

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
**NEW DELHI**

**PRINCIPAL BENCH**

**SERVICE TAX APPEAL NO. 55299 OF 2013**

(Arising out of Order-in-Original No. 65/ST/AKM/2012 dated 28.08.2012 passed by the Commissioner (Adjudication), Central Excise New Delhi)

**M/s. Schulmberger Asia Services  
Ltd.**

**...Appellant**

Versus

**Commissioner, Service Tax,  
Delhi**

**...Respondent**

**APPEARANCE:**

Shri B.L. Narasimhan and Shri Kunal Agarwal, Advocates for the appellant.

Shri Radhey Tallo, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**

**HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 11.04.2023**

**Date of Decision: 03.07.2023**

**FINAL ORDER NO. 50810/2023**

**JUSTICE DILIP GUPTA:**

M/s. Schulmberger Aisa Services Ltd.<sup>1</sup> has sought the quashing of the order dated 28.08.2012 passed by the Commissioner (Adjudication), Service Tax, Commissionerate, New Delhi<sup>2</sup> confirming the demand of service tax with interest and penalty.

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1. the appellant  
2. the Commissioner

2. The issue that arises for consideration in this appeal relates to classification of activities of wireline logging and perforation during the relevant period from 14.05.2003 to 31.03.2008 under the category of 'technical testing and analysis'<sup>3</sup> services defined under section 65(106) of the Finance Act, 1994<sup>4</sup> and made taxable under section 65(105)(zzh) of the Finance Act. It needs to be noted that the term 'technical testing and analysis agency' has been defined under section 65(107) of the Finance Act.

3. The appellant was providing services in the exploration and production sector to M/s. Oil and Natural Gas Corporation<sup>5</sup>. These services included the following activities:

- (a) Wireline logging services
- (b) Perforation services and other mechanical jobs
- (c) 'Logging While Drilling'<sup>6</sup> services and 'Measurement While Drilling'<sup>7</sup> services.

4. These services were provided by the appellant in the mineral oil wells of ONGC at the onshore and offshore locations in the western, eastern and southern regions of India. The appellant contends that for performing these activities below the ground, it has to deploy sophisticated electronic tools which can work in hostile environment with extreme pressures and temperatures. These tools are called logging tools.

5. The activity of **wireline logging** involves systematic gathering of measurements of characteristics of the underground rock formations

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3. TTA Services  
 4. the Finance Act  
 5. ONGC  
 6. LWD  
 7. MWD

and strata traversed by the cased and open holes drilled by the customers. This activity is performed by deployment of logging tools on wires in the holes. The measurements are transmitted uphole via an electro-mechanical cable. The data is recorded on digital mechanical tapes by the computer on surface, which gives the output known as 'logs'. These logs are then provided by the appellant to the customers.

6. The activity of **perforation** involves creation of holes in the casing at desired depths by controlled use of explosives. The appellant contends that as it deploys electro-mechanical cables underground, these mechanical activities are also performed by the appellant for proper creation of holes, through which the oil/hydrocarbon can flow to the well.

7. After the introduction of the taxable category of TTA services, the appellant believed that it would be liable to service tax, so it registered itself under the said category and started paying service tax on the consideration received by it under for the contracts. However, in June 2004 and thereafter the appellant was informed by ONGC that wireline logging services would not be covered under TTA services and so not leviable to service tax. The appellant, therefore, stopped depositing/recovering service tax for wireline logging, perforation and other mechanical jobs provided by it to ONGC w.e.f. September, 2004 and the appellant also informed this fact to the department. The appellant also filed three refund applications dated 23.12.2004, 24.02.2005 and 20.07.2005 for refund of Rs. 4,15,65,474/- paid as service tax during the period December, 2003 to November, 2004. A show cause notice dated 16.10.2006 was issued to the appellant by the department challenging the claims for refund. The refunds were

rejected by orders dated 08.10.2007 and 05.11.2009. These orders have been challenged by the appellant before the Tribunal in Service Tax Appeal No. 172 of 2010.

8. The appellant also examined the service tax applicability and concluded that the newly introduced 'mining service' w.e.f. 01.06.2007 was comprehensive enough to cover wireline logging, perforation and other mechanical jobs provided by the appellant to ONGC and the service tax on these services paid by the appellant earlier to 01.06.2007 was not payable under category of TTA services. The appellant registered itself under the taxable category of 'mining service' and started discharging service tax on the invoices raised on ONGC w.e.f. 01.06.2007. The appellant disclosed this fact to the department and declared the service under the category of 'mining services' in the ST-3 returns.

