आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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सत्यमेव जयते

आज़ादी का अमृत महोत्सव

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(क)	फ़ाइल संख्या / File No.	GAPPL/COM/GSTP/69/2023-APPEAL/३५८-३५५
(ख)	अपील आदेश संख्या और दिनांक / Order-in-Appeal and date	AHM-CGST-003-APP-183/2023-24 and 16.01.2024
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील्स) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	19.01.2024
(ङ)	Arising out of Order-In-Original No. AHM-GST-003-JC-SP-002-22-23 dated 16.03.2023 passed by the Joint Commissioner, CGST & CEx, Commissionerate: Gandhinagar	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Asia Bulk Sacks Pvt. Ltd., Survey No. 211/214, Ground Irana Road, Bhudasan, Mehsana, Gujarat-382715

(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)	जीएसटी अधिनियम / सीजीएसटी अधिनियम के तहत गठित अपीलीय न्यायाधिकरण की राष्ट्रीय पीठ या क्षेत्रीय पीठ उन मामलों में जहां शामिल मुद्दों में से एक सीजीएसटी अधिनियम, 2017 की धारा 109 (5) के अनुसार आपूर्ति के स्थान से संबंधित है। 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)	सीजीएसटी अधिनियम, 2017 की धारा 109(7) के संदर्भ में उपरोक्त पैरा- (ए)(i) में उल्लिखित के अलावा जीएसटी अधिनियम/सीजीएसटी अधिनियम के तहत गठित अपीलीय न्यायाधिकरण की राज्य पीठ या क्षेत्र पीठ 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)	अपीलीय न्यायाधिकरण में अपील सीजीएसटी नियम, 2017 के नियम 110 के तहत दायर की जाएगी और प्रत्येक एक लाख रुपये के टैक्स या इनपुट टैक्स क्रेडिट या टैक्स या इनपुट टैक्स क्रेडिट में अंतर के लिए एक हजार रुपये का शुल्क संलग्न किया जाएगा, इसमें शामिल या जिस आदेश के विरुद्ध अपील की गई है उसमें निर्धारित जुर्माने, शुल्क या जुर्माने की राशि, अधिकतम पच्चीस हजार रुपये के अधीन। 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)	सीजीएसटी अधिनियम, 2017 की धारा 112(1) के तहत अपीलीय न्यायाधिकरण में अपील प्रासंगिक दस्तावेजों के साथ या तो इलेक्ट्रॉनिक रूप से या रजिस्ट्रार, अपीलीय न्यायाधिकरण द्वारा अधिसूचित फॉर्म जीएसटी एपीएल-05 में, नियम 110 के तहत निर्धारित सामान्य पोर्टल पर दायर की जाएगी। सीजीएसटी नियम, 2017, और फॉर्म जीएसटी एपीएल-05 ऑनलाइन दाखिल करने के सात दिनों के भीतर अपील किए गए आदेश की एक प्रति के साथ संलग्न किया जाना चाहिए। 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)	भुगतान के बाद सीजीएसटी अधिनियम, 2017 की धारा 112(8) के तहत अपीलीय न्यायाधिकरण के समक्ष अपील दायर की जाएगी – Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying –

	(i) आक्षेपित आदेश से उत्पन्न कर, ब्याज, जुर्माना, शुल्क और जुर्माने की पूरी राशि, जैसा कि अपीलकर्ता द्वारा स्वीकार किया गया है; और (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant; and (ii) सीजीएसटी अधिनियम, 2017 की धारा 107(6) के तहत भुगतान की गई राशि के अलावा, विवाद में कर की शेष राशि के पच्चीस प्रतिशत के बराबर राशि, उक्त आदेश से उत्पन्न होती है, जिसके संबंध में अपील की जाती है दायर किया गया है। (ii) A sum equal to twenty five per cent 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)	केंद्रीय वस्तु एवं सेवा कर (कठिनाइयों का नौवां निवारण) आदेश, 2019 दिनांक 03.12.2019 में प्रावधान किया गया है कि ट्रिब्यूनल में अपील आदेश की सूचना की तारीख या उस तारीख से तीन महीने के भीतर की जा सकती है जिस दिन राष्ट्रपति या राज्य अध्यक्ष, जैसा भी मामला हो, अपीलीय न्यायाधिकरण कार्यालय में प्रवेश करता है, जो भी बाद में हो। 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 www.cbic.gov.in 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 www.cbic.gov.in.

अपीलिय आदेश / ORDER-IN-APPEAL

The present appeal has been filed by M/s. Asia Bulk Sacks Pvt. Ltd., Survey No. 211/214, Ground Irana Road, Bhudasan, Mehsana, Gujarat-382715 (hereinafter referred to as the appellant) against Order in Original No. AHM-GST-003-JC-SP-002-22-23 dated 16.03.2023 [hereinafter referred to as "the impugned order"] passed by the Joint Commissioner, CGST & C. Ex, Commissionerate Gandhinagar [hereinafter referred to as "adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant holding Goods and Service Tax Registration no. 24AACCA4884D1ZW is engaged in the manufacturing of Sacks and Bags of a kind used for the packing of goods of Man-Made Textile material, Flexible Intermediate Bulk containers etc falling under Chapter 63 & 39. During the course of the audit, Final Audit Report No.:- GST/894/2022-23 dated 17.11.2022 was issued to the appellant for the period from July 2017 to March 2020 for the GST Revenue Paras remained unsettled which are discussed in detail below :

Revenue Para 1: Interest on non-reversal of input tax credit in the case of late payment of consideration of inward supply of goods/services i.e payment made after 180 days.

During the course of audit and on verification of records of inward supply of goods/ services on which ITC was availed and details of consideration paid to the supplier of Goods / services, it was observed that the taxable person had made payment to some supplier for the period July 2017 to March 2020, beyond 180 days from the date of invoice. Since, the appellant has made payment towards the value of supply alongwith tax thereon after 180 days to supplier, hence, the ITC wrongly availed amounting to Rs.12,25,849/- (CGST Rs.6,03,715/- + SGST Rs.6,03,715/- + IGST Rs.18,419/-)was required to be demanded and recovered from them under Section 74(1) of CGST Act, 2017/ Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. Since the appellant has subsequently paid to the supplier the value for the supply of goods including tax, the said ITC appears to be adjusted against the proposed demand of ITC. The appellant however was also liable to pay interest amounting to **Rs.1,96,757/-** (CGST of Rs.96,699/-, SGST of Rs. 96,699/- & IGST of Rs. 3,359/-) under Section 50(3) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017.

Revenue Para-2: Exports against Advance Authorization under which IGST claimed as refund, under Rule 96(10) of CGST Rules, 2017.

During the course of the audit it was observed from the financial records and shipping bills, etc., that the appellant had availed the refund of IGST paid on Zero Rated Supplies after availing benefit of exemption from payment of IGST along with BCD on the imported inputs and raw materials in terms of Notification no. 79/2017-Customs dated 13.10.2017 and thus, contravened the provisions of Notification No.16/2020-CT dated 23.03.2020.

In terms of Rule 96(10) of the Central Goods and Service Tax Rules, 2017 the appellant while availing refund of IGST paid on Zero rated Outward Supplies should not have availed the benefit of Notification no. 79/2017-Customs dated 13.10.2017. The same has been clarified vide Notification No. 16/2020-CT dated 23.03.2020. The appellant had imported inputs under Advance authorization license and availed full exemption from payment of IGST on the same. They further exported their final products and claimed refund for those Shipping Bills. It appeared that the appellant is not eligible to refund claim on which they have not paid IGST during the time of procurement of raw material. The amount of erroneously taken refund is **Rs. 2,08,02,566/-** [Rs.1,66,74,795/- for the year 2017-18 (23.10.2017 to 31.03.2018) and Rs.41,27,771/- for the year 2018-19] and the same is required to be reversed/paid back along with applicable interest and penalty.

Revenue Para 3: Non-reversal / Short reversal of input tax credit on exempt supply (MEIS Licence Sale & High Seas Sale) as per Rule 42 of the CGST Rules, 2017.

