

EY Tax Alert

CESTAT holds GST ITC cannot be utilized towards pre-deposit for appeals under earlier regime

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Executive summary

This Tax Alert summarizes a recent ruling¹ of the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad on utilization of Input Tax Credit (ITC) under Central Goods and Services Tax Act, 2017 (CGST Act) for payment of mandatory pre-deposit under Central Excise Act, 1944 (CEA).

Assessee had preferred an appeal under CEA before the first appellate authority. Accordingly, it made a pre-deposit of 7.5% of the disputed amount by way of reversal of ITC under CGST Act in its GSTR-3B return.

Commissioner (Appeals) rejected the appeal on the ground that mandatory pre-deposit as per Section 35 of the CEA was not made. Assessee preferred an appeal before CESTAT by paying additional 2.5% of the impugned amount as pre-deposit through DRC-03.

CESTAT relied on the judgement of Orissa High Court (HC)², wherein it was held that as per Section 41 of CGST Act, credit lying in electronic credit ledger (ECRL) can be utilized only for payment of self-assessed output tax. Further, the High Court had held that "output tax", as defined under Section 2(82) could not be equated to the pre-deposit required to be made in terms of Section 107(6).

It observed that decision of the HC is binding on the Tribunal and hence, held that mandatory deposit under Section 35F of CEA cannot be made by way of debit in the ECRL maintained under CGST Act.

¹ 2022-TIOL-777-CESTAT-ALL

² 2021(10) TMI-524- Orissa High Court

Background

- ▶ Assessee had filed an appeal under Central Excise Act, 1944 (CEA) before first appellate authority. Accordingly, it made a pre-deposit of 7.5% of the disputed amount by way of reversal of Input Tax Credit (ITC) under Central Goods and Services Tax Act, 2017 (CGST Act) in its GSTR-3B.
- ▶ First Appellate authority rejected Appellant's appeal on the ground that it had not made mandatory pre-deposit as per Section 35 of the CEA.
- ▶ Aggrieved by the same, Assessee appealed before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad by depositing an additional 2.5% of the impugned amount *vide* DRC-03 challan.

Assessee's Contentions

- ▶ Section 35F of the CEA does not specify any method for payment of pre-deposit and various Courts have upheld the eligibility to utilize CENVAT credit balance for payment of mandatory pre-deposit.
- ▶ As per Section 142(7) of the CGST Act, present appeal should be disposed of in accordance with provisions of the erstwhile laws. Consequently, payment of mandatory pre-deposit using credit balance should be permitted in line with the position under the erstwhile regime as upheld in various High Court (HC) decisions and Circular no. 15/CESTAT/General/2013-14³.
- ▶ Since old CENVAT credit lying in balance has been transitioned to Goods and Services Tax (GST) regime and forms part of GST credit pool, there should not be any restriction in utilization of that credit.
- ▶ CENVAT credit is duty already suffered by the assessee and hence debit entry in ITC should be treated as compliance by payment in cash.
- ▶ Central Board of Excise and Customs (CBIC) *vide* Circular⁴, had clarified that recovery of arrears arising under erstwhile laws shall be made as central tax liability which can be paid through the utilization of the amount available in the electronic credit ledger (ECRL) or electronic cash ledger (ECL) of the registered person.
- ▶ The Board again *vide* Circular⁵ clarified that taxpayers may reverse the wrongly availed CENVAT credit under the erstwhile law and inadmissible transitional credit through GSTR-3B.
 - Payment of pre-deposit through ITC reversal has been well accepted by Bangalore CESTAT in the case of Dell International Services India Pvt Ltd⁶ and the same has been accepted by Department.

- ▶ Delhi HC in Amit Gupta⁷ held that the bail amount can be paid by ECL as well as by debit of ECRL.
- ▶ Orissa HC in the case of Jyoti Construction⁸ had held that "output tax", as defined under Section 2(82) of the CGST Act could not be equated to the pre-deposit required to be made in terms of Section 107(6).

However, the said judgment is not relevant to the facts of the present case as it was rendered in the context of GST provisions and not with respect to erstwhile provisions.

- ▶ Also, in Jyoti Construction (*supra*) reliance was placed on Section 41(2) of CGST Act which is proposed to be amended in terms of Finance Act, 2022 and condition for utilization of credit only for payment of output tax is being done away with. When the proposed amendment would come into effect, there would be no restriction even under GST laws to debit ECRL for payment of pre-deposit.
- ▶ Further, procedural amendments are clarificatory in nature and retrospectively applicable as held in the case of Vatika Township (P) Ltd⁹.
- ▶ Presently, DRC-03 on GST portal gives an option of making pre-deposit either through ECL or ECRL. This shows that the intention of the legislature is to allow pre-deposit payment through ECRL.
- ▶ Moreover, other Benches of CESTAT also have allowed the payment of pre-deposit through GST credit.

Revenue's Contentions

- ▶ First Appellate Authority has correctly held that Section 35 of the CEA does not provide an option of making pre-deposit by way of reversing CGST credit from ECRL.
- ▶ Section 174(2)(f) of CGST Act envisages continuation of past cases of CEA as if such Act had not been repealed. Accordingly, pre-deposit should be made under Section 35F of the CEA and not under CGST Act.

Assessee already has central excise registration and there is no valid reason to make payment under CGST Act.

- ▶ Moreover, in case the appeal is allowed, refund of ITC reversal may not be possible because there is no provision for refund of ITC under section 54(3) of the CGST Act, except on account of zero-rated supply and ITC accumulated due to inverted duty structure.
- ▶ Furthermore, since there are conflicting decisions of the Tribunal on this issue, decision of the HC in the case of Jyoti Construction (*supra*) would prevail.

³ Dated 28 August 2014

⁴ Circular No. 42/16/2018-GST Dated 13 April 2018

⁵ Circular No. 58/32/2018-GST Dated 4 September 2018

⁶ 2019 TIOL-286-CESTAT-BANG

⁷ 2022-TIOL-641-HC-DEL-GST

⁸ 2021(10) TMI-524- Orissa High Court

⁹ [2014] 49 taxmann.com 249

CESTAT Ruling

- ▶ As per Section 41 of CGST Act, credit lying in ECRL can be utilized only for payment of self-assessed output tax.
- ▶ The order of the Tribunal in the case of Dell International India Services Pvt Ltd (*supra*) was an interim consent order.
- ▶ Moreover, the Orrisa HC (*supra*) after considering the provisions of CGST Act held that the said Act has no provision for utilization of CENVAT credit, other than for payment of self-assessed output tax.
- ▶ The decision of the HC is binding on the Tribunal and assessee has not produced any judgment of any other HC under GST era which supports its contentions.
- ▶ Further, the case laws relied by Assessee are different from the facts of the present case and cannot be relied upon.
- ▶ Hence, it was held that mandatory deposit under Section 35F of CEA cannot be made by way of debit in the ECRL maintained under CGST Act.

Comments

- a. The ruling is likely to result in additional cash outflow in the hands of taxpayers, even if they have sufficient balance in credit ledger.
- b. Practically we understand that taxpayers are making pre-deposit using ITC balance and the same is not disputed by the department in many cases. However, it is expected that Revenue may challenge the same considering this CESTAT decision.
- c. It is worthwhile to note that CBIC vide Circular 172/04/2022 had clarified that GST ITC can be utilized for self-assessed liability or the amount payable as a consequence of any proceeding instituted under GST. Interestingly, this circular does not seem to have been considered by CESTAT.
- d. A similar clarification from CBIC for allowing utilization of GST ITC for appeals under erstwhile regime, if issued, will reduce unwarranted litigations.

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