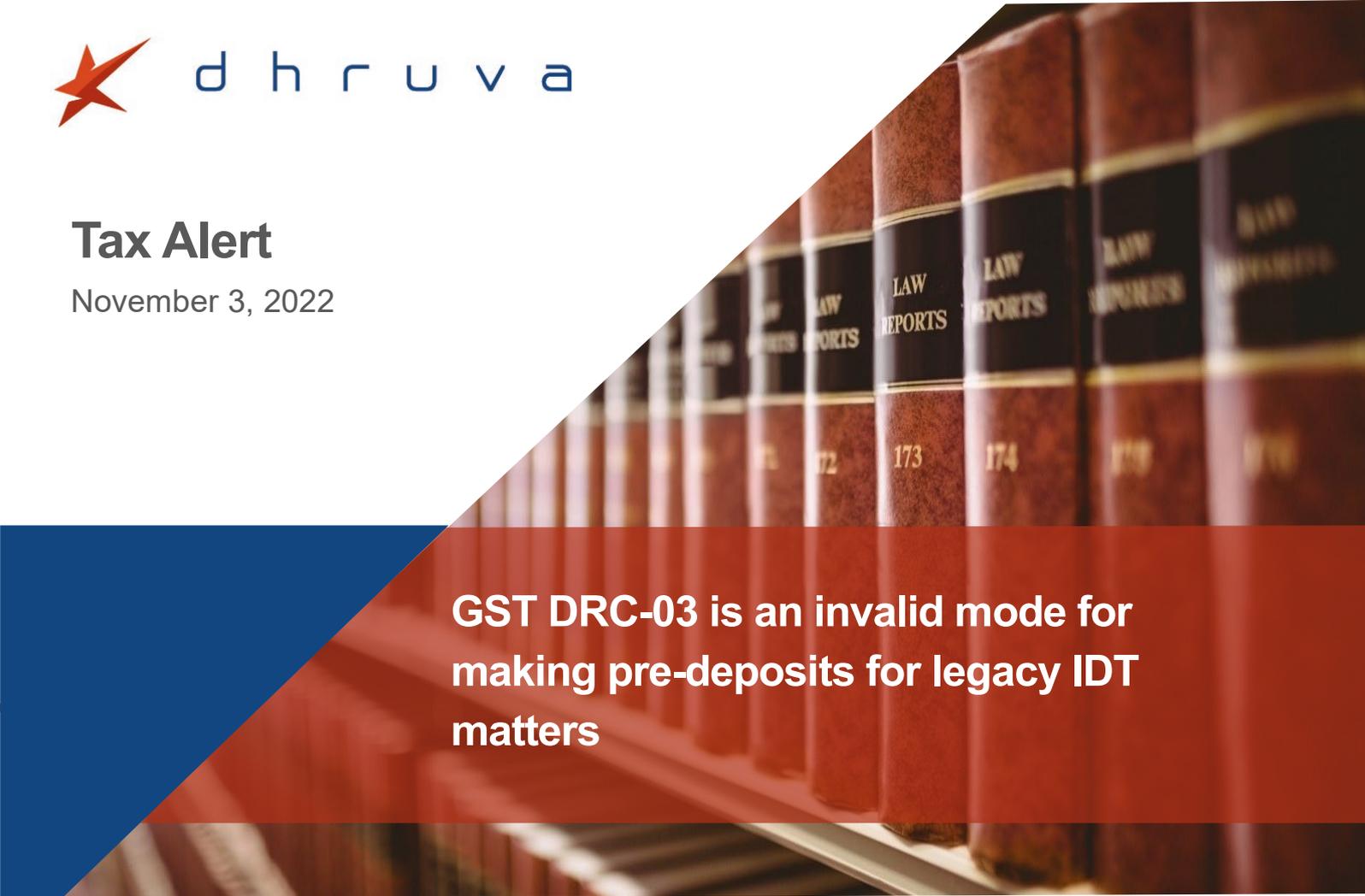


Tax Alert

November 3, 2022



GST DRC-03 is an invalid mode for making pre-deposits for legacy IDT matters

Instructions were issued on October 28, 2022¹ clearing the air on correct mode for making pre-deposits in respect of legacy IDT matters. This update is an insight into the instructions, the judicial aspects and consequence for taxpayers.