During the course of audit of the records, it was observed that the appellant was involved in taxable supply as well as exempt supply (MEIS Licence Sales and High Seas Sale). The MEIS licence sale is covered under (Duty Credit Scrips) HSN 4907 and exempted from 13.10.2017 as per provision of S. No. 122A of Notification No. 35/2017-Central Tax (Rate) dated 13.10.2017 and High Seas Sale was also exempted supplies in the F. Y 2018-19 i.e till 31.01.2019. Further, in view of Section 17(2), 17(3) of CGST Act, 2017 read with Rules 42 of CGST Rules, 2017, the amount of credit shall be restricted to so much of the input Tax as it is attributable to the said taxable supplies including Zero Rated supplies. Therefore, total ITC amounting to **Rs.1,00,416/-** (CGST Rs. 48,890/- + SGST Rs. 48,890/- + SGST Rs. 2,636/-) taken on exempted service is required to be disallowed and recovered from the appellant under Section 74(1) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The appellant has reversed Rs. 34,882/- (CGST Rs.16,983/- + SGST Rs.16,983/- + IGST Rs.916/-) which is to be adjusted against the proposed demand. The appellant is also liable to pay interest on the ITC in terms of Section 50(1) read with Section 74(1) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The penalty under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 also imposable on the said noticee for wrongful availment of refund of IGST paid on export of goods.

2.1 The appellant was therefore issued a SCN bearing F.No. GADT/TECH/SCN/GST/192/2022-Tech & Legal dated 06.01.2023 wherein it was proposed to;

- Disallow and recover ITC of Rs.12,25,849/- (CGST Rs.6,03,715/- + SGST Rs.6,03,715/- + IGST Rs.18,419/-) under Section 74(1) of CGST Act, 2017/ Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017;
- Demand and recover interest of Rs.1,96,757/- (CGST of Rs. 96,699/- + SGST of Rs. 96,699/- & IGST of Rs. 3,359/-) on the above wrongly availed and utilized ITC under the provisions of Section 50(3) of CGST Act, 2017/Gujarat GST Act,

2017 read with Section 20 of IGST Act, 2017;

- Demand and recover IGST of Rs. 2,08,02,566/- under the provisions of sub-section (1) of Section 74 of CGST Act, 2017 read with Section 20 of IGST Act, 2017 along with interest under the provisions of Section 50(3) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017;
- Imposition of penalty under Section 74(1) of CGST Act, 2017 read with Section 20 of IGST Act, 2017;
- Demand and recover tax amounting to Rs.65,534/- (CGST of Rs.31,907/-, SGST of Rs.31,907/- and IGST of Rs.1,720/-) under the provisions of Sub-section (1) of Section 74 of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 alongwith interest under the provisions of Section 50(1) read with Section 74(1) of CGST Act, 2017 read with Section 20 of IGST Act, 2017;
- Impose penalty under Section 74(1) of CGST Act, 2017 read with Section 20 of IGST Act, 2017.

3. The said SCN was adjudicated vide the impugned order wherein;

- Demand of ITC of Rs.12,25,849/- (CGST Rs.6,03,715/- + SGST Rs.6,03,715/- + IGST Rs.18,419/-) was confirmed under Section 74(1) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017;
- Demand of interest of Rs.1,96,757/- (CGST of Rs. 96,699/-, SGST of Rs. 96,699/- & IGST of Rs. 3,359/-) was confirmed under the provisions of Section 50(3) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017
- Demand of IGST of Rs. 2,08,02,566/- was confirmed under the provisions of sub-section (1) of Section 74 of CGST Act, 2017 read with Section 20 of IGST Act, 2017 along with interest under the provisions of Section 50(3) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017;
- Penalty of Rs. 2,08,02,566/- was imposed under Section 74(1) of CGST Act, 2017 read with Section 20 of IGST Act, 2017;
- Demand of tax amounting to Rs.65,534/- (CGST of Rs.31,907/-, SGST of Rs.31,907/- and IGST of Rs.1,720/-) was confirmed under the provisions of Sub-section (1) of Section 74 of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 alongwith interest under the provisions of Section 50(1) read with Section 74(1) of CGST Act, 2017 read with Section 20 of IGST Act, 2017;
- Penalty of Rs.65,534/- was imposed under Section 74(1) of CGST Act, 2017 read with Section 20 of IGST Act, 2017.

4. Aggrieved by the impugned order, the appellant has preferred this appeal on following grounds:

- <u>Interest on reversal of ITC for non-payment of consideration along with tax to the suppliers within 180 days</u>

  ITC is not reversible under second proviso to Section 16(2) and therefore, no interest is payable. Section 16(1) of CGST Act provides that the registered

person is entitled to avail ITC. Section 16 of the CGST Act is an enabling section. Section 16(2) of the CGST Act begins with a non-obstante clause and, *inter alia*, provides for the conditions for availing ITC of the tax paid on inputs, input services and capital goods. Second proviso to Section 16(2) of the CGST Act, *inter alia*, provides for reversal of ITC on account of non-payment to the supplier of goods by the recipient within one hundred and eighty days from the date of issuance of invoice. The proviso under consideration is appended to sub-section (2) of Section 16 of the CGST Act. The said provision provides for pre-conditions for availment of ITC. Here, the second proviso to section 16(2) of the CGST Act travels beyond the conditions prescribed/enlisted in sub-section (2) clause (a) to (d). In other words, the proviso over-reaches the conditions prescribed under Section 16(2) (a) to (d) and carves out an additional condition which appears to be an overstep over the legislative mandate. It is well settled law that a proviso must be limited to the subject matter of the enacting clause. It is not a separate or independent enactment. The show cause notice did not allege that the supplier of the appellant has not paid tax to the Government. On a cohesive reading of clause (c) of Section 16(2) and the second proviso to section 16(2) of the CGST Act it can be inferred that the rationale behind such conditions is that the tax charged in respect of supply has been actually paid to the Government. In other words, once the tax stands paid by the supplier, there cannot be a case for denial of ITC of such tax. Even after introduction of point of taxation in March/April 2011, the provision of Rule 4(7) of the Cenvat Credit Rules, 2004 akin to section 16(2) and the second proviso thereof were retained on statute book. In other words, despite service tax becoming payable on accrual basis, the condition of recipient paying the value of service along with tax to the service provider was maintained on statute.

- Rule 37 of the CGST Rules contains the mechanism to effectuate the aforesaid provisions. Now, w.e.f. 01.10.2022, vide Notification No. 19/2022-Central Tax dated 28.09.2022 the said Rule 37 has been amended.

Pre-amendment	***Post amendment***
First, the disclosure regarding ITC pertaining to inwards supplies of which payment is not made within 180 days from the date of invoice shall be made in Form GSTR-2.	***First,*** Payment equivalent to ITC pertaining to inwards supplies of which payment is not made within 180 days from the date of invoice shall be made in Form GSTR-3B.
Second, this disclosure shall be made in the month immediately following the period in which limit of 180 days is crossed. Thus, the provision requires addition to output tax liability only after 180 days and not before.	***Second,*** the payment shall be made in the month immediately following the period in which limit of 180 days is crossed. Thus, the provision requires payment only after 180 days and not before.

Third, as per rule 37(2), this amount of ITC shall be added to the output tax liability for the month in which the above disclosure is made.	No such provision
Fourth, interest @18% would be payable from the date of availing such credit till the date it is added to output tax liability as above.	***Third,*** interest would be payable under Section 50.

From the above it can be understood that Rule 37, as stood before the amendment (period up to 01.10.2022), required the taxpayer to make disclosure regarding ITC pertaining to inwards supplies of which payment is not made within 180 days from the date of invoice in Form GSTR-2. The Central Government, vide ***Notification 19/2017-CT dated 08.08.2017 and Notification No. 20/2017-CT dated 08.08.2017***, extended the last date for filing GSTR-2 and GSTR-3 for the period July, 2017. Thereafter, the Central Government vide Notification No. 29/2017-CT dated 05.09.2017, Notification No. 30/2017-CT dated 11.09.2017 and Notification No. 54/2017-CT dated 30.10.2017 again extended the last date for filing returns under GSTR-2 and GSTR-3 for the abovementioned period. At last, the Central Government, ***vide Notification No. 58/2017-CT dated 15.11.2017***, declared that the date for filing returns under GSTR-2 and GSTR-3 for the period July, 2017 to March, 2018 shall be notified subsequently. The same was ratified in ***Notification No. 72/2017-CT dated 29.12.2017***. Further, w.e.f. 01.01.2021, the return in Form GSTR-2 & GSTR-3 have been deleted from Rule 60 and Rule 61 respectively. Thus, the said return never came into effect for the disputed period. Thus, it can be understood that the mechanism to make disclosure in terms of Rule 37 never came into force and therefore, the ITC cannot be denied to taxpayer for non-availability of mechanism by the Government. Thus, the demand for reversal of ITC due to non-payment to vendor within 180 days is bad and arbitrary. Hence, the appellant is not required to reverse the ITC and consequently, no interest is payable.

