingly, the Noticees are liable to pay service tax from 01.01.2005 on such services that were provided by a service provider** who was outside India and had no office or establishment in India but those services were received in India by the Noticees.

3.3.2 Under the agreements Sheraton had agreed to promote, market and sell the services of the Noticees outside India. Sheraton was to undertake the activities of promotion, marketing or sales through resources and means at its command outside India and promote, market or sell services of the Noticees outside India. The activities of Sheraton were definitely classifiable under the 'business auxiliary service'. The Noticees have not disputed the classification of services of Sheraton but has contested their liability to pay service tax under reverse charge mechanism before 18.04.2006. Though the activities of Sheraton were performed outside India yet the benefit of the services were received in India. The sale of the services provided by the Noticees by way of renting of rooms in their hotels was enhanced in India. The Noticees paid 3% of the room rent received in India to Sheraton for the services rendered by Sheraton. **The business and commerce of the Noticees established in India**

**was benefitted by the services provided by Sheraton. The services were, therefore, received in India and the liability to pay service tax with respect to services arose from 01.01.2005. Similarly, the services provided by American Express, Radius and ABCCS for promoting the services of the Noticees on the websites of the service providers though provided outside India yet were received in India. Hence, the liability of the Noticees to pay service tax with respect to those services was with effect from 01.01.2005. The 'interior decorator's service' and 'architect's service' were with respect to the immovable properties situated in India.** The interior decorator's service and the architect's service were, therefore, received in India from non-resident service provider not having an office or establishment in India. **The liability to pay service tax on these services was also from 01.01.2005.**

3.3.3 The service tax on the service rendered by Sheraton has been demanded in show cause notices at Sr. No. 1 and 5 in paragraph 1.11. In the show cause notice at Sr. No. 1 the demand of service tax with respect to services received from Sheraton is for period from 01.07.2003 to 16.06.2005. The Noticees are liable to pay service tax on such services only from 01.01.2005. **The demand for period prior to 01.01.2005 is bad in law and is not payable by the Noticees. The Noticees are, thus, liable to pay service tax only for the period from 01.01.2005 to 16.06.2005 subject to the demand having been issued within the limitation prescribed by law. The question of limitation shall be examined later.**
*****"

**(emphasis supplied)**

5. Regarding the **third issue** relating to classification of services in relation to SPGP and FFP, the Commissioner held that the show cause notice merely alleged that payments made by ITC to the service providers

were for rendering "business auxiliary service"[7], but the show cause notice did not specify which particular clause of section 65(19) of the Finance Act was attracted. The Commissioner, however, examined sub-clause (ii) of clause (19) of section 65 of the Finance Act and held that this particular sub-clause will not be attracted for the following reasons:

> "3.4.3 **For providing of service of business promotion and marketing there should be an agreement, express or implied, that one person shall promote, market or sell the goods or services of the other person to the third person or world at large.** When such an activity is undertaken then the intention is to keep the business rivals at bay so that the profits or the goodwill of the service recipient is increased. The service provider has to convince the other persons about the quality of the services or goods of the services or goods of the service recipients and create an impression in the minds of the other persons that they shall be benefitted in terms of money, quality, feel goods factor or all of them if they buy the goods or avail the services of the service recipient. **There is no allegation or evidence showing that for these two programmes, Sheraton was engaged in the business of promotion or marketing of services of the Noticees. The Noticees had not hired the services of Sheraton for conducting advertisements or a publicity campaign or selling of any services provided by them. Sheraton did not advertise or canvass the hotels of the Noticees to the exclusion of other hotels nor did they prevail upon the member-guests to stay in the hotels of the Noticees.** The member-guests had the option to stay in the hotels of the business rivals of the Noticees. The member-guests also had the option to avail free travel on the partner-airlines or purchase merchandise. In such a situation it is inconceivable that the participation in the two programmes was equivalent to receipt of service of business auxiliary. **The primary**

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**7. BAS**

> **object of the aforesaid two programmes was not to increase the room sales revenue of the Noticees but to provide additional benefits by way of accumulation of reward points to the member-guests who chose to stay on their hotels. Any increase in occupancy of the hotels of the Noticees was purely incidental.**"
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> **(emphasis supplied)**

6. The Commissioner ultimately held:

> "3.4.6 **It is inappropriate to say that the participation of the Noticees in the aforesaid two programmes led promotion or marketing or services provided by the Noticees to the exclusion of business rivals.** It is not possible to conclude that Sheraton provided service or promotion or marketing services provided by the Noticees. Accordingly, the participation of the Noticees in the two programmes never resulted in their receiving any service in the category of 'business auxiliary service'. **In absence of any evidence showing that how the activities of Sheraton were amounting to providing of service in the category of 'business auxiliary service' under other sub-clauses of Section 65 (19), it is not possible to hold that if the service in the category of 'business auxiliary service' was ever involved in activities of Sheraton in so far as the administration of SPGP and FFP was concerned.** Accordingly, the allegations in the show cause notices at Sl. No. 2, 3, 4 & 5, in so far as they relate to the recovery of service tax under the category of 'business auxiliary service' for participation in the aforesaid two programmes, are without substance. The show cause notices are bad in law and no recovery can be made under them."
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> **(emphasis supplied)**

7. With regard to the **fourth issue**, the Commissioner noticed that the show cause notice proposed to recover service tax on "manpower

recruitment or supply agency services" on the following two services provided by ITC to the service recipient:

**(i)** Manpower supply to four hotels under "Operating Service Agreements"

**(ii)** Manpower supply to five units on cost recovery basis.

8. The Commissioner also noticed that in addition, the show cause notices also proposed to recover service tax on manpower recruitment or supply agency services in the following two cases:

**(a)** Services provided by G.J. Hamburger Production

**(b)** Services provided by Mr. Michael Brian Agars

9. In regard to the first set relating to manpower supply to four hotels under "operating service agreements", the Commissioner observed:

