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**J. B. NAGAR CPE STUDY CIRCLE**

**Intensive Course on Service tax**

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# Glossary

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Particulars	Abbreviation used
Finance Act, 1994	Finance Act
Service Tax Rules, 1994	Rules
Cenvat credit Rules, 2004	Credit Rules
Central Excise Act, 1944	Excise Act
Central Excise Rules, 2002	Excise Rules
Union of India	UoI
Assistant Commissioner	AC
Deputy Commissioner	DC
Customs Act, 1962	Customs Act

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# Index

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- ▶ Rectification of Mistake
- ▶ Interest for late payment
- ▶ Penalties
- ▶ Prosecution
- ▶ Compounding of offences
- ▶ Applicability of provision of Central Excise

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# Introduction to presentation

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- ▶ Service tax law is still an evolving law, many positions are still not settled and there is a lot of scope for interpretation - to add to that sweeping reforms introduced vide the implementation of the negative list based approach
  
- ▶ Direct precedents not available for most of the issues
  
- ▶ This could result into alleged non-payment, delayed payment of Service tax or various issues in relation to :
  - ▶ Incorrect claim / utilization of Cenvat credit
  - ▶ Valuation of services (determining value of services for levying tax)
  - ▶ Classification of services (determining the category / rate of Service tax) – will continue to be important even under the negative list based taxation regime
  - ▶ Non - Compliance with the provisions / sections of the Act and the Rules etc
  
- ▶ Given this, there could be significant exposure to litigation with respect to interest / penalties applicable for various offences

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# Introduction to presentation

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- ▶ Further, new Compounding of offences Rules have been introduced with effect from 29 May 2012 to provide immunity to the assessee from prosecution where the assessee has committed specified offences
  
- ▶ The current presentation seeks to cover certain aspects in relation to interest, penalties, prosecution, compounding of offences etc.

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# Rectification of Mistake

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# Rectification of Mistake

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- ▶ Under section 74 of the Finance Act, with a view to rectifying any mistake apparent on record, the assessing officer who has passed any order may amend the same within 2 years of the date on which such order was passed
  
- ▶ However, where any matter has been considered and decided in any proceeding by way of appeal or revision, (the officer notwithstanding anything contained in any law for the time being in force), may amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided
  
- ▶ Subject to the provisions of this section, the officer may make an amendment
  - ▶ On his own motion or
  - ▶ Or where the mistake is brought to his notice by the assessee or the Commissioner of Central Excise or Commissioner of Central Excise (Appeals)
  
- ▶ No adverse amendment in the order (viz increasing of liability / reducing refunds) can be made before intimating the assessee about the intention or allowing a reasonable opportunity of being heard
  
- ▶ Where an amendment is made, the order shall be passed in writing

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# Rectification of Mistake

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- ▶ The officer shall make the refund, in case the amendment has an effect of reducing the liability or increasing the refund of the assessee
- ▶ The officer shall make an order specifying the sum payable by the assessee, in case the amendment has an effect of enhancing the liability or reducing the refund already made



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# Interest for late payment

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# Interest – Delayed payment of Service Tax

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- ▶ Service provider (or recipient in certain specified cases) is liable to make payment of Service tax under section 68 of the Finance Act
- ▶ Rule 6(1) of the Rules specifies that Service tax for services deemed to be provided during a particular month as per the rules framed is payable by 6<sup>th</sup>(if paid electronically) / 5<sup>th</sup> (if paid manually) of the immediately following calendar month
- ▶ If the tax payer is an individual or proprietary firm or partnership firm, the Service tax shall be payable by the 6<sup>th</sup> (if paid electronically) / 5<sup>th</sup> (if paid manually) of the immediately following quarter in which service is deemed to be provided
- ▶ Service tax liability for the month of March is payable by 31<sup>st</sup> March of the same year
- ▶ Section 75 of the Finance Act specifies that simple interest is payable if any person fails to deposit tax within the prescribed time

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# Interest – Delayed payment of Service Tax

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- ▶ Prescribed rate of interest - Not below 10% p.a. and not exceeding 36% p.a.
- ▶ Presently, rate of interest notified (18% p.a. - wef 1 April 2011) and earlier (13% p.a. - upto 31 March 2011) – vide Notification 14/ 2011 dated 1 March 2011
- ▶ In case, value of services provided does not exceed Rs 60 lakhs during the years covered in the notice / preceding financial year, rate of interest shall be reduced by 3% p.a.

