



## आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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DIN- 20231164SW0000717367

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या File No : GAPPL/ADC/GSTP/2876/2023 -APPEAL / 8464 - 30

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-003-APP-JC- 50 /2023-24**

दिनांक Date : **21.11.2023** जारी करने की तारीख Date of Issue : **24.11.2023**

श्री आदेश कुमार जैन संयुक्त आयुक्त (अपील) द्वारा पठित

Passed by Shri Adesh Kumar Jain, Joint Commissioner (Appeals)

ग Arising out of Order-in-Original No. 01/LOK/SUPDT/HMT-1/2023-24 dated 19.06.2023 issued by The Superintendent, CGST, Range-I, Division Himmatnagar, Gandhinagar Commissionerate.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant	Respondent
M/s J J Patel, 1, First Floor Yash Complex, Mahavirnagar Char Rasta, Himmatnagar, Sabarkantha, Gujarat - 383001	The Superintendent, CGST, Range-I, Division Himmatnagar, Gandhinagar Commissionerate

(A)	इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(iii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying - (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant, and (ii) A sum equal to <u>twenty five per cent</u> of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उपरोक्त अपीलकर्ता प्राधिकारी को अपील दायर करने से संबंधित व्यापक, विस्तृत और नवीनतम प्राधान्यों के लिए, अपीलकर्ता विभागीय वेबसाइट <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website <a href="http://www.cbic.gov.in">www.cbic.gov.in</a>



**ORDER-IN-APPEAL****BRIEF FACTS OF THE CASE:**

M/s. J.J.Patel, 1, First Floor, Yash Complex, Mahavirnagar Char Rasta, Himmatnagar, Sabarkantha, Gujarat-383001, (hereinafter referred to as the "appellant") has filed the appeal on 22.09.2023 against Order-in-Original No. 01/LOK/SUPDT/HMT-1/2023-24, dated 19.06.2023 (date of communication is 26.06.2023) (hereinafter referred to as the "impugned order") passed by the Superintendent, Central GST & C.Ex., Range-1, Division-Himmatnagar, Gandhinagar Commissionerate, Gandhinagar (hereinafter referred to as the "adjudicating authority") for wrong avallment of Input Tax Credit in comparison to GSTR-2A with GSTR-3B, amounting to Rs. 6,82,880/- alongwith interest and penalty.

2(i). Brief facts of the case in the present appeal is that the appellant registered under GSTIN 24AAKFJ3341F1ZN, are engaged in the activity of supply of goods falling under HSN 68079010 (Articles of Asphalt or of Similar material for example petroleum bitumen or coal tar pitch, other: tarfelt roofing), HSN 68079090 (Articles of Asphalt or of similar material (for example, petroleum bitumen or coal Tar Pitch) Other: Other) HSN 68109100 (Articles of cement, of concrete or of artificial stone, whether or not reinforced other articles or civil engineering). The taxpayer is also availing the facility of Input Tax Credit. During the scrutiny of the returns of the appellant for the period from July 2017 to March 2018 as per SOP circulated by CBIC vide instruction No. 02/2022-GST dated 22.03.2022 it was observed that the ITC Credit value round mentioned/availed and utilized for payment of truces in their GSTR-3B (declared in Table 4) is more than the ITC (input Tax Credit) value found in the GSTR-2A, as detailed in below table. Further, on examination of GSTR-2A returns of the appellant, some amount of ITC availed by the said appellant in their GSTR-3B was not reflected in their GSTR-2A returns. It appears that the supplier of goods had not actually paid the Integrated Goods and Services Tax (IGST), Central Goods and Services Tax ("CGST") and State Goods and Service Tax ("SGST") to the Government account as the amounts availed as ITC in GSTR-3B were not reflected in the GSTR-2A of the said taxpayer. Therefore, it appears that the appellant has wrongly availed ITC in their GSTR 3B returns as the same is not reflected in their GSTR 2A returns. The details of the said ITC wrongly availed by the said taxpayer is as below:

