



ALL ABOUT INTEREST
IN GST- PAST, PRESENT
& FUTURE OUTLOOK



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All about Interest under GST – Past, Present and Future Outlook.

History of Interest under GST

When the GST got introduced from 1st July 2017, quite a number of registered persons were struggling to come to terms with the change in the systems, policies and procedures that was brought by the new regime. This resulted in some of the major compliance decisions getting impacted such as discontinuation of GSTR 3 and prolonged usage of GSTR 3B. Though this allowed simplification of return filing process, it also caused one major shortcoming only to bubble into a much larger problem later. Usage of GSTR 3B meant that the return could not be filed without payment of full tax liability unlike GSTR 3B which allowed part payment of self-assessed liability (thereby saving interest burden).

As per the instructions 11 and 12 to the Form GSTR 3:

“11. GSTR-3 filed without discharging complete liability will not be treated as valid return.

12. If taxpayer has filed a return which was not valid earlier and later on, he intends to discharge the remaining liability, then he has to file the Part B of GSTR-3 again.”

Further to the above, section 2(117) of the CGST Act 2017 provided the below:

“Valid return means a return furnished under sub-section (1) of section 39 on which self-assessed tax has been paid in full”

Under demand and recovery provisions, Section 75(12) of the CGST Act 2017 provided the following:

“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”

The above two provisions seemed to have no applicability in the era of GSTR 3B wherein the return was not even accepted by the GST portal if the self-assessment tax was not paid in full. There was no question of self-assessed tax liability and interest remaining unpaid if the portal did not allow the taxpayer to proceed with filing of return if they remained pending. Where there was no return with unpaid liability in GSTR 3B, there were no invalid returns under GST in terms of Section 2(117) of the CGST Act 2017.

Due to a newly introduced taxation system, businesses were not aware that the payment of self-assessed tax did not happen only upon depositing the money in the electronic cash ledger or having ITC in electronic credit ledger. This happened only upon setting off the tax liability in GSTR 3B. As a result, even when there was a delay in filing of return GSTR 3B due to a technical or any other reason, businesses did not pay any interest which was a self-declared liability. Some of them believed that late fees were the only liability in case of delay in filing returns. Even the Government did not immediately demand or recover the interest liability for most of the businesses even if they were a delay in setting off the tax liability online.

Meaning of ‘fails to pay the tax’ as per Section 50

Section 50(1) while discussing about interest on delayed payment of tax provides the following:

“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.”

From the plain reading of the above and the tryst with the earlier tax regimes led to the belief that the delay in cash portion of the tax would form the basis of computation of interest. However, upon reading the payment provisions as per Section 49, it was implied that the payment of tax was to be made from both electronic cash ledger and electronic credit ledger. Thereby applying the Doctrine of literal construction, failure to pay tax implies payment of interest on the gross tax liability before adjustment of input tax credit. To compound the said issue, Telegana High Court in case of M/s. Megha Engineering & Infrastructures Ltd. Vs Commissioner of Central Tax as per Writ Petition No.44517 of 2018 held that interest was actually payable on the gross tax liability before setting off input tax credit.

For example, if the gross tax liability was Rs. 100 lakhs, ITC of Rs. 95 lakhs and Rs. 5 lakhs was paid in cash, the interest was demanded on Rs. 100 lakhs and not Rs. 5 lakhs.

Amendment of Section 50 to allow interest on net tax liability

Realizing the unintended consequence and the disastrous impact it had on the calculation of interest payment, Finance Act 2019 proposed to insert the following proviso in Section 50(1) of the CGST Act 2017:

“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 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”

From the above, it clearly implied that interest to be paid on the amount which was being paid through cash and not the amount which was being paid through the electronic credit ledger. However inexplicably, it was proposed to be implemented only prospectively and not on a retrospective basis.

In the midst of the prevailing dispute, the Madras High Court in case of Refex Industries Limited stated that the tax is to be recovered on the cash portion of the tax on the premise of the above amendment being clarificatory in nature and should be meant to give a retrospective effect. However, the Government refused to adhere to the above stating that the premise on which such judgement was given was that the said proviso was already effective whereas the actual situation was that the said proviso was yet to be notified.

Finally upon great deliberation, it was decided in the 39th GST Council meeting in March 2020 that such amendment would be given a retrospective effect. Even then, such proviso has not been notified or given effect under the law.

