



Udyog whitepaper



Voluntary payment provision in the central excise, customs & service tax statutes

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To err is human, and errors can happen in tax also. Amnesty procedures are available to limit the damage in terms of penal / criminal liability. These have certain limitations and risks too; hence it is necessary to examine each carefully before committing to one of them. Here we shall look into those procedures that are built into the respective statutes, and we shall not consider temporary amnesty or voluntary disclosure schemes.

Criminal liability and how to obtain relief from it

With the introduction of criminal liability for service tax offences in the Finance Bill of 2013, the threat of jail terms hangs over errors made in customs, central excise, as well as service tax. Some of the offences are cognizable and non-bailable, so there may even be arrest and de facto jail term without the benefit of any defense.

Criminal liability of Customs

In customs, the punishments for specific offences are found in sections 132 to 135A of the Customs Act. These are, briefly:

- Making or using false declarations in dealings with customs. (Maximum imprisonment: 2 years or fine or both)
- Obstructing a customs officer in discharge of his statutory powers. (Maximum imprisonment: 2 years or fine or both)
- Refusal to allow X-ray or other medical procedures to detect / bring out goods from the body that are liable to confiscation. (Maximum punishment: six months or fine or both)
- Making preparation to export goods in contravention of the Customs Act (Maximum punishment: 3 years or fine or both)
- Attempt to export goods in contravention of the Customs Act;
- Mis-declaration of value of goods, or evasion of any duty or prohibition
- Keeping or dealing with goods in the knowledge that they are liable to confiscation.
- Fraudulently claiming drawback or other export-related exemptions.

For the last four bullet points above, the maximum imprisonment is 7 years and minimum is 1 year if the value of the goods is Rs 1 crore or more or the duty involved is Rs 50 lakhs or more; or if the prohibited goods are notified for the purpose of this punishment. In other cases (i.e. goods that are of value less than one crore of rupees and involve customs duty less than fifty lakhs, and are not in the list of prohibited goods notified for the more severe punishment), the maximum punishment is 3 years and / or fine, and no minimum is specified.

Criminal liability in Central Excise

The criminal liability in central excise arises, under section 9 of the Central Excise Act, for offences of

- Non-registration
- Evasion of excise duty
- Removal of excisable goods in contravention of the Central Excise Act or rules made thereunder
- Taking credit of duty in contravention of rules
- False declarations
- Failure to supply information, or supply of false information, to the excise officials.
- Dealing with or keeping excisable goods that are liable to confiscation.



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In addition to or in lieu of a fine, the maximum imprisonment is 7 years if the duty involved is Rs 50 lakhs or more, and the minimum is 1 years; and in other cases, the maximum is 3 years and no minimum is specified.

Criminal liability in Service Tax

In service tax, the criminal liability is specified under section 95 of the Finance Act 1994. The offences that attract imprisonment in addition to or in lieu of a fine are:

- Evasion of service tax, knowing that it is payable
- Taking Cenvat credit in contravention of the rules
- Maintaining false books of accounts
- Giving false information to the department
- Collecting service tax and retaining it for over six months without paying it to the government.

The last of the list above is a cognisable and non-bailable offence if the amount exceeds Rs 50 lakhs.

Relief from criminal liability: two routes

Two routes are possible to exorcise the bogey of imprisonment. One is the Settlement Commission; and the other is the compounding option provided under the respective enactments. The eligibility conditions are somewhat different, and so are the details of the relief available in either route.

Settlement Commission

Establishment of the Settlement Commission & its applicability to excise, customs & service tax

The Customs & Excise Settlement Commission was established under section 32 of the Central Excise Act 1944, by notification 40/1999-CE(NT) dated 9 June 1999. Chapter XIVA of the Customs Act 1962 provides for settlement of customs cases by approaching the said Settlement Commission. In 2012, the relevant provisions of the Central Excise Act have been made applicable to service tax matters also under section 83 of the Finance Act 1994. Procedural rules have been framed under each of the enactments for approaching the Settlement Commission.