9. On 23.10.2008, a show cause notice was issued to the appellant alleging that the appellant was providing TTA services and had not discharged service tax liability on such services provided by the appellant to ONGC. The details mentioned in the show cause notice are as follows:

| <b>Period during which amount was received by the appellant</b> | <b>Rate of service tax</b> | <b>Alleged taxable value</b> | <b>Alleged service tax</b> | <b>Education cess</b> | <b>SHE cess</b> |
|-----------------------------------------------------------------|----------------------------|------------------------------|----------------------------|-----------------------|-----------------|
| 14.05.2003<br>to<br>09.09.2004                                  | 8%                         | 23,98,86,000                 | 1,91,90,880                | -                     | -               |
| 10.09.2004<br>to<br>17.04.2006                                  | 10.2%                      | 275,79,36,690                | 25,57,93,669               | 55,15,873             | -               |
| 18.04.2006<br>to<br>10.05.2007                                  | 12.24%                     | 224,07,05,864                | 26,88,84,704               | 53,77,694             | -               |

|                               |        |                      |                     |                    |                  |
|-------------------------------|--------|----------------------|---------------------|--------------------|------------------|
| 11.5.2007<br>to<br>31.03.2008 | 12.36% | 101,55,35,900        | 12,18,64,308        | 24,37,286          | 12,18,643        |
| <b>Total</b>                  |        | <b>625,40,64,454</b> | <b>68,57,33,561</b> | <b>1,33,30,853</b> | <b>12,18,643</b> |
| <b>Grand Total</b>            |        |                      | <b>70,02,83,057</b> |                    |                  |

10. The appellant filed a reply to the show cause notice and denied the allegations. The appellant categorically asserted that the newly introduced 'mining services' w.e.f. 01.06.2007 was comprehensive enough to include wireline logging, perforation, MWD and LWD services.

11. The Commissioner, however, by order dated 28.08.2012 confirmed the demand with interest and penalty. The relevant paragraphs are reproduced below:

"30. The assessee is in the field of oil exploration and it is not necessary that technical analysis of data/wire logs by ONGC is necessary to predict the presence of hydrocarbons in the oil well. The physical properties of the surface of oil well, the type of rocks; their hardness/softness, rocks soaked in mud or crude oil; type of fluids; their viscosity, odor, color, pressure of gas or oil etc. can always give an indication of presence of oil or gas in the well. The physical examination of above qualities or quantities, indications from highly sophisticated instruments do establish the quality or reliability of presence or absence of something and this trial or examination, as per the dictionary meaning is 'testing'. I find that as per the conditions of the contract the assessee had to provide processed results to the Corporation. It is also the condition that if required in short period then such results are to be provided within one week. As discussed above, the activity of the assessee of collection of data, its processing with the use of sophisticated instruments is nothing but 'technical testing or analysis' service. Thus all the above said services rendered by the assessee are covered under the category of 'technical testing and analysis' service and the same is liable to service tax.

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35. The assessee has submitted that its services are covered under the category of 'mining services' and that

the same were not covered by earlier taxable service 'technical testing and analysis service'. The assessee has also argued that creation of new entry was not made by way of bifurcation of earlier entry. As discussed in earlier para, I do not find that the activities of the assessee are covered under the 'mining service'. The services of the assessee are not related to mining, it is not extracting mineral oil or gas. The activities of assessee are testing of surface material of the well with depth for finding whether the same contains oil or gas or simply hard rock with the help of sophisticated technical instruments and submission of the processed data and report to ONGC for further action. The assessee may require further instruction for continuing further tests, collection of data at more depths in the well if it has the potential of oil/gas bearing or otherwise to abandon its activities if the well is simply consists of rocks. It is not the case that all the wells drilled where the assessee was engaged by ONGC for services as per the contract resulted in oil/gas bearing sites and that the mineral is being extracted therefrom by the assessee. The role of the assessee is not to extract oil or gas from the wells, their activities in relation to the well are before the well starts producing gas or crude oil. Thus the services of the assessee cannot be covered under 'mining services'. Even if the sites are potential wells, the services of the assessee are not related to extraction of oil/gas from the mine, its only restricted to analyzing the properties of the material constituents and making out the processed data and hence their services are not covered under the definition of 'mining services'."

12. Regarding the invocation of the extended period of limitation, the Commissioner observed:

"46. I find that the assessee has stated that after introduction of taxable service of 'Technical testing and analysis' with effect from 1-7-2003 they got themselves registered under the said category and started paying service tax on the consideration received by them under the said contracts; that they were raising invoices and service tax was being charged on the said invoices at the applicable rates. I find that the assessee stopped payment of service tax abruptly and on its own from the year 2004

and without seeking and waiting for any clarifications from the department. It is also seen that they did not surrender the registration in the category of 'Technical testing and analysis' and also not sought any clarification on the issue from the competent authority separately on priority basis. It is also observed from the ST-3 returns of the assessee for the period subsequent to 2004 that the category of services on which service tax has been paid has been shown as 'Technical testing and analysis' only. The above actions of the assessee amounted to non-declaration of facts to the department, with willful intention to evade service tax, resulting in contravention of various provisions of the said Rules and thus provisions of section 73(1) of the Act are invokeable. The assessee has also stated that they started payment of service tax in the category of 'Mining Services' with effect from 1-6-2007 however, there is no such details in the ST-3 returns. I find that the assessee has not only the willful intention to evade tax, but it actually evaded payment of service tax abruptly and unilaterally on its activities without seeking any clarification from the department in the category of 'Technical testing and analysis service' and wrongly showing the payment of tax in the said category in its returns. The incorrect assessment and payment of service tax by the assessee amounted to deliberate misdeclaration and suppression of facts with intent to evade tax. Thus I find that the provisions of section 73(1) of the Finance Act are invokable in the instant case."

