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- 20230164SW000000BB5A

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/2753/2021 -APPEAL /7323- 28

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-002-APP-ADC-133/2022-23**
दिनाँक Date : **12-01-2023** जारी करने की तारीख Date of Issue : **13-01-2023**

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/11/PACIFICA/AM/2021-22 DT. 14.09.2021** issued by Assistant Commissioner, CGST & CX, Division-VI, Ahmedabad North

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

M/s. Pacifica (India) Projects Pvt. Ltd., 4-5, Sigma Corporate-1, Near Mann Party Plot, Behind Rajpath Club, Bodakdev, Ahmedabad-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 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 वेबसाइटwww.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. Pacifica (India) Projects Pvt. Ltd., 4-5, Sigma Corporate-1, Near Mann Party Plot, Behind Rajpath Club, Bodakdev, Ahmedabad, Gujarat-380059 (hereinafter referred as *'Appellant'*) has filed the present appeal against the Order-In-Original No. GST/D-VI/O&A/11/PACIFICA/AM/2021-22, dated 14.09.2021 (hereinafter referred as *'impugned order'*) passed by the Assistant Commissioner, CGST & C.Ex., Division-VI [S.G.Highway-West], 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.24AADCP7522N1Z6 has filed the present appeal on 07.12.2021. 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-01, dated 16.06.2021 and Show Cause Notice dated 16.06.2021 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.25,92,074/- 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.2,59,207/- 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 07.12.2021, wherein they have mainly raised the following points:-

i) Regarding invocation of Section 73 of CGST Act, 2017, they submitted that the impugned order has been issued to recover the allegedly wrongly availed transitional credits by taking recourse to Section 73 of the CGST Act, 2017. They submitted that

Section 73 do not permit the recovery of any transitional credits. They submitted that the aforesaid provisions permit the recovery of "any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized." The impugned order to recover the CENVAT Credit is clearly not in the nature of "any tax has not been paid or short paid or erroneously refunded". They further submitted that the term "input tax credit" has been defined u/s 2(63) read with Sec. 2(62) of the CGST Act, 2017 to mean the tax which has been charged on the supply of goods or services or both.

ii) The appellant submitted that the CENVAT Credit is in respect of the tax levied under the erstwhile law (i.e. Central Excise Act, 1944) and hence the same cannot be considered to be the tax charged on any supply of goods or services or both under the CGST Act, 2017. They further submitted that even CBIC's Circular No. 37/11/2018-GST dt. 15.03.2018 clarifies that transitional credits are not "input tax credits" and hence is not admissible for refund.

iii) They submitted that the recovery of transitional credit cannot be done by invoking the provisions of Section 73 of the CGST Act, 2017 and hence the impugned order deserves to be vacated itself on this count.

iv) They further submitted that Rule 121 cannot be pressed into service to apply Section 73 in the manner not contemplated by the given express provisions of the Act. Sec. 73 as submitted before only provides for making the demands in respect of "input tax credits". They, therefore, submitted that even though Rule 121 in the context of transitional credit provides for applying Section 73, the same cannot be applied in absence of specific enabling provisions under the said Sec. 73. It is a settled law that a rule cannot travel beyond the provisions of the Act.

In support of their claim the appellant has relied upon following decisions.

- Babaji Kondaji Garad v. Nasik Merchants Co-operative Bank Ltd., (1984) 2 SCC 50 (SC - Three-Judge Bench);
- CIT v. S. Chenniappa Mudaliar, (1969) 74 ITR 41;
- CIT, Andhra Pradesh v. Taj Mahal Hotel, (1971) 82 ITR 44;

- Union of India vs. Intercontinental Consultants and Technocrats Pvt. Ltd. 2018 (10) GSTL 401 (S.C.) ;

They submitted that Rule 121 cannot travel beyond the express provisions of Sec. 73 which only permit the recovery of "input tax credits" so as to even permit the recovery of transitional credits and that even on this ground also the impugned order erroneously invoking Sec. 73 deserves to be vacated.