# Illustration - How to calculate interest ?

## FACTS

- A. Service tax liability for the month of October 2011 = Rs. 1,00,000
- B. Due date of payment = 6 November 2011\*
- C. Actual date of payment = 18 January 2012

Particulars	Amounts (Rs.)
Amount of Service tax to be paid	1,00,000
Rate of interest	18 % p.a.
Days for which tax payment is delayed –	Nov = 24 days (30-6) Dec = 31 days Jan = 18 days <b>Total = 73 days</b>
Interest	$1,00,000 \times 18\% \times 73/365 = \text{Rs. } 3600$

\* Assumed that the payment is made electronically

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# Other Interest - Amount collected in Excess

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- ▶ Under Section 73B of the Finance Act, when an amount has been collected in excess of the tax assessed or determined and the same has not been paid, the person is liable to pay such amount along with the prescribed rate of interest
- ▶ The person shall be liable to pay interest from the first day of the month succeeding the month in which the amount was to be paid till the date of payment of such amount
- ▶ Prescribed rate of interest - Not below 10% p.a. and not exceeding 24% p.a.
- ▶ Presently, rate of interest notified (18% p.a.- wef 1 April 2011) and earlier (13% p.a.- upto 31 March 2011) – vide Notification 15/ 2011 dated 1 March 2011
- ▶ In case, value of services provided does not exceed Rs 60 lakhs during the years covered in the notice issued under section 73A of the Finance Act / preceding financial year, rate of interest shall be reduced by 3% p.a.

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# Other Interest – Cenvat credit wrongly taken or erroneously refunded

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- ▶ Typically, output service provider / manufacturer of goods can avail the Cenvat credit of the tax paid on eligible inputs / inputs services and utilize the same against the output Service tax / Excise duty liability
  
- ▶ Rule 14 of the Credit Rules, specifies that where the credit has been taken **and**<sup>1</sup> utilized or erroneously refunded, interest is applicable as per Section 11A and 11AA of the Excise Act or Section 73 or Section 75 of the Finance Act – currently the applicable rates are same as for delayed payment
  
- ▶ Earlier the terms used were, when credit has been taken or utilized **or** erroneously refunded due to which authorities sought to recover interest even on wrong availments – discussed in later slides
  
- ▶ Some common examples of wrong availment of credits :
  - ▶ Credit availed of the tax paid on the ineligible inputs / input services (very relevant in light of the amendment in the definition of inputs / input services vide Finance Act, 2011)
  
  - ▶ Credit availed of the tax paid on the invoices addressed to unregistered premises etc

<sup>1</sup> The term “and” was substituted for “or” with effect from 1 April 2012

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# Judicial Precedents - Interest

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- ▶ In **Pratibha processors Vs Uol reported in 1996 (88) ELT 12**, the Supreme Court laid down the meaning of term interest as “ Interest is compensatory in character and is imposed on an assessee who has withheld the payment of any tax as and when it is due and payable – Levy of interest is geared to actual of tax withheld and the extent of delay in paying the tax on the due date, thus it is compensatory and different from penalty, which is penal in character”
- ▶ In **Commissioner of C.Ex., Mum-I Vs Bombay Dyeing & Ltd. reported in 2007 (215) ELT 3**, the Supreme Court held that reversal of the credit before the utilization amounts to not taking of the credit.
- ▶ In **Commissioner of Central Excise Vs Maruti Udyog Ltd reported at 2010 (262) ELT 180 (P&H)** , the Punjab and Haryana High Court held that once the shortages are not a result of any clandestine or unauthorized utilization, no demand could be raised and Sections 11AB (interest) and 11AC (penalty) of the Central Excise Act are also not applicable
- ▶ As per the aforesaid judgements the courts held that the interest / penalty were applicable only upon the utilization of Cenvat credit irregularly availed and not upon taking of irregular/ ineligible credit

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# Judicial Precedents - Interest

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- ▶ The Supreme Court Ruling in the case **UoI vs Ind-Swift Laboratories Ltd reported at 2011 – TIOL – (21) – SC - CX** gave rise to an interpretation that under Rule 14 of the Credit rules (applicable in the case of incorrect claim of Cenvat credit), interest needs to be paid from date of taking or utilizing such Cenvat credit – based on the said judgement, the authorities could recover interest even on irregular taking of Cenvat credit which has not been utilized
- ▶ Recently in the case of **Bill Forge Vs Commissioner of Central Excise and Service Tax**, the Karnataka High Court held that word “taken” in Rule 14 of the Credit rules should be interpreted to mean being taken for utilization against output tax liability

