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A dead claim of interest, coming alive? – 2.0



The levy of “interest” often poses interesting disputes and GST law is not an exception. Interest is compensatory in nature and imposed on a taxpayer who withholds payment of tax beyond prescribed time limit.

The first two years of GST witnessed least interruption by authorities amidst smooth implementation. However, the times have changed in last few months. In surmounting pressure to achieve revenue targets, the authorities have drawn out all their claws. The authorities are turning hostile to make maximum recovery from the taxpayers.

In this background, we bring next part of our piece ***‘A dead claim of interest, coming alive?’*** to discuss prominent issues relating to interest that have surfaced in recent past or likely to surface in coming times.

Interest on gross tax liability v. net tax liability – An avoidable controversy!!!

One dispute that have knocked the door of Courts on multiple occasions in recent past is whether interest is payable on gross tax liability or net tax liability (after adjusting available ITC). This dispute is an epitome of a controversy that could have been well avoided had GST Council and Government acted timely.

Section 50(1) of the CGST Act imposes interest on gross liability since tax liability on output and availability of ITC are distinct concepts. At the same juncture, GST portal does not permit furnishing of monthly return GSTR-3B unless taxpayer fully deposit its tax liability. Thus, a taxpayer cannot make part payment of tax even to the extent of available ITC and its interest liability will keep accruing even on available ITC amount.

GST Council recognized this issue in its 31st meeting dated December 22, 2018 and recommended that interest should be charged on net liability. However, there was a considerable delay in making statutory amendments. In the intervening period, the issue reached up to Telangana High Court¹ which correctly upheld levy of interest on gross liability in the absence of provision to levy the same on net liability.

Finance Act, 2019 inserted a proviso in Section 50(1) for levy of interest on net liability. Again, there was a delay on part of making the said proviso effective. To add insult to injury, the department initiated recovery of interest on gross liability from taxpayers despite GST Council’s intent to the contrary.

The matter reached Madras High Court² which held that proviso to Section 50 was inserted to correct anomaly and interest should be levied on net liability. The Court read the same as clarificatory and held it to be retrospective. With due respect, High Court incorrectly interpreted ‘proposed proviso’ as ‘effective proviso’ and rendered its decision on the premise that proviso has already been made effective. To that extent, the High Court erred in holding levy of interest on net liability.

Finally, in last GST Council Meeting held on March 14, 2020, the Council decided interest would be levied on net liability retrospectively from July 1, 2017. This retrospective amendment though late, would bring a major respite for taxpayers.

¹ Megha Engineering and Infrastructures Ltd. v. CCT, [2019 (26) GSTL 183 (Telangana)]

² Refex Industries Ltd. v. ACCGST & CE, [2020-VIL-71-MAD]

Interest on excess availment of Input Tax Credit ('ITC) – A case of *casus omissus*?

Section 50(3) of the CGST Act³ levies interest on undue or excess claim of ITC under Section 42(10) of the CGST Act. Notably, Section 42 provides for matching, reversal and reclaim of ITC. Initially, the Government intended to implement Form GSTR-2 (inward supplies details) to ensure complete matching of ITC between a taxpayer and its suppliers. However, Form GSTR-2 was never implemented due to technological bottlenecks on GSTN portal. Thus, Section 42 (matching of ITC) was also kept in abeyance.

Section 42 provides for the manner of identification of undue or excess ITC and recovery thereof. Section 50 creates an umbilical cord with Section 42 for levy of interest on excess availed ITC, there is no substantive provision for recovery of interest in the present situation of Section 42 being in abeyance. This seems to be a case of *casus omissus* in GST law.

Recovery of interest – Is issuance of Show Cause Notice (SCN) mandatory?

In the recent times, the department has sought to recover interest by taking recourse to Section 75(12) of the CGST Act. Section 75(12) overrides Section 73 as well as Section 74 and provides that any amount of unpaid interest shall be recovered as per Section 79. In terms of Section 79, the department has started garnishee proceedings like issuance of notices to banks of taxpayers etc.

Notably, Section 73 and Section 74 mandates the department to issue SCN for making any demand. An attempt to make recovery without issuing SCN, is perverse and violative of principles of natural justice. Recently, Karnataka High Court⁴ held that the issuance

of SCN is *sine qua non* to recover interest payable under Section 50. Similar view has been taken by Jharkhand High Court⁵ wherein the Court held that if the department wants to initiate any penal action against the petitioner, it needs to mandatorily follow principles of natural justice. Thus, recovery of interest without issuance of SCN, is illegal.



³ Central Goods and Services Tax Act, 2017

⁴ L. C. Infra Project Pvt. Ltd. v. Union of India [2019 (28) GSTL 3 (Karnataka)]

⁵ Godavari Commodities Ltd. v. Union of India [2019 VIL 596 Jharkhand]

Conclusion

The authors hope that the department understands its statutory “Lakshman Rekha” before making attempts to recover interest from the taxpayers. Else these disputes are likely to continue for long and eventually knock the doors of the Supreme Court for attaining finality.



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