Description	IGST	CGST	SGST	CESS	Total Tax
ITC as per GSTR 3B	0	11416320	11416320	0	22832640
ITC as per GSTR 2A	0	11019557	11019557	0	22039114
Excess ITC Availed	0	396763	396763	0	793526

Hence, Rs.7,93,526/- in respect of difference between GSTR-2A v/s GSTR-3B was required to paid along with interest/penalty. Further the adjudicating authority

allow the input tax credit of Rs. 1,10,646/- in terms of Para 4 & Para No. 4.1.2 of Circular No. 183/15/2022-GST dated 27.12.2022. Accordingly, the appellant was directed to pay/reverse the in-eligible ITC of Rs. 6,82,880/- alongwith interest and penalty .

3. The appellant was further issued show Cause Notice vide F.No.GEXCOM/SoR/3898/2022 dated 29.09.2022. Further, the adjudicating authority passed the impugned order and confirm the demand to recover the ITC of amounting to Rs. 6,82,880/- (CGST Rs. 3,41,440/- and SGST Rs. 3,41,440/-) under the provisions of Sections 73(1) of the CGST Act read with the SGST Act, 2017 alongwith interest under Section 50(1) of the CGST Act read with the SGST Act, 2017 and penalty amounting to Rs. 68,288/- (CGST Rs. 34,144/- and SGST Rs. 34,144/-) under section 122(2)(a) of the CGST Act read with similar provision of SGST Act, for the following reasons :

- they referred the Provisions of Section 16(2), Section 38 and Section 155 of the CGST Act 2017;
- they extend the benefit of eligible ITC amounting to Rs. 1,10,646/- to the taxpayer by virtue of Para 4 & Para 4.1.2 of circular No. 183/15/2022-GST dated 27.12.2022;
- the taxpayer has not followed the above conditions. As the said conditions has to be mandatorily fulfilled by the appellant of ITC;
- that the taxpayer has an opportunity to substantiate their claim of ITC with supporting documents as envisaged under Circular No.183/15/2022-GST. however, they failed to do so in most cases;
- the registered person has wrongly availed Input Tax Credit of Rs. 6,82,880/- which is not available to them as per their GSTR-2A statement and also for which sufficient explanation is not available with them which they could produce before department. Hence, first proviso to section 73 of the CGST Act, 2017 read with section 122(2)(a) and 50(1) of CGST Act, 2017 have find reasonably be invoked in the present case.

4. Being aggrieved with the impugned order, the appellant preferred the present appeal on 22.09.2023 for the following reasons:

- that w.e.f. 01.01.2022, a recipient is eligible to claim Input Tax Credit only if the details of the invoices / debit note are auto populated in FORM GSTR-2A/2B i.e., the limit of 5% has been done away with. Since the condition has been introduced with effect from 01.01.2022;
- that the appellant has complied with all the relevant conditions of subsection (2) of section 16 of CGST Act, 2017 effective in the F.Y. 2017-18. The main contention of the adjudicating authority is contravention of section 162(c) of the CGST Act, 2017 which says that "the tax charged in respect of such supply has



