

GST Alert 04/2021-22

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### Refund of GST paid in wrong heads

It may so happen that while paying taxes, one may instead of paying IGST has paid CGST + SGST (C+S) or vice versa and accordingly has filed returns reporting the taxes in wrong tax heads. Section 77 of the CGST and SGST Acts and Section 19 of the IGST Act had built in provisions to cover such situations by providing for paying of the correct taxes and refund of the wrongly paid taxes and additionally these provisions also prescribed that there would be no interest liability on such tax payments. However, there was no mechanism prescribed under the rules on how to avail the refunds, vide notification 35/2021-CT dated 24.09.2021, CGST Rules have been amended and new rule 89(1A) has been introduced for prescribing this vital mechanism of claiming refund. Government has also vide Circular no. 162/18/2021-GST dated 25.09.2021 clarified certain issues. Our analysis of this vital piece of legislation is as under:

#### 1. Why this situation arises?

Many a times taxpayers while issuing invoices misinterpret place of supply provisions and charge the wrong tax, instead of IGST they charge C+S or other way around. Accordingly, they pay C+S instead of IGST, later on during their internal check or GST audit or departmental inquiry or audit, the mistake is realised. As per law it is mandatory to pay the taxes under correct head, else it would be treated as not paid.

#### 2. Gist of Legal Provisions

Section 77 of the CGST Act, 2017 reads as follows:

**“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:

*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.”*

On Conjoint reading of both the provisions following is established:

- a. If at a later stage it held that tax paid initially was paid under a wrong head, such wrongly paid tax shall be refunded back to the taxpayer
- b. Refund will be granted in a manner as prescribed in rules
- c. The correct tax payable by such a taxpayer will not be subjected to Interest

### 3. Rule 89 (1A)

As mandated by the legal provisions discussed above, government was required to makes rules for prescribing the mechanism for claiming refund, which it had not done for last more than 4 years. New rule 89 (1A) has been introduced in the CGST Rules w.e.f. 24.09.2021. it reads as under:

*“(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.”*

As per this rule, refund would be filed as under:

- a. This rule clarifies that the refund u/s 77 of CGST Act/ Section 19 of IGST Act, 2017 can be claimed **before the expiry of two years from the date of payment of tax under the correct head**
- b. However, in cases, where the taxpayer has made the payment in the correct head before 24.09.2021, such refund application can be filed before 23.09.2023.
- c. Refund has to be filed on the GST portal in form RFD 01

#### 4. How to pay the tax in correct head

In case a taxpayer realises his mistake and chooses to pay the tax in correct tax head, it is not clarified vide which form he has to make this payment, in my view he will have to make the payment under form GST DRC 03.

#### 5. Can refund be claimed only if payment of correct tax is done on ascertainment by Department.

Vide the circular referred above, it is clarified that the term “subsequently held” in the law covers both the cases where the mistake is either subsequently found by taxpayer himself as or where it is found 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.

#### 6. What is time limit for availing refund of GST paid in wrong heads

As stated in the rule and as discussed above, refund can be claimed within 2 years of the date of the payment in correct head.



However, in cases, where the taxpayer has made the payment in the correct head before 24.09.2021, such refund application can be filed before 23.09.2023.

It is important to note here that the date of mistaken invoice where tax is charged in wrong heads or the date of payment of that wrong tax is not relevant to calculate the 2 years time limit, what is relevant and important is the date when subsequently the tax was paid in the correct tax head.

### 7. When is refund not available

In following situations refund will not be available

- a. Merely disclosing the mistaken tax payment in wrong heads would not make one eligible to avail the refund thereof, taxpayer will have to pay the tax in the correct tax head, only then will he eligible to claim refund of wrongly paid tax earlier.
- b. If the time limit of 2 years from the date of correct tax payment has elapsed or 23.09.2023, whichever is later.
- c. Refund under section 77 of the CGST Act / section 19 of the IGST Act would not be available where the taxpayer has made tax adjustment through issuance of credit note under section 34 of the CGST Act in respect of the said transaction.

### 8. Conclusion

In dual GST model, as confusing as it is, place of supply provisions are sometimes very difficult to comprehend even for the best legal minds. Accordingly, it is a possibility that due to unintended interpretational mistakes, taxpayers charge taxes in the wrong heads. Twin provisions of section 77 and 19 in the 2 GST laws provided due protection to the taxpayers in terms of interest not being levied in case something like this happened, it recognised the fact that the taxpayer had paid the taxes but they were paid in wrong heads. It was one of the most benevolent provisions under GST, but mysteriously it was not activated as the refund mechanism was not notified for last more than 4 years since GST first arrived. Its better late



then never and we are happy they have kept it easy and erred on the side of the taxpayers in clarifying certain mischievous portions in the law.

Having said so one important piece missing in the circular is the question of what happens to the credit availed by the recipient on the invoice issued by the supplier where the tax is charged in the wrong heads. The invoice has been reported in GSTR 1 which has travelled to GSTR 2A of the recipient. By changing an IGST transaction to C+S transaction or the other way round, in almost all cases the beneficiary state would change which would result in faulty passing of credits which would in my mind impact the distribution of taxes between centre and states, as the supplier is now paying the correct tax without reporting it either in GSTR 1 or 3B, he will be making the payment in form DRC 03 which is a plain vanilla form and doesn't have enough information to trigger ITC checks.

Hope solving one problem though belatedly doesn't result in a problem of a much bigger kind which no one can solve.

*Formulated by:*

*N J Jain & Associates*

**Chartered Accountants**

**CA Nitesh Jain**

Managing Partner

**CA Praveen Maheshwari**

Partner

**CA Gaurav Khetan**

Partner

**CA Jay Dalwadi**

Partner

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