



आयुक्तकाकार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.
GST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
Phone: 079-26305065 Fax: 079-26305136
E-Mail : commrappl1-cexamd@nic.in



By Regd. Post

DIN NO.: 20230264SW0000809176

(क)	फाइल संख्या / File No.	GAPPL/ADC/GSTP/1909/2022 / ८९०४-१०
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-CGST-002-APP-ADC-162/2022-23 and 27.02.2023
(ग)	पारित किया गया / Passed By	श्रीमिहिररायका, अपरआयुक्त (अपील) Shri Mihir Rayka, Additional Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	28.02.2023
(ङ)	Arising out of Order-In-Original No. CGST/A'bad North/Div VII/ST/DC/181/2021-22 dated 24/25.03.2022 passed by The Deputy Commissioner, CGST, Division - VII (S G Highway East), Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of Appellant	M/s Dev Buildcon (GSTIN-24AAMFD4921B1ZV) Dearkesh Radiance, T.P. 44, Motera, Ahmedabad, Gujarat-380005

(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 .

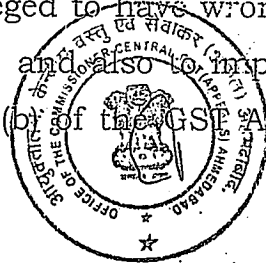


ORDER-IN-APPEAL

BRIEF FACTS OF THE CASE :

M/s. Dev Buildcon, Dwarkesh Radiance, T.P.44, Motera, Ahmedabad-380005 (hereinafter referred to as "*the appellant*"), holding GSTIN 24AAMFD4921B1ZV has filed appeal against Order-In-Original No. CGST/A'bad North/ Div-VII/ ST/ DC/ 181/ 2020-21, dated 24/25.03.2022 (hereinafter referred to as the "*impugned order*") passed by the Deputy Commissioner, CGST & C.Ex., Division-VII [S.G.Highway-East], Ahmedabad-North (hereinafter referred to as the "*adjudicating authority*").

2. The facts leading to this case are that the officers from the Directorate General of Goods and Services Tax Intelligence, Ahmedabad Zonal Unit [AZU], Ahmedabad (hereinafter referred to as 'DGGI') visited the business premises of *the appellant* on 22.01.2020. During the visit of officers of DGGI, it was noticed that *the appellant* has not filed GSTR-1M and GSTR-3B for the period from April-2018 to December-2019 and also not paid the GST for the period from April-2018 to December-2019, therefore, DGGI initiated proceeding by issuing a Show Cause Notice F. No. DGGI/ AZU/ Gr. D/ 36-50/ 2021-22, dated 30.06.2021 demanding CGST amount of Rs.50,35,472/- and SGST amount of Rs.50,35,472/- (Total Rs. 1,00,70,944/-) under Section 74(1) of the Central Goods and Services Tax Act, 2017 /Gujarat Goods and Services Tax Act, 2017 (herein after referred to as the 'CGST Act, 2017/GGST Act, 2017' and collectively as the 'GST Acts, 2017'). The notice further proposed to add Input Tax Credit (CGST) amount of Rs. 33,83,585/- and Gujarat GST amount of Rs.33,83,585/- (Total Rs. 67,67,170/-) under Section 16(2)(d) read with Section 74(1) of the GST Acts, 2017; and to demand and recover CGST Rs.95,009/- and Gujarat GST Rs.95,009/- (Total Rs. 1,90,018/-) evaded by way of non-payment of tax under Reverse Charge Mechanism (RCM) under Section 9(3) readwith Section 74(1) of the GST Acts, 2017. The notice further proposes to demand interest on the CGST; SGST; ITC alleged to have wrongly availed under Section 50 of the CGST/GGST Acts, 2017; and also to impose penalty under Section 74, 122(1)(iii), 122(1)(xv) & 122(2)(b) of the GST Acts, 2017.

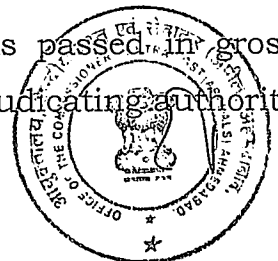


3. The Adjudicating Authority vide Order-in-Original No. CGST/ A'bad North/ Div-VII/ ST/ DC/ 181/ 2020-21, dated 24.03.2022 has:

