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ITC Adjustment : Interest : **On Belated Payment of Return/Tax**

Recently issued D.O. Letter dated 10th Feb. 2020 bearing no. CBEC-20/16/07/2020 GST is causing uprolls in GST trade circle. Because according to the said circular - "*List of the registered person who have not discharged the due interest liability while filing GSTR 3B returns belatedly*" is around Rs. 45,99,600 crores hence, the said D.O. letter. It refers section 50(1) and section 75(12) and directly authorities below to proceed to realize the said interest.

Obviously, in this context the question arises whether interest is payable in accordance with law in cases where GSTR 3B filed belatedly?

In this series, it will be interested to note that 3 recent judgements :

★ **Megha Engineering and Infrastructures Ltd. vs. The Commissioner of Central Tax and Others [2019 - TIOL -893) :**

- . The amendment brought to Section 50(2), was only at the stage of press release by the Ministry of Finance at the time when the Division Bench passed its order and the Division Bench thus states that 'unfortunately, the recommendations of the GST Council are still on paper. Therefore, we cannot interpret Section 50 in the light of the proposed amendment.

★ **Shree Nanak Ferro Alloys (P) Ltd. Union of India [2020] 114, P-302.**

In this case the assessee has neither concealed any transaction nor submitted any fraud and hence, the assessee shall not be liable to pay interest on the amount of the integrated tax payable.

This case neither directly nor indirectly touches the issue in discussion in

this Article because in this case an amount was deposited wrongly in one head instead of the other, but in any case amount was deposited.

- ★ **M/s. Refax Industries Ltd. vs. Assistant Commissioner of CGST and Central Excise, Chennai**, Writ Petition No. 23360/2019 and 23361/2019 decided on 06-01-2020 :

13. The argument that ITC is liable to be reversed if it is found to have been erroneously claimed, and that it may be invalidated in some situations, does not militate with my conclusion as aforesaid. The availment and utilization of ITC are two separate events. Both are subject to the satisfaction of statutory conditions and it is always possible for an Officer to reverse the claim (of availment or utilization) if they are found untenable or not in line with the statutory prescription. Credit will be valid till such time it is invalidated by recourse to the mechanisms provided under the Statute and Rules.
15. The above proviso, as per which interest shall be levied only on that part of the tax which is paid in cash, has been inserted with effect from 01.08.2019, but clearly seeks to correct an anomaly in the provision as it existed prior to such insertion. It should thus, in my view, be read as clarificatory and operative retrospectively.

and Hon'ble Court finally held in para 16 -

The amendment brought to Section 50(1), was only at the stage of press release by the Ministry of Finance at the time when the Division Bench passed its order and the Division Bench thus states that '*unfortunately, the recommendations of the GST Council are still on paper. Therefore, we cannot interpret Section 50 in the light of the proposed amendment*'. **Today, however, the amendment stands incorporated into the Statute and comes to the aid of the assessee.**

Note - Author of this Article failed to find any Notification supporting the date of effectiveness of Proviso w.e.f. 1-08-2019.

Prior to GST Law

Under Excise Law, Service Tax Law and during VAT regime, a tax payer was liable to pay interest on belated payment of tax but calculation of net tax liability was determined after second of Capital ITC of duties and taxes paid on inputs to avoid consequential reduction cascading effect of taxes.

GST Law brought some concept of input ITC, however, in GST a tax payer has to pay interest on gross amount of output tax liability without any adjustment of input tax, if he made any delayed payment GST and filing of Return under Section 39. Thus, this provision prima face defeat the input of ITC so some extent.

In continuation, it may be noted that only ITC is available which has been actually paid by the seller, on the other hand it also means receipting claiming credit of tax which has already been received by the Government and shown on cash ledger register. Since interest in the nature of compensatory in the tax law then levy of interest on the amount which has already been received by the Government will alter its compensatory in nature but will be in the nature of penalty. It may be noted that filing of return under section 39 a dealer is already liable to pay late fee under Section 47 and penalty under section 127.

Thus, two liabilities has been fastened upon him. One aspect of this problem is that though section 62(2)(d) says that no registered person shall be entitled to the credit liability unless he has furnished the return under section 39. But the same section fails to point out that date of submission of return will be deemed as the date of availability of Input Tax Credit to the buying dealer.

