



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

07926305065-

टेलीफैक्स 07926305136



DIN- 20230364SW000000B519

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/1011/2022 -APPEAL

/9730 - 36

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-002-APP-ADC-168/2022-23**
दिनांक Date : **20-03-2023** जारी करने की तारीख Date of Issue : **20-03-2023**

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/75/STONE/AM/2021-22 DT. 17.02.2022** issued by The Assistant Commissioner, CGST & CX, Division-VI, Ahmedabad North

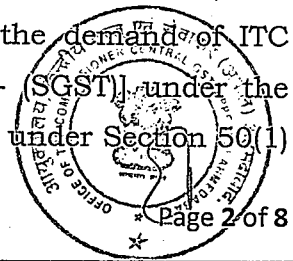
घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s. Stone Gallery, Survey No. 483-484, Nr. Adani CNG, S G Highway, Gota, Ahmedabad-380061

(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. Stone Gallery, Survey No. 483-484, Nr. Adani CNG, S G Highway, Gota, Ahmedabad - 380 061 (hereinafter referred to as the "appellant") has filed the appeal on 24.03.2022 against Order-in-Original No. GST/D-VI/O&A/75/STONE/AM/2021-22 dated 17-02-2022 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, Central GST & C.Ex., Division-VI, Ahmedabad North Commissionerate (hereinafter referred to as the "adjudicating authority") for non-reversal of ineligible ITC amounting to Rs. 6,37,762/-.

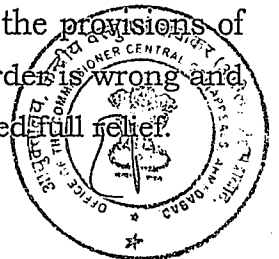
2. Brief facts of the case in the present appeal is that the appellant registered under GSTIN 24ACOF3412J1ZI, are engaged in trading in stones. During the audit of records of the appellant conducted for the period from July 2017 to March 2019 on 4.5.2021 (FAR No. 07/2021-22 (GST)) and raised objection that the appellant has not reversed CGST of block Input Tax Credit ("ITC") under Section 17(5) of the CGST Act, 2017 amounting to Rs. 3,18,881/- (Total ITC Rs. 6,37,762/- i.e Rs. 3,18,881/- CGST + Rs. 3,18,881/- SGST) as the appellant had availed and utilized Input Tax Credit of such input services namely works contract and construction services which are 'blocked credit', under the provisions of Section 17(5) of the Central GST Act, 2017 and Gujarat GST Act, 2017 (collectively the "Act"). On asking about the reversal of said ITC, the appellant submitted that they have already reversed the same and produced DRC-03 debit entry no. NIL dated 30.11.2019. Further, on going through DRC-03 submitted by the appellant as a proof of payment / reversal of ITC, it was observed that the appellant has reversed / paid SGST of Rs. 5,87,760/- but has not reversal / paid CGST amount. Hence it appeared that the appellant is required to pay / reverse the CGST amount of Rs. 3,18,881/- alongwith appropriate interest and penalty on both CGST and SGST. Further, the appellant accepted the objection that under the provisions of Section 16(1) and clauses (c) and (d) to Section 17(5) of the Act that ITC shall not be admissible on the input services namely Works Contract and Construction services as they fall within the purview of "blocked credit", and paid the CGST tax amounting to Rs. 25,000/- [(i.e Rs.637762-Rs.587760 = Rs. 50002 (Rs.25001 CGST + Rs. 25001 SGST)], Rs.18,725/- as interest and Rs. 6,250/- as penalty. The appellant stated the since they have paid / reversed an amount of Rs. 5,87,760/- as SGST instead of Rs. 3,18,881/- vide DRC-03 dated 30.11.2019, the differential amount of Rs. 2,68,879/- (i.e Rs. 5,87,760-Rs. 3,18,881 = Rs.2,68,879/-) paid by them should be adjusted against the CGST and they would not be liable for payment of CGST to the extent of Rs. 2,68,879/- and contested that the paid / ITC reversed should be adjusted against it. The appellant was further issued SCN under the provisions of Section 74 of the Act, read with Section 50 and Section 122 of the Act, as there is no provision of adjustment of ITC paid /reversed under one head i.e SGST to another head i.e CGST. Further, the adjudicating authority passed the impugned order and confirming the demand of ITC amounting to Rs.6,37,762/- [(Rs.3,18,881/- (CGST) + Rs. 3,18,881/- (SGST)] under the provisions of Section 74(1) of the Act, confirmed the demand of interest under Section 50(1)



