



सत्यमेव जयते

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- 20240564SW0000111D47

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या File No : GAPPL/ADC/GSTP/2189/2024 -APPEAL / ११०३ - ३१

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-003-APP-JC- 07 /2024-25**

दिनांक Date : **30.04.2024** जारी करने की तारीख Date of Issue : 01.05.2024

श्री आदेश कुमार जैन संयुक्त आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No. ZD240324017573P dated 11.12.2023 issued by the Assistant Commissioner, CGST Division- Gandhinagar, Gandhinagar Commissionerate

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

Appellant	Respondent
M/s Shreeji Construction (Legal Name: Gaurav Bhupendrabhai Patel), 115, Anand Nagar, Sector-27, Gandhinagar, Gujarat, 382027	The Assistant Commissioner, CGST Division- Gandhinagar, Gandhinagar Commissionerate

(A)	इस आदेश(अपील) से व्यथित 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 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) <b>Full amount of Tax, Interest, Fine, Fee and Penalty</b> arising from the impugned order, as is admitted/accepted by the appellant, and (ii) A sum equal to <b>twenty five per cent</b> 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)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी 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> .

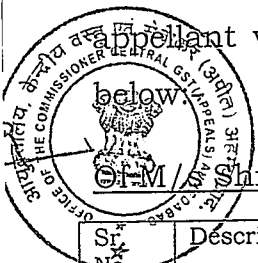


**ORDER-IN-APPEAL****BRIEF FACTS OF THE CASE:**

M/s Shreeji Construction (Legal Name: Gaurav Bhupendrabhai Patel), 115, Anand Nagar, Sector-27, Gandhinagar, Gujarat-382027 (hereinafter referred to as the "appellant") has filed the appeal on 18.03.2024 against Order-in-Original No. ZD240324017573P dated 11.12.2023 (hereinafter referred to as the "impugned orders") passed by the Assistant Commissioner, CGST, Division Gandhinagar, Gandhinagar Commissionerate (hereinafter referred to as the "adjudicating authority").

**2(i).** Brief facts of the case in the present appeal is that the appellant is engaged in construction services in respect of commercial or industrial buildings and civil structures, works contract services falling under HSN Code 00440290, 00440410. They have a GSTIN No. 24ACFPP5433RIZ3. During the scrutiny of returns of the said taxpayer for the period from April-2018 to March 2019 under section 61 of the CGST Act, 2017 read with Rule 99 of the CGST Rules, 2017 as amended as per SOP for scrutiny of returns for the FY 2018-19 circulated by CBTC vide instruction No. 02/2022-GST dated 22.03.2022, certain discrepancies were noticed and accordingly, FORM GST ASMT-10 dated 03.04.2023 was issued to the

appellant with a request to pay the amount of tax/interest/late fees as detailed

below:  

Shreeji Construction (Legal Name: Gaurav Bhupendrabhai Patel)

Sr. No.	Description	IGST	CGST	SGST	Total
1	Excess ITC claimed in GSTR 3B as compared to GSTR-2A for the period of April 2018 to September 2018	0	13,520	13,520	27,040
2	Interest for late filing of monthly return GSTR-3B for the period of April 2018 to March 2019	0	2,48,181	2,48,181	4,96,362
3	Inadmissible ITC from the month of Oct. 2018 to March 2019 as per Section 16(4) of the CGST Act 2017	0	11,24,941	11,24,941	22,49,882
	Total	0	13,86,642	13,86,642	27,73,284

**2(ii).** In the instant case, the appellant has wrongly availed Input Tax Credit of Rs. 27,040/- (CGST Rs. 13,520/- & SGST Rs. 13,520/-) & interest amounting to Rs.4,96,362/- (CGST Rs. 2,48,181/- & SGST Rs. 2,48,181/-), for delayed payment of tax for the months from April 2018 to March 2019 has already been paid by the appellant vide DRC 03.

