Detailed analysis of key issues in 'Interest and Penalties' under GST

For effective implementation of any tax-law and to do justice to tax abiding society, certain provisions to take action against offenders are required. While interest is economic consequence which is compensatory in nature, penal provisions in many cases act as a deterrent and criminal prosecution as a serious punishment against intentional tax evasions. Ignorance is never an excuse in the eyes of law. Hence, all taxpayers, Chartered Accountants and tax professionals are expected to be aware of the severe consequences in the law, which many times may also be due to inadvertent mistakes. In this article, we are going to discuss a few of the key current issues and expected future issues on the topic of interest and penalties under GST. Read on…

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Interest on Net tax liability – Does the retrospective amendment put an end for all the chaos?

After a long deliberation on whether interest is payable on gross tax liability or net tax liability, and whether the amendment is prospective or retrospective basis, finally the battle gets settled when the retrospective amendment of inserting proviso to subsection (1) of section 50 of CGST Act, 2017 gets notified vide *Notification No. 16/2021 – Central Tax dated 1st June, 2021.* While the battle gets settled, the war continues.

The GST council gave an in-principle approval for the amendment in law in its 31st meeting held on December 22, 2018 as below:

'Amendment of section 50 of the CGST Act to provide that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit, i.e., interest would be leviable only on the amount payable through the electronic cash ledger.'

However, when the actual amendment was proposed and implemented, the scope got narrowed down to only a specific scenario. A careful reading of the inserted provision in a sequential manner is as below:

- *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.*

In simple words, interest is payable only on the liability discharged through cash that too only in the scenario of late filing of return, where such return is filed before initiating proceedings u/s 73 or 74. Let us analyse some practical scenarios where interest is still payable on gross tax liability, even though they are discharged of ITC, despite the retrospective amendment being made effective:

Scenario 1

When liability is omitted to be declared in the previous month.

As per *Circular No. 26/26/2017-GST dated 29th December, 2017*, the same can be rectified by way of including such liability in the current returns to be filed. It is also important to appreciate that the legal eligibility to offset tax liability against ITC is available, only when unutilized ITC is available until the expiry of the period of such liability, either availed in the past or to be availed in the current period. It is not legally valid to discharge current tax liability out of future ITC.

Scenario 2

When nil return has been filed inadvertently and both tax liability as well as ITC has been omitted to be declared in Form GSTR-3B of the previous month

It is important to understand that non-reporting of equivalent ITC does not entail automatic offset against unreported liability. Tax liability and ITC should be separately declared and then offsetting procedure should be made while filing Form GSTR-3B. Accordingly, as per *Circular No. 26/26/2017-GST dated 29th December, 2017*, the error has been rectified by way of including both liability and ITC in the current returns to be filed.

Scenario 3

Tax liability discharged utilizing ITC, either voluntarily or after receiving intimation from the proper officer, through Form DRC-03 before initiation of proceedings u/s 73 or 74.

Inference : In all these scenarios, even if the liability is met out of eligible ITC available to be offset for the period, going by the strict wordings of the newly inserted proviso, since supplies made during a tax period is not declared in the return u/s 39 for the ***said period***, interest would still be payable on the entire gross liability, even though it is discharged fully or partially by way of ITC.

Conclusion

Even though the law has been amended retrospectively for interest to be payable on liability discharged through cash, one has to exercise abundant caution in calculating the interest. A careful understanding of the limited applicability of this proviso would help the taxpayer to be more vigilant in timely tax discharges and to avoid unidentified interest consequences which can arise from department in future.

Excess interest paid on Gross tax liability basis – Can this be claimed as refund and is it bound by the time limitation mentioned under section 54 of CGST Act, 2017?

Since the inception of the GST law, there were unsettled multiple views on whether

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interest is payable on gross or net tax liability basis and even after proposing amendment to the law to make interest applicable on net tax liability, clarity had been lacking on whether it is applicable prospectively or retrospectively. In all these times, many taxpayers have paid excessive interest on gross tax liability, either voluntarily or based on demand from the tax department. However, once the law is settled clearly on retrospective amendment, issue arises on whether such excessive interest paid in the past is refundable.

APPROACH 1: REFUND OF 'INTEREST'

As per section 54(1) of the CGST Act, 2017 *any person claiming refund of any* ***tax and interest****, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from relevant date in such form and manner as may be prescribed.*

Without differentiating the interpretation of 'tax and interest' as against 'tax or interest', a plain reading of section 54 allows refund of interest under GST.

As per explanation 2(h) to section 54 of the Act, 'relevant date' means – *'in any other case, the date of payment of tax.'*

It is important to analyse the applicability of such time limitation of two years, since most of the excessive refund would have been paid during the early days of GST implementation.