Eligibility for approaching the Settlement Commission

The Settlement Commission can be approached for settling a 'case'. A case is defined as a matter in respect of which a show cause notice has been issued and is pending for adjudication. The following are the requirements:

- Pendency of a show cause notice in respect of the case, for decision by adjudicating authority;
- The matter involves a duty demand of over Rs 3 lakhs;
- The applicant accepts the liability and makes the payment before approaching the Commission;
- The applicant makes full disclosure;
- Over 180 days have expired since any seizure of goods / documents/ books of accounts;
- Application must not pertain to interpretation of classification.

Positives: Relief that the Settlement Commission can give

The Settlement Commission obtains a report from the department on the application, gives a hearing to both sides, and then gives an order of settlement, in which it orders for payment of interest and penalties. The statute requires the Commission to pass the settlement order before expiry of nine calendar months of the application. After compliance with the settlement order, no further departmental action lies against the applicant. Also, the applicant gets immunity from prosecution under the relevant enactment, viz., the Customs Act 1962, the Central Excise Act 1944, or the Finance Act 1994.

It is seen that the penalty ordered by the Commission is generally lower than that imposed by adjudicating authorities. This is partly because the Commission has the discretion to order or waive penalties and is not bound by the penal provisions, including mandatory minimum penalties, which the adjudicating authority has to implement. Thus the benefits of going to the Settlement Commission are quick and final settlement, lower penalties (likely), and removal of the threat of prosecution by the department.

Contra: Relief that the Settlement Commission cannot give, and possible problems that may arise

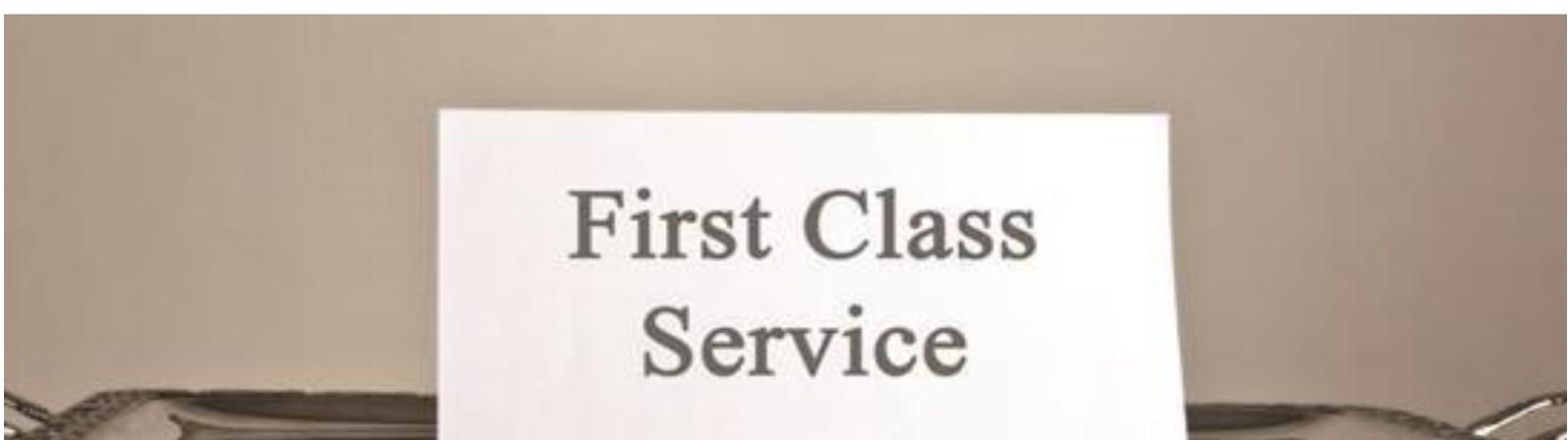
Immunity from prosecution is given by the Settlement Commission only in respect to the enactment under which the 'case' is made. The Commission cannot give immunity against action, including prosecution, under other enactments like those pertaining to income tax, sales tax, foreign exchange or companies law. At the same time it demands complete disclosure from the applicant, and its orders are not confidential: on the contrary, they are reported in journals. Thus there is the danger that a Pandora's box is opened up by attracting the attention of other agencies, though the attempt was to settle the case and close the matter.

