

AMOUNT PAID DURING INVESTIGATION
WHETHER INTEREST PAYABLE ON REFUND

By

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In this Article, an attempt has been by the Author to explain exhaustively various situations in which the assessee would be entitled to claim interest in the event of delay in refund of amount withheld by the Department without any justifiable reasons.

2: On many occasions, Departmental officers visits the units and carry out detailed and exhaustive investigation. During investigation, under the threat of arrest of Director, Senior Officers, Partners and Sole Prop, detention of goods and other coercive measures, the officers of the Department compel the assessee to Deposit the amount alleged to be duty, tax being evaded by the assessee.

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3: There were/are cases where the officers of the Department compel/pressurize the party to deposit the amounts which is almost equal to the amount of duty / taxes alleged to be evaded by the party. Now, in 2019, it has also come to notice besides, tax, penalty and also perforced to be deposited. After the completion of investigation, the Department issues Show Cause Notice to the party and in almost all cases, the demand sought to be raised in the SCN, get confirmed under the order of Adjudication passed by the Adjudicating Authority. In the pre-GST regime, in most of the cases, the first appeal was to be filed

before Custom Excise and Service Tax Appellate Tribunal, (hereinafter called CESAT) and ultimately proceedings get culminated into an Final Order being passed by CESTAT and in most of the cases, because of faulty investigation, demand of duty/tax, interest and penalty is set aside with consequential relief.

4: Of course, there were cases where the First Appeal was to be filed before the Commissioner (Appeal), who also invariably confirms the demand sought to be raised in the SCN and ultimately, the party gets the real justice in the hand of Hon'ble CESTAT – where one of the relief is that the party shall be entitled to “consequential relief”. In other words, in case any Amount/Deposit/ purported tax so paid/deposited previously shall be refunded to the party in case the Department accept the Final Order of the CESTAT.

5: In most of the cases, at the time of consideration of the application of the party for refund of amount/deposit/tax, it is invariably delayed for various reasons which are not necessary to be dealt with. There are two situations where the party feels that they are entitled to interest for delayed refund viz: (i) in a case where the party had deposited the amount during investigation at the behest of the Department and ultimately refunded after Appellate Order attained finality (ii) where deposit was made (by way of pre-deposit) as a condition precedent for filing of an appeal before Appellate Authority or Appellate Tribunal and becomes refundable after the appellate order attained finality. Fortunately, Section 115 CGST Act now allow interest, at the rate to be specified, from the date of deposit. It may kindly be appreciated in Section 115, the word used is “amount” and not “tax””duty” or “levy”. Therefore, the Department also does not dispute that pre-deposit is only “amount” and not “tax””duty” or “levy”.

6: However, let me analyze Section 54(1), which, inter-alia, provide as under:-

Section 54(1): 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 the relevant date in such form and manner as may be prescribed.

7: The second limb of Section 54(1) provide for refund of “any other amount”. In order to seek refund, we have to see provisions of Section 54 of CGST Act and more particularly Section 54(8)(e), which, inter-alia, reads as under:-

Section 54(8)(e): the tax and interest, if any, or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any person; or

AMOUNT PAID DURING INVESTIGATION SHALL ALWAYS BE TREATED AS “DEPOSIT” & NOT “TAX” OR “DUTY” OR LEVY OR CESS”

8: The Hon’ble Allahabad High Court in the case of Ebiz.com (P) Ltd Vs. CCE MANU/UP/3167/2016, while holding that any amount paid by the party during investigation, shall be always be treated as “deposit” and shall neither be treated as a “duty” or “tax”. The court has held as follows:-

22. It has been consistent view of various courts that any amount, deposited during pendency of the adjudication proceedings or investigation is in the nature of deposit made under protest or pre-deposit as, therefore, principal of unjust enrichment would not be attracted.

9: The Hon'ble Madras High Court in the case of CCE Vs. Pricol Ltd MANU/TN/1261/2015 has held as under:-

There are very many judgments of various courts, which have also reiterated the same principles that any amount deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and , therefore, principal of unjust enrichment would not apply.

10: The aforesaid decisions of the Madras High Court and the Allahabad High Court in Pricol Ltd. and EBIZ. Com Pvt. Ltd., respectively, were followed by the Allahabad High Court in subsequent decision cited as CCE Vs. Eveready Industries India Ltd. MANU/UP/4095/2017.

