



सत्यमेव जयते

आयुक्तकाकार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.
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(क)	फाइल संख्या / File No.	GAPPL/ADC/GSTP/256/2022 / 5398 - 5403
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-CGST-002-APP-ADC-108/2022-23 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/18/CCECC-TPL JV/AM/2021-22 dated 05.10.2021 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 CCECC-TPL JV (GSTIN-24AACAC8547R1Z5) R S No. 80, 81, 82, 107, 108, B/h UGVCL, At Bhadaj, Taluka-Dascroi, Ahmedabad, Gujarat-380054

(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 remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट 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

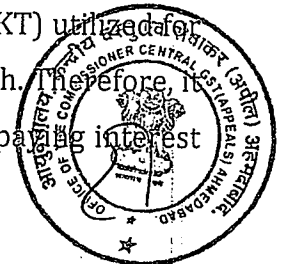
Brief Facts of the Case :

M/s. CCECC- TPL JV , Land Survey No. 80-82, 107-108, At Bhadej, Next to Braj Bhoomi Society, Science City/ Bhadej Circle, Near MK Farm, S.P.Ring Road, Ahmedabad-380060, Gujarat (hereinafter referred as 'Appellant') has filed the present appeal against the Order No. GST/D-VI/O&A/18/CCECC-TPL JV/AM/2021-22, dated 05.10.2021 (hereinafter referred as the '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.24AACAC8547R1Z5 has filed the present appeal on 12.01.2022. During the course of verification of Form TRAN-1 and ST-3 return of the appellant it was observed that the 'Appellant' had wrongly carried forward the closing balance of credit of Krishi Kalyan Cess [Hereinafter referred to as 'KKC'] of Rs.75,851/- 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 KKC amount of Rs.75,851/- was paid by the appellant on 02.07.2021 vide GST DRC-03 DI2407210025545 however, applicable interest and penalty on this amount has not been paid by them. A Show Cause Notice dated 29.07.2021 was accordingly issued to the appellant. Thereafter, the adjudicating authority vide impugned order has confirmed the said demand of wrongly availed Cenvat Credit of KKC of Rs.75,851/- under 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.10,000/- 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 following grounds:-

- The credit of KKC has never been utilized for discharging any GST liability and its lying unutilized in electronic credit ledger till the date of reversal of KKC.
- The amendment of Finance Act, 2021 allows to charge interest on "net cash basis". It means the interest is payable only when ineligible ITC (KKT) utilized for discharging any GST liability or any delayed liability payable in cash. Therefore it is evident that they never utilized the KKC, therefore question of paying interest does not arise.



- In support of their claim, they referred the amendment proviso to section 50 for levy on interest.
- Regarding penalty, they stated that they have already reversed the KKC before issuing the DRC-01(SCN) and therefore as per Section 73 read with Section 122 shall not be levied.

In view of the above submission, the appellant prayed to set aside the impugned order and to allow appeal in full with consequential relief and to dismiss the demand of interest and penalty on reversal of KKC.

3. Personal Hearings in the matter were granted on 16.09.2022, 18.10.2022, 16.11.2022 & 22.11.2022. However despite of granting ample opportunities of hearing, in the interest of natural justice, neither appellant nor any authorized representative appeared to attend the hearing. The appellant has also not represented for any adjournment in the matter.

It proceeded to decide the appeal on merit on the basis of available records, submission in the ground of appeal, judicial pronouncements and the legal position in the matter.

Discussion and Findings:

4(i). I have carefully gone through the facts of the case available on records, submissions made by the 'Appellant' in the Appeals Memorandum. I find that the 'Appellant' had availed the credit of Krishi Kalyan Cess of Rs.75,851/- through TRAN-1 as transitional credit. However, as being pointed out during verification of TRAN-1 that the credit of 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 29.07.2021 was issued to the appellant in this regard. Thereafter, the adjudicating authority vide impugned order has confirmed the demand of wrongly availed credit of 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.10,000/-. Accordingly, the appellant has preferred the present appeal.

4(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) Krishi Kalyan Cess [KKC] amount 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.

4(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.

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 collectecd as additional duty of customs under section (1) of section 3 of the Customs Tariff Act, 1975”



F.No. : GAPPL/ADC/GSTP/256/2022-APPEAL

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 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 KKC amount of Rs.75,851/- .

I further 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- I credit of KKC amount of Rs.75,851/- .

4(iv). On carefully going through the submission of appellant I find that on being pointed out the credit of KKC amounting to Rs.75,851/- was reversed by the appellant. I further find that the appellant has not utilized the said credit of KKC and the same was 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 on 02.07.2021 vide DRC 03 and interest is not payable on ITC as the same was not utilized, therefore penalty of Rs.10,000/- will also not be applicable.

4 (v). 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 02.07.2021 i.e. the date of reversal of the said Input Tax Credit. Further I find that the balance of CGST in Electronic Credit ledger was more than the reversal amount.



F.No. : GAPPL/ADC/GSTP/256/2022-APPEAL

for the period when TRAN-1 was filed i.e. on 20.12.2017 till the date of reversal i.e. 02.07.2021. I find that the adjudicating authority has also not alleged at any point of time that the said wrongly availed credit of KKC was ever utilized. Therefore, I find that interest is not leviable in the present case.

4(vi). The appellant has transited Krishi Kalyan Cess amounting to Rs.75,851/- 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 KKC of Rs.75,851/- vide DRC-03 dated 02.07.2021. Hence, I find that prior to the above amendment dtd. 29.08.2018, there was no legal backing in the Act for restricting Tran-1 credit on cess. When such retrospective amendment is brought in the statute, the tax payer responded by reversing the credit of Rs.75,851/- from their Electronic Credit Ledger. 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 read with 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 duce after 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 the credit of Rs.75,851/- would not be sustainable. Hence, I find that penalty is also not imposable upon the appellant.

5. In view of the above discussions, I upheld the impugned order confirming the demand of Tran-1 credit of KKC amounting to Rs.75,851/- and 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.

6. 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)

Date: 21.11.2022



Attested

(Ajay Kumar Agarwal)
Superintendent (Appeals)
Central Tax,
Ahmedabad.



By R.P.A.D.

To,
M/s. CCECC- TPL JV,
Land Survey No. 80-82, 107-108,
At Bhadej, Next to Braj Bhoomi Society,
Science City/ Bhadej Circle,
Near MK Farm, S.P.Ring Road,
Ahmedabad-380060, 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.