Notices from Department for direct recovery and provisional attachment of bank account

Amidst the turmoil in the industry regarding the interpretation of Section 50 and the 'yet to be effective' amendment, the Department proceeded with issuance of direct notices for recovery of the tax amount. Such notice did not allow any opportunity of being heard. It simply stated that the registered person was to pay the specified interest within a given time frame without any recourse to challenge the calculation or the levy of interest in the first place. Failure to pay such interest within that time would directly involve recovery provisions.

Even a request for the process of adjudication and opportunity of being heard did not result in any favorable answers from the Department. In some cases, it has been reported that the Departmental officials had reached the taxpayer's premises for recovery of interest under the guise of inspection which was unprecedented and completely unlawful.

The direct recovery provisions invoked by the Department stemmed from the powers which they contemplated arose from Section 75(12) of the CGST Act 2017. This section provided for direct recovery of unpaid self-assessed tax liability or unpaid interest on such tax. As part of the recovery operations of the department, quite a few cases invited attachment of properties including bank account in terms of Section 83. This was on the backdrop of failure to implement GSTR 3 (which allowed payment of part tax amount), intended provision to levy interest on gross tax liability (only realized later by the Government), not allowing payment through ITC or cash if any part of the liability remained unpaid in GSTR 3B, non-recovery of interest for 2 years or more till the amount boiled to a large sum etc.

Relief through some favourable high court judgements

In the case of LC Infra Projects (P) Ltd vs Union of India [2019] 109 taxmann.com 141 (Karnataka), the Single Bench of Karnataka High Court held that the issuance of Show Cause notice is an essential condition to proceed with the recovery of interest payable thereon under Section 50 of the Act and penalty leviable under the provisions of the Act or the Rules. Further, interest payable as determined by the Departmental authority being without issuing Showcause notice, it was in breach of the principles of natural justice. Thereby the order passed by the authorities could not be sustained. Further, the attachment of bank account without issuance of any notice by invoking the provisions of Section 75(12) of the CGST Act was totally misconceived. Further, it was concluded that such section was applicable only to the self-assessment made by the assessee and not to quantification or determination of interest made by the Authority.

When the above case was referred to the High Court Division Bench [2020] 116 taxmann.com 205 (Karnataka), they affirmed the order of the Single Bench by placing its comment that whether there was a failure on the part of the assessee to pay the tax or any part thereof within the period prescribed, the assessee is entitled to be heard as he could always point out on the basis of the material on record produced that there was no delay in payment of tax. Further, it interpreted that from the plain reading of Section 73(1), the said provision is applicable only in case of non payment or short payment of tax. Assuming Section 73 is applicable in case of non payment of interest, principles of natural justice still ought to be followed before making of any demand.

Further to the above, the Madras High Court while delivering its judgement dated 19th December 2019 in the case of *CGST & Central Excise and others v. Daejung Moparts Pvt. Ltd. and ors* that even though the liability to

pay interest under Section 50 is an automatic liability, still the quantification of such liability, certainly, cannot be by way of an unilateral action, more particularly, when the assessee disputes with regard to the period for which the tax alleged to have not been paid or quantum of tax allegedly remains unpaid. In order to decide and determine such quantum, the objections raised by each petitioners shall have to be, certainly, considered.

Now, in the most recent judgement in case of Mahadeo Construction Co v. Union of India [2020] 116 taxmann.com 262 (Jharkhand), the Jharkhand High Court gave a landmark judgement mandating the issuance of showcause notice before recovery of interest amount. It had been contended that provisions of Section 79 of the CGST Act for recovery of tax could be adopted only when "any amount payable by a person to the Government under the provisions of the Act and the Rules is not paid". It has been submitted that the words "any amount payable" is to be interpreted in the context in which it has been used and the amount payable (unless admitted) can only be determined by initiating adjudication process as provided under Section 73 or 74 of the CGST Act. In absence thereof, initiation of garnishee proceedings is not sustainable in the eyes of law and even amounts to taking extra legal steps for recovery of the amount from an assessee.

It was noted that there was a dispute between the Assessee-Petitioner and the Revenue regarding liability of interest for alleged delayed filing of monthly return for the months of February and March, 2018 and, consequentially, alleged delay in payment of tax.