- (a) confirmed the demand of GST of Rs.1,00,70,944/- (CGST Rs.50,35,472/- + Gujarat GST Rs.50,35,472/-) for the period from April, 2018 to December, 2019 under Section 74(1) of the GST Acts, 2017 and ordered appropriation of the same against payment made;
- (b) confirmed the demand of GST of Rs.67,67,170/- (CGST Rs.33,83,585/- & Gujarat GST Rs.33,83,585/-) under Section 16(2)(d) readwith Section 74(1) of the CGST / Gujarat GST Acts and ordered appropriation of the same against payment made;
- (c) confirmed the demand of GST of Rs.1,90,018/- (CGST Rs.95,009/- & Gujarat GST Rs.95,009/-) under Section 9(3) readwith Section 74(1) of the CGST / Gujarat GST Acts not paid under RCM for supplies received from the unregistered person. Not yet paid by the appellant.
- (d) confirmed the demand of applicable interest on the taxable value of Rs.11,68,121/- under Section 50 of the CGST / Gujarat GST Acts. Not yet paid by the appellant;
- (e) confirmed the demand of applicable interest on the GST amounts **Taxes** i.e. CGST Rs.50,35,472/-, Gujarat GST Rs.50,35,472/-, **RCM Taxes** CGST Rs.95,009/- & Gujarat GST Rs.95,009/- and **ITC** of CGST Rs.33,83,585/- & Gujarat GST Rs.33,83,585/- [confirmed at Para 3(a), (b) & (c) above], under Section 50 of the CGST / Gujarat GST Acts; Ordered appropriation of the amount of interest Rs.25,22,060/- already deposited;
- (f) imposed penalty of Rs.1,70,28,132/- [CGST Rs.50,35,472/- + Rs.33,83,585/- + Rs.95,009/- & Gujarat GST Rs.50,35,472/- + Rs.33,83,585/- + Rs.95,009/-] under Section 74(1) of the GST Acts, 2017;
- (g) dislodge the protest payment made towards penalty Rs.15,39,144/- and orders appropriation of the same against penalty ,

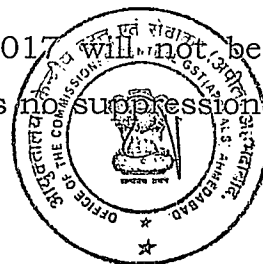
4. Being aggrieved, the appellant filed the present appeal on 14.06.2022 on the following grounds:-

- (a) the impugned order is a non-speaking order and is passed in gross violation of the principles of natural justice as the adjudicating authority



has confirmed the demand along with interest and penalty without considering the submissions. They relied on the following judgements in support of their contention :-

- *Cyril Lasardo (Dead) Vs. Juliana Maria Lasarado* – 2004(7) SCC 431
- *Asstt. Commissioner, Commercial Tax Deptt Vs. Shukla & Bros* – 2010(254) ELT 6(SC)
- (b) Section 74 of the CGST Act, 2017 will not be applicable in the present case to demand tax as there is no suppression on their part.
- (c) The whole issue shall fall under Section 73(5) of the CGST Act, 2017 as they had paid the amount of tax and informed the department.
- (d) Government vide Notification No. 22/2018-CT dated 14.05.2018 waives the late fee payable under Section 47 of the CGST Act for failure to furnish the return in Form GSTR-3B by due date for the month Oct-2017 to April-2018. It construed that non-filing of return on time cannot be said to be suppression of facts by the appellants.
- (e) GSTR-3B is not return under Section 39 of the CGST Act, 2017.
- (f) There is no provision under the CGST Act, 2017 to recover the amount equal to the ITC availed in terms of Section 16(2) of the CGST Act, 2017.
- (g) Regarding short payment of interest on the taxable value of Rs.11,68,121/- is concerned, they referred Section 16(1) & 16(2) and Section 50 of CGST Act, 2017 & contended that they are not liable to pay interest as they were having sufficient balance in their Electronic Credit Ledger [ECL].
- (h) They have already deposited interest of Rs. 25,22,060/- vide DRC-03 dated 21.05.2020. They have made excess payment of interest of Rs.12,91,847/- on the taxable value of Rs.3,01,32,070/- in respect of supplies purchased during the disputed period.
- (i) They are not liable to pay interest under Section 50 of the CGST Act, 2017 as the entire tax liability of Rs.1,00,70,944/- has been discharged by utilizing ITC from Electronic Credit Ledger . Hence, demand of interest under Section 50 on the entire tax liability of Rs.1,00,70,944/- is liable to be dropped.
- (j) They re-iterated that Section 74 of the CGST Act, 2017 will not be applicable in the present case to demand tax as there is no suppression



of facts with intention to evade payment of tax and relied upon various decisions of the Apex Court in support of their contention.

- (k) Similarly Section 122(1) / 126 of the CGST Act, 2017 are also not applicable in their case.
- (l) They have also paid Rs.1,90,018/- along with interest of Rs.85,508/- thereon vide DRC-03 dated 21.05.2021. The excess interest paid is adjusted here.

