

## Interest on Delayed Payment of Tax – on Gross or Net Tax Liability – Bone of Contention Remains

Date of Issue: 26<sup>th</sup> August 2020

### Jointly By:

#### CA. Chitresh Gupta

FCA, LL.B, B. Com(H)

Co-Author of book “GST –Law, Analysis & Procedures”

Faculty on Goods & Services Tax by ICAI

#### CA. Shilpi Gupta

FCA, M.Com, B.Com(H) -SRCC

Co-Author of book “GST –Law, Analysis & Procedures”

Faculty on Goods & Services Tax by ICAI

There has been a big controversy that whether interest on delayed payment of tax has to be paid on gross tax liability or net tax liability paid through electronic cash ledger after adjustment of input tax credit?

*As per section 50(1) of the CGST Act, 2017, 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.*

Thus, as per section 50(1), every person who is liable to pay tax but fails to pay such tax to Government within the prescribed period shall be liable to pay interest. There was confusion among the stakeholders that the words ‘liable to pay tax’ used in section 50(1) is to be interpreted to mean gross tax liability or net tax liability after adjustment of input tax credit. Further to add to the confusion, the department had started issuing notices demanding interest on gross tax liability based on Megha Engineering & Infrastructures Ltd. case.

In the case of **M/s Megha Engineering and Infrastructures Ltd.** Vs Commissioner of Central Tax, Hyderabad [2019 (4) TMI 1319 - Telangana and Andhra Pradesh High Court], the Telangana high court has rejected a writ petition challenging the imposition of interest on total goods and services tax liability including input tax credit.

In the aforesaid case, the petitioner, had filed the petition after tax authorities asked it to pay interest on the input tax credit portion of the tax due. The petitioner submitted that the GST portal is designed not to accept returns in the GSTR-3B form unless the entire tax liability is charged by the assessee. As a result, even if an assessee was entitled to set off liabilities against input tax credit to the extent of 95%, the returns could not be filed unless the remaining 5%

was also paid. There was a delay on the part of the petitioner in filing the returns. The petitioner submitted that the delay in filing the returns was also not huge. The court said that until returns are filed as self-assessed, no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place. It is only after a claim is made in the returns that it gets credited in the electronic credit ledger, it said. Once payment is made from such electronic credit ledger, the government gets a right over the money available in the ledger. Since ownership of such money is with the taxpayer till the time of actual payment, the government is entitled to interest up to the date of entitlement to appropriate it, the court said.

Later on, a proviso was inserted in section 50(1) vide Finance (No. 2) Act, 2019 w.e.f. 01-08-2019 **but not notified**, which provides 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 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.*

Thus, as per the proviso interest has to be paid on net tax liability. Again since the proviso was not notified the controversy continued.

Further, the Honorable Madras High Court has taken a contrary view in **M/s. Refex Industries Limited, M/S. Sherisha Technologies Pvt. Ltd. Vs AC CGST & CE [2020 (2) TMI 794 - Madras High Court]**:

It was held the use of the word 'delayed' connotes a situation of deprivation, where the State has been deprived of the funds representing tax component till such time the return is filed accompanied by the remittance of tax. The availability of ITC runs counter to this, as it connotes the enrichment of the State, to this extent. Thus, Section 50 which is specifically intended to apply to a state of deprivation cannot apply in a situation where the State is possessed of sufficient funds to the credit of the assessee.

The proper application of Section 50 is one where interest is levied on a belated cash payment but not on ITC available all the while with the Department to the credit of the assessee. The latter being available with the Department is, thus, neither belated nor delayed.

It was further held that proviso to Section 50(1), 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 be read as clarificatory and operative retrospectively.

### **GST Council Recommendations**

The proviso to section 50(1) was though inserted prospectively vide Finance (No.2) Act, 2019 with effect from the date to be notified. The change was welcome by industry. However, majority questioned that the same should be made applicable retrospectively.

Thus, the GST Council has recommended in its 39<sup>th</sup> meeting held on 14.03.2020 that interest for delay in payment of GST to be charged on the net cash tax liability w.e.f. 01.07.2017 (Law to be amended retrospectively).

### **Recent Notification dated 25-08-2020**

Now, on 25<sup>th</sup> August 2020, the CBIC has issued a **Notification No. 63/2020–Central Tax** notifying the 1st September 2020 as the date on the proviso to section 50(1) shall come into force. Thus, interest on net tax liability will be effective from 01-09-2020 and not retrospectively as recommended by the GST Council.

## **Way Forward**

The **Notification No. 63/2020 – Central Tax dated 25-08-2020** issued by CBIC making the proviso to section 50(1) which provides for payment of interest on tax liability effective from 01-09-2020 is clearly in contravention of the recommendations made by GST Council in its 39<sup>th</sup> Meeting.

Further, in **M/s. Refex Industries Limited, M/S. Sherisha Technologies Pvt. Ltd.** case as discussed supra, it was held that proviso to Section 50(1) seeks to correct an anomaly in the provision as it existed prior to such insertion. It should thus be read as clarificatory and operative retrospectively.

Thus, the CBIC should come out with a corrigendum to the aforesaid Notification specifying the effective date as 01-07-2017.

### **DISCLAIMER:**

*The views expressed in this article are personal views of the Authors. This article includes general information about legal issues and developments in the law of GST in India. Such materials are for informational purposes only and may not reflect the most current legal developments. These informational materials are not intended, and must not be taken, as legal advice on any particular set of facts or circumstances. We disclaim all liability in respect to actions taken or not taken based on any or all the contents of this article to the fullest extent permitted by law.*