



सत्यमेव जयते

आयुक्तकाकार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.
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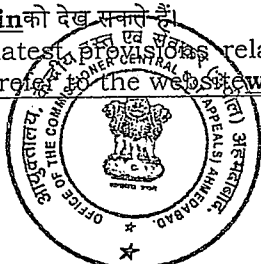


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DIN NO.: 20231264SW0000222A71

(क)	फ़ाइल संख्या / File No.	GAPPL/ADC/GSTP/2248/2023 / १४९५ - ९९
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-CGST-002-APP-JC-105/2023-24 and 29.11.2023
(ग)	पारित किया गया / Passed By	श्री आदेश कुमार जैन, संयुक्त आयुक्त (अपील) Shri Adesh Kumar Jain, Joint Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	01.12.2023
(ङ)	Arising out of Order-In-Original No. GST-06/D-VI/O&A/745/PUNISHKA/AM/2022-23 dated 22.03.2023 passed by The Assistant Commissioner, CGST, Division-VI, Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Puniska Healthcare Private Limited (GSTIN: 24AAJCP3348J1Z8), 3rd Floor, 301, W-1, New York Timber Street, Opp PSP House, Ambali Road, B/h S G Highway, Ahmedabad, Gujarat-380054

(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) <u>Full amount of Tax, Interest, Fine, Fee and Penalty</u> 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.Punishka Healthcare, 3rd Floor, 301, W-1, New York Timber Street, Opp PSP House, Ambli Road, B/H S G Highway, Ahmedabad, Ahmedabad, Gujarat, 380054 (GSTIN 24AAJCP3348J1Z8) (hereinafter referred to as "the appellant"), have filed appeal against GST-06/D-VI/O&A/745/PUNISHKA/AM/2022-23, dated 22.03.2023 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, CGST & C.Ex., Division-VI, Ahmedabad-North Commissionerate (hereinafter referred to as the "adjudicating authority").

2. Facts of the case in brief, are that the appellant are is engaged in manufacturing of infusions and transfusions solutions, drug medicines and all kinds of pharmaceuticals and allied products. During the Audit conducted by the Department, it was observed that the Appellant had availed input tax credit amounting to Rs. 61,10,765.00 on various inputs or input services, which were not used or intended to be used in the course or furtherance of business. Input tax credits availed on such tax charged invoices in respect of input or input services were in nature of personal use only, and not used or intended for use in business purpose (Revenue Para 4). Therefore, the same was required to be recovered under the provision of Section 74 of the CGST Act, along with the applicable rate of interest under section-50 of the said Act along with penalty. It was also revealed that they had wrongly availed input tax credit amounting to Rs.1,746.00 against Credit Note issued under section 34 of the CGST Acts, 2017 by their supplier, during the audit period, which is otherwise not eligible to them in terms of section 16 of the CGST Act 2017 read with Rule 36 of the CGST Rules 2017(Revenue Para 4). Therefore, the same was required to be recovered under the provision of Section 74 of the CGST Act, along with the applicable rate of interest under section-50 of the said Act along with penalty.

Therefore, a show-cause-notice was issued to the Appellant as to why?

"....."

(vii) Input Tax Credit amounting to Rs 61,10,765.00, wrongly availed by them should be demanded and recovered from them under section 74 of the CGST Acts, 2017;[Revenue Objection Para No. 2]

(viii) Since input tax credit amounting to Rs 61,10,765.00 was reversed in their electronic credit ledger through DRC-O3 vide debit entry number DI2412210339461, D12412210339461 & D12412210339461 all dated

21.12.2021, why is same should not be appropriate against the demand of (vii) above;

(ix) A penalty should not be imposed upon them, under the provisions of Section 74(5) of the CGST Act read with Section 20 of the IGST Act on the proposed demand of input tax credit at (vii) above;

(x) Input Tax Credit amounting to Rs 1746.00, wrongly availed by them should be demanded and recovered from them under section 74 of the CGST Acts, 2017;[Revenue Objection Para No.4]

(xi) Since input tax credit amounting to Rs.1746.00 reversed through DRC-03 vide debit entry No.DI2412210343662 dated 21.12.2021, why same should not be appropriate against the demand of (x) above;

(xii) A penalty should not be imposed upon them, under the provisions of Section 74(5) of the CGST Act read with Section 20 of the IGST Act on the proposed demand of input tax credit at (x) above.”