13. Shri B.L. Narasimhan, learned counsel for the appellant assisted by Shri Kunal Agarwal made the following submissions:

- (i) Once a taxable entry has been introduced without any change to the existing entries, the levy cannot sustain under any other category prior to such introduction;
- (ii) The activities undertaken by the appellant do not qualify as 'technical testing and analysis' services;

- (iii) Wireline logging, perforation and other mechanical jobs undertaken by the appellant fall under the taxable category of 'mining service'; and
- (iv) The extended period of limitation could not have been invoked in the facts and circumstances of the case.

14. Dr. Radhe Tallo, learned authorized representative appearing for the department supported the impugned order and submitted that the appeal should be dismissed.

15. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

16. In order to appreciate the contentions, it would be necessary to first reproduce the definitions of the relevant terms.

17. Section 65(106) of the Finance Act defines 'technical testing and analysis' in the following manner:

**"65(106)** "technical testing and analysis" means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or information technology software or any immovable property, but does not include any testing or analysis service provided in relation to human beings and animals;

Explanation: For the removal of doubts, it is hereby declared that for the purposes of this clause, "technical testing and analysis" includes testing and analysis undertaken for the purpose of clinical testing of drugs and formulations; but does not include testing or analysis for the purpose of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals."

18. Section 65(107) of the Finance Act defines 'technical testing and analysis agency' in the following manner:

**"65(107)** "testing testing and analysis agency"  
means any agency or person engaged in providing service  
in relation to technical testing analysis."

19. Section 65(105)(zzh) of the Finance Act provides that 'taxable service' means any service provided or to be provided to any person, by a technical testing and analysis agency, in relation to technical testing and analysis.

20. A perusal of section 65(106) of the Finance Act indicates that the service should be in relation to physical, chemical, biological or any other scientific testing or analysis; such service should be provided by an agency engaged in providing services of technical testing; and the object tested is either goods or materials or any immovable property.

21. The terms 'testing' and 'analysis' used in the said definition have not been defined in the Finance Act or the Central Excise Act, 1944 or the Rules made thereunder. Reference can, therefore, be made to the meanings of these terms available in the standard dictionaries/texts.

## **TESTING**

### **Webster's Dictionary:**

"Any trial or examination; means of trial; a criterion; a standard; means of discrimination; a group of questions or problems to be answered or solved as a gauge of ability, knowledge, or aptitude. A vessel used in refining gold and silver; a cupel. A substance which is employed to detect the presence or identity of any ingredient in a compound, by causing it to exhibit some known property; a reagent To try; to subject to trial and examination; and to prove, as by experiment or by some fixed standard; to refined, as gold or silver, in cupellation; to examine as by the application of some

reagent. To make, give or achieve a certain rating or score from an examination; to undergo a trial; to be analyzed."

**Words and Phrases Permanent Edition Volume 41A:**

"Testing" means the **act of proving** the truth, genuineness, **or quality of anything by experiment, or by some principals or standard**. Ainsworth v. McKay, 175 P. 887, 888, 55 Mont. 270"

**ANALYSIS**

**Webster's Dictionary**

"The resolution of a compound object into its constituent elements or component parts: opposed to synthesis; a consideration of anything in its separate parts and their relation to each other; a statement of this; **the process of subjecting to chemical tests to determine ingredients.**"

22. Thus, a 'test' must necessarily have an effect of establishing the characteristics of the object tested, either in the sense of quality or qualification. Testing is a process through which the object being tested is examined against various prescribed standards in order to find out whether it confirms to the standards or not. 'Analysis' has the character of detailed examination, and would predominantly involve the interpretation of collected data. Analysis seeks to discover the underlying nature of data and the implications of the data.

23. The contention of the appellant is that 'testing' and 'analysis' cannot be equated with logging or measurement, which activities the appellant claims are predominantly carried out by the appellant. According to the appellant, testing and analysis require an analytical

approach to the subject by applying either experimental factors or external forces and these are processes through which the strength, quality, genuineness, standard or other such attribute of the subject is judged.

24. Measurement, according to the appellant is a factual approach to the subject without any comparison to a standard.

25. It would, therefore, be necessary to examine the meaning of this term in dictionaries and it is as follows:

### **MEASUREMENT**

#### **McGraw – Hill Encyclopedia of SCIENCE Et TECHNOLOGY**

##### **5<sup>TH</sup> Edition Measure**

"A reference sample used in comparing lengths, areas, volumes, masses and the like. The measure employed in scientific work are based on the international units of length, mass and time – the meter, the kilogram, and the second – but decimal multiples and submultiples are commonly employed."

