सत्यमेव जयते

आयुक्तकाकार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
GST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
Phone: 079-26305065 Fax: 079-26305136
E-Mail : commrappl1-cexamd@nic.in

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(क)	फ़ाइल संख्या / File No.	GAPPL/ADC/GSTP/251/2022 / 5369 - 72
(ख)	अपील आदेश संख्याऔर दिनांक / Order-In-Appeal No.and Date	AHM-CGST-002-APP-ADC-104/2022-23 and 29.11.2022
(ग)	पारित किया गया / Passed By	श्री मिहिर रायका, अपर आयुक्त (अपील) Shri Mihir Rayka, Additional Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	30.11.2022
(ङ)	Arising out of Order-In-Original No. GST/D-VI/O&A/21/GODREJ PROPERTIES/AM/2021-22 dated 13.10.2021 passed by The Assistant Commissioner, CGST, Division – VI (S G Highway West), Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Godrej Properties Limited (GSTIN-24AAACG3995M1Z7) 2nd Floor, Godrej Properties Ltd., Rudrapath Complex, Nr. Rajpath Club, S G Highway, Ahmedabad, Gujarat-380059

(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 Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying – (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant; and (ii) A sum equal to twenty five per cent of the remainingamount 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**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.**

ORDER-IN-APPEAL

Brief Facts of the Case :

M/s. Godrej Properties Ltd., 2nd Floor, Rudra Path Complex, Near Rajpath Club, Sarkhej-Gandhinagar Highway, Ahmedabad-380059, Gujarat (hereinafter referred as *'Appellant'*) has filed the present appeal against Order No. GST/D-VI/O&A/21/GODREJ PROPERTIES/AM/2021-22, dated 13.10.2021 (hereinafter referred as *'impugned order'*) passed by the Assistant Commissioner, CGST & C. Ex., Division-VI, Ahmedabad-North (hereinafter referred as *'adjudicating authority'*).

2(i). Briefly stated the facts of the case is that the *'Appellant'* is holding GST Registration GSTIN No.24AAACG3995M1Z7 has filed the present appeal on 12.01.2022. On verification of TRAN-1 and ST-3 return of the appellant it was observed that they had wrongly carried forward the closing balance of credit of Education Cess Rs.6,45,942/-; SHEC Cess Rs.3,22,979/- & Krishi Kalyan Cess i.e. KKC Rs.8,07,884/- [Total of Rs.17,76,805/-] as reflecting in the ST-3 Return filed for the period of April-June'2017, in TRAN-1 as transitional credit. The same was not admissible as per Section 140(1) of the CGST Act, 2017. Accordingly, the said amount Education Cess Rs.6,45,942/- ; SHEC Cess Rs.3,22,979/- & Krishi Kalyan Cess i.e. KKC Rs.8,07,884/- total of Rs.17,76,805/- was reported to has been paid by the appellant in GSTR-3B for June, 2018 filed on 20.07.2018 and intimated vide letter 28.08.2018, however, applicable interest and penalty on this amount have not been paid by them.

Further, on verification of TRAN-1 filed by the appellant it was observed that they had taken credit of on the input held in stock in Table No.7(a), on which the CENVAT credit was not available in the Service Tax regime. The appellant had availed credit of Rs.12,91,188/- in TRAN-1 against inputs contained in their finished goods or semi finished goods (i.e. their building under development) held in stock on the appointed day. The said credit was denied on the grounds that the building under construction being attached to earth cannot be called "goods" in terms of definition as per Section 2(52) and in terms of case laws under erstwhile Central Excise Act, 1944. Also the condition no. (v) as mentioned under Section 140(3) had also not been fulfilled. The registered person who is eligible for any abatement under CGST Act cannot claim the above said credit on input contained in their finished goods or semi-finished goods. Therefore, the adjudicating authority viewed that the transitional credit of inputs already used in construction and contained in WIP as on 30.06.2017 was not admissible. Accordingly, the said credit of Rs.12,91,188/- was reported to have been paid by the

appellant on 01.11.2019 vide GST DRC-03 DC2411190001887/ DI2411190001328 , intimated vide letter dated 08.07.2021, however, applicable interest and penalty on this amount has not been paid by them.

