

Payment under protest – Excise & Service Tax

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The service tax provisions especially with regards to the taxable services being added year after year are normally not drafted too well leading to confusion and multiple interpretations. When the tax compliant assessee is faced with such issues which could go either way he may prefer to err in favour of revenue. At that time the payment under protest is a good option. This Article aims at providing an insight of importance, procedure and legal position of "*Payment under Protest*".

Importance of *payment under protest*:

In case any person, who is not sure whether there is a levy on a particular transaction/ activity due to vague definition, possible exemption/ exclusion he may opt for payment of duty / tax under protest. Such payment does not admit the liability and at the same time also challenges the levy. Further and more importantly in case of refund of duty / tax paid, the period of limitation to one year would not be applicable. If paid under protest the refund is available for periods or 10 + years also as long as the burden of the same has not been passed on.

Legal provision

It is very interesting to note that there is no legal provision with regard to *payment under protest* either in Central Excise Act, 1944 or The Customs Act, 1962 or under the Finance Act, 1994. However the reference of *payment under protest* is given only under the Refund section 11B of the Central Excise Act, 1944 and under Section 27 of The Customs Act, 1962 respectively. The proviso to the above mention section provides that the time limit prescribed under the said sections is not applicable in case where such payment was made under protest.

Meaning

The meaning of *payment under protest* although is not specifically mentioned any where in the act can be inferred in common parlance as the payment is made while not agreeing to the applicability of tax or duty. The disagreement with revenue's view is made clear but to avoid any confrontation at that particular point of time, duty is being

paid and the assessee reserves his right to get recompense on the outcome of final verdict on disputed issue.

Procedure for *payment under protest*

The procedure for the *payment under protest* is not given in the legal statute exists as on date, however the procedure for *payment under protest* under central excise was provided under Rule 223B of Central Excise Rules 1944, which was not brought to the present Central Excise Rules 2002. The CBE&C Supplementary provision carries the same procedure that is enumerated as under:

- a. The assessee should inform the Superintendent or Inspector of Central Excise in writing giving reasons for paying duty under protest and a dated acknowledgement would be given to him.
- b. He would mark invoices or monthly/quarterly return indicating the goods on which duty is paid 'under protest'. If it is a lump-sum duty payment in respect of past demand, he may record the fact of duty *payment under protest* in the Personal Ledger Account [against debits] CENVAT Account [against debits] and the Daily Stock Account.
- c. If a case is appealed against by the assessee or where the appeal period for further appeal is available, he may continue to pay duty under protest. However, if decision is not in his favour and he exhausts the appellate remedy or does not appeal within stipulated period, the assessee should not have any right to pay duty under protest.

Supplementary provision is legally backed with the transitional provision under Rule 33 of the Central Excise Rules, 2002. However this is not having any legal relevance as far as the service tax is concern. The payment of service tax under protest can be made by making a letter to the department clearly indicating the fact and reason for *payment under protest*. Further the self-assessment returns may also specifically indicate that such payment is made under protest.

Earlier endorsing the payment Challan 'TR-6' by works "*payment under protest*" was widely used for making the *payment under protest*, however due to the change in the payment system and in e-filing arena the importance of such practice has lost.

Legal Precedents

There are number of Judgments under the various forums with respect to *payment under protest*. Some of the important judicial pronouncement are give as under

- a. Appeal against order of assessment itself indicates *payment under protest* - A.K. Enterprise vs Commissioner of Customs (Port), Kolkata 2006 (199) ELT 0067 Tri.-Ca
- b. Endorsement of remark on TR-6 Challan was sufficient compliance of *payment under protest* and limitation cannot apply - Star Forging Pvt. Ltd. vs Commissioner of Central Excise, Rajkot 2004 (167) ELT 0316 Tri.-Bom
- c. Duty having been paid pending an appeal, to be deemed to be *payment under protest* - Manik Machinery Mafs. Pvt. Ltd. vs Commissioner of C. Ex., Mumbai 2003 (157) ELT 0439 Tri.-Bom
- d. Once gate passes are endorsed with the mark '*payment under protest*', it is deemed to be a substantial compliance with the requirements of law since Rule 233B of the Central Excise Rules, 1944 is only directory and not mandatory. - C.C.E., Baroda vs Gujarat Communication & Electronics Ltd. 1997 (096) ELT 0179 Tri.-Del
- e. Duty paid under orders of the Court whether by way of order granting stay, suspension, injunction or otherwise is to be treated as a *payment under protest* - Mafatlal Industries Ltd. vs Union of India 1997 (089) ELT 0247 S.C
- f. The Departmental contention that merely because at the material time there was no provision under the rules for *payment under protest*, the appellants could not do so and the Government could unauthorisedly and illegally retain the amount cannot be accepted. [1983 E.L.T. 1495 (S.C.); 1978 E.L.T. (J 18); 1980 E.L.T. 16 (A.P.) relied upon].- Phosphate Company Ltd. vs Collector Of Central Excise, Calcutta 1987 (031) ELT 0599 Tri.-Del - Maintained in 1997 (96) ELT A81 (S.C.)

Conclusion

The absence of specific legal provision has discouraged the unsure tax payer from making the *payment under protest*. The paper writers feel, wherever the manufacture or the service provider is not sure of his/her liability can always opt for the making the *payment under protest*. To this the department may also raise a Show Cause Notice for making *payment under protest*, however this does not have any cost towards interest or penalty. One very important point that requires attention is that *payment under protest* is

not only limited to paying in cash/account current but also can be used for making payment by way of CENVAT Credit.

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