
Adjudication, Interest, Penalty and Dispute Resolution System

Certified Course of ICAI

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Coverage

- Show Cause Notices
- Summons and Audits

Assessment/ Penalty etc

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Recovery of service tax (escapement assessment)

- No system for scrutiny assessment. Though the department does audits
- Audit is under rule 5A of ST Rules – since it is without any reason – Delhi HC has ordered status quo
- Escapement assessment – point based SCN
 - Where service tax
 - Is not levied/ not paid
 - Short levied/ short paid
 - Erroneously refunded
- Then the CEO may issue notice within **18 months**
- In case of fraud, collusion, wilful mis-statement, suppression of facts with intent to evade payment of service tax – **five years**

Excise/ Customs

- Parallel provisions
 - Excise – S. 11A
 - Customs – S. 28
 - The normal period under excise/ customs – 1 year
- The provisions of these sections are similar in effect – Uniworth Textiles (SC)

Extended period

Rajasthan Spinning 2009 (238) ELT 3 (SC)

Conditions of section must be satisfied – Dharmendra Textiles explained

21. From the above, we fail to see how the decision in *Dharamendra Textile* can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application

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23. The decision in *Dharamendra Textile* must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what *Dharamendra Textile* decides

Uniworth Textiles (SC) – every non payment cannot be an outcome of suppression

Assessment (S. 73) – old provisions

Sec.	issue	option	effect
73 (1A) and Provis o to 73 (2)	(1A) Where any service tax has not been levied by reason of fraud/collusion etc, with intent to evade payment of service tax, by a person to whom a SCN is served	such person may pay: -service tax -Interest, and -penalty equal to twenty-five per cent of the service tax within thirty days of the receipt of the notice.	Proceedings deemed completed

Now omitted

Assessment (S. 73) – new provisions

Sec.	issue	option	effect
73 (4A)	<ul style="list-style-type: none">•During course of investigation/ audit/ verification – found that service tax has not been paid•True and complete details available in specified records•No SCN issued	<ul style="list-style-type: none">• may pay the amount of such<ul style="list-style-type: none">- service tax,-Interest, and-Penalty = 1% p.m. / max 25%• And inform excise officer	<ul style="list-style-type: none">•No SCN would be issued•Proceedings deemed completed

specified records" means records **including** computerised data as are required to be maintained by an assessee in accordance with any law, or

where there is no such requirement - the invoices recorded by the assessee in the books of account

Best Judgment Assessment

If any person, liable to pay service tax, —

- (a) fails to furnish the return under section 70;
- (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder,

Then after issuance of notice for production of records/ documents/ evidences etc, determine tax to the best of his assessment

BJA is a method of assessment

Amount collected as tax

- Amount though not payable if collected as tax
- Has to be paid
- If not paid, adjudication S. 73A(3)
- With interest S. 73B(3)

Penalty provisions-S.78

Sec.	Situation	Particulars	Penalty (S.78)	Comments
78 (1)	<ul style="list-style-type: none"> •Service tax has not been levied by reason of fraud/ collusion with intent to evade service tax •SCN issued and adjudicated 	True and complete particulars of transaction not available in specified records	Pay penalty = service tax	<ul style="list-style-type: none"> •Earlier - 100% - 200% of tax evaded •No remission u/s 80
Proviso	<ul style="list-style-type: none"> •Service tax has not been levied by reason of fraud/ collusion with intent to evade service tax •SCN issued and adjudicated 	True and complete particulars of transaction available in specified records	Pay penalty = 50% of service tax	<ul style="list-style-type: none"> •If paid within 30 days of adjudication Penalty = 25% of service tax •(For small service providers 90 days) •Remission possible u/s 80

Excise/ Customs

- Excise – Section 11AC – parallel
- Customs – S. 114A
 - Section slightly different
 - Pay penalty 25% if paid within 30 days – no condition of recording in the books of accounts etc

Penalty – u/s 76/ 77

Period	Penalty	Maximum
Earlier	2% p.m. / Rs. 200 per day (whichever higher)	100% of tax
Now	1% p.m. / Rs. 100 per day (whichever higher)	50% of tax