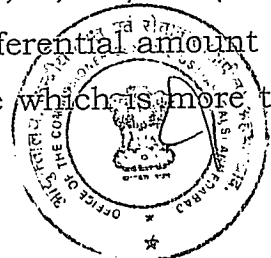
In view of the above submissions the appellant prayed to set aside the OIO and allow the appeal in full with consequential relief.

PERSONAL HEARING:

5. Personal hearing in this case was held on 28.12.2022, Shri Priyam Shah, Chartered Accountant, appeared in person, on behalf of the appellant as authorised representative. He reiterated the submissions made in appeal memorandum and also submitted a further written submission dated 28.12.2022 & 19.01.2023.

5.1 In the written submission dated 28.12.2022, the appellant contended on the following the points:-

- (a) On being pointed out by the department that payment to certain creditors have not been made within 180 days, they reversed ITC of Rs. 67,67,170/- (CGST Rs.33,83,585/- & Gujarat GST Rs.33,83,585/-). They also paid interest of Rs.25,22,060/- [Rs.12,61,030/- under CGST and 12,61,030/- under Gujarat GST] without verifying that there is no liability to pay any interest as even after reversal of ITC of Rs. 67,67,170/- they still have excess credit balance in Electronic Credit Ledger. In support, they submitted a month wise statement showing excess ECL balance after reversal of respective supplier ITC on completion of 180 days. Thus, since **the ITC availed but not utilized**, they are not liable to pay interest.
- (b) The adjudicating authority mentioned that Rs.11,68,121/- is the difference of value not paid to creditors [Rs.3,45,11,563/- - (Minus) Rs.3,33,43,442/-] and interest is liable on such differential amount Rs. 2,10,262/- @ 18%. Again they have excess balance which is more than



Rs.2,10,262/- hence there will not be the case of payment through cash ledger, accordingly there will not be any liability of interest.

- (c) Interest of Rs.25,22,060/- [Rs.12,61,030/- under CGST and Rs.12,61,030/- under Gujarat GST] paid vide DRC-03 dated 21.05.2021 which is not liable to pay, need to be refunded.
- (d) They accepted the liability of RCM of Rs.95,009/- each under CGST & SGST Act and requested to adjust this amount from excess payment of interest made and require to be refunded to them.
- (e) The case of non-filing of return will covered by Section 73 and not by Section 74, as the case is not of any fraud or suppression of facts or any wilful misstatement, even though to avoid litigation and dispute they paid interest and also penalty @ 15% .

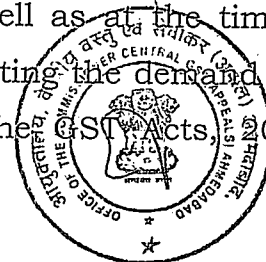
5.2 In further written submission dated 19.01.2023, the appellant contended on the following points:-

- (a) Interest / penalty can be imposed only when ITC has been availed and utilized. They relied on a decision of Hon'ble Madras High Court in case of *Aathi Hotels Vs. Asstt. Commissioner (ST)* - [2022- 137 taxmann.com 435 (Madras)] wherein the Hon'ble court by following Supreme Court's judgement in case of *UOI Vs. Ind-Swift Laboratories Ltd.* [(2011) 30 STT 461(SC)], ruled that interest & penalty is not leviable, where ITC has been availed and which is not utilized.
- (b) The non-filing of return will covered by Section 73 and not by Section 74, as the case is not of any fraud or suppression of facts or any wilful misstatement. However, they still paid voluntary payment of penalty @15% as per Section 74(5) ibid before issue of the SCN.

In view of the above further submissions the appellant prayed to set aside the Order and allow the appeal.

DISCUSSION AND FINDINGS:-

6. I have carefully gone through the facts of the case and the submissions made by the appellant in their grounds of appeal as well as at the time of personal hearing and find that appellant is mainly contesting the demand and imposition of penalty under Section 74 and 122 of the GST Acts, 2017.



F.No. : GAPPL/ADC/GSTP/1909/2022-APPEAL

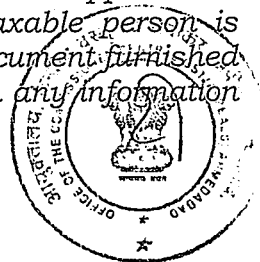
According to the appellant, it is a mere late payment and late filing of returns and hence the provisions of Section 74 and 122 of the GST Acts, 2017 are not attracted. So the questions to be answered in the present appeal are

- (i) whether the demand of tax and imposition of penalty under Section 74 of the GST Acts, 2017 is proper or otherwise;
- (ii) whether interest is applicable on the amount of reversal of ITC of Rs.67,67,170/- for creditors not paid within 180 days the taxable value of Rs.3,33,43,442/- or otherwise; and
- (iii) whether interest on taxable value of Rs.11,68,121/- is payable or otherwise.