- **Without prejudice, no interest is payable:** Rule 37(3), during the disputed period, *inter alia*, provides that the interest shall be payable at the rate notified under Section 50(1) from the date of availment till the date on which the said amount is added to the output tax liability. Sub-section (1) of Section 50 is applicable when the person fails to pay tax. In the instant case, there is no unpaid tax. The dispute pertains to reversal of ITC due to non-payment of consideration to the supplier. Thus, the provisions of Section 50(1) would not be attracted and the appellant is not be liable to pay interest, if any, under the said provision.

On perusal of Section 50(3), it appears that interest on ITC availed and utilized wrongly shall be leviable under Section 50(3). However, Section 50 does not

prescribe for payment of interest for scenarios falling under second proviso to Section 16(2). Also, neither second proviso to Section 16(2) nor Rule 37 provides for payment of interest under Section 50. Rule 37 only stipulates that interest would be levied at the rate notified under Section 50(1). Therefore, the provision referred to Section 50 only for limited purpose of borrowing the rate at which interest would be payable. Reliance placed in the case of ***Mahindra & Mahindra Ltd v. Union of India - 2022-TIOL-1319-HC-MUM-CUS.*** No interest can be levied on reversal of ITC, if any, in terms of proviso to Section 16(2) of the CGST Act.

- The show cause notice has calculated interest from the date of invoice of the supplier. The appellant submits that, assuming whilst denying that the interest is payable on reversal of aforesaid ITC, the calculation/ computation of interest in the show cause notice, as confirmed vide impugned order is incorrect for the reason *infra. In* terms of section 16(2), the taxpayer is entitled to take ITC subject to satisfaction of conditions (clauses (a) to (d)) laid under the said section. Thus, on receipt of invoice, a taxpayer can avail ITC of GST paid by the supplier. The second proviso to Section 16(2) of the CGST Act *inter alia*, provides that the recipient/taxpayer shall pay the value of supply along with tax thereon to the supplier within a period of one hundred and eighty days failing which amount equal to ITC availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed. The provisions of Section 50(3) of the CGST Act can be invoked only when the assessee avails and utilize the ITC wrongly. Thus, ITC pertaining to invoices for which payment is being made after 180 days can be said to be availed wrongly after completion of 180 days only. Thus, the interest, if any, is payable only after completion of 180 days.

  If the interpretation canvassed by the department is to be accepted, then, the specific provision of Section 16(2) of the CGST Act and the language employed therein which provides for the time period of one hundred and eighty days for payment would become redundant. Further, even Rule 37(3) provides that the interest is to be calculated from the date of availment. Therefore, the interest calculated in the show cause notice from the date of invoice of the vendor has no legs to stand. Rule 37(3) of the CGST Rules, *inter alia*, provides for the time period for which interest liability is to be calculated. However, no such time period is provided under the parent act. The said rule goes beyond the act which is bad in law. Reliance placed on following decisions;

  a. ***Mohit Minerals Private Limited V/s Union of India 2020-TIOL-164-HC-AHM.***
  b. ***Shiri Ram, (2000) 5 SCC 451,***
  c. ***Kunj Behari Lal Butail v. State of H.P., (2000) 3 SCC 40,***
  d. ***Union of India v. Intercontinental Consultant and Technocrats - 2018 (10) G.S.T.L. 401 (S.C.)***

  Rule 37 has been recently amended whereby the sub -rule (3) of Rule 37 prescribing the time period from the date of invoice to the date of payment has been omitted. This itself shows that the intention of the legislature was never to

charge/demand interest for the initial period of one hundred and eighty days. No revenue loss is sustained by department on account of availment of ITC and its reversal, later on, without utilizing against output tax liability. Therefore, to the extent the ITC is not utilized, no interest is leviable. As per sub-section (3) of Section 50 read with Rule 88B (3), the liability to pay interest would arise only if the credit is utilised. Section 50 read with Rule 88B (3) clearly stipulates thatinterest for the wrongly availed and utilised ITC shall be calculated for period starting from date of utilisation said wrongly availed credit to dateof reversal of such credit. So, if the taxpayer's balance of credit is always more than the amount required to be reversed now, due to non-payment of consideration within 180 days, no interest liability would arise or interest will be payable only to the extent of ITC utilized. Hence, in view of the above submissions the appellant submits that the computation of interest in the show cause notice is incorrect and therefore, impugned order, confirmed the said demand, is liable to be set aside.

- Section 50(3) of the CGST Act provides for interest on undue or excess claim of ITC. Interest under Section 50(3) of the CGST Act can be levied only if there is an undue or excess claim of ITC under Section 42(10) or if there is an *undue or excess reduction* in the output tax liability under Section 43(10) of the CGST Act. In other words, the interest under Section 50(3) of the CGST Act can be levied on the tax/ ITC payable due to mismatch in the return filed by the recipient and the supplier. However, in the instant case, there is no undue or excess reduction in the output tax liability as explained *supra.* Hence, provisions of Section 50(3) of the CGST Act would not be attracted to the facts of the present case. Hence, on this count too, the impugned order is liable to be set aside.

- Without prejudice, during the period of dispute, the appellant had balance in electronic credit ledger and therefore, no interest can be levied under Section 50(1) of the CGST Act. The provisions of Section 50(1) of the CGST Act prescribes the provision of interest on delayed payment of tax.The said proviso to Section 50(1) was inserted vide Section 100 of the Finance Act, 2019 notified on 25.08.2020 vide Notification No. 63/2020-C.T., dated 25.08.2020, w.e.f. 1st September, 2020. However, before notifying the above proviso, the GST Council in its meeting held on 14.03.2020 recommended interest to be charged on the net cash tax liability w.e.f. 1st July, 2017 and accordingly, recommended the amendment of Section 50 of the Act retrospectively w.e.f. 1st July, 2017. Thereafter, CBIC, vide its instructions in Letter F. No. CBEC-20/01/08/2019-GST dated 18.09.2020, instructed the GST officers to recover interest only on the net cash tax liability (i.e. that portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger). Thereafter, vide Section 112 of the Finance Act, 2021, retrospective effect was given to the proviso. Thus, the assessee had to pay interest only on the portion of liability payable through cash. In the present case, the appellant, during the period of dispute, had sufficient balance in its electronic credit ledger. In other words, the appellant had availed ITC but not utilized the same for discharging GST liability.

Hence, no interest can be demanded from the appellant. Copy of the electronic credit ledger for the disputed period is annexed herewith for reference.

ISSUE NO. 2:

➢ Recovery of refund claim in alleged violation of Rule 96(10) of the CGST Rules: Rule 96(10) of the CGST Rules falls within Chapter X – Refund of the CGST Rules. The Government of India No. 1, through Central Board of Indirect Tax & Customs, vide Notification No. 3/2018-CT dated 23.01.2018 inserted impugned sub-rule (10) to Rule 96 of the CGST Rules, with retrospective effect from 23.10.2017. From perusal of the above provision, it can be understood that Rule 96(10) clearly recognizes two parties viz. "person claiming refund" and the "supplier, who supplies availing benefit under the given notifications, to the person claiming refund". Hence, initially the restriction was applicable only if the supplier avails the benefit and not the recipient (i.e. the exporter). Further, Circular No. 45/19/2018-GST, dated 30.05.2018 at Para 7 clarified as under with regard to applicability of Rule 96(10):

> *"Sub-rule (10) of Rule 96 of the CGST Rules seeks to prevent an exporter, who is receiving goods from suppliers availing the benefit of certain specified notifications under which they supply goods without payment of tax or at reduced rate of tax, from exporting goods under payment of integrated tax. This is to ensure that the exporter does not utilise the input tax credit availed on other domestic supplies received for making the payment of integrated tax on export of goods."*