of the Act, and imposed equivalent penalty under Section 74 of the Act. Being aggrieved with the impugned order, the appellant preferred the present appeal on 24.03.2022.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on the following grounds:

- i. The appellant claimed an ineligible ITC amounting to Rs. 6,37,762/- (Rs. 3,18,881/- CGST + Rs. 3,18,881/- SGST) in the year 2017-18. While filing the Annual return for the year 2017-18, they ought to have reversed Rs. 3,18,881/- as CGST and Rs. 3,18,881/- as SGST. However, they inadvertently reversed Rs. 5,87,760/- only under SGST head and nothing was reversed under CGST head, as they were ineligible for said ITC availed under the Section 17(5) of the Act being ITC shall not be admissible on the input services namely Works Contract and Construction services as they fall within the purview of "blocked credit".
- ii. During the audit, it was identified that the appellant ought to have reversed Rs.3,18,881/- as CGST and SGST each instead of only reversing SGST of Rs.5,87,760/-. The contention of the appellant is to set off Rs. 2,93,881/- from SGST head to CGST head by following the judgment of the High Court of Ernakulam in the case of Saji S. Vs. Commissioner State GST department Kerala at Ernakulam [WP(C) NO. 35868 of 2018] and Shree Nanak Ferro Alloys Pvt Ltd Vs the Union of India, Jharkhand High Court. The appellants contention was to adjust excess payment of SGST head against CGST, as the department denied the same and consequently they paid the tax amounting to Rs.2,93,881/- under CGST head through DRC-03 (through Cash Ledger) dated 02.02.2022, i.e before the passing of impugned order dated 17.02.2022. However the appellant stated that the adjudicating authority has passed the impugned order without giving them opportunity of being heard.
- iii. The appellant further contended that as per Section 77 of the Act, the department/ cannot levy interest on any intra-state transaction which subsequently classified as inter-state transaction, hence violation of Section 77 of the Act.
- iv. The impugned order imposing equivalent penalty under Section 74 of the Act is not correct and is required to be set aside, penalty being *ultra vires*. It is not in dispute that the input tax credit of disputed amount Rs.6,37,762/- was not admissible to the appellant as input services namely works contract and construction services which are 'blocked credit' under the provisions of Section 17(5) of the Act. They contended that the penalty order is wrong and unjust and the penalty needs to be deleted in *toto* and granted full relief.



PERSONAL HEARING :

4. Personal hearing in the present appeal was held on 21.10.2022, Shri Tarak Shah, Authorised Representative / Chartered Accountant, appeared in person on behalf of the appellant in the present appeal. During P.H. he has submitted that they have nothing more to add their written submission till date.

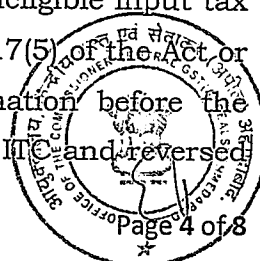
DISCUSSION AND FINDINGS:

5. I have gone through the facts of the case, written submissions made by the 'appellant'. I find that the main issue to be decided in the instant case is whether the equivalent penalty under Section 74(1) of the CGST Act, 2017 and Gujarat GST Act, 2017 is required to be imposed or not, as the appellant is disputed only against the penalty amounting to Rs.6,37,762/- imposed under Section 74(1) of the Act.

5.1 I have carefully gone through the facts of the case available on records and submissions made by the 'appellant' in the appeal Memorandum. I find that the appellant has not disputed the ineligible input tax credit (ITC) of Rs.6,37,762/- and interest thereof.

