

**April, 2020**

**Edition I**

# **RECOVERY OF GST INTEREST (UNDER DISPUTE)**

**WITHOUT ADJUDICATION – WHETHER PERMISSIBLE?**

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## RECOVERY OF GST INTEREST (UNDER DISPUTE)....

Without adjudication – Whether permissible

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### **KEY QUESTION**

*Whether interest liability under Section 50 of the Central Goods and Services Tax Act, 2017 can be determined without initiating any adjudication process either u/s 73 or 74 of the CGST Act in the event of an assessee raising dispute towards liability of interest?*

### **BACKGROUND**

The aforesaid question appears to be of seminal importance since the Central Goods and Services Tax Act, 2017 (for short 'CGST Act/the Act') being relatively new, the stakeholders are bound to have divergent views as to the interpretation of its various provisions. Indeed, of late in many cases the tax authorities have issued the demand and have initiated recovery proceedings under Section 79 of the Act against many assesses by attaching their bank accounts for the recovery of the interest payable under Section 50 of the Act without first adjudication of

the same or without even issuance of the show cause notice.

Such straight away demand and recovery proceedings are based on the premise that the liability to pay the interest on the delayed returns or on delayed payment of tax is automatic and consequently it becomes an amount payable under the Act or the Rules made thereunder hence it does not require any adjudication by virtue of Section 75 (12) of the CGST Act.

Hence, recovery proceedings for the recovery of such interest can be initiated straight away under Section 79 of the CGST Act without first doing any adjudication under Section 73 or 74 of the CGST Act or issuance of show cause notice.

### **RELEVANT LEGAL PROVISIONS**

In view of the aforesaid, let us examine some relevant provisions of the CGST Act which are reproduced below:-

#### **Section 39. Furnishing of returns**

*(1) Every registered person, other than an Input Service Distributor or a non-*

resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form, manner and within such time as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars as may be prescribed:

*PROVIDED* that the Government may, on the recommendations of the Council, notify certain classes of registered persons who shall furnish return for every quarter or part thereof, subject to such conditions and safeguards as may be specified therein.

.....

(7) Every registered person, who is required to furnish a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return:

*PROVIDED* that the Government may, on the recommendations of the Council, notify certain classes of registered persons who shall pay to the Government the tax due or part thereof

as per the return on or before the last date on which he is required to furnish such return, subject to such conditions and safeguards as may be specified therein.”

**Section 50. Interest on delayed payment of tax**

Section 50(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.

Section 50 (2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

Section 50 (3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim

or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent, as may be notified by the Government on the recommendations of the Council.”

**Section 73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts.**

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized for any reason, other than the reason of fraud or any willful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in subsection (10) for issuance of order.

(3) Where a notice has been issued for any period under subsection (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or subsection (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

**Section 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.—**

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which

*has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*

*(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in subsection (10) for issuance of order.*

*(3) Where a notice has been issued for any period under subsection (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under sub-section (1), on the person chargeable with tax.*

*(4) The service of such statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of Section 73,, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under*

*sub-section (1) are the same as are mentioned in the earlier notice.*

*(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*

*(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.*

*(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.*

*(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of show cause*

notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

*Explanation 1.*—For the purposes of section 73 and this section,—

(i) the expression “all proceedings in respect of the said notice” shall not include proceedings under section 132;

(ii) 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.

*Explanation 2.*—For the purposes of this Act, the expression “suppression” shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer”

**Section 75. General provisions relating to determination of tax.**

(12) 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.



## **ANALYSIS OF LEGAL PROVISIONS AND JUDICIAL PRECEDENTS**

Thus perusal of the provisions of Section 39(1) read with Section 39(7) of the CGST Act shows that an assessee is liable to pay tax within 20<sup>th</sup> day of the succeeding month for which the assessee was liable to file his monthly return. Further, Section 50 of the Act contains provisions relating to Levy of Interest on delayed payment of tax. The words “pay, on his own, interest at such rate” employed in sub-section (1) prima facie show that the liability to pay the interest is automatic however, perusal of sub-section (2) of Section 50 itself would show that interest payable under sub-section (1) of Section 50 is required to be calculated in such manner, as may be prescribed.

Further, perusal of the Section 73 and Section 74 of the Act shows that both these sections provide for the procedure for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by an assessee. Both the sections have

almost similar provisions with some variations however, they both operate in different situations. While Section 73 operates where any element of fraud or any wilful-misstatement or suppression of facts to evade tax is not involved, on the other hand Section 74 is attracted in situations where fraud or any wilful-misstatement or suppression of facts to evade tax is also involved. From the provisions of Section 73 and Section 74 of the Act it is to be seen that where it appears to the Proper Officer that any tax has not been paid or short paid” the Proper Officer shall serve notice on the person chargeable with tax, “which has not been so paid” or “which has been short paid” requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50 of the Act and a penalty leviable under the provisions of the Act and Rules.

