



सत्यमेव जयते

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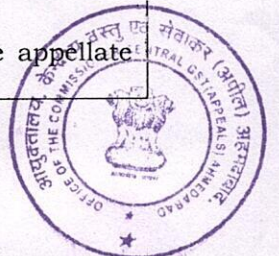


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DIN NO. : 20220864SW00007757C7

(क)	फाइल संख्या / File No.	GAPPL/ADC/GSTP/2313/2021-APPEAL/3350-62
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-CGST-002-APP-ADC-060/2022-23 and 30.08.2022
(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	30.08.2022
(ङ)	Arising out of Order-In-Original No. GST/D-VI/O&A/06/KARNAVATI/2020-21 dated 29.07.2021 issued by The Assistant Commissioner, Division-VI (S G Highway West), Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Karnavati Club Ltd. (GSTIN-24AAACK7865Q1ZU) Address:- S. G. Highway, Ahmedabad, Gujarat-380058

(A)	इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(iii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying – (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant; and (ii) A sum equal to <u>twenty five per cent</u> 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. Karnavati Club Ltd., S. G. Highway, Ahmedabad - 380058 (hereinafter referred as '*Appellant*') has filed the present appeal against Order No. GST/D-VI/O&A/06/KARNAVATI/JRS/2021-22, dated 29.07.2021 (hereinafter referred as '*impugned order*') passed by the Assistant Commissioner, CGST & C. Ex., Division - VI, Ahmedabad North (hereinafter referred as '*adjudicating authority*').

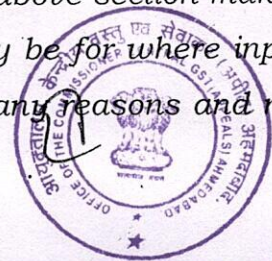
2(i). Briefly stated the facts of the case is that the '*Appellant*' is holding GST Registration - GSTIN No.24AAACK7865Q1ZU has filed the present appeal on 20.10.2021. During the course of audit it was observed that the '*Appellant*' had wrongly carried forward the closing balance of credit of Krishi Kalyan Cess of Rs.1,52,742/- as reflecting in the ST-3 Return filed for the period of April-June'2017, in TRAN-1 as transitional credit. The same was not admissible as per Section 140(1) of the CGST Act, 2017. Accordingly, the said KKC amount of Rs.1,52,742/- was paid by the appellant however, applicable interest and penalty on this amount has not been paid by them. A Show Cause Notice dated 16.06.2021 was accordingly issued to the appellant. Thereafter, the adjudicating authority vide impugned order has confirmed the said demand of wrongly availed Cenvat Credit of KKC of Rs.1,52,742/- under proviso to 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.15,274/- in terms of Section 122 (2) of the CGST Act, 2017.

2(ii). Being aggrieved with the *impugned order* the *appellant* has filed the present appeal on 20.10.2021 wherein stated that -

- *they had contended that they are not liable to pay interest as the amendment was brought on 01.02.2019 with retrospective effect and as there is no willful intention they are not liable to pay any penalty. However, the contention of appellant was not accepted and detailed SCN demanding interest u/s 50 and penalty u/s 122 was issued. Thereafter, without considering the submission of appellant the adjudicating authority has passed the impugned order*