Section 77 – Miscellaneous penalty – Non registration/ non maintenance of accounts/ Non issuance of invoice/ Other offences for which no separate penalty –

Earlier – Rs. 5,000

Now – Rs. 10,000

It may be in combination with penalty computed at 200 per day in that case whichever is higher

Penalty – Section 76

Example

- X, an assessee, fails to pay service tax of 10 lakh rupees payable by the 5th March. X pays the amount on the 15th March. The default has continued for ten days. The penalty payable by X is computed as follows:—

Higher of

(a) 1 per cent of the amount of default for 10 days

$$\frac{1}{100} \times 10,00,000 \times \frac{10}{31} = \text{Rs. } 3,225.80$$

OR

(b) Penalty calculated @ Rs. 100 per day for 10 days = Rs. 1,000

Thus Penalty liable to be paid is Rs. 3226.00.

Penalty – Section 76

Athena Comments

- Mens rea is not an ingredient for imposing penalty under Section 76 unlike Section 78 *The Management Group V CST New Delhi 2007 (11) STJ 173 (Cestat)*
- In case entire amount along with interest is deposited before issuance of SCN , penalty under section 76 cannot be imposed *Commissioner of Service Tax Bangalore V. Master Kleen 2012 (25) STR 439*
- Penalty under Section 76 cannot be reduced below prescribed limit invoking Section 80 and tribunal cannot vest its discretionary power regarding this *CCE & Customs V. V construction 2011 (22) STR 520 Guj.*
- Penalty under Section 76 and Section 78 are mutually exclusive and they both cannot be applied simultaneously

Section 80

- No penalty u/s 76, 77 and proviso to 78
 - No remission for penalty u/s 78(1) where transaction not even recorded in books
- If assessee able to demonstrate reasonable cause for failure to pay tax

Late filing of return

- Late fee: Maximum 20000
- Upto 15 days delay: Rs. 500
- 16 – 30 days: Rs. 1000
- 31 days and more:
 - 1000 + 100/day from 31st day.
 - Maximum Rs. 20,000
- This is waived in case of VCES

Adjudication of penalty

- Penalty cannot be automatic
- Adjudication required
- Section 83A

Interest

- Section 75
- Automatic
- If tax accepted, then penalty can be contested interest cannot be contested
- Rate: 18% [Notification No. 14/2011-ST]
- If value of taxable services does not exceed 60 Lakh:
 - During any financial year(s) covered by notice – in case of notice
 - Previous year – in other cases (Ex: self assessment)
 - Then rate of interest – 15%

Interest

Athena comment

- Interest is to be paid even in case where the increase in Service tax is due to revision of invoice amount.
- Even when Service tax is paid before issuance of SCN interest under Section 75 is liable to be paid Reliance Security Agency V.CCE 2009 (16) STJ 241 (Cestat)
- No need to prove guilty mind to impose interest.
- Interest is payable whenever there is delay in payment of Service tax.

Drafting responses

- Limitation
- Principle of natural justice
 - Notice setting forth enough facts and clear point to which reply sought
 - Opportunity of being heard
 - Order reasoned i.e. must set forth the reason for the decision
- Penalty – ingredients
- Merits – each case would differ
- Prayer is very important – ask for hearing
- All grounds to be taken
- Additional grounds may be taken in form of WS/ Synopsis

Dispute Resolution System

1/27/2015



Type of Forums

- Non Litigation Mode
 - Advance Ruling
- Semi Litigation
 - Settlement Commission
- Litigation Mode
 - Departmental Authorities
 - CESTAT/RA
 - High Courts/Supreme Court
 - NTT

PART A

Non Litigation Mode Advance Ruling

Advance Ruling

- In IT since 1993 and in Excise/Customs since 1999, in Service Tax since 2003.
- Authority Established under Section 28F of Customs Act and is common for all.
 - Chairperson – retired judge of SC
 - IRS officer qualified to be member of CBEC
 - ILS officer qualified to be Addl Secy
 - No proceeding void on account of vacancy.
- “advance ruling” means the determination, by the authority of a question of law or fact specified in the application regarding the liability to pay duty in relation to an activity proposed to be undertaken, *(service tax in relation to a service proposed to be provided)* by the applicant; [Section 23A (b)]

Advance Ruling

Excise: “activity” means production or manufacture of goods and includes any new business of production or manufacture proposed to be undertaken by the existing manufacturer,

Customs: “activity” means import or export and includes any new business of import or export proposed to be undertaken by the existing importer or exporter,

Service tax: words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder shall apply, so far as may be, in relation to service tax as they apply in relation to duty of excise.