The above Circular clearly establishes that the supplier and an exporter are two different persons and the restriction shall apply only if such exporter receives the goods from a supplier who avails the benefit of the given notifications on his outward supply. Hence, the present case is clearly not covered by the restriction placed under Rule 96(10) as it existed till 08.10.2019. Vide Notification No. 54/2018-CT dated 09.10.2018 (coming into effect from 09.10.2019), Rule 96(10) of the CGST Rules was substituted. It can be understood that Rule 96(10) of the CGST Rules, 2017 came into effect from 23.10.2017 and was substituted vide Notification No. 54/2018-CT dated 09.10.2018. Rule 96(10) provides a class of person who cannot claim refund of IGST paid on export of goods or services. The said class includes the person availing benefit of Notification No. 79/2017-Customs dated 13.10.2017. In other words, Rule 96(10) of the CGST Rules restricts the exporter or zero-rated supplier from claiming refund of IGST where such exporter or zero-rated supplier has procured inputs under the above notification. The above Rule is ultra-vires to the extent it disallows refund of IGST paid on exports where such exporter or zero-rated supplier has procured inputs in terms of the above notification for the reasons explained *infra*. So, export of goods is a zero-rated supply. Further, in terms of sub-section (3) of Section 16, a registered person making zero-rated supply has an option to supply goods or services or both under bond or Letter of Undertaking *or* on payment of IGST. The department can only prescribe *conditions, safeguards*

and procedure for export under bond or LUT or on payment of IGST. The provision nowhere creates an exclusion of a class of exporters from claiming refund of IGST paid on exports subject to availment of a particular notification. Even Section 54 of the CGST Act contains no provisions empowering the department to direct/ mandate the taxpayer/ exporter to not claim refund of IGST paid on export of goods. Here, the Rule 96(10) places / prescribes a substantive condition which is not present under the statute. The said rule lacks legislative competency, is wholly beyond authority of law and in complete violation of provisions of section 54 of the CGST Act, 2017 and section 16 of the IGST Act, 2017. In view of the above submission, Rule 96(10) of the CGST Rules, 2017 is ultra-vires to the CGST Act, 2017 and IGST Act, 2017 and therefore, the demand based on such ultra-vires provision is liable to be quashed and set aside.

- **Notification 54/2018-CT is prospective in nature :** The government of India, through Central Board of Indirect Tax & Customs (CBIC), vide Notification No. 3/2018-CT dated 23.01.2018 inserted impugned sub-rule (10) to Rule 96 of the CGST Rules, with retrospective effect from 23.10.2017. Thus, it can be understood that Rule 96(10) clearly recognizes two parties viz. "person claiming refund" and the "supplier, who supplies availing benefit under the given notifications, to the person claiming refund". Hence, initially the restriction was applicable only if the supplier avails the benefit and not the recipient (i.e. the exporter). Vide Notification No. 39/2018-CT, dated 04.09.2018, sub-rule (10) was again substituted. From perusal of the above notification, it can be understood that the rule now provides that the refund of IGST on export shall not be available to exporter if.:

  (a) the benefit of Notification No. 48/2017-CT, Notification No. 40/2017-CTR or Notification No. 41/2017-ITR has been availed on the supplies made to the exporter;
  (b) the benefit of Notification No. 78/2017-Cus. or Notification No. 79/2017-Cus. has been availed by the exporter.

The rule was amended retrospectively. The aforesaid amendment endangered all the refund claims of the exporters who imported goods without payment of IGST under Notification No. 78/2017-Cus. or Notification No. 79/2017-Cus. At one end, the exporter's refund claim would become invalid and at the other end, the exporter would be ineligible to avail ITC beyond 30.09.2018. To put an end to this imbroglio, again this rule was retrospectively amended (w.e.f. 23.10.2017) vide Notification No. 53/2018-CT dated 09.10.2018. The position prevailing post Notification No. 3/2018-CT was restored. Simultaneously, Notification No. 54/2018-CT dated 09.10.2018 was also issued. The notification is identical to Notification No. 39/2018-CT but was not retrospective. In other words, Rule 96(10) of the CGST Rules amended vide Notification 39/2018-CT was rescinded vide Notification No. 53/2018-CT and the said provision was given effect prospectively w.e.f. 09.10.2018 vide Notification No. 54/2018-CT. Thus, the refund claims made before 9.10.2018 shall be governed by

Notification No. 53/2018-CT i.e. the original position wherein the bar is with respect to the supplier only and claims made on or after 09.10.2018 shall be governed by Notification No. 54/2018-CT i.e. the amended position wherein the bar is with respect to the imports (under notifications 78/2017-Cus, 79/2017-Cus) by the exporter himself. Hence, the refund claimed by the Appellant during November 2017 to October 2018 does not fall within the purview of bar under Rule 96(10) of the CGST Rules as inserted vide Notification No. 54/2018- CT.

Further, vide Notification No. 54/2018-CT, the department is taking away the right to claim refund of the class of persons. The retrospective implementation of the Rule 96(10) will take away the accrued right of the Appellant. The appellant never contended that they have not claimed exemption of IGST on import of inputs. However, the retrospective insertion of explanation to Rule 96(10) does not make the Notification No. 54/2018-CT dated 09.10.2018 as retrospective. As explained supra, the Rule 96(10), as inserted vide Notification No. 3/2018-CT, was same from 23.10.2017 to 08.10.2017. The insertion of explanation does not make any difference to the present case. The insertion of explanation does not mean that Rule 96(10), as was prior to amendment vide Notification No. 54/2018-CT, included recipient who have claimed benefit under Notification No. 79/2017-Cus. The explanation merely clarifies that the restriction under Rule 96(10) shall not be applicable on the person who had not claimed exemption from IGST under the specified notifications therein. However, as stated above, the restrictions under Rule 96(10) of the CGST Rules, 2017, from 23.10.2017 to 08.09.2018, provided that the supplier should not have availed the benefit under the specified notification. However, the appellant is a recipient and not supplier. Thus, the restriction, if any, shall be applicable post amendment to Rule 96(10) of the CGST Rules vide Notification No. 54/2018-CT. The Ld. Joint Commissioner has misconstrued the submissions of the appellant on the decision of Hon'ble Gujarat High Court in *Cosmo Films (supra).* The appellant submits that the said decision is taken into reconsideration by the Hon'ble Gujarat High Court in the case of ***Zaveri & Co. Pvt. Ltd. vs. Union of India - 2020-TIOL-2246-HC-AHM-GST.*** Thus, the issue is subjudice and not attained finality. Hence, reliance on the decision of Hon'ble Gujarat High Court in *Cosmo Films (supra)* is incorrect. In view of the above submissions, the Appellant submits that the Rule 96(10), as amended vide Notification No. 54/2018-CT dated 09.10.2018 is prospective in nature. Hence, the refund granted prior to such amendment cannot be treated as violative of Rule 96(10). Hence, the impugned order, to the extent it confirmed the demand for the period December 2017 to October 2018, is liable to be quashed and set aside.

- **<u>Without prejudice, Rules cannot overstep the Parent act:</u>** The Appellant submits that the provisions of parent act i.e., Section 16 of the IGST Act, 2017 and Section 54 of the CGST Act, 2017, allow the Appellant to claim refund / rebate of taxes paid on exports. There is no condition or impediment prescribed under the above said provisions. However, vide Notification no. 54/2018-CT, the department has brought impediments in the form of restrictions under rules which is impermissible in law. The provisions contained in the parent Act

pertaining to claim of refund / rebate in case of zero-rated supplies did not envisage any conditions /restrictions for claiming refund / rebate. Such restrictions cannot be introduced through the rules unless specific powers for such purpose have been granted. Neither Section 16 of the IGST Act / 54 of the CGST Act nor the rule making powers envisages any authority in the delegated legislation to impose such condition. In view of the above, the amended Rule 96(10) is bad in law and the demand based on such provision is liable to be quashed and set aside.

- **Entire proceeding is Revenue Neutral:** No demand of recovery of refund can lie in as much as the entire exercise is revenue neutral. Assuming, the Appellant has erroneously claimed refund of IGST paid on export of goods, as alleged by the department, the Appellant will be entitled for re-credit of IGST paid through ITC. Hence, there is no revenue implication, whatsoever, in the instant case. In such a situation, the demand/ recovery of refund granted of cannot survive.