11: In view of the above discussions, there is no manner of doubt that amount paid during investigation is neither “duty” nor “tax” nor “levy” nor “cess”, and, therefore, clearly called “amounts” so as to fall within the ambit of Section 54(8)(e) of CGST Act, 2017 and the Proper Officer shall refund the amount to the party upon completion of formalities.

12: In the scheme of Section 54, 56 and 57, though there is a provision of refund of “any other amount” as envisaged in Section 54(8)(e) of CGST Act but, there is no provision for payment of interest in the event of delay in refund of “any other amount”. However, proviso to Section 56 says that where any claim arises from the order of Adjudicating Authority, Appellate Authority and Appellate Tribunal, is not refunded within sixty days, interest at such rate not exceeding 9%, as may be notified, would be payable. The point for consideration arises as to whether when in the main body of Section 56, the word only “tax “ is

appearing, can we interpret proviso so widely so as to include any other amount besides “tax” while interpreting the words of proviso.

13: The Supreme Court in *Tribhovandas Haribhai Tamboli Vs. Gujarat Revenue Tribunal & Ors.* MANU/SC/0355/1991MANU/SC/0355/1991 : (1991) 3 SCC 442, while defining the principle as to how proviso is to be interpreted, has held as follows:-

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field, which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other.

14: The Supreme Court in *UOI Vs. Dilip Kumar Singh* MANU/SC/0910/2015 has, while interpreting the scope of “proviso”, has observed as under:-

"20. Equally, it is settled law that a proviso does not travel beyond the provision to which it is a proviso. Therefore, the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

15: This is also ratio laid down by the Hon’ble Supreme Court in *Dwarka Prasad v. Dwarka Das Saraf*, [MANU/SC/0505/1975 (1976) 1 SCC 128]"

16: There is no gainsaying in the fact that - for example, the investigation commenced say in the year 2005, an amount of Rs.1.5 Crores has been deposited during investigation. Later on SCN has been issued, adjudication upon and first appeal filed before the CESTAT which came to be decided in the year 2018 in favour of assessee. Thereafter, the application for refund of the amount paid during

investigation, has been filed and refund was granted in 2019 – but, department does not grant any interest for the period 2005 to 2019.

14: In my humble view, there is no specific provision for grant of interest on the amount paid since words used in Section 56 are “tax” and not “any other amount” - as has been used in sub-section (1) of Section 54 or in Section 54(8)(e). Hence, there is no specific prohibition in grant of interest by the judicial and quasi-judicial authorities nor there is any enabling provision for grant of interest as a consequence of refund of amount paid during investigation. Hence, there is no material difference in position of law both in pre-GST regime and post GST regime. Consequently, position of law as enunciated thus far shall equally apply to the post GST regime with equal virulence.

PAYMENT OF INTEREST ON THE AMOUNT DEPOSITED BY PARTY AT THE BEGINNING OF INVESTIGATION AND REMAINED LYING WITH DEPARTMENT TILL FINAL DECISION.

15: The Gujarat High Court in Hindustan Coca-Cola Beverages (P) Ltd Vs. UOI MANU/GJ/0126/2013, while repelling the arguments that since there is no provision for payment of interest and, therefore, interest cannot be granted, has held as under:-

5. The contention to the effect that no interest is payable because there is no provision of interest under the scheme of the Act is also thoroughly mis-conceived and mis-placed. When Department acts illegally and not as per the Scheme of the Act, the interest on such refund can never be provided for under the scheme of the Act.

6: It was further pointed out by the Learned Senior Advocate for the petitioner that the decision of the Hon'ble Supreme Court in Sandvik Asia Ltd Vs. CIT has been referred to a Larger bench in the case of CIT Vs. Gujarat Flouro Chemicals MANU/SC/0689/2012. The said decision is neither stayed nor suspended and, therefore, continues to hold the field. Moreover, the said decision is doubted with respect to the issue whether interest is payable by the Revenue to the assessee if the aggregate of installments of Advance Tax/TDS paid exceeds the assessed tax. Therefore, a doubt is cast only in respect of the findings which is in the context of Section 214 and Section 244 of the Income Tax Act, and not with regard to grant of interest as compensation to the party who has been wrongfully deprived of the use of its money by an illegal retention of the same by the authority. Therefore, the said decision will continue to hold good in respect of refund cases, on equitable considerations, where any amount is wrongfully withheld from an assessee without authority of law.

