

GST

Interest on delayed payment – Proviso to Section 50 of CGST Act is retrospective in operation

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ISSUE

Whether Proviso to Section 50 of the Central Goods and Services Tax Act, 2017 ('**CGST Act**') is retrospective in operation even as the Notification brought it into effect prospectively?

RELEVANT FACTS

Section 50 of the CGST Act deals with levy of interest on delayed remittance of the output GST liability. Section 100 of the Finance (No.2) Act, 2019 inserted a Proviso to Section 50 which stated that interest is leviable only on that portion of output liability which is discharged by way of cash. The date on which the said amendment would become effective was not specified. Later, in the minutes of the 39th GST Council meeting where the recommendation to insert the Proviso was discussed, it was stated that the amendment would be retrospective w.e.f. 1 July 2017.

Subsequently, *vide* Notification No. 63/2020-Central Tax, dated 25 August 2020, the Central Government notified 1 September 2020 as the date on which the Proviso would come into force. This led to doubts and apprehension in the industry. The Central Board of Indirect Taxes and Customs ('**CBIC**') issued a Press Release dated 26 August 2020 stating that the notification was issued prospectively only to get over technical limitations and the decision of the GST council in the 39th meeting would be given full effect.



The GST Authorities had issued notices to the assesseees levying interest on the total output liability including the portion discharged by way of Input Tax Credit ('ITC'). In case of many assesseees, no opportunity was granted before confirming the levy of interest and proceedings to recover interest by attachment of bank accounts were resorted to.

The issue before the Madras High Court was thus, on the effective date of application of the Proviso to Section 50 of the CGST Act.

RELEVANT ARGUMENTS ON BEHALF OF THE ASSESSEES

- The credit was available even before output tax liability arose and hence the question of delay does not arise.
- Interest is a measure of compensation and since ITC is already available in the electronic ledger, there is no question of the same being due to the revenue.
- No opportunity was granted before raising the impugned demand and consequential proceedings.
- The Proviso has been inserted to set right an anomaly and is therefore retrospective in operation.
- The Madras High Court in *Refex Industries Limited v. Assistant Commissioner* [Decision dated 6 January 2020 in W.P. No. 23360 & 23361 of 2019] has already held the proviso to be applicable retrospectively.

RELEVANT ARGUMENTS ON BEHALF OF THE REVENUE

- Section 41 of the CGST Act provides that the entitlement to credit is only with the filing of return on self-assessment basis. Thus, same cannot be availed of till such time a return is filed by an assessee.
- As per Section 49 of the CGST Act, only when a credit entry is made in the electronic credit ledger the entitlement to avail the same arises.
- The effective date of applicability of Section 100 of the Finance (No.2) Act, 2019 was not notified when the decision in *Refex Industries* was rendered. Thus, the decision is of no benefit to the assessee.

- The Telangana High Court in *Megha Engineering and Infrastructure Ltd. v. Commissioner of Central Taxes, Hyderabad* [W.P. No. 44517 of 2018] has held that liability to pay interest is on the total output liability including that portion discharged by utilising ITC.
- A clarification was issued by the CBIC bearing No. 20/16/07/2020-GST, dated 10 February 2020 to the effect that liability to interest would arise on total amount of tax liability as revealed in the GST return.

RATIO

- The Proviso to Section 50 of the CGST Act is retrospective in operation notwithstanding the notification bringing it into effect from 1 September 2020. Thus, interest is leviable only on that portion of the output GST liability discharged belatedly by way of cash with effect from 1 July 2017.

REASONING

- The decision of the Madras High Court in the case of *Refex Industries*, has dealt with this very issue and held in favour of the Petitioner.
- The Department is **enriching itself doubly** by, on the one hand, holding in its coffers the available credit and on the other, seeking the payment of interest upon the same sum.
- It is settled that where a **Proviso was designed to eliminate unintended and prejudicial consequences** which would cause hardship to a party, such a Proviso should be seen to be remedial and one that mitigated the prejudice caused **from inception**.
- Moreover, interest is intended to **compensate the revenue** for loss of capital. In the present case, there is no loss insofar as the revenue is in possession of the credit which is as good as cash.
- The decision of the Telangana High Court in *Megha Engineering* is dated 18 April 2019, i.e., long prior to the amendment made to Section 50 by insertion of the Proviso and the clarifications issued by the GST Council and CBIC.
- This entire controversy has now been settled by the CBIC *vide* its Circular in F.No. CBIC 20/01/08/2019-GST, dated 18 September 2020 where it has

reiterated that the amendment by insertion of Proviso of Section 50 of the CGST Act is intended to be retrospective and thus, recovery of interest will only be on net cash tax liability from 1 July 2017.

- The Centre, the State and the CBIC are in agreement that the operation of the Proviso of Section 50 should only be retrospective and the interpretation to the contrary by the authorities constituted under the CBIC is misplaced.
- Further, on perusal of the minutes of 31st GST council meeting dated 22 December 2018, minutes of 35th GST Council meeting dated 21 June 2019, minutes of 39th GST Council meeting dated 14 March 2020, press release of the GST Council post the 39th meeting and the CBIC press release dated 26 August 2020, it is clear that the amendment is intended to be retrospective in nature.



IMPLICATIONS AND COMMENTS

- This decision provides a much-needed relief to assesseees who were apprehensive on the date of applicability of the Proviso to Section 50 of the CGST Act
- Though the CBIC press release has stated that the notification was issued due to technical limitations, the Madras High Court through judicial intervention has given effect to the intention that was expressed in the GST Council meetings, press releases, etc.
- This decision could be relied upon in other cases where notice has been issued demanding interest on the total output liability paid belatedly including the portion paid by utilising ITC and / or where proceedings have been initiated to attach bank accounts of the assesseees.

[*Maansarovar Motors Private Limited and Ors. v. Assistant Commissioner and Ors.* – Judgment dated 29 September 2020 in W.P. Nos. 28437, 29998, 31081 of 2019 and Ors., Madras High Court]

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