> "3.5.4 **The contentions of the Noticees, however, make a very strong point that they were not merely concerned with supply of manpower but had taken over the hotels from the owners to operate, manage and administer them as independent business units and the Noticees were involved in all aspects related to operating those hotels as successful business ventures.** The agreements entered into between the Noticees and such hotels clearly show that the agreements were not for supply of manpower but for operating and managing the hotels. The agreements also reveal that in addition to the salary of the staff deployed by the Noticees, the Noticees were also recovering additional charges for their services to manage and operate the hotels. The agreements for management and operations of hotels cannot be vivisected to recover the service tax only on the portion of the salaries of the employees recovered by the Noticees from such hotels, to charge service tax on 'manpower supply agency's service. **The agreements entered into between the Noticees**

**and the owners of such hotels were for complete management and operations of the hotels. The dominant aspect of the agreements is required to be examined and the dominant aspect was not the supply of manpower. The dominant aspect was operations of the hotels as business units. Consequently, the service tax could not have been charged only on that component of the value of basket of services which represented the value of the manpower supply.**"

**(emphasis supplied)**

10. Regarding the second set of agreement relating to manpower supply to five units on cost recovery basis, the Commissioner held:

"3.5.5 **Under other set of agreement, the Noticees have deputed their employees to other hotels to operate and maintain those hotels in line with the ITC Welcome group standards and run those hotels in smooth and efficient manner.** The Noticees recover salaries and other cost of their employees from those units on actual basis without any mark up. *****

3.5.6 **After 18.4.06 the terms of 'commercial concern' was replaced by the term 'any person'. Now 'any person' engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise is covered under the definition of the 'manpower recruitment or supply agency'.** ***** The Noticees have stated in their reply to the show cause notices that they had supplied manpower to five hotels and were recovering salaries from such hotels. They have been supplying the manpower to five hotels from June, 2005 to March 2008 and still they have argued that they are not engaged in supply of manpower in the normal course of the business. It is not one isolated incident of supply of manpower to one hotel and hence some credence to their argument. **It is a case of supply of manpower to five hotels for a period of nearly three years and still the**

**impudent contention that they are not engaged in the normal course of business to supply manpower. Their contention is unacceptable. It is not necessary that for an agency to be the 'manpower recruitment or supply agency' that the only or dominant engagement should be the manpower recruitment or supply.** The definition is wide enough to include services provided directly or indirectly and in any manner. In any case, continuous supply of manpower to five persons for three years is sufficient reason to cover the Noticees in the definition of 'manpower recruitment or supply agency'. **The Noticees have correctly been called upon to pay service tax on the 'manpower recruitment or supply agency's service' with respect to service being discussed in this paragraph and they are liable to pay service tax on the service rendered by them.**"

**(emphasis supplied)**

11. Regarding the agreement with G.J. Hamburger Production, the Commissioner observed:

"3.5.7 ***** **In so far as their agreement with G.J.Hamburger Production is concerned they have admitted that the services rendered by G.J.Hamburger Production was in the category of 'manpower recruitment or supply agency's service' and they were liable to pay service tax and they have admitted that service tax to the extent of Rs.11,99,700/-** (Rupees Eleven lakhs ninety nine thousand seven hundred) is payable by them. *****"

**(emphasis supplied)**

12. With respect to the service provided by Michael Brian Agars, the Commissioner observed:

"3.5.8 ***** **I accept the argument of the Noticees that since Mr. Michael Brian Agars performed the programme as an artist in the**

**restaurant of their hotels, hence there was no question of 'supply of manpower' in such a case.** Consequently, the demand to the extent of Rs. 1,28,269/- (Rupees one lakh twenty eight thousand two hundred and sixty nine) does not stand on merit."

**(emphasis supplied)**

13. Regarding the **fifth issue** relating to service tax computed on higher of the two values of the expenditure made in foreign currency, the Commissioner observed as follows:

"3.6 ***** **As discussed in paragraph 2.4 (supra) there were two sets of figures (in Annexure-A and in Annexure-17) available to the auditors of the department in relation to expenditure made in foreign currency by the Noticee.** The expenditure was in relation to number of heads, such as, management consultancy, maintenance and repair, advertisements outside India, membership fee for clubs and associations outside India, commercial coaching and traveling, business exhibition services, business support service, Sheraton fee etc. There were variations in two sets of figures and also the amounts on which the service tax was paid. **For computing the demand of short payment of service tax the revenue authority has computed the demand on higher of the two figures in both the Annexure.**

3.6.1 Issuing show cause notice for recovery of services tax without ascertaining the correct value of the service and by selectively picking up the higher amount of the value of services from more than one source, is an incorrect way of issuing the show cause notice. **No tax liability can be computed on basis of presumption or some hypothetical value of the services.** Before the tax liability is computed, the exact value of the transaction which has to be taxed, the rate applicable and the time period involved have to be correctly computed and explicitly stated in the show cause notice. Any failure to do so would amount to denial, to the person charged with short payment of tax, a reasonable opportunity to defend himself. **The**

**demand computed in the manner in which it has been computed in the show cause notice can be set aside only on the ground of being presumptive.**"

**(emphasis supplied)**

14. Details of the five show cause notices containing the description of the service, the period of demand and the period beyond the normal period is shown in the following table:

| S. No. | Show cause notice date | Name of the service | Period | Beyond normal period/amount |
|---|---|---|---|---|
| 1. | 05.01.2007 | BAS (Promotion and marketing) | 01.07.2003 to 16.06.2005 | Entire period is beyond normal period. Entire period is also prior to 18.04.2006 |
| 2. | 17.10.2008 | BAS (SPGP + FFP) | July 2003 to June 2008 | Beyond normal period is from July 2003 till April 2007 |
| 3. | 23.10.2008 | i. Manpower supply services | June 2005 to March 2008 | Beyond normal period is from June 2005 till April 2007. Amount is Rs. 1,34,00,673/- out of total demand of Rs. 2,43,91,836/-. |
| | | ii. BAS (SPGP+FFP) | April 2003 to March 2008 | Beyond normal period is from April 2003 till April 2007. Amount is Rs. 1,51,37,141/- out of total demand of Rs. 2,80,86,783/-. |
| | | iii. Commercial training & coaching services | April 2003 to March 2008 | Beyond normal period is from July 2003 till April 2007. Amount is Rs. 2,31,35,619/- out of total demand of Rs. 2,44,37,842/-. |
| 4. | 31.03.2009 | i. Manpower supply services | April 2008 to Sept 2008 | Within normal period |
| | | ii. BAS (SPGP+FFP) | April 2008 to Sept 2008 | |
| 5. | 24.04.2009 | i. BAS (Promotion and marketing) | October 2003 to March 2004 | Since the demand is prior to 01.01.2005, it has been dropped by the Commissioner. Department has not challenged this funds. |
| | | ii. BAS (SPGP+FFP) | | |
| | | iii. Interior Decorators | | |
| | | iv. Architect service | | |

15. The Commissioner noticed that the demand sustainable with respect to the first show cause notice dated 05.01.2007 is for the period from 01.01.2005 to 16.06.2005. The Commissioner noticed that the last date for issuing the demand for the normal period of one year was not later than 25.10.2006 but the show cause notice was issued on 05.01.2007. The Commissioner then examined whether the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act could have been invoked and held that the extended period of limitation could not have been invoked.

