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TAX WRONGLY PAID UNDER CGST SECTION 77(1) & IGST SECTION 19(1) — A WELCOME CLARIFICATION

Prologue

A Case of Wrongful payment of GST Liability under the wrong head, viz., CGST + SGST in place of IGST (by treatment of an Inter State Supply as Intra) and vice versa, could lead the Tax Payers in a soup.

Take for instance the case of Buying Agents (Intermediaries) who provide procurement services to Foreign Clients, from Indian Vendors. Whether the said transaction is Intra State leviable to CGST + SGST or whether the same is Inter State leviable to IGST is still a question mark. Contradictory advance rulings and Departmental FAQs on the matter only compound the problem. The Author has only given one example to illustrate the issue – there are many such Grey areas, waiting to test our Grey Matter in GST Law

Payment of GST under the Wrong Head

Where such wrong payment is made of IGST in place of CGST + SGST and vice versa S. 77 of the CGST Act, 2017 & IGST S. 19(1) offered a remedy of refund of wrong tax paid, subject to payment of correct tax (however interest stands waived). For ready understanding S. 77 of the CGST Act, 2017 & IGST S. 19(1) have been reproduced -

“Section 77. Tax wrongfully collected and paid to Central Government or State Government.—(1) A registered person who has paid the Central tax and State tax or, as the case may be, the Central tax and the Union territory tax on a transaction considered by him to be an intra-State supply, **but which is subsequently held** to be an inter-State supply, shall be refunded the amount of taxes so paid in such manner and subject to such conditions as may be prescribed.

(2) A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the amount of central tax and State tax or, as the case may be, the Central tax and the Union territory tax payable.”

Section 19 of the IGST Act, 2017 reads as follows:

“Section 19. Tax wrongfully collected and paid to Central Government or State Government. — (1) A registered person who has paid integrated tax on a supply considered by him to be an inter-State supply, **but which is subsequently held** to be an intra-State supply, shall be granted refund of the amount of integrated tax so paid in such manner and subject to such conditions as may be prescribed.

(2) A registered person who has paid central tax and State tax or Union territory tax, as the case may be, on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall not be required to pay any interest on the amount of integrated tax payable.”

Imagine the plight of innocent Tax Payers who have already paid GST (say at 18%) on the transaction under the wrong head, now the correct GST again to be paid (another 18% in total now 36%), before the wrong GST paid could be obtained as refund.

Further, whether the Assessee would get the refund of the Wrong Tax paid at all if he has applied beyond the limitation period of 2 years from the relevant date of the transaction, was still a question mark.

Clarifications vide Circular 162 of 2021

In this context, the CBIC vide Circular No. 162/18/2021-GST, dated 25-9-2021 has clarified as follows, atleast giving partial relief to the Assessee -

Clarification regarding the term “Subsequently Held” – Para 3 clarifies as follows -

Doubt	Clarification
Doubts have been raised regarding the interpretation of the term “subsequently held” in the aforementioned sections, and whether refund claim under the said sections is available only if supply made by a taxpayer as inter-State or intra-State, is subsequently held by tax officers as intra-State and inter-State respectively, either on scrutiny/assessment/audit/investigation, or as a result of any adjudication, appellate or any other proceeding or whether the refund under the said sections is also available when the inter-State or intra-State supply made by a taxpayer, is subsequently found by taxpayer himself as intra-State and inter-State respectively.	In this regard, it is clarified that the term “subsequently held” in section 77 of CGST Act, 2017 or under section 19 of IGST Act, 2017 covers both the cases where the inter-State or intra-State supply made by a taxpayer, is either subsequently found by taxpayer himself as intra-State or inter-State respectively or where the inter-State or intra-State supply made by a taxpayer is subsequently found/held as intra-State or inter-State respectively by the tax officer in any proceeding. Accordingly, refund claim under the said sections can be claimed by the taxpayer in both the above-mentioned situations, provided the taxpayer pays the required amount of tax in the correct head.

Clarification regarding “Relevant Date” – Para 4 clarifies as follows -

4.1 In order to prescribe the manner and conditions for refund under section 77 of the CGST Act and section 19 of the IGST Act, sub-rule (1A) has been inserted after sub-rule (1) of rule 89 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as “CGST Rules”) vide Notification No. 35/2021-Central Tax dated 24-9-2021. The said sub-rule (1A) of rule 89 of CGST Rules, 2017 reads as follows:

“(1A) Any person, claiming refund under section 77 of the Act of any tax paid by him, in respect of a transaction considered by him to be an intra-State supply, which is subsequently held to be an inter-State supply, may, before the expiry of a period of two years from the date of payment of the tax on

the inter-State supply, file an application electronically in **FORM GST RFD-01** through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that the said application may, as regard to any payment of tax on inter-State supply before coming into force of this sub-rule, be filed before the expiry of a period of two years from the date on which this sub-rule comes into force.”