## Conclusion

- ▶ *Given the fact that the terms used now are credit taken and utilized wrongly, interest should be applicable on when the amount wrongly availed has been utilized*
- ▶ *Authorities / Supreme Court’s contention that interest is applicable even on illegal availment of credit should not hold good*



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# Penalties

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# Penalty under Section 76 – for failure to pay Service Tax

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- ▶ In case any person fails to pay Service tax as payable under the provisions of Section 68 and the Rules along with the interest (determined as per Section 75), the penalty applicable shall be the **higher** of the following :
  - ▶ Rs 100 per day for every day during which the failure continues OR
  - ▶ 1 % of the tax per month

Starting with the first day after due date till the date of actual payment of the outstanding amount of Service tax

- ▶ The total amount of penalty payable in terms of this section shall not exceed 50% of the tax payable

# Illustration - How to calculate Penalty under Section 76?

## FACTS

- A. Service tax liability for the month of June 2012 = Rs.10,00,000
- B. Due date of payment = 6 July 2012
- C. Actual date of payment = 16 July 2012

Particulars	Illustrative Amounts
Amount of Service tax to be paid	Rs.10,00,000
Penalty - <i>higher of</i>	
a) Rs. 100 for each day OR	a) $Rs.100 \times 10 \text{ days (July 16 – July 6)} = Rs. 1000$
b) 1% of tax per month	b) $1\% \times 10,00,000 \times 10/31 = Rs. 3226$
	Whichever is higher, therefore Penalty = Rs. 3226

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# Penalty under Section 77 – for contravention of Rules and provisions of the Act for which no penalty is prescribed

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## *Specific Penalties for Contravention of Rules*

### 1. Non Registration

- ▶ Under Section 77(1)(a), any person who is liable to pay Service tax, or required to take registration, fails to take registration under the provisions of Section 69 or Rules, the penalty is the **higher** of the following :
  - ▶ Rs 10,000, OR
  - ▶ Rs 200 for every day during which such failure continues

Starting with the first day after due date for obtaining registration till the date of actual compliance

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## Penalty under Section 77 – for contravention of Rules / provisions of the Act and for which no penalty is prescribed

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### 2. Failure to maintain books of account / other documents

- ▶ Under Section 77(1)(b), any person who fails to keep, maintain or retain books of account required in accordance with the provisions of the Finance Act and the Rules, shall be liable to a penalty which may extend to Rs 10,000

### 3. Failure to furnish information / produce documents / appear before the Central Excise Officer

- ▶ Under Section 77(1)(c), any person who fails to furnish information / produce documents / appear before the Central Excise Officer, when issued with a summon, the penalty applicable shall be the higher of :
  - ▶ Rs 10,000, OR
  - ▶ Rs 200 for every day during which such failure continues

Starting with the first day after the applicable due date, till the date of actual compliance

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## Penalty under Section 77 – for contravention of Rules / provisions of the Act and for which no penalty is prescribed

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### 4. Other Penalties under Section 77

- ▶ Under Section 77(1)(d), any person required to pay tax electronically, fails to do the same shall be liable to a penalty which may extend to Rs 10,000
- ▶ Under Section 77(1)(e), any person who issues invoice (in accordance with the provisions of the Finance Act and the Rules) with incorrect or incomplete details OR fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to Rs 10,000

### *Residuary Penalty*

- ▶ Under Section 77(2), any person contravening any provisions of the Finance Act or the Rules for which no penalty is separately provided, shall be liable to a penalty which may extend to Rs 10,000

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# Judicial Precedents - Penalty

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## ***Electronic Payment***

- ▶ In the of case **Re: Indian Oxalate Ltd reported at 2009 (247) E.L.T. 957** assessee were unable to make the electronic payment as they were new to internet banking, had fear of fraud and were not issued requisite code and password by their banker
- ▶ The Commissioner (Appeals) held that there was breach of rule, it was mere technical violation without any deliberate act of assessee for which they could not be held liable to penalty

