

# TAX INFO

*Dated 20/10/2021*

Latest update on GST Law: Information regarding **Analysing the validity of Pre-Deposit of appeal to be made from Cash Ledger only** based on the **Judgement issued by Orissa High Court in case of M/s Jyoti Construction.**

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A highly debatable and burning issue emerged from the latest judgement pronounced by Orissa High Court in the case of M/s Jyoti Construction vs. Deputy Commissioner W.P. C No. 23508 of 2021 dated 07.10.2021 wherein it has been held that **“pre-deposit”** for filing an appeal, to be made from **Electronic Cash Ledger**. Since, the appellant filed an appeal by debiting Electronic Credit Ledger and hence the impugned appeal was dismissed by the honourable Orissa High Court.

The following questions emerged from the impugned order:

1. Why “pre-deposit” payment to be made from Electronic Cash Ledger only?
2. Whether ITC available in Electronic Credit Ledger is not as good as balance available in Electronic Cash Ledger?
3. Impact on the working capital of the taxpayer, who is filing an appeal under GST Law.
4. Facility available on GSTN Common Portal to allow payment of “pre-deposit” from the Electronic Credit Ledger of the appellant.
5. Impact of the above judgement on all pending appeals filed under GST wherein **“pre-deposit”** are made using **Electronic Credit Ledger**.

## Relevant Provisions:

- Section 41(1): Every registered taxpayer shall be entitled to take credit of **Eligible Input Tax**; such amount shall be credited on a provisional basis to his Electronic Credit Ledger.
- Section 41(2): The above provisional credit shall be used only for payment of self-assessed output tax as per return.

Now, question emerged when this provisional ITC would become final.

- Section 42: Every inward supply in GSTR-2 was supposed to be matched with the corresponding outward supply filed in GSTR-1 by the supplier and said matching was to be communicated through MIS-1 but unfortunately such matching communication was kept in abeyance till date. So, can it be presumed that the provisional credit would tantamount to final credit in the absence of matching communication as provided under the GST Law and can such credit be used for payment of tax other than self-assessed liability shown in the returns.
- Section 49(2): The amount available in Electronic Cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provision of this Act.
- Section 49(3): The amount available in Electronic Credit Ledger may be used for making any payment towards output tax under this Act.
- Section 2(82): “Output tax” means the tax chargeable under this Act on taxable supply of goods or services or both but excludes tax payable on RCM basis.
- Section 59: Every registered person shall self-assess the tax payable under this Act and furnish a return for each tax period as specified under Section 39 of the CSGT Act. Thus, self-assessment means **determination of tax liability by the taxpayer himself** and not by the proper officer or the tax authorities.
- Rule 85(4): Provides payment from Electronic Cash Ledger while the payment are made towards (i) TDS, (ii) TCS, (iii) RCM Liability, (iv) Tax under Composition Scheme, (v) Any amount payable towards interest, penalty, fees or any other amount payable under the Act.
- Section 107(6): No appeal shall be filed under GST unless the appellant has paid
  - a) Full admitted tax
  - b) 10% of the remaining amount of tax in dispute

Now, the mute question arise whether this “pre-deposit” (10% of the remaining amount of tax in dispute) is a part and parcel of “**output tax liability**” and can be paid from **Electronic Credit Ledger** or otherwise it is all together under a different head “pre-deposit” and payable only from the Electronic Cash Ledger.

As per taxpayer, this “pre-deposit” was a specific percentage of the output tax as defined under section 2(82) of the CGST Act and therefore, even payment equivalent to specific percentage (10%) if paid as “pre-deposit” is a part and parcel of output tax liability and can be discharged from Electronic Credit ledger. In case of failure, appellant is required to pay the remaining balance of 90% of output tax liability after setting of pre-deposit of 10% deposited at the time of filing an appeal, of course interest provision would attract as per the law.

As per the Department, the liability of “pre-deposit” could be discharged only by debiting the Electronic Cash ledger by the taxpayer. Department argued that “pre-deposit” cannot be equated to the output tax as define in Section 2(82) of the CGST Act. Section 41(2) set out the purposes for which the ITC can be utilised. It can be utilised for payment of “**self-assessed output tax as per the return**”. As per the Department, the appeal is filed not against the **self-assessed liability** but against the demand created by way of order by the tax authority and hence this cannot be equated to the output tax as per Section 2(82) and hence, this “pre-deposit” is nothing but “**any other amount**” as stipulated under Rule 85(4) that can be paid only in cash.

As per the legal fraternity, Section 41 deals with claim of ITC and provisional acceptance thereof and nothing beyond that. It does not cover a situation when the said provisional credit would attain finality by virtue of Section 42. Once, the provisional ITC attain finality, its utilisation no more depend on Section 41 but will work in accordance with Section 49 of the CGST Act. Explanation to section 49 clearly brings out the distinction between “**tax dues**” and other dues:

1. “Tax dues” means the tax payable under this Act and does not include interest, fee and penalty; and
2. “Other dues” means interest, penalty, fee or any other amount payable under this Act or the rules made there under.