A Show Cause Notice dated 02.08.2021 was accordingly issued to the appellant. Thereafter, the adjudicating authority vide impugned order has confirmed the said demand of wrongly availed Cenvat credit of Education Cess Rs.6,45,942/-; SHEC Cess Rs.3,22,979/- & Krishi Kalyan Cess i.e. KKC Rs.8,07,884/- [Total of Rs.17,76,805/-] & also credit of Rs.12,91,188/- taken in TRAN-1 against inputs contained in their finished goods or semi finished goods , under the provisions of Section 73 of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017. The adjudicating authority vide impugned order has also confirmed the demand of interest under Section 50 read with Section 73 of the CGST Act, 2017 and imposed a penalty of Rs.1,77,681/- & Rs.1,29,119/- in terms of Section 122 read with Section 73 of the CGST Act, 2017.

2(ii). Being aggrieved with the impugned order the appellant has filed the present appeal on 12.01.2022 mainly on the grounds that the adjudicating authority has not given any findings on the following points :-

- Section 140(1) of the CGST Act among other things , provides that a registered person is entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return furnished in the existing regime for the period ending with the day immediately preceding the appointed day.
- Further, explanation to Section 142 provides that for the purpose of transitional provisions, the expression "CENVAT credit" shall have the same meaning as assigned to it in the Central Excise Act, 1944 or the rules made thereunder.
- In this regard, Rule 3(1) of the CENVAT Credit Rules, 2004 (Credit rules) framed under the Central Excise Act, 1944 ('Excise Act') and the Finance Act, 1994 ('Finance Act') deals with the eligibility of CENVAT credit for a manufacturer or a service provider. The said rule included in its ambit EC and SHEC paid on excisable goods and on taxable services to be allowed as CENVAT Credit.
- It may be noted here that vide Notification No. 28/2016-Central Excise (NT), dated 26.05.2016, Rule 3(1a) was inserted in Credit Rules which provided that CENVAT credit of EC, SHEC and KKC shall be allowed to provider of output service.
- In the light of above discussion , they understand that the CENVAT credit referred under Section 140(1) of CGST Act includes the credit of EC, SHEC and KKC as

these were specifically included in the definition of CENVAT Credit given under the Credit Rules.

- Further, the language of Section 140(1) does not impose any restriction regarding the type / nature of CENVAT credit to be carried forward in the GST regime. In other words, Section 140(1) does not expressly bar carry forward of EC, SHEC & KKC which were validly taken and shown as closing balance in the returns.
- CENVAT credit of EC, SHEC and KKC was allowed as per Rule 3(1) of Credit Rules and being a service provider, credit of EC, SHEC and KKC is allowed. The credit of EC, SHEC and KKC lying in the Cenvat credit account is an accrued right of the appellant since the cess on inputs / input services was already paid by the appellant.
- Based the above, they humbly reiterate that in their view, the appellant is eligible to carry forward in the GST regime, the credit of KKC validly shown in ST-3 , in terms of Section 140(1) of the CGST Act. Further, they are not required to reverse the same.
- Section 140(3) of the CGST Act among other things, provides that a registered person is entitled to take, in his electronic credit ledger, the amount of CENVAT credit against inputs lying in stock or inputs contained in semi-finished or finished goods.
- They are liable to pay GST on supply of construction service and entire credit can be availed by them in the course or furtherance of business. Further, the provisions of Section 73 and Section 74 of the Gujarat GST Act, 2017 do not apply in the present case since they apply only in case of short payment or non-payment of taxes whereas the appellant have rightly availed the credit and even if the credit is inadmissible the credit is not utilized, hence there is no short payment or non-payment of taxes.

The appellant has relied upon several judgments wherein it has been held that demand must be set aside if the order is a non-speaking order.

The appellant has further relied on CBIC's 3rd edition FAQ dated 15.12.2018 and claimed that the cesses were subsumed into the basic GST rate. Hence, the carry forward of CENVAT credit of EC, SHEC and KKC shall be allowed under section 140(1) of the CGST Act, 2017.

That prior to amendment through CGST Act, 2018, the provision of Section 140(1) of CGST Act, 2017 makes reference to CENVAT credit which is provided under Rule 3(1) and 3(1a) of Credit Rules and lists the duties / taxes, a manufacturer or producer of final products or a service provider be allowed to take as credit.

