

2022 (9) TMI 44 - CESTAT ALLAHABAD**M/S. JOHNSON MATTHEY CHEMICAL INDIA PVT. LTD. VERSUS ASSISTANT COMMISSIONER CGST,
AND CENTRAL EXCISE, KANPUR**

DEFECT DIARY No. 701942022

Dated: - 23-8-2022

Maintainability of appeal - appeal rejected on the ground that the Appellant had not made the pre deposit as per section 35F of the Central Excise Act, 1944 - requirement to make pre-deposit by debiting the Electronic Cash Ledger and Electronic Credit Ledger - section 41 of the GST Act - HELD THAT:- In M/S. DELL INTERNATIONAL SERVICES INDIA PVT. LTD. VERSUS COMMISSIONER OF CENTRAL TAX GST COMMISSIONERATE [[2019 \(1\) TMI 1033 - CESTAT BANGALORE](#)], the Tribunal accepted the contention of the appellant as learned authorized representative did not dispute that mandatory pre deposit can be made through the CGST Credit. Accordingly, the Tribunal held that mandatory pre deposit can be made through the CGST Credit.

Thus, it has to be held that mandatory deposit under section 35F of Excise Act cannot be made by way of debit in the Electronic Credit Ledger maintained under CGST Act - the defect is not cured. However, four weeks time is granted to the appellant to make the mandatory pre-deposit, so as to remove the defect.

Judgment / Order

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT AND HON'BLE MR. P. ANJANI KUMAR,
MEMBER (TECHNICAL)**

Ms. Priyanka Rathi, Chartered Accountant for the Appellant

Mr. B.K. Jain, Authorised Representative for the Respondent

ORDER**P. ANJANI KUMAR:**

M/s Johnson Matthey Chemical India Pvt. Ltd. [1] has filed this appeal against the Order-in-Appeal dated January 25, 2022 passed by the Commissioner (Appeals), Allahabad whereby he rejected the Appeal on the ground that the Appellant had not made the pre deposit as per section 35F of the Central Excise Act, 1944 [2].

2. The Registry had pointed out two defects in the instant Appeal. One was with respect to non-submission of self-attested copies of order in original and the second was with respect to the mandatory pre-deposit of 10% of disputed duty. The appellant, by letter dated May 13, 2022, clarified that the defect with respect to the attested copies of order in original has been cured. Further, with respect to defect of pre-deposit, it was submitted that there is no defect as requisite pre-deposit of total 10% had already been made. Before the first appellate authority, 7.5% of disputed amount was deposited by way of reversal in GSTR-3B and an additional amount of 2.5% was deposited vide DRC-03 challan. The appellant has submitted copies of the relevant GSTR-3B and DRC-03.

3. Ms Priyanka Rathi, learned Chartered Accountant, appearing for the appellant submits that the finding of the learned Commissioner (Appeals) is erroneous as the Appellant had made pre-deposit of 7.5% of the disputed amount as per section 35F of the Excise Act, by way of reversal of CGST credit, duly reflected in GSTR-3B under Column 4B (2) and that the Appellant was not put to notice of any defect, with respect to the pre-deposit, by the learned Commissioner (Appeals).

4. Learned Chartered Accountant submits that when the matter was listed before the Bench, under defect matters, on 15.06.2022, the Bench directed that appellant to submit a brief note on this legal issue along with relevant case law and that the department should examine the issue of payment of pre-deposit by reversal through CGST credit. She submits that the total disputed amount in the Appeal filed before the Commissioner (Appeals) was INR 48,38,725/-; the Appellant had accordingly, made pre-deposit of 7.5%, i.e. Rs 3,62,905/- by way of reversal of CGST credit and the same was noted in the impugned order at paragraph 4.1 (1), while holding that pre-deposit made through credit reversal cannot be accepted.

5. Learned Chartered Accountant submits further that this finding is totally erroneous as the payment of pre-deposit through credit reversal has been well accepted by this Tribunal in ***Dell International Services India Pvt. Ltd. vs. Commissioner of Central Tax 2019 TIOL-286-CESTAT-BANG.*** Learned Chartered Accountant submits that section 35F of the Excise Act 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. Thus, payment by credit is an accepted mode of payment of pre-deposit. Further, as the old credit lying in balance has been transitioned to GST regime and forms part of GST credit pool, there should be no restriction in utilization of that credit. Reliance has been placed on the following cases which hold that when the credit provisions do not bar utilisation of credit for the payment of pre-deposit, such a restriction cannot be impliedly read:

- **Akshay Steel Works Pvt. Ltd. v. Union of India 2014 (304) E.L.T.518 (Jhar.) (2)**
- **Hindprakash International Pvt. Ltd. v. Commissioner 2016 (41) S.T.R. 70 (Tribunal) (3)**
- **United ChloroParafins v. CCE 2018 (10) G.S.T.L. 501 (Tri.-Kolkata) (4)**

6. Learned Chartered Accountant submits that in the present case, as per the GST transition provisions of Section 142(7) of the CGST Act, the present Appeal should be disposed of in accordance with provisions of the erstwhile laws. Consequently, it is submitted that the 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 Circular no. 15/CESTAT/General/2013-14 dated August 28, 2014 which clarified that credit reversal is a proper mode for payment of mandatory pre-deposit. She submits that pre-deposit made by reversing CENVAT credit shall be valid as credit in CENVAT account since it is a duty which the assessee has already suffered, which he can encash. Debit Entry in ITC should, therefore, be treated as compliance by payment in cash. Reliance has been placed on:

- **Cadila Health Care Pvt Ltd. v. UOI 2018-TIOL-1236-HC-AHM CX**
- **Manaksia Ltd. v. CCE, Haldia 2017 (354) E.L.T. 415 (Tri. - Kolkata)**
- **Vrinda Engineers Pvt. Ltd. v. CCE Kolkata -II & I 2016 (45) S.T.R. 519 (Tri. - Kolkata)**
- **India Casting Co. v. CEGAT 1998 (104) E.L.T. 17 (All.)**
- **U.O.I. v. Vikrant Tyres Ltd. 1999 (35) RLT 427 (Kar.)**
- **MorarjeeBrembana Ltd. v. CCE 2003 (157) E.L.T. 657**
- **Kopran Ltd. v. CCE 2005 (188) E.L.T. 431 (Tri. - Mumbai)**

7. Learned Chartered Accountant submits in addition that CBIC vide Circular No. 42/16/2018-GST dated April 13, 2018, clarified that the recovery of arrears arising under the existing law shall be made as central tax liability to be paid through the utilization of the amount available in the electronic credit ledger or electronic cash ledger of the registered person, and the same shall be recorded in Part II of the Electronic Liability Register. Further, the Board again vide Circular No. 58/32/2018-GST dated September 04, 2018, issued clarification on the process of recovery of arrears of wrongly availed CENVAT credit under the existing law and CENVAT credit wrongly carried forward as transitional credit in the GST regime. It was mentioned by CBIC that taxpayers may reverse the wrongly availed CENVAT credit under the existing law and inadmissible transitional credit through Table 4(B)(2) of FORM GSTR-3B, as the functionality to record this liability in the electronic liability register was not available on the common portal at that time.

8. On the other hand, Shri B.K. Jain, learned authorised Representative for the respondent department, submits that Commissioner (Appeals), by order dated 21.01.2022, has correctly held that no such option of making pre-deposit by way of reversing CGST credit is provided under section 35 of the Excise Act. Clause (f) of sub-section (2) of section 174 of CGST Act, 2017 envisages continuation of proceedings of past cases of erstwhile repealed Central Excise Act as if such Act had not been repealed; pre-deposit should be made under section 35F of the Excise Act and not under CGST Act; the appellant already has central excise registration and there is no valid reason to make payment under CGST Act; though it is found from perusal of GSTR-3B for the month of August, 2021, that there was reversal of CGST credit of Rs.3,62,905/- the purpose of such reversal is not mentioned anywhere which makes the said reversal doubtful and in case the appeal is allowed, refund of ECRL/ 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.

9. Learned Authorised Representative submits that the issue of manner of pre-deposit to be made in cash or by debiting the electronic credit ledger (ECRL) ITC, has been decided by the Orissa High Court in ***M/s Jyoti Construction vs. Deputy Commissioner of CT & GST 2021(10)TMI-524- Orissa High Court*** and it has been held that it is not possible to accept the plea of the petitioner that 'output tax', as defined under section 2(82) of the CGST Act could be equated to the pre-deposit required to be made in terms of section 107(6) of the CGST Act. Further, the proviso to section 41(2) of the GST Act limits the usage to which the ECRL could be utilised; it cannot be debited for making payment of pre deposit at the time of filing of the appeal in terms of Section 107 (6) of the CGST Act; no error was committed by the appellate authority in rejecting the Petitioner's contention that the ECRL could be debited for the purposes of making the payment of pre-deposit; the prayer of the Petitioner that the debiting of the ECRL made by it should be reversed is a separate cause of action for which the Petitioner should independently seek appropriate remedies in accordance with law and that the making of the pre-deposit by the Petitioner is not contingent upon the above reversal of the debit entry in the ECRL.