## ***Registration***

- ▶ In the case of **P. Jani and Co Vs Commissioner of Service Tax reported at 2010 (20) STR 701**, assessee did not take registration as they were unaware about the change in law and applicability of service tax under a new taxable category introduced
- ▶ Once advised by the department, assessee obtained registration and accordingly Tribunal held that since the bonafide intention was established no penalty under Section 76 or Section 78 was imposable
- ▶ However, the penalty under Section 77 was sustained

# Penalty for Non-Filing of Service Tax Returns

- ▶ Under Rule 7 of the Rules, every assessee shall submit a half-yearly return in 'Form ST-3' along with the tax TR - 6 challan in triplicate for the months contained in the half year by 25<sup>th</sup> of the month following the particular half year that is for April to September by 25<sup>th</sup> October and for October to March by 25<sup>th</sup> April
- ▶ Under the Notification 43 / 2011 dated 25 August 2011, it has become mandatory to file the half yearly Service tax return electronically
- ▶ In case, a person fails to file Service tax return within the prescribed period, then the person liable to furnish the return shall pay the following amounts based on the period of delay

Number of days of delay	Amount
Within 15 days from the date prescribed	Rs 500
Beyond 15 days but not later than a 30 days from the date prescribed	Rs 1000
Beyond 30 days from the date prescribed	Rs 1000 + Rs 100 for every day from the 31 <sup>st</sup> day till the date of filing



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# Penalty for Non-Filing of Service Tax Returns

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- ▶ The sum of amounts payable in terms of the aforesaid Rule shall not exceed the amount specified in Section 70 - the amount specified under Section 70 in this regard is Rs 20,000 (wef 1 April 2011 and amount prior to 1 April 2011 was Rs 2,000)
- ▶ In case the assessee has paid the amount as prescribed under the above Rule, the proceedings in respect of the delayed submission of return shall be deemed to be concluded
- ▶ Where the gross amount of Service tax payable is NIL, the Central Excise Officer on being satisfied that there is sufficient reason for not filing the return, waive the penalty

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# Penalty under Section 78 – for failure to pay Service Tax

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- ▶ Under Section 78(1), in case 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* mis-statement, or
  - ▶ *suppression* of facts, or
  - ▶ contravention of any of the provisions of this chapter or of the rules made there-under with the *intent to evade the payment of Service tax*

the person liable to pay Service tax or erroneous refund on account of the aforesaid reasons, shall be liable to a penalty equal to the Service tax, computed as per the above (apart from the tax demand and interest as applicable)

- ▶ Proviso (1) - where true and complete details of the transactions are available in the specified records, the penalty shall be reduced to 50% of the Service tax amount
- ▶ Proviso (2) - where the Service tax (along with the interest) is paid within 30 days from the date of date of communication of order, determining the amount of demand, amount of penalty (as per Proviso (1)) shall be 25% of the such Service tax

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# Penalty under Section 78 – for failure to pay Service Tax

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- ▶ Proviso (3) - the benefit of the reduced penalty under the Proviso (2) shall be available only if the amount of penalty so determined has also been paid within the period of 30 days
- ▶ Proviso (4) - where the value of taxable services of any assessee does not exceed Rs 60 lakhs during any of the years covered in the Notice / during the preceding financial year, the period of 30 days shall be extended to 90 days
- ▶ Under Section 78(2), if the Service tax payable is reduced / increased by the Commissioner (Appeals), Appellate Tribunal or other Courts, then the said increased / reduced amount of Service tax is to be considered for the purpose of the provisions of Section 78
- ▶ Proviso (1), when there is an increase in the amount, then the interest payable along with the 25% of consequential increase in the penalty, the said amount should also be paid within 30 days
- ▶ **Proviso (2), when penalty is payable under this section, the provision of Section 76 is not applicable**

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# Penalty – Section 80

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## Section 80 – Penalty not to be imposed in certain cases

- ▶ Notwithstanding anything contained in the provisions of Section 76, 77 or 78 of the Finance act, no penalty shall be imposable, if the assessee proves that there was a **reasonable cause** for the said failure
  
- ▶ Further, a specific insertion was made for the taxable service category of “Renting of Immovable property”, it states as follows :
  - ▶ In case any payment due upto 6 March 2012 (under this taxable service category) is paid within 6 months from the date of from the date on which Finance Bill receives accent from the President, no penalty shall apply on the same
  
  - ▶ The Presidential accent was received on 28 May 2012 and the last date for payment of the same should be 28 November 2012

