

**DELAY IN REFUND – RIGHT OF ASSESSEE  
TO CLAIM INTEREST FROM DEPARTMENT.**

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. 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/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 and becomes refundable after the appellate order attained finality.

6: In the pre-GST regime, Section 11B of Central Excise Act, 1944 , as is relevant for our purposes, read as under:-

***Section 11B: (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one***

*year from the relevant date in such form and manner, as may be prescribed;*

*Section 11BB If any duty ordered to be refunded under sub-section (2) of Section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that Section, there shall be paid to the applicant interest at such rate, (not below five percent) and not exceeding thirty percent per annum.*

6.1: At the same time, the relevant provisions of CGST Act, 2017 may also kindly be seen.

*Section 54 CGST Act, 2017.*

*Refund of tax. – (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:*

*(2) to (7).....*

*(8) Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-*

*(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 other person; or*

*(9) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or*

*any court or in any other provisions of this Act or the rules made thereunder or in any other law for the time being in force, no refund shall be made except in accordance with the provisions of sub-section (8).*

**Section 56:** *If any tax ordered to be refunded under sub-section (5) of Section 54 to any applicant is not refunded within sixty days from the date of receipt of application under sub-section(1) of that section, interest at such rate not exceeding six percent, as may be specified in the notification issued by the Government on the recommendations of the council, shall be payable in respect of such refund from the date immediately after the expiry of sixty days from the date of receipt of application under the said sub-section till the date of refund of such tax.*

7: The Section 11B and Section 11BB of Central Excise Act,1944, govern the refund of duty and time within which the payment has to be made. The Section 11B contains a restrictive covenant in as much as the application is required to be made within a period one year from the “relevant date” and Section 11BB provides for payment of interest in case, the duty has not been refunded within a period of three months from the date of application accompanying the Appellate Order.

7.1: The Section 54(8)(e) (reproduced above) permit refund of “any other amount paid by the applicant”. Since both types of (i) amount paid during investigation and (ii) amount paid by way of pre-deposit at the time of filing an appeal, are neither “duty” nor “tax”, shall, in my view, clearly called “amounts” so as to fall within the ambit of Section 54(8)(e) of CGST Act, 2017 and the proper shall refund the amount to the party. However, there is no specific provision for grant of interest on the amount paid in two situations – since the words used in Section 56

are “tax” and not “any other amount” as have been used in sub-section (1) of Section 54. 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 (i) amount paid during investigation and (ii) amount paid by way of pre-deposit. 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.

8: There have been cases where it has been held by the Courts/Tribunal that in case the Tax/Duty has been paid “under protest” then the limitation of one year shall not apply. The combined reading of Section 11B and 11BB makes it clear that the party shall be entitled to interest only upon application being submitted within a period of one year from the date of passing of appellate order, when refund has not been granted within a period of three months from the date of application seeking refund pursuant to Appellate Tribunal. The Department has been granting refund of tax/duty within a period of three months and that too after consistent follow up and after usual exercise having been done.

9: Nonetheless, question arises as to whether the party would be entitled to interest in two situations narrated in para 5 hereinabove. First of all, let us discuss situation No. 1 as below:-

**Party had deposited the amount during investigation at the behest of the Department and ultimately refunded after Appellate Order attained finality**

10: One had to ponder as to whether the above situation is governed by the provisions of Section 11B of the Central Excise Act, 1944 – in my

humble view, clearly NO in as much as Section 11B of Central Excise Act, 1994 govern the refund of duty/taxes. Where an amount remained deposited/kept with the Department right from the time of investigation to till the time finally appeal is allowed and as a consequence of which, ultimately refund is granted within three months after Appellate Order, whether the party is entitled to interest or not ? Undisputedly neither Section 11B nor 11BB covers the situations narrated in para 9 hereinabove. The question then arises as to whether when or how it could be treated that the amount has been deposited “under protest” – when there is no marking “under protest” on the TR-6, GAR-7 Challan or any documents evidencing deposit of money or covering letter with which the above challans have been annexed or separately the party has written a letter with marking “under protest” to the Department.

10.1: On many occasions, moment, the letter is sent “under protest”, the Department pressurize the party to lift mark “under protest”. To the aid and succor of the party, in the following judgments, the Hon’ble High Courts and different benches of Hon’ble CESTAT held that whenever any amount had been deposited during investigation, it shall always be treated as deposited “under protest” irrespective of the fact that whether there is a marking of “under protest” or not.