##### **Measurement as defined in Oxford's Dictionary**

"The action of measuring.> an amount, size, or extent as established by measuring.> a unit or system of measuring."

##### **Measurement as defined in Webster's Dictionary**

"The action of measuring; the amount or size ascertained by measuring; the amount or size ascertained by measuring; a system of measuring."

26. Measure is defined in the dictionaries in the following manner:

### **MEASURE**

#### **In Oxford's Dictionary**

(1) Ascertain the size, amount, or degree of (something) by comparison with a standard unit or with an object of known size .> be of (a specified size or degree) .> (measure something out) take an exact quantity of something .> assess the extent, quality, value or effect of .> (measure up) reach the required or expected standard. Means of achieving a purpose : cost cutting measures .> a legislative bill.

(2) A standard unit used to express size, amount or degree .> An instrument used as a container, rod, or tape marked with standards units and used for measuring.

(3) (A measure of) a certain amount or degree of .> an indication of extent or quality."

**In Webster's Dictionary**

"To ascertain the extent, dimensions capacity of, esp. against some standard; to judge the greatness or import of; to value; to proportion; to allot or distribute by measure, to serve as a measure."

27. The word 'measure' would, therefore, relate to determining the quantum or characteristic of a particular thing. It is the act of ascertaining the dimensions, extent or other parameters against a measure or a standard.

28. It would, therefore, be appropriate to examine the scope of the work to be provided by the appellant in the two contracts dated 08.04.2002 and 08.04.2004 entered into between the appellant and ONGC. Under the Agreement dated 08.04.2002, the appellant was required to provide 10 wireline logging units for logging, perforation and related activities. The Agreement dated 08.04.2004 was entered for

'well logging, perforating and other wireline' services. The scope of the work provided in Annexure B of the Agreement is as follows:

"Scope of Work

The Contractor shall carry out Well Logging and Perforating Services and other wireline operations in on-land exploratory, development and work over wells drilled in the "Area of operations" in India as determined by Corporation by mobilizing its logging unit/ tool/ equipment(s), material and personnel capable of operating such Equipment(s) efficiently."

29. It would be seen that the appellant had been appointed for 'logging' of data in the concerned borewells/oil rigs. The scope of work and nature of equipment required to be mobilized by the appellant make the following factors clear:

- (i) The appellant was required to make available state of the art equipment and tools available for logging of real time information and measurement of parameters in the oil rigs;
- (ii) The data may be recorded by way of imaging or frequency or neutrons or gamma rays, etc.;
- (iii) The data captured by the appellant has to be efficiently communicated; and
- (iv) In addition to logging, the appellant was also required to perform ancillary activities such as perforation and puncturing.

30. What, therefore, transpires is that the activities undertaken by the appellant do not involve testing or analysis. It is the data procured by the appellant that is communicated to ONGC which, thereafter, independently analyses the same for determining the course of action.

The function required to be performed by the appellant is strictly limited to the scope of measuring different parameters related to the oil rigs, and additionally, perforation, which has no relation to testing and analysis services.

31. The appellant has also placed reliance on the literature provided in respect of ‘well-logging’ and ‘perforation’ activities in the **Dictionary of Petroleum Exploration, Drilling, & Production by Norman J. Hyne** to submit that logging and perforation activity undertaken by the appellant is not towards any testing or analysis:

**Well Logging**

|    |          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|----|----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | Log      | 1) a record of rock properties in a well, usually made by a geologist or a service company. Some types of logs are sample, mud, drilling time, and wireline<br>2) a curve or set of curves or symbols that records the physical, electrical, radioactive, and/or sonic properties of rocks and fluids in the rocks in a wellbore<br>3) the process of making a well log<br>4) a written record of events during drilling a well such as driller’s pr drilling time log<br>5) a record of detected imperfections in a pipe inspected by electronic equipment                                                                                       |
| 2. | Well log | A record of rock and fluid properties with depth in a well. A well log is usually plotted on a long strip of paper with depth in the well in the depth track down the length of the strip... A well log can be either a single type of measurement or several types of measurements plotted together. Some different types of well logs include drilling time, sample or lithologic, mud, and wireline well logs. The wireline well logs are made by lowering sensors in a sonde or tool down the well on a wireline. Wireline well logs include electric, induction, gamma ray, neutron porosity, formation density, caliper, and dipmeter logs. |
| 3. | Wireline | The evaluation of a well using a sonde run into the well on a                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

|  |         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|--|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | logging | <p>wireline... The sonde is hoisted onto the drill floor and lowered down the well. Electrical, acoustical, and radioactive properties of the formations and their fluids are measured by remote sensing as the sonde is brought back up the hole under a constant speed.</p> <p>Different sondes are run at different speeds, and some sensors can be combined on the same sonde. The measurements are recorded on a film with a depth scale and on magnetic tape in the logging truck.</p> |
|--|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