The appellant further contended that it is evident from Rule 3 of Credit Rules that the EC, SHEC and KKC are eligible credit. Thus, the amount of CENVAT credit includes EC, SHEC and KKC; that they declared the credit of the said cess in the returns filed for the month of June, 2017 which is also not disputed in the SCN. Thus, appellant falls within the provisions of Section 140(1) of the CGST Act. Thus credit was correctly admissible to them at the time of filing Form GST Tran-1.

They further submitted that in the erstwhile regime, CENVAT credit of cesses, which includes EC, SHEC and KKC were utilized only towards payment of those cesses. With the introduction of GST, since there was no levy of cesses, there was no output liability of the same and therefore, the CENVAT credit balance of such cesses could not be utilized by tax payers across India. Hence, in absence of any mechanism to utilize the balance of the cesses as on 30 June 2017, the same remained unutilized.

In support of their claim appellant relied upon the following case laws:-

- *Hon'ble Karnataka High Court in case of Union of India Vs. Slovak India Trading Co. Pvt. Ltd. - [2002(201)ELT 559(Kar)];*
- *Srinivasa Hair Industries Vs. CCE, Chennai-II- [2016-TIOL-1203-CESTAT-MAD];*
- *Jain Vangaurd Polybutylene Ltd. Vs. Commissioner of C.Ex, Nasik.- [2009(247) ELT 658 (Tri-Mumbai)].*

Appellant further contended that the credit of EC, SHEC and KKC is admissible even after the retrospective amendment of Section 140(1) of CGST Act, 2017.

In support of their interpretation the appellant placed reliance on the following case laws:-

- *Future Gaming & Hotel Services (Pvt.) Ltd. - [2015(40) STR 833(Sikkim)];*
- *Martin Lottery Agencies Ltd.- [2009(14) STR 593(SC)];*
- *Eicher Motors Ltd. - [1999(106) ELT3 (SC)];*
- *Samtel India Ltd. - [2003(155) ELT 14(SC)];*
- *M/s Bharat Heavy Electricals Ltd.- [Order No.51849/2019 dated 26.04.2019];*
- *Hon'ble High Court of Gujarat in the case of Filco Trade Centre Pvt. Ltd. Vs. Union of India.- [2018-TIOL-120-HC-AHM-GST];..... etc.*

- *M/s Idea Cellular Ltd. - [2019(6) TMI 903-CESTAT, Mumbai]...*

Regarding disallowance of transitioned credit on input held in semi-finished and finished goods, the appellant has submitted that the definition of the term "goods" have remained similar in pre and post GST regime; that it is undisputed fact that both goods and services are used in construction of complex or building. In support of their interpretation the appellant placed reliance on the following case laws:-

- *M/s J. K. Spinning and Weaving Mills Ltd. [1987(32) ELT 234(SC)];*
- *M/s Vasantha Green Projects. [2018(5)TMI 889-CESTAT, Hyderabad];*
- *M/s All India Fedrn of Tax Practitioners. [2007(7) STR 625(SC)];*
- *M/s Coca Cola India Pvt. Ltd. [2009(15) STR 657 (Bom)];*
- *M/s Delhi Cloth and General Mills Co. Ltd.[1977(1) ELT(J199)(SC)];*

Relying on the above decision, the appellant has contended that the activity of construction has remained same prior to June, 2017 and w.e.f June, 2017. The only change is by deeming fiction, i.e. the entire contract has been considered as service. Hence, the under-construction building remains movable goods as long as the occupancy certificate is not received. They further submitted that the inwards are part of the semi-finished goods (work-in-process) on which the GST is to be paid, the ITC of the said inwards should be allowed ; the goods are something which can be bought and sold in the market but the semi-finished stage is not capable of being sold and purchased . Thus, it cannot be considered as goods at all.

Regarding demand of interest, the appellant contended that the amount of EC, SHEC and KKC and Cenvat credit on input held in stock in Tran-1 was always unutilized. They submitted the copy of Electronic Credit Ledger for the period from July, 2017 till 31.03.2020 to show that the amount of EC, SHEC and KKC and Cenvat credit on input held in stock amounting to Rs.30,67,993/- were never utilized. They reversed the credit of EC, SHEC and KKC and Cenvat credit on input held in stock amounting to Rs.30,67,993/- suo moto before issuance of show cause notice itself. They are not covered under any category of the persons liable for interest under CGST Act.