7. At the foremost, I observed that in the instant case the "impugned order" is of dated 24/25.03.2022 and the present appeal is filed on 14.06.2022. As per Section 107(1) of the CGST Act, 2017, the appeal is considered to be filed in time.

8. I find that the show cause notice proposed to recover the CGST and GGST not paid by the appellant for the period from April-2018 to December-2019. I find that the appellant consequent to visit of DGGI officers on dated 22.01.2020 had filed all the pending GSTR returns for the period from April-2018 to December-2019 on 22/23/24.01.2020 and accounted for the details of taxable supply made for the period from April-2018 to December-2019 in their books of account. DGGI have determined the tax liability only from the books of accounts maintained by the appellant and from the GSTR-1M filed by them. Thus, the instant matter is just a case of delayed payment of tax liability on the part of appellant as no undeclared income or transaction was detected during the DGGI's investigation. I find that the show cause notice has taken reliance in the Explanation-2 given under Section 74 of the CGST Act, 2017 which explained the expression 'suppression' to allege that the appellant suppressed facts. Explanation-2 to Section 74 of the CGST Act 2017 reads as under:

"Explanation-2. — For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."



From the plain reading of the above explanation it is evident that suppression is (i) non-declaration of fact or information in the return, statement, report or any other document furnished or (ii) failure to furnish any information on being asked for. In the present case, the appellant had booked their transaction in their books of account and filed GSTR-1M returns for certain period before the investigation took place. The amount of GST was determined on the basis of the transaction declared in their books of account. It is also observed that subsequently the appellant has filed their GSTR-1M and GSTR-3B returns for the disputed period which was admitted in the notice itself. All the tax dues were also paid by the appellant while filing these returns. In the circumstances, I find that present matter is not a case where suppression of facts or non-declaration on the part of the appellant is proved. Further the term 'suppression' as provided in the said explanation is failure to furnish information on being asked for. Since, before issuance of the show cause notice, I find that the appellant has submitted all the relevant documents and information to the department at the time of inspection by DGGI and the show cause notice has been issued on the basis of information taken from the books of account of the appellant; it cannot be the case of failure to furnish information either. Therefore, I find that it is not a case for invoking the provisions of Section 74 of the CGST/IGST Act, 2017 for demanding the GST but it is a case of delayed payment of GST for which the GST Acts has provided the provision for payment of interest under Section 50 ibid and the demand was required to be confirmed under Section 73 of the CGST/IGST Act, 2017.

8.1 I find that in the instant case, the appellant is registered with the department. They were making taxable supplies and in terms of Section 9, though they were levying and collecting GST, but were not discharging their tax liability as stipulated under Section 12 of the Act. They, however, subsequently filed their GSTR-1M for April, 2018 to December, 2019 and discharged their tax liability by filing GSTR-3B for the period April, 2018 to December, 2019 on 22.01.2020 and 23.01.2020. Thus, the tax payments for these period as well as the statutory returns were filed subsequent to initiation of investigation but before issuance of SCN.

8.2 So far as the GST liability is concerned, I find the demand has been raised under Section 74(1) alleging suppression. Relevant text of Section 74 of CGST Act, 2017 is reproduced:-



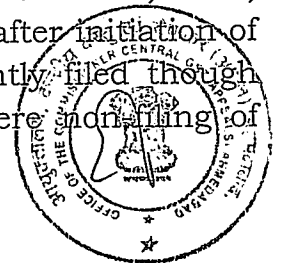
SECTION 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts. — (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

Explanation 2. — For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

8.3 On bare perusal of the legal provision under Section 74, it is apparent that in a case where it appears to a proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax, which has not been paid or has been short paid or to whom refund has been erroneously made or who has wrongly availed or utilised input tax credit requiring him to show cause as to why he should not pay the amount specified in the notice along with the interest payable thereupon under Section 50 and a penalty equivalent to the tax specified in the notice. The ingredients of Section 74 of the Act require either of the following ingredients to be satisfied for proceeding there under i.e. that the tax in question has not been paid or short paid or erroneously refunded or the ITC has been wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of facts to evade tax.