- been actually paid to the Government either in cash or through utilisation of input tax credit admissible in respect of the said supply";
- there is no mechanism available under the GST regime to cross check whether the tax has been actually paid by the supplier on a particular supply. The appellant always carried bonafide belief that the tax has been paid on such supplies by the suppliers and there is never an intention to evade payment of tax;
  - that GSTR 2A became operational from September 2018 onwards. Before September 2018, the buyer had no such facility where he can check as to whether the supplier has reported its supply or not. Hence for the period July 2017 to March 2018 to cross verify its purchases from GSTR 2A was not possible at all;
  - Press release by CBIC and clarity by the Ministry of Finance on twitter that GSTR 2A is in nature of taxpayer facilitation & does not impact the taxpayer to avail the ITC;
  - that till 31st December 2021, Section 16 of CGST Act, 2017 - Eligibility and conditions for taking input tax credit, does not prescribe such condition that to avail ITC the said purchase should be reflected in GSTR 2A;
  - they referred the judgments of Union of India Vs Bharti Airtel Ltd. & Ors (Supreme Court of India) 2021; The Hon'ble Kerala High Court in case of St. Joseph Tea Company Ltd. Vs State Tax Officer, held that ITC shall not be denied only on the ground that the transaction is not reflected in GSTR 2A, The Hon'ble Madras High Court in the case of Sri Vinayaga Agencies vs. The Assistant Commissioner, CT Vadapalani, R.S. Infra-Transmission [2018 (4) TMI 1800 Rajasthan HC] D.Y. Beathe! Enterprises [(2021) 127 Taxman. Com 80 (Madras High Court)], The Hon'ble Calcutta High Court in Suncraft Energy Private Limited and Another v. The Assistant Commissioner, State Tax [MAT 1218 of 2023 dated August 02, 2023],
  - there is no mechanism available under the GST regime to cross check whether the tax has been actually paid by the supplier on a particular supply. The buyer always carries bonafide belief that the tax has been paid on such supplies by the suppliers and there is never an intention to evade payment of tax;
  - that it is not possible for the appellant to definitively ascertain whether the supplier has paid the tax on invoices or debit notes that appear in their GSTR-2A. Likewise, it is equally difficult to determine whether the supplier has indeed paid the taxes but failed to report these transactions in their GSTR-1;
  - Rule 36(4) of the CGST Rules, 2017, introduced on October 9, 2019, initially permitted registered taxpayers to claim Input Tax Credit up to a maximum of 20% of eligible credit as reflected in GSTR 2A. Subsequently, this limit was



reduced to 10% from January 1, 2020, and further lowered to 5% from January 1, 2021. With the introduction of sub section "aa," in Section 16(2) of the CGST Act, 2017 effective from January 1, 2022, this percentage was reduced to zero so as to align the Rule with the Sub Section of the said Act;

- that the department imposed restrictions on Input Tax Credit availment from October 9, 2019, onwards, with prospective application. Consequently, no such conditions were applicable for the disputed period spanning from July 2017 to March 2018;
- that for the period under dispute i.e. from July 2017 to March 2018, recipients were not obligated to verify whether the aforementioned invoices or debit notes were reflected in GSTR-2A;
- it is binding upon the department to commence the recovery process directly from the supplier when the supplier has collected tax from the buyer but has not remitted it to the government;
- that taking into account the circumstances of the present case, during the period from July 2017 to March 2018, it was impractical for the appellant to verify the contents of GSTR-2A, as this feature was only introduced from September 2018 onwards. Moreover, the absence of invoice reflection in GSTR 2A does not equate to non-payment of tax. And the condition to check whether the invoices or debit notes are getting reflected in GSTR 2A for availing the ITC got introduced from 01 January 2022, hence the said condition is also not required to be checked for the period under dispute;

On the basis of above grounds, the appellant most humbly prays that the impugned order confirming demand of Rs. 6,82,880/- along with interest and penalty thereon be quashed and set aside.

#### **PERSONAL HEARING :**

5. Personal hearing in the present appeal was held on 19.10.2023. Shri Sachin Dharwal, C.A., Authorized Representative appeared in person on behalf of the appellant in the present appeal. During P.H. they have submitted that they have made all the payments through bank. The supplier is existent or not, cannot be verified during the year 2017-18. He further re-iterated the written submissions and requested to allow appeal.

#### **DISCUSSION AND FINDINGS:**

6. I have gone through the facts of the case, written submissions made by the 'appellant'. I find that the main issue to be decided in the instant case whether the appellant had wrongly availed Input Tax Credit in comparison to GSTR-2A with GSTR-3B, amounting to Rs. 6,82,880/- alongwith interest and penalty.



7(i). I find that in the instant case adjudicating authority is contending that the appellant has contravened the provisions of Section 16 of CGST Act 2017. In this regard, I hereby refer the relevant provisions as under:

**Section 16. Eligibility and conditions for taking input tax credit.-**

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

1[(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;]

(b) he has received the goods or services or both.