So the issue to be decided in the instant case is whether (i) the appellant is liable to pay interest under Section 50 of the CGST Act, 2017 and penalty in terms of Section 74(1) of the CGST Act, 2017 on wrongly availed Input Tax Credit of Rs. 27,040/- and (ii) whether the appellant has wrongly availed ITC of Rs. 22,49,882 (CGST Rs.11,24,941/- & SGST Rs. 11,24,941/- by contravening the provisions of Section 16(4) of the CCST Act, 2017 and levy of interest and penalty thereon.

3. The appellant stated that they were not agreed with the above observations. The appellant was further issued show Cause Notice on 26.06.2023. Further, the adjudicating authority passed the impugned order dated 11.12.2023 and confirm the demand of the appellants as mentioned below on the following reasons:

- (i) to pay interest under Section 50 of the CGST Act, 2017 and penalty in terms of Section 74(1) of the CGST Act, 2017 on wrongly availed Input Tax Credit of Rs. 27,040/-;
- (ii) to disallowed wrongly availed ITC of Rs. 22,49,882 (CGST Rs.11,24,941/- & SGST Rs. 11,24,941/- by contravening the provisions of Section 16(4) of the CCST Act, 2017 and levy of interest and penalty thereon.

- that the registered person has wrongly availed ITC on which tax charged in respect of such services has not been actually paid to the Government in terms of the Section 16(2)(c) of the Central Goods and Services Act, 2017 ('CGST Act') and Gujarat State Goods and Services Act, 2017 ('SGST Ant') (collectively 'Act'). I find that they have reversed the wrongly availed ITC on dtd. 28.08.2023 under the provision of Sections 39(7) of the CGST Act, 2017 read with the provisions of Rule 85(3) of the Central Goods and Services Rules, 2017 (CGST Rules') and Rule 85(3) of the SGST Rules, 2017 (collectively 'Rules') after issuance of SCN dtd. 26.06.2023 any Suppressed the facts with an intent to wrongly avail ITC and hence same is required to be adjusted against the recovery under the provision of Section 74(1) of the Central Goods and Services Act. 2017;
- that the Noticee had failed to discharge their correct liability by filing correct GST Returns for the relevant period. Therefore, the Noticee is liable for penal action as laid down under Section 122(2)(b) of CGSI Act, 2017 for contravening the above discussed various provisions of the CGST Rules, 2017 and also liable to pay interest under section 50 of the CGST Act, 2017;
- that the taxpayer has not fulfilled the conditions of section 16(4) of the CGST Act 2017; that the tax payer had filed GSTR 3B returns for the month from October, 2018 to March, 2019 after the due date of return filling for the month of September, 2019 which was last date of availing the ITC for the FY 2018-19, however, the Noticee has availed the ITC after the due date. Hence, the taxpayer was not eligible to avail the ITC for the F. Y. 2018-19;
- that the Noticee was not eligible to avail the ITC beyond the stipulated time period as prescribed under Section 16(4) of the CGST Act, 2017. Therefore the Noticee is liable for payment of such ITC along with applicable interest thereon under the provisions of Section 50 of the CGST Act, 2017 and penalty under Section 122(2)(b) read with Section 74(1) of the CGST Act 2017.

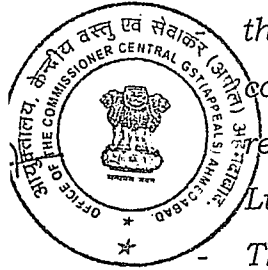


4. Being aggrieved with the impugned order, the appellant preferred the present appeal on 18.03.2024 for the following reasons:

- the appellant was unable to file GST returns for a period from October 2018 to March 2019 due to genuine hardship. On implementation of GST, the abatement was removed, and 18% GST was imposed on the works contract;
- it was not possible for him to make payment of tax as the contract was an ongoing contract from a period before implementation of GST and price revision was under process with government entity. In such a situation, he cannot make payment of GST and as per the GST mechanism he could not file GST return without making payment of GST. Non filing of GST return obstructed the ITC claim of the appellant;
- In case of Tvl.Kavin HP Gas Gramin Vitrak vs Commissioner of Commercial taxes W.P.(MD).Nos.7173 and 7174 of 2023 and W.M.P.(MD)Nos.6764 and 6765 of 2023, honourable Madras High Court in a similar situation noted;
- Section 41 entitles every registered person to take the credit of eligible input tax as self-assessed in his return. However, the registered person is unable to file the return under Section 39 unless they make payment of GST. On perusal of Section 39(1) and 39(7), it is clearly evident that payment of tax is not a pre-condition for filing the return. Further, the due date for filing return and payment of tax is prescribed independently;

