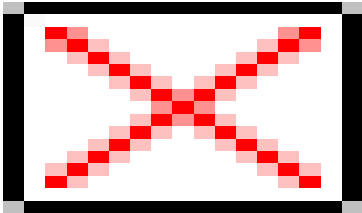


Pre-deposit - mode of payment quagmire

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Background

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Appellant is required to make payment of specified percentage of disputed tax dues (commonly referred to as mandatory pre-deposit) for filing appeal against an adjudication order / first appeal order. Upon payment of such amount, a stay is granted against recovery of the balance disputed tax dues as per the order appealed against in pendency of the appeal proceedings.

Under the erstwhile Central Indirect tax laws, payment of mandatory pre-deposit using CENVAT credit balance was widely practiced. Even under the GST regime, some taxpayers have adopted a position that mandatory pre-deposit for appeal filing can be paid using electronic credit ledger balance. However, the issue has been litigious and the tax / appellate authorities in various cases have been insisting payment of mandatory pre-deposit only in cash.

Recent decision of the Orissa High Court

The controversy around this issue is further fueled by the recent decision of the Orissa High Court in the case of **Jyoti Construction vs. Deputy Commissioner of CT & GST 1**, wherein the Hon'ble High Court has upheld the stand of the tax authorities to require payment of mandatory pre-deposit only in cash and deny use of credit balance for making such payment.

In the context of provisions of Section 107 of the Odisha Goods and Services Tax Act, 2017 (provisions of which are *pari materia* to Section 107 of the Central Goods and Services Tax [Act, 2017](#) ("**CGST Act**")), the Hon'ble High Court has held that:

- a. The payment of mandatory pre-deposit as per Section 107(6)(b) cannot be treated as "**Output tax**" as defined under Section 2(82) of the CGST Act.
- b. Section 41(2) of the CGST Act (dealing with provisional acceptance of self-assessed Input tax and utilization thereof) limits usage of Input tax credit and hence, the same cannot be used for making payment of pre-deposit at the time of filing of appeal.

At this juncture, while on a slightly different fact profile, it may be noted that the Bangalore Bench of CESTAT in the case of **Dell International Services India Private Limited vs. Commissioner of Central Tax 2** had upheld payment of mandatory pre-deposit using electronic credit ledger balance of CGST in respect of appeal pertaining to erstwhile Central Indirect tax laws.

Relevant provisions under the GST law and erstwhile Central Excise law

In order to analyse the aforesaid decision and impact thereof on appeals required to be filed under the CGST Act as well as the erstwhile Central Indirect tax laws, it would be pertinent to refer to relevant statutory provisions.

Relevant provisions of the CGST Act and Central Goods and Services Tax [Rules, 2017](#) ("CGST Rules")

Section / Rule	Particulars
S. 2(82)	"output tax " in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;
S. 41	(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger. (2) The credit referred to in sub-section (1) shall be utilised only for payment of self-assessed output tax as per the return referred to in the said sub-section.
S. 107(6) and (7)	(6) No appeal shall be filed under sub-section (1), unless the appellant has paid,- (a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and (b) a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order subject to a maximum of twenty-five crore rupees, in relation to which the appeal has been filed. (7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.
S. 49	(2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41, to be maintained in such manner as may be prescribed. (3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed. (4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.
Rule 69	The following details relating to the claim of input tax credit on inward supplies including imports, provisionally allowed under section 41, shall be matched under section 42 after the due date for furnishing the return in FORM GSTR-3- â€¦â€¦â€¦

Relevant provisions under the Central Excise Act, 1944 ("Excise Act") and the CENVAT Credit Rules, 2017 ("CCR")

Section / Rule	Particulars
S. 35F	The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal- (i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty , in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute-in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or] Commissioner of Central Excise; (ii) â€¦ â€¦
R. 3(3)	The CENVAT credit may be utilised for payment of - (a) any duty of excise on any final product ; or (b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or (c) an amount under sub rule (2) of rule 15 of Central Excise Rules, 2017: â€¦ â€¦

In view of the above, it is evident that the statutory provisions under the CGST Act and the Excise Act as regards payment of mandatory pre-deposit and purposes for which tax credit may be used are comparable in as much as:

- a. Payment of pre-deposit is described as a specified percentage of duty / tax amount in dispute;
- b. Tax credit can be used for payment of output tax / any duty of excise on final product.