v) Regarding manner of communication they submitted that the summary of notice in FORM GST DRC-01 has to be issued "electronically" on the GSTN portal. They also submitted that even the summary of the order in FORM GST DRC-07 has to be issued "electronically" on the GSTN portal. It is settled law that the proceedings under the law are to be carried out in the manner as per the provisions of the given law. Proceedings not carried in the prescribed manner shall not be valid. They relied on the decision in the case of Akash Garg Vs State of M.P. (Madhya Pradesh High Court) (W.P. No. 16117/2020) wherein it has been held in the context of aforesaid Rule 142 that the proceedings have to be undertaken in the manner prescribed and the proceedings undertaken otherwise shall not be valid.

vi) They submitted that in the given facts and circumstances of the case it is an undisputed fact that the notice in FORM GST DRC-01, as well as FORM GST DRC-07, has not been issued "electronically" on the portal. They hence submitted that the proceedings have not been conducted in the prescribed manner. They, therefore, submitted that even on this ground the impugned order deserves to be vacated.

vii) Regarding limitation the appellant referred the Section Sec. 73(2) & 73(10) of the CGST Act, 2017 which provides that "The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order." and that "The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates..... " and submitted that it is an undisputed fact that the FORM GST TRAN – 1 under consideration has been filed on 17.11.2017.

viii) The appellant further referred the Section 140(3) of the CGST Act, 2017 and Rule 117(1) of the CGST Rules, 2017 and submitted that the declaration in FORM GST TRAN-1 is itself the return in which transitional credits are taken. They submitted that the time limits u/s 73(10) of three years for the passing of the order shall be considered from the date of filing the declaration in FORM GST TRAN-1. They further submitted that the transitional credits cannot be said to relate to any annual return since the same is in respect of the erstwhile taxes paid on the opening stocks available on 01.07.2017. They hence submitted that the time limit to pass the order u/s 73(9) of the CGST Act, 2017 expired on 15.11.2020 (i.e. three years from the date of filing of TRAN – 1). They hence submitted that now the further proceedings are time-barred and therefore even on this ground the impugned order deserves to be vacated.

ix) They further submitted that the proposed demands cannot be sustained. They referred the Sec. 140(3) of the CGST Act, 2017 and submitted that the impugned order recovers the CENVAT credit of Rs. 25,92,074/- on the grounds that (a) the same is not in respect of inputs held in stock and (b) that they are eligible for abatement under the CGST Act, 2017 and hence are not entitled to transitional credits. They submitted that for the aforesaid reasons no recovery can be made and relied upon the following decisions :-

- P. Varghese Vs Income Tax Officer, Ernakulam and Anr. - AIR 1981 SC 1922.
- Tarlochan Dev Sharma vs State Of Punjab 2001 AIR SCW 2689 (3 member bench)
- Commissioner of Income Tax, Bangalore v. J.H. Gotla Yadagiri - AIR 1985 SC 1698 .
- Mahadeo Prasad Bais (Dead) v. Income-Tax Officer 'A' Ward, Gorakhpur and another - (1991) 4 SCC 560
- Oxford University Press v. Commissioner of Income Tax (2001) 3 SCC 359.

They, therefore, submitted that a manifest intent in the context of allowing the transitional credits in respect of opening stocks as of 01.07.2017 deserves to be achieved and hence the interpretation furthering the said intent deserves to be adopted.

x) They further submitted that Section 140(3) of the CGST Act, 2017 permits the taking of the transitional credits in respect of "inputs held in stock and inputs contained in semi-finished or finished goods held in stock". The same is provided even to the

persons who were engaged in providing works contract service for the reason that the said tax does not become part of the cost when the given "inputs held in stock and inputs contained in semi-finished or finished goods held in stock" are used further in making the taxable outward supplies on payment of GST. They, therefore, submitted that the term "inputs held in stock" shall denote not only the inputs held in as it is form but even the inputs which have been used in the construction activity which remains unsold or unbilled as on 30.06.2017. The said inputs continue to be the property of the supplier in absence of any booking of the unsold units or billing for the booked units. They hence submit that such inputs duly qualify for the claim of transitional credits.

xi) They further submitted that it is an undisputed fact that the inputs in stock as part of the construction work in respect of which the transitional credits has been taken is only in respect of unbooked units or unbilled portion for the booked units on which GST has also been discharged post 01.07.2017 as applicable.