8.4 In the instant case, the appellant has filed the GSTR-1 and GSTR-3B belatedly. The notice alleges that the appellant had suppressed the taxable income by not filing the GSTR-1 and GSTR-3B returns timely for the period from **April 2018 to December, 2019**, under Section 37 & Section 39 of the CGST, Act, 2017. However, for the period from April 2018 to December 2019, the appellant did not file the GSTR-1 in time as the same was filed on 03.01.2020 i.e beyond the due date prescribed in the statute. It is also observed that the appellant, for the period from April, 2018 to December, 2019, did not file the GSTR-3B in time but filed the same belatedly after initiation of investigation by DGGI. So, both the returns were subsequently filed though belatedly and after initiation of investigation. I find that mere non-filing of



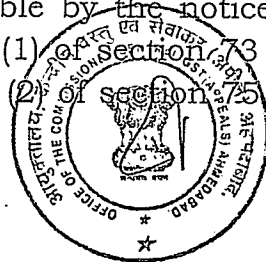
returns and delayed payment of tax cannot be ground to invoke the provisions of fraud or wilful misstatement or suppression of fact. As to allege suppression, there should be non-declaration of facts or information in the return. The term 'suppression' in the explanation is defined as any non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made there-under, or failure to furnish any information on being asked for, in writing, by the proper officer shall amount to suppression. I find that in the instant case, neither the demand notice nor the impugned order has brought out any non-declaration or any additional information on record to allege suppression of facts or established any suppression of facts to evade tax, which the appellant were required to declare in their GSTR-1 return, but failed to declare. I, therefore, find that the GST demand amounting to Rs. 1,00,70,944/- made under Section 74 (1) is not sustainable as no suppression is brought on record to invoke the provisions of extended period of limitation.

8.5 I, however, find that the demand would be sustainable under Section 73(1) of the CGST Act, 2017. I, therefore, in terms of Section 75(2) of the CGST Act, 2017, hold that the proper officer shall re-determine the tax payable by the appellant by deeming the notice have been issued under Section 73(1) in accordance with the provisions of sub-section (2) of Section 75 of the said Act and within the time limit specified under Section 75(3). Relevant provision of Section 75(2) is reproduced below:-

SECTION 75. General provisions relating to determination of tax. —

(2) Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.

8.6 This provision was further clarified by the CBIC vide Circular No.185/17/2022-GST dated 27.12.2022, wherein it was stated that where the show cause notice has been issued by the proper officer to a noticee under sub-section (1) of section 74 of CGST Act for demand of tax not paid/ short paid or erroneous refund or input tax credit wrongly availed or utilized, the appellate authority or appellate tribunal or the court concludes that the said notice is not sustainable under sub-section (1) of section 74 of CGST Act, for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax have not been established against the noticee and directs the proper officer to re-determine the amount of tax payable by the noticee, deeming the notice to have been issued under sub-section (1) of section 73 of CGST Act, in accordance with the provisions of sub-section (2) of section 75 of CGST Act.



8.7 Thus, in terms of Section 75(2) of the CGST Act, 2017 and CBIC's clarification vide Circular No.185/17/2022-GST dated 27.12.2022, the impugned order confirming the tax payable by the appellant under Section 74(1), needs to be determined by the proper officer by deeming, as if the SCN has been issued under Section 73(1) of the Act.

9. Further, the appellant had put forth an argument before the adjudicating authority as well as in the present appeal that the GSTR-3B is not a return as per Section 39 of the CGST Act, 2017. They claimed that in terms of Section 39 of the CGST Act, 2017 read with Rule 61 of the CGST Rules, 2017, the prescribes returns to be filed is FORM GSTR-3 which shall be electronically generated on the basis of information furnished through FORM GSTR-1. The PART-B of the said return shall be electronically generated on the basis of the return in FORM GSTR-3B. So, Form GSTR-3B is a part of the Form GSTR- 3. Further, Form GSTR-3B filed is just a provisional return, which is subject to the finalization by filing Form GSTR-3 by rectifying any discrepancy and paying corresponding tax etc. Where the amount of input tax credit in FORM GSTR-3 exceeds the amount of input tax credit in terms of FORM GSTR-3B, the additional amount shall be credited to the electronic credit ledger of the registered person. If the taxpayer has claimed a lesser amount in GSTR-3B than the amount of ITC as per the Form GSTR- 3, then the difference would be credited to the electronic credit ledger. Thus, Form GSTR-3B is not the final statement/return to claim ITC and the eligibility to claim ITC is governed by Form GSTR-3. Therefore, to that extent the impugned order is baseless and liable to be set aside.

9.1 In terms of Section 37 of the CGST, Act 2017 read with Rule 59 of the CGST, Rules, 2017, every registered person has to furnish details of outward supplies of goods or services effected during a tax period, in Form GSTR-1 electronically for the month or the quarter, as the case may be. Similarly, Section 39 read with Rule 61 provides that every registered person other than a person referred to in Section 14 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be, under section 52 shall, for every calendar month or part thereof,

furnish, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars, shall furnish a return in **FORM GSTR-3B** within such time, as may be prescribed.