### Perforation

|    |                                     |                                                                                                                                                                                                                                                                                                                                                                                                                           |
|----|-------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | Perforate                           | To shoot holes or perforations in casing or liner, cement, and producing formation to complete or recomplate a well. Either shaped explosive charges or, less commonly, projectiles or bullets are fired from a perforating gun.                                                                                                                                                                                          |
| 2. | Perforating gun                     | A downhole tool that uses either bullets or, more commonly, shaped explosive charges that short high-velocity (30,000 ft/sec) gases to blow holes called perforations in the casing or liner, cement and producing formation in a well... Perforating guns are run on wirelines or a tubing or drillstring. Wireline guns are fired electronically, whereas the tubing conveyed guns are fired by pressure or a drop bar. |
| 3. | Perforations or perforation tunnels | Holes shot in the casing or liner, cement, and producing formation by bullets or shaped-explosive charges to allow oil and/gas from a producing zone to flow into the well                                                                                                                                                                                                                                                |

32. It would be seen from the above technical literature that well logging is the process of recording measurements of various properties of rock and fluid at various depths in a well, and nothing more. It is also clear that perforation is a purely mechanical activity whereby holes/perforations are shot in the casing or liners.

33. It can, therefore, safely be concluded that the appellant was responsible for mobilizing equipment necessary for conducting the

measurement/logging activities at the site and undertake perforation of the oil rigs casings. These activities do not involve any testing or analysis and accordingly, cannot be classified under 'technical testing and analysis service'.

34. The learned counsel for the appellant has contended that wireline logging, perforation and other mechanical jobs undertaken by the appellant would fall under the taxable category of 'mining service' introduced w.e.f. 01.06.2007. Section 65(105)(zzzy) of the Finance Act defines the said taxable service as any service provided or to be provided to any person, by any other person in relation to mining of mineral, oil or gas.

35. The services like wireline logging, perforation and other wireline related services involving mechanical jobs like cutting, puncture, plug/packer setting, cable splicing, etc., which were undertaken by the appellant at the time of drilling an oil well are integrally connected with the mining of oil or gas and have a direct nexus with the drilling of a well. Thus, these activities would be covered by the taxable category of 'mining service' w.e.f. 01.06.2007.

36. In this connection, reliance has been placed on the decision of the Bombay High Court in **Indian National Shipowners' Association vs. Union of India and others**<sup>8</sup>, wherein it was held that though the phrase 'in relation to' is of wide import but the context in which the same is used has to be kept in mind and that the services rendered by a person must have a direct or a proximate relation to the subject matter of the taxing entry. The Bombay High Court also held that the context in which the words 'in relation to' are used has to be borne in mind to

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8. 2009 (14) STR 289

examine the extent of the scope of an entry which may be of wide amplitude.

37. It has also been contented by the learned counsel for the appellant that when 'mining service' was introduced w.e.f. 01.06.2007 without any change to the existing entries, then levy cannot sustain under any other category including TTA prior to such introduction w.e.f. 01.06.2007.

38. The issue that needs to be decided is whether the activity carried out by the appellant would fall under TTA services prior to 01.06.2007. According to the appellant, the said activity will be covered under the scope of mining related services under section 65 (105)(zzzy) of the Act w.e.f. 01.06.2007. The contention is that on introduction of such a service from 01.06.2007, there was no amendment in the definition of TTA services and, therefore, the activity covered under a new category of mining related services cannot be classified under the existing category of TTA services prior to 01.06.2007.

39. This issue was examined at length by a Division Bench of the Tribunal in **Aryan Energy (P) Ltd vs. Commissioner of Customs and Central Excise, Hyderabad**<sup>9</sup>. The appellant therein was also engaged in the activity of beneficiation of coal on behalf of the KPCL. The adjudicating authority classified the said activity under BAS services. The Division Bench of the Tribunal observed that the said activity would be covered under mining services with effect from 01.06.2007 and service tax could not be levied under BAS for any period prior to 01.06.2007. The relevant portion of the order of the Division Bench is reproduced below:-

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9. 2009 (13) STR 42 (Tri.-Bang.)

**"14. On going through the contract with the KPCL, we are satisfied that the dominant activity of the appellant is beneficiation/washing of coal.** The appellant has been associated in the meeting of expert Committee (Thermal and coal mining) held on 19th and 20th December, 2000 on coal mining projects. The Coal Mines (Nationalisation) Act, 1973 defines under Section 2(h) 'Mine' 'Mine' means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on, and includes (i) all borings and bore holes; (ii) all shafts, whether in the course of being sunk or not; All lands, buildings, and equipments belonging to the owner of the mine, and in, adjacent to or situated on the surface of, the mine where the washing of coal obtained from the mine or manufacture, therefrom, of coke is carried on. Similar definition is appearing in Section 2(g)(x) of the Coal Mines (Taking over of Management) Act, 1973. The Coking Coal Mines (Emergency Provisions) Act, 1971 has also defined 'mine' in similar manner. **In all the enactments relating to coal mining, washing of coal has been treated as part of the mining activity.** As laymen we tend to think that mining means only digging deep into the earth and extracting the minerals. However, in the statutory provisions the definition of mining appears to be very wide. In the Colliery Control Order Section 2(c) defines 'Colliery.' 'Colliery' means any mine or open working where winning or extraction of coal is the principal object of the mining, quarrying or any other operation carried on therein, and includes a plant for the production of coke or for the *washing of coal*. When the ash content of the coal is very high, the quality is poor. The Mines and Minerals (Development and Regulation) Act, 1957 in the Second Schedule gives the different gradations of coal. Among the gradation, washery grade is clearly indicated. **From all this, it is dear that washing of coal is also a part of mining activity.**