3. The adjudicating authority passed the following order :

“i

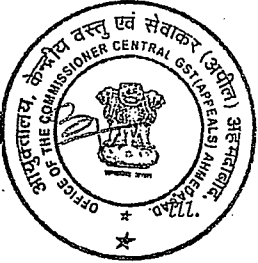
ii I confirm the demand of ITC amounting to Rs 61,10,765.00 wrongly availed by them under section 74 of the CGST Acts, 2017 and since input tax credit amounting to Rs 61,10,765.00 was reversed in their electronic credit ledger through DRC-03 vide debit entry number DI2412210339461, DI2412210339461 & DI2412210339461 all dated 21.12,2021, I order to appropriate the same against the demand;

I confirm the demand of penalty amounting to Rs. 61,10,765/- imposed upon them under the provisions of Section 74(1) and 122 (2) (b) of the CGST Act, 2017 read with Section 20 of the IGST Act on (ii) above ;

iv. I confirm the demand of ITC amounting to Rs 1746.00 wrongly availed by them under section 74 of the CGST Act, 2017 and since input tax credit amounting to Rs. 1746.00 reversed through DRC-03 vide debit entry No.DI2412210343662 dated 21.12.2021, I order to appropriate the same against the demand;

v. I confirm the demand of penalty of Rs. 1746.00 imposed upon them; under the provisions of Section 74(1) and 122(2) (b) of the CGST Act read with Section 20 of the IGST Act on (iv) above.”

4. Being aggrieved with the impugned order, the appellant filed present appeal on the following grounds:



- The matter pertains to penalty of ITC reversal pertaining to (i) ITC incorrectly availed on supplies received and (ii) Failure to reverse ITC on credit notes issued by vendor
- we humbly would like to state that we have not received any intimation in Form GST DRC 01A. The provision of Rule 142 of CGST rules, 2017 is laid down to provide taxpayer an opportunity to make payment of tax, interest or penalty before issuance of show cause notice and avail benefit of reduced penalty under section 74(5) of CGST Act, 2017. Issuing show cause notice without issuing Form GST DRC 01A will tantamount to violation of principles of natural justice.
- Considering the legal provisions laid down in rule 142 of CGST Act, 2017 and order passed by Hon'ble Gujarat High Court in case of AGROMETAL VENDIBLES PRIVATE LIMITED Versus STATE OF GUJARAT, we understand that intimation under Form GST DRC -01A is mandatory before issuance of show cause notice to levy penalty under section 74 of CGST Act, 2017. As on the date, we have not received any intimation under Form GST DRC 01A. Accordingly, the show cause notice issued to us is in violation of principles of natural justice since mandatory intimation has not been provided to us. Hence, we humbly request you to kindly set aside the impugned shown cause notice, Order-in-Original and also set aside levy of penalty there under.

We had agreed to reverse ITC of INR 61,10,764/- because at the time of audit discussion, we were informed by the audit team that those invoices pertain to construction of building and hence, the same is not allowed u/s 7(5) of the CGST Act, 2017. No where it was discussed or proved that the supplies pertain to personal use. All the goods and services have been duly received at factory/ office premises of the Company.

The input tax credit reversal of INR 1746/- pertains to credit note issued by the vendor (Hiramani Steel Private Limited). We are inadvertently missed reversing input tax credit of INR 1746/- pertaining to only 1 credit note issued the vendor. At the time of audit, we are appraised of this fact, and we agreed to reverse input tax credit to the tune of INR 1746/-

- We would humbly like to state that this was an inadvertent mistake on part of data entry person and there was not mala fide intention of evading tax. Please find enclosed credit note table of combined GSTR 2A of 2 years (Annexure 7). As it can be noted from GSTR 2A, credit note impacting GST input tax credit of INR 28,41,013/- was issued by our various vendors during the audit period. Discrepancy in reversal of input tax credit has been noted only for 1 credit note, that too for a small amount of INR 1746/-.
- We humbly state that input tax credit reversal pertaining to both the above-mentioned grounds were done through DRC 03 before issuance of final audit report as well as show cause notice in December 2021.

Further, the appellant has prayed to set aside impugned order imposing penalty of INR 61,10,765/- on input tax credit reversal and penalty of INR 1746 on input tax credit reversal pertaining to credit note issued by the vendor.