From the above, it is clear that sum equivalent to 10% of the remaining tax is nothing but a “pre-deposit” of part of tax payable under the Act. Also, note that GSTN Portal allows payment of “pre-deposit” using ITC which means Government considered it as tax payment otherwise it would have restricted on GST Common Portal itself as in the case of “other dues” means interest, penalty, fee or any other amount payable under this Act which portal itself restricting for payment from Electronic Credit Ledger. Such a “pre-deposit” payment from Electronic Cash Ledger would put an extra burden on working capital flow of the taxpayer and all the appeals already filed where “**pre-deposit**” are made from Electronic Credit Ledger should not be straight away dismissed solely on the basis of verdict given by Orissa High Court in the case of M/s Jyoti Construction Vs. Deputy Commissioner W.P. (C) No. 23508 of 2021 dated 07.10.2021. Also, note that in case appeal is lost by the appellant then remaining 90% tax liability can be discharged from Electronic Credit Ledger as per the law and hence, it would result in absurdity that “pre-deposit” cannot be made from Electronic Credit Ledger. The law must consider this absurdity and must come out with such clarification at the earliest possible in view of the above Orissa High Court Judgement. What will happen if another High Court hold the view that such a “pre-deposit” from Electronic Credit Ledger is a sufficient compliance by taxpayer in view of the facts that payment either from Electronic Cash Ledger or from Electronic Credit Ledger is a neutral effective for collection of taxes and should not be a barrier for filing an appeal which is a privilege given to the taxpayer under the four corners of the law.

Please note that ITC claimed on bogus / fake invoicing, then department creates demands and taxpayers paid such demands from Electronic Credit Ledger and even interest provisions does not attracts in such case where ITC is availed on fake invoices but not yet utilized. Since demands created by department are paid from Electronic Credit Ledger without interest provisions lawfully then it cannot be said that only Self assessment Liability only can be set off from Electronic Credit Ledger.

Also note that in case of ITC availed by taxpayers on fake invoicing then department is empowered to Block ITC credit to the extent of ITC claimed on fake invoicing with a view that such wrongly ITC cannot be utilized to set off from other liability from this wrong availed ITC, it means unlawful ITC has a direct linkage with Electronic Credit Ledger and hence any demand on this count by Department can be paid from Electronic Credit Ledger so not necessarily only Self Assessment but any Tax demand created in the

Assessment Order can be paid from Electronic Credit ledger, whereas Interest, penalty or late fee demand can be set off only from Electronic Cash Ledger.

Please also note that Form GST APL-01, Point No. 15(b) which contains details of payment of Admitted Tax and pre-deposit @10%, Rule 108 stipulates provisions for payment either through Cash Ledger or from Credit Ledger in any proportionate as per taxpayer's choice. Since prescribed format allows payments of pre-deposit from any mode then such a judgement by Orissa High Court needs re-consideration in view of the facts that all such probabilities may not be considered during argument in this case.

**b) Details of payment of admitted amount and pre-deposit (pre-deposit 10% of the disputed tax and cess)**

No.	Description	Tax Payable	Paid Thru Cash Ledger		Paid Thru Electronic Credit Ledger			
			Amounts	Debit Entry No.	C G S T	S C T	I G S T	C E S S
1	IGST							
2	CGST							
3	SGST							
4	CESS							

As per Circular No. 42/16/2018-GST dated 13.04.2018 and further Circular No. 58/32/2018- GST dated 04.09.2018, Any demands in respect of arrears of Central Excise Duty, service Tax or wrongly availed CENVAT Credit / Transitional Credit can be paid through electronic Credit Ledger.

“Pre-deposit” made by the petitioner by availing CENVAT Credit shall be accepted for the purpose of Section 35F of the Central Excise Act. {**Cadila Healthcare Pvt Ltd. Case decided by the Gujarat High Court**}

The CEGAT, (as the CESTAT was then called) allowed the applicants prayer for payment of pre-deposit by debit in RG-23 part II. The Tribunal held that the amount may be paid either by debit or by PLA or by cash. **Haryana State Electricity board Vs. CCE, New Delhi. 1994(73) E. L. T. 588 (Tribunal)**

The Tribunal observed “we are of the view that pre-deposit of the duty amount by way of debit in MODVAT Account can be accepted as sufficient compliances with Section 35F and, therefore, the assessee need not be called upon to make any payment through TR-6 challan”  
**Monik Moti Forging Pvt. Ltd. Vs CCE, Aurangabad. 2010-TIOL-1863 CESTAT, Mumbai**

In view of the above observations, Author is of the view that the Government is the final authority and hence has to give an immediate and favourable clarification for the trade & industry in the country on the above subject matter and must consider the fate of already filed appeals. If appeals are dismissed solely on this ground then it will become time barred and none of the higher authority would even allow condonation of delay as rule does not permits for such condonation of delays and appellant should not suffer for any ambiguity or in-action or negligence on his part. Since it is beyond the control and reach of the appellant and hence Government must resolve this issue at the earliest in the interest of natural justice.

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