ISSUE NO. 3:

- Reversal of common ITC attributable to High Sea Sale: High Sea Sale is a non-taxable supply and not 'exempt supply'. Therefore, provisions of Section 17(3) of the CGST Act are not applicable on High Sea Sale transaction. The CGST Act and IGST Act do not define the term high seas. Even the Customs Act make no mention of it. Therefore, it is necessary to refer general meaning of 'high seas'. The Duhaine's Law Dictionary describes it as *"the open ocean, not part of the exclusive economic zone, territorial sea or internal waters of any State." According to Article 1 of the UN Convention on High Seas, "The terms 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Article 86 of the United Nations Convention on the Law of the Sea (UNCLOS) refers to high seas as " all parts of the sea that are not included in the exclusive economic zone, in the territorial seas or in the internal waters of a State, or in the archipelagic waters of an archipelagic State ."Article 87ibid adds -" The high seas are open to all States, whether coastal or land-locked ."*

- A High Sea Sale is a sale of goods by a consignee, named in the relevant bill of lading, to another buyer while the goods are enroute to their eventual destination. A high sea sale does not mean that sale transaction must be made while the vessel carrying the cargo is still on high seas. It can be made any time after the vessel has crossed the territorial waters of the exporting country but before it enters the territorial waters of the importing country. For any transaction to be accepted as a High Sea Sale, it must be made before the import general manifest (IGM) is filed under Section 30 of the Customs Act, 1962 and supported by appropriate documentation necessary for Customs clearance. In terms of Section 7(2) of the IGST Act goods imported into India is treated as 'inter-state supply' and therefore, leviable to IGST in terms of Section 5 of the IGST Act read with Section 3 of the Customs Tariff Act, 1975. In terms of the IGST Act, import of goods into India, i.e. the supply up until

their stay in the docks is treated as inter-State supply. In other words, the goods imported into India, including those purchased in a high sea sale, are subject to the levy under Section 5 of the IGST Act. The Customs duties are levied on the goods after the same have been imported into India but before they are cleared by the Customs. The term "import" has been defined, almost identically in Section 2(10) of IGST Act and Section 2(23) of the Customs Act, as "bringing into India from outside India". Further, "*India*" under Section 2(27) of the Customs Act has been defined, as noted earlier, thus: "*India includes the territorial waters of India*". Thus, the transaction taken place before on High Seas cannot be treated as an import and IGST Act is not applicable to such transaction. The said transaction is a non-taxable supply. The same was clarified by the CBIC, vide circular no. 33/2017-Cus dated 01.08.2017. The relevant extract is reproduced below:

"4. GST council has deliberated the levy of Integrated Goods and Services Tax on high sea sales in the case of imported goods. The council has decided that IGST on high sea sale (s) transactions of imported goods, whether one or multiple, shall be levied and collected only at the time of importation i.e. when the import declarations are filed before the Customs authorities for the customs clearance purposes for the first time. Further, value addition accruing in each such high sea sale shall form part of the value on which IGST is collected at the time of clearance."

The CBIC clarified that in respect of high seas sale of imported goods, IGST would be levied only once, at the time of customs clearance. The High Sea Sale is neither supply of goods or services. The same is evident from Entry 8(a) of Schedule III of the CGST Act. The same was inserted vide Section 32 of the CGST (Amendment) Act, 2018 (No. 31 of 2018). Recently, the Central Government, vide Clause 142 of the Finance Bill, 2023, proposed to give the above amendment effective from 01.07.2017. Thus, the legislative intent was to treat the High Sea Sale as not a supply leviable to IGST.

- Section 2(47) of the CGST Act defines exempt supply, the exempt supply means supply which attracts nil rate of tax or supply exempt under Section 11 of the CGST Act or Section 6 of the IGST Act and includes non-taxable supply. In terms of Section 2(78) "non-taxable supply" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act. In other words, supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel is a non-taxable supply. The central government has power to exempt supply under Section 11 of the CGST Act or Section 6 of the IGST Act. These supplies shall be leviable to tax. A transaction not leviable to tax cannot be exempted from levy. The High Sea Sales is neither supply of goods or services, the same cannot be treated as 'supply'. Thus, the transaction which is not a 'supply' does not fall within the ambit of 'exempt supply'. Hence, the provisions of Section 17(3) of the CGST Act cannot be made applicable to the transaction involving High Sea Sales. In view of the above submissions, the

appellant is not liable to reverse ITC in terms of Section 17(3) of the CGST Act read with Rule 42 of the CGST Rules, 2017.

- Section 74 is not invokable in the present case:. In fact, the appellants were under bonafide belief that they are entitled to refund & ITC for the reasons mentioned hereinabove. Thus, the invocation of section 74 is bad in law. The show cause notice as well as the impugned order proceeds on assumptions and presumptions. No evidence has been brought on record by the department in support of their allegation on suppression of facts on part of the appellant. No such act on part of the appellant is forthcoming on record. In absence of any tangible evidence, the appellant submit that the allegation of suppression is factually incorrect. The appellants are registered with the GST department and have paid GST as applicable during the period in dispute. The appellants have duly disclosed the ITC availed in its GST returns. The refund claim has been verified and sanctioned by the proper officers. Hence, in such circumstances, the appellants submit that the allegation of suppression of fact is unsustainable. Further, the show cause notice has been issued pursuant to audit conducted by the department. Thus, there cannot be any allegation of suppression on the part of the appellant. Hence, the provisions of Section 74 have been invoked in an arbitrary manner and therefore, the impugned order is liable to be quashed and set aside. The appellants were under a bonafide belief. It is well settled that non-disclosure of information not required to be disclosed under law, does not amount to suppression. Hence, there can be no allegation of suppression of facts in the present case. The appellant rely upon decision of the Hon'ble Supreme Court in the case of **Continental Foundation V/s CCE 2007 (216) ELT 177 (SC)**, wherein the Hon'ble Apex Court has held as under:

10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. ***Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty.*** *Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression.* ***When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement.*** *The latter implies making of an incorrect statement with the knowledge that the statement was not correct.*

··· (emphasis supplied)

- No penalty can be imposed on the appellant: The appellants are not liable to pay GST or reverse ITC and not liable to pay interest and have rightly claimed refund, the appellants cannot be subjected to penalty under section 74(1) of the CGST Act,2017. Where there is no demand of duty, penalty cannot be imposed - **Coolade Beverages Limited (2004) 172 ELT 451 (All).** The appellants rely upon the following decisions in support of the above submission:

a. *CCE V/s Sarup Tanneries Limited 2005 (184) ELT 217 (T)*
b. *CCE V/s Explicit Trading 2004 (169) ELT 205 (T)*
c. *Goyal M. G Gases Ltd V/s CCE 2004 (168) ELT 369 (T)*
d. *Kanthuria Portfolios V/s CCE 2003 (158) ELT 355 (T)*
e. *Goenka Woolen Mills V/s CCE 2001 (135) ELT 873 (T)*

➢ **No interest can be imposed on the appellant under Section 50(1) of the CGST Act, 2017:** The appellant submits that for the reasons explained *supra*, interest under Section 50 of the CGST is not chargeable. When the tax demanded itself is not payable by the appellant, interest under Section 50(1) of the CGST is also not chargeable.

5. Personal Hearing in the case was held on 28.11.2023. Shri Anshul Jain, Advocate and Shri Dhiren Soni, Chartered Accountant appeared for personal hearing on behalf of the appellant. They reiterated the contents of the written submission and requested to allow their appeal.

6. I have carefully gone through the facts of the case available on record, grounds of appeal in the appeal memorandum, oral submissions made during personal hearing, the impugned order passed by the adjudicating authority and other case records. The issue before me for decision in the present appeal is whether the demand of interest on delayed reversal ITC, reversal of erroneous refund of IGST taken & inadmissible ITC availed on exempted supply, confirmed alongwith interest, and penalties vide the impugned order passed by the adjudicating authority in the facts and circumstances of the case is legal and proper or otherwise.

6.1 In **Revenue para-1,** interest was demanded on non-reversal of input tax credit on late payment of consideration of inward supply of goods/services made after 180 days. It was observed that the appellant had made payment to some supplier for the period July 2017 to March 2020, towards the value of supply alongwith tax thereon after 180 days, hence, the ITC wrongly availed amounting to Rs.12,25,849/- was demanded and recovered from them under Section 74(1) of CGST Act, 2017/ Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. As the appellant has subsequently paid to the supplier the value for the supply of goods including tax, the said ITC appears to be adjusted against the proposed demand of ITC. The SCN alleges that the appellant was also liable to pay interest amounting to **Rs.1,96,757/-** under Section 50(3) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017.