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**16. Once it is established that the activity of the appellant is mining,, it cannot be taxed under the Business Auxiliary Service for the period prior to 1-**

**6-2007.** Even when we examine the definition of business auxiliary service, it is seen that production which does not amount to manufacture comes under business auxiliary service. The beneficiation of coal does not amount to production of coal because beneficiation is a process, which enhances the quality of the coal. However, in the definition of business auxiliary service, an amendment was carried out to include process also w.e.f. 16-6-2005. The appellant has made an alternative submission that if the activity carried out by them is not considered as mining activity the demand can be sustained only from 16-6-2005 to 31-8-2005 only. There are sufficient grounds to hold that the activities carried out by the appellant amounts to mining service. When such a view is taken, the appellant would not at all be liable to service tax for a period prior to 1-6-2007. In view of this, we are not going into the valuation of the service liable to service tax. In fine, the impugned order cannot be sustained. Hence, we allow the appeal with consequential relief.”

**(emphasis supplied)**

40. The Division Benches of the Tribunal in **M/s. Aryan Coal Beneficiations Pvt. Ltd. vs. Commissioner of Service Tax, New Delhi**<sup>10</sup> and **M/s. Spectrum Coal and Power Ltd. vs. Commissioner of Central Excise, Raipur**<sup>11</sup> took the same view after following the decision of the Tribunal in **Aryan Energy**.

41. In this connection, it will also be pertinent to refer to the decision of the Bombay High Court in **Indian National Shipowners’**. It was held that introduction of a new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services. It was also observed that creation of the new entry was not by way of amending the earlier entry and it was not

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10. 2012 (9) TMI 205-CESTAT, New Delhi

11. 2012-TIOL-1125-CESTAT-DEL

carved out of any earlier entry. The relevant portion of the judgment of the Bombay High Court is reproduced below:-

"37. **Entry (zzzzj) is entirely a new entry.** Whereas entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by entry (zzzzj) can be identified by the presence of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig or platform, diving support, fire fighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. They give vessels on time charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession in and effective control of such machinery, equipment and appliances is not parted with. Therefore, those activities clearly fall in entry (zzzzj) and the services rendered by the members of the 1st petitioner have been specifically brought to the levy of Service Tax only upon the insertion of this new entry.

38. If the Department's contention is accepted that would mean that the activities of the members of the 1st petitioner are covered by entry (zzzy) and entry (zzzzj). Such a result is difficult to comprehend because entry (zzzzj) is not a specie of what is covered by entry (zzzy). **Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services. Therefore, prior to introduction of entry (zzzzj), the services rendered by the members of the 1st petitioner were not taxable. Creation of new entry is not by way of amending the earlier entry.** It is not a carve out of the earlier entry. Therefore, the services

rendered by the members of the 1st petitioner cannot be brought to tax under that entry."

**(emphasis supplied)**

42. Reference can also be made to the decision of the Tribunal in **M/s Malviya National Institute of Technology vs. Commissioner, Service Tax, Jaipur**<sup>12</sup> wherein it was observed that:-

"14. \*\*\*\*\* The definition of 'CE' services as it stood prior to 16 July, 2001 was not amended when a new service namely, 'STC' was inserted on 16 July, 2001. It cannot, therefore, be alleged that 'STC' service had been carved out from 'CE' Services. In fact, the definition of 'CE' services continued to remain the same, till it was amended in 2006. Thus, the Show Cause Notice proceeded on an incorrect premise that even prior to 16 July 2001, the nature of service provided in 'STC' services was the same as 'CE' Services."

43. The same view was taken by the Tribunal in **M/s Hal Offshore Ltd. vs. Commissioner of Service Tax, Delhi**<sup>13</sup> wherein it was observed that:-

"9. \*\*\*\*\* **The same service cannot be taxed under two different tax entry for different periods. Admittedly, the taxing scope of business support service did not undergo in the statute by change or amendment during the material time. A new service tax entry for supply of tangible goods was introduced w.e.f. 16/05/2008.** It is not the case of the Revenue that the said tax entry is not applicable to the appellant. The only contest is that prior to 16/05/2008 the same service should be taxed under different entry, namely, BSS. We find no legal support for such assertion. In this connection we refer to decision of the Tribunal in Deibold Systems (P) Ltd. vs CST, Chennai-2008 (9) STR 546 (Tri.-Chennai) 2008-TIOL-489-CESTAT-MAD. **The Tribunal held that in case of introduction of new tax**

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12. 2019 (6) TMI 127-CESTAT New Delhi

13.