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# Penalty – Section 80

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- ▶ *Judicial precedents where there is a reasonable cause:*
  - ▶ Penalty was waived in the case of **Hutchison Telecom Ltd Vs CCE (2006) 1 STR 80 (CESTAT)** where service tax was not paid under a bona fide belief, as assessee paid sales tax on SIM cards, holding it as a sale of goods
  - ▶ In the case of **FIIT Jee Ltd Vs CST (2006) 4 STR 143 (CESTAT)**, it was held that if there is no malafide fide intention, penalty can be waived
  - ▶ In the case of **CCE Vs NISA Industrial Services (P) Ltd (2011) 24 STR 644 (CESTAT)**, it was held that reduction / waiver in penalty is justified where there is no intention to evade duty / tax
  - ▶ In the case of **CCE Vs T.Stanes & Co. Ltd (2008) 12 STR 236 (CESTAT)**, it was held that if the short payment was due to incorrect interpretation of statutory provisions and not due to wanton omission, penalty can be reduced
  - ▶ In the case of **Creative Hotels (P) Ltd Vs CCE (2007) 6 STR 238 (CESTAT)**, it was held that the when assessee was not aware and paid tax along with interest immediately after knowing liability penalty can be waived / reduced

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# Judicial Precedents - Penalty

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- ▶ In **Pratibha processors Vs UoI reported in 1996 (88) ELT 12**, the Supreme Court laid down the meaning of term penalty as “ Penalty is ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of a particular statute”
- ▶ In **K.P.Pouches (P) Ltd Vs UoI reported in 2008 (228) ELT 31**, the Delhi High Court held that since the assessee had deposited the entire duty amount well before the issuance of the SCN, it would be liable to pay only 25% of the penalty amount (as per 1<sup>st</sup> proviso to Section 11 of Central Excise Act)  
Further it held that adjudication order should explicitly state options available to assessee under Section 11AC, once the choices are made known to the assessee and still the assessee does not take advantage of the 1<sup>st</sup> proviso of Section 11, it will be entirely at its own peril
- ▶ In **UoI Vs Dharamendra Textile Processors reported in 2008 (231) ELT 3**, the Supreme Court held that penalty under Section 11AC is a mandatory penalty and there is no scope for discretion, further, it held that Mens Rea not essential and willful concealment not essential for attracting civil liability

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# Judicial Precedents - Penalty

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- ▶ The Supreme Court in the case of **UoI Vs Rajasthan Spinning & Weaving Mills reported at 2009 (238) ELT 3 (SC)** held as follows :
  - ▶ 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.
  - ▶ Penalty under Section 11AC of Central Excise Act, 1944 is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section
  - ▶ If the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted

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# Judicial Precedents - Penalty

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- ▶ The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act
- ▶ Duty paid before issue of show cause notice is subject to payment of interest, also the said provision on waiver of notice is inapplicable if non-payment of duty is intentional and by reason of deception
- ▶ In absence of any element of deception or malpractice, duty is not recoverable for a period exceeding 1 year, further period of notice and duty demand extended to five years if non-payment of duty is intentional and by adopting any means indicated in relevant proviso of Section 11A of Central Excise Act, 1944



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# Penalty – Other Provisions

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- ▶ Under Section 73 (3) of the Finance Act where any Service tax has not been levied / short levied or short paid or erroneously refunded and an assessee on the basis of his own ascertainment or on the basis of tax ascertained by the officer pays the amount **before the service of notice** and informs the officer in writing, then the officer shall not serve any notice on such assessee
- ▶ Provided, the officer may determine the amount of short payment or erroneously refunded, and the same has not been paid - the officer shall proceed to recover such amount in the manner specified
- ▶ Interest as applicable under Section 75 shall be payable on the amount paid by the person under this subsection
- ▶ No penalty shall under any of the provisions of the Act or the Rules shall be imposed in respect of payment of Service tax under the captioned section

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# Penalty – Other Provisions