In support of their claim appellant relied upon the following case laws:-

- *Pratibha Processors Vs. Union of India- [1996(88) ELT 12(SC)];*
- *Star India Ltd. - [2006 (1) STR 73(SC)];*
- *D.S.Narayana & company Pvt. Ltd. - [2019(4) GSTL 201(Tri-Hyd.]*

Regarding penalty appellant contended that they have already reversed the credit of EC, SHEC and KKC and Cenvat credit on input held in stock, amounting to Rs.30,67,993/- in GST-3B filed in July, 2018 and GST- DRC-03, dated 01.11.2019, respectively and also the same was unutilized and they have not used cash payment for making such reversal. Hence even if the demand is upheld penalty should not be imposed in the present case. In support of their claim and interpretation the appellant relied upon various case laws and requested to set aside the penalty.

3. Personal Hearing in the matter was held on 21.09.2022 through virtual mode which was attended by Shri Pawan Kabra & other authorized representatives, on behalf of the *'Appellant'*. During P.H. he has reiterated the submissions made till date and informed that they want to give additional submission/information, which was approved and 7 working days period was granted.

4. Accordingly, the appellant has submitted the additional written submission on 28.09.2022, wherein they stated that:-

They draw attention to the recent retrospective amendment under Section 50(3) of the CGST Act, 2017 vide the Finance Act, 2022 to provide for interest charge only when input tax credit is <u>availed and utilised</u>, effective from 01.07.2017. The relevant extract of the same is as follows: -

> ***"50. Interest on delayed payment of tax.***
>
> *(3) Where the input tax credit has been wrongly <u>availed and utilised</u>, 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."*

Further, CBIC had recently issued a Notification No. 09/2022-Central Tax dated 25 July 2022, which was made effective retrospectively from 1st July 2017 wherein Section 50 of the CGST Act was amended and proviso to section 50(1) was inserted which is re-produced below for easy reference:

"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 shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger".

In a nutshell, the CBIC has notified that the interest on late GST payments would be applicable only on net cash tax liability after the deduction of the available input tax credits and hence interest levy is only on liability paid in cash and the same is not applicable for ITC availed and not utilized i.e. lying unutilized in the Electronic Credit Ledger.

In view of above amendment, in their case they have never utilized the disputed CENVAT credit transitioned as on date of reversal. Hence, in the above case demand for input tax credit along with interest and penalty should be set aside.

In addition to their earlier submission they also placed reliance of the following judicial precedents:

a. Pratibha Processors Vs Union of India – [1996 (88) E.L.T. 12 (S.C.)]

b. Sutherland Global Services Pvt. Ltd. Vs. Assistant Commissioner CGST and Central Excise.- [TS-972-HC-2019 (MAD)-NT)] ;

c. Sutherland Global Services - [TS-878-HC-2020(MAD)-NT] ;

d. CCEx. Vs. Delphi Automotive Systems Ltd.-[2013 (292) E.L.T. 189 (All.)];

e. Godrej & Boyce Mfg. Co. Ltd. Vs Union of India and Ors.

f. M/s Godrej Greenview Housing Ltd. Order-In-Appeal No. AK/ADC/GST/522/ RGD-APP/2021-22.

g. M/s Godrej Redevelopers (Mumbai) Pvt. Ltd. Order-In-Appeal No. AK/ADC/ GST/491-492/RGD-APP/2021-22

h. M/s Godrej Landmarks Redevelopers (Mumbai) Pvt. Ltd. Order-In-Appeal No. AK/ADC/GST/511/RGD-APP/2021-22

i. M/s Godrej Projects Development Pvt. Ltd. Order-In-Appeal No. AK/ADC/ GST/510/RGD-APP/2021-22

j. M/s Godrej Properties Ltd. Order-In-Appeal No. AK/ADC/GST/479-480/RGD-APP/2021-22

In view of the above submission, they pleaded that the demand for input tax credit along with interest and penalty should be set aside and proceedings initiated vide impugned order be dropped.