16. With respect to the show cause notices at serial no's. 3 and 4 dated 23.10.2008 and 31.03.2009, the Commissioner held that part of the demand pertaining to "manpower recruitment or supply agency services" is to be paid by ITC. ITC also admitted liability of Rs. 11,99,700/- as a recipient of service. The Commissioner also noticed that ITC was liable to pay service tax in relation to the manpower supply to the five hotels. Thus, the Commissioner found that the demand sustainable on merits pertaining to the third and fourth show cause notices for supply of manpower is for the period from June 2005 to September 2008. The third show cause notice was issued on 23.10.2008 though the last date within the normal period was 25.04.2007. The demand for the show cause notice at serial no. 3 was, therefore, confirmed only for the period between April 2007 and March 2008 which was the normal period of limitation. Regarding the fourth show cause notice dated 31.03.2009, the Commissioner found that the entire demand was within a normal period of limitation.

17. The Commissioner ultimately passed the following order:

"4.1 In view of the above discussion and findings, I pass the following order:

4.2 Service Tax including Cess amounting to Rs. 1,01,25,811/- (Rs. One Crore one lac twenty five thousand eight hundred and eleven only) is required to be paid by the Noticees in relation to "manpower recruitment or supply agency's service" as a provider of services

4.3 Service Tax including Cess amounting to Rs. 11,99,700/- (Rs. Eleven lac ninety nine thousand and seven hundred only) is required to be by the Noticees in relation to "manpower recruitment or supply agency's service" as a recipient of service.

4.4 Service Tax including Cess amounting to Rs. 4,24,110/- (Rs. Four lac twenty four thousand one hundred and ten) is required to be paid by the Noticees in relation to foreign expenditure made on online access of reports.

4.5 Service Tax including Cess amounting to Rs. 1,70,904/- (Rs. One lac seventy thousand nine hundred and four) is required to be paid by the Noticees in relation to foreign expenditure made on certain reimbursements.

4.6 Interest under Section 75 of the Act'94 is to be paid by the Noticees on all the aforesaid amounts from the due date till the date of payment.

4.7 The Noticees are to pay penalty under Section 76 of the Act'94, which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two percent of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax and cess. Such penalty shall in no case be more than the service tax to be paid by the Noticees as mentioned in paragraph 4.2 to 4.5.

4.8 Penalty of Rs. 5,000/- is imposed under Section 77 of the Act'94 on the Noticees."

18. **Service Tax Appeal No. 706 of 2011** has been filed by the department to assail the following five issues that had been decided against the department:

**(i)** Promotion and marketing of ITC hotels by Sheraton USA on account of such hotels being members of SGPG and FFP;

**(ii)** Services provided by ITC as manpower recruitment and supply agency;

**(iii)** Commercial training and coaching services only on the difference in amount of demand as calculated by ITC and the department;

**(iv)** The expenditure incurred by ITC in foreign currency on account of the fee for artist Michael Brian Agars covered by manpower recruitment and supply agency; and

**(v)** Invocation of extended period of limitation.

## FIRST ISSUE

19. The contention of the department is that Sheraton USA is providing the service of promotion and marketing of ITC hotels since such hotels are members of SPGP and FFP administered by Sheraton USA and service tax has to be recovered from ITC under the reverse charge mechanism under rule 2(1)(d)(iv) of the 1994 Rules.

20. The Commissioner has found as a fact that BAS was not involved in the activities of Sheraton so far as the administration of SPGP and FFP are concerned. Paragraph 3.4.3 and 3.4.6 of the order have been reproduced

above. The findings contained in paragraph 3.4.2 of the order are also relevant and are reproduced below:

> "3.4.2 Under the programmes, the member-guests opting to staying in the hotels of the Noticees or other hotels were to earn points on specified expenditures and the points earned could be redeemed by way of free stay in any of the hotels that were members of the programmes, free travel on the partner airlines or by way of purchase of merchandise. **The hotels that were member to the programmes had to pay 5% of the amount spent by the member guest during his stay in the hotel, to Sheraton for administering the programmes. Whenever, a member-guest stayed in any of the hotels of the Noticees and redeemed his accumulated points for free stay, Sheraton compensated the Noticees for the free stay.** Similarly in the FFP, whenever a member-guest availed free travel the partner-hotels compensated the airlines through Sheraton by way of contributing out of the expenditure made by the member-guest during his stay in the hotel."
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> **(emphasis supplied)**

21. It is, therefore, clear from the aforesaid finding that the amount paid by a hotel, being 5% of the amount spent by the member guest, is for the purpose of administering the programme. On receipt of the amount, Sheraton compensates the hotels where the points are redeemed by the hotel guests. Similarly, in the FFP programme, the member airlines where the member guest avails free travel is compensated through Sheraton by way of contributing out of the expenditure made by the member guest during his stay in the hotel. It would also be pertinent to refer to paragraph 3.4.4 of the order and it is reproduced below:

> "3.4.4. ***** Each one of them contributed to the success of the schemes and some revenue earned out the schemes was contributed to the administrator of the schemes to administer the schemes. The

> administrator also compensated the members at whose establishment the points accumulated from the schemes were redeemed."

22. What, therefore, transpires is that the contribution given by the hotel to the administrator of the Scheme is to compensate the hotel member where the hotel guest redeems the points. Thus, payments are made to compensate and meet the expenditure and, therefore, there is no taxable value.