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- ▶ As per the said Section 73 (4A), where in the course of any audit, investigation or verification, it is found that any Service tax has not been levied or short levied / short paid or erroneously refunded, **provided the true and correct details are available in the specified records** and such a person chargeable to Service tax or to whom erroneous refund is made accepts the fact, he may pay the Service tax in full or in part
- ▶ Such payment shall be made along with the interest (as per Section 75) and penalty equal to 1% of the service tax for each month during the period of dispute restricted to 25% of the tax amount, before the service of notice and inform the officer in writing then the officer **shall not serve any notice** in respect of the amount so paid and proceedings in respect of such amounts shall be deemed to be concluded.
- ▶ Provided, the officer may determine the amount of short payment or erroneously refunded, and has not been paid, then the officer shall proceed to recover such amount in the manner specified
- ▶ Further, for the purpose of this sub section and Section 78, “specified records” means records including computerized data as required to be maintained as per any law in force and when there is no such requirement, the invoices recorded by the assessee In the books of account shall be considered as the specified records
- ▶ Earlier, said section was notwithstanding both 73(3) and 73(4), now vide Finance Act, 2012, the same has been amended to be notwithstanding 73(4) only – accordingly 73(3) may still apply in such cases

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# Difference – Interest and Penalty

# Interest Vs Penalty

Particulars	Interest	Penalty
Meaning	Interest is the compensatory amount typically levied on the delayed payment of any amount due to the revenue	Penalty is a penal amount typically levied due to non compliance / contravention of the provisions of the Act and Rules
Sections	<p>Interest is governed by the following provisions -</p> <ul style="list-style-type: none"> <li>▶ Section 73B and 75 of the Finance Act</li> <li>▶ Section 11AB of the Excise Act</li> <li>▶ Rule 14 of the Credit Rules</li> </ul>	<p>Penalty is governed by the following provisions –</p> <ul style="list-style-type: none"> <li>▶ Section 76, 77 and 78 of the Finance Act</li> <li>▶ Section 11AC of the Excise Act</li> <li>▶ Rule 15 of the Credit Rules</li> </ul>
Nature / Applicability	Interest is compensatory in nature and mandatorily applicable	Penalty is penal in nature and is discretionary except in certain cases such as fraud, wilful mis-statement

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# Prosecution

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# Prosecution provisions introduced in the Finance Act

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- ▶ When service tax was introduced in the year 1994 it provided for very stringent measures in case of non compliance with service tax provisions
  
- ▶ Section 87 to Section 92 prescribed criminal liabilities
  
- ▶ The Finance Act 1998 omitted the aforesaid sections 87 to 92 with effect from 16 October 1998
  
- ▶ Further Section 89 introduced in Finance Act, 2011 with effect from 8 April 2011 lays down various offences for which prosecution could be initiated
  
- ▶ The offences stated are as follows :
  - ▶ Knowingly evades the payment of service tax or

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# Prosecution provisions introduced in the Finance Act

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- ▶ Availment and utilization of credit of taxes or duty without actual receipt of taxable services / goods
- ▶ Maintaining false books of account or failure to supply any information or supplying false information
- ▶ Collects any amount as Service tax and fails to pay the amount within 6 months from the date when the payment becomes due
- ▶ The punishments prescribed for the aforesaid offences are :
  - ▶ In case where the amount exceeds Rs. 50 lakhs, imprisonment for a term which may extend to 3 years
  - ▶ In absence of special and adequate reasons to the contrary to be recorded, the imprisonment shall be for a minimum of 6 months
  - ▶ In any other case, the imprisonment may extend to 1 year

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# Prosecution provisions introduced in the Finance Act

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- ▶ Further, in case any person is convicted for an offence and again convicted for any offence under this section, then he shall be punishable for the second and every subsequent offence, for a term which may extend to 3 years
  - ▶ However, in absence of special and adequate reasons to the contrary to be recorded, the imprisonment shall be for a minimum of 6 months
- ▶ No person shall be prosecuted for any offence under this section except for the sanction of the Chief Commissioner of Central Excise
- ▶ Further, the following grounds/ facts will not be considered for lenient view:
  - ▶ The accused has been convicted for the first time for an offense under the Section 89
  - ▶ The accused has been ordered to pay a penalty or any other action under this Act, other than prosecution which constitutes the offence
  - ▶ The accused was not the principal offender and was acting merely as a secondary party
  - ▶ The age of the accused



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# Compounding of offences

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# Compounding of Offences

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- ▶ Service tax (compounding of offences) Rules, 2012 have been introduced vide Notification No. 17/ 2012 dated 29 May 2012
- ▶ Said Rules, grant powers to compounding authority (chief commissioner having jurisdiction over the place where offence has been / alleged to be committed) to grant immunity from prosecution if he is satisfied that the person making the application has made full and true disclosures of the facts (subject to conditions)
- ▶ In order to compound the offence, the applicant may either before or after the institution of prosecution make an application in the form prescribed to the compounding authority
- ▶ Procedure of compounding of offence post receipt of application:
  - ▶ Upon the receipt of application, the compounding authority shall call for a report or any other information from the reporting authority (Commissioner of Central Excise / Service tax or any officer appointed by the chief commissioner, having jurisdiction over the place where the offence is alleged to have been committed) to examine the application.