Discussion and Findings:

5(i). I have carefully gone through the facts of the case available on records, submissions made by the *'Appellant'* in the Appeals Memorandum as well as through additional submission. I find that the *'Appellant'* had availed the credit of Education Cess Rs.6,45,942/-; SHEC Cess Rs.3,22,979/- & Krishi Kalyan Cess i.e. KKC Rs.8,07,884/- [Total of Rs.17,76,805/-] through TRAN-1 as transitional credit. However, as being pointed out during verification of TRAN-1 that the credit of Education Cess ; SHEC Cess & Krishi Kalyan Cess [KKC] is not admissible, the appellant had paid the same. It was also observed that the appellant has not paid the applicable interest and penalty on this amount. Accordingly, a SCN dated 02.08.2021 was issued to the appellant in this regard. Thereafter, the adjudicating authority vide impugned order has confirmed the demand of wrongly availed credit of Education Cess ; SHEC Cess & Krishi Kalyan Cess [KKC] and appropriated the amount so paid by the appellant. I find that the adjudicating has confirmed the demand of interest and also imposed penalty of Rs.1,77,681/-. Accordingly, the appellant has preferred the present appeal.

5(ii). I find that the adjudicating authority has denied the Tran-1 credit and confirmed the demand on the ground that as per Section 140 of the CGST Act, credit of Cess amount cannot be carry forwarded to the GST regime. As per the CGST (Amendment) Act, 2018, Section 140 of the CGST Act stands amended retrospectively w.e.f. 01.07.2017 so that the credit of Cess from the pre-GST regime cannot be carry forwarded to GST regime. The term, eligible duties and taxes has been detailed in explanation-2 to section 140 of CGST Act, from which Cess has been excluded. Therefore, the core issue before me is to decide as to whether- (i) Education Cess ; SHEC Cess & Krishi Kalyan Cess amounts can be carried forward to the GST regime as admissible Tran-1 credit, (ii) interest on the demand confirmed is chargeable under Section 50 readwith Section 73 of CGST Act, in the present case & (iii) penalty is imposable on the appellant under the provisions of Section 122 readwith Section 73 of CGST Act; or otherwise..

5(iii). For ease of reference, Section 140 (1) of CGST Act, 2017 is reproduced as under:-

140. (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished

by him under the existing law within such time and in such manner as may be prescribed:

Explanation 3 of said Section further provides :-

Explanation 3.—For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975.

The appellant has stated that even in the amended provisions of Section 140 of the CGST Act clarification provided under the explanation-3 with respect to the term "eligible duties and taxes" does not apply to the term "Cenvat credit of eligible duties" used under Section 140(1). Their argument is that credit cannot be denied on the basis of such explanation as it cannot go beyond the main section. In this context, before going ahead it is necessary to understand in which manner the Explanations- 1, 2 & 3 defines the term eligible duties and taxes under Section 140 of CGST Act. As per the amended (w.e.f. 01.07.2021) version of the Section 140(1) of CGST Act, a registered person shall be entitled to take in his electronic credit ledger, the amount of Cenvat credit of eligible duties carried forward in the return; and the term eligible duties has been detailed in explanation- 1 to Section 140 of CGST Act. Similarly, as per Section 140(5) of CGST Act, a registered person shall be entitled to take in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs and input services received on or after the appointed day; and the term eligible duties and taxes has been detailed in explanation- 2 to Section 140 of CGST Act, which is also applicable to Section 140(1). The eligible duties and taxes enlisted under both Explanations-1 & 2 don't include any type of Cess. Moreover, Explanation-3 under Section 140 of CGST Act read as under: *"For removal of doubts, it is hereby clarified that the expression eligible duties and taxes ' excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collectecl as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975"*

Thus, it is very clear from the amended provisions under Section 140 of CGST Act that, for the purpose of sub-sections 1 and 5, as per Explanations- 1 & 2 given thereunder, the terms eligible duties & eligible duties and taxes, doesn't include any type of Cess. Moreover. Explanation-3 under this section further clarifies this. Moreover, Section 140(1) of CGST Act, 2017, is amended retrospectively w.e.f. 01 .07.2017 vide the CGST (Amendment) Act, 2018 dtd 29.08.2018. Therefore, provisions of retrospectively amended section would be applicable in all the cases of credits transited by filing Tran-1

under Section 140 of CGST Act. Therefore, I find that Cenvat credit of Education Cess ; SHEC Cess & Krishi Kalyan Cess is not allowed to be carried forward to the GST regime as Tran- 1 credit under sub-sections (1) & (5) of Section 140 of CGST Act. In view of above discussions, I upheld the impugned order confirming the duty demand of Tran- I credit of Education Cess ; SHEC Cess & Krishi Kalyan Cess amounting to Rs.17,76,805/.

