

## 'Taxpayers' woes on payment of GST under wrong head

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Implementation of the Goods and Services Tax (GST) with effect from 1 July 2017, mandated taxpayers to determine the place of supply to establish whether a transaction is an inter-state or an intra-state supply, depending upon the location of the supplier. Consequently, taxpayers are required to discharge IGST or CGST and SGST, as the case may be.

During the early years of GST implementation, there were many instances of taxpayers paying taxes under the wrong head owing to various reasons, such as incorrect place of supply, error in mapping system, etc. The law makers had envisaged such a scenario and had thus introduced provisions to provide relief to taxpayers who had inadvertently paid taxes under the wrong head.

### **Legislative provisions under the GST Act**

Section 77(1) of CGST Act, 2017 and Section 19(1) of the IGST Act, 2017, deal with the situation of tax wrongfully collected and paid to the central or state government.

Section 77(1) of CGST Act, 2017 states that the taxpayer who has inadvertently paid CGST and SGST on intra-state supply which is subsequently held to be an inter-state supply, shall be refunded the amount of CGST and SGST paid. Further, where [a taxpayer has paid integrated tax on a transaction considered by him to be an inter-state supply, but which is subsequently held to be intra-state](#), shall not be required to pay any interest on the amount of CGST and SGST.

Similarly, section 19(1) of IGST Act, 2017 provides for refund of IGST in case the supply is subsequently held to be that of intra-state. It also prescribes for waiver of interest on the correct payment of IGST where a taxpayer has paid CGST and SGST, on a transaction considered by him to be an intra-state supply, but which is subsequently held to be inter-state.

A new rule, 89(1A) of CGST Rules, 2017 was inserted<sup>[1]</sup> that provided for filing of refund application for the tax amount paid in respect of a transaction considered to be an intra-state supply, which is subsequently held to be an inter-state supply, within two years from the date of payment of tax under the correct head.

### **Circular issued in this regard**

The term "**subsequently held**" in the aforementioned sections was interpreted in various ways and doubts were raised whether refund claim was available only:

- if the supply is subsequently held by tax officers as intra-state or inter-state as the case may be, either on scrutiny/ assessment/ audit/ investigation, or as a result of any adjudication, appellate or any other proceeding or
- if the supply is subsequently found by taxpayer himself as intra-state or inter-state as the case may be.

Refund claims filed by assesseees were rejected by tax authorities contending that refund would be granted only if the department 'subsequently held' that tax is paid under the wrong head and not on suo-moto determination of the error by the assessee.

CBIC vide [Circular No. 162/18/2021 - GST](#) dated 25 September 2021, clarified that the term 'subsequently held' mentioned in the Act covers both the above cases and refund can be claimed provided the required amount of tax is paid in the correct head. The circular also clarifies that refund as mentioned above would not be available where tax adjustment has been made by issuance of credit notes.

Separately, in cases where the taxpayer has made the payment under the correct head before the date of issuance of Notification No. 35/2021 - Central Tax dated 24 September 2021, the refund application can be filed before the expiry of two years from the date of issuance of the said notification, i.e., before 23 September 2023.

In case of Axis Bank Limited v/s Union of India<sup>[2]</sup>, the assessee erroneously paid IGST instead of CGST and SGST due to incorrect mapping of office premises. The company then filed a refund application of IGST wrongly paid for the period from July 2017 to August 2019 on 14 February 2020, i.e., before 24 September 2021. The said application was rejected on the grounds that the claims are time-barred. The said rejection was made through an order passed on 23 November 2020, i.e., much before the above-mentioned circular was issued. The High Court remanded the matter back to Assistant Commissioner Central Tax to provide for refund of IGST paid, since the time limit of 23 September 2023 had not lapsed.

### ***Judicial precedents allowing adjustment of taxes paid under one head against another head***

In case of Saji S. Proprietor vs The Commissioner, State GST Department, Thiruvananthapuram and others<sup>[3]</sup>, the state tax officer detained the goods in transit and demanded payment of IGST and penalty. Since the petitioner inadvertently remitted the tax under the head SGST instead of IGST, the state tax officer refused to release goods.

The Kerala High Court observed that section 77 provides for the refund of the tax paid mistakenly under one head instead of another. However, Rule 92 provides that where the amount of refund is completely adjusted against any outstanding demand under the Act or under any existing law, an order giving details of the adjustment is required to be issued in Part A of FORM GST RFD-07. The petitioner contended that under the process of adjustment, the amount remitted under one head can be adjusted under another head, since the demand can be any amount under the Act. In view of this, the HC instructed the officers to release the goods and allowed the petitioners to transfer the amount from SGST to IGST.

In case of Shree Nanak Ferro Alloys Pvt Ltd vs Union of India [\[TS-1238-HC-2019\(JHAR\)-NT\]](#), the authorities demanded payment of IGST along with interest, stating that IGST was short paid. The company informed that it actually paid tax under CGST. The Jharkhand HC instructed the petitioner to deposit the amount of IGST without interest and that it shall be entitled to get the refund of CGST or adjust the CGST amount against its future liabilities.