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# Compounding of Offences

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- ▶ The reporting authority shall furnish the report within one month from the date of receipt of communication from the compounding authority or within such extended period as may be allowed by the compounding authority
  
- ▶ On examining the application, the compounding authority may by order, either allow the application indicating the compounding amount and immunity from prosecution or reject the application, however,
  - ▶ Application cannot be rejected unless an opportunity has been granted to the applicant of being heard
  - ▶ Application shall not be allowed unless the applicable service tax, interest and the penalty has been paid
  
- ▶ Copy of the order shall be sent to the applicant
  
- ▶ The applicant shall within a period of 30 days pay the compounding amount to the compounding authority and shall furnish a proof of payment to the compounding authority
  
- ▶ The compounding amount paid shall not be refunded except where the court rejects grant of immunity
  
- ▶ The applicant shall not claim as a right, that his offence be compounded

# Compounding of Offences

► The compounding amount shall be determined as per the table below:

Sr. No	Offence	Offence under Section	Compounding amount
1	Evasion of payment of Service tax	Section 89 (1)(a)	Upto 50% of the service tax evaded, Subject to minimum of 10% of the service tax evaded
2	Availment and utilisation of credit without actual receipt of taxable services / excisable goods	Section 89 (1)(b)	Upto 50% of the CENVAT credit wrongly utilised, Subject to minimum of 10% of the said amount
3	Maintains false books of accounts, fails to supply information, supplies false information	Section 89 (1)(c)	Rs. 50,000 (first offence), to be increased by 100% of the amount for each subsequent offence
4	Collects service tax but fails to pay to the credit of Central Government within six months	Section 89 (1)(d)	Upto 25% of service tax not deposited Subject to minimum of 2% for each month for which amount has not been so deposited

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# Compounding of Offences

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- ▶ Where the assessee has committed offences falling under more than one category specified in the table and where the amount of tax evasion / credit utilized is same for all offences, the compounding amount shall be the amount for which a higher compounding amount has been prescribed
  
- ▶ The compounding authority shall grant immunity from prosecution for any offence if he is satisfied that the applicant has co-operated in the proceedings and has made full and true disclosure of the facts of the case
  
- ▶ Withdrawal of immunity from prosecution in following cases:
  - ▶ Immunity granted to the applicant shall be withdrawn if he fails to pay any sum specified in the order passed by the compounding authority within the time specified in the order or
  
  - ▶ Fails to comply the conditions subject to which the immunity was granted
  
  - ▶ The compounding authority is satisfied that the applicant in the course of proceedings concealed any facts or had given false evidence

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# Applicability of provision of Central Excise

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# Applicability of provision of Central Excise

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- ▶ Section 83 of the Finance Act, provides for the Sections of the Central Excise Act, 1944, which shall apply, so far as may be in relation to service tax
- ▶ We have provided below the synopsis of some of key sections, followed by the illustrative list of all the said sections

## Section 11B

- ▶ Any person claiming refund of any duty of excise and interest (if any paid on such duty) may make an application to the Assistant / Deputy Commissioner within 1 year before the expiry of relevant date
- ▶ The said refund is subject to conditions

## Section 11BB

- ▶ If any duty to be refunded is not refunded within 3 months from the date of receipt of application , then interest shall be paid from the date after expiry of 3 months from such date till the date of refund of such duty

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# Applicability of provision of Central Excise

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## Section 12A

- ▶ Every person liable to pay tax shall at the time of clearance of goods, prominently indicate in all the documents relating to assessments, sales invoice and other like documents, the amount of such duty will form a part of the price at which the goods are sold

## Section 12B

- ▶ Every person who has paid the duty of excise on any goods, shall be deemed to have passed on the full incidence of such duty to the buyer of such goods

## Section 14

- ▶ An Central Excise officer has the power to summon any person whose attendance he considers necessary to give evidence or produce a document or any other thing in any enquiry for any purposes of this Act