The appellant has argued that by way of discharging the liability of Cess on inputs/input services, cenvat credit of such Cess amount is an accrued right for them. As the Hon'ble Supreme Court had held in the case of Eicher Motors Ltd., such accrued right cannot be taken away by introduction of new law. Section 174 of CGST Act, 2017 provides that the amended Act cannot affect the right, privilege accrued under the repealed act. The credit of Cesses amounts paid by the appellant is an accrued right under the provisions of CENVAT Credit Rules issued under the provisions of Section 94 of the Finance Act, 1994. Therefore, as per the appellant, the repeal of the said Act should not affect their accrued right.

In this context, I find that ITC cannot be claimed as a matter of right; but it is a form of concession provided by the Act, claimed only in terms of the provisions of the statute, as held by the Apex Court in the case of TVS Motors as under. The Apex Court in the case of *TVS Motor Co. Ltd. Vs. State of Tamil Nadu - [2018] 98 taxmann.com 343/70 GST 501*, held that:

".41. It is very clear from the aforesaid discussion that this Court held that ITC is a form of concession which is provided by the Act; it cannot be claimed as a matter of right but only in terms of the provisions of the statute; therefore, the conditions mentioned in the aforesaid Section had to be fulfilled by the dealer;"

I further find that in the case of Commissioner of CGST & ors. Vs M/s. Sutherland Global Service Pvt. Ltd., vide order dated 16.10.2020 in Writ Appeal No. 53 of 2020, Hon'ble High Court of Madras held that :-

"60. Obviously, the transition of unutilised Input Tax Credit could be allowed only in respect of taxes and duties which were subsumed in the new GST Law. Admittedly, the three types of Cess involved before us, namely Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess, were not subsumed in the new GST Laws, either by the Parliament or by the States. Therefore, the question of transitioning them into the GST Regime and giving

them credit under against Output GST Liability cannot arise. The plain scheme and object of GST Law cannot be defeated or interjected by allowing such Input Credits in respect of Cess, whether collected as Tax or Duty under the then existing laws and therefore, such set off cannot be allowed.".

"62. That the Assessee was not entitled to carry forward and set off of unutilised Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess against the GST Output Liability with reference to Section 140 of the CGST Act, 2017."

In view of above discussions & decisions, I upheld the impugned order confirming the duty demand of Tran-1 credit of EC, SHEC & KKC amounting to Rs.17,76,805/-. I find that the facts of the judgments cited by the appellant in support of their claim of availability of credit of EC, SHEC & KKC in GST regime are distinguishable.

I also find that there is no provision in CGST Act, 2017 to pay taxes under protest, however, the appellant reversed the wrongly transited Cenvat Credit of EC, SHEC & KKC under protest to avoid any litigation or claim refund the same in future. Thus, I hold that the appellant rightly reversed the wrongly transited Cenvat Credit and the adjudicating authority correctly appropriated the same in the impugned order.

5(iv). I further find that he appellant had taken credit of Rs.12,91,188/- against inputs contained in their finished goods or semi finished goods (i.e. their building under development) held in stock on the appointed day in Table No.7(a) of TRAN-1, on which the CENVAT credit was not available in the Service Tax regime. The said credit was denied on the grounds that the building under construction being attached to earth cannot be called "goods" in terms of definition as per Section 2(52) and in terms of case laws under erstwhile Central Excise Act, 1944. Also the condition no. (v) as mentioned under Section 140(3) had also not been fulfilled. Therefore, the adjudicating authority found the said transitional credit of inputs already used in construction and contained in WIP as on 30.06.2017 as inadmissible. Therefore, the adjudicating authority vide impugned order has confirmed the demand of wrongly availed credit of Rs.12,91,188/- against inputs contained in their finished goods or semi finished goods and appropriated the amount so paid by the appellant. I find that the adjudicating has confirmed the demand of interest and also imposed penalty of Rs. 1,29,119/-. Accordingly, the appellant has also preferred the present appeal on this issue.