**entry without amending the preexisting tax entry it cannot be said that the same activity will be liable to tax under pre-existing as well as new entry.**

Following the said ratio, which has been adopted in many other cases by the Tribunal, we hold that there is no merit in the contention of the Revenue for the tax liability of the appellant in respect of supply of tangible goods prior to 16/05/2008."

**(emphasis supplied)**

44. In the instant case, the definition of TTA did not undergo any change when a new service 'in relation to mining' was introduced w.e.f. 01.06.2007. The department admits that w.e.f. 01.06.2007, the activity carried out by the appellant is covered under the category of service in relation to mining. This activity could not, therefore, have been categorized under TTA service prior to 01.06.2007.

45. As it has been found that the activity undertaken by the appellant w.e.f. 01.06.2007 pertains to mining services as made taxable under section 65(105)(zzzy) of the Finance Act, service tax under TTA services cannot be charged from the appellant prior to 01.06.2007.

46. It has also been contended by the learned counsel for the appellant that in the facts and circumstances of the case the extended period of limitation could not have been invoked.

47. What transpires from the records is that the appellant has been paying service tax under the category of 'mining services' w.e.f. 01.06.2007 which was the date on which it was introduced. Prior to this date the appellant was not discharging service tax on the service of wireline logging, perforation and data processing under the category of TTA and this fact was communicated by the appellant to the department

by a letter dated 23.12.2004 sent to the Deputy Commissioner of Service Tax and the relevant portion of the letter is reproduced below:

**"23 December 2004**

Office of the Deputy Commissioner of Service Tax  
11th Block  
7<sup>th</sup> Floor  
CGO Complex  
Lodhi Road  
New Delhi

Dear Sir

Re: Service Tax Return for Half Year ending September 30, 2004

We are enclosing herewith our service tax return for the Half Year ending September 30, 2004 relating to the following taxable service categories:

- Technical testing and analysis service;
- Commissioning or installation service; and
- Maintenance or repair Service

Please be informed that our customer M/S Oil and Natural Gas Corporation, has brought to our knowledge that as per an opinion received by them from an eminent legal expert, Wire line Logging Services do not fall within the ambit of the term Technical Testing and Analysis. The conclusion arrived at has therefore given rise to an ambiguity with respect to taxability of Wire line Logging and similar services under the category of Technical Testing and Analysis. We **have accordingly not recovered/deposited service tax with respect to contracts with ONGC, Offshore Service Group, Mumbai Region for the period under return. A copy of the opinion and correspondence from ONGC in this regard is attached as Annexure 1 & 2 respectively. However to the extent service tax has been recovered from the clients, the same has been duly deposited.**

**To establish our bonafide, we are reflecting the gross value of services invoiced, realized and tax payable thereon (which had not been**

**recovered/deposited) and are bringing the matter to your notice for immediate and appropriate resolution.**

You are requested to acknowledge receipt of the same.

Thanking you,

Your sincerely,

For Schlumberger Asia Services Limited"

**(emphasis supplied)**

48. These facts were again communicated by the appellant to the Office of the Deputy Commissioner of Service Tax by letters dated 06.03.2005, 09.11.2005, 09.03.2007, 25.04.2007 and subsequently after 'mining services' was introduced w.e.f. 01.06.2007, the appellant informed the Office of the Deputy Commissioner of Service Tax by a letter dated 25.10.2007 that wireline logging services would not fall under the TTA service but because mining services was introduced w.e.f. 01.06.2007 the appellant had also sought registration of mining services in the service tax registration.

49. It is also not in dispute that w.e.f. 01.06.2007 the appellant has been paying service tax on mining services.

50. It also transpires from the records that the appellant had filed refund applications in 2005 since the appellant was not required to deposit service tax under the TTA services. The returns filed by the appellant from 2004 onwards show that the appellant has consistently informed the department that the services performed by the appellant would not fall under the TTA services. It was only on 23.10.2008 that the department issued a show cause notice to the appellant invoking the extended period of limitation. It is in this context that it has to be

examined whether the department is justified in invoking the extended period of limitation.

51. The issue, therefore, that arises for consideration is whether the Commissioner was justified in holding that the extended period of limitation contemplated under section 73(1) of the Finance Act was correctly invoked in the facts and circumstances of the case.

52. The contention of the learned counsel for the appellant is that the necessary ingredients for invoking the larger period of limitation contemplated under the proviso to section 73(1) of the Finance Act, namely willful suppression of facts with an intent to evade payment of service tax do not exist and, therefore, the extended period of limitation could not have been invoked.

53. In order to appreciate this contention it would appropriate to reproduce section 73 of the Finance Act as it stood at the relevant time. 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."

54. 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.

55. The 'relevant date' has been defined in section 73 (6) of the Finance Act as follows;

**"73(6)** For the purpose of this section, "relevant date" means,-

(i) In the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short paid-

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;"

56. 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 wilful 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.