PERSONAL HEARING:

5. Personal hearing in this case was held on 29.09.2023. Shri Karan Rajvir Sr.Executive and Shri Sagar Vaja Assistant Manager of M/s Punishka

Healthcare Pvt. Ltd. appeared in person. They submitted that the case doesn't fall under Section 74 of the CGST Act, 2017 as there is no willful misstatement or suppression of fact. They have reversed the ineligible credit as suggested by Audit before issue of SCN, even before issue of Audit Report. No DRC-01 was issued, directly SCN under Section 74 has been issued, therefore on these grounds itself, the SCN is not legal and proper and therefore OIO needs to be set aside. They further submitted additional submissions and reiterated the written submissions. They further submitted that at no point of time they have utilized the said credit and thus there is no evidence on record to invoke section 74 or any men-rea exist, looking into size of business.

In view of the above, they requested to drop the penalty imposed under Section 74 of the CGST Act, 2017.

6 DISCUSSION AND FINDINGS:-

6.1 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 observe that the appellant is mainly contesting with penalty of Rs.61,12,511/- (Rs.61,10,765 + Rs.1,746/-) imposed vide the impugned order on input tax credit availed of Rs.61,10,765/- on various inputs which were not used or intended to be used in the course of furtherance of their business and Input Tax credit of Rs.1,746/- against Credit Note issued under Section 34 of the CGST Act, 2017 by their supplier which was not otherwise eligible to them in terms of Section 16 of the CGST Act, 2017 read with Rule 36 of the CGST Rules, 2017.

6.2 So the issue to be decided in the present appeal is:

Whether the impugned order passed by the adjudicating authority with regard to penalty imposed under the provisions of Sections 74(1) of the CGST Act, 2017 and Section 122(2)(b) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 on the appellant for availment of ineligible ITC, is proper or otherwise?

6.3. At the foremost, I observed that in the instant case the "impugned order" is of dated 22-03-2023 and the present appeal is filed on 22.06.2023. As per Section 107(1) of the CGST Act, 2017, the appeal is required to be filed within three months time limit. Therefore, I find that the present appeal is filed within normal period prescribed under Section 107(1) of the CGST Act, 2017. Accordingly, I am proceeding to decide the case.

6.4 I observe that Appellant has availed the ITC of Rs.61,12,511/- on various inputs which were not used or intended to be used in the course of furtherance of their business, these goods in nature of personal use or non business purpose. Therefore, in terms of Section 17 of the CGST Acts, 2017, ITC on such Inputs or Input services or capital goods though covered in tax paid invoices are not eligible and required to be reversed. I also observe that the Appellant has agreed to this and reversed/paid the said amount of ineligible ITC, interest not applicable as the same has not been utilized, however did not pay the penalty for the said wrong availment of ITC.

6.5 Further, I observe that Input Tax credit of Rs.1,746/- availed against Credit Note issued under Section 34 of the CGST Act, 2017 by their supplier which was not otherwise eligible to them in terms of Section 16 of the CGST Act, 2017 read with Rule 36 of the CGST Rules, 2017 is required to be reversed. The appellant agreed to this and has reversed/paid the said ITC, interest not applicable as the same has not been utilized, however did not pay the penalty for the said wrong availment of ITC.

6.6 I also observe that the appellant is not aggrieved with the non-eligibility of the Input Tax credit availed, as pointed out by Audit, as they have agreed and reversed/paid the same, however aggrieved with regard to imposition of penalty vide the impugned order.

6.7 I observe that Penalty under Section 74(1) and 122(2) (b) of the CGST Act, 2017 has been imposed. Therefore, I refer the said provisions, the text of which is as under:

**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.

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.

"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,-

(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."

6.8 I observe that the appellant has availed the ITC Rs.61,12,511/- (Rs.61,10,765 + Rs.1,746/-) inspite of the fact that it was not eligible to be taken, under the provisions as per the foregoing paras, knowingly which was detected only during the Audit by the Department. The said ITC would have been utilized, if the same had not been detected by the Audit which was reversed by the Appellant only after the detection by audit. I observe that the provisions of Section 74(1) of the GST Act, 2017 provides that where the input tax credit has been wrongly availed or utilised for the reason of fraud or any willful misstatement or suppression of facts to evade tax, shall be liable to a penalty equivalent to the tax specified in the notice. I find that as the Appellant in the present case has suppressed the vital facts that the credit so availed by them was actually not in furtherance of their business, thereby misstated the facts of avaiement of the credit Rs.61,10,765/- which was not eligible to be taken by them and as regards to the non reversal of input Tax credit of Rs.1,746/- against the credit note, though it is stated as inadvertent mistake on the part of data entry operator with no malafide intention, I observe that the said mistake would have gone unnoticed, as the same has happened on the part of the Appellant, if the Audit would not have pointed it out, thus the total credit would have been utilized by them, if the same had not been detected by Audit, which has been accepted and reversed/paid by them. Therefore, I am of the view that the Appellant is liable for penalty under the provisions ibid. The various judgements quoted by the Appellant are of erstwhile Central Excise & service Tax regime, whereas the suppression defined in GST regime is clearly explained in the explanation 2 as in the foregoing paras.