Therefore, a bare reading of Section 73(1) or Section 74(1) especially the words “amount specified in the



notice along with interest payable thereon under Section 50” used in both sections clearly show that a show cause notice is not only required to be issued for the short payment of tax or non-payment of tax, but also for the recovery of interest under Section 50 of the CGST Act. However, the question arises whether the show cause notice or adjudication is necessary before recovery of interest under section 50 of the Act in all situations. Before we discuss that, let us examine 75 (12) of the Act.

As is seen from the perusal of Sub-section 12 of Section 75 of the Act, reproduced above, the said section clearly empowers the tax authorities to initiate the recovery proceedings against the assessee without taking recourse to the adjudication under section 73 or 74 of the Act, 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. However, the underlined words are of great import

here which clearly show that sub-section 12 of section 75 can be taken recourse to by the tax authorities only and only in such cases where the amount of self assessed tax or interest thereon remained unpaid (wholly or partly), in other words the amount of admitted tax or admitted interest remains unpaid or partly paid. Therefore, sub-section 12 of section 75 is applicable only to the self assessment made by the assessee and not to the quantification or determination made by the tax authorities. This view also finds support in the judgment of **Hon’ble High Cour of Karnataka in Writ Petition No. 28876 of 2019 (T-Res)** titled as ‘*M/s. LC Infra Projects Pvt. Ltd. Vs the Union of India & Ors*’, wherein the Hon’ble High Court has held.....

*“6.....The notion of the third respondent Authority that Section 75(12) of the Act empowers the authorities to proceed with recovery without issuing show cause notice is only misconceived. The said section is applicable only to the self assessment made by the assessee*

*and not to the quantification or determination made by the authority.”*

Going back to the question, whether the show cause notice or adjudication is necessary Under Section 73 or Section 74 of the Act before recovery of interest leviable under Section 50 of the Act in all situations. From the combined reading of Section 73 or Section 74 (as the case may be) and sub-section 12 of Section 75 of the Act it appears that if the amount of interest is not admitted by an assessee or if the same is disputed by the assessee, the tax authorities have to determine the same by means of adjudication inclusive of issuance of the show cause notice as per the procedures laid down in Section 73 or 74 of the CGST Act (as the case may be) and it is after such determination and adjudication that the recovery proceedings under Section 79 of the Act can be initiated by the authorities, instead of taking recourse to Section 75(12) of the Act.

The judicial interpretation of the relevant provisions of the CGST Act, also seem to support this view. The issues whether interest liability under Section 50 of the Act can be determined without initiating any adjudication process either u/s 73 or 74 of the CGST Act in the event of an assessee raising dispute towards liability of interest, and whether recovery proceedings u/s 79 of the CGST Act can be initiated for recovery of interest u/s 50 of the said Act without initiation and completion of the adjudication proceedings under the Act recently fell for the consideration of the **Hon'ble High Court of Jharkhand in W.P. (T) No. 3517 of 2019**, titled as *'Mahadeo Construction Co Vs Union of India and others*, wherein vide its judgment dated 21.04.2020, a Division Bench of this Hon'ble High Court, citing another recent judgment of **Hon'ble Madras High Court**, in *The Assistant Commissioner of CGST & Central Excise and others Vs. Daejung Moparts Pvt. Ltd. and ors*, has held as follows:

“20. This Court, while interpreting the term “tax not paid” has held that if a tax has not been paid within the prescribed period, the same would fall with the expression “tax not paid” as mentioned under Section 73 of the CGST Act. The aforesaid interpretation further finds support from other subsections of Section 73, particularly sub-sections (5), (6) and (7) of Section 73. A bare reading of the aforesaid sub-sections (5), (6) and (7) of Section 73 would reveal that a person chargeable with tax, if before service of notice pays the amount of tax along with interest payable thereon under Section 50 of the Act on the basis of his own ascertainment, then the Assessing Officer, if satisfied that correct tax along with interest has been paid by the said assessee, shall not issue any notice under Section 73(1) of the Act. However, Section 73(7) of the Act provides that if an assessee, who has itself on his own ascertainment, deposited the tax along with interest, but if in the opinion of the Proper Officer, the amount paid on own ascertainment falls short of the amount actually payable, then a notice would be issued by the said Proper Officer under Section 73 (1) of the Act for recovery of the actual amount payable. Thus, from a conjoint reading

of the aforesaid provisions, it would be evident 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. The natural corollary of the above interpretation is that if an assessee has allegedly delayed in filing his return, but discharges the liability of only tax on his own ascertainment and does not discharge the liability of interest, the only recourse available to the Proper Officer would be to initiate proceedings under Section 73(1) of the CGST Act for recovery of the amount of “short paid” or “not paid” interest on the tax amount.

