

Manner of Payment of Pre-Deposit - Time to bring uniformity

Dec 09, 2022



Surbhi Premi

Partner, Lakshmikumaran & Sridharan attorneys



Kundan Kumar

Principal Associate



Ashutosh Choudhary

Associate

Many taxpayers have recently witnessed rejection of appeal by the tax authorities on the ground that the statutory requirement of making the payment of pre-deposit was not made in the correct manner. The expectations of the tax authorities from taxpayers to follow the prescribed procedure and statutory requirements are not erroneous. However, such expectations should not result in rejection of appeal when there is lack of clarity in law regarding the manner of payment of such pre-deposit for filing an appeal.

The confusion persists as to whether Form DRC-03 can be used for such payment for filing an appeal under the erstwhile regime and the current GST regime. Further, there is an existing dilemma over the utilisation of credit for making the mandatory payment of pre-deposit for filing an appeal via Form APL-01 under the GST regime. The tax authorities are refusing to accept the appeals of taxpayers who are using Form DRC-03 and making the payment by using electronic credit ledger. In this respect, it is significant to ascertain the correct manner of payment of pre-deposit in the light of recent CBIC instructions and High Court judgments to mitigate the existing confusion.

Method of Payment of Pre-deposit

Form DRC-03 is prescribed for the intimation of payment of tax, interest and/or penalty under Section 73 and Section 74 of the CGST Act, as enumerated under Rule 142 of the CGST Rules. The issue of whether Form DRC-03 can be used for payment of pre-deposit was considered by the Hon'ble Bombay High Court in the case of **Sodexo India Services Pvt Ltd v. Union of India and Others** [\[TS-453-HC-2022\(BOM\)-ST\]](#). The Hon'ble High Court, while observing the existing confusion regarding the method of payment of pre-deposit under the Central Excise Act, 1944 and the Finance Act, 1994 directed

the Board to issue appropriate clarification in this regard.

In pursuant to the aforesaid direction of the Hon'ble Bombay High Court, the CBIC has issued [**Instruction Number-240137/14/2022 dated 28th October 2022 \('CBIC Instruction'\)**](#), clarifying that payment through Form DRC-03 is not a valid mode of payment for making pre-deposits under Section 35F of the Central Excise Act, 1944. It was clarified that the procedure prescribed under Circular No. 1070/3/2019-CX dated 24th June 2019 should be utilised for making pre-deposit under the Central Excise Act 1944 and the Finance Act 1994. As per the said Circular, the taxpayers are required to create a challan on the integrated CBIC portal for payment of central excise and service tax arrears. The said Circular provides the complete procedure with regard to the creation of challan and payment of central excise and service tax arrears.

The above clarification to use *challans* for making payment of pre-deposit seems to be in conformity with the statutory requirements of Central Excise Act, 1944. The **Form E.A.-1** and **Form E.A.-3**, which are prescribed for filing an appeal to Commissioner (Appeal) and Appellate Tribunal, *respectively*, under Central Excise Act 1944, indicate that deposit of duty and/or penalty has to be made through a *challan*.

The CBIC Instruction appears to be beneficial for prescribing a method for making payment of pre-deposit while filing an appeal under Finance Act 1994. **Form ST-4** and **Form ST-5**, which are prescribed for filing service tax appeal under Finance Act 1994, are silent about the method of payment of accepted and/or disputed amount of service tax liability and penalty. It also adheres to the intention of Section 83 of the Finance Act 1994, which provides that certain provisions of Central Excise Act, 1944 are applicable in relation to service tax as they apply in relation to a duty of excise.

The CBIC Instruction also states that Form DRC-03 cannot be used for making pre-deposit under GST. It has been clarified that Form APL-01 can be used to file an appeal in GST regime, with the option of paying pre-deposit amount. This is in accordance with Rule 108(1) of the CGST Rules, which prescribes Form APL-01 to file an appeal with the Appellate Authority under Section 107(1) of the CGST Act. Thus, Form APL-01 allows the taxpayer to pay pre-deposit when the tax authorities upload the copy of order on the GST portal.

However, the portal happens not to be allowing taxpayers to make the payment of pre-deposit through Form APL-01, wherein the copy of order is not uploaded by tax authorities. In such scenarios, the taxpayers are left with no option but to make pre-deposit through DRC-03 or Form GSTR-3B in the absence of any other mode available for payment of pre-deposit. It remains to be seen as to whether such payment of pre-deposit would be accepted by the tax authority.

Electronic Credit Ledger for the Payment of Pre-Deposit

Section 49(4) of the CGST Act, read in conjunction with Rule 86(2) of the CGST Rules, provides that the amount available in the electronic credit ledger shall be debited to the extent necessary for making any payment towards 'output tax' under GST law. The term 'output tax' is defined to mean the tax chargeable under this Act on taxable supply of goods or services or both. Accordingly, in GST regime, the input tax credit in electronic credit ledger is allowed to be used for the payment of output tax.

The issue of using electronic credit ledger for the payment of pre-deposit was considered by Hon'ble High Court of Orissa in the case of **Jyoti Construction v. Deputy Commissioner**, [**\[TS-523-HC\(ORI\)-2021-GST\]**](#). The Hon'ble High Court disallowed the use of electronic credit ledger while observing that pre-deposit would not qualify as 'output tax' under the GST Act. However, Hon'ble High Court of Allahabad in **Tulsi Ram and Company v. Commissioner**, **[2022] (Allahabad)** and Hon'ble High Court of Bombay in **Oasis Realty v. Union of India**, **[2022] (Bombay)** have allowed the use of electronic credit ledger for the mandatory payment of pre-deposit for filing an appeal.

Further, CBIC Instruction prescribes Form GST APL-01 for the payment of pre-deposit for filing an appeal under GST law. It is to be noted that Serial No. 15 of FORM GST APL-01 provides for '*the details of payment of admitted amount and pre-deposit*' and allows the payment of pre-deposit by using electronic credit ledger. However, the CBIC Instruction also specifies that pre-deposit as a requirement for exercising the right to appeal is '*neither is in the nature of duty nor can be treated as arrears under the existing law*'. It seems that the CBIC Instruction creates a conflicting situation that pre-deposit even

though not in the nature of arrears of tax or duty can be paid by using electronic credit ledger under the GST regime.

Concluding Remarks:

Taxation laws are supposed to be taxpayers-friendly with proper procedure and appropriate safeguards against the adverse orders, decisions, and actions of the tax authorities. It is desired from appellate forums that taxpayer' appeal should not be rejected on insignificant grounds such as payment of pre-deposit through Form DRC-03 instead of challan/APL-01 specifically in the light of fact that such payment can be made using cash/ITC ledger, and there is lack of clarity in law with regard to correct manner of payment of such deposit.

Nevertheless, since the procedure for payment of pre-deposit has been clarified by CBIC Instruction, the taxpayer shall follow the prescribed procedure (challans for the erstwhile regime and APL-01 for the GST regime) to minimize the risk of unwanted litigation and rejection of appeal. However, the acceptance of pre-deposit paid through Form DRC-03 by the tax authority is to be seen in cases where APL-01 does not enable the taxpayer to pay pre-deposit when the copy of the order is not uploaded on the portal by the tax authorities.