that there is no link between the payment of tax and filing of return and the common portal was not allowing the taxpayers to file the returns, is also recognized by Gujarat High Court in case of Octagon Communications Pvt Limited Vs UOI 2019- TIOL-909-HC-AHM-GST (interim order);

- The challenge to constitutionality of section 16(4) is being heard by honourable Supreme Court. In case of Mrutyunjay kumar vs Union of India and others, honourable Supreme Court has issued notice to respondents;
- Nowhere in the GST law it has been prescribed that the entitlement to take credit comes only through GSTR-3B. Section 41 of GST law provides the procedure to avail the eligible (i.e. entitled under section 16 of the CGST Act) input tax in the return of registered person. Procedure for availment of input tax credit (section 43A) is yet to be prescribed and notified. In case of the appellant, the ITC has been taken in the books of account prior to due date mentioned in Section 16(4) and further most of details of such input tax credit are reflecting in the FORM GSTR 2A of the appellant. Hence, the appellant is not restricted under the provision of Section 16(4). As most of the details of input tax credit are already available in GSTR 2A which is available with the department prior to due date prescribed under Section 16(4) and the availment of such ITC would be a mere disclosure in GSTR-3B, therefore, the substantial benefit cannot be denied due to procedural lapse of mere non-disclosure in GSTR-3B within the due date;



- the judgement of Madras High Court in case of M/s.Sri Shanmuga Hardwares Electricals vs State tax officer (Writ Petition Nos.3804, 3808 & 3813 of 2024 and W.M.P.Nos.4105,4107, 4110, 4111, 4116 & 4119 of 2024) wherein honourable Madras High Court has held as under in para 6 of the judgement When the registered person asserts that he is eligible for ITC by referring to GSTR-2A and GSTR-9 returns, the assessing officer should examine whether the ITC claim is valid by examining all relevant documents, including by calling upon the registered person to provide such documents. In this case, it appears that the claim was rejected entirely on the ground that the GSTR-3B returns did not reflect the ITC claim. Therefore, interference is warranted with the orders impugned herein;

In view of the above the appellant pray to set aside the impugned order of the Adjudicating authority demanding reversal of ITC. We pray to pass an order as the appellate authority may deem fit and just.

#### **Virtual Hearing :**

5. Virtual hearing in the present appeal was held on 25.04.2023. Shri Brijesh Thakar, C.A., Authorized Representative appeared in on behalf of the appellant in the present appeal. During hearing he has submitted that in case of M/s. Gitanjali Construction also the issue is identical so both the cases may be heard together. He further submitted that due to genuine hardship, i.e. the recipient of service M/s. ONGC has revised the contract at later date as detailed in the appeal memorandum. They filed the returns only by delay of less than a month for the reasons beyond their control. Further they have paid all dues with interest and late fees. The legitimate right of ITC can't be denied for procedure things. They rely on Hon'ble High Court of Madras in case of Tvl. Kavin HP Gas Gramin Vitrak vs Commissioner of Commercial taxes W.P.(MD).Nos.7173 and 7174 of 2023 and W.M.P.(MD)Nos. 6764 and 6765 of 2023. He further reiterated the written submissions and requestd to allow appeal. All the ITC is reflected in GSTR-2A and there is no revenue loss. It's a case of late filing of GSTR-3B and availment of ITC beyond the date specified in Section 16(4) of the CGST Act 2017.