Now, we should consider the Proviso -

Proviso appended to Sub-section (1) of Section 50 of CGST Act, 2017

Vide Finance (2) Act, 2009 following proviso was added but date from it will take effect was to be notified but has not been notified till date. It reads as below :-

Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 and 74 in respect of said period, shall be levied on that portion of tax that is paid by the debiting the electronic cash ledger.

The real problem lies infectivity of the above Proviso? Whether prospective or retrospective? If none, as is in the present case, why department has taken this Proviso as non-effective, till date?

A *Proviso* should be interpreted in a manner which would be conformity with the intention of the legislature and the object of the Act - *Virendra Kumar vs. Krishi Utpadan Mandi Samiti (1988) 70 STC 360 (SC)*

It is also said that the main function of *provisio* is to put a clarification and to attach a condition and to the main provision. It indicates the exceptions to the provision, but may aid in explaining what is meant to be vide conveyed by its part.

It appears that according to above referred D. O. Letter, since *Proviso* has not been made effective therefore, department of the view that the clarification added by the *Proviso* means that *the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, in respect of said period, shall be levied on that portion of tax that is paid by the debiting the electronic cash ledger.*

Such arguments carries no legal support.

Since above quoted *provisio* refers above Input Tax Credit, therefore, it will be apposite to reproduce the definition of ITC along with *Electronic Credit Ledger*.

Sec. 2 (63) – defines "input tax credit" means the credit of input tax; (appearing in Electronic Credit Ledger)

Electronic Credit Ledger

All eligible Input Tax Credit that is claimed by a registered dealer in the GST returns (GSTR-2 or GSTR-3B) reflects in Electronic Cash Ledger.

Credit in Electronic Cash Ledger can be used only for payment of tax.

This means that balance of *Electronic Credit Ledger* cannot be utilised for payment of interest, penalty or late fees. Interest and Penalty can be paid only through actual cash payment.

In order to fully appreciate this issue, it will be useful to go through concerned provisions of law.

Sec. 50 - Interest on delayed Payment of Tax - CGST Act, 2017

- (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.
- (2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.
- (3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under subsection (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.

In order to appreciate the scheme of payment of tax along with Return it is necessary to visit to sub-section (12) of section 75 of CGST Act, 2017.

Sec. 75 - General provisions relating to determination of tax -

- (12) Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79.

On a conjoint reading of Section 50(1) and Section 75(12) it appears that -

- (a) A person will self assess the tax and in accordance with the return furnished under section 39 pay the tax in cash (as per procedure)
- (b) If Return is filed late and an amount remains unpaid either wholly or partly interest is payable on such remaining unpaid tax.
- (c) While calculating the interest though ITC is available for adjustment but it shall not be taken as payment available because of belated filing of return/payment of tax.

From the above, it may be noticed that no manner of payment has been prescribed for payment of tax and hence the controversy. Whether the adjustment of *Input Tax Credit* as appearing in *Electronic Credit Ledger* and adjusted against payment of tax may be taken as tax paid or not?

Otherwise, also according to the provisions of the GST Act, if some amount is appearing in electronic cash ledger, it undoubtedly is due to deposit of tax in the Government Treasury and therefore, it ought to be deducted while discharging liability of payment of tax due under the Act.

The Controversy -

This controversy arose due to sub-section (1) of Section 50 introduced by Finance (2) Act, 2019 date of which was to be notified later on. It appears that though belatedly it has been interpreted by the department that since Proviso is not yet effective meaning thereby interest is payable from the date of commencement of GST Act, i.e. 1st July, 2017.

Thus, the conclusion in D.O. letter appears erroneous as it has read section 50(1) of GST Act, and proviso was not read with full context. *Proviso*, normally is in the nature of clarification and therefore, it ought to have been read as a clarification of sub-section (1) *ab initio*. Only then interpretation of such explanation will truly reflect the intention of the legislature.

In the case of reported as **State of Maharashtra vs. Suresh Trading Company [109 STC 439]** regarding adjustment of ITC under Maharashtra VAT Act, in para 5 Hon'ble Apex Court held that "*A purchasing dealer is entitled by law to rely upon the certificate of registration by selling dealer to act upon it. Whatever may be effect of a retrospective cancellation upon the selling dealer, it can have no effect upon any person who has acted upon the strength of a registration certificate when the registration was current.*" Same logic and law laid down will apply on Electronic Credit Ledger showing ITC deposits in the Portal.

Therefore, any other interpretation will be violence with the language and impermissible under the said tenets of interpretation of law, as appearing in Section 50(1) whether read with proviso or without proviso.