23. ITC has also given details of the manner in which the SPGP program operates. Under the SPGP programme more than 1000 different hotels across the world participate and are members. The programme is so designed that by virtue of the terms and conditions of the programme, a hotel guest is entitled to the benefit of the programme by earning points upon stay in a member hotel. The hotel guest can then redeem the points so earned at any of the member hotels. The member hotels, where the points are redeemed by the hotel guest, are entitled to be reimbursed by Sheraton as per the terms and conditions of the programme. In order to meet the expenses to reimburse the member hotel where the points are redeemed, an initial payment is made by every member hotel to Sheraton, and Sheraton administers the programme to meet the cost.

24. It would be seen that such payments are made by the member hotels to enable the reimbursement of expenses incurred by member hotels on account of redemption of points by the hotel guests. As such, only on account of the terms and conditions of the programme, the benefits to the hotel guests are ensured and the expenses incurred on account thereof are met. The function of Sheraton is like any other person who may be appointed to administer a voluntary programme organized for

mutual interest of several hotels. The role of Sheraton is only to administer the programme. It cannot, therefore, be said that merely on account of this administrative functions carried out by Sheraton, it renders any promotional or marketing service to any member hotel. The administrative function involves the receipt of payment from member hotels for reimbursing the redemption expenses to member hotels.

25. There is no service rendered by Sheraton. The hotel guests come to member hotels to take advantage of the benefit under the programme. This happens on account of the underlying Scheme of the programme on account of which the hotel guests come to stay in member hotels. Sheraton does not play any role in recommending any member guest to stay in any particular member hotel. The choice to stay in a member hotel is entirely of the hotel guest. No role is played by Sheraton to promote or market any particular hotel. The role is limited to administering the programme to ensure that the amount is received from the member hotel, where the hotel guests earn the points, by way of its contribution, so that the said amount is utilized for payment by way of reimbursement to the member hotel where the hotel guests redeem the points.

26. As such, no service or promotion or marketing is rendered by Sheraton to the member hotels where the hotel guest earns the points and makes its contribution for implementation of the programme.

27. Frequent Flyer works in the same manner. The points earned by using flights can also be redeemed at the hotels.

28. It is, therefore, not possible to accept the contention advanced by the learned authorized representative appearing for the department that the services provided by Sheraton are in the nature of publicity and aimed

at increasing the occupancy of the hotels and hence covered under the scope of BAS.

29. Even if it is assumed that some service is provided by Sheraton, still no service tax can be levied as there is no "taxable value" in the SPGP and FFP. The amount charged has to be necessarily towards consideration for the service provided which is taxable under the Finance Act. There has to be a nexus between the amount charged and the service provided and, therefore, any amount charged which has no nexus with taxable service is not a consideration for the service provided nor does it become a part of the value taxable under section 67 of the Finance Act. This is what was held by the Tribunal in **Balaji Enterprises** vs. **Commissioner of Central Excise and Service Tax, Jaipur-I**[8].

## SECOND ISSUE

30. The show cause notice proposes to recover service tax on "manpower recruitment and supply agency services" on the following two services provided by ITC to the service recipient:

> "(i) Manpower supply to four hotels under "Operating Service Agreements"
>
> (ii) Manpower supply to five units on cost recovery basis."

31. In addition, the show cause notice also proposes to recover service tax on manpower recruitment and supply agency services in the following two cases:

> "(a) Services provided by G.J. Hamburger Production
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> (b) Services provided by Mr. Michael Brian Agars"

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**8. Service Tax Appeal No. 54510 of 2014 decided on 20.09.2019**

32. In respect to the first set relating to manpower supply to the four hotels under "operating service agreements", the Commissioner held that the dominant nature of the agreement is not for supply of manpower and, therefore, service tax could not have been charged. However, with regard to the supply of manpower to the five units and the agreement with G.J. Hamburger Production, the Commissioner confirmed the demand. The Commissioner also dropped the demand with regard to the service provided by Michael Brian Agars.

33. Learned authorized representative appearing for the department submitted that the Commissioner committed an error in dropping the demands. Learned authorized representative pointed out that ITC was recovering staff charges, namely, gross salary including provident fund, pension, gratuity of the employees and this clearly shows that the staff belongs to ITC and it was recovering such cost from the owners of the five hotels. Learned authorized representative also submitted that it is a fact that Michael Brian Agars had performed as an artist in the restaurants and, therefore, service tax should not have been dropped.

34. Learned senior counsel appearing for ITC, however, submitted that the issue involved is covered by the order dated 14.03.2018 of the Tribunal in **Commissioner of Central Excise, Delhi vs. M/s. ITC Ltd.**[9] for the subsequent period. Learned senior counsel also pointed out that the Commissioner committed no illegality in dropping the demand.

35. The submissions advanced by the learned authorized representative appearing for the department and the learned senior counsel for ITC have been considered.

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**9. Service Tax Appeal No. 51447 of 2014 decided on 14.03.2018**

36. In the decision rendered by the Tribunal on 14.03.2018 in the matter of ITC for the subsequent period, the Tribunal observed as follows:

> "5. The respondent, in this case, made agreements/ arrangements with the hotels namely, WH Rama International, Grand Bay, Srinivasa Resort, ITC Park (Chennai), Fortune Park Hotels Ltd., Maharaja Heritage Resorts Ltd., Landbase India Ltd., Sullivan Court and International Travel House for stationing various managerial/ supervisory personnel, in order to maintain ITC standards and run its operation in a smooth and efficient manner. Since the respondent and those hotels are independent cost centers, the salary and other cost were recovered on actual basis, without any markup. It is an undisputed fact on record that the respondent is not engaged in the business of providing/ recruiting/ supply of man power. Rather, the respondent was established with the sole objective of providing the hospitality business of itself and through its associated companies. Since the actual expenses incurred by the respondent towards deployment of the managerial personal were reimbursed by the hotels on actual basis, without any markup, it cannot be said that such expenses should be considered a service fee, taxable under the category of "Manpower Recruitment or Supply Agency" service. We find that in the case of Fortune Parks Hotels Ltd. (supra), which is one of the hotels, where the respondent deploys its staff members, the Tribunal has held that the salary paid to the employees and reimbursed by the hotels, without any markup, cannot be subjected to service tax under Section 67 of the Act, by treating the same as part of the 'gross amount' charged by service provider 'for services provided by him'."