6.9 Further, as per provisions of Section 155 of the CGST Act, 2017, the onus to prove admissibility of the Credit availed lies on the Taxpayer, which reads as under:

155. Burden of proof.— Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person.

6.10I find that the Appellant has not at any point of time proved that the said credit is admissible to them. Therefore the said wrongly availed credit is

liable to be recovered along with interest and penalty. Since the same is not utilised by the Appellant and reversed/paid, the liability of interest does not arise, however, I am of the view that the penalty under the provisions ibid is payable.

6.11 As regards contention of the Appellant that they were not issued intimation in Form DRC-01A, I observe that the appellant were issued query memo vide DIN 20220464WY0000222ADF DATED 22.04.2022 requesting to pay up the penalty at applicable rate on the wrong availment of ITC amounting to Rs.61,12,511/- (i.e.Rs.61,10,765 + Rs.1,746/-) under the provisions of Section 74 of the CGST Act, 2017, however, the Appellant neither paid the applicable penalty nor replied the said query memo dated 22.04.2022. Further, as per the provisions of Section 142(1A), it has been provided that the proper Officer may before service of Notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A. The text of which is as under:

¹[Rule 142. Notice and order for demand of amounts payable under the Act. -

(1A) The ³[proper officer may], before service of Notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, ⁴[communicate] the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.];

². Inserted vide Notification No 49/2019- CT dated 09.10.2019

³. Substituted vide Notification No 79/2020-CT dated 15.10.2020 for "proper officer shall".

⁴. Substituted vide Notification No 79/2020-CT dated 15.10.2020 for "shall communicate".

6.12 From the above, I find that the issuance of DRC-01A is not mandatory, as the words "proper officer shall" have been substituted as "proper officer may" vide Notification No.79/202-CT dated 15.10.2020. The proper officer may communicate the details of tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A. The judgment quoted by the Appellant that the Hon'ble Gujarat High Court in case of AGROMETAL VENDIBLES PRIVATE LIMITED Versus STATE OF GUJARAT that intimation under Form GST DRC -01A is mandatory before issuance of show cause notice to levy penalty under section 74 of CGST Act, 2017. However on going through the said judgment, I observe that the dispute in the said case is with regard to "contents of the intimation are incorrect" wherein the Hon'ble High Court has found that "the intention of

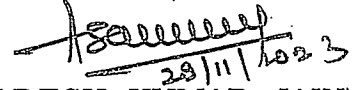
the proper officer was to give an intimation in accordance with sub-section (5) of Section 74 and therefore, the intimation should have been in the Form GST DRC – 01A and not Form GST DRC – 01. There is a vast difference between Rule 142(1)(a) and Rule 142 (1A) of the Rules.”

6.13 From the above, I find that the above judgment is not applicable in the present case. Therefore, I am of the view that the Appellant is liable for penalty under the provisions *ibid*.

7. In view the foregoing facts and discussions, I do not find any infirmity in the order passed by the adjudicating authority in the present case. Thus O-I-O is upheld being Legal and proper.

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

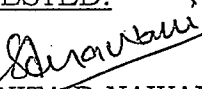
8. The appeal filed by the “Appellant” stands disposed of in above terms.



(ADESH KUMAR JAIN)
JOINT COMMISSIONER (APPEALS)
CGST & C.EX., AHMEDABAD.

Date : 29.11.2023

ATTESTED.



(SUNITA D.NAWANI)
SUPERINTENDENT
CGST & C.EX.(APPEALS),
AHMEDABAD.

By R.P.A.D.

M/s.Punishka Healthcare, 3rd Floor,
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(GSTIN 24AAJCP3348J1Z8)

Copy to:

1. The Principal Chief Commissioner of CGST & C.Ex., Ahmedabad Zone.
2. The Commissioner, CGST & C. Excise, Appeals, Ahmedabad.
3. The Commissioner, CGST & C.Ex, Ahmedabad-North Commissionerate.
4. The Dy / Assistant Commissioner, CGST & C.Ex, Division-VI, Ahmedabad-North Commissionerate.
5. The Superintendent (Systems), CGST Appeals, Ahmedabad, for publication of the OIA on website.
6. Guard File/P.A. File.