From the available records, submissions of the appellant as well as discussions and findings mentioned in the impugned order by the adjudicating authority, I find that when it has come to the knowledge of the appellant that the input tax credit (ITC) of Rs. 6,37,762/- being shall not be admissible on the input services namely Works Contract and Construction services as they fall within the purview of "blocked credit" under section 17(5) of the Act to them, they immediately reversed the ineligible ITC of Rs.5,87,760/- as availed by them through DRC-03 dated 30.11.2019 but inadvertently in the single head of SGST instead of CGST and SGST each, before conducting the audit or without pointed out by the department. However, they have also paid remaining CGST ITC amount Rs. 25000/- with interest Rs. 18,625/- and penalty thereof Rs. 6250/- vide DRC-03 debit entry dated 7.5.2021 and also paid Rs. 293881/- under the head CGST through DRC-03 debit entry No. DC240222000826 dated 02.02.2022 under the said Act and rule made there-under before passing the impugned order dated 17.02.2022.

5.2 Further, I also find that the appellant vide DRC-03 dated 07.05.2021 paid tax amount which includes remaining amount towards SGST Rs.25,000/-, alongwith Interest Rs. 18,625/- and penalty Rs. 6250/- under the CGST Act, 2017 and rules made thereunder. I also find that the appellant filed refund claim of Rs. 2,68,679/- on 28.03.2022 on account of excess payment/tax made in single SGST head and consequent to the above the department has sanctioned the refund of Rs. 2,68,679/- vide Order No. ZQ2404220336928 dated 27.04.2022 to the appellant. From the above, it is very much clear that the appellant's intention was not to evade tax or not to avail ineligible input tax credit (ITC) as it fall within the purview of 'blocked credit' under Section 17(5) of the Act or to suppress any facts or information or non-disclosure of any information before the department. The appellant himself ascertained the availment of ineligible ITC and reversed

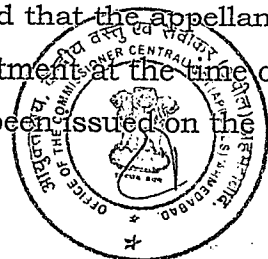


it on his own motion before pointed out by the department.

5.3 I find that the impugned order ordered to recover the availed and utilized ITC of input services namely works contract and construction services which were "blocked credit" under provisions of Section 17(5) of the Acts. The appellant availed the ITC amounting to Rs. 6,37,762/- against above services for the FY 2017-18. I find that the appellant before conducting the audit or without pointed out by the audit had reversed the ineligible ITC availed by their own but inadvertently in the single head of SGST instead of CGST and SGST each. The audit party have only pointed out the ineligible ITC availed but inadvertently reversed in single head of SGST from the books of accounts as maintained by the appellant. Thus, the instant matter is just a case of ineligible availment of ITC and inadvertent reversal of the same in single head of SGST on the part of appellant as no undeclared income or transaction was detected during the audit. I find that the appellant has violated the provisions of Section 16(1) and Section 17(5) of the CGST/GGST Act, 2017. I find that the impugned order 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 already reversed the ineligible ITC amounting to Rs. 5,87,760/- in single head of SGST, they have also paid remaining CGST ITC amount Rs. 25,000/- with interest Rs. 18,625/- and penalty thereof Rs. 6,250/- vide DRC-03 debit entry dated 7.5.2021 and also paid Rs. 2,93,881/- under the head CGST through DRC-03 debit entry No. DC240222000826 on dated 02.02.2022. The amount of ineligible ITC was pointed out by the audit party only on the basis of the reversal of ITC but inadvertently in single head of SGST declared in their books of account. 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 conducting audit and the show cause notice and impugned order have 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 Act, 2017 for demanding the wrongly availed and utilized ITC under Section 16(1) and Section 17(5) of the CGST Act, 2017, but it is a case of inadvertently reversal made in single head of SGST 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 Act, 2017 and Gujarat GST Act, 2017 (the Acts).