37. In view of the aforesaid decision of the Tribunal, it has to be held that the Commissioner committed no illegality in dropping the demand.

38. This apart, it needs to be noted that the Commissioner has also found as a fact that ITC recovers salary and other costs of the employees on actual basis without any markup.

## THIRD ISSUE

39. This issue pertains to commercial training and coaching services. It has not been assailed by the department on merits and the only ground taken in the appeal is regarding difference in the amount of demand calculated by ITC and the department.

40. There was a difference in the figure as per the balance sheet of ITC and the figures supplied to the audit. The department intended to recover the demand on the basis of the higher of the two values. ITC had in their reply given detailed explanation on this aspect. The Commissioner has held that merely issuing the show cause notice without asserting the correct value of the service and by selectively picking up the higher amount is an incorrect way of issuing the show cause notice, and thus the demand being only on presumptive basis was required to be set aside. The Commissioner also observed that the department had not placed any evidence to sustain the allegations. The Commissioner also observed that the explanation offered by ITC in their reply to the show cause notice was reasonable and appeared to be correct and should be accepted unless the department was able place any evidence. The department has not been able to point out any error in the findings recorded by the Commissioner.

## FOURTH ISSUE

41. In the matter of Michael Brian Agars, the Commissioner observed that he was performing programs in the hotels as an artist and, therefore, there was no question of "supply of manpower service". There is no error in the finding recorded by the Commissioner.

## FIFTH ISSUE

42. To examine the extended period of limitation, it would be pertinent to refer to the finding recorded by the Commissioner that the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act could not have been invoked. The Commissioner observed as follows:

> "3.9.1 If the Noticees failed to assess the tax correctly for period between 01.01.2005 and 16.05.2005 and pay the tax on time and file correct ST-3 Return, then the initial onus of proof that the Noticees had intentionally evaded the tax was on the revenue. Only after the initial burden is discharged, the extended period of limitation can be applied. **Other than the allegation of intentional evading of tax, no evidence has been adduced to show that the Noticees had the knowledge that they were liable to pay tax and they avoided to pay the tax. It is well established law that mere failure to pay the tax is not sufficient to invoke the extended period of limitation.** The text of proviso to Section 73 (1) is such that only fraud, suppression, mis-statement or contravention of law is not sufficient to invoke the extended period of limitation. The acts or omissions of the defaulter have to be intentional. There, thus, is the requirement of guilty mind or mens rea on part of the defaulter. **Mere allegation of intentional evasion is not sufficient. The allegation has to be supported by evidence.** *****
>
> In the present proceedings no evidence has been brought on record to prove that the situations visualised in proviso to Section 73 (1) existed. There is nothing on record to show that the Noticees were aware that they were liable to tax and they intentionally evaded the payment of tax. In such circumstances it is unfair to invoke extended period of limitation.
>
> *****

3.9.3 **In the present proceedings there was doubt about the taxability of the services provided by a non resident service provider who had no office or establishment in India.** Though Rule 2 (1) (d) (iv) was notified on 16.08.2002 yet no notification under Section 68 (2) was issued till 31.12.2004, which only could have enabled collection of service tax from a person other than the service provider. The Notification No. 36/2004- ST dated 31.12.2004 was issued under Section 68 (2) and it was made effective from 01.01.2005. The legal implications of the Rule 2 (1) (d) (iv) and notification 36/2004 have been discussed in paragraph 3.3.1. **In such circumstances any ordinary assessee would have entertained doubts about the taxability of services received from a service provided located outside India.** Even the revenue authorities themselves took time to rectify the situation of not notifying services under Section 68 (2). Only after notification of services under Section 68 (2) the legality of Rule 2 (1) (d) (iv) was upheld as discussed in paragraph 3.3.1. **In such circumstances to charge the Noticees with suppressions of fact, mis-statement or contravention of law with intent to evade payment of tax is unjustified and illegal.**
*****

3.9.4 **The invoking of extended period of limitation under proviso to Section 73 (1) was, therefore, unjustified and illegal.** As the demand for non-payment of service tax is beyond the normal period of one year hence the demand is unenforceable. As no service tax is recoverable, no interest can be demanded from the Noticees. The circumstances under which penalty under Section 78 can be imposed are similar to invoking of extended period of limitation. The invoking of extended period of limitation has been held to be unjustified. Accordingly, there can be no ground to impose penalty under Section 78."

**(emphasis supplied)**

43. Learned authorized representative appearing for the department submitted that the Commissioner committed an error in holding that the extended period of limitation could not have been invoked. The learned authorized representative pointed out that in the regime of self-assessment, it is the responsibility of an assessee to provide all relevant information and in any case even if there was a doubt, ITC could have sought clarification from the department. Thus, learned authorized representative submitted, it is the duty of an assessee to disclose all the material facts and any deviation would amount to intention to evade payment of service tax. To support this connection, learned authorized representative placed reliance upon the judgment of the Supreme Court in **Mallur Siddeswara Spinning Mills (P) Ltd.** vs. **C.C.E., Coimbatore**[10] and the decisions of the Tribunal in **Andhra Pradesh State Electricity Board** vs. **Collector of Central Excise, Hyderabad**[11], **Aircell Digilink India Ltd.** vs. **Commissioner of Central Excise, Jaipur**[12] and **Bharti Cellular Ltd.** vs. **Commissioner of Central Excise, Delhi**[13].

44. Learned senior counsel appearing for ITC, however, supported the findings recorded by the Commissioner on the issue of invocation of the extended period of limitation.

45. The submissions advanced by the learned authorized representative appearing for the department and the learned senior counsel for ITC have been considered.

46. In order to appreciate the contentions, it would appropriate to reproduce section 73 of the Finance Act, as it stood at the relevant time.

