

# Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

**Dear Professional Colleague,**

## **Every audit objection doesn't lead to invocation of extended period and levy of penalty**

We have summarized the important judgment of the Hon'ble Tribunal in the case of LANDIS + GYR LTD. V. COMMISSIONER OF CENTRAL EXCISE [2013] 32 Taxmann.com 268 (Kolkata – CESTAT) on following issue as discussed here under:

**Issue:** Whether every audit objection leads to invocation of extended period and levy of penalty, except where mala fide intent is proved?

**Facts:** Landis + Gyr Ltd. ("the Appellant") is a manufacturer of Electric Meters. During the period June 2005 to May 2007 they received small quantity of Electric Meters for trading. In the manufacture and trading of the said Electric Meters, they had availed CENVAT credit paid on input Services viz. G.T.A. Service and business auxiliary services.

The Department, during an audit conducted in 2007 found that the Appellant has availed and utilized wrong credit. Thereafter, the Appellant reversed the proportionate CENVAT Credit amounting to Rs.3,41,397/- availed on the traded goods along with interest of Rs. 10,477/-. Later on in 2009, a Show Cause Notice ("the SCN") was issued proposing penalty under section 11AC of the Central Excise Act, 1944 ("the Excise Act") on the ground that if the Department had not pointed out the mistake, the amount could not have been recovered. The SCN also proposed to invoke extended period of five years under section 11A (1) of the Excise Act. On adjudication, the Ld. Asstt. Commissioner has imposed a penalty of Rs. 3, 41,397/- under section 11AC of the Excise Act. The Appellant filed an appeal before the Commissioner (Appeals), who upheld the Order-in-original. The Appellant being aggrieved by the order of the Commissioner (Appeals) filed an appeal before the Hon'ble CESTAT.

**Held:** The Hon'ble CESTAT held that every shortcoming noticed during Audit cannot be held as due to mala fide intention on part of Assessee so as to invoke extended period of limitation and levy the penalty. The assessee has paid entire duty and interest voluntarily before SCN was served once it was observed in Central Excise Revenue Audit ("CERA") without contending the same, revealed that intention was not to evade tax and absence of mala fide intention.

Further, the Tribunal held that Penalty under section 11AC of the Excise Act cannot be justified unless the duty short paid or not paid was on account of suppression of facts, misstatement etc. The Hon'ble Supreme Court in the case of UOI v. Rajasthan Spg. & Wvg. Mills 2009 (238) ELT 3 (SC) laid down the principle that Penalty under Section 11AC, as the word suggests, 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 (reproduced below for easy reference):

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*“Section 11AC. Penalty for short-levy or non-levy of duty in certain cases.-*

*(1) The amount of penalty for non-levy or short-levy or non-payment or short payment or erroneous refund shall be as follows:—*

*(a) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under subsection (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined.....”*

Hope the information will assist you in your Professional endeavours. In case of any query/information, please do not hesitate to write back to us.

Thanks & Best Regards

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