



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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DIN- 20221264SW0000318529

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/2759/2021-APPEAL / 6182-87

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-002-APP-ADC-119/2022-23**
दिनांक Date : **20-12-2022** जारी करने की तारीख Date of Issue : **20-12-2022**

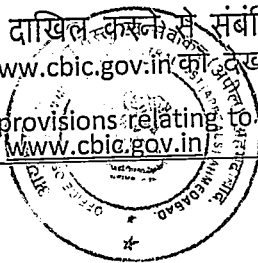
श्री मिहिर रायका_अपर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Mihir Rayka, Additional Commissioner (Appeals)

ग Arising out of Order-in-Original No. **GST/D-VI/O&A/23/SUN SHILP/AM/2021-22 DT. 01.11.2021** issued by Assistant Commissioner, CGST & CX, Division-VI, Ahmedabad North

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s. Sun Shilp Construction, Plot No. 43, Sun Builders Group, Adjoining Saket-3, Pakvan Sindhu Bhavan Road, Ahmedabad-380058

(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

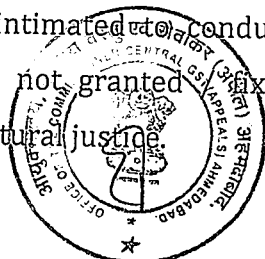
Brief Facts of the case:

M/s. Sun Shilp Construction, Plot No.43, Sun Builders Group, Adjoining Saket-3, Pakvan Sindhu Bhavan Road , Ahmedabad, Gujarat-380058 (hereinafter referred as 'Appellant') has filed the present appeal against the Order-In-Original No. GST/D-VI/O&A/23/SUN SHILP/AM/2021-22, dated 01.11.2021 (hereinafter referred as 'impugned order') passed by the Assistant Commissioner, CGST & C. Ex., Division-VI, Ahmedabad-North Commissionerate (hereinafter referred as 'the adjudicating authority').

2. Briefly stated the facts of the case is that the 'Appellant' is holding GST Registration - GSTIN No. 24ACQFS6621R1ZA has filed the present appeal on 27.12.2021. During the course of verification of TRAN-1, it was observed that the 'Appellant' had taken credit in Table No.7(a) of TRAN-1 against the inputs contained in their finished goods or semi-finished goods (i.e. building under development) held in stock on the appointed day. Same was not found to be admissible as a building under construction being attached to earth cannot be called "goods" in terms of definition as per Section 2(52) and in terms of various case laws under erstwhile Central Excise Act, 1944. The condition no. (v) as mentioned in the Section 140(3) had also not found to be fulfilled. The registered person who is eligible for any abatement under CGST Act cannot claim such credit hence the transitional credit was not admissible. DRC-01A, dated 07.07.2021 and Show Cause Notice dated 02.08.2021 were accordingly issued to the appellant. The adjudicating authority vide the impugned order has confirmed the said demand of wrongly availed Cenvat Credit of Rs.4,18,026/- 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 of the CGST Act, 2017 and imposed penalty of Rs.41,803/- in terms of Section 122 read with Section 73 of the CGST Act, 2017.

3. Being aggrieved with the *impugned order* the *appellant* has filed the present appeal on 27.12.2021, wherein they stated that:-

- The appellant had twice intimated to conduct the hearing virtually but the adjudicating authority had not granted fixed any hearing virtually. Hence, violated the principles of natural justice.



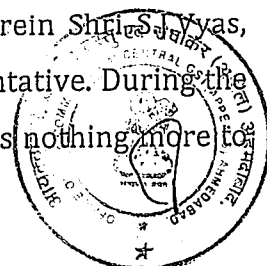
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- Under Service Tax laws credit was available, however if abatement was claimed, there was bar in availing credit. However, under Section 140(3) credit is allowed in those cases where earlier credit not availed. They are covered as works contract service provider availing exemption under Notification No.26/2012-ST.
- There is no condition of maintain stock of inventory in respect of Transitional Credit under Section 140(3). The credit granted and claimed is in respect of inputs already consumed and contained in work-in-process. This fact is not doubted in the notice.
- There is no abatement available to them under the GST laws and therefore, they are covered under Section 140(3) of the CGST Act, 2017.
- The credit is not taken on building under construction but was claimed on inputs viz. cement, fiber glass, steel, cable. The definition of input has not been examined in the proceedings.
- It is irrelevant observation that building under construction is immovable and not goods as much as credit is not taken on building under construction and the output is taxable service and not goods.
- They have not claimed any abatement under GST law hence findings of the order is baseless.
- There has been continuous electronic credit balance of more than Rs.4.18 lacs hence the question of interest shall not come into play. Further Section 122(2) applies to availment of ITC, whereas they have availed transitional credit hence not covered within the scope of this section and penalty cannot be imposed upon appellant.