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**10. 2004 (166) E.L.T. 154 (S.C.)**
**11. 1984 (16) E.L.T. 579 (Tribunal)**
**12. 2006 (3) S.T.R. 386 (Tri. – Del.)**
**13. 2006 (3) S.T.R. 423 (Tri. – Del.)**

This section deals with recovery of service tax not levied or paid or short levied or short paid or erroneously refunded. It is as follows:

> "**73(1)** Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
>
> **PROVIDED** that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-
> (a) fraud; or
> (b) collusion; or
> (c) wilful mis-statement; or
> (d) suppression of facts; or
> (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,
>
> by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted."

47. It would be seen from a perusal of sub-section (1) of section 73 of the Finance Act that where any service tax has not been levied or paid, the Central Excise Officer may, within one year from the relevant date, serve a notice on the person chargeable with the service tax which has not been levied or paid, requiring him to show cause why he should not pay amount specified in the notice.

48. The proviso to section 73(1) of the Finance Act stipulates that where any service tax has not been levied or paid by reason of fraud or collusion

or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or the Rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax, the provisions of the said section shall have effect as if, for the word "one year", the word "five years" has been substituted.

49. It is correct that section 73 (1) of the Finance Act does not mention that suppression of facts has to be "wilful" since "wilful" precedes only misstatement. It has, therefore, to be seen whether even in the absence of the expression "wilful" before "suppression of facts" under section 73(1) of the Finance Act, suppression of facts has still to be willful and with an intent to evade payment of service tax. The Supreme Court and the Delhi High Court have held that suppression of facts has to be "wilful" and there should also be an intent to evade payment of service tax.

50. Before adverting to the decisions of the Supreme Court and the Delhi High Court, it would be useful to reproduce the proviso to section 11A of Central Excise Act, 1944[14], as it stood when the Supreme Court explained "suppression of facts" in **Pushpam Pharmaceutical Co.** vs. **Commissioner of Central Excise, Bombay**[15]. It is as follows:

> "**11A.** Where any duty of excise has not been levied or paid or has been short-levied or short-pain or erroneously refunded, by the reason of-
>
> (a) fraud; or
> (b) collusion; or
> (c) any wilful misstatement; or
> (d) suppression of facts; or
> (e) contravention of any of the provisions of this Act of the rules made thereunder with intent to evade payment of duty

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**14. the Central Excise Act**
**15. 1995 (78) E.L.T. 401 (SC)**

> by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant dated, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under Section 11AA and a penalty equivalent to the duty specified in the notice."

51. In **Pushpam Pharmaceuticals Company**, the Supreme Court examined whether the department was justified in initiating proceedings for short levy after the expiry of the normal period of six months by invoking the proviso to section 11A of the Central Excise Act. The proviso to section 11A of the Excise Act carved out an exception to the provisions that permitted the department to reopen proceedings if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from the relevant date under the circumstances mentioned in the proviso, one of which was suppression of facts. It is in this context that the Supreme Court observed that since "suppression of facts" has been used in the company of strong words such as fraud, collusion, or wilful default, suppression of facts must be deliberate and with an intent to escape payment of duty. The observations are as follows:

> "4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. **But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts.** The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of court the context in which it has been used indicates otherwise. **A perusal**

> **of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty.** Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."
>
> **(emphasis supplied)**

52. The Delhi High Court in **Bharat Hotels Limited** vs. **Commissioner of Central Excise (Adjudication)**[16] also examined the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Finance Act, 1994 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.**
>
> *****
>
> **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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**16. 2018 (12) GSTL 368 (Del.)**

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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.**"

**(emphasis supplied)**

53. It would also be appropriate to refer the decision of the Delhi High Court in **Mahanagar Telephone Nigam Ltd.** vs. **Union of India and others**[17]. The Delhi High Court observed that merely because MTNL had not declared the receipt of compensation as payment for taxable service, does not establish that it had wilfully suppressed any material fact. The Delhi High Court further observed that the contention of MTNL that receipt was not taxable under the Act is a substantial one and no intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return. The relevant portion of the observations are:

"28. In terms of the proviso to Section 73(1) of the Act, the extended period of limitation is applicable only in cases where service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, or collusion, or wilful misstatement, or suppression of facts, or contravention of any provisions of the Act or the Rules made thereunder with an intent to evade payment of service tax. **However, the impugned show cause notice does not contain any allegation of fraud, collusion, or wilful misstatement on the part of MTNL. The impugned show cause notice alleges that the extended period of limitation is applicable as MTNL had suppressed the material facts and had contravened the provisions of the Act with an intent to evade service tax.** Thus, the main question to be addressed is whether the allegation

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**17. W.P. (C) 7542 of 2018 decided on 06.04.2023**

that MTNL had suppressed material facts for evading its tax liability, is sustainable.

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41. **In the facts of this case, the impugned show cause notice does not disclose any material that could suggest that MTNL had knowingly and with a deliberate intent to evade the service tax, which it was aware would be leviable, suppressed the fact of receipt of consideration for rendering any taxable service.** On the contrary, the statements of the officials of MTNL, relied upon by the respondents, clearly indicate that they were under the belief that the receipt of compensation/financial support from the Government of India was not taxable. **Absent any intention to evade tax, which may be evident from any material on record or from the conduct of an assessee, the extended period of limitation under the proviso to Section 73(1) of the Act is not applicable.** The facts of the present case indicate that MTNL had made the receipt of compensation public by reflecting it in its final accounts as income. **As stated above, merely because MTNL had not declared the receipt of compensation as payment for taxable service does not establish that it had willfully suppressed any material fact.** MTNL"s contention that the receipt is not taxable under the Act is a substantial one. **No intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return.**"

**(emphasis supplied)**

54. It is, therefore, clear from the aforesaid decisions that the extended period of limitation could have been invoked only if there was suppression of facts with intent to evade payment of service tax.

55. It is in the light of the aforesaid position of law that the facts of the present case would have to be examined. The Commissioner has observed in the impugned order that even if ITC failed to correctly assess the

service tax for the period between 01.01.2005 and 16.05.2005 and had not filed correct ST-3 returns, then too it was for the department to substantiate that ITC had knowledge that it was liable to pay tax but still it avoided payment of tax since mere failure to pay tax is not sufficient to invoke the extended period of limitation. The findings recorded by the Commissioner are in accordance with the principles laid down in the aforesaid decisions.

