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Madras HC: GST Interest on Net Tax Liability

Synopsis:

The Hon'ble Madras HC in its recent decision in the case of ***Refex Industries Limited v. The Assistant Commissioner of CGST & Central Excise [Writ Petition No. 23360 & 23361 of 2019 dated January 6th, 2020]*** has held that interest u/s 50 of CGST Act can be levied only on belated 'cash' component of tax and not on 'ITC' component.

The Hon'ble HC, *inter alia*, relied on the newly inserted proviso to Section 50(1) of the CGST Act to opine that this recently inserted proviso, as per which interest shall be levied only on the 'cash' part of the tax inserted w.e.f. August 01, 2019, clearly seeks to correct an anomaly in the provision as it existed prior to such insertion, hence should thus, be read as clarificatory and operative retrospectively.

This judgment has come at that time while the issue of calculation of interest on delayed GST payment is being much talked about. **This newsletter discusses the above judgment and also makes an analysis as to whether the amendment u/s 50(1) of the CGST Act has been given effect yet or not.**

Facts:

M/s. Refex Industries Limited ("Refex") & M/s. Sherisha Technologies Pvt. Ltd. ("Sherisha"), collectively referred as "**the Petitioners**" have filed simultaneous Writ Petitions respectively i.e. **W.P.No.23360 & W.P.No.23661 of 2019** in the Hon'ble Madras High Court ("**Madras HC**") against the Assistant Commissioner of CGST & Central Excise, Rajakilpakkam ("**Respondent 1**") and the Superintendent of Central Tax, Rajakilpakkam ("**Respondent 2**"), collectively referred to as "**the Respondents**".

The Petitioners are registered as assesseees under the provisions of the CGST Act, 2017 ("**CGST Act**") and have admittedly filed Returns of Income belatedly for the period 2017-2018. The Respondent 2 have issued Communications dated May 7th, 2019 (in W.P .No. 23360 of 2019) and May 15th, 2019 (in W.P.No.23361 of 2019) computing the delay in filing of Returns and consequently the interest to be remitted on the tax amount shown in the Returns.

Demand notices were issued to the Banks of the Petitioners seeking to recover the arrears of interest from the balances in their accounts. The Petitioners objected stating that they had sufficient Input Tax Credit ("**ITC**") available with the Department and thus interest could be demanded, if at all, only on the cash component of the tax remitted belatedly.

Issue involved:

Whether Interest Liability in GST arises only on net tax liability, which was paid in cash?

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Held:

The Hon'ble Madras HC has passed the following order in the matter of **Writ Petition No. 23360 & 23361 of 2019 dated January 6th, 2020** observing as follows:

- There is some history to this matter as this very issue appears to have been raised earlier by a Petitioners in **W.P.No.15978 of 2019**. A learned single Judge, by order dated June 13th, 2019, directed the Petitioners therein to remit the admitted tax, being tax on the cash component of the demand belatedly paid and the Department to dispose the representation of the Petitioners in that case to the effect that there would be no liability to interest in regard to the ITC available with the Department.
- As against the aforesaid order, Writ Appeals were filed before the Division Bench and by order dated July 23rd, 2019, the two Hon'ble Judges expressed divergent views. One Judge dismissed the Writ Appeals, whereas the second Judge was of the view that the legal issue on the levability of interest called for a deeper consideration than had been extended by the learned single Judge at the stage of admission and such summary dismissal required revisiting.
- The matter was thus referred to a Third Judge, who by his order delivered on December 19th, 2019, held that Writ Appeals of the Revenue were not warranted, since the learned single Judge had not in the original instance determined the legal issue in a manner detrimental to the Revenue, but only remitted the matter back to the Assessing Officer to determine the quantum of liability.
- The question crystallised by the Third Judge for consideration is as to whether interest on belated payment of tax as contemplated under Section 50 of the CGST Act is automatic or whether the same would have to be determined after considering the explanation offered by the assessee. At paragraph 29, the Hon'ble Judge holds that the liability to pay interest under Section 50 is automatic. However, since the Petitioner in that case had raised disputes with regard to the period for which the tax had allegedly not been paid, as well as the quantum of tax remaining unpaid in excess of ITC, all being questions of fact, he was of the view that such matters would have to be resolved after hearing the assessee. He categorically states *'therefore in my considered view though the liability fastened on the assessee to pay interest is an automatic liability, quantification of such liability certainly needs an arithmetical exercise after considering the objections if any, raised by the assessee.'*
- Perusing Section 50, the HC observed that Section 50 of the CGST Act provides for interest on belated payment of tax and as held by the third Judge, such levy is 'automatic', and is intended to compensate the revenue for the remittance of tax belatedly and beyond the time frames permitted under law.
- Though in the context of the Income Tax Act, 1961, the question of whether remittance of interest under Sections 234A, 234B and 234C of the Income Tax Act,

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1961 for belated filing of return, belated remittances of advance tax and deferment of advance tax are mandatory came to be considered by the Hon'ble Supreme Court in the case of **Commissioner Of Income Tax, Mumbai vs Anjum M.H.Ghaswala & Ors (252 ITR 1)**, and held to be compensatory and hence mandatory. The principle of the said judgment applies on all fours to the present case.