**Explanation.-** For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services-

where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person;]

3[(ba) the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted;]

(c) subject to the provisions of 4[section 41 5[\*\*\*]], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

7(ii). In the instant case, it is observed that the amounts of Rs. 6,82,880/- were not reflected in the GSTR-2A return which was availed as ITC in their GSTR-3B returns and the tax charged in respect of certain transactions had not been actually paid to the Government account by the suppliers from whom they had made the purchases, Section 16(2)(c) of the Act says that the registered person shall not be entitled to take ITC in respect of supplies on which the tax has actually not been paid. Further, the appellant has not produced any documentary evidence to

say that the suppliers from whom they had made purchase, had paid the tax leviable on the supplies, therefore the ITC would not be admissible to them the said registered person have contravened the provisions of Section 16(2)(c) of the CGST Act, 2017 as they have wrongly availed the ITC without the tax being discharged on the supplies made by suppliers from whom they had made purchases. Further it is observed that the appellant has also contravened the provisions of Section 38(iv) of the CGST Act, 2017.

7(iii). Further as per Section 155 of CGST Act, 2017 the burden of proof, in case of eligibility of ITC, availed by the appellant, lies entirely on the appellant. I refer to the relevant extract of Section 155 of the CGST Act, 2017:

**Section 155. Burden of proof.-**

*Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person.*

In the instant case the appellant has to prove his eligibility to avail ITC in the light of aforesaid conditions, enumerated in Section 16 of the CGST Act, 2017. However I find that the appellant has failed to satisfy all the mandatory conditions to make him eligible for ITC on supply of goods mentioned in invoices.

Further it is observed that in the instant case the adjudicating authority has also extend the benefit of Circular No. 183/15/2022-GST issued on 12/12/2022 by The Central Board of Indirect Taxes and Customs, Department of Revenue, Ministry of Finance, Government of India which deals with matter of difference of input tax credit availed in form GSTR-3B as compared to that detailed in Form GSTR-2A for financial year 2017-18 and 2018-19. In this regard, I hereby refer the relevant provisions as under:

**Circular No. 183/15/2022-GST, dated 27.12.2022.**

*Subject: Clarification to deal with difference in Input Tax Credit (ITC) availed in FORM GSTR-3B as compared to that detailed in FORM GSTR-2A for FY 2017-18 and 2018-19-reg.*

*The main content of this circular are reproduced as under. " In order to ensure uniformity in the implementation of the provisions of the law across the field formations, the Board, in exercise of its powers conferred under section 168(1) of the CGST Act, hereby clarifies as follows:*

Sr. No.	Scenario	Clarification
a.	---	---
b.	---	---
c.	---	---
d.	<i>Where the supplier has filed FORM GSTR-1 as well as return in FORM GSTR-3B for a tax period, but he has declared the supply with wrong GSTIN of the recipient in FORM GSTR-1</i>	<i>In such cases, the difference in ITC claimed by the registered person in his return in FORM GSTR-3B and that available in FORM GSTR-2A may be handled by following the procedure provided in para 4 below. In addition, the proper officer of the actual recipient shall intimate the concerned jurisdictional tax authority of the</i>

		<p>registered person, whose GSTIN has been mentioned wrongly, that ITC on those transactions is required to be disallowed, if claimed by such recipients in their FORM GSTR-3B. However, allowance of ITC to the actual recipient shall not depend on the completion of the action by the tax authority of such registered person, whose GSTIN has been mentioned wrongly, and such action will be pursued as an independent action.</p>
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4. The proper officer shall first seek the details from the registered person regarding all the invoices on which ITC has been availed by the registered person in his FORM GSTR 3B but which are not reflecting in his FORM GSTR 2A. He shall then ascertain fulfillment of the following conditions of Section 16 of CGST Act in respect of the input tax credit availed on such invoices by the said registered person:

- i) that he is in possession of a tax invoice or debit note issued by the supplier or such other tax paying documents;
- ii) that he has received the goods or services or both;
- iii) that he has made payment for the amount towards the value of supply, along with tax payable thereon, to the supplier

Besides, the proper officer shall also check whether any reversal of input tax credit is required to be made in accordance with section 17 or section 18 of CGST Act and also whether the said input tax credit has been availed within the time period specified under sub-section (4) of section 16 of CGST Act.