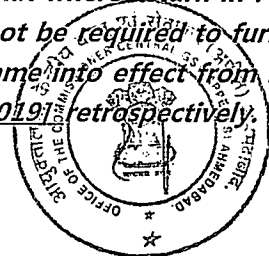
Now, to examine the contention of the appellant whether they were not required to file GSTR-3B when it is not a prescribed document under the law.

9.2 The Hon'ble Apex Court in the Civil Appeal No. 5978 of 2021, filed by **U.O.I Vs AAP and Co**, as reported in 2021 (55) G.S.T.L. 513 (S.C.). held that the judgment of Hon'ble Gujarat High Court passed in case of AAP and Co. - 2019 (26) G.S.T.L 481 (Guj.) has been expressly overruled by a three-Judge Bench decision of this Court in Civil Appeal No. 6520 of 2021 titled *Union of India v. Bharti Airtel Ltd. & Ors.*, reported in 2021 (54) G.S.T.L. 257 (S.C.). The relevant text of the decision passed in Bharti Airtel is reproduced below;

" 39. It is futile to urge that Section 39(9) has no application to the fact situation of the present case. In that, allowing filing of return in Form GSTR-3B albeit a stop gap arrangement, is ascribable to Section 39 of the 2017 Act read with Rule 61 of the 2017 Rules. Indeed, it is not comparable to the mechanism specified for electronically generated Form GSTR-3 referable to Rule 61. Nevertheless, Form GSTR-3B is prescribed as a "return" to be furnished by the registered person and by the subsequent amendment of Rule 61(5) brought into force with effect from 1-1-2017, it has been clarified that such person need not furnish return in Form GSTR-3 later on. Notably, the validity of that amendment including that of Notification dated 9-10-2019 bearing No. 49/2019, is not put in issue before us.

40. No doubt, in the initial stages, it was notified that Form GSTR-3B will be in lieu of Form GSTR-3 but that was soon corrected by deletion of that expression. At the same time, as the mechanism for furnishing return in terms of Sections 37 and 38 was not operationalized during the relevant period (July to September, 2017) and became operational only later, the efficacy of Form GSTR-3B being a stop gap arrangement for furnishing of return, as was required under Section 39 read with Rule 61, would not stand whittled down in any manner. It would still be considered as a return for all purposes though filled manually electronically.

41. The Gujarat High Court in the case of AAP & Co., Chartered Accountants through Authorized Partner v. Union of India & Ors. [2019-TIOL-1422-HC-AHM-GST = 2019 (26) G.S.T.L. 481 (Guj.)], was called upon to consider the question whether the return in Form GSTR-3B is the return required to be filed under Section 39 of the 2017 Act. Although, at the outset it noted that the concerned writ petition had been rendered infructuous but, went on to answer the question raised therein. It took the view that Form GSTR-3B was only a temporary stop-gap arrangement till due date of filing of return Form GSTR-3 is notified. We do not subscribe to that view. Our view stands reinforced by the subsequent amendment to Rule 61(5), restating and clarifying the position that where return in Form GSTR-3B has been furnished by the registered person, he shall not be required to furnish the return in Form GSTR-3. This amendment was notified and came into effect from 1-7-2017 [Vide Notification/GSR No. 772(E), dated 9th October, 2019] retrospectively. The validity of this amendment has not been put in issue."



[Emphasis Supplied]

Thus, applying the ratio of Hon'ble Apex Court's decision, I do not find merit in the argument of the appellant that Form-3B is not a prescribed return, hence, was not required to be filed.

10. I further find that the payment of GST and filing of GST returns were made much prior to issue of the subject show cause notice. Further, I find that the computation of GST was made on the basis of the records maintained by the tax payer and also on the basis of GSTR-1 returns filed by them. When the tax along with interest was paid before the issuing the notice, according to sub-section 5 of Section 73 of CGST/SGST Act 2017, no penalty was required to be imposed. Section 73 of the CGST/SGST Act 2017 which read as under:

SECTION 73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts. —

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) to (4) ...

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment....

(8) to (11)"

10.1 I find that the adjudicating authority has held that the appellant has not paid/ short paid the interest. In this regard, I find that the appellant submitted particulars of tax and interest paid and contended that they are entitled to the benefit of the proviso to sub- section (1) of Section 50 of the CGST Act, 2017. The said proviso is for charging of interest only on that part of tax, which is paid through electronic cash ledger.