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# Applicability of provision of Central Excise

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## Section 31, 32, 32A – 32P

- ▶ The said sections are in relation to the Customs and Central Excise Settlement Commission and the jurisdiction, powers, procedures etc. with regard to the same. Earlier the settlement commission was only for the Excise and Customs matters and now the same is made applicable to service tax matters as well

## Section 35G – 35M

- ▶ The said sections are in relation to the Appeals to be filed with the High Court and Supreme Court

# Applicability of provisions of Central Excise

- ▶ In the table below, we have listed down all the sections of the Central Excise Act which are applicable to service tax

Sr. No	Section of Central Excise Act	Subject
1	9A	Certain offences to be non cognizable
2	9AA	Offences by Company
3	9B	Power of Court to publish name, place of business etc of persons convicted under the Act
4	9C	Presumption of culpable mental state
5	9D	Relevancy of statement under certain circumstances
6	9E	Application of Section 562 of the Code of Criminal Procedure, 1898 and of the Probation of Offenders Act, 1958
7	11B	Claim for refund of duty
8	11BB	Interest on delayed refunds
9	11C	Power not to recover duty of excise not levied or short levied as a result of general practice

# Applicability of provisions of Central Excise

Sr. No	Section of Central Excise Act	Subject
10	12	Application of the provisions of the Customs Act, 1962 (52 of 62) to Central Excise Duties
11	12A	Price of goods to indicate the amount of duty paid thereon
12	12B	Presumption that the incidence of duty has been passed thereon
13	12C	Consumer Welfare Fund
14	12D	Utilisation of the fund
15	12E	Powers of Central Excise officers
16	14	Power to summon persons to give evidence and produce documents in inquiries under this Act
17	15	Officers required to assist Central Excise Officer
18	31	Definitions in relation to the settlement commission
19	32	Customs and Central Excise Settlement Commission
20	32A – 32P	Powers and procedures of Settlement Commission

# Applicability of provisions of Central Excise

Sr. No	Section of Central Excise Act	Subject
21	33A	Adjudication Procedure
22	34A	Confiscation or penalty not to interfere with other punishment
23	35EE	Revision by Central Government
24	35F / 35 FF	Deposit, pending appeal of duty demanded or penalty levied / Interest on delayed refund of amount deposited under provision to Section 35F
25	35G	Appeal to highcourt
26	35H	Application to High court
27	35I	Power of High court or Supreme court
28	35J	Case before High court to be heard by not less than 2 judges
29	35K	Decision of High court or Supreme court on the case stated
30	35L	Appeal to the Supreme Court.
31	35M	Hearing before Supreme Court
32	35N	Sums due to be paid notwithstanding reference etc.

# Applicability of provisions of Central Excise

Sr. No	Section of Central Excise Act	Subject
33	35O	Exclusion of time taken for copy
34	35Q	Appearance by authorised representative
35	35R	Appeal not to be filed in certain cases
36	36	Definitions
37	36A	Presumption as to documents in certain cases
38	36B	Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence.
39	37A	Delegation of powers.
40	37B	Instructions to Central Excise Officers
41	37C	Service of decisions, orders, summons, etc.
42	37D	Rounding off of duty, etc.
43	38A	Effect of amendments etc Rules, Notifications and orders
44	40	Protection of action taken under the Act.

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# FAQs

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# FAQ's on various topics

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- ▶ Whether interest under Rule 14 of the Credit Rules be applicable upon irregular taking or utilization of Cenvat credit?
- ▶ What would amount as irregular availment of Cenvat credit (viz accounting for in the books of account / disclosing as availed in returns)?
- ▶ Whether penalty under Section 76 and Section 78 be applicable simultaneously in the same dispute?
- ▶ Is the penalty under Section 78 mandatory or discretionary upon the adjudicating officer?
- ▶ Whether Cenvat credit is available of the amount paid as interest / penalty?
- ▶ How strictly would the prosecution provisions pursued by the departmental officers?

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# Thank You

## Disclaimer

- ▶ This presentation is for academic purpose only and may contain certain discussions on illustrative basis rather than based on the bare-text from the law. Reference to case law or government clarifications is on a selective basis and not exhaustive.
- ▶ This presentation is not intended to be advice in any manner and neither the speaker or PDS Legal shall be responsible for any action or abstinence relying on this presentation.