

INTEREST PAYABLE UNDER GST— WHETHER COMPENSATORY OR COMPLEMENTARY TO REVENUE

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Introduction:

Traditionally, it was a well-accustomed practice under the Indirect Tax laws viz. Excise, Service Tax and VAT laws that interest is payable on the amount of tax due after adjustment of the input tax credit, that remains unpaid by the due date. Coming to GST laws, the said practice got dented under the concept of 'Electronic Credit Ledger', 'Electronic Cash Ledger' and 'Electronic Liability Ledger' and offsetting the liabilities with amounts in cash and credit ledgers through GSTR-3B returns. Recently, the Principal Commissioner, Hyderabad has issued a Standing Order No. 01/2019 dated 04.02.2019 to clarify that interest is payable on gross liability including on the portion of the liability that was adjusted using the accumulated Input Tax Credit ('ITC'). In this context, let us go through the statutory provisions and legal principles laid down by courts on this issue and accordingly understand the nuances of the clarification given in the said order.

Clarification given in standing order of Hyderabad Principal Commissionerate:

The Hyderabad Principal Commissioner vide their standing order (supra) has clarified that interest is payable for delayed payment of tax under section 50 of Central Goods & Services Tax Act, 2017 (CT Act) read with corresponding State Goods & Services Tax Acts (ST Acts). Such interest is payable on gross liability (before adjustment of accumulated ITC) in cases where there is a delay in filing GSTR-3B return for offsetting the amount in 'Electronic Liability Ledger' with amounts in 'Electronic Credit Ledger' and 'Electronic Cash Ledger'.

The relevant extracts of the said order are reproduced hereunder:

6. Since ITC/Credit in balance in the 'Electronic Credit Ledger' cannot be treated as the Tax paid, unless it is debited in the said credit ledger while filing the return for off-setting the amount in the 'Liability Ledger', the interest liability under Sec. 50 is mandatorily attracted on the entire Tax remained unpaid beyond the due date prescribed. The ITC in balance as on the due date for filing the return has no relevance with regard to the interest liability u/Sec.50. It is immaterial whether the self-assessed tax is paid through the Credit/ITC or the Cash. Once the payment is beyond the prescribed date, interest liability is attracted on the entire Tax amount

Accordingly, instructions are given to the department officers to identify cases of belated filing of GSTR-3B returns and ensure whether interest is paid not only of the tax liability that was paid in cash but also on the tax liability that was paid using ITC. The impact of the clarification given on applicability of interest on tax dues is explained in the following example.

Example: XYZ Limited is required to pay an amount of Rs 30 lakhs towards taxes for the month of January 2019. The accumulated ITC balance as on 31.01.2019 is Rs 25 lakhs. The due date for filing GSTR-3B return and to pay the tax amount 20.02.2019. XYZ Limited has filed GSTR-3B return on 28.02.2019 by paying the

balance Rs. 5 lakhs in cash. In this scenario, going by the above standing order, XYZ Limited is required to pay interest for delayed payment of tax for eight days on a gross liability of Rs. 30 lakhs but not on the net liability after ITC adjustment i.e. Rs. 5 lakhs.

Having understood the impact of the clarification in the Standing Order, when we compare with the erstwhile Central Excise, Service Tax, and VAT laws, the requirement to pay interest would arise only on the net liability to be payable in cash after adjustment of accumulated credit. In view of the contrary interpretation on this aspect between the current regime and the erstwhile regime, let us try to understand the reasons for the same.

Comparative Legal Provisions between Current regime and Erstwhile regime:

Section 50 of CT Act prescribes for payment of interest when there is a delay in payment of tax. The relevant extract is reproduced hereunder:

Section 50(1):

*Every person **who is liable to pay tax** in accordance with the provisions of this Act or the rules made thereunder, **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*

Upon examination of sub-section (1) of Section 50, it only prescribes that interest is payable when there is a failure to pay the tax or any part thereof to the Government within the period prescribed. It does not expressly provide that tax is payable even on the extent of the tax liability that was offset with accumulated ITC. In the absence of such express intention under Section 50(1), whether such interpretation to pay interest even on tax liability that was met out of accumulated ITC holds good is required to be judicially tested. The reasons stated in the standing order for such conclusion is that the balance in 'Electronic Credit Ledger' cannot be treated as tax paid unless it is debited in the said ledger by offsetting the said amount with 'Electronic Credit Ledger' through the filing of GSTR-3B return.

The offsetting procedure followed in filing the returns is provided in Section 49 of the CT Act which provides for payment of GST, interest, penalty and other amounts. The said section provides for payment of tax liability using balances in electronic cash ledger and credit ledger. The relevant extracts are reproduced hereunder:

Sub-Section (3) and (4) of Section 49:

(3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.

Sub-section (4) of section 49 provides that the amount available in electronic credit ledger may be used for making any payment towards output tax. In view of the existence of this provision, a view is possible that tax payment to the extent made by using ITC would be said to have been only by debit to electronic credit ledger which can be done only by way of filing of prescribed GSTR-3B return. In our view, though no reference was given to Section 49, this might be the reason for the Principal Commissioner to clarify that interest is payable even on the tax liability that was met out of accumulated ITC.

