dhruva advisors llp

Indirect Tax Alert

Date: October 23, 2021

Dimensions – 130th Edition

Judgments under GST era

Jyoti Construction v. *Deputy Commissioner of CT and GST and Another*[1]

Issue for Consideration

Whether payment of pre-deposit in case of appeals filed before the Appellate authority can be made through debiting the electronic credit ledger ('ECRL') instead of electronic cash ledger ('ECL') under the Central Goods and Services Tax Act, 2017 ('the Act')?

Discussion

- The Petitioner is a partnership firm engaged in the execution of works contracts including civil, electrical, and mechanical contracts. An order was issued by the Respondent demanding payment of tax and interest against which the Petitioner filed an appeal before the Appellate authority ('the Authority') in Form GST APL-01.
- Section 107(6) of the Act prescribes payment of 10% of the disputed tax subject to a maximum of ₹ 25 crores as a pre-deposit at the time of filing an appeal. Section 49(3) of the Act and rule 85(4) of the CGST Rules, 2017 ('the Rules') specify that ECL should be debited for making any payment, *inter alia*, towards 'any other amounts payable' under the Act.
- The Authority rejected the appeal filed by the Petitioner on the ground that the pre-deposit amount was paid by debiting the ECRL instead of debiting the ECL which is in contravention of the provisions under the Act.
- The Petitioner has filed a writ petition against the rejection order passed by the Authority and contended as follows:
  - Section 49(4) of the Act specifies that ECRL can be utilised for making any payment towards 'Output tax' where output tax has been defined under section 2(82) to mean tax chargeable on taxable supply of goods or services or both.
  - On combined reading of the above provisions, the pre-deposit amount required to be paid by the Petitioner is nothing but a percentage of the output tax and thus it could be discharged by way of debiting the ECRL.
  - Section 107(6) of the Act is merely a machinery provision and must be interpreted accordingly to serve the purpose of collecting the pre-deposit amount which could be done by debiting the ECLR.

[1] 2021-VIL-715-ORI

- The department argued that the pre-deposit amount cannot be equated to output tax under the Act and submitted as follows:
  - Section 41(2) of the Act provides that input tax credit ('ITC') shall be utilised for payment of self-assessed output tax as per the return filed under section 39 of the Act. ITC cannot be utilised to discharge any other liability including pre-deposit.
  - The department has relied on the judgment pronounced in the case of *Sukhdev Singh* v. *Bhagatram Sardar Singh*[2] to state that if the statute prescribes a manner in which certain things are to be done, then those things have to be done only in that manner.
  - Reliance has also been placed on the Supreme Court judgment given in the case of *Jayam & Co.* v. *State of Tamil Nadu*[3] wherein it was held that ITC is itself a concession and has to be utilised as per the provisions of the Act and not in any other manner.
- The Hon'ble Orissa High Court held as follows:
  - The contention of the Petitioner that pre-deposit amounts can be equated to Output tax as defined under section 2(82) of the Act (*supra*) cannot be accepted. Furthermore, section 107(6) of the Act prescribing the amount of pre-deposit to be paid cannot be held to be merely a 'machinery provision'.
  - Section 41(2) of the Act specifies that ECLR shall be utilised only for payment of output tax and not for any other purposes and thus, it cannot be debited for payment of pre-deposit amounts at the time of filing an appeal.
  - The Petitioner's prayer to allow them to make payment of the pre-deposit amounts only after the amounts debited in the ECLR are reversed is a separate issue and the Petitioner should seek appropriate remedy in accordance with law. Payment of pre-deposit amount is not contingent upon such reversal of ITC debited in the ECLR.

[2] 1975 (2) TMI 111
[3] 2016 (9) TMI 408
[4] 2019 (1) TMI 1033
[5] 2021-VIL-719-MAD

Judgment

The Hon'ble Orissa High Court dismissed the writ petition and held that the ECLR cannot be debited to make payment of the pre-deposit amounts at the time of filing an appeal under the Act.

Dhruva Comments:

In terms of section 107(6) of CGST Act, pre-deposit of 10 percent needs to be made for 'tax in dispute' arising from the impugned order for the purpose of filing appeal. Section 49(4) deals with ECLR and allows for making payment of output tax. Thus, it needs to be deliberated as to whether output tax would not include disputed tax for which pre-deposit payment is to be made. Disallowing usage of ECLR for making pre-deposit would put additional financial burden on businesses.

The CESTAT had pronounced a divergent view in the case of *Dell International Services India Pvt. Ltd.* v. *Commissioner of Central Tax*[4] and allowed the payment of pre-deposit required under the erstwhile Service tax law by utilising the accumulated ITC balance in the ECLR. Interestingly, learned AR has also accepted the legal position that mandatory pre-deposit can be made through CGST credit because that has been the practice in erstwhile excise and service tax regime where courts have accepted pre-deposit for filing appeal if the same has been paid by debiting the Cenvat account.