21. It is not a true that liability of interest under Section 50 of the CGST Act is automatic, but the said amount of interest is required to be calculated and intimated to an assessee. 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. Recently,

**the Hon'ble Madras High Court**, in its decision dated 19<sup>th</sup> December, 2019 rendered in Writ Appeals in the case of **The Assistant Commissioner of CGST & Central Excise and others Vs. Daejung Moparts Pvt. Ltd. and ors.**, has taken similar view. The said Writ Appeals were initially decided by a Two Judges Bench of the Hon'ble Madras High Court and divergent views were taken by the Hon'ble Judges on the issue of initiation of adjudication proceedings before imposing liability of interest under Section 50 of the Act. The matter was, thus, referred to learned Third Judge, which was decided vide Judgment dated 19<sup>th</sup> December 2019 in the following terms:-

“27. A careful perusal of the above said provision would show that every person who is liable to pay tax, but fails to pay the same or any part thereof within the period prescribed shall, on his own, pay interest at such rate not exceeding 18% for the period for which the tax or any part thereof remains unpaid. Thus, sub clause (1) of Section 50 clearly mandates the assessee to pay the interest on his own for the period for which the tax or

any part thereof remains unpaid. The liability to pay interest is evidently fastened on the assessee and the same has to be discharged on his own. Thus, there cannot be any two views on the liability to pay interest under Section 50(1) of the said Act. In other words, such liability is undoubtedly an automatic liability fastened on the assessee to pay on his own for the period for which tax or any part thereof remains unpaid.

28. Sub-section (2) of Section 50 contemplates that the interest under Sub-section (1) shall be calculated in such manner as prescribed from the day succeeding the day on which such tax was due to be paid. Sub-section (3) of Section 50 further contemplates that a taxable person who makes an undue or excess claim of input tax credit under Section 42(10) or undue or excess reduction in output tax liability under Section 43 (10) shall have to pay interest on undue or excess claim or such undue or excess reduction, at the rate not exceeding 24 percent.

29. A careful perusal of sub Sections (2) and (3) of Section 50 thus would show that 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. Likewise, whether an undue or excess claim of input tax credit or reduction in output tax liability was made, is also a question of fact which needs to be considered and decided after hearing the objections of the assessee, if any. 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 arithmetic exercise after considering the objections if any, raised by the assessee. It is to be noted that the term “automatic” does not mean or to be construed as excluding

“the arithmetic exercise”. In other words, though liability to pay interest arises under Section 50 of the said Act, it does not mean that fixing the quantum of such liability can be unilateral, especially, when the assessee disputes the quantum as well as the period of liability. Therefore, in my considered view, though the liability of interest under section 50 is automatic, quantification of such liability shall have to be made by doing the arithmetic exercise, after considering the objections of the assessee. Thus I answer the first issue accordingly.

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22. The next issue for adjudication in the instant writ application is as to whether garnishee proceedings under Section 79 of the CGST Act can be initiated for recovery of interest without adjudicating the liability of interest, when the same is admittedly disputed by the assessee. Section 79 of the CGST Act empowers the authorities to initiate garnishee proceedings for recovery of tax where “any amount payable by a person to the Government under any of the provisions of the Act and Rules made

thereunder is not paid". Since in the preceding paragraphs of our Judgment, we have already held that though the liability of interest is automatic, but the same is required to be adjudicated in the event an assessee disputes the computation or very levability of interest, by initiation of adjudication proceedings under Section 73 or 74 of the CGST Act, in our opinion, till such adjudication is completed by the Proper Officer, the amount of interest cannot be termed as an amount payable under the Act or the Rules. Thus, without initiation of any adjudication proceedings, no recovery proceeding under Section 79 of the Act can be initiated for recovery of the interest amount.

*(emphasis supplied)*

## **CONCLUSION**

Therefore, from the above discussion it follows that if the amount of interest leviable under Section 50 of the Act is not admitted or is disputed by an assessee, the same requires determination through an adjudication process to be initiated as per the detailed provisions contained under Section 73 or 74 of

the CGST Act, which clearly entail issuance of the show cause notice, determination or quantification of the interest liability after considering the reply/representations, if any, made by assessee and passing of an order by the proper officer/tax authorities, failing which the demand of disputed/not admitted interest leviable under Section 50 and initiation of recovery proceedings for such interest under Section 79 against the assessee including of attachment of his bank account is liable to be set aside by the Courts.

### **Disclaimer:**

This article has been prepared for information and educational purposes only. Laws, Rules and Regulations are subject to judicial interpretation which may vary and evolve as per the peculiarity of every case. It is strongly recommended to seek professional advice on any specific issue.