- Since inception of the GST regime, making pre-deposits for filing of an appeal under the erstwhile Excise and Service Tax laws has not been smooth. Taxpayers resorted to various approaches including payment through Form GST DRC-03 ('DRC-03') or through a credit reversal entry in Form GSTR-3B. The Central Board of Indirect Taxes and Customs (CBIC) issued Circular² providing for a mechanism for making payments of Central Excise and Service Tax arrears however, owing to procedural complications, the said procedure was not universally adopted.
- **Instruction No. 240137/14/2022, dated October 28, 2022** ('Instructions') issued by the Central Excise & Service Tax Wing of the CBIC clarifies the air on making pre-deposits and provides that payments made through Form DRC-03 is not a valid mode for complying with the pre-deposit requirement for filing an appeal under the erstwhile Central Excise and Service Tax laws.
- The Instructions mentions that pre-deposit is a mandatory requirement for exercising the right to appeal. Hence, the pre-deposit amount could neither be treated as a 'duty' nor as an arrears of tax under the erstwhile Indirect Taxes regime and so, it could not be stated that the entitlement of payment through Form DRC-03 was covered under transitional provisions of the GST law (which deals with grandfathering the issues under the erstwhile Indirect Taxes regime).

¹ Instruction No. 240137/14/2022

² Circular No. 1070/3/2019-CX, dated June 24, 2019

- Accordingly, the pre-deposit payments for legacy IDT matters should be made through the dedicated CBIC-GST Integrated portal in terms of its earlier Circular dated June 24, 2019.
- It has also been clarified that payments³ through Form DRC-03 is not a valid mode for making pre-deposits under the GST law as well, and the same ought to be deposited at the time of filing appeal on the GST portal through Form GST APL-01.

Judicial aspects

- The Instructions are issued pursuant to the directions given by the Bombay High Court in the matter of ***Sodexo India Services Pvt. Ltd. v. Union of India***⁴.
- In the said case, the petitioner had preferred an appeal before the Commissioner (Appeals) under Section 35F of the Central Excise Act, 1944 read with Section 85 of the Finance Act, 1994. The petitioner deposited the mandatory pre-deposit amount in cash by filing of Form DRC-03 on the common GST portal. The Commissioner (Appeals) dismissed the appeal on the ground that the pre-deposit made was improper.
- Recognizing the divergent practices being followed by both the taxpayers as well as the Department officials in respect of payment of pre-deposit amounts for filing appeals in legacy IDT disputes, the Bombay High Court directed CBIC to come up with suitable clarifications to resolve the ambiguity.

Dhruva Comments:

The Instructions shall help in developing a standard practice for pre-deposit payments in legacy Central Excise and Service Tax disputes.

That said, the clarification opens up the debate on the issue of pre-deposit through utilization of Input Tax Credit ('ITC') is a raging dispute in the GST regime.

On one hand, the Instructions hints that while filing the appeal in Form GST APL-01, the pre-deposit condition may be complied with by a taxpayer either through cash payments or by utilizing the ITC balance available in the Electronic Credit Ledger. On the other hand, the Instructions clarify that pre-deposit is neither a 'tax' nor a 'duty' and so the Form DRC-03 may not be used for payment of pre-deposit. This is likely to create confusion. On topic, there are divergent rulings of the Bombay High Court⁵, Allahabad High Court⁶ and Orissa High Court⁷ on whether pre-deposit amounts can be paid through utilization of ITC. The GST authorities will read the Instructions to their advantage and insist on discharging the pre-deposit obligation in cash only.

³ <https://cbecgst.gov.in/>

⁴ 2022-VIL-686-BOM-CE

⁵ Oasis Realty v. UOI, 2022-VIL-674-BOM

⁶ Tulsiram & Company v. Commissioner (Writ Tax No. 1237 of 2022)

⁷ Jyoti Construction v. Dy. Commissioner, 2021-VIL-715-ORI



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