Position and jurisprudence under the erstwhile Central Indirect tax laws

The controversy as regards eligibility to use CENVAT credit for payment of mandatory pre-deposit for appeal filing prevailed even under the erstwhile Central Indirect tax laws. However, the CESTAT had issued Circular no. [15/CESTAT/General/2013-14](#) dated 28.08.2014 to clarify the prevailing confusion over the mode of payment of mandatory pre-deposit. The said Circular implied that mandatory pre-deposit in respect of duty amount can be made using CENVAT credit.

Further, eligibility to utilize CENVAT credit balance for payment of mandatory pre-deposit was upheld by various High Courts including in the cases of **Cadila Healthcare Pvt. Ltd. vs. Union of India** ³, **Commissioner of CGST vs. SRD Nutrients Pvt. Ltd.** ⁴, **Akshay Steel Works Pvt. Ltd. vs. Union of India** ⁵ mainly on the following grounds:

- a. There is no prohibition against use of CENVAT credit for such payment of mandatory pre-deposit.
- b. Rule 3 of CCR does not appear to be exhaustive in terms of purposes for which credit can be used.
- c. Credit in an assessee's CENVAT account is a duty he has already suffered.

Payment of pre-deposit using electronic credit ledger balance (for appeals to be filed after July 2017)

As elaborated hereinabove, the provisions of the CGST Act and the Excise Act are comparable as regards payment of mandatory pre-deposit for filing appeal and purposes for which credit balance may be utilized. Considering the same, one may still place reliance on various High Court decisions and the CESTAT Circular referred above whereby eligibility to use CENVAT credit balance for payment of mandatory pre-deposit was upheld.

There may also be some scope to counter the key reasons cited by the Orissa High Court in the recent decision in the case of Jyoti Construction (supra) to conclude ineligibility to use electronic credit ledger balance for payment of mandatory pre-deposit.

- Considering the language of Section 107(6)(b) of the CGST Act and essence of the said provision, it may be argued that mandatory pre-deposit is nothing but a part payment of the disputed tax liability and hence, may be treated as similar to **"Output tax"**; payment of which may be made using electronic credit ledger in terms of Section 49(4) of the CGST Act.
- The pre-deposit amount ought to be treated as **"Output tax"** since Section 107(6)(b) also describes the same as **"ten per cent of the remaining amount of tax in dispute"**.
- While Section 41(2) of the CGST Act states that credit referred in Section 41(1) shall be used only for payment of **"self-assessed output tax"**, one should also refer to Section 49(4) which permits the utilization of amounts in electronic credit ledger for **"making any payment towards output tax"**.
Further, Section 42 of the CGST Act read with Rule 69 of the CGST Rules prescribe the steps required to be taken in respect of provisionally allowed credit in terms of Section 41(1) of the CGST Act. A harmonious interpretation of all these provisions may imply that the restriction as per Section 41(2) of the CGST Act is only qua provisionally credited input tax. However, once the said input tax claim attains finality in terms of Section 42 of the CGST Act read with Rule 69 of the CGST Rules, the same may be used for any payment towards output tax.

Additional points in respect of appeals under the erstwhile Central Indirect tax laws

Such appeals, in terms of Section 142(7) of the CGST Act, should be disposed of in accordance with provisions of the erstwhile laws. Consequently, it may be argued that payment of mandatory pre-deposit using the electronic credit ledger balance should be permitted in line with the position under the erstwhile regime as upheld in various High Court decisions and the CESTAT Circular referred above.

Further, the Circular no. [42/16/2018-GST](#)

dated 13.04.2018 clearly permitted payment of arrears of tax pertaining to Service tax and Excise duty using electronic credit ledger balance. Consequently, payment of pre-deposit using the electronic credit ledger balance should be allowed.

Conclusion

In view of the analysis made hereinabove, it is evident that the issue at hand involves harmonious interpretation of various provisions of the CGST Act and the CGST Rules.

Let's hope this litigation on "how to make payment to initiate a litigation" stands resolved (by the CBIC) soon!

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¹ [2021-TIOL-2007-HC-ORISSA-GST](#)

² [2019-TIOL-286-CESTAT-BANG](#)

³ [2018-TIOL-1236-HC-AHM-CX](#)

⁴ [2019-TIOL-2390-HC-GUW-CX](#)

⁵ 2014 (304) ELT 518 (Jhar.)

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