In view of the above submission the appellant prayed to set aside the impugned order with consequential benefit to appellant.

Personal Hearing:

4. Personal Hearing in the matter was held on 18.10.2022 wherein Shri S. J. Vyas, appeared in person on behalf of the 'Appellant' as authorized representative. During the Personal Hearing he reiterated the submissions made till date and has nothing more to add.



Discussion and findings:

5(i). I have carefully gone through the facts of the case, grounds of appeal, submissions made by the 'Appellant' in the Appeals Memorandum as well as through additional submission and documents available on record. I find that the appellant had taken credit of Rs.4,18,026/- 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.4,18,026/- against inputs contained in their finished goods or semi finished goods. I find that the adjudicating has confirmed the demand of interest and also imposed penalty of Rs.41,803/- Accordingly, the appellant has also preferred the present appeal on this issue.

5(ii). I observed that in the instant case the "impugned order" is of dated 01.11.2021 and appeal is filed on 27.12.2021. As per Section 107(1) of the CGST Act, 2017, the present appeal is considered to be filed in time.

5(iii). In this case, the transitional credit of Rs.4,18,026/- availed by the appellant on the 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



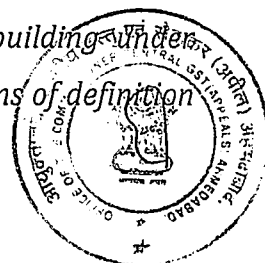
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entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, within such time and in such manner as may be 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(iv). I further refer the letter F.No.381/274/2017, dated 27-2-2018 issued by the Directorate General of Audit, New Delhi. I find that the said letter was issued in a case of M/s. ABC wherein it was noticed during the 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

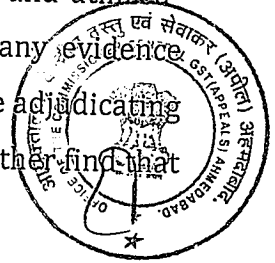


as per Section 2(52) mentioned above and in terms of various case laws under erstwhile Central Excise Act, 1944. Therefore it is appears that in the case of building construction, the transitional credit of inputs already used in construction and contained in WIP as on 30-6-2017 is not admissible.

5(v). 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(vi). 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.4,18,026/- 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.4,18,026/- 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.

5(vii). I further find that interest is levied on "ineligible ITC availed and utilized" under Section 50 of CGST Act, 2017. The appellant has not produced any evidence regarding non-utilization of the Input Tax Credit wrongly availed before the adjudicating authority. Therefore, I find that interest is leviable in the present case. I further find that



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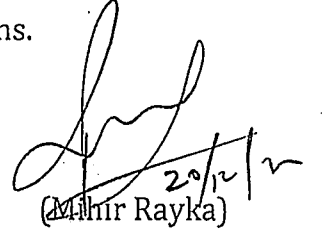
the appellant is also liable for penalty under Section 122 read with Section 73 of CGST Act, 2017 for contravention of the provisions of Section 140 of CGST Act, 2017. Hence, I find that penalty is also imposable upon the appellant.

6. I further find that the *adjudicating authority* has granted personal hearing on dates 03.09.2021, 16.09.2021, 30.09.2021 & on 18.10.2021. I find that ample opportunity for personal hearing has been granted in the matter during the proceedings. Therefore, the principles of natural justice have appropriately been followed by the *adjudicating authority*.

7. In view of the above discussions, I don't find any infirmity in the impugned order passed by the adjudicating authority. Accordingly, I upheld the impugned order and reject the appeal filed by the appellant.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

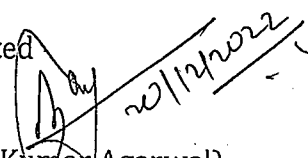
The appeal filed by the *appellant* stands disposed of in above terms.


(Mihir Rayka)

Additional Commissioner (Appeals)

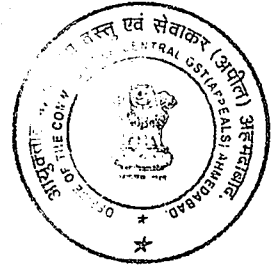
Date: 20.12.2022

Attested


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

By R.P.A.D.

To,
M/s. Sun Shilp Construction,
Plot No.43, Sun Builders Group,
Adjoining Saket-3,
Pakvan, Sindhu Bhavan Road,
Ahmedabad, Gujarat, 380058



Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner [Appeals], CGST & C. Ex., 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