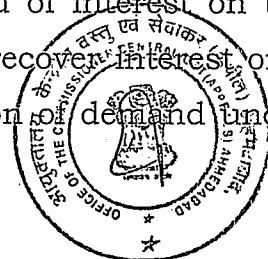
10.2 I find that, in the impugned order, the interest has been calculated on the entire amount of GST payable. As per Section 50 of the CGST Act 2017, the interest shall be levied on the portion of the tax that is paid by debiting the electronic cash ledger. The sub section (1) of Section 50 provides for interest on delayed payment of tax, which is reproduced below:

“SECTION 50. Interest on delayed payment of tax. — (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger”.

[As per Section 112 of the Finance Act, 2021 this amendment has been with effect from 1st June, 2021 retrospectively from 1.7.2017, which has been notified vide Notification No. 16/2021-Central Tax, dated 01.06.2021.]

From the above discussions and plain reading of the substituted Section 50, it is clear that the interest under Section 50 of the CGST Act, 2017 can only be levied on the net tax liability and not on the gross tax liability where the supplies made during the tax period are declared in the return after the due date. However, where such returns are furnished after commencement of any proceedings under Section 73 or Section 74 in respect of said period, then interest shall be payable on the entire amount. In the instant case, I find that for the period April 2018 to December 2019, the returns were filed by the appellant before commencement of proceedings under Section 74. Therefore, in terms of amended Section 50, which was given retrospective effect vide Notification No. 9/2022-Central Tax dated 05-07-2022, the interest shall be payable only on the net cash tax liability (i.e. that portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger). I, therefore, find that to that extent the demand of interest on the gross tax payable is not legally sustainable and order to recover interest only on the net cash tax liability subject to the re-determination of demand under Section 73(1).

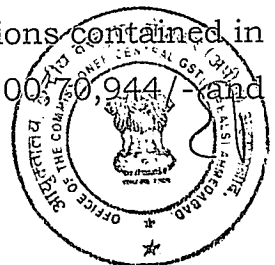


10.3 In this case, I find that, the interest has been demanded on the entire amount of GST including that paid by debiting from electronic credit ledger. I find that the appellant had discharged the entire tax liability of Rs.1,00,70,944/- (CGST Rs.50,35,472/- + Gujarat GST Rs.50,35,472/-) while filing GSTR-3B returns and also entire ITC demand of Rs.67,67,170/- (CGST Rs.33,83,585/- & Gujarat GST Rs.33,83,585/-) vide DRC-03 dated 21.03.2020 through electronic credit ledger, which has also been mentioned / appropriated in the impugned order. The appellant has discharged the interest liability on the entire part of tax / ITC through electronic credit ledger before issue of show cause notice. Therefore, I hold that there is no interest is payable in the present case on the above demands. Thus, it is a case of mere late payment of tax and since the tax along with interest is paid [however interest is not payable on the liability discharged through Credit Ledger], no penalty is attracted and the proceedings are to be closed in accordance with sub-section (5) of Section 73 *ibid* which read as under:

"5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment."

10.4 I further find that interest is not leviable on the tax liability GST of Rs.1,00,70,944/- (CGST Rs.50,35,472/- + Gujarat GST Rs.50,35,472/-) and ITC demand of Rs. 67,67,170/- (CGST Rs.33,83,585/- & Gujarat GST Rs.33,83,585/-) as the same has been discharged through Electronic Credit Ledger and they have sufficient balance in the Electronic Credit Ledger throughout the disputed period April, 2018 to December, 2019 as per Section 50(1) of the CGST Act, 2017 as amended by the Finance Act, 2021 with effect from 1.6.2021.

11. As the tax payer had paid the tax before issue of the notice and also discharged the interest liability, as discussed in the above para, within thirty days of issue of show cause notice, therefore, as per the provisions contained in Section 73(5), no penalty is attracted on GST amount of Rs. 1,00,70,944/- and ITC reversal demand of Rs. 67,67,170/-.



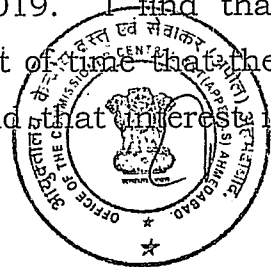
12. On carefully going through the submissions of appellant I find that on being pointed out the inputs tax credit was reversed by the appellant vide DRC-03, dated 21.03.2020. I further find that the appellant has not utilized the said ITC and the same were lying unutilized till they reversed the same. The appellant has contended that interest is levied only on **"ineligible ITC availed and utilized"** and not on **"ineligible ITC availed"**. They also contended that as tax has already been paid vide GST DRC-03 dated 21.03.2020 and interest is not payable on the ITC as the same was not utilized, therefore penalty on such reversed amount i.e on Rs. 67,67,170/- will also not be applicable.

13 (i) 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.]