56. This apart, it has also been contended by the learned senior counsel for ITC that ITC bona fide believed that it was not liable to pay service tax and, therefore, there can possibly be no intention on the part of ITC to evade payment of service tax.

57. ITC was justified in forming such an opinion as ultimately most of the demands have been dropped by the Commissioner. This contention advanced by the learned senior counsel of ITC deserves to be accepted in view of the judgment of the Supreme Court in **Commissioner of C. Ex. & Customs** vs. **Reliance Industries Ltd.**[18]. The Supreme Court held that if an assessee bona fide believes that it was correctly discharging duty, then merely because the belief is ultimately found to be wrong by a judgment would not render such a belief of the assessee to be mala fide. If a dispute relates to interpretation of legal provisions, the department would be totally unjustified in invoking the extended period of limitation. The Supreme Court further held that in any Scheme of self-assessment, it is the responsibility of the assessee to determine the liability correctly and this determination is required to be made on the basis of his own judgment and in a bona fide manner. The relevant portion of the judgment is reproduced below:

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**18. 2023 (385) E.L.T. 481 (S.C.)**

"23. **We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bona fide belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a mala fide belief particularly when such a belief was emanating from the view taken by a Division Bench of Tribunal. We note that the issue of valuation involved in this particular matter is indeed one were two plausible views could co-exist. In such cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking bona fides. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bona fide manner.**

24. **The extent of disclosure that an assessee makes is also linked to his belief as to the requirements of law.** *****. On the question of disclosure of facts, as we have already noticed above the assessee had disclosed to the department its pricing policy by giving separate letters. It is also not disputed that the returns which were required to be filed were indeed filed. In these returns, as we noticed earlier there was no separate column for disclosing details of the deemed export clearances. Separate disclosures were required to be made only for exports under bond and not for deemed exports, which are a class of domestic clearances, entitled to certain benefits available otherwise on exports. **There was therefore nothing wrong with the assessee's action of including the value of deemed exports within the value of domestic clearances.**"

**(emphasis supplied)**

58. Learned authorized representative also submitted that since it is a case of self-assessment, it was imperative for ITC to have provided all the relevant documents to the department

59. It is not possible to accept this contention. Even in a case of self-assessment, the department can always call upon an assessee and seek information and it is the duty of the proper officer to scrutinize the correctness of the duty assessed by the assessee. The departmental instructions issued to officers also emphasise that it is the duty of the officers to scrutinize the returns.

60. In this connection, reference can be made to the decision of the Tribunal in **M/s. Raydean Industries** vs. **Commissioner CGST, Jaipur**[19]. The relevant portion of the decision of the Tribunal in **Raydean Industries** is reproduced below:

> "24. **It would be seen that the ER-III/ER-I returns filed by the applicant clearly show that the applicant had categorically declared that it had cleared the final products by availing the exemption under the notification dated 17.03.2012. The applicant had furnished the returns on the basis of self assessment. Even in a case of self assessment, the Department can always call upon an assessee and seek information.** It is under sub-rule (1) of rule 6 of the Central Excise Rules, 20028 that the assessee is expected to self assess the duty and sub-rule (3) of rule 12 of the 2002 Rules provides that the proper officer may, on the basis of information contained in the return filed by the assessee under sub-rule (1), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee. Sub-rule (4) of rule 12 also provides that every assessee shall make available to the proper officer all the documents and records for

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**19. Excise Appeal No. 52480 of 2019 decided on 19.12.2022**

verification as and when required by such officer. **Hence, it was the duty of the proper officer to have scrutinized the correctness of the duty assessed by the assessee and if necessary call for such records and documents from the assessee, but that was not done. It is, therefore, not possible to accept the contention of the learned authorized representative appearing for the Department that the appellant should have filed a proper assessment return under rule 6 of the Rules.**

25. **Departmental instructions to officers also emphasise upon the duty of officers to scrutinize the returns.** The instructions issued by the Central Board of Excise & Customs on December 24, 2008 deal with "duties, functions and responsibilities of Range Officers and Sector Officers". It has a table enumerating the duties, functions and responsibilities and the relevant portion of the table is reproduced below:

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26. The Central Excise Manual published by CBEC on May 17, 2005, which is available on the website of CBEC, devotes Part VI to SCRUTINY OF ASSESSMENT.

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27. **It is thus evident that not only do the 2002 Rules mandate officers to scrutinise the Returns to verify the correctness of self assessment and empower the officers to call for documents and records for the purpose, Instructions issued by the department also specifically require officers at various levels to do so.**"

**(emphasis supplied)**

61. In **M/s G.D. Goenka Private Limited** vs. **The Commissioner of Central Goods and Service Tax, Delhi South**[20], the Tribunal made similar observations and they are as follows:

> "**16. Another ground for invoking extended period of limitation given in the impugned order is that the appellant was operating under self-assessment and hence had an obligation to assess service tax correctly and take only eligible CENVAT credit and if it does not do so, it amounts to suppression of facts with an intent to evade and violation of Act or Rules with an intent to evade. We do not find any force in this argument because every assessee operates under self-assessment and is required to self-assess and pay service tax and file returns.** If some tax escapes assessment, section 73 provides for a SCN to be issued within the normal period of limitation. This provision will be rendered otiose if alleged incorrect self-assessment itself is held to establish wilful suppression with an intent to evade. **To invoke extended period of limitation, one of the five necessary elements must be established and their existence cannot be presumed simply because the assessee is operating under self-assessment.**"
>
> **(emphasis supplied)**

62. It would also be pertinent to refer to the decision of the Tribunal in **M/s. India Glycols Limited** vs. **Commissioner of CGST & Central Excise**[21]. The Tribunal held:

> "39. What, therefore, transpires from the aforesaid decisions is that there can be a difference of opinion between the department and Revenue and an assessee may genuinely believe that it is not liable to pay duty. On the other hand, the department may have an opinion that the assessee is liable to pay duty. The assessee may, therefore, not pay duty in the self-

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**20. Service Tax Appeal No. 51787 of 2022 dated 21.08.2023**
**21. Excise Appeal No. 52129 of 2019 decided on 20.08.2024**