In the recent case of *Schlumberger Asia Services Ltd. v. Commissioner of CE & ST, Gurgaon-*I *(Service Tax Appeal No. 60095 of 2021),* Hon'ble CESTAT-Chandigarh, on 24-5-2021, analysed the applicability of time limitation of two years for refund in the case of retrospective amendment to section 140 (Transitional arrangements for ITC) of the Act on 30-8-2018 (w.e.f. 1-7-2017) held that, '*when there was no provision of law existed,* ***when amendment itself takes on 30-8-2018, therefore, the relevant date of filing the refund claim shall be 30-8-2018****. Therefore, refund claim filed within one year of the said date and is not barred by limitation.'*

Based on the aforesaid judgement, it can be inferred that the ***relevant date*** for retrospective insertion of proviso to section 50 ***is 1st June, 2021***, being the date of *Notification No. 16/2021 – Central Tax.* Thus, refund of any excess interest paid can be claimed within two years from 1st June, 2021.

APPROACH 2: REFUND OF 'AN AMOUNT PAID ERRONEOUSLY'

In the recent case of *Comsol Energy Private Limited vs State of Gujarat (order dated 21st Dec 2020), (Special Civil Application No. 11905 of 2020)*, Hon'ble Gujarat High Court **allowed refund of IGST paid on ocean freight beyond limitation period prescribed under GST Law**.

> Since the inception of the GST law, there were unsettled multiple views on whether interest is payable on gross or net tax liability basis and even after proposing amendment to the law to make interest applicable on net tax liability, clarity had been lacking on whether it is applicable prospectively or retrospectively.

M/s Comsol Energy Private Limited filed the refund claims of IGST paid on ocean freight under the RCM after the decision of Hon'ble High Court, Gujarat in *Mohit Minerals (Pvt.) Ltd. v. Union of India and others [Special Civil Application No. 726 of 2018 dated January 23, 2020]* in which it was held that RCM on ocean freight lack legislative competency and the same were declared as unconstitutional.

Department issued Deficiency memo against such refund claim and hence writ application was filed by M/s Comsol Energy, wherein Hon'ble Gujarat High court:

- Observed that, Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. Since, the amount of IGST collected by the Central Government is without authority of law, the Respondent is obliged to refund the amount erroneously collected.

- Further observed that, section 54 of the CGST Act is applicable only for claiming refund of any tax paid under the provisions of the CGST Act. The ***amount collected by the respondent without authority of law is not considered as tax collected by them and therefore, section 54*** of the CGST Act is not applicable.

- Noted that, section 17(1) of the Limitation Act is the appropriate provision for claiming the refund of the amount paid to the Respondent under the mistake of law.

- Set aside Impugned Deficiency Memo and directed the Respondent to process the refund claim along with simple interest at the rate of 6% per annum at the earliest.

Based on the aforesaid judgement, it may be argued that the excess amount in the form of interest on gross tax liability is ***merely an amount collected without authority of law***, and hence refundable without time limitation under section 54 of the CGST Act.

Possibility of multiple penalties for two offences in same transaction

Section 122(1) of the CGST Act contains list of 21 offences for which penalty shall be levied. The issue analysed here is whether penalty can be levied under more than one category of offence arising out of the same transaction.

Example: A person liable to obtain registration under GST law has issued tax invoice and supplied goods without obtaining the registration. In this scenario, he is issuing an incorrect invoice since he is not allowed to issue invoice without obtaining registration. Thus, the following two penal provisions are attracted:

Section 122(1) Where a taxable person who

(i) supplies any goods or services or both without issue of any invoice ***or issues an incorrect or false invoice with regard to any such supply****;*

(xi) is liable to be registered under this Act but fails to obtain registration;

Concept of Double Jeopardy

'Double jeopardy' refers the prosecution or punishment of a person twice for the same offence. The rule against double jeopardy is stated in the maxim *nemo debet bis vexari pro una et eadem causa*. It is a significant basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence.

Reference to legacy law decisions

1. The Hon'ble Kerala High Court in the case of *Asst. Commissioner of Central Excise vs. Krishna Poduval – 2005 (1) S.T.R. 185 (Kerala)* has held that penalty under section 76 of the Finance Act, 1994 can be imposed for mere default/delay in payment of Service Tax in addition to the penalty under section 78 and these penalties are mutually exclusive and even if offences are committed in the course of same transaction or arise out of the same act, penalty is imposable for ingredients of both offences. The rationale explained in the said decision is as below:

'The penalty imposable under Section 76 is for failure to pay service tax by the person liable to pay the same in accordance with the provisions of Section 68 and the Rules made thereunder, whereas Section 78 relates to penalty for suppression of the value of taxable service. Of course these two offences may arise in the course of the same transaction, or from the same act of the person concerned. But we are of opinion that the incidents of imposition of penalty are distinct and separate and even if the offences are committed in the course of same transaction or arises out of the same act, the penalty is imposable

for ingredients of both the offences. There can be a situation where even without suppressing value of taxable service, the person liable to pay service tax fails to pay. Therefore, penalty can certainly be imposed on erring persons under both the above Sections, especially since the ingredients of the two offences are distinct and separate.'

2. In the case of *Ranjit Singh Alias Jeeta vs Union of India and Another (FAO No. 4458 of 2007 (O&M)*, Hon'ble Punjab and Haryana High Court gave a similar verdict on 11th December, 2009. Relevant extracts of the decision are as below:

   In order that the prohibition is attracted, the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred.