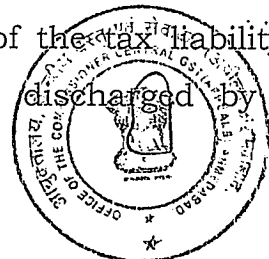
[As per Section 110 of the Finance Bill, 2022 this amendment has been with effect from 1st July, 2017, which has been notified vide Notification No. 09/2022-Central Tax, dated 05.07.2022.]

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 but have not utilized the same till its reversal. Further, I find that the balance of CGST in Electronic Credit ledger was more than the reversal amount during the disputed period i.e from April 2018 to December 2019. I find that the adjudicating authority has also not alleged at any point of time that the said wrongly availed ITC was ever utilized. Therefore, I find that interest is not leviable on the ITC reversed i.e for Rs.67,67,170/-.



13 (ii) Further, the appellant paid interest of Rs. 25,22,060/- vide DRC-03 dated 21.05.2021. As per the calculation sheet of interest payment of Rs.25,22,060/- provided by the appellant to the proper officer, the taxable value was reflected as Rs. 3,33,43,442/- instead of Rs. 3,45,11,563/-. However, on perusal of the submission dated 28.12.2022 wherein the appellant submitted the month-wise and yearwise statement / calculation sheet showing excess Electronic Credit Ledger (ECL) balance in ITC at the end of F.Y 2019-20 even after reversal of respective supplier's ITC on completion of 180 days time limit. From this, I find that even after reversal of ITC of Rs. 67,67,170/- on year-wise basis, the appellant still have excess credit balance in their Electronic Credit Ledger (ECL) of Rs. 40,74,514/- at the end of F.Y 2019-20. So, I find that the appellant has availed ITC but not utilized it, the appellant is, therefore, not liable to pay any interest, as they were not required to pay any amount by debiting cash ledger as per Section 50 of the CGST Act, 2017 as amended. Thus, I find that the appellant is not liable to pay any interest, as it is a case of "ITC availed but not utilized". In view of the above, it appears that the appellant are not liable to pay any interest, so question of short payment of interest does not arise in the present matter. Hence, I find that the demand of the interest on taxable value of Rs.11,68,121/- is also not sustainable, however, the adjudicating authority may re-determine the same and may conclude the same only after examination of records and facts.

13(iii) The appellant had received supplies from an unregistered persons for an amount equal to Rs. 10,55,655/-. For which the GST liability to the tune of Rs. 1,90,018/- along-with interest of Rs. 85,508/- under Reverse Charge Mechanism (RCM) is required to be discharged. I, further find that the appellant has already discharged all the tax liability and also interest which is not payable in terms of above discussions, except payment of Rs.1,90,018/- (CGST Rs.95,009/- & Gujarat GST Rs.95,009/-) under Section 9(3) read with Section 74(1) of the CGST / Gujarat GST Acts not paid under RCM for supplies received from the unregistered persons. The appellant has not submitted any payment details of Rs.1,90,018/- (CGST Rs.95,009/- & Gujarat GST Rs.95,009/-). Since they could not prove the payment of the tax liability of Rs.1,90,018/- alongwith interest same remains to be discharged by the



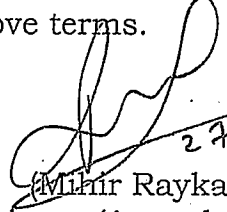
appellant. Hence, the demand of the ITC reversal Rs.1,90,018/- not paid by the appellant alongwith interest is sustainable.

14. In view of the above, I uphold the demand of tax liability of Rs.1,90,018/- along-with interest and ordered for re-determination of tax, interest and penalty under Section 73 of the CGST Act, 2017.

15. In view of the foregoing discussions and findings, the impugned O-I-O is set aside to the above extent and sent back to the adjudicating authority for re-determination of tax, interest and penalty. Thus, I order the present appeal partially allowed and partially rejected.

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

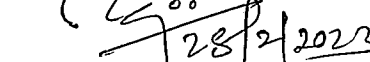
The appeal filed by the *appellant* stands disposed of in above terms.


27/02/23

(Mihir Rayka)
Additional Commissioner (Appeals)

Date: 27.02.2023

Attested


28/2/2023
(TEJAS J MISTRY)
Superintendent (Appeals)
Central Tax, Ahmedabad.



By R.P.A.D.

To,
M/s. Dev Buildcon, Dwarkesh Radiance,
T.P.44, Motera, Ahmedabad-380005

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, CGST & C.Ex., Ahmedabad-North
5. The Deputy/ Assistant Commissioner, CGST & C. Ex, Division-VII [S.G.Highway- East], Ahmedabad-North.
6. The Superintendent [Systems], CGST (Appeals), Ahmedabad.
7. ~~Guard File/ P.A. File.~~