xii) They also submitted that Sec. 142(10) of the CGST Act, 2017 provides that the goods or services or both supplied on or after the appointed day in pursuance of a contract entered into prior to the appointed day shall be liable to tax under the provisions of the CGST Act, 2017. Therefore the said provisions also support the view that transitional credits in respect of stock even used for the construction but held by the supplier shall be eligible for the reason that the said goods supplied on or after 01.07.2017 shall be liable to tax even if the contract has been entered prior to the said date.

xiii) They further submitted that the impugned order denies the transitional credit in respect of the stock used in construction activity but still held by the supplier on the ground that the same is no longer in the form of "goods" and hence cannot be considered as "inputs". The impugned order relies on the definition of "inputs" u/s 2(59) of the CGST Act, 2017 to support the proposition. They submitted that the said proposition is not tenable as the definition of "input" means any goods used or intended to be used by the supplier. It is an undisputed fact that the transitional credits have been availed in respect of the excise duty paid in respect of "goods" such as cement, steel, etc. They further submitted that the definition of "inputs" includes not only the goods intended to be used (i.e. available in as it is condition) but even includes goods that have already

been "used". The given definition does not differentiate between available goods or used goods as long as they have been inputs at the time of procurement. They, therefore, submitted that the inputs used in the construction activity but held by the supplier shall continue to remain the inputs held in stock so as to allow the claim of the transitional credit u/s 140(3) of the CGST Act, 2017. They, therefore, submitted that the transitional credits taken by them cannot be recovered on the said ground.

xiv) The impugned order also recovers the transitional credits on the ground that the supplier has violated the condition under clause (v) of Sec. 140(3). Said clause reads as - "Sec. 140(3)- (v) the supplier of services is not eligible for any abatement under this Act".

xv) In this regard, the appellant submitted that they have not violated the aforesaid condition and therefore the demand of the transitional credits on the said ground deserves to be vacated. They submitted that they are in the business of construction of real estate projects. The supplies made by them on and after 01.07.2017 in the form of construction services attracts the full rate of tax of 18% after allowing for the land deduction to the extent of the 1/3rd value of the total consideration charged. They, therefore, submitted that in absence of any abatement available to them on or after 01.07.2017 they cannot be said to have violated the aforesaid condition. They hence submitted that even on this ground the demand of the transitional credit cannot be sustained and therefore the impugned order deserves to be vacated.

xvi) They further submit that the aforesaid condition has been provided to avoid the situation where the supplier avails transitional credit on inputs but do not pay the tax on the value of the said inputs as part of the further supply of the construction services by availing any abatement. They submitted that under GST, the tax is levied on the entire value of the construction services (including the goods as well as service elements) barring only the value of the land. They, therefore, submit that as GST stands leviable on the embedded value of the inputs on or after 01.07.2017, the transitional credits in respect of the stock on the said inputs as of 30.06.2017 cannot be denied. They hence submitted that even on the said ground the demand of the transitional credit cannot be sustained and therefore the impugned order deserves to be vacated.

xvii) Regarding interest, they submitted that because of the non-tenability of the demands of the transitional credit on the aforesaid grounds, interest cannot be recovered. Therefore on this ground itself, the demands of interest deserve to be vacated.

xviii) They submitted that the impugned order recovers the interest u/s 50 @ 18%. They referred the provisions of 50(1) of the CGST Act, 2017 and submitted that the provisions provides for the levy of interest when the person "fails to pay the tax or any part thereof". Further, the proviso provides for the levy of interest only on the portion of the tax which is paid by debiting the electronic cash ledger. They, therefore, submitted that the said provisions are attracted only if there has been a failure to pay the output tax. This is more so as the tax paid belatedly by utilizing the tax credits do not attract interest. The impugned order recovers the transitional credits, not any output tax. They, therefore, submitted that the recovery of any tax credits cannot attract any interest u/s 50(1). They hence submitted that even on this ground the demand of interest deserves to be vacated. They further submitted that the impugned order demands interest u/s 50 "of the Finance Act, 1994 and there are no provisions u/s 50 of the Finance Act, 1994 so as to justify the demand of interest.

xix) Regarding imposition of penalty of Rs. 2,59,207/- u/s 122(2) of the CGST Act, 2017, the appellant submitted that in absence of the tenability of the demands of the transitional credits, no penalty can be imposed. They referred the provisions of Sec. 122(2) and submitted that the said provisions are attracted only where "the input tax credit has been wrongly availed or utilised". As submitted earlier the claim of transitional credits is not in the nature of "input tax credits" u/s 2(63) of the CGST Act, 2017. They, therefore, submitted that no penalty can be imposed under the aforesaid provisions.