6.2 The appellant however, claim that Rule 37 before the amendment (period up to 01.10.2022), required the taxpayer to make disclosure regarding ITC pertaining to inwards supplies of which payment is not made within 180 days from the date of invoice in Form GSTR-2. However, the Central Government, vide Notification 19/2017-CT dated 08.08.2017 and Notification No. 20/2017-CT dated 08.08.2017, extended the last date for filing GSTR-2 and GSTR-3 for the period July, 2017. Thereafter, the Central Government vide Notification No. 29/2017-CT dated 05.09.2017, Notification No. 30/2017-CT dated 11.09.2017 and Notification No.

54/2017-CT dated 30.10.2017 again extended the last date for filing returns under GSTR-2 and GSTR-3 for the abovementioned period. Lastly, the Central Government, vide Notification No. 58/2017-CT dated 15.11.2017, declared that the date for filing returns under GSTR-2 and GSTR-3 for the period July, 2017 to March, 2018 shall be notified subsequently. The same was ratified in Notification No. 72/2017-CT dated 29.12.2017. Further, w.e.f. 01.01.2021, the return in Form GSTR-2 & GSTR-3 have been deleted from Rule 60 and Rule 61 respectively. Thus, the said return never came into effect for the disputed period. Thus, the mechanism to make disclosure in terms of Rule 37 never came into force and therefore, the ITC cannot be denied to taxpayer for non-availability of mechanism by the Government.

6.3 To examine their above contention, relevant text of Section 16, is reproduced below;

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;
[(aathe 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 —
(i) 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.]
[(bathe 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 [section 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; and*
(d) he has furnished the return under section 39 :

Provided that where the goods against an invoice are received in lots or installments, the registered person shall be entitled to take credit upon receipt of the last lot or installment :

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be [paid by him along with interest payable under section 50], in such manner as may be prescribed :

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him [to the supplier] of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(Emphasis Supplied)

6.4 In terms of the second proviso to Section 16 above, where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be [paid by him along with interest payable under section 50], in such manner as may be prescribed. Further, the reversal of ITC in case of non-payment of consideration is prescribed in Rule 37 of CGST Rule, 2017.

6.5 Relevant text of Rule 37 is re-produced below;

"Reversal of input tax credit in Rule 37 the case of non-payment of consideration. (1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section (2) of section 16, shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in FORM GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice :
Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of Section 16 :
Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of Section 16.
(2)The amount of Input Tax Credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.
(3)The registered person shall be liable to pay interest at the rate notified under sub-section (1) of section 50 for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in sub-rule (2), is paid.
The time limit specified in sub-section (4) (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier."

6.6 In terms of Rule 37(1), the disclosure regarding ITC pertaining to inward supplies of which payment is not made within 180 days from the date of invoice shall be made in Form GSTR-2. This disclosure should be made in the month immediately following the period in which limit of 180 days is crossed. Further, as per rule 37(2), this amount of ITC shall be added to the output tax liability for the month in which the above disclosure is made. And in terms of Rule 37(3), the registered person shall be liable to pay interest at the rate notified under sub- section (1) of Section 50, from the date of availing such credit till the date the amount added to output tax liability is paid.

6.7 From the facts of the case, it is clear that the appellant has not paid the value for supply of goods including tax amount to the supplier within 180 days. Therefore, the ITC wrongly availed amounting to Rs.12,25,849/- was demanded from them. The appellant subsequently paid the value for supply of goods including tax amount to the supplier after 180 days and therefore the said payment was adjusted against the proposed demand of ITC. However, the appellant did not discharge the interest liability as required in Rule 37(3) and claimed that as Rule 37 (3) was omitted vide Notification No.19/2022-CT dated 28.09.2022, they are not required to pay interest.

6.8 I have gone through Notification No.19/2022-CT dated 28.09.2022, I find that the said sub-rule (3) of Rule 37 was omitted vide said notification and effective date of notification was from the 1st day of October, 2022. As the period involved in Revenue para-1 covers period July, 2017 to March, 2020, I find that the amendment introduced vide aforesaid notification in Central Goods and Services Tax (Second Amendment) Rules, 2022 cannot be made applicable to the present case. Thus, at the relevant period sub-section (3) of Rule 37 was in existence. I, therefore, find that the appellant in terms of sub-rule (3) of Rule 37, shall be liable to pay interest at the rate notified under sub-section (1) of section 50 for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability is paid.

6.9 Another contention of the appellant is that the Central Government, vide Notification No. 19/2017-CT dated 08.08.2017 and Notification No. 20/2017-CT dated 08.08.2017, extended the last date for filing GSTR-2 and GSTR-3 for the period July, 2017. Thereafter, the Central Government vide Notification No. 29/2017-CT dated 05.09.2017, Notification No. 30/2017-CT dated 11.09.2017 and Notification No. 54/2017-CT dated 30.10.2017 again extended the last date for filing returns under GSTR-2 and GSTR-3 for the abovementioned period. At last, the Central Government, vide Notification No. 58/2017-CT dated 15.11.2017, declared that the date for filing returns under GSTR-2 and GSTR-3 for the period July, 2017 to March, 2018 shall be notified subsequently. The same was ratified in Notification No. 72/2017-CT dated 29.12.2017. Further, w.e.f. 01.01.2021, the return in Form GSTR-2 & GSTR-3 have been deleted from Rule 60 and Rule 61 respectively. Thus, the said return never came into effect for the disputed period. As the mechanism to make disclosure in terms of Rule 37 never came into force and therefore, the ITC cannot be denied to them for non-availability of mechanism by the Government. It is observed that government vide various notification extended the time limit for filing GSTR-2. However, their claim that the return in Form GSTR-2 & GSTR-3 have been deleted from Rule 60 and Rule 61 respectively, hence, they are not liable to furnish the details of such supplies, is not acceptable. I also find that the amendment in Rule 60 & 61 was made w.e.f. 01.01.2021. As the period of dispute is prior to this amendment, the changes cannot be made applicable. Thus, I find that in terms of Rule 37, they were required to furnish the amount of value not paid and the amount of ITC availed on the amount not paid to the supplier in Form-GSTR-2 within the stipulated period. Though the amount of ITC was reversed by the appellant the same should have been done alongwith interest.

6.10 Further, they also claimed that in terms of the provisions of Section 50(1), they are not liable to pay interest on the reversal of ITC due to non-payment of consideration to the supplier. It is observed that interest amounting to Rs. 1,96,757/- has been demanded under the provisions of Section 50(1) of CGST Act, 2017. Relevant section 50 is re-produced below;

Section 50- Interest on delayed payment of tax.-

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

*[1][**Provided** that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.]*

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

[2][(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed]

6.11 In terms of sub-section (1) above, every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, shall pay interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council. I agree with the contention of the appellant that interest liability on wrongly availed and utilized ITC shall not be covered under sub-section (1). I find that the interest liability on wrongly availed and utilized ITC shall accrue in terms of sub-section (3) above, which was introduced vide Notification No. 9/2022-CT dated 05.07.2022 and was brought into force w.e.f 05.07.2022. In the instant case, the period of dispute covers July, 2017 to March, 2020, however, the payment towards value of supply alongwith tax was made in the year 2018 to 2021 i.e. prior to introduction of sub-section (3) of Section 50 hence, I find that the appellant shall not be liable to pay interest as their case does not fall under sub-section (1) of Section 50 either. Further, CBIC vide Instruction issued vide F. No. CBEC-20/01/08/2019-GST dated 18.09.2020, stated that for the period 01.07.2017 to 31.08.2020, field formations may recover interest only on the net cash tax liability (i.e. that portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger). Since, the demand of interest is on the ITC, the same shall not sustain, in view of my above discussion and findings.

7. Under **Revenue Para-2,** it was observed that the appellant had availed the refund of IGST paid on Zero Rated Supplies after availing benefit of exemption from payment of IGST along with BCD on the imported inputs and raw materials in terms of Notification No. 79/2017-Customs dated 13.10.2017 and thus, contravened the provisions of Notification No.16/2020-CT dated 23.03.2020. The SCN alleges that in terms of Rule 96(10) of the Central Goods and Service Tax Rules, 2017, the appellant while availing refund of IGST paid on Zero rated Outward Supplies should not have availed the benefit of Notification no. 79/2017-Customs dated 13.10.2017, as was clarified vide Notification No. 16/2020-CT dated 23.03.2020. The appellant had imported inputs under Advance authorization license and availed full exemption from

payment of IGST on the same. They further exported their final products and claimed refund for those Shipping Bills. It appeared that the appellant is not eligible to refund claim on which they have not paid IGST during the time of procurement of raw material. The amount of erroneously taken refund is **Rs.2,08,02,566/-** [Rs.1,66,74,795/- for the year 2017-18 (23.10.2017 to 31.03.2018) and Rs.41,27,771/- for the year 2018-19] and the same was therefore proposed to be reversed/paid back along with applicable interest and penalty.