- Section 50 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 with the Department to the credit of the assessee since the latter being available with the Department is neither belated nor delayed.
- The Hon'ble Madras HC further commented that the 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 August 1st, 2019, but clearly seeks to correct an anomaly in the provision as it existed prior to such insertion and hence should be read as clarificatory and operative retrospectively.
- HC rejected reliance on the decision of the Telangana High Court in the case of **Megha Engineering and Infrastructures Ltd. v. The Commissioner of Central Tax and others (2019-TIOL 893)**, noting that the amendment brought to Section 50(1), was only at the stage of press release by the Ministry of Finance at the time when the Division Bench passed its order and the Division Bench thus stated that *"unfortunately, the recommendations of the GST Council are still on paper. Therefore, we cannot interpret Section 50 in the light of the proposed amendment"*.
- **Today, however, the amendment stands incorporated into the Statute and comes to the aid of the assessee.**

Consequently, the Writ Petitions were allowed, and the Impugned Notices were set aside.

Our Comments: Is the amendment u/s 50(1) of the CGST Act really effective?

Though the above judgment of Madras HC dwells with retrospective application of proviso to Section 50(1) of the CGST Act which talks about applicability of interest on net tax liability of GST, but it is important here to examine if the above proviso as was proposed to be inserted in the Budget 2019 is really effective?

Perusal of the Finance (No. 2) Bill, 2019 would reveal that Section 50 of the CGST Act is amended vide clause 100 therein, which is reproduced as under:

"100. In section 50 of the Central Goods and Services Tax Act, in sub-section (1), the following proviso shall be inserted, namely:—

"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

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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.”

Interestingly, though the Finance (No. 2) Bill, 2019 was enacted on August 1, 2019, but enactment of clause 100 [dealing with amendment in Section 50(1)], is still a question. At this juncture, it is important here to note that as per Section 1 of the Finance (No. 2) Act, 2019, following is provided w.r.t. “Short Title and Commencement”:

“1. (1) This Act may be called the Finance (No. 2) Act, 2019.

(2) Save as otherwise provided in this Act,-

(a) sections 2 to 69 shall be deemed to have come into force on the 1st day of April, 2019;

(b) sections 92 to 112 and section 114 shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.”

Thus, Section 100 of the Finance (No. 2) Act, 2019, is purported to take effect from such date as the Central Government may, by notification in the Official Gazette, appoint. And, **as of now, there is no notification issued by the Government to bring in effect Section 100 of the Finance (No. 2) Act, 2019, which is the core provision of discussion in respect of liability to pay interest on net tax liability u/s 50(1) of the CGST Act.**

In nutshell, the question of retrospective or prospective application of newly inserted proviso to Section 50(1) of the CGST Act seems to be ignoring the very fact of the provision itself being non-effective as on date.

Further, there have rounds of discussion on the stated issue and off late, the ***CBIC in its series of tweets (on February 15, 2020)*** had categorically stated that ***“The GST laws, as of now, permit interest calculation on delayed GST payments on the basis of gross tax liability..... In spite of this position of law and Telangana High Court’s order, the Central Government and several State Governments, on the recommendations of GST Council, amended their respective CGST/SGST Acts to charge interest on delayed GST payment on the basis of net tax liability..... Such amendment will be made prospectively. The States of Telangana and West Bengal are in process of amending their State GST Acts. After the process of amendments is complete, the changed provisions can be put in operation for the entire country”.***

Even the inter-departmental directive issued by the CBIC vide ***Instruction F. No. CBEC-20/16/07/2020-GST dated February 10, 2020***, also clarifies that the interest is to be paid on the tax liability that is paid belatedly either in cash or through ITC utilization.

Seemingly, the conundrum on issue of taxability of interest on gross tax liability or net tax liability seems not to be settling, more so because there has been a humongous delay in implementing the provision itself, which was envisaged as a relief for taxpayers. As of now, Section 50(1) of the CGST Act mandates calculation of interest on gross tax liability only. **But, ideally, the interest must be applied on net tax liability only as rightly discussed and held**

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by the Hon'ble Madras HC and the above amendment to Section 50(1) of the CGST Act, being clarificatory in nature, must be given retrospective effect.

Important Provisions:

Section 50(1) of the CGST Act, 2017: Interest on Delayed Payment of Tax

“(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.

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.

.....”

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