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

Personal Hearing:

4. Personal Hearing in the matter was held on 18.10.2022 through virtual mode which was attended by Shri Abhay Y. Desai, Advocate, on behalf of the *'Appellant'* as authorized representative. 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 15 working days were granted.

5. Accordingly, the appellant has submitted the additional written submission on 23.11.2022, wherein they stated that:-

That the following submissions be considered while deciding the captioned appeal:

i) The issue involved relates to the admissibility of the claim of transitional credit u/s 140(3) of the CGST Act, 2017 of Rs. 25,92,074/- in respect of the excise duty paid stocks as of 30.06.2017.

ii) They are engaged in the business of the development of various real estate projects. In the pre-GST regime, they use to discharge service tax on the bookings received before the completion certificate after claiming the available exemption with respect to the land/input costs. They were also not claiming any CENVAT credit as regards the inputs. As of 30.06.2017, they had an inventory of the work-in-progress in terms of the under-constructed building. They, therefore, availed the transitional credit u/s 140(3) of the CGST Act, 2017 in respect of the excise duty paid inputs purchased within the preceding year (i.e., from 01.07.2016 to 30.06.2017) and available as work-in-progress in the financial statements as of 30.06.2017.

iii) They submitted that the provisions of Sec. 140(3) of the CGST Act, 2017, provide that the registered person can claim the 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. The condition specified under clause (i) provides that such inputs or goods are used or intended to be used for making taxable supplies under the CGST Act, 2017.

iv) They hence submitted that the purpose of allowing the claim of the transitional credit in respect of the stocks as of 30.07.2017 is to avoid cascading effect of tax (i.e., tax on tax) as evident from the fact that condition under clause (i) stipulates that the said stock must be used in making the taxable supplies under GST. The law, therefore, provides the benefit to avoid the cost of the pre-GST taxes in respect of stock as of

30.06.2017 to be added to the value of outward supply made under GST (on which GST shall be discharged) by using the said stock.

v) They further submitted that Sec. 140(3) uses the expression 'inputs held in stock and inputs contained in semi-finished or finished goods held in stock'. The term 'input' has defined u/s 2(59) of the CGST Act, 2017 to mean any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business. Hence even the goods 'used' are included within the term 'input'. They further submit that Sec. 140(3) uses the expression 'held in stock'. The word 'stock' has been defined by Merriam-Webster Dictionary to mean 'a store or supply accumulated or available'.The term 'stock' therefore includes stock in any form which is available for supply. They also submitted that Sec. 7(1)(a) read with Sr No. 5(b) to Schedule II to the CGST Act, 2017 provides that the construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of the completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier, shall be considered as a taxable supply of services. They hence submitted that the inputs used in the under-constructed building available with us as of 30.06.2017 is for the further supply of taxable construction services in respect of the units booked before the completion certificate

vi) They, therefore, submitted that the inputs used in the under-constructed building available for booking as of 30.06.2017 are clearly a 'stock' available with us to make the supply of taxable services under GST. Hence, the expression 'inputs held in stock and inputs contained in semi-finished or finished goods held in stock' shall include even used inputs held in stock in terms of an under-constructed building which is available for making taxable supplies under GST.

vii) They also submitted that the definition of 'goods' as provided u/s 2(52) of the CGST Act, 2017 and relied upon in the impugned SCN as well as OIO cannot be used to deny the transitional credits since Sec. 140(3) does not use the expression 'goods' but uses the expression 'inputs held in stock and inputs contained in semi-finished or finished goods held in stock'. They hence submitted that the definition of 'goods' cannot be read in isolation for the purpose of Sec. 140(3) but is required to be read along with the words 'inputs held in stock and inputs contained in semi-finished or finished goods

held in stock'. If done so, it will lead to an unmistakable conclusion that the said Sec. 140(3) duly permits the transitional credit in respect of stocks available as of 30.06.2017 (by way of inputs used in an under-constructed building) for supply under the GST regime.