7.1 The appellant however claim that Rule 96(10) of the CGST Rules, 2017 came into effect from 23.10.2017 and was substituted vide Notification No. 54/2018-CT dated 09.10.2018. They claim that Rule 96(10) provides a class of person who cannot claim refund of IGST paid on export of goods or services. The said class includes the person availing benefit of Notification No. 79/2017-Customs dated 13.10.2017 i.e. it restricts the exporter or zero-rated supplier from claiming refund of IGST where such exporter or zero-rated supplier has procured inputs under the above notification. The above Rule is ultra-vires to the extent it disallows refund of IGST paid on exports where such exporter or zero-rated supplier has procured inputs in terms of the above notification for the reasons explained *infra*. They claim that Section 54 of the CGST Act contains no provision empowering the department to direct / mandate the taxpayer/ exporter to not claim refund of IGST paid on export of goods. Thus, the substantive condition prescribed in Rule 96(10) violates the provisions of Section 54 of the CGST Act, 2017 and Section 16 of the IGST Act, 2017.

7.2 To examine their claim relevant text of Section 96(10) of the CGST Act is re-produced below;

Rule 96- Refund of integrated tax paid on goods [1][or services] exported out of India.-

XXXX

[15][(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have -

(a) received supplies on which the benefit of the Government of India, Ministry of Finance notification No. 48/2017-Central Tax, dated the 18th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1305 (E), dated the 18th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme or notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321 (E), dated the 23rd October, 2017 has been availed; or

(b) availed the benefit under notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1272 (E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299 (E), dated the 13th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme.]

[16][Explanation. - For the purpose of this sub-rule, the benefit of the notifications mentioned therein shall not be considered to have been availed only where the registered person has paid Integrated Goods and Services Tax and Compensation Cess on inputs and has availed exemption of only Basic Customs Duty (BCD) under the said notifications.]

(Emphasis supplied)

7.3 Rule 96(10) above places restrictions on exporters from claiming refunds on IGST paid for exports if the exporters themselves or their suppliers have availed the specified benefits vide the notifications mentioned in the provision. The rule restricts three classes of exporters, such as advance authorization license holders, export oriented units, and merchant exporters from claiming a refund on payment of IGST after exporting finished goods or services, if such exporters themselves or their suppliers have availed the benefit of any of the notifications specified under Rule 96(10).

7.4 CBIC vide Circular No. 45/19/2018-GST, dated 30-5-2018, at Para-7, while clarifying the scope of Rule 96(10) stated that;

> *"7. **What is the scope of the restriction imposed by rule 96(10) of the CGST Rules, regarding non-availment of the benefit of notification Nos. 48/2017-Central Tax, dated the 18-10-2017, 40/2017-Central Tax (Rate), dated 23-10-2017, 41/2017-Integrated Tax (Rate), dated 23-10-2017, 78/2017-Customs, dated 13-10-2017 or 79/2017-Customs, dated 13-10-2017?***
>
> *7.1 Sub-rule (10) of rule 96 of the CGST Rules seeks to prevent an exporter, who is receiving goods from suppliers availing the benefit of certain specified notifications under which they supply goods without payment of tax or at reduced rate of tax, from exporting goods under payment of integrated tax. This is to ensure that the exporter does not utilise the input tax credit availed on other domestic supplies received for making the payment of integrated tax on export of goods.*
>
> *7.2 However, the said restriction is not applicable to an exporter who has procured goods from suppliers who have not availed the benefits of the specified notifications for making their outward supplies. Further, the said restriction is also not applicable to an exporter who has procured goods from suppliers who have, in turn, received goods from registered persons availing the benefits of these notifications since the exporter did not directly procure these goods without payment of tax or at reduced rate of tax.*
>
> *7.3 **Thus, the restriction under sub-rule (10) of rule 96 of the CGST Rules is only applicable to those exporters who are directly receiving goods from those suppliers who are availing the benefit under notification No. 48/2017-Central Tax, dated the 18th October, 2017, notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017 or notification No. 78/2017-Customs, dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017.***
>
> *7.4 Further, there might be a scenario where a manufacturer might have imported capital goods by availing the benefit of Notification No. 78/2017-Customs, dated 13-10-2017 or 79/2017-Customs, dated 13-10-2017. Thereafter, goods manufactured from such capital goods may be supplied to an exporter. It is hereby clarified that this restriction does not apply to such inward supplies of an exporter."*

7.5 Similarly, in C.B.I. & C. Circular No. 59/33/2018-GST, dated 4-9-2018, it further clarified that;

> *" **5. Scope of rule 96(10) of the CGST Rules :***
>
> *5.1 Rule 96(10) of the CGST Rules, as amended retrospectively by notification No. 39/2018-Central Tax, dated 4-9-2018 provides that registered persons, including importers, who are **directly purchasing/importing supplies** on which the benefit of reduced tax incidence or no tax incidence under certain specified notifications has been availed, shall not be eligible for refund of integrated tax paid on export of goods or services. For example, an importer (X) who is importing goods under the benefit of Advance Authorization/EPCG, is **directly purchasing/importing supplies** on which the benefit of reduced/Nil incidence of tax under the specified notifications has been availed. In this case, the restriction under rule 96(10) of the CGST Rules is applicable to X. However, if X supplies the said goods, after importation, to a domestic buyer (Y), **on payment of full tax,** then Y can rightfully export these goods under payment of integrated tax and claim refund of the integrated tax so paid. However, in the said example if Y purchases these goods from X after availing the benefit of specified notifications,*

then Y also will not be eligible to claim refund of integrated tax paid on export of goods or services.

5.2 Overall, it is clarified that the restriction under rule 96(10) of the CGST Rules, as amended retrospectively by notification No. 39/2018-Central Tax, dated 4-9-2018, applies only to those purchasers/importers who are directly purchasing/importing supplies on which the benefit of certain notifications, as specified in the said sub-rule, has been availed."

7.6 However, Rule 96(10) was amended vide Notification No.16/2020-CT dated 23.03.2020 wherein an explanation was inserted with retrospective effect from 23.10.2017. Text of the explanation is re-produced below;

*"**Explanation**. - For the purpose of this sub-rule, the benefit of the notifications mentioned therein shall not be considered to have been availed only where the registered person has paid Integrated Goods and Services Tax and Compensation Cess on inputs and has availed exemption of only Basic Customs Duty (BCD) under the said notifications.".*

7.7 The appellant in the instant case have imported inputs under Advance Authorization license and availed full exemption from payment of IGST on the same. They further exported their final product and claimed refund of those shipping bills. Thus, the appellant availed the refund of IGST paid on Zero rated Supplies after availing benefit of Notification No.79/2017-Customs dated 13.10.07. Therefore, in terms of Notification No. 16/2020-CT dated 23.03.2020, they were not eligible for refund. The appellant however claim that sub-rule (10) of Rule 96 introduced vide Notification No. 54/2018-CT dated 09.10.2018 has prospective effect and the refund claims filed before 09.10.2018 shall be governed by Notification No. 53/2018-CT dated 09.10.2018. I do not accept their contention because vide Notification No. 16/2020-CT dated 23.03.2020 an explanation was inserted in Rule 96(10) of the said Rules.

7.8 So, by virtue of above explanation, a registered person has not availed the exemption thereof if the registered person has paid IGST and Compensation Cess on inputs and has availed exemption only on BCD under the said notification. In the instant case, the appellant has not paid the IGST at time of procuring the raw materials. Therefore, I find that in terms of the above explanation the appellant is not liable to refund. The refund of Rs.2,08,02,566/- erroneously taken by the appellant is required to be paid alongwith interest.

