

Use of ITC for payment of pre-deposit under GST remains a controversy

Oasis Realty v. Union of India¹

The Bombay High Court examined whether the balances from the electronic credit ledger ('ECL') may be utilised to pay the statutory pre-deposit of an amount equivalent to 10% of tax, to file an appeal under section 107 of the Maharashtra Goods and Services Tax Act, 2017 ('the Act'). The Court concluded that the ECL balance could be utilised for payment of pre-deposit.

Analysis of the judgment

The judgment interprets the language used in section 107 of the Act to examine if the stance of the petitioner, that ECL balance can be used for payment of the statutory pre-deposit to file an appeal, is correct or if that of the tax department is well grounded, that ECL balance cannot be used for payment of pre-deposit, and so it should be paid in cash.

The language of section 107(6) of the Act is at the centre of this dispute and is reproduced here along with section 49(4) and 2(82) of the Act:

*"(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.*

Provided that no appeal shall be filed against an order under sub-section (3) of section 129, unless a sum equal to twenty-five per cent. of the penalty has been paid by the appellant."

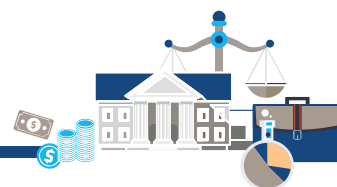
Section 49(4) of the Act which concerns payment of tax, interest, penalty, and other amounts, uses the words *"**The amount available in the electronic credit ledger may be used for making any payment towards output tax** under this Act ..."*

"**Output Tax**" is defined in section 2(82) of the Act as *"(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,"*

Held

- The Hon'ble Bombay High Court interpreted the statutory provision to mean that payment under section 107(6) of the Act is a tax component that is required to be paid under clause (b), if the order is

¹ Writ Petition (ST) no. 23507/2022



disputed, and that it is not a deposit. Reference has been made to rule 86(2) of the Maharashtra Goods and Services Tax Rules, 2017, wherein it is provided that ECL balances can be used to discharge any liability under section 49 of the Act.

- In relation to the definition of “output tax” it was held that output tax includes both payment of self-assessed tax as well as payments arising as a consequence of any proceeding under the Act. The Hon’ble High Court concluded that ECL balances can be used for payment of the mandatory pre-deposit for filing of an appeal since it is a payment of or towards disputed tax.
- The Hon’ble Orissa High Court in the case of **Jyoti Construction v. Deputy Commissioner of CT & GST**² examined the very issue and held that it is impossible to equate the “output tax” payable to the amount of pre-deposit required to be made for filing of an appeal. The Hon’ble Bombay High Court didn’t comment on the observation in this judgment and instead referred to CBIC’s circular³ (‘GST Circular’) in which, among other things, it clarified that ECL balance may be used for payment of output tax arising as a consequence of any proceedings instituted under the provisions of the GST Law.

Dhruva Comments:

GST was introduced as one integrated and nation-wide tax with expectations of it being progressive both in approach and applicability.

Litigation on a variety of topics is now taking centre stage in this new law. Under the erstwhile law the very question of CENVAT credit being utilised for payment of pre-deposit was contested in various cases until the CESTAT issued a circular⁴ clarifying that CENVAT credit can be used for payment of pre-deposit of service tax and central excise in the erstwhile regime.

In the central indirect taxes scheme (pre-GST), pre-deposit to file an appeal was viewed as “deposit” and not payment of taxes, and consequently considered as not liable to be subject to provisions of section 11B of

the Central Excise Act, 1944 and section 27 of the Customs Act 1962, which deals with refund.

In the case of **Tulsi Ram and Company**⁵ the Allahabad High Court has allowed the use of ECL balances to pay pre-deposit as required under section 107(6) of the respective state GST legislation.

In the GST regime, with contrary decisions of the Bombay High Court, Allahabad High Court and Orissa High Court coupled with the GST Circular the taxpayers still don’t have a clarity, if they may proceed to use ECL balances to pay the mandatory pre-deposit. While ITC is equivalent to tax paid, the rationale to disallow its usage for payment of pre-deposit for maintaining an appeal seems harsh and unfounded. Strictly, if there is a shift in focus from the words “the remaining amount of tax” to “a sum equal to” the decision of the Bombay High Court may be challenged by the GST department.

The fallout of these decisions is that varied practices will be adopted despite the fact that GST is ‘One nation, one tax’.

² TS-523-HC(ORI)-2021-GST

³ Circular no. 172/04/2022-GST dated 06.07.2022.

⁴ Circular no. 15/ CESTAT/ General/ 2013-14 dated 28.08.2014

⁵ Writ petition no. 1237 of 2022





ADDRESSES

Mumbai

1101, One World Centre,
11th floor, Tower 2B, 841,
Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahlanagar, Corporate Road,
Ahmedabad 380015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune 411045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
Emaar Square Building 4, 2nd Floor,
Office 207, Downtown,
Dubai, UAE
Tel: + 971 56 900 5849

KEY CONTACTS

Dinesh Kanabar

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Niraj Bagri

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

Dhruva Advisors has been consistently recognised as the “India Tax Firm of the Year” at the ITR Asia Tax Awards in 2017, 2018, 2019, 2020 and 2021.

Dhruva Advisors has also been recognised as the “**India Disputes and Litigation Firm of the Year**” at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the “**Best Newcomer Firm of the Year**” at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the “**Best Newcomer Firm of the Year**” at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for General Corporate Tax** by the International Tax Review’s in its World Tax Guide.

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for Indirect Taxes** in International Tax Review’s Indirect Tax Guide.

Dhruva Advisors has also been consistently recognised as a **Tier 1 Firm in India for its Transfer Pricing** practice ranking table in ITR’s World Transfer Pricing guide.

Disclaimer:

The information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and professional opinions. Before acting on any matters contained herein, reference should be made to subject matter experts, and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of any material contained in this publication