The compounding option

The compounding option differs from the settlement option in forum (i.e., who decides the matter), eligibility conditions, and extent of discretion of the compounding authority. The confidentiality is somewhat higher, as the orders are not reported, and thus would not come to notice unless specifically sought by some other agency. (This is sometimes done in inter-departmental coordination committee meetings.)

Statutory provisions for compounding

Section 9A(2) of the Central Excise Act 1944 (also made applicable to service tax under section 83 of the Finance Act 1994), and section 137(3) of the Customs Act 1962 provide for the option to compound offences. Procedural rules have been made separately for compounding of offences relating to central excise, customs and service tax.



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Who decides on compounding applications?

The Chief Commissioner of Customs & Central Excise is empowered under the respective rules to decide on compounding applications. This is in contrast to the three-member bench of the Settlement Commission that decides on applications for settlement. Naturally a lone individual feels less free to exercise discretion in favour of the applicant, given the general climate of suspicion that pervades the revenue department.

Eligibility conditions for an application for compounding

An application for compounding an offence may be made at any time before or during prosecution. This implies that it may be made voluntarily by an entity / individual who wish to come clean and pre-empt proceedings. This is in contrast to the requirement of the Settlement Commission that there should be a 'case' pending against the applicant before the adjudicating authority. On the other hand, it also gives the potential applicant the option to wait and watch what the department will do, and to go for the compounding option only if prosecution is actually launched.

What is payable for compounding the offence

The rules for compounding offences prescribe the maximum / minimum amount that can be ordered to be paid for compounding different categories of offences. For example, for service tax collected and not deposited with the government, the maximum is 25% of the amount involved and the minimum is 2% per month of the amount involved. The compounding fee does not close adjudication proceedings; it only precludes prosecution. Therefore the amount of customs or excise duties or service tax, as well as penalties and interest, would still be payable upon adjudication.

In sum, compounding may prove to be a far more expensive option than settlement of the case; however, it is an option that remains open for much longer, and is an effective defence against prosecution.

Relief given / not given by compounding the offence

Compounding gives immunity from prosecution for the offence that has been compounded, under the enactment under which it has been compounded. However it does not give immunity from prosecution or any other action for the same transaction under other enactments like income-tax, foreign exchange law, company law. As any transaction has different aspects that are governed by these different laws, the compounding order may become a problem if shared with another agency. However, unlike orders of the Settlement Commission, compounding orders are not reported in journals.

Compounding does not carry any possibility of reduction of penalty, as an application for settlement might. The adjudication proceedings are separate, and are not interrupted by compounding proceedings.

Penal liability and possibility of relief

The above was about criminal liability arising out of default in customs, excise or service tax. There is also a penal liability, which is departmentally adjudicated. The statutory provisions for demanding customs or excise duty or service tax are almost identical. Show cause notice has to be served within the period of limitation specified in the statute (five years for cases of evasion, and one year for others). Penalties are usually proposed in the same show cause notice.

Penalty equal to amounts not paid

In cases of evasion of customs or excise duties or service tax, the relevant statutes provide for a mandatory penalty equal to the amount of duties / tax evaded. This is compulsorily levied if the adjudicating authority finds that the non-payment was occasioned by fraud, suppression or wilful misstatement of facts, or contravention of rules with intent to evade payment. The same ingredients also lead to extension of the period of limitation for the demand, from one year to five years. In central excise and service tax, the penalty in evasion cases is reduced to fifty per cent of the amount evaded, if the default is discovered during audit, investigation or verification in the course of which full information is on the default is found in the official records of the defaulter. It is expected that a similar provision will be introduced shortly in customs too, once on-site post clearance audit becomes the norm.



Other penalties

In cases of non-payment simpliciter without ingredients of 'evasion', the related procedural violations would still attract penalties – for example, for incorrect entries in returns, or non-filing of returns, for not taking registration, and so on. In service tax there is also a per diem penalty for each day of non-payment until the amount is made good.