10. Learned Authorised Representative submits that the appellant has relied upon an interim order No. 105/2018 of Bangalore Tribunal in ***Dell International Services India Ltd.***, wherein the Tribunal allowed pre-deposit made through CGST credit. The decision of the Tribunal is an interim order and since there are conflicting decisions of the Tribunal and the High Court, on this issue, had held otherwise, the decision of the High Court would prevail.

11. Learned Chartered Accountant for the appellant submits that the contentions raised by the Department are devoid of any merit and are untenable. Reliance upon the ***Jyoti construction*** case of Orrisa High Court is misplaced; the said judgment is not relevant to the facts of the present case as it was rendered in the context of GST provisions only and not with respect to erstwhile provisions wherein it is well settled that credit could be utilized for payment of pre deposit. Further, the erstwhile credit has been transitioned to GST and forms part of GST credit pool and since the previous excise duty and service tax

has been subsumed into GST, the ITC under GST wherein previous credit is also transferred should be utilized for payment of pre-deposit by debiting the electronic credit ledger in accordance with Section 41.

12. Learned Chartered Accountant for the appellant submits that Delhi High Court in **Amit Gupta Vs Directorate General of GST Intelligence Headquarters 2022-VIL-307-DEL** held that the bail amount can be paid by cash ledger as well as by debit of the Input Tax Credit ledger. In Jyoti Construction reliance was placed on section 41(2) which itself is proposed to be amended and condition for utilization of credit only for payment of output tax is being done away with. In terms of the Finance Bill, 2022, Section 41 has been proposed to be substituted with a new Section 41 wherein the restriction on utilization of credit only for payment of self-assessed output tax is done away with. Further, when the proposed amendment would come into effect, there would be no restriction even under GST laws to debit credit ledger for payment of pre-deposit.

13. Learned Chartered Accountant submits that the procedural amendments which are clarificatory in nature are retrospectively applicable as held in **Commissioner of Income Tax (Central - I) v Vatika Township (P) Ltd [2014] 49 taxmann.com 249**. She submits that even at present, the DRC 03 form on GST portal itself gives the option of making pre-deposit payment either through cash or credit ledger; this itself shows that the intention of the legislature is to allow pre-deposit payment through credit ledger; as per principle of Contemporanea Expositioas, the clarification issued by Government can be contemporaneous exposition of its intention, as held in **Spentex Industries v. CCE. 2015 (324) E.L.T. 686 (S.C.)**

14. Learned Chartered Accountant submits further that the contention that refund of ITC cannot be granted in case the Appeal is allowed is erroneous as the assessee always has the option of taking re-credit of the amount debited from the Electronic credit ledger for payment of pre-deposit in terms of Rule 86 (4A). Though the decision of the Tribunal in **Dell International** is an interim order, the same has conclusively determined the rights of the parties with respect to payment of pre-deposit and as such the issue that was required to be decided in the said interim order stands determined. Further, the Department has itself, in the same decision accepted the fact of payment of pre deposit of erstwhile matters from the GST Credit. Thus, without challenging the said determination made in the interim order, the Department cannot be permitted to contend to the contrary.

15. Learned Chartered Accountant also submits that other Benches of the Tribunal also have allowed the payment of pre-deposit through GST Credit. In **Cargill Business Service India Pvt. Ltd**, Registry accepted the application wherein pre-deposit was made through GST credit and that grave prejudice would be caused if the Appellant is singled out and denied the opportunity to make pre-deposit through credit ledger.

16. Learned Chartered Accountant submits lastly that without prejudice, the learned Commissioner (Appeals) has not provided any opportunity to cure the defects and for this she relies on **Century Laminating Co. v. CCE 2017 (347) E.L.T. 400 (All.) (18)**, wherein it was held that opportunity should be given to cure the defect.