viii) They also submitted that the pleadings canvassed above are aligned with the object of allowing the transitional credit in terms of avoiding the cascading effect of tax as evidenced by the condition stipulated in clause (i) to Sec. 140(3).

ix) They relied on the following decisions wherein it has been held that a taxing statute must be construed on its plain terms, with regard to the underlying purpose of the provision and the interpretation which effectuates purpose is preferred, especially if supported by the plain meaning of words:

- Radha Krishan Industries vs. State of Himachal Pradesh2021 (48) GSTL 113 (S.C.)
- Steel Authority of India Ltd. vs. Commissioner of C. Ex., Raipur2019 (366) ELT 769 (S.C.)
- Southern Motors vs. State of Karnataka2017 (358) ELT 3 (S.C.)
- Union of India vs. G.S. Chatha Rice Mills2020 (374) ELT 289 (S.C.)
- CCE vs. Universal Ferro & Allied Chemicals Ltd.2020 (372) E.L.T. 14 (S.C.)
- ALD Automotive Pvt. Ltd. vs. Commercial Tax Officer2018 (364) ELT 3 (S.C.)

x) They submitted that the ratio of the aforesaid apex court decisions is required to be respectfully followed. They hence submitted that the plain meaning of Sec. 140(3) as well as the underlying purpose duly supports our case.

xi) They, therefore, submitted that in the present case it is an undisputed fact that they have availed the transitional credit only in respect of the work-in-progress as of 30.06.2017.

xii) They further submitted that the said work-in-progress has been undisputedly used in supplying taxable services under GST. They, therefore, submitted that in view of the provisions of the law, the claim of transitional credit deserves to be allowed. They also submit that the given claim cannot be denied for the want of submission of details

in view of the appended details as well as the CA certificate. They hence submit that the impugned SCN and the OIO denying the valid claim is required to be quashed.

xiii) The impugned SCN and the OIO also deny the claim on the ground that they have violated the condition stipulated in clause (v) to Sec. 140(3) supra. The said condition provides that the supplier of services is not eligible for any abatement under the CGST Act, 2017. They submitted that in the present facts the impugned SCN as well as the OIO fails to provide any evidence to support the ground that they are eligible for abatement under the CGST Act, 2017. They, therefore, submit that on this ground itself, the impugned SCN and the OIO denying the valid claim is required to be quashed.

xiv) They also submitted that it is an undisputed fact that they are liable to discharge GST @ 18% on the construction services provided on and after 01.07.2017 in respect of the under-constructed building. They submit that the law only permits the deduction towards the value of the land since the sale of land is not considered as a supply by virtue of Sec. 7(2)(a) read with Sr. No. 5 to Schedule III to the CGST Act, 2017. They hence submitted that they are not eligible for any abetment towards the value of inputs from the total value of taxable supply. They, therefore, submitted that in absence of the availability of any abetment in the GST regime, the condition stipulated in clause (v) cannot be made applicable to us. They hence submitted that the impugned SCN and the OIO denying the valid claim even on this ground is required to be quashed.

xv) They also relied on the OIA passed by Ld. Commissioner (Appeals), Raigad wherein it has been held that the transitional credit in respect of the inputs lying as part of the under-constructed building is eligible u/s 140(3) of the CGST Act, 2017.

In view of the above submission, the appellant prayed to set aside the impugned order.

Discussion and findings:

6(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 he appellant had taken credit of Rs.25,92,074/- 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.25,92,074/- 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.2,59,207/-. Accordingly, the appellant has preferred the present appeal.

6(ii). I observed that in the instant case the "impugned order" is of dated 14.09.2021 and appeal is filed on 07.12.2021. As per Section 107(1) of the CGST Act, 2017, the present appeal is considered to be filed in time.

6(iii). In this case, the transitional credit of Rs.25,92,074/- 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 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 :

I find that the appellant is registered with the GST department for providing works contract services, construction of residential complex, special services provided by builders... etc.

As the supply of service in relation to construction of residential complex also involves transfer of "land/undivided share of land" which do not attract GST, the value of such land/ undivided share of land shall be deemed to be 1/3rd of the total amount charged for such supply.