5(v). In this case, the transitional credit of Rs.12,91,188/- availed by the appellant on inputs contained in finished goods held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day was held inadmissible and ordered for recovery. I find that transitional credit availed by the appellant was held inadmissible under Section 140 (3) of CGST Act, 2017. For better appreciation of facts, I refer to Section 140 (3) of CGST Act, 2017 as under:

Section 140 (3) of CGST Act, 2017:-

A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of Notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to] the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and (v) the supplier of services is not eligible for any abatement under this Act:

(v) the supplier of services is not eligible for any abatement under this Act :

5(vi). I further refer the letter F.No.381/274/2017 dated 27-2-2018 issued by Directorate General of Audit, New Delhi. I find that said letter was issued in a case of M/s. ABC wherein it was noticed that during audit that the said assessee has taken transitional credit of inputs (bricks, TMT bars and rods, cement etc) held in stock as on 30-6-2017 as well as on inputs contained in their building under development. The DG (Audit), referring to the provisions of Section 140 (3) of CGST Act, 2017 clarified as under:

As per Section 2 (59) of the said Act, `inputs' means any goods other than capital goods used or intended to be used by a supplier in course of furtherance of business. As per Section 2 (52) of the said Act, ` Goods' means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply. M/s. ABC referred to Section 140 (3) of the CGST Act, 2017 and submitted that they availed the credit of Rs.59.24 lakh in Tran 1 against the inputs contained in their finished goods or semi finished goods (i.e. their buildings under development) held in stock on the appointed day. The contention of the assessee does not appear to be correct as a building under construction being attached to earth cannot be called `goods' in terms of definition as per Section 2 (52) mentioned above and in terms of various case laws under erstwhile Central Excise Act, 1944. Therefore it is appears that in the case of building construction, the transitional credit of inputs already used in construction and contained in WIP as on 30-6-2017 is not admissible.

5(vii). In view of above, I find that the provisions of Section 140 (3) of CGST Act, 2017 allows transitional credit of inputs contained in semi-finished and finished goods in stock as on appointed day only to the specified class of persons. However, clarification issued by DG (Audit) categorically rules out transitional credit of inputs already used in construction of building in stock and contained in work in progress as on 30-6-2017 on the ground that such buildings does not fall under the definition of *`goods'* given under Section 2 (52) of CGST Act, 2017 under which `goods' is defined to mean only movable property.

5(viii). Concurrent reading of Section 140(3) of CGST Act, 2017, Section 2(52) of CGST Act, 2017 and clarification issued by DG (Audit) leads that, the term `goods' given under Section 140 (3) of CGST Act, 2017 means every kind of movable property. Therefore, to qualify for availing transitional credit of eligible duties of input contained in semi-finished or finished `goods' in terms of Section 140(3), such goods ought to be movable goods. I find that in this case, transitional credit of Rs.12,91,188/- was availed on inputs already used in such buildings/ structures and contained in under construction buildings/structures (work in progress). Such buildings/structures are undoubtedly immovable goods. Since Section 140(3) read with Section 2(52) allows transitional credit only on inputs used finished/semi-finished goods of movable nature, I find that transitional credit of Rs.12,91,188/- availed on inputs used in such buildings/structures is not admissible. I further find that the registered person who is eligible for any

abatement under CGST Act cannot claim the credit under reference in view of the condition (v) of Section 140(3) of CGST Act, 2017. Therefore, I do not find any infirmity in the findings of the adjudicating authority disallowing and ordering recovery of transitional credit availed on inputs used in such under-construction buildings / structures in stock as on 30-6-2017. I also find that the facts of the judgments cited by the appellant in support of their claim of availability of transitional credit of inputs contained in semi-finished and finished goods in stock as on appointed day are distinguishable.

5(ix). On carefully going through the submissions of appellant I find that on being pointed out the credit of EC, SHEC & KKC amounting to Rs.17,76,805/- and also credit of inputs used into finished/semi-finished goods of Rs.12,91,188/- were reversed by the appellant. I further find that the appellant has not utilized the said credit of EC, SHEC & KKC and also the credit of inputs used into finished/semi-finished goods and the same were lying unutilized till they reversed the same. The appellant has contended that interest is levied only on "ineligible ITC availed and utilized" and not on "ineligible ITC availed" and referred to the amendment of Section 50 of CGST Act, 2017 done through Section 110 of Finance Bill 2022, which was notified through Notification No. 09/2022-Central Tax dated 05.07.2022. They also contended that as tax has already been paid vide GSTR-3B of June, 2018 and also GST DRC-03 dated 01.11.2019 and interest is not payable on the ITC as the same was not utilized, therefore penalty of Rs.1,77,681/- and also Rs.1,29,119/- will also not be applicable.