17. Heard both sides and perused the records of the case.

18. Brief issue that requires to be considered in this case is as to whether the appellant assessee is entitled to make the pre-deposit of duty, payable under the old Central Excise regime, as per the requirement of section 35F of the Excise Act by debiting the Electronic Cash Ledger and Electronic Credit Ledger, under the CGST regime. It is the contention of the appellant that the same is permissible in view of the Circular issued by Tribunal; decisions of the Tribunal and Courts and looking to the fact that the credit balance under old regime has been subsumed in the new credit under CGST regime by way of transfer to the credit ledger. The appellant relies on the decision of Tribunal in **Dell International** and claims that similar deposit by M/s Cargill Business Service India Pvt. Ltd has been accepted by the

Registry of the Tribunal. On the other hand, it is the contention of the department that section 41 of the GST Act does not permit such payment as was held by Orissa High Court in **Jyoti Construction** and that the decision of High Court needs to be followed over the decision of Tribunal as per judicial discipline.

19. We find that as per the provisions of section 41 of CGST Act, credit lying in the electronic Credit Ledger can be utilised only for self-assessed output Tax. Section 41 of the CGST Act provides as under.

41. Claim of input tax credit and provisional acceptance thereof.

(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.

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."

20. In this context the Orissa High Court held, in *Jyoti Construction*, that:

"14. The Court does not find the above decision to be helpful to the Petitioner. It is not possible to accept the plea of the Petitioner that "Output Tax", as defined under Section 2(82) of the OGST Act could be equated to the pre-deposit required to be made in terms of Section 107 (6) of the OGST Act. Further, as rightly pointed out by Mr. Mishra, learned ASC, the proviso to Section 41 (2) of the OGST Act limits the usage to which the ECRL could be utilised. It cannot be debited for making payment of pre-deposit at the time of filing of the appeal in terms of Section 107 (6) of the OGST Act. It is not therefore possible to accept the plea Section 107 (6) of the OGST Act is merely a "machinery provision".

21. In ***Dell International Services India Pvt. Ltd.***, the Tribunal accepted the contention of the appellant as learned authorized representative did not dispute that mandatory pre deposit can be made through the CGST Credit. Accordingly, the Tribunal held that mandatory pre deposit can be made through the CGST Credit. As pointed out by the learned authorized representative, in the instant case, the said order of the Tribunal in the ***Dell International India Services Pvt. Ltd.*** was an interim consent order. Moreover, the judgment of Orrisa High Court in the ***Jyoti Construction*** considered the provisions of CGST Act and held that CGST Act has no provision for utilization of CENVAT Credit, other than for payment of self-assessed output tax. The decision of the High Court is binding on the Tribunal and the appellant has not produced any judgment of any other High Court which supports the contention of the appellant. The case of ***Amit Gupta*** deals with debiting of ITC Credit for furnishing personal bond as a pre-condition of bail and as such the facts of the case are different and, therefore, cannot be relied upon.

21. The appellant has relied upon various cases. We find that all the cases are about debit of pre-deposit amount from CENVAT Credit Register. As such, the same are not applicable to the facts of the present case.

22. In view of the above, it has to be held that mandatory deposit under section 35F of Excise Act cannot be made by way of debit in the Electronic Credit Ledger maintained under CGST Act. To that extent, we hold that the defect is not cured. However, four weeks time is granted to the appellant to make the mandatory pre-deposit, so as to remove the defect.

(Order pronounced in the open court on 23.08.2022)

[1] the appellant

[2] the Excise Act

Citations: in 2022 (9) TMI 44 - CESTAT ALLAHABAD

1. [2015 \(10\) TMI 774 - Supreme Court](#)
2. [2014 \(9\) TMI 576 - Supreme Court](#)
3. [2022 \(5\) TMI 129 - DELHI HIGH COURT](#)
4. [2021 \(10\) TMI 524 - ORISSA HIGH COURT](#)
5. [2018 \(11\) TMI 80 - GUJARAT HIGH COURT](#)
6. [2017 \(8\) TMI 880 - ALLAHABAD HIGH COURT](#)
7. [2013 \(9\) TMI 777 - JHARKHAND HIGH COURT](#)
8. [1998 \(7\) TMI 210 - ALLAHABAD HIGH COURT](#)
9. [2019 \(1\) TMI 1033 - CESTAT BANGALORE](#)
10. [2017 \(6\) TMI 1196 - CESTAT KOLKATA](#)
11. [2017 \(9\) TMI 1477 - CESTAT KOLKATA](#)
12. [2016 \(12\) TMI 1163 - CESTAT KOLKATA](#)
13. [2015 \(6\) TMI 1245 - CESTAT AHMEDABAD](#)
14. [2004 \(4\) TMI 509 - CESTAT, MUMBAI](#)
15. [2003 \(8\) TMI 266 - CESTAT, MUMBAI](#)