Further, the Jharkhand High Court referred its own judgement in the case of Godavari Commodities Ltd. v. Union of India and ors., reported in 2019 SCC Online Jhar 1839 wherein it implied that 'tax not paid or short paid' in terms of Section 73 would also include tax not paid within the due date. Thereby, showcause notice should be issued even in such cases. Even otherwise if Section 73 is not applicable, if any penal action is taken against the petitioner, irrespective of the fact whether there is provision under the Act or not, the minimum requirement is that the principles of natural justice must be followed.

Apart from the above, the interpretation of Section 73(7) of the CGST Act 2017 is that even in a case where an assessee files his return as per his own ascertainment, pays the tax and even pays interest, but if the said amount paid by the assessee is falling short of the amount actually payable, the Proper Officer is required to initiate proceedings under Section 73(1) for recovery of the said amount of tax and interest. If an assessee disputes the liability of interest i.e. either disputes its calculation or even the levability of interest, then the only option left for the Assessing Officer is to initiate proceedings either under Section 73 or 74 of the Act for adjudication of the liability of interest. Till such amount is adjudicated and determined, it cannot be considered as amount payable under Section 79 and automatic recovery cannot take place.

Inferences from the above and the future outlook

The following are the inferences which can be drawn after the aforesaid judgements and carrying out of the amendments under Section 50:

- a. Without issuance of showcause notice, recovery of interest liability cannot be carried out by the department automatically. Showcause notice and providing opportunity of being heard would be mandatory. The above

judgements would certainly facilitate those cases where the Department have incorrectly levied or wrongly calculated the interest and thereafter enforced their recovery.

- b. It is most likely that the department would be issuing notice under Section 73 or 74. However, it can be challenged that since there is no short payment or non-payment of tax liability, Section 73(1) and 74(1) cannot be attracted. Solely for the demand of interest wherein no part of the tax is unpaid, whether notice is issuable under Section 73 or 74 can be litigated. What transpires out of this litigation will be interesting to watch.
- c. There seems to be no specific provision under the law under which Notice can be issued solely for interest liability. Even Section 61 for scrutiny of returns requires follow up action under 73 and 74 if it does not result in Departmental or Special Audit. Notices allowed to be issued under the provisions of 'Offences and Penalties' may not hold much significance in case of interest liability only. Only the future beholds the answer to the provision under which the Department can stand its ground for the purpose of recovery of interest under Section 50.
- d. The provision under which the notice is issued can be turn out to be a substantial difference in the quantum of demand that can be raised by the department. The proviso to section 50(1) of the CGST Act 2017 is quite clear in stating that if the demand arises through section 73 or 74, interest would be calculated on the gross tax liability (i.e. before adjustment of input tax credit). If the proceedings are under any other provision, then the interest would be demanded only on the amount being paid through electronic cash ledger. However, it is suggested that in order to avoid litigation over the calculation of interest on gross tax liability, one should suo-moto pay the self-calculated and admitted interest liability.
- e. Difference between Section 73 and 74 for issuance of notice may not be important for interest liability. This is because the interest demand would not change in either Section 73 or section 74. Further, the penalty amount has been quantified under both the sections depending on the quantum of tax liability. Assuming that only interest is pending without any unpaid taxes, penalty should not be leviable in either of the two sections. Even upon reading the provisions of 'Offences and Penalties', no provisions apart from the residuary Section 125 of the CGST Act 2017 (General Penalty) seems to be applicable in the given case.
- f. Till the continuation of GSTR 3B, it is hard to fathom a situation wherein Section 75(12) can be applicable in any case apart from GSTR 9. In GSTR 9 only, the registered person could disclose the interest amount but not pay the same. This is not allowed in GSTR 3B.
- g. In the humble opinion of the author, even if interest is disclosed in GSTR 9C but not paid, that would invite principles of natural justice and adjudication process before recovery of any tax amount. This is because the said liability would not be self-assessed but assessable by the GST auditor which may or may not be agreeable to the taxpayer.
- h. All the recovery actions by the department including attachment of the bank account before providing any opportunity of being heard should face some impediments in view of the aforesaid cases.

- i. In cases where the taxpayer had maintained sufficient balance in electronic credit ledger and the demand amount has been paid through the credit ledger completely, no interest should be payable as the ITC would be considered to have been availed. This principle had been laid down by the Patna High Court in case of M/s Commercial Steel Engineering [TS-553-HC-2019(PAT)-NT]. This principle may not be acceptable to the Departmental authorities especially at the lower level. With proper adjudication process and opportunity of being heard, such automatic demand and recovery of interest liability should certainly reduce if not reach a halt.

Thanks & Regards,

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