5 (x). Considering the foregoing facts, I hereby referred the provisions of Section 50 (3) of the CGST Act, 2017, the same is as under:-

> *SECTION 50 (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.]*
>
> [As per Section 110 of the Finance Bill, 2022 this amendment has been with effect from 1st July, 2017, which has been notified vide Notification No. 09/2022-Central Tax, dated 05.07.2022.]

In view of above, it is abundantly clear that interest is leviable only if the Input Tax Credit has been wrongly availed and utilized. In the present matter, the appellant availed the ITC in the Electronic Credit Ledger through TRAN-1 but have not utilized the same till 20.07.2018 [the date of filing of GSTR-3B of June, 2018] i.e. the date of reversal

of the said Input Tax Credits in respect of EC, SHEC & KKC and also DRC-03 dated 01.11.2019 in respect of inputs used in finished/semi-finished goods. Further, I find that the balance of CGST in Electronic Credit ledger was more than the reversal amount for the period when TRAN-1 was filed i.e. on 19.09.2017 till the date of reversal i.e. 20.07.2018 / 01.11.2019. I find that the adjudicating authority has also not alleged at any point of time that the said wrongly availed credits of EC, SHEC & KKC & inputs used in finished/semi-finished goods was ever utilized. Therefore, I find that interest is not leviable in the present case.

5(xi). The appellant has transited EC, SHEC & KKC amounting to Rs.17,76,805/- under Section 140 of CGST Act,2017. The definition of eligible duties as given in explanations under Section 140 of CGST Act, 2017, does not include Cess, after the retrospective amendment brought in the Section on 29.08.2018. The appellant has reversed the disputed credit of EC, SHEC & KKC of Rs.17,76,805/- in their GSTR-3B for June, 2018. Hence, I find that prior to the above amendment dtd. 29.08.2018, there was no legal backing in the Act for restricting Tran- l credit on cess. Similarly , Directorate General of Audit, CBIC, New Delhi vide letter F.No.381/274/2017 clarified on dated 27-2-2018 that in the case of building construction, the transitional credit of inputs already used in construction and contained in WIP as on 30-6-2017 is not admissible. Prior to retrospective amendment brought in the statute, the tax payer responded by reversing the credit of Rs.17,76,805/- from their Electronic Credit Ledger on 20.07.2018 and also after clarifications issued by the DG(Audit), CBIC, the appellant has paid the disputed credit of Rs.12,91,188/- taken on inputs used in semi-finished / finished goods. Therefore, in the above circumstances I am not in agreement with the adjudicating authority's findings of contravention of provisions under Section 140 of CGST Act as ground for imposing penalty in this case under Section 122 readwith Section 73 of CGST Act. I find that it is improper to penalize a tax payer for retrospective amendment in law once he has positively responded with payment of such dues prior to such amendments in the Act. Further, I find that in terms of Section 73(5) & 73(8) of CGST Act, 2017 when duty is discharged with interest (in the present case interest is not charged) before the issuance of SCN, imposing penalty in the case of reversal of both the credits of Rs.17,76,805/- & Rs.12,91,188/- would not be sustainable. Hence, I find that penalty is also not imposable upon the appellant.

6. In view of the above discussions, I upheld the impugned order confirming the demand & appropriation of Tran-1 credit of EC, SHEC & KKC of Rs.17,76,805/- and also credit of inputs contained in their finished goods or semi finished goods of

Rs.12,91,188/- already paid / reversed by the appellant. However, I set aside the demand of interest and penalty imposed by the original adjudicating authority. The impugned order is modified to the above extent. Hence, the appeal is partially allowed and partially rejected.

7. 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.

(Mihir Rayka)
Additional Commissioner (Appeals)

Attested
30/11/2022
(Ajay Kumar Agarwal)
Superintendent (Appeals)
Central Tax,
Ahmedabad.

Date: 29.11.2022

By R.P.A.D.

To,
M/s. Godrej Properties Ltd.,
2nd Floor, Rudra Path Complex,
Near Rajpath Club,
Sarkhej -Gandhinagar Highway,
Ahmedabad – 380059, Gujarat.

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Ex., Appeals, Ahmedabad.
3. The Commissioner, CGST & C. Ex., Ahmedabad-North.
4. The Additional Commissioner, Central Tax (System), Ahmedabad-North.
5. The Deputy/Assistant Commissioner, CGST & C. Ex, Division-VI, Ahmedabad-North.
6. Guard File.
7. P.A. File.