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

6. I have gone through the facts of the case, written submissions made by the 'appellant'. It is observed that the main issue to be decided in the instant case is whether:

- (i) the appellant is liable to pay interest under Section 50 of the CGST Act, 2017 and penalty in terms of Section 74(1) of the CGST Act, 2017 on wrongly availed Input Tax Credit of Rs. 27,040/- and

- (ii) the appellant has wrongly availed ITC of Rs. 22,49,882 (CGST Rs.11,24,941/- & SGST Rs. 11,24,941/- by contravening the provisions of Section 16(4) of the CCST Act, 2017 and levy of interest and penalty thereon;

**7(i).** In the instant case, it is observed that the appellant has wrongly availed Input Tax Credit of Rs. 27,040/- by contravening the provisions of Section 16(2)(C) of the CCST 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) .....

**(c) subject to the provisions of 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply**

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

**7(ii).** In the instant case, it is observed that the Input Tax Credit of Rs. 27,040/- was 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. On being pointed out the appellant had paid the tax vide DRC-03.

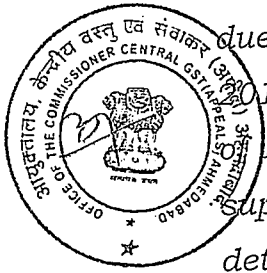
**7(iii).** As the appellant contravened the provisions of Section 16(2)(C) of the CCST Act, 2017 and had failed to discharge their correct liability by filing correct GST Returns for the relevant period, they are liable for penal action Rs. 27,040/-, as laid down under Section 122(2)(b) of CGST Act, 2017 read with Section 74(1) of the CGST Act 2017, and also liable to pay interest under section 50 of the CGST Act, 2017.

**8(i).** In the instant case, it is also observed that the appellant has wrongly availed ITC of Rs. 22,49,882/- by contravening the provisions of Section 16(4) of the CCST Act, 2017. In this regard, I hereby refer the relevant provisions as under:

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

*(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.*

*Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.]*



**8(ii).** In the instant case it is observed that the appellant had filed GSTR 3B returns for the month from October, 2018 to March, 2019 after the due date of return filing for the month of September, 2019 which was last date of availing the ITC for the FY 2018-19. However, the appellant has availed the ITC after the due date. In view of the above I find that the appellant has violated the provisions of Section 16(4) of the CGST Act, 2017 by not filing the GSTR 3B returns on time and availing the ineligible ITC for the financial year 2018-19. Therefore the appellant is liable for payment of such ITC amounting to Rs. Rs. 22,49,882/- along with applicable interest thereon under the provisions of Section 50 of the CGST Act 2017 and penalty under Section 122(2)(b) read with Section 74(1) of the CGST Act 2017.

**8(iii).** Further it is observed that the judgments referred by the appellant in his written submission were not identical to the instant case, as in the instant case the appellant has availed the ITC after the due date of return filing for the month

September, 2019 which was last date of availing the ITC for the FY 2018-19. In the case of M/s. Govind Construction Vs. UOI [W.P No. 9108 of 2021 dated 08.09.2023] the Hon'ble High Court of Patna also held that the concession of ITC under sub-section (1) of Section 16 of the CGST/ BGST Act is depended upon the fulfillment of requisite conditions laid down under various provisions including sub-section (4) thereof. 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.

9. 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 दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed of in above terms.

*(Signature)*  
30/04/2024

**(Adesh Kumar Jain)**

Joint Commissioner (Appeals)

Date: 30.04.2024

Attested

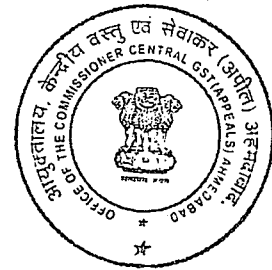
*(Signature)*  
30/04/24

(Sandheer Kumar)  
Superintendent (Appeals)

By R.P.A.D.

To

M/s Shreeji Construction,  
(Legal Name: Gaurav Bhupendrabhai Patel),  
115, Anand Nagar, Sector-27, Gandhinagar, Gujarat-382027.



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. / Assistant Commissioner (RRA), CGST & C.Ex, Gandhinagar.
5. The Dy. / Assistant Commissioner, CGST & C.Ex, Division- Gandhinagar, Gandhinagar Commissionerate.
6. The Supdt.(Systems), CGST Appeals, Ahmedabad.
7. Guard File
8. P.A. File.