On the contrary to the said legal interpretation, let us examine the provisions of erstwhile Central Excise Act, 1944 and the rules made thereunder in connection with the payment of excise duty and interest for delayed payment of excise duty. Please note that the provisions of Service Tax and VAT laws also provide for similar interpretation to the one under Central Excise law. The said provisions are not reproduced to avoid repetition.

Section 11AA of Central Excise Act, 1944:

*(1) Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, **the person, who is liable to pay duty, shall, in addition to the duty, be liable to pay interest at the rate specified in sub-section (2), whether such payment is made voluntarily or after determination of the amount of duty under section 11A.***

(2) Interest, at such rate not below ten percent and not exceeding thirty-six percent per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid in terms of section 11A after the due date by the person liable to pay duty and such interest shall be calculated from the date on which such duty becomes due up to the date of actual payment of the amount due.

The said section provides for payment of interest on the amount of duty liable to be paid for a tax period. The provisions relating to tax payment are given in Rule 8 of Central Excise Rules, 2002. Sub-rule (1) of the said rule which is relevant in the present context is reproduced hereunder for ready reference:

(1) The duty on the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month, if the duty is paid electronically through internet banking and by the 5th day of the following month, in any other case

On perusal of sub-rule (1) of said rule, it provides that the assessee is liable to pay excise duty by sixth or fifth of the following month if the duty is paid through internet banking or in any other manner respectively.

This implies that the payment within the due date has been provided for in the excise law only on the net liability to be paid in cash after adjustment of CENVAT Credit¹.

Unlike the case of Section 49 of the CT Act, there was no provision being provided in Central Excise Law for adjustment of accumulated CENVAT credit with the corresponding output liability. The due date for payment of tax was only prescribed for the amount payable in cash and not for adjustment of accumulated CENVAT Credit. Accordingly, the requirement to pay interest under erstwhile Central Excise law is only on the net tax liability that was payable in cash after the due date.

With this understanding of the possible reasons for the different interpretation of said aspect in current regime as compared to the erstwhile regime, we now proceed to understand the principles laid down by judiciary on the collection of interest.

Principle laid down by Judiciary on collection of Interest:

Prathiba Processor's case:

The Supreme Court in the matter of Prathiba Processors v Union of India², has explained the distinction between the term 'tax', 'interest' and 'penalty' that are used in fiscal statutes. The relevant extract of the judgment is reproduced hereunder:

*13. In fiscal Statutes, the import of the words - "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. **Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date.** Essentially, it is compensatory and different from penalty - which is penal in character*

(emphasis supplied)

Bill Forge's case:

The Karnataka High Court in the matter of CCE v Bill Forge Private Limited³, vide para 21, it was held as under:

Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest. Section 11AB of the Act is attracted only on delayed payment of duty i.e., where only duty of excise

¹ ITC under the earlier law was referred as CENVAT Credit.

² 1996 (88) ELT 12 (SC)

³ 2012 (26) STR 204 (Kar), 2012 (26) STR 204 (Kar)

has not been levied or paid or has been short levied or short paid or erroneously refunded, the person liable to pay duty, shall in addition to the duty is liable to pay interest. Section do not stipulate interest is payable from the date of book entry, showing entitlement of CENVAT credit. Interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is taken or utilized wrongly.

(emphasis supplied)

In view of the legal position laid down by Courts, a tax is a compulsory exaction of money if the levy gets attracted and a penalty is something penal in nature which is imposed for any attempt to evade tax or violate the provisions of the law. On the other hand, interest is compensatory in nature and it will be generally collected on the actual amount withheld by the taxpayer to the extent of delay in paying the tax on the due date. This would be so because the Revenue gets prejudiced to the extent of the delay. Whether the interpretation adopted in the standing order justify that the collection of interest for delayed tax payment is compensatory in nature? We will try to find the answer with the below scenarios:

Scenario #1:

During January 2019, XYZ Limited has purchased goods for Rs.10,00,000 from ABC Ltd. The invoice issued by ABC Ltd contains tax of Rs. 1,80,000/- making the total invoice value Rs. 11,80,000/-. ABC Ltd being the vendor is required to deposit the tax amount by 20.02.2019 by filing GSTR-3B return. XYZ Limited will avail the input tax credit of Rs. 1,80,000/- in the month of January 2019 only. The revenue involved in the said ITC reaches the exchequer by 20.02.2019.

The said goods are sold by XYZ Limited in February 2019 at Rs. 15,00,000/- with GST payable Rs. 2,70,000/-. The due date for deposit of the amount by filing GSTR-3B is 20.03.2019. Suppose, XYZ Limited has delayed the return by 10 days and has filed by 30.03.2019. In such a situation, going by interpretation of standing order, XYZ Limited is required to pay interest on the entire due amount of Rs. 2,70,000/- including the amount of Rs. 1,80,000/- towards ITC which in fact has reached the exchequer by the due date. To this extent, there is no loss to the exchequer. But the standing order mandates the collection of interest on Rs. 2,70,000/- instead on Rs. 90,000/-. Such practice amounts to an undue collection of interest even though there was no loss to the exchequer.

