



आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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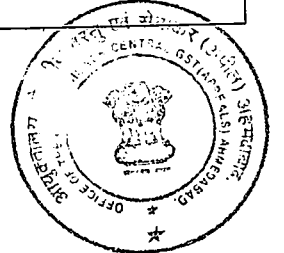
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आज़ादी का
अमृत महोत्सव

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DIN NO. : 20230164SW00007227DC

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| (क) | फ़ाइल संख्या / File No. | GAPPL/ADC/GSTP/257/2022 / 3549 - 52 |
| (ख) | अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date | AHM-CGST-002-APP-ADC-138/2022-23 and 19.01.2023 |
| (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 | 20.01.2023 |
| (ङ) | Arising out of Order-In-Original No. GST/D-VI/O&A/15/SAFAL/AM/2021-22 dated 05.10.2021 issued 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 Safal Engineers and Realities LLP (GSTIN-24ACLF55783R1Z2) B-Safal House, B/h Mirch Masala Restaurant, Near Pakwan Char Rasta, S G Highway, Ahmedabad, Gujarat-380059 |

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| (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

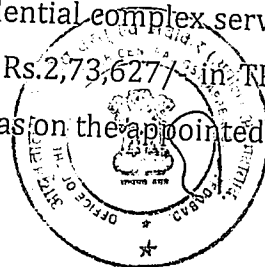
Brief Facts of the case:

M/s. Safal Engineers and Realities LLP, B-Safal House, B/h Mirch Masala Restaurant, Off. S.G.Highway, Ahmedabad, Gujarat, 380059 (hereinafter referred as 'Appellant') has filed the present appeal against Order No. GST/D-VI/O&A/15/SAFAL/AM/2021-22, dated 05.10.2021 (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 are that the 'Appellant' is holding GST Registration No. 24ACLF55783R1Z2 and they have filed the present appeal on 19.01.2022. 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 on 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 alongwith Show Cause Notice, dated 30.07.2021 was accordingly issued to the appellant. The adjudicating authority vide impugned order has confirmed the said demand of wrongly availed Cenvat Credit of Rs.2,73,627/- 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.27,363/- 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 19.01.2022, wherein they stated that:-

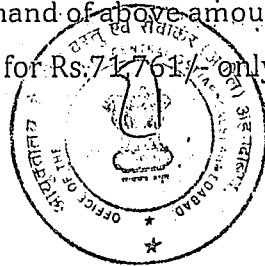
- (i) they engaged in providing construction of residential complex service under HSN 995412. They availed input tax credit of Rs.2,73,627/- in TRAN-1 for Central Excise duty paid on inputs held in stock as on the appointed date.



- (ii) details of total ITC of Rs.2,73,627/- can be bifurcated as under :-

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| Rs.2,73,627/- [Excise duty on Total stock]. | Rs.1,42,739/- [Pertaining to moveable goods not used till appointed date.] | Rs.71,098/- [Already reversed being 49.81 % of Rs.142739/- on receipt of BU permission.] |
| | | Rs.71,641/- [ITC actually under dispute out of Rs.2,73,627/-] |
| | Rs.1,30,888/- [Pertaining to goods already used and became immovable property before appointed date] | Rs.65,195/- [Already reversed based on Carpet Area being 49.81% of Rs.130888/- on receipt of BU permission.] |
| | | Rs.65,693/- [Already reversed through DRC-03 dated 28.08.2021 within 30 days of receipt of SCN] |

- (iii) In terms of Rule 42 of the CGST Rules, 2017, builders and developers are required to reverse ITC based on Carpet area pertaining to unsold units remaining on the date of receipt of BU permission. The appellant has already reversed such credit in GSTR-3B for September, 2020 to the extent of 49.81% of total ITC availed from 01.07.2017 till the date of receipt of BU permission. Thus out of total ITC of Rs.2,73,627/- , 49.81% i.e. Rs.1,39,294 /- (should be Rs.1,36,293/-) is already reversed on receipt of BU permission. To which CA Certificate has been submitted.
- (iv) This fact brought to the notice of the adjudicating authority but he simply ignores it without any further verification and discussion the OIO.
- (v) Out of Rs.1,30,888/- of ITC pertaining to Goods which are used before the appointed date, Rs. 65,195/- (49.81% of Rs.1,30,888/-) is already reversed. Rest of Rs.65,693/- is accepted by them as wrongly availed and has paid along with interest of Rs.45,808/- vide DRC-03 dated 28.08.2021.
- (vi) Thus, confirmation of the demand of above amount in OIO amounts to double taxation and dispute remains for Rs.71,761/- only.