4.2 The aforementioned amendment in the rule 89 of CGST Rules, 2017 clarifies that the refund u/s 77 of CGST Act/S.19 of IGST Act, 2017 can be claimed before the expiry of 2 years from the date of payment of tax under the correct head, *i.e.* integrated tax paid in respect of subsequently held inter-State supply, or central and state tax in respect of subsequently held intra-State supply, as the case may be.

However, in cases, where the taxpayer has made the payment in the correct head before the date of issuance of Notification No. 35/2021-Central Tax dated 24-9-2021, the refund application under section 77 of the CGST Act/section 19 of the IGST Act can be filed before the expiry of two years from the date of issuance of the said notification. *i.e.* from 24-9-2021.

4.3 Application of sub-rule (1A) of rule 89 read with section 77 of the CGST Act/section 19 of the IGST Act is explained through following illustrations.

A taxpayer “A” has issued the invoice dated 10-3-2018 charging CGST and SGST on a transaction and accordingly paid the applicable tax (CGST and SGST) in the return for March, 2018 tax period. The following scenarios are explained hereunder:

Sl.No.	Scenario	Last date for filing the refund claim
1	Having realized on his own that the said transaction is an inter-State supply, “A” paid IGST in respect of the said transaction on 10-5-2021.	Since “A” has paid the tax in the correct head before issuance of Notification No. 35/2021-Central Tax, dated 24-9-2021, the last date for filing refund application in FORM GST RFD-01 would be 23-9-23 (two years from date of notification)
2	Having realized on his own that the said transaction is an inter-State supply, “A” paid IGST in respect of the said transaction on 10-11-2021 <i>i.e.</i> after issuance of Notification No. 35/2021-Central Tax dated 24-9-2021	Since “A” has paid the correct tax on 10-11-2021, in terms of rule 89 (1A) of the CGST Rules, the last date for filing refund application in FORM GST RFD-01 would be 9-11-2023 (two years from the date of payment of tax under the correct head, <i>i.e.</i> integrated tax)
3	Proper officer or adjudication authority or appellate authority of “A” has held the transaction as an inter-State supply and accordingly, “A” has paid the IGST in respect of the said transaction on 10-5-2019	Since “A” has paid the tax in the correct head before issuance of Notification No. 35/2021-Central Tax, dated 24-9-2021, the last date for filing refund application in FORM GST RFD-01 would be 23-9-23 (two years from date of notification)
4	Proper officer or adjudication authority or appellate authority of “A” has held the transaction as an inter-State supply and accordingly, “A” has paid the IGST in respect of the said transaction on 10-11-2022 <i>i.e.</i> after issuance of Notification No. 35/2021-Central Tax dated 24-9-2021	Since “A” has paid the correct tax on 10-11-2022, in terms of rule 89 (1A) of the CGST Rules, the last date for filing refund application in FORM GST RFD-01 would be 9-11-2024 (two years from the date of payment of tax under the correct head, <i>i.e.</i> integrated tax)

Rule 89 (1A) of the CGST Rules would be applicable for section 19 of the IGST Act also, where the taxpayer has initially paid IGST on a specific transaction which later on is held as intra-State supply and the taxpayer accordingly pays CGST and SGST on the said transaction.

Further, It has also been clarified that any pending refund applications or disposed off, before issuance of Notification No. 35/2021-Central Tax, dated 24-9-2021, would also be dealt in accordance with the provisions of rule 89 (1A) of the CGST Rules, 2017.

However, Refund u/s 77 CGST / Sec. 19 IGST Act would not be available where the taxpayer has made tax adjustment through issuance of credit note u/s 34 of the CGST Act.

Epilogue:

The above circular is a good starting point in streamlining provisions where tax has been paid under wrong head. But it is just a start and not the end. Yours truly had written to the Finance Ministry and GST Council, on this matter almost a year before the issuance of the Circular. In that representation, I had also highlighted a few steps that could be taken to alleviate issues faced by Tax payers in such situations. Circular addresses many of the issues I had raised.

As a permanent solution, I had suggested that appropriate amendment be made to Sec. 77 to provide for a inter adjustment of Tax between State Govt. / Central Govt. where CGST/ SGST has been paid wrongly instead of IGST (and vice versa) similar to the erstwhile Central Sales Tax Act, 1956 – instead of asking the assessee who has wrongly paid CGST + SGST to pay IGST again and claim refund of the wrong tax (which may become time barred in most cases). Whether this solution will also be implemented remains to be seen.

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