### ***Judicial precedents allowing refund of tax paid under wrong head and rejecting adjustment of taxes***

Contrary to the above case law, in case of M/s Walchandnagar Industries Limited v/s Assistant Commissioner ST<sup>[4]</sup>, the HC rejected the request for adjustment. In the instant case, the company inadvertently paid IGST considering the transaction as inter-state supply. The authorities issued a show cause notice to treat the transaction as intra-state supply. The company requested for adjustment of money paid under IGST towards CGST and SGST payable, which was rejected by the authorities. The HC held that the company shall pay CGST and SGST and thereafter make a claim for refund of IGST wrongfully paid and rejected the request for adjustment.

In a similar decision of Ola Fleet Technologies Private Limited v/s Union of India<sup>[5]</sup>, wherein Ola had wrongfully paid IGST instead of CGST and SGST, as the IT system determined the place of supply as inter-state. The High Court held that adjustment of IGST with CGST and SGST (as ruled out in the case of Saji S.

Proprietor) would amount to adopting a procedure not provided under the statute. The Telangana HC held that petitioner should pay the CGST and SGST amount first and then apply for refund of IGST wrongfully paid.

### ***Plausible outcome in case of inadvertent payment of taxes under wrong head***

#### *Issuance of credit note and a fresh invoice*

One way to rectify such an error could be to issue credit note against the wrong invoice and then issue a fresh invoice with appropriate taxes. This may appear to be the easier option for the taxpayer since paying right taxes and then claiming refund would be tedious, accompanied by blockage of funds. However, it is to be noted that this option may not be strictly in accordance with Section 34 of CGST Act. Further, it would be restricted till 30th November, following the end of the financial year in which such supply was made, or the date of furnishing of the relevant annual return, whichever is earlier.

On a note of caution, it may be mentioned here that tax authorities have been disallowing the issuance of credit note along with fresh invoice.

#### *Filing of refund claim*

In cases where the wrong payment is noticed, the payment of right taxes can be made through Form GST DRC-03 and then the taxpayer can file a refund of wrong tax paid, through application in Form GST RFD-01, within prescribed time period. The taxpayer can submit Form GST DRC-03, the copies of returns where the inadvertent payment was made, the invoice copy and/ or purchase order copy, to determine correct place of supply, to the authorities along with the application.

#### *Paying tax under the correct head with no refund being allowed of the wrong taxes paid earlier*

Section 54(8) of CGST Act, 2017 states that the refundable amount under Section 77, shall, instead of being credited to fund, be paid to the applicant. However, practically, when the taxpayer has issued invoice with wrong taxes and the incidence of tax has been passed onto the buyer, i.e., buyer has taken credit based on the wrong invoice issued to him, then the authorities might not allow refund of tax paid earlier. This shall result into additional burden to the taxpayers.

However, practically, it is observed that where the taxes are incorrectly captured in the invoice, the recipient hesitates in availing credit and where the taxes pertain to a state where the recipient is not registered, it shall not reflect in Form GSTR 2B (dissuading the recipient to avail credit). This leads to loss of credit for the recipient. Even where the supplier rectifies the mistake and pays correct taxes, the recipient shall not be in a position to avail credit as the payment is made through Form GST DRC-03.

### ***Conclusion***

While inter-head adjustment was allowed in the case Saji S. and Shree Nanak Ferro Alloys Pvt Ltd, it was outright rejected in the cases of Ola and Walchandnagar. In cases where GST is paid under wrong head in case of payments to be made under Reverse Charge Mechanism ('RCM'), most taxpayers do not prefer to file the refund claim and adjusting the same with their monthly liabilities. Based on recent judicial precedents, tax authorities can take a view that adjustment of tax cannot be made from one head to another. Thus, it is crucial that the GST Council issues appropriate clarification on adjustment of taxes wrongfully paid, to avoid divergent practices followed by various judicial authorities.

Even though the circular dated 25 September 2021, provides for some relief to taxpayers for claiming refund in case of determination of the mistake by the assessee, the fact that the taxpayer has to make payment of correct taxes first and then claim refund of wrong taxes paid, tantamounts to blockage of funds and can hamper working capital requirement. Further, the recipient shall not be in a position to avail credit as the payment is made through Form GST DRC-03, amounting to loss of credit and ultimately leading to increase in cost of goods/services for the end consumer.

It is vital that authorities take cognizance of this issue and provide relief to taxpayers in terms of quick processing of refund claims within prescribed timelines of one month, to ensure that taxpayers are not

saddled with additional liability owing to errors in decoding the place of supply, especially when the GST law was at its nascent stage. Further, a mechanism is needed that enables the recipient to avail credit, especially when the taxes have been paid to the supplier. The mechanism should also ensure that such inadvertent errors on the part of the seller, do not affect recipient's eligibility to avail credit.

*\*The views expressed are personal only.*

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[1] Vide Notification No. 35/2021 - Central Tax dated 24 September 2021

[2] [TS-592-HC(AP)-2022-GST]

[3] [TS-662-HC-2018(KER)-NT]

[4] dated 21 July 2022

[5] dated 16 March 2022