16: The Division Bench of Hon'ble Tribunal in the case of Kerala Chemicals and Proteins Ltd. vs. CCE: MANU/CB/0426/2006 has granted interest over delayed payment of interest although there is no provision for payment interest over interest - although invariably it is argued that the Tribunal is a create of statute and cannot act beyond province of law.

17: The Hon'ble Tribunal in the case of BSL Ltd. vs. CCE (17.05.2019 - CESTAT - Delhi), has observed as under even though there is no provision for grant of interest over delayed payment of interest, yet it is allowable because there is no prohibition in law:-

The Tribunal in Kerala Chemicals (supra) is applicable on the facts of this case since the same is in accordance with the decisions of the Hon'ble Supreme Court and the Hon'ble Gujarat High Court as mentioned in earlier paragraphs although these decisions have not been discussed in the aforesaid decision of the Tribunal. Only because there is no provision for interest on refund of delayed interest that does not mean that there is any bar or prohibition for granting the same and therefore following the law laid down by the Hon'ble Supreme Court and the decisions of Hon'ble Gujarat High Court as well as the decision of the coordinate Bench of the Tribunal as aforesaid, the prayer of the Appellant for grant of interest on delayed payment of interest is allowed and the impugned order of the learned Commissioner is set aside.

15: The Hon'ble Kerala High Court in the case of Sony Pictures Networks (P) Ltd Vs. 2017(353) ELT 179 (Ker) has held as follows:—

14: Now, the sole question remains to be considered is what is the nature of interest that the petitioner is entitled to get. As discussed above in the judgment CCE Vs. ITC (supra), the Apex Court confined the interest to 12% and further held that any judgment/decision of any High Court taking contrary view, will be no longer good law. The said judgment is rendered, in my considered opinion under similar circumstances. So also, in Kull Fire works Industries Vs. CCE 1997(95) ELT 3 SC, the pre-deposit made by the assessee was directed to be returned to him with 12% interest.

16: The Hon'ble CESTAT in the case of Ghaziabad Ship Breakers Pvt. Ltd. Vs. Commissioner of Customs MANU/CS/0290/2010 has held that interest @ 12% shall be allowable for the period the amount remained

kept/deposited with the Department to till the date of refund. Subsequently, the Tribunal, in a very latest case of Arihant Tiles and Marbles Pvt. Ltd. MANU/CE/0346/2019, has held that interest by way of compensation is allowable relying upon the judgment in the case of Sandvik Asia Ltd. 2006 (196) ELT 257 SC.

17: The Hon'ble CESTAT in the case of Binrajka Steel Tubes Ltd. vs. CCE: MANU/CB/8380/2007 has observed as under:-

The Hon'ble Gujarat High court, in the case of Vijay Textiles, has held that if the Excise authorities have collected any amount as tax without the authority of law, it is just and proper and that they should pay interest at the rate of 12% per annum from the date of collection of the said amount till the date of actual repayment. The Hon'ble Calcutta High Court, in the case of Dilichand Shreelal (cited supra), has held that the department is liable to pay interest at the rate of 12% p.a. when the duty collected is unauthorized. The Hon'ble Rajasthan High Court, in the case of Adarsh Metal Corporation (cited supra), has held that there is no need to file any claim arising out of order passed in appeal and the state is liable to refund the amount with interest at the rate of 12%. The Hon'ble Calcutta High Court, in the case of Calcutta Chemical Co. Ltd. (cited supra), has held that the department is liable to pay interest for unauthorized collections. The Hon'ble Calcutta High Court, in the case of East Anglia Plastics Ltd. (cited supra), has awarded interest at the rate of 10% for the use of money collected without authority of Law. The ratio of the above case laws is clearly applicable to the present case.

8. Therefore, we allow the payment of interest from the date of payment of the duty by the appellant to the department till the

date of payment of refund at the rate as notified for interest on refund under Section 11BB during the relevant periods.

19: Further, the Hon'ble CESTAT in the case of Marshall Foundry & Engg. (P) Ltd Vs. CGST Appeal No. E/60916/2019-Ex(SM) (Date of pronouncement 28.11.2019), while discussing the entire law on the subject, has held that Appellants are entitled to claim interest for the period the amounts remained with the Department i.e. from the date of deposits made during investigation to till, the amount is actually refunded by the Department to the party after the decision of appeal.

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