Advance Ruling

(i) “Applicant” means –

- a non-resident setting up a joint venture in India in collaboration with non-resident or resident;
- a resident setting up a joint venture in India in collaboration with a non-resident;
- a wholly owned subsidiary Indian company, of which the holding company is a foreign company,

(ii) a joint venture in India where one or more of the equity holders is a non-resident having substantial interest in such arrangement.

(iii) a resident as may be notified-

- Public Sector Company Since 2009
- Resident Public Limited since 2011/2013

A R Subject Matter

- (a) classification
- (b) applicability of a notifications having a bearing on the rate of duty;
- (c) the principles to be adopted for valuation.
- (d) any duty chargeable under any other law in the same manner as duty of excise/customs
- (e) admissibility of credit of duty or tax
- (f) determination of the liability to pay duties of excise/Service tax
- (g) the valuation of taxable goods/ services
- (h) Origin of goods under custom law.

A R: Procedural aspects

- The Application shall be made in quadruplicate
 - accompanied by a fee of Rs 2500
 - Can be withdrawn an within 30 days from the date of application.
 - Application shall not be admitted where issue agitated is
 - (a) already pending in the applicant's case before any Central Excise Officer, the Appellate Tribunal or any Court;
 - (b) the same as in a matter already decided by the Appellate Tribunal or any Court:
- Rejection only after hearing and by reasoned order.
- Hearing before pronouncement has to be requested
 - Ruling within 90 days of filing of application

Advance Ruling

- Binding on applicant and Commissioner and his team as long as there is no change in facts or law.
- No precedent for others

PART B

Semi Litigation Mode Settlement Commission

Meaning of Settlement

- The word settlement has not been defined in the indirect tax statutes.

Black's Law Dictionary

'An agreement ending a dispute or lawsuit

- In Black's Dictionary itself the judicial settlement is defined as below

'The settlement of a civil case with the help of the judge who is not assigned to adjudicate the dispute'

- As per the Wikipedia, the online encyclopedia the most common meaning of settlement refers to when the parties to a dispute reach an agreement as to the case, which is said to settle the claim.

What is to be settled

- Excise and Customs have similar but independent provisions.
- Excise provisions have been made applicable to Service Tax by Budget 2012
- **“case”** means any proceeding under the relevant act for the levy, assessment and collection of excise duty or Customs Duty or Service tax as the case may be, pending before an adjudicating authority on the date on which an application is made
- However remanded cases remain excluded.

Conditions to be fulfilled

- True and full disclosure of the duty liability
- The applicant has filed returns showing production, clearance, filed returns showing details of taxable services, filed bill of entry/shipping bill during the relevant period as the case may be.
- The additional amount of duty accepted by the applicant in his application exceeds Rs Three lakhs.
- The applicant has paid the additional amount of duty accepted along with interest.
- a show cause notice for recovery of duty issued; OR it is a case of seizure of goods/documents more than 180 days ago.

Exclusions/Inclusions

- No Application can be made for deciding classification of goods/services
- Outright fraud and clandestine cases included provided the return/bill of entry/shipping bill for the relevant period filed. The transactions being taken to commission may not have been included in Return etc.
- Cases where return is filed late is also included-especially in Service Tax.
- NDPS and cases in respect of goods notified under Section 123 of Customs Act excluded.

Procedure before Commission

- Once the case is admitted the Settlement Commission enjoys exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise/customs Officer in relation to the case
- And thus excise/customs officers cannot investigate, adjudicate or issue further notices, corrigendum in the case.
- Once the case is filed, it cannot be withdrawn, but it can be remitted back by the commission.