> assessment carried out by the assessee, but this would not mean that the assessee has wilfully suppressed facts. To invoke the extended period of limitation, one of the five necessary elements must be established and their existence cannot be presumed merely because the assessee is operating under self assessment. If some duty escapes assessment, the officers of the department can always call upon the assessee to submit further documents and he may also conduct an enquiry. **In fact when the audit was conducted, the officers of the audit team would have scrutinized the records and, therefore, notice should have been issued within the stipulated time from the date the audit was conducted. Even otherwise merely because facts came to light only during the audit does not prove that there was an intent on the part of the assessee to evade payment of duty.**"
>
> **(emphasis supplied)**

63. In **Sunshine Steel Industries** vs. **Commissioner of CGST, Customs & Central Excise, Jodhpur**[22], the Tribunal observed that the department cannot be permitted to invoke the extended period of limitation by merely stating that it is a case of self-assessment. The relevant observations are:

> "20. **The Department cannot be permitted to invoke the period of limitation by merely stating that it is a case of self-assessment as even in a case of self-assessment, the Department can always call upon an assessee and seek information.** It is under sub-rule (1) of rule 6 of the Central Excise Rules, 2002 that the assessee is expected to self-assess the duty and sub-rule (3) of rule 12 of the Rules provides that the proper officer may, on the basis of information contained in the return filed by the assessee under sub-rule (1), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the

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**22. (2023) 8 Centax 209 (Tri.-Del.)**

> assessee. Sub-rule (4) of rule 12 also provides that every assessee shall make available to the proper officer all the documents and records for verification as and when required by such officer. **Hence, it was the duty of the proper officer to have scrutinized the correctness of the duty assessed by the assessee and if necessary call for such records and documents from the assessee, but that was not done. It is, therefore, not possible to accept the contention of the learned authorized representative appearing for the Department that the appellant should have filed a proper assessment return under rule 6 of the Rules.**"
>
> **(emphasis supplied)**

64. **Civil Appeal No. 4246 of 2023** (Commissioner of CGST, Customs and Central Excise vs. Sunshine Steel Industries) filed by the department before the Supreme Court to assail the aforesaid decision of the Tribunal in **Sunshine Steel Industries** was dismissed by the Supreme Court on 06.07.2023 and the judgment is reproduced below:

> "Delay condoned.
> 2. Heard learned counsel for the appellant.
> 3. This Court is not inclined to interfere with the impugned order of the High Court (Sic).
> 4. The appeal is dismissed.
> 5. Pending applications, if any, are disposed of."

65. Learned authorised representative appearing for the department also submitted that in case there was any doubt, ITC could have obtained clarification from the department, but as it did not obtain clarification it is evident that it suppressed facts with intention to evade payment of service tax.

66. This contention of the learned authorized representative appearing for the department cannot be accepted. There is no requirement for an

assessee to seek clarification from the department, as was held by the Delhi High Court in **Mahanagar Telephone Nigam**. The relevant portion of the judgment of the Delhi High Court is reproduced below:

> "32. *********. Further, there is no provision in the Act which contemplates any procedure for seeking clarification from jurisdictional service tax authority. Clearly, the reasoning that MTNL ought to have approached the service tax authority for clarification, is fallacious."

67. Learned authorized representative appearing for the department has, however, placed reliance upon certain decisions to contend that the Commissioner committed an error in holding that the extended period of limitation could not have been invoked.

68. In **Mallur Siddeswara Spinning Mills**, it was noticed by the Supreme Court that both the Commissioner and the Tribunal had held that the Trade Notice that was issued by the Delhi Collectorate clarified that if the machine or a generator was superficially attached or bolted to the ground to ensure that its operation was vibration free it would not mean that it became an immovable property, as it can be unbolted and bought and sold. It was, therefore, held that suppression of this fact, despite of the clarification issued in the Trade Notice, was with an intention to evade payment of service tax.

69. In **Andhra Pradesh State Electricity Board**, the Tribunal explained that 'bona fide belief' does not mean a blind belief or a self opinionated belief. It is a belief which is reached after a sincere attempt to understand the issue and examine it reasonably.

70. In **Aircell Digilink India**, the Tribunal observed that the contention of the appellant that it had been working under a 'bona fide belief' that the

service of sale of SIM cards to the subscribers was not taxable could not be accepted as there was nothing on the record to suggest that the appellant approached the office of the service tax authorities to ascertain the details. This decision of the Tribunal holding that the appellant should have approached the authorities for guidance is contrary to the decision of the Delhi High Court in **Mahanagar Telephone Nigam**.

71. In **Bharti Cellular**, the Tribunal found as a fact that suppression of facts was with an intention to evade payment of service tax.

72. The aforesaid decisions relied upon by the learned authorized representative appearing for the department, therefore, do not come to the aid of the department.

73. There is, therefore, no error in the order of the Commissioner holding that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

74. As there is no merit in any of the contentions advanced by the learned authorized representative appearing for the department, Service Tax Appeal No. 706 of 2011 filed by the department deserves to be dismissed.

75. **Service Tax Appeal No. 1086 of 2011** has been filed by ITC to assail that part of the order passed by the Commissioner which denies relief to ITC. This relates to the demand of service tax proposed on "manpower recruitment or supply agency service". In relation to manpower supply to five units on cost recovery basis, the Commissioner noticed that ITC had deputed employees to other hotels to operate and maintain those hotels in line with ITC Welcome group standards and run those hotels in a smooth and efficient manner. Thus, supply of manpower to five hotels for a period of nearly three years would clearly attract

service tax under the head of "manpower recruitment or supply agency service".

76. There is no error in the finding recorded by the Commissioner as indeed ITC did provide manpower supply to the five hotels.

77. In regard to the agreement with G.J. Hamburger Production, the Commissioner noted that ITC admitted the service tax liability to the extent of Rs. 11,99,700/-. This ground has, therefore, not been pressed by the learned senior counsel appearing for ITC.

78. Service Tax Appeal No. 1086 of 2011 filed by ITC, therefore, deserves to be dismissed.

79. Thus, for all the reasons stated above, Service Tax Appeal No. 706 of 2011 filed by the department and Service Tax Appeal No. 1086 of 2011 filed by ITC are dismissed.

(Order Pronounced on **15.04.2025**)

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

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

Shreya