- (vii) Regarding penalty, they pleaded that Rs.2,01,986/- already paid before issue of SCN hence no penalty is imposable as per Section 73(8) of CGST Act, 2017. Confirming the demand of interest is also on wrong interpretation of law.
- (viii) Disputed amount is only of Rs.71,641/- ; that even if they assume without accepting that ITC availed by them, was not to be availed, still, the only amount of demand that can be raised could not be more than Rs.71,641/-.

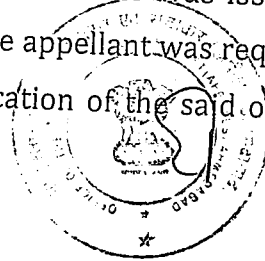
In view of the above submission the appellant prayed to quash the demand of credit, levy of interest and penalty and set aside the demand order.

4. Personal Hearing in the matter was held on 24.11.2022 wherein Shri Punit Prajapati, Chartered Accountant, appeared in person, on behalf of the 'Appellant' as authorized representative. During P.H. he has reiterated the submissions made till date.

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 Appeal Memorandum and documents available on record. I find that he appellant had taken credit of Rs.2,73,627/- 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.2,73,627/- 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.27,363/-. Accordingly, the appellant has preferred the present appeal.

5(ii). I observed that in the instant case the impugned order was issued on 05-10-2021 and the appeal was filed on 19-01-2022. The appellant was required to file the appeal within 3 months from the date of communication of the said order as per



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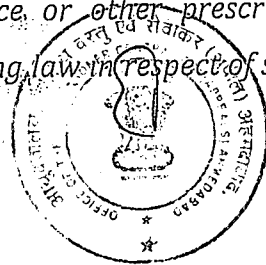
Section 107 (1) of CGST Act, 2017. I find that the order was communicated to the appellant on dated 05-10-2021 and present appeal was filed on dated 19-01-2022 i.e. after a period of three months hence the appeal was filed beyond the time limit as prescribed under Section 107 of the Act, i.e. delayed by 15 days. Further, as per Section 107(4) of CGST Act, 2017, the appellate authority has powers to condone the delay of one month in filing of appeal, over and above the prescribed period of three months as mentioned above. In view of the Section 107(4) of the CGST Act, 2017 looking to the COVID-19 situation, I condone the delay of 15 days occurred in filing the present appeal.

5(iii). In this case, the transitional credit of Rs.2,73,627/- 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.

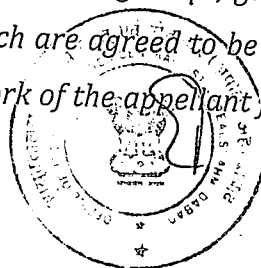
As the supply of service in relation to construction of residential complex also involves transfer of "land/undivided share of land" which do not attract GST, the value of such land/ undivided share of land shall be deemed to be $\frac{1}{3}$ rd of the total amount charged for such supply.

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 $\frac{2}{3}$ rd 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).

As such ITC claimed 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.

5(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



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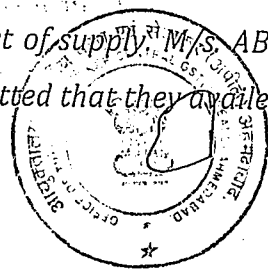
definition of 'works contract' as given under Section 2(119) of the CGST Act, 2017 and the GGST Act, 2017 as the construction of pipeline network becomes immovable property. Therefore, even if the contract of the appellant was on work-in-process stage on the appointed day, the same would not be covered 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 (1) 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.