Scenario #2:

Assuming the facts of the above example remain the same except that ABC Limited has failed to file the return and pay the tax by 20.02.2019. Instead, the said return was filed on 10.03.2019. In such event, interest is collected on the due amount of Rs. 1,80,000/- from both ABC Limited as tax due in cash and from XYZ Limited as ITC not being set-off in time by filing GSTR-3B return. In this situation, there is a loss to the exchequer to the extent of Rs. 1,80,000/- from ABC Limited and Rs. 90,000 from XYZ Limited. But interest is

recovered on Rs. 1,80,000 from ABC Limited and on Rs. 2,70,000 from XYZ Limited. This implies that interest is payable on revenue loss to the extent of Rs. 1,80,000/- is recovered from two taxpayers.

Suppose the customer of XYZ Limited availed input tax credit of Rs. 2,70,000/- and there was a delay in offsetting the tax payable by him in subsequent months. In such an event, it can be concluded that interest on revenue loss to the extent of Rs. 1,80,000/- will be recovered from three taxpayers and interest on revenue loss to the extent of Rs. 90,000/- will be recovered from two taxpayers. This implies that the recovery of interest on the same amount of tax on more than one occasion goes on as many times as the suppliers in the supply chain defaults in filing GSTR-3B return within due date to offset the gross liability towards tax.

In view of the above scenarios, the interpretation that interest is payable on the gross liability including the amount of liability that was paid using accumulated ITC would result into collection of interest even when there was no loss of revenue or collection of interest from more than one tax payer involved in the supply chain in the event where there is a simultaneous default in filing the GSTR-3B returns. Therefore, this interpretation does not support the view that the amount of interest collected is compensatory in nature. In fact, it can be said that such collection is complementary to the revenue collected by Governments because interest is collected on the same amount of revenue on more than one occasion from different taxpayers. Therefore, as the interpretation of standing order is going against the principle that interest is compensatory in nature, the same is required to be tested judicially.

Further, it is worth to observe that Rule 87 of Central Goods & Services Tax Rules, 2017 (CT Rules), vide sub-rule (6) and (7) state as under:

(6) On successful credit of the amount to the concerned government account maintained in the authorised bank, a Challan Identification Number shall be generated by the collecting bank and the same shall be indicated in the challan.

(7) On receipt of the Challan Identification Number from the collecting bank, the said amount shall be credited to the electronic cash ledger of the person on whose behalf the deposit has been made and the common portal shall make available a receipt to this effect.

From the above, it is evident that the moment payment of taxes is made, the Challan Identification Number (CIN) will be generated, and the corresponding tax amount reaches the government account maintained by collecting bank. In other words, the assessee while making payment of tax, the CIN gets generated only once the tax amount has reached the concerned government account. What only remains from the assessee/tax payer is an offset procedure which is pure technical in nature. The amounts which are in Electronic Cash Ledger and Electronic Credit Ledger must be used for offsetting the liability in Electronic Liability Ledger and the same is done by filing the GSTR-3B return.

In such a situation, once the credit and cash are in respective ledgers (which by that time belongs to the respective governments), the delay in action of assessee/tax payer off setting them with liability because of delayed filing of return attracting interest is illogical, since there is no loss to the revenue. In such event,

interpreting the delay in remittance of tax under Section 50 by giving due emphasis to the offset procedure laid down under sub-sections (3) and (4) of Section 49 may not be rational.

Understanding the ambiguity involved in interpretation of Section 50 towards collection of interest, the GST Council in their 31st Meeting has recommended amendment to the said section that interest should be charged only on the net tax liability of the taxpayer after considering the admissible input tax credit i.e. interest payable on the amount paid through Electronic Cash Ledger.

Despite such recommendation, the Hyderabad Principal Commissioner has issued the subject standing order clarifying that interest is payable on gross liability. Based on such recommendation, notices are issued by Department officers to recover interest on gross liability from taxpayers who have filed their GSTR-3B returns belatedly. In view of this reason, an appropriate recommendation is required to be made to withdraw the said order and to ensure that the amendment proposed to Section 50 should be given retrospective effect.

Conclusion:

Summing up the above discussion, the standing order mandates the recovery of interest under Section 50 on the gross liability towards GST including the amount of ITC adjusted towards such liability. However, the language of Section 50 does not expressly provide for such intention to collect interest on gross liability. The reason could be because of set-off requirement while filing GSTR-3B return under Section 49 as discussed above. Such interpretation leads to the collection of interest even though there was no revenue loss or collection of interest from more than one person on the same amount of revenue loss, thereby, distorts the well-established legal principle that interest is compensatory in nature and rather it turns out to be complementary to revenue. Hence an appropriate representation is required to be made to withdraw the said standing order and to ensure retrospective effect to the amendment recommended to Section 50 by GST Council.