Powers of Commission

- *Power of Settlement Commission to grant immunity from prosecution and penalty in its discretion if applicant has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability,*
- *Meaning of co-operation*
- *Meaning of true disclosure*
- *Effect on Non cooperation*

Orders of Commission

- Not appealable, however amenable to writ jurisdiction of HC
- Binding between the parties and cannot be opened in normal course.
- Not to be used as evidence in other proceedings

Commission approach

Can they settle the duty liability which is say 10% of what is demanded in SCN?

How to approach Commission

Be ready to enhance your liability before Commission

PART C

Litigation Mode

Via departmental adjudication

Investigation and Commencement of Civil Litigation

- Search and Seizure under Section 12F, arrest under Section 13 and summon and statements under Section 14 of CEA 1944.
- Various sections of CA are applicable to Excise matters. (Section 100-110A of CA 1962) (82,83,91 of FA 1994-Arrest in ST introduced by Budget 2013)
- Issuance of SCN under section 11A/28/73
- Passing of orders by officers where SCNs issued/waived or on best judgment or in Refund/rebate cases

Investigation and Commencement of Criminal Prosecution

- Omprakash case and 2013 amendments
- Cognizable/non cognizable
- Bailable/non bailable
- Launch of prosecution with approval of Chief Commissioner

Litigation within Department

Central Excise Officers	Powers of Adjudication (Amount of duty involved)
Superintendent	Upto Rs.1 Lakh (excluding cases involving determination of rate of duty or valuation and cases involving extended period of limitation)
Deputy/Assistant Commissioners	Upto Rs. 5 lakhs
Joint/Addl Commissioners	Above Rs. 5 lakhs and up to Rs.50 lakhs
Commissioners	Without Limit

Litigation within Department

However following Cases would be adjudicated by the Additional/Joint Commissioners without any monetary limit.

- Case of loss of goods in transit or in a factory or a warehouse
- rebate of duty of excise on goods exported or raw materials used in the manufacture of such goods
- goods exported outside India (except to Nepal or Bhutan) without payment of duty;
- Sec 122 of CA and Section 33 of CEA gives some arbitrary limits in cases of confiscation and penalty, which are not followed.

Orders in Departmental Adjudication

- Confirmation of full duty
- Imposition of 100% penalty under Section 11AC of the Act
- Personal penalties under Rule 26
- Confiscation and Redemption fine under Rule 25
- Confirmation of interest under 11AB from the relevant date

Departmental Adjudication

- The natural Justice Aspect, the *nemo judex in sua causa*
 - Cases where officers get reward. V.K. THAMPI Case 988 (33) E.L.T. 424
- Comparison of Indian Litigation with US Litigation Procedure.

Appeals – time period and scope

- 1st appeal – CCE(A)
 - 2 months + 1 month
- 2nd appeal / 1st appeal (against CCE order) – Tribunal –
 - 3 months + sufficient cause [see section 5 of Limitation Act (*Katiji case*)]
 - Last fact finding authority
- Appeal against Tribunal order
 - Substantial Question of law
 - Not relating to rate of tax/ valuation – HC (Section 35G CE Act)
 - 180 days + reasonable cause
 - relating to rate of tax/ valuation – SC (Section 35L CE Act)
 - Time period – as per SC Rules
- Appeal against HC Order – to SC

Appeal within the department

- Order passed by Sup/AC/DC/JC/Addl Commissioner shall be appealed before Commissioner of Central Excise (Appeals)
- In duplicate accompanied by original order or certified copy of order
- No fee payable
- within sixty days from the date of the communication of order:
- With a possible condonation of 30 days.
- Up to three adjournments can be taken easily

Appeal before Tribunal

- Appellate Order passed by Commissioner (Appeal) as well as original order passed by Commissioner (executive) shall be appealed before CESTAT.
- In 4 copies accompanied by original order or certified copy of order against which appeal is filed.
- Fee payable
 - (a) Amount under dispute is up to five lakh rupees – Rs 1000
 - (b) Amount under dispute is more than (a) but up to fifty lakh rupees – Rs 5000
 - (c) Amount under dispute is more than fifty lakh rupees – Rs 10000
 - (d) All misc applications Rs 500
 - (e) No fee for Cross objections
 - (f) No fee for govt appeals