- Interest under section 50 is not payable. Liability to pay interest is in nature of quasi-punishment and would arise only in case of default. In this regard, referred case of *Star India Pvt. Ltd. Vs. Commr. of Central Excise, Mumbai & Goa* [2006 (1) STR 73(SC)] and case of *Commissioner of C. Ex. Puducherry Vs. M/s. Pondicherry Paper Ltd.* [2014 (35) STR 32 (Mad.)].
- Penalty under Section 122(2)(a) can be imposable for the following reasons –
 - o Where the person has supplied goods or services or both on which goods and services tax ("GST") has not been paid **OR**
 - o Where the persons has supplied goods or services or both on which goods and service tax has short paid **OR**
 - o Erroneously refunded **OR**
 - o Where the **Input tax credit** has been wrongly availed or utilized.
- Here in the subject case the appellant has neither evaded the payment of GST nor short paid the same on supply of goods or services done by it nor have been refunded GST. erroneously and also not wrongly availed or utilized Input Tax Credit as defined vide Section 2(63) read with Sectin 2(62).
- In the present case, claiming Krishi Kalyan Cess as CENVAT Credit and carried forwarding the same as Transitional Credit not fall under the above transtaction, so penalty under Section 122(2) must not be imposable on the appellant.
- To invoke Penalty provisions guilty mind i.e. Means-rea is necessary.
- Appellant on 26.12.2017 filled up the TRAN-1 for carry forwarding of CENVAT credit of Krishi Kalyan Cess, at that time there is no denial for the carry forwarding of subject cess in to GST. The said denial has been brought into the act by retrospective amendment done on 01.02.2019 made applicable w.e.f. 01.07.2017. Thus, there is no guilty mind can be seen in the above case. Further, referred the case of *Hindustan Steel Limited Vs. State of Orissa* and case of *State of M.P. and Ors. Vs. Bharat Heavy Electricals* (1997 (7) SCC 1). Also referred case of *Mahadev Logistics Vs. Cus. and C. Ex. Settlement Commission, New Delhi* [2017 (3) G.S.T.L. 56 (Chhattisgarh)] and case of *Commissioner of Central Excise, Calcutta-II Vs. Indian Aluminium Company Limited* – (2020) 15 SCC 167 = 2010 (259) E.L.T. 12 (S.C.).
- Recovery of transitional credit under Section 73 of the CGST Act, 2017 not permissible. The bare reading of the text of the above section makes it clear that adjudication under Section 73 can only be for where input tax credit has been wrongly availed or utilized for any reasons and not



otherwise, Input Tax Credit has been defined under Section 2 and from the reading of the definition it is clear that Transitional credit is not a part of input tax credit. In this regard referred CBIC's Circular No. 37/11/2018-GST dated 15.03.2018.

- If credit under Section 140 does not fall within purview of Section 73 a show cause notice cannot be issued under section 73 for the same. Reliance cannot be placed on Rule 121 of the CGST Rules, 2017 as the said rules deals with recovery of "Recovery of credit wrongly availed". There can be no recovery of credit without there being determination of amount payable. The amount payable cannot be determined under CGST Act, 2017 but is has to be determined as per the existing law in terms of Section 142 of the CGST Act, 2017 by the authorities and not under Section 140. Section 142 makes it clear that recovery of CENVAT credit has to be made as per existing law and not as per GST law therefore recovery of the same is not permissible. Moreover, Section 79 deals with recovery of any amount due to the government and not Section 73 therefore notice under Section 73 is bad in law and must be quashed.

3. Personal Hearing in the matter was through virtual mode held on 14.07.2022 wherein Sh. Bishan R. Shah, CA appeared on behalf of the 'Appellant' as authorized representative. During P.H. he has reiterated the submissions made till date and informed that they want to give additional submission/information, which was approved and 7 working days period was granted.

Accordingly, the appellant has submitted the additional written submission on 28.07.2022 wherein stated that

- the appellant has availed Credit of the Krishi Kalyan Cess on 26.12.2017 and utilized the same on 20.02.2018. The credit has been reversed on 06.04.2019 by paying Cash.
- Explanation 3 to Section 140 was inserted on 01.02.2019 with retrospective effect from 01.07.2017. It was clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under Section 3(1) of the Customs Tariff Act, 1975 (51 of 1975).
- Accordingly, when transitional credit availed on 26.12.2017 was very well backed by law effective on that date.



- *Payment of cess has been made on 06.04.2019 i.e. very well before issuance of SCN, however SCN failed to quantify interest amount, hence the SCN being vague and bad in law.*
- *According to amended Section 50 of the CGST Act, 2017 the interest can be imposed on the credit availed and utilized.*

In the additional submission the appellant has also reiterated the submissions already made in appeal memorandum.