> "'Double jeopardy' refers the prosecution or punishment of a person twice for the same offence. The rule against double jeopardy is stated in the maxim *nemo debet bis vexari pro una et eadem causa.*

On the face of it, both the statutes and the provisions thereof operate in different fields. Different ingredients have been provided for levy of penalty for different offences, which do not over-lap each other, even if the facts emanating the proceedings under the two statutes may be common.

If the facts of the present case are considered in the light of enunciation of law on the principles of double jeopardy, as referred to above, the only conclusion which can be arrived at is that the levy of penalty on the appellant under the 1973 Act cannot be said to be barred on account of principle of double jeopardy, as the proceedings initiated either by the authorities under the 1962 Act or under the 1973 Act cannot be held to be on account of prosecution and conviction by a court of law, as is required to be established and further the same being under two different statutes, where ingredients for levy of penalty are altogether different.

Inference: If the ingredients of the two offences are different, then there would be two separate offences and consequently two penalties can be levied. Therefore, as stated in the above example, there are two different offences having two separate ingredients (1) failure to obtain GST registration and (2) issuance of incorrect invoice, thereby collecting tax without authority of the law. Hence, there would be a scenario where two different penalties can be levied on the same transaction. It is not the act rather the ingredient that determines whether penalty is leviable under more than one provision. Though there is no specific rule that more than one penalty shall be levied, there is no bar for such levy of multiple penalties.

> "If the ingredients of the two offences are different, then there would be two separate offences and consequently two penalties can be levied.

Double penalty under Section 129 & 130

The issue of whether proceeding can be carried out by the authorities under section 129 as well under section 130 at a time for the same offence has been deliberated in detail by the Hon'ble High Court of Gujrat in the case of *Synergy Fertichem Private Limited vs. State of Gujarat order dated 23 Dec 2019 (Special Civil Application No. 4730, 6125, 6118, 9105, 10018 of 2019)*. The key observations of the Hon'ble Court are as below:

- *Section 129 of the Act talks about detention, seizure and release of goods and conveyances in transit. On the other hand, Section 130 talks about confiscation of*

goods or conveyance and levy of penalty and fine. Although, both the sections start with a non-obstante clause, yet, the harmonious reading of the two sections, keeping in mind the object and purpose behind the enactment thereof, would indicate that they are independent of each other. Section 130 of the Act, which provides for confiscation of the goods or conveyance is not, in any manner, dependent or subject to section 129 of the Act. Both the sections are mutually exclusive.

- *Even if the goods or the conveyance is released upon payment of the tax and penalty under Section 129 of the Act, later, if the authorities find something incriminating against the owner of the goods in the course of the inquiry, if any, then it would be permissible to them to initiate the confiscation proceedings under Section 130 of the Act.*
- *Section 130 of the Act is not dependent on clause (6) of Section 129 of the Act.*

Section 130 of the Act, which provides for confiscation of the goods or conveyance is not, in any manner, dependent or subject to section 129 of the Act. Both the sections are mutually exclusive.

- *Sections 129 and 130 respectively of the Act are mutually exclusive and independent of each other. If the amount of tax and penalty, as determined under Section 129 of the Act for the purpose of release of the goods and the conveyance, is not deposited within the statutory time period, then the consequence of the same would be forfeiture of the goods and the vehicle with the Government. This does not necessarily imply that the confiscation proceedings can be initiated only in the event of the failure on the part of the owner of the goods or the conveyance in depositing the amount towards the tax and liability determined under section 129 of the Act.*
- *From the plain reading of sections 129 and 130 of the Act, it is clear that the suppliers or receivers of the goods transporting any goods in contravention of provisions of the Act or the Rules made thereunder are liable for the detention or seizure of the goods under Section 129 of the Act and under Section 130 (i)(v) of the Act for confiscation of the goods and conveyance. Thus, for the same breach and/or contravention of the provisions of the Act, there are two types of penalties provided under Section 129 and Section 130(i)(v) of the Act.*
- *There is need to look into both the provisions, i.e., Sections 129 and 130 of the Act and amend the sections accordingly so as to remove certain inconsistencies. Let this aspect be looked into by the Government in accordance with law.*

It is interesting to note that the concluding recommendation of the Hon'ble High Court to revisit the two provisions has been considered by the Government and amendment has been proposed in the Finance Act 2021, delinking Section 129 and Section 130 and is yet to be made effective.

Penalty under Assessment provisions vs Penalty provisions

As per Explanation 1(ii) to Section 74 of the Act, *where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, ~~129 and 130~~ are deemed to be concluded.*

Note: Reference to Section 129 and 130 has been removed from this explanation as per the amendment in Finance Bill 2021. However, the same is not yet notified.

Inference: In such scenarios, where the law explicitly prescribes the restriction, there shall not be any possibility of levy of multiple penalties. Otherwise, where there are multiple ingredients in a single act, it may call for multiple penalties. ■■■