8. In **Revenue Para 3,** it was observed that the appellant were involved in taxable supply as well as exempt supply (MEIS Licence Sales and High Sea Sale). The MEIS licence sale is covered under (Duty Credit Scrips) HSN 4907 and exempted from 13.10.2017 as per provision of S. No. 122A of Notification No. 35/2017-Central Tax (Rate) dated 13.10.2017 and High Seas Sale was also exempted supplies in the F. Y 2018-19 i.e till 31.01.2019. Further, in view of Section 17(2), 17(3) of CGST Act, 2017 read with Rules 42 of CGST Rules, 2017, the amount of credit shall be restricted to so much of the input Tax as it is attributable to the said taxable supplies including Zero Rated supplies. Therefore, total ITC amounting to **Rs.1,00,416/-** (CGST Rs. 48,890/- + SGST Rs. 48,890/- + SGST Rs. 2,636/-) taken on exempted service was proposed to be recovered from the appellant under Section 74(1) of CGST Act, 2017/Gujarat GST Act,

2017 read with Section 20 of IGST Act, 2017. The appellant had reversed ITC of Rs. **34,882/-** (CGST Rs.16,983/- + SGST Rs.16,983/- + IGST Rs.916/-) which was appropriated against the proposed demand. Thus, the remaining tax amounting to Rs.65,534/- was proposed to be demanded alongwith interest on the ITC in terms of Section 50(1) read with Section 74(1) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The penalty under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 was also imposable on the appellant for wrongful availment of refund of IGST paid on export of goods.

8.1 In the instant case the appellant has voluntarily reversed the ITC amounting to Rs. 16,984/-(CGST) plus Rs.916/- IGST under Rule 42 of CGST Rules, 2017 on account of MEIS License sale considering the same as exempt supply. However, for the High Sea Sale the appellant claim that it is a non-taxable supply and not 'exempted supply', therefore, provisions of Section 17(3) of the CGST Act are not applicable on High Sea Sale transaction. In terms of Section 7(2) of the IGST Act goods imported into India is treated as 'inter-state supply' and therefore, leviable to IGST in terms of Section 5 of the IGST Act read with Section 3 of the Customs Tariff Act, 1975. In terms of the IGST Act, import of goods into India, i.e. the supply up until their stay in the docks is treated as inter-State supply. In other words, the goods imported into India, including those purchased in a high sea sale, are subject to the levy under Section 5 of the IGST Act. Thus, the transaction taken place before on High Seas cannot be treated as an import and IGST Act is not applicable to such transaction. The said transaction is a non-taxable supply. The same was clarified by the CBIC, vide circular no. 33/2017-Cus dated 01.08.2017. The relevant extract is reproduced below:

> *"4. GST council has deliberated the levy of Integrated Goods and Services Tax on high sea sales in the case of imported goods. The council has decided that IGST on high sea sale (s) transactions of imported goods, whether one or multiple, shall be levied and collected only at the time of importation i.e. when the import declarations are filed before the Customs authorities for the customs clearance purposes for the first time. Further, value addition accruing in each such high sea sale shall form part of the value on which IGST is collected at the time of clearance."*

8.2 They claim Entry 8(a) of Schedule III of the CGST Act was inserted vide Section 32 of the CGST (Amendment) Act, 2018 (No. 31 of 2018). The legislative intent was to treat the High Sea Sale as not a supply leviable to IGST. Further, they claim that Section 2(47) of the CGST Act defines exempt supply, the exempt supply means supply which attracts nil rate of tax or supply exempt under Section 11 of the CGST Act or Section 6 of the IGST Act and includes non-taxable supply. In terms of Section 2(78) "non-taxable supply" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act. In other words, supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel is a non-taxable supply. The High Sea Sales is neither supply of goods or services, the same cannot be treated as 'supply'. Thus, the transaction which is not a 'supply' does not fall within the ambit of

'exempt supply'. Hence, the provisions of Section 17(3) of the CGST Act cannot be made applicable to the transaction involving High Sea Sales. In view of the above submissions, the appellant is not liable to reverse ITC in terms of Section 17(3) of the CGST Act read with Rule 42 of the CGST Rules, 2017.

8.3 It is observed that the integrated tax on goods imported into India is to be levied and collected in accordance with Section 3 of the Customs Tariff Act, 1975 and Section 12 of the Customs Act, 1962 and the same is to be levied and collected at the time of import into India. The goods are considered to be imported into India only after they clear the customs frontier after compliance of applicable procedures and payment of duty as applicable.

8.4 As per Section 5(1) of the IGST Act, 2017.

SECTION 5. Levy and collection. — (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person :

Provided that the integrated tax on goods [other than the goods as may be notified by the Government on the recommendations of the Council] imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962).

8.5 Section 7(2) of the IGST states that;

(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

8.6 Thus, as per Section 7(2) of the IGST Act and proviso to Section 5(1) of the IGST Act it is very clear that in respect of import goods there is no levy and collection except in accordance with the provisions of Section 12 of the Customs Act, 1962 and Section 3 of the Customs Tariff Act, 1975. Section 12 of the Customs Act, 1962 provides that custom duties which includes integrated tax in respect of imported goods would be levied only at the time of import or export of goods. So, in case of goods sold on high seas sale basis there is no levy till the time of their customs clearance in compliance with Section 12 of the Customs Act and Section 3 of the Customs Tariff Act. In view of this the import goods sold on high seas sale basis, though they are clearly in the nature of inter-State supply would come in the category of "exempt supply" as no duty is leviable on them except in accordance with proviso to Section 5(1) of the IGST Act.

8.7 The definition of 'exempt supply' given in Section 2(47) of the CGST Act is as under:-

"As per Section 2(47) of the Central Goods and Services Tax (CGST) Act, 2017, "exempt supply" means supply of any goods or services or both which attracts nil rate of tax or

which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, ***and includes non-taxable supply".***

8.8 Further, I find that Section 2(78) of the CGST Act defines 'non-taxable supply' as;

*"**non-taxable supply**" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act".*

Thus, it is very clear that the goods which are sold on high seas sale basis are non-taxable supply as no tax is leviable on them till the time of customs clearance in accordance with and compliance of Section 12 of the Customs Act, 1962 and Section 3 of the Customs Tariff Act, 1975.

8.9 I find that the above legal position is further reiterated and confirmed by Circular No. 3/1/2018-IGST, dated 25-5-2018 issued by the Central Board of Indirect Taxes and Customs, GST Policy Wing.

Question 2

Whether input tax credit will have to be reversed, to the extent of inputs, input services and common input services used by the Applicant, in case the above transaction is not subjected to the levy of IGST by treating the same as an exempt supply for the purpose of Section 17 of the CGST Act?

Yes. In view of the detailed discussions and observations in respect of Question 1 above, the goods sold on High Seas sale basis being non-taxable supply as per Section 2(78) of the CGST Act and being exempt supply as per Section 2(47) of the CGST Act, the input tax credit to the extent of inputs, input services and common input services would be required to be reversed by the applicant as per Section 17 of the CGST Act.

8.10 In view of the legal provisions stated hereinabove, I find that the High Sea Sale is a non-taxable supply and covered in the definition of exempt supply hence the appellant shall be liable to reverse the ITC claimed on such exempt supplies. Accordingly, I uphold the demand of **Rs. 65,534/-** .

9. I find that the appellant is also liable to pay interest under Section 50. In terms of Section 50

Section 50. Interest on delayed payment of tax.-

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

*[1][**Provided** that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.]*

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

[2][(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed]

10. In the instant case, the appellant in light of above provision is liable to pay interest on non-reversal of ITC availed on late payment made on inward supply of goods or services; interest for erroneously taken refund of Rs.2,08,02,566/- and interest on the ITC availed on exempted supply of goods.

11. Further, I find that the inadmissible refund and ineligible ITC was noticed during the course of Audit. The appellant though registered with the department, did not discharge their tax liability correctly nor did they disclose the facts in the periodical returns, all of which clearly indicate the willful act of suppression with the sole intent to evade GST. As the appellant have not paid the tax amount therefore, in terms of sub-section (1) of Section 74, they shall be liable to pay penalty equivalent to the tax specified in the notice. I, therefore, find that the penalty imposed under Section 74 (1) of CGST Act, 2017 on the Revenue para-2 & Revenue para-3 is also legally sustainable.

12. In view of the above, I uphold the demand, interest and penalty confirmed in the impugned order.

13. 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.

ज्ञानचंद जैन
आयुक्त (अपील्स)

सत्यापित/Attested :

रेखा नायर
अधीक्षक (अपील्स)
सी जी एस टी, अहमदाबाद

Dated: 16 January, 2024

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4. The Superintendent (System), CGST, Appeals, Ahmedabad. (for uploading the OIA).

5. Guard File.