Discussion and Findings :

4(i). I have carefully gone through the facts of the case available on records, submissions made by the 'Appellant' in the Appeals Memorandum as well as through additional submission. I find that the 'Appellant' had availed the credit of Krishi Kalyan Cess of Rs.1,52,742/- through TRAN-1 as transitional credit. However, as being pointed out by the audit that the credit of KKC is not admissible, the appellant had paid the same. The audit has also pointed out that the appellant has not paid the applicable interest and penalty on this amount. Accordingly, a SCN dated 16.06.2021 was issued to the appellant in this regard. Thereafter, the adjudicating authority vide impugned order has confirmed the demand of wrongly availed credit of KKC and appropriated the amount so paid by the appellant. I find that the adjudicating has confirmed the demand of interest' and also imposed penalty of Rs.15274/-. Accordingly, the appellant has preferred the present appeal.

4(ii). On carefully going through the submissions of appellant I find that the appellant is not disputing about the issue that the transitional credit of Krishi Kalyan Cess is not admissible as per Section 140 of the CGST Act, 2017. However, I find that the appellant is mainly contending that the Section 140 amended on 01.02.2019 with retrospective effect from 01.07.2017. So, when transitional credit of Krishi Kalyan Cess availed on 26.12.2017 through TRAN-1 was very well backed by law effective on that date. Hence, the appellant is of the view that they are not liable to pay interest and penalty also. Further, I find that the appellant is contending that transitional credit is not recoverable under Section 73 of the CGST Act, 2017.

4(iii). Considering the foregoing facts, I hereby referred the provisions of Section 73 of the CGST Act, 2017, the same is 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 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 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.

In view of above, it is very much clear that in the matter of Input Tax Credit wrongly **availed or utilized**, as per section 73 of the CGST Act, 2017 such person is liable to pay such ITC with interest under Section 50. Penalty is also leviable under the provisions of CGST Act, 2017.

4(iv). Further, I find that in the present matter penalty is imposed under the provisions of Section 122 (2) of the CGST Act, 2017. Accordingly, I have referred the same and reproduced as under :

Section 122. Penalty for certain offences.-

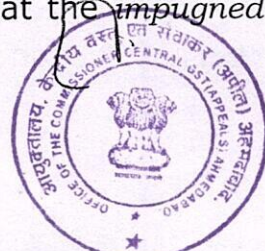
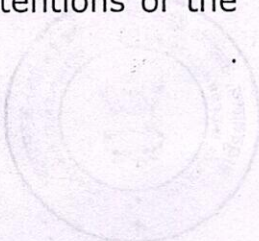
(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,-

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

In view of above, it is very much clear that in the event of Input Tax Credit wrongly availed or utilized penalty is imposable under the provisions of Section 122. Further, I find that in the present matter, as per Section 140 of the CGST Act, 2017 it is very much clear that transitional credit of Krishi Kalyan Cess under TRAN-1 is not admissible.

5. In view of the foregoing facts I do not find any force in the contentions of the 'appellant'. Accordingly, I find that the impugned order

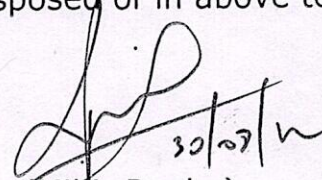


passed by the *adjudicating authority* is correct as per the provisions of GST law.

6. Accordingly, I do not find any reason to interfere with the decision taken by the *adjudicating authority* vide "*impugned order*". In view of above discussion, I reject the appeal filed by the '*appellant*'.

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

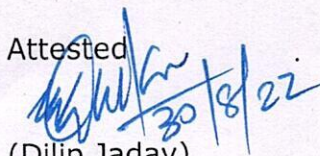
The appeal filed by the appellant stands disposed of in above terms.


(Mihir Rayka)

Additional Commissioner (Appeals)

Date: 30.08.2022

Attested


(Dilip Jadav)
Superintendent (Appeals)
Central Tax, Ahmedabad



By R.P.A.D.

To,
M/s. Karnavati Club Ltd.,
S. G. Highway, Ahmedabad - 380058

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 Deputy/Assistant Commissioner, CGST & C. Ex, Division-VI, Ahmedabad North.
5. The Additional Commissioner, Central Tax (System), Ahmedabad North.
6. Guard File.
7. P.A. File