4.1.2 In cases, where difference between the ITC claimed in FORM GSTR-3B and that available in FORM GSTR 2A of the registered person in respect of a supplier for the said financial year is upto Rs 5 lakh, the proper officer shall ask the claimant to produce a certificate from the concerned supplier to the effect that said supplies have actually been made by him to the said registered person and the tax on said supplies has been paid by the said supplier in his return in FORM GSTR 3B.

8(ii).

In terms of Circular No.183/15/2022-GST dated 27.12.2022, it is observed that the difference between GSTR-2A and GSTR 3B of Rs. 6,82,880/- are raised during the period from July 2017 to March 2018. Accordingly, the appellant had submitted the all the required documents to the adjudicating authority for availing the benefit of said circular. The adjudicating authority after giving the benefit of the said circular, drop the demand of Rs. 1,10,646/-. Further the appellant have also submitted that they have asked for information from other suppliers too but they have not yet sent them any information regarding tax paid by them on invoices raised to the appellant. In this regard, it is observed that the adjudicating authority had already given the benefit of Circular No.183/15/2022-GST dated 27.12.2022 to the appellant but appellant has failed to produce documents to justify that the ITC claimed by them of Rs. 6,82,880/- is respect of difference between GSTR-2A and GSTR 3B is legal and proper.

9. Further it is observed that the judgments referred by the appellant in his written submission were on different issue and no one is identical to the instant case. Further, The Hon'ble Supreme Court in the State of Kamataka v. M/ s. Ecom



Gill Coffee Trading Pvt. Ltd. [Civil Appeal No. 230 of 2023 dated March 13, 2023] has quashed and set aside the order passed by the Hon'ble Karnataka High Court on the grounds that until the purchasing dealer discharges the burden of proof under Section 70 of the Karnataka Value Added Tax Act, 2003 (the KVAT Act), and proves the genuineness of the transaction/purchase and sale by producing the relevant materials, such as name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc, such purchasing dealer shall not be entitled to Input Tax Credit. As the ITC provisions under GST are largely Par materia to the VAT regime mere possession of tax invoice cannot be the ground to claim ITC. Further, it is observed that the department stand and provisions of the CGST Act, 2017 read with the 1GST Act, 2017 and the CGST Rules, 2017 is pretty clear on the said issue of wrong availment and utilization of Input Tax Credit.

10. In view of the above discussions, I do not find any merit in the contention of the appellant so as to intervene in the impugned order passed by the adjudicating authority. Accordingly, I find that the impugned order of the adjudicating authority is legal and proper and hence upheld.

अपीलकर्ता द्वारा दई गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।  
The appeal filed by the appellant stands disposed of in above terms.

Attested

(Sandheer Kumar)  
Superintendent (Appeals)

By R.P.A.D.

To

M/s. J.J.Patel,  
1, First Floor, Yash Complex, Mahavirnagar Char Rasta,  
Himmatnagar, Sabarkantha,  
Gujarat-383001.

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Excise, Appeals, Ahmedabad.
3. The Commissioner, Central GST & C.Ex, Gandhinagar Commissionerate.
4. The Dy. / Asstt. Commissioner, CGST & C.Ex, Division-Himmatnagar, Gandhinagar Commissionerate.
5. The Superintendent, CGST & C.Ex, Range-1, Division-Himmatnagar, Gandhinagar Commissionerate.
6. The Superintendent (Systems), CGST Appeals, Ahmedabad, for publication of the OIA on website.
7. Guard File
8. P.A. File.

Asanujy  
21/11/2023  
(Adesh Kumar Jain)  
Joint Commissioner (Appeals)  
Date: 21.11.2023