Appeal before Tribunal

- within ninety days from the date of the communication of order:
- provision for condonation of delay without limit
- Right of appeal is conditional: Amount under dispute needs to be deposited first or stay application has to be moved for waiver of pre deposit.
- Tribunal may, in its discretion, refuse to admit an appeal in any disputed case, other than a case where the determination of any question having a relation to the rate of duty or to the value of goods for purposes of assessment is in issue , where amount involved does not exceed Rs 50000/-

Appeal before Tribunal/RA

However in following Cases no appeal lies to Tribunal

- Case of loss of goods in transit or in a factory or a warehouse
- rebate of duty of excise on goods exported or raw materials used in the manufacture of such goods
- goods exported outside India (except to Nepal or Bhutan) without payment of duty;
- baggage cases
- Short landing cases
- drawback cases

Note: In these cases a revision application can be filed before RA in the Ministry of Finance.

RA orders are not appealable.

Appeal before Tribunal

- **Single Member:** A case where amount involved is upto 50 lakh and the issue is not of the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.
- **DB:** Without limit
- **LB:** matters referred to it by DB
- **Third Member:** on difference of opinion

Departmental Appeal National Litigation Policy

For fact based cases, government will not approach

- Supreme court if duty involved is up to 5 lakhs
- High court if duty involved is up to 2 lakhs
- Tribunal if duty involved is up to 1 lakh

Departmental Appeal in CESTAT: Special Provisions: Section 35E/129D/86

- Against the order of Commissioner (Appeals) only on authorization by a committee of Commissioners
- Against the order of Commissioner only on authorization by a committee of chief Commissioners

Challenge to CESTAT Orders

- Under Section 35G/130 an appeal shall lie to the High Court from every order passed in appeal by CESTAT not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment, on a substantial question of law within 180 days from the receipt of the order. (delay may be condoned by HC) accompanied by a fee of two hundred rupees in case of private party; extra fee is payable as per specific high court rules.
- Else under Section 35L/130E appeal lies directly to the Supreme Court against the order of CESTAT.

Challenge to HC Orders

- Civil Appeal lies to Supreme Court under Section 35L of the act against the order passed by HC under 35G.
- Time limit, fee etc as per SC procedure.

Difficulties in High Courts/SC

- All high Courts do not have specialized tax bench.
- Not ready to go through the complex facts and laws.
- Over burdened courts

Writ Jurisdiction of HC

- Under Article 226/227 at any stage one can approach HC under its writ jurisdiction on the ground that
 - No alternate remedy is available
 - If alternate remedy is available it is not efficacious
- Order passed by HC in its writ jurisdiction can be challenged before SC by way of SLP under article 136

National Tax Tribunal

- The National Tax Tribunal (NTT) Act 2005, was enacted with an objective to replace the High Courts in disputes on Direct & Indirect Tax matters.
- 15 Tribunals; 10 for Direct Tax and five for Indirect Tax matters are proposed.
- The Act is under challenge before various High Courts on several grounds, such as
 - Who is eligible to appear before NTT
 - Judicial review & sovereignty with respect to writ jurisdiction of the High Courts
 - composition of the selection committee for appointment of members

Drafting

- Limitation – very important [2009 Hongo India 236 ELT 417 SC]
 - Limitation in central excise is different from limitation in service tax
- The order appealed against – take all grounds against the issue which is in appeal
 - On assessee's appeal, appellate authority cannot enhance demand
- The assessment order cannot travel beyond SCN
- Stay application – balance of convenience, financial hardship and undue hardship
 - Inherent power
 - Section 35 F of CE Act

Audit

1/27/2015



Travelite case

- Delhi High Court
- Supreme Court stayed

Avenues for CA professionals

Services/ Avenues

- Litigation
- Advisory/ planning - Corporate arrangements – CA' are involved – service tax angles need to be seen
- Compliance procedures

Future of indirect taxes

- IDT regime on a cross road
- Proposed GST would be one of the biggest break through
- Record based system where procedures and systems may be more important than the substantive issues
- Capacity building for the upcoming GST

International trade

- Self assessment in customs
- Anti dumping, safeguards and counter veiling measures
- Free trade agreements

THANK YOU

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