5(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;

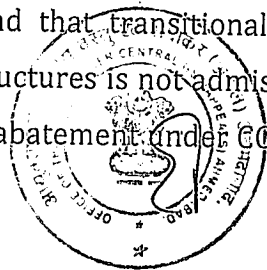
As per Section 2 (59) of the said Act, 'inputs' means any goods other than capital goods used or intended to be used by a supplier in course of furtherance of business. As per Section 2 (52) of the said Act, 'Goods' means every kind of movable property other than money and securities but includes actionable 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.

5(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.

5(vii). 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.2,73,627/- was availed on different kind of inputs already used in such buildings/ structures and contained in under construction buildings/structures (work-in-progress) and some of movable inputs used after the appointed date. 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 availed on such inputs which were used in such buildings/structures is not admissible. I further find that the registered person who is eligible for any abatement under CGST Act



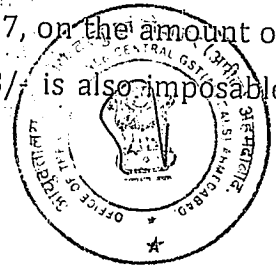
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cannot claim the credit under reference in view of the condition (v) of Section 140(3) of CGST Act, 2017.

5(viii). On carefully going through the submissions of appellant I find that out of total ITC of Rs.2,73,627/-, Rs.1,36,293/- i.e. 49.81% of total ITC has already been reversed on receipt of BU permission on 10.06.2020 and claimed to have been reflected in the GSTR-3B of September, 2020. To which CA Certificate has been submitted. I further find that the credit of Rs.65,693/- was accepted by the appellant as wrongly availed and has paid the same along with interest of Rs.45,808/- vide DRC-03 dated 26.08.2021. I further find that the adjudicating authority during the proceedings should have verify and considered the said reversals and payment made much before the issue of impugned order. I, therefore, find that the demand of the said credit already reversed is not sustainable. However, I direct the adjudicating authority to verify and confirm the said reversals.

5(ix). I further find that the credit for Rs.71,761/- as stated by the appellant is pertaining to Kitchen equipments and Kitchen furniture and being movable goods credit on them claimed to have been admissible. In this regards, I find that the said credit is pertaining to pre GST Era and belonging to the items claimed to have been used in sample house after the appointed date. I find that appellant has submitted the Invoices of the said goods alongwith appeal papers. I find that such inputs being movable goods, ITC of Rs.71,761/- taken in Tran-1 as claimed by the appellant is admissible. Therefore, interest & penalty is not payable on the said amount of credit.

5(x). I further find that the interest under Section 50 of CGST Act, 2017 is payable on the total amount of ITC of Rs.1,36,293/- from the date of receipt of BU upto the date of its reversal. There is no evidence on record in support of payment of such interest. Therefore, in the above circumstances, I find that the benefit of Section 73(8) of CGST Act, 2017 cannot be given to the appellant. 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, on the amount of credit of Rs.2,01,986/- . Hence, I find that penalty of Rs. 20,198/- is also imposable upon the appellant.



6. In view of the above discussions, I upheld the impugned order confirming the demand of credit of Rs.2,01,986/- alongwith interest (only on the portion of credit of Rs.1,36,293/-) and also penalty of Rs.20,198/- only. However, I set aside the demand of Rs.71,641/-. The impugned order is modified to the above extent. Hence, the appeal is partially allowed and partially rejected.

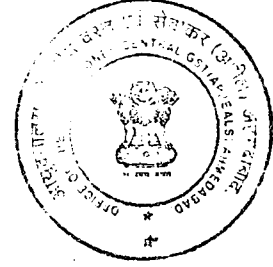
7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the *appellant* stands disposed of in above terms.

(Minir Rayka)
Additional Commissioner (Appeals)

Date: 19.01.2023

Attested

(Ajay Kumar Agarwal)
Assistant Commissioner [In-situ] (Appeals)
Central Tax, Ahmedabad.



By R.P.A.D.

To,
M/s. Safal Engineers and Realities LLP,
B-Safal House, B/h Mirch Masala Restaurant,
Off. S.G.Highway, Ahmedabad,
Gujarat, PIN- 380059

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 Assistant Commissioner, CGST & C.Ex, Division-VI, Ahmedabad-North.
5. The Superintendent [System], CGST (Appeal), Ahmedabad.
6. Guard File.
7. P.A. File