As such GST on Residential Complex [for which a part or total consideration is received prior to issue of a completion/occupancy certificate or its first occupancy, whichever is earlier], shall be 2/3rd of the total consideration charged for such supply (thus GST payable on a Flat/House/ Complex would works out to be 12% of the total consideration inclusive of the value of land/ undivided share of land). This fact has been accepted by the appellant in their reply enumerated at Para 3(xv) & (xvi) above.

As such ITC claimed Rs.25,92,074/- on the inputs contained in their finished goods or semi-finished goods (i.e. building under development) held in stock on the appointed day is not found to be admissible as per condition mentioned at above condition (v) of Section 140(3) of the CGST Act,2017.

6(iv). It is seen that in the case of M/s R.B.Construction Company 2019 (23) G.S.T.L. 429 (App. A.A.R.-GST), Appellate Authority For Advance Ruling Under GST, Gujarat, has held as under:-

10.6 Section 2(52) of the CGST Act, 2017 and the GGST Act, 2017 defines the term 'goods' as 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. The work of the appellant falls within the definition of 'works contract' as given under Section 2(119) of the CGST Act, 2017 and the GGST Act, 2017 as the construction of pipeline network becomes immovable property. Therefore, even if the contract of the appellant was on work-in-process stage on the appointed day, the same would not be covered within the terms 'semi-finished or finished goods' as the term 'goods' covers movable property and not immovable property.

10.7 In view thereof, the appellant is not entitled to avail input tax credit of Central Excise duty and VAT paid on pipes, under sub-sections (l) and (6) of Section 140 of the CGST Act, 2017 and the GGST Act, 2017.

I find that as per Section 2(59) of the CGST Act, 2017, Inputs means any goods other than capital goods used or intended to be used by a supplier in course of furtherance of business. Whereas 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.

6(v). 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.

6(vi). 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.

6(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.25,92,074/- 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.25,92,074/- 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.

6(viii). I find that the appellant has contended that the issuance of SCN and passing of Impugned Order under Section 73 read with Rule 142 of the CGST Act/Rules, 2017, in facts of the present case, is without jurisdiction; that the proceedings initiated under Section 73 of the CGST Act, leading to confirmation of demand and recovery of transitional credit under Section 73 read with Rule 142, are beyond jurisdiction and thus, liable to be set aside; that no interest is recoverable and no penalty is imposable.

In this regards, I find that the appellant have irregularly taken the transitional Credit of Rs.25,92,074/- deliberately with intent to avail irregular Cenvat credit . Had the information not been disclosed during the course of verification of Tran-1, the facts would not have come to knowledge of the department. Thus, the appellant has found to be suppressed the facts from the department with intent to avail irregular credits. In this manner, they appear to have contravened the provisions of Section 140 of the CGST Act, 2017. Therefore, the provisions of Section 73 of the CGST Act, 2017 are invokable for recovery of the said credit of Rs.25,92,074/- from the appellant.

6(ix). I further find that the appellant has contended on the issue of limitation and stated that time limit period of issuance of the order prescribed is three years from the date of filing of TRAN -1. The contention of the appellant is not tenable as Section 73(10) of CGST Act, 2017 clearly stipulates that *"the proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund."* In view of explicit provisions under the Act, I do not find any angle of limitation in the instant matter because as per GST portal Annual Return for the period 2017-18 wherein the Transitional Credit availed was filed by the appellant on 05.02.2020 and the impugned order was issued on 14.09.2021 which is well with the time limit as per the CGST Law.

6(x). 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 the appellant is also liable for penalty under Section 122 readwith 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(xi). I further find that the judgments / decisions relied upon by the appellant are not relevant in the facts and circumstances of the present case as discussed hereinabove.

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.

12/01/23

(Mihir Rayka)
Additional Commissioner (Appeals)

Date: 12.01.2023

Attested

13/01/2023

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

By R.P.A.D.

To,
M/s. Pacifica (India) Projects Pvt. Ltd.,
4-5, Sigma Corporate-1,
Near Mann Party Plot,
Behind Rajpath Club,
Bodakdev, Ahmedabad,
Gujarat-380059

F.No. : GAPPL/ADC/GSTP/2753/2021-APPEAL

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 Deputy/Assistant Commissioner, CGST & C. Ex, Division-VI [S.G.Highway-West], Ahmedabad-North.
5. The Superintendent [System], CGST, Appeals, Ahmedabad.
6. Guard File.
7. P.A. File.