- a): CCE Vs. Pricol Ltd. &Ors. MANU/TN/1261/2015
- b): CCE,Lucknow Vs. Eveready Industries Ltd.  
MANU/UP/4095/2017
- c): Gujarat Engineering Works Vs. Commissioner of Central Excise. MANU/CS/0121/2013
- d) Shree Ram Foods Industries MANU/GJ/0359/2002

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

11: The Hon'ble Allahabad High Court in the case of Ebiz.com (P) Ltd Vs. CCE MANU/UP/3167/2916, 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.*

11.1: The above judgment holds two things (i) amount paid during investigation shall only be called “deposit” and not “duty” or “tax” (ii) and principal of unjust enrichment shall not apply and impliedly holds that limitation of one year or two years for seeking refund shall not be apply nor the restriction that interest shall become applicable only after the expiry of three months from the date of application filed by the party.

12: 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.*

**PAYMENT OF INTEREST ON THE AMOUNT LYING WITH THE DEPPTT – FROM THE DATE OF DEPOSIT TO TILL DATE OF REFUND:**

13: 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.*

**WHETHER PRE-DEPOSIT IS MADE AT THE TIME  
OF FILING OF APPEAL ALSO ATTRACT  
INTERESES FOR THE PERIOD DURING AMOUNTS  
REMAINED WITH THE DEPARTMENT.**

14: The Hon'ble Calcutta High Court in the case of Assistant Collector of C. Ex. vs. Calcutta Chemical Company Ltd. MANU/WB/0276/1992, has observed as under:-

*If the collection made by the appellant was unauthorized, the appellants having retained and enjoyed the benefit of such money for so long, are bound to compensate for the use and retention of such money and accordingly the respondent is entitled to interest and such interest should be paid at the rate of 12 per cent per annum.*

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 Binjrajka 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.***

18: 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.

19: 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:-

***According to me, the decisions cited by the learned Authorized Representative are not applicable in the facts of the present matter, rather the decision of 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.***

20: The Hon'ble Tribunal in the case of Maithan Ceramics Ltd. vs. CCE: MANU/CH/0136/2019, has observed as under:-

*While introducing the new provisions, Board had issued Circular No. : 984/8/2014-CX : MANU/EXCR/0008/2014, dated 16-9-2014 for proper implementation of such provisions. In para 5.1, it is clarified that "Where the Appeal is decided in favour of the party/assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944 or Section 129EE of the Customs Act; 1962. In Para 5.2, it is also clarified that such Pre-deposit for filling Appeal is not a payment of duty. Hence refund of Pre-deposit need not be subjected to the process of refund of duty under either Section 11B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962."*

21: 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.

### **LIMITATION OF ONE YEAR SHALL NOT APPLY**

22: The Division Bench of Hon'ble Madras High Court in the case of Ucal Fuel Systems Ltd MANU/TN/5496/2011 has held as under:-

*6. We are in full agreement with the finding rendered by the Ld Single Judge that the limitation contained in Section 11B of Central Excise Act, is not applicable to the case since the amount*

*in question was not paid towards Excise Duty but only by way of deposit during investigation. Moreover, as per Section 11BB of the Central Excise Act, this Court can order payment of interest at a very reasonable rate and accordingly, interest at the rate of 6% per annum from the date of deposit till then date of payment to the first respondent.*

**UNJUST ENRICHMENT SHALL NOT APPLY TO PRE-DEPOSIT**

23: The Hon'ble Supreme Court in the case of CCE Vs. Finacord Chemicals (P) Ltd MANU/SC/0626/2015 has held as under:-

*19. It is stated at the cost of repetition that since the amount in question was deposited in compliance with the interim order passed by the High Court of Bombay, which was not towards duty, the question of unjust enrichment would not arise at all.*

24: The Board Circular dated 2.1.2002 clearly clarified that in the matter of refund of pre-deposit, refunds would not be covered by the provisions of Section 11B of the Customs Act or Section 35 F of the Central Excise Act, - meaning thereby the aforesaid provisions which pertain to unjust enrichment shall not apply.

25: In my view, the entire law discussed pertaining to pre-GST era, shall equally apply to post GST era also in view of the fact that there is no material difference in the provision for grant of interest in different situations as provided under Section 54 and 56 of CGST Act, 2017.