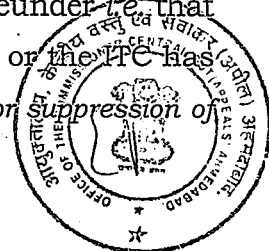
6. So far as the ineligible ITC availed and inadvertently reversal of ITC in the single head of SGST is concerned, I find the demand confirmed has been raised under Section 74(1) alleging suppression. Relevant text of Section 74 of CGST Act, 2017 is reproduced:-

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 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 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.

6.1 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 willful 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 proceedings thereunder 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 willful misstatement or suppression of facts to evade tax.



6.2 I, however, find that the ITC demand confirmed 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 ITC to be reversed / 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:-

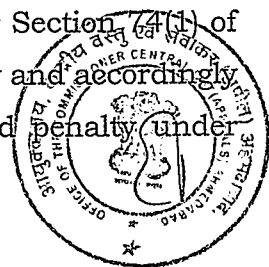
SECTION 75. General provisions relating to determination of tax. —

(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.

6.3 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 willful-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.

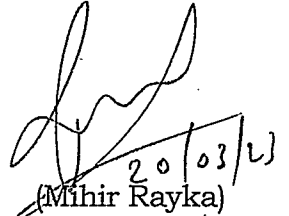
6.4 Thus, in terms of Section 75(2) of the CGST Act, 2017 and CBIC's clarification vide Circular No.185/17/2022-GST dated 27.12.2022, the impugned order confirming the demand of Input Tax Credit (ITC) by the adjudicating authority under Section 74(1), needs to be re-determined by the adjudicating authority by deeming, as if the SCN has been issued under Section 73(1) of the Act.

7. In view of the above discussions, I uphold and confirming the demand of ineligible Input Tax Credit of Rs. 6,37,760/- along-with interest under Section 50 of CGST Act, 2017 which is not disputed by the appellant and which was subsequently paid by the appellant along-with interest. I hold that the imposing the equivalent penalty under Section 74(1) of the CGST Act, 2017 is not legal & proper and sustainable in the eyes of law and accordingly order to the adjudicating authority to re-determine the ITC, interest and penalty under Section 73(1) of the CGST Act, 2017.

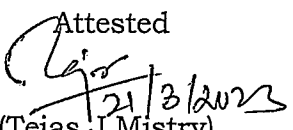


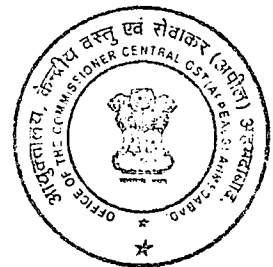
8. In view of above discussions, the *impugned order* passed by the *adjudicating authority* in relation to imposition of equivalent penalty under Section 74(1) of the CGST Act, 2017, is thus set aside to the above extent. Accordingly, I allow the appeal of the "Appellant" to the above extent only and the adjudicating authority is directed to re-determine Input Tax Credit (ITC), interest and penalty under Section 73(1) of CGST Act, 2017 in light of the of Section 75(2) of the CGST Act, 2017 and CBIC's clarification vide Circular No.185/17/2022-GST dated 27.12.2022.

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


(Mihir Rayka)

Additional Commissioner (Appeals)
Date: 20.3.2023

Attested

(Tejas J Mistry)
Superintendent,
Central Tax (Appeals), Ahmedabad



By R.P.A.D.

To

M/s. Stone Gallery, Survey No. 483-484,
Nr. Adani CNG, S G Highway, Gota,
Ahmedabad - 380 061

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Excise, Appeals, Ahmedabad
3. The Commissioner, Central GST & C.Ex, Ahmedabad North Commissionerate
4. The Dy / Assistant Commissioner, CGST & C.Ex, Division-VI, Ahmedabad North Commissionerate.
5. The Additional Commissioner, Central Tax (System), Ahmedabad North Comm'te.
6. The Superintendent (Systems), CGST Appeals, Ahmedabad, for publication of the OIA on website.
- ✓ 7. Guard File
8. P.A. File.