Waiver of penalty in service tax if 'reasonable cause' is shown

In service tax there is a statutory mandate under section 80 of the Finance Act 1994 for waiver of some of the penalties if the person shows reasonable cause for non-payment of service tax. The penalties that can be waived thus are the per diem penalty, and the penalties for non-registration, non-maintenance of books of accounts, failure to appear when summoned by an officer or to produce documents / furnish information, failure to make electronic payment of service tax where required, wrong or incomplete information in the invoice issued; and finally, the 50% penalty payable in cases of evasion when the relevant information is available in the books of accounts of the evader.

To await waiver of penalty in adjudication may, however, be a risky enterprise, as section 80 requires the adjudicating authority to form a view on whether there was reasonable cause for the action or inaction that led to the proposal for penalty. Such nebulous issues are rarely decided in favour of the noticee. There are more pro-active ways for the assessee to sidestep heavy penalties. These are discussed below.

Voluntary payment

Voluntary payment, with interest, of excise duty, customs duty or service tax can lead to closure without issue of show cause notice. This is provided in section 11A(1) of the Central Excise Act, wherein a person may pay the amount (ascertained as due, either by himself or by a central excise officer); and inform the department, whereupon no notice will be issued for the amount. (However, if the department finds that more ought to have been paid, it can issue notice for the differential amount. Limitation for this, of one year in central excise and 18 months in service tax, runs from the date of receipt of intimation of payment of the inadequate amount.)

Section 28(1) of the Customs Act, section 11A(1) of the Central Excise Act and section 73(3) of Chapter V of the Finance Act 1994 have identical provisions with regard to customs duties and service tax respectively, except that in service tax the period of limitation is eighteen months. Thus in customs, excise and service tax, if any non-payment or short-payment of the levy is discovered in internal checking or in checking by the department, it is best to avail this option and make the payment with interest but without penalty. This applies only in cases where there is no allegation of evasion, or grounds for supporting such an allegation. No notice is supposed to be issued by the department thereafter.

Voluntary payment in cases of evasion

Notwithstanding the non-applicability of the voluntary payment clause to cases of evasion, the statute provides that in cases where any audit, investigation or verification reveals non-payment of duties / service tax, but the specified records contain full information on the default, the defaulter can make a voluntary payment of the amount with interest plus a penalty as specified below, and this will provide closure to the matter. The prescribed penalties are –

Service tax: 1% of the unpaid amount per month, subject to a maximum of 25% of the unpaid month; once this is paid and informed to the department, there will be no notice.

Central excise: same as above;

Customs: there is no provision for voluntary payment before issue of notice. However, a noticee may pay the duty demanded with interest and penalty equal to 25% of the duty, within 30 days of receipt of the notice, and the proceedings will stand concluded.

Factors informing the decision to opt for voluntary payment

As seen above, there are two kinds of voluntary payment: one in which the department accepts that there is no evasion, and the other in which the defaulter accepts that there was evasion. Where there is no allegation of evasion, and it is just a case of non-payment simplicitor, there is no adverse fallout of making voluntary payment, and it is highly recommended.

In cases of evasion, a penalty of up to 25% has to be voluntarily paid along with the amount of customs or excise duty or service tax that is due, and the matter stands concluded. If the chance to make this payment is passed up, adjudication proceedings will proceed and culminate in penalty equal to 100% of the amount due.

However, the purported defaulter may hesitate to avail of the chance to pay a lower penalty and close the issue, if the so-called dues are arising out of a matter of fine interpretation, because this may leave him as a person with a tainted record for various purposes. The factors that come into play in making a decision on whether to pay with penalty are:

- Payment with penalty is an admission of evasion
- Admitted evasion is a taint on one's track record. (For example, it may affect one's eligibility for certain procedural concessions in customs.)
- Admitted evasion contradicts any attempt at claiming refund later.
- Refund is possible on merits if the interpretational issues are properly presented and it is shown that non-payment was based on one's belief that the amount was not payable.

We must also note that the voluntary payment provisions do not bar a subsequent claim for refund. Such a bar has been introduced for the first time only in the 2013 amnesty scheme for service tax. Accordingly, the safest bet for an assessee who has a case of interpretation and wants to litigate the issue, but on his own terms, will be to pay the disputed amounts and then gather supporting data and file a claim for refund.



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