Platinum Holdings Pvt. Ltd. v. *Addl. Commissioner of GST and Central Excise (Appeals) and Another*[5]

Issue for Consideration

Whether Special Economic Zone ('SEZ') units / developers are entitled to refund of tax paid erroneously

on inward supplies of goods and services under the Central Goods and Services Act, 2017 ('the Act')?

Discussion

- The Petitioner is a unit located in an SEZ and has procured supplies from various vendors for development of the SEZ. Supplies to SEZ, being a zero-rated supply under the Act, no GST applies on supplies made to the Petitioner for development or export. However, some vendors have charged Integrated Goods and Services Tax ('IGST'), and some have erroneously even charged Central Goods and Services Tax ('CGST') and State Goods and Services Tax ('SGST') on the invoices and recovered the same from the Petitioner.
- The Petitioner has filed applications to claim refund of such taxes erroneously paid by them which has been rejected by the GST department. The Appeal filed by the aggrieved Petitioner has also been rejected ('the impugned order'), resulting in filing of this writ petition before the Hon'ble Madras High Court.
- The GST department held that refunds can be claimed only by the supplier of goods or services under section 54 of the Act and rule 89 of the CGST Rules, 2017 ('the Rules') and not by the recipients of such supplies.
- The Petitioner argued that they are eligible to claim refund of GST paid on inward supplies and submitted as follows:
  - There is no dispute that the inward supplies procured by them are zero-rated supplies under the Act and that tax has been remitted by the Petitioner.
  - Section 54 of the Act which deals with refund of tax refers to *'any person'* and includes the recipient of services also within its ambit.
  - It is to be noted that explanation provided in section 54 specifies[6] the time limit for filing refund application when filed by other than the supplier of goods / services. If it were the intention of the legislature to deny refund of taxes to recipient of supplies, there would have been no need to insert the above explanation in the Act.
- The Revenue argued that rule 89 of the Rules states that *only* the suppliers are entitled to claim refund of GST and that it would be difficult for the department to determine eligibility of recipients to such refund.
- The Hon'ble Madras High Court held as follows:
  - In the absence of any material placed on record by the department, it is held that there is no double claim of refund of tax by the supplier as well as the recipient in the present case.
  - The statutory scheme of refund under the Act permits any entity to seek refund of GST paid under the Act subject to the condition that refund has not been claimed twice against the same supply.
  - The language employed in section 54 as well as rule 89 commences with the words *'any person'* and thus it is clear that any person can make an application claiming refund of tax paid under the Act and that it does not contain any restriction in its operation.
  - Rule 89 of the Rules refers to the suppliers as one type of entity that may claim refund of tax paid and cannot be interpreted to be the only entity allowed to file a claim for refund of tax paid.
  - The learned GST officer has erred in inserting the word *'only'* while interpreting rule 89 of the Rules and subsequently rejecting the refund claim filed by the Petitioner. It is a settled position that no word / phrase can be inserted in a statutory provision and must be interpreted literally. Thus, the restriction placed by the department is misplaced and liable to be quashed.
  - In respect of the quantification of the refund, the Petitioner should appear before the

[6] Explanation: For the purpose of this section, (2)"Relevant date" means…(g) in the case of a person, other than the supplier, the date of receipt of goods or services or both by such person

Respondent and present the necessary documentary evidence in support of its claim of refund of tax paid. Additionally, the Petitioner would be required to establish that there is no double claim of tax and that the tax has been paid by the supplier to the GST department.

Judgment

The Hon'ble Madras High Court allowed the writ petition and held that refund of GST paid can be claimed by any entity under the Act including an SEZ unit which is the recipient of zero-rated services.

Dhruva Comments:

While there is no specific provision which debars an SEZ unit from claiming a refund, it has been a contentious issue since the implementation of GST. The Appellate authority in the case of *Vaachi International Pvt. Ltd.* v. *Assistant Commissioner (ST)*[7] had held that refund applications can only be filed by the suppliers of goods / services to the SEZ units.

This is a welcome judgment and provides much needed clarity on the disputed subject. It is imperative that the CBIC issues suitable clarifications with respect to the eligibility of refund claims filed by the SEZ units to ensure consistent application of law and help taxpayers avoid legal hassles.

[7] 2020 (11) TMI 1

www.dhruvaadvisors.com

Follow us on:

ADDRESSES

Mumbai
11th Floor, One World Centre,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad
B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahladnagar, Corporate Road,
Ahmedabad 380 015
Tel: +91-79-6134 3434

Bengaluru
Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR
101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122 002
Tel: +91-124-668 7000

Pune
305, Pride Gateway, Near D-Mart, Baner,
Pune 411 045
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

Ritesh Kanodia
ritesh.kanodia@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's 'General Corporate Tax'** and **'Indirect Tax'** ranking tables as a part of ITR's World Tax guide. The firm is also listed as a **Tier 1 firm** for India's **'Transfer Pricing'** ranking table in ITR's World Transfer Pricing guide.