57. 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, as it stood when the Supreme Court explained “suppression of facts” in **Pushpam Pharmaceutical Co. vs. Commissioner of Central Excise, Bombay**<sup>14</sup>. It is as follows:

“**11A:** Where any duty of excise has not been levied or paid or has been short-levied or short-paid 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 or the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, 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.”

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14. 1995 (78) E.L.T. 401 (SC)

58. 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 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)**

59. This decision was referred to by the Supreme Court in **Anand Nishikawa Company Ltd. vs. Commissioner of Central Excise**<sup>15</sup>

and the observations are as follows:

“26 ..... This Court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay, while dealing with the meaning of the expression “suppression of facts” in proviso to Section 11A of the Act held that the term must be construed strictly. **It does not mean any omission and the act must be deliberate and willful to evade payment of duty.** The Court, further, held:-

“In taxation, it (“suppression of facts”) can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.”

27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that **“suppression of facts” can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty.** When facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of

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**15. 2005 (188) E.L.T. 149 (SC)**

duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act.”

**(emphasis supplied)**

60. These two decisions in **Pushpam Pharmaceuticals** and **Anand Nishikawa Company Ltd.** were followed by the Supreme Court in the subsequent decision in **Uniworth Textile Limited vs. Commissioner of Central Excise, Raipur**<sup>16</sup> and the observation are:

“18. We are in complete agreement with the principal enunciated in the above decisions, in light of the proviso to section 11A of the Central Excise Act, 1944.”

61. The Supreme Court in **Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I**<sup>17</sup> also held:

“10. The expression “suppression” has been used in the proviso to Section 11A of the Act accompanied by very strong words as ‘fraud’ or “collusion” and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. **Suppression means failure to disclose full information with the intent to evade payment of duty.** When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 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)**

62. The Delhi High Court in **Bharat Hotels Limited vs. Commissioner of Central Excise (Adjudication)**<sup>18</sup> also examined at

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16. 2013 (288) E.L.T. 161 (SC)

17. 2007 (216) E.L.T. 177 (SC)

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."**

(emphasis supplied)

63. It would also be useful to refer to a decision of the Tribunal in **Shiv-Vani Oil & Gas Exploration Services Ltd. vs. C. S. T., New Delhi**<sup>19</sup>, wherein the Tribunal after making reference to the decision of the Supreme Court in **Cosmic Dye Chemical vs. CCE, Bombay**<sup>20</sup>, observed that there should be an intent to evade payment of service tax

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18. 2018 (12) GSTL 368 (Del.)

19. 2017 (47) STR 200 (Tri-Del.)

20. 1995 (75) E.L.T. 721 (SC)

if the extended period of limitation has to be invoked. The observations are as follows:

"8. Regarding the demand for extended period, we find the reason given by the Original Authority is not legally sustainable. In fact he recorded that in terms of proviso to Section 73 of Finance Act, 1994, the intention to evade payment of duty is not required to invoke extended period or to impose penalty. We find that for invoking extended period as well as for imposing penalty under Section 78, the legal provisions are identical. The words used like fraud, collusion, willful mis-statement, suppression of fact or contravention of any provisions of Chapter V of Finance Act, 1994 or of the Rules made thereunder with intent to evade the payment of Service Tax, will show that the ingredient of mala fide is a pre-requisite to invoke both the legal provisions (proviso to Section 73 and Section 78). The Original Authority recorded that it may be true that the assessee has not contravened any provisions with intend to evade payment of service tax, however, he proceeded to confirm the demand for extended period and to impose penalty of an equal amount under Section 78. We find that Hon'ble Supreme Court in Cosmic Dye Chemical v. CCE, Bombay reported in [1995 \(75\) E.L.T. 721](#) (S.C.) held as below:- Now so far as fraud and collusion are concerned, it is evident "6. that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words

"with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Misstatement or suppression of fact must be wilful."

64. Very recently, the Delhi High Court in **Mahanagar Telephone Nigam Ltd. vs. Union of India and others**<sup>21</sup> after referring to the decisions of the Supreme Court in **Pushpam Pharmaceutical, Anand Nishikawa, Cosmic Dye Chemical, Uniworth Textile Limited** and **Bharat Hotels Limited** observed as follows:

"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)**

65. The records indicate that the appellant had repeatedly informed the department from 23.12.2004 that prior to 01.06.2007 it had not been discharging service tax on wireline logging, perforation and data

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21. W.P. (C) 7542/2018 decided on 06.04.2023

processing services under the category of TTA services and by a letter dated 25.10.2007 the appellant had also informed the department that it had started paying service tax on mining services when it was introduced for the first time w.e.f. 01.06.2007. Yet, the show cause notice was issued to the appellant only on 23.10.2008. Thus, the extended period of limitation could not have been invoked in the facts and circumstances of the case.

66. The impugned order dated 28.08.2012 passed by the Commissioner, for all the reasons stated above, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced on **03.07.2023**)

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

**(HEMAMBIKA R. PRIYA)**  
**MEMBER (TECHNICAL)**