



सत्यमेव जयते

आयुक्तका कार्यालय  
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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DIN NO.: 20231264SW000000A8B6

(क)	फ़ाइल संख्या / File No.	GAPPL/ADC/GSTP/2652/2023 / 9624 - 30
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-CGST-002-APP-JC-110/2023-24 and 12.12.2023
(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	14.12.2023
(ङ)	Arising out of Order-In-Original No. CGST/WT0703/UK/01/2023-24 dated 24.05.2023 passed by The Superintendent, CGST, Range-III, Division-VII, Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Dhara Enterprise (GSTIN: 24BQDPP1807J1ZX), Ground Floor, Shop No. 14-15, Satyam Complex Vibhag-2, Opposite Gujarat High Court, S.G. Highway, Ahmedabad, Gujarat-380060

(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 <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> 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 <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> .



**ORDER-IN-APPEAL**

**Brief Facts of the Case:**

M/s. Dhara Enterprise, Ground Floor, Shop No. 14-15, Satyam Complex Vibhag-2, Opposite Gujarat High Court, S.G. Highway, Ahmedabad, Gujarat-380060 (hereinafter referred to as "the appellant") are engaged in providing Restaurant Service falling under HSN 9963. They are registered with GST and holding GSTIN 24BQDPP1807J1ZX. The appellant has filed appeal against Order-In-Original No. CGST/WT0703/UK/01/2023-24, dated 24.05.2023 (hereinafter referred to as the "impugned order") passed by the Superintendent, CGST & C.Ex., Range-III, Division- VII, Ahmedabad North Commissionerate (hereinafter referred to as the "adjudicating authority").

**2(i).** The facts leading to this case are that the appellant supplied services i.e. restaurants, eating joint including mess, canteens etc. and opted to pay GST @5% on their supplies of services in terms of Notification No. 46/2017- Central Tax (Rate) dated 14.11.2017 during the period from March 2018 to March, 2021. The said Notification No. 46/2017- Central, Tax (Rate) dated 14.11.2017, provides that service provided by restaurant, eating joint including mess, canteens etc. shall be leviable to 5% GST subject to a condition that input tax charged on goods and services used in supplying the service has been taken. The appellant availed Input tax credit of input / input services used supplying their services during the period from March, 2018 to March 2021, and paid their entire tax liability through Input Tax Credit amounting to Rs.11,44,262/- in contravention to the condition laid down in the said notification.

**2(ii).** The appellant availed Input Tax Credit of Rs.11,44,262/- during the period from March, 2018 to March, 2021 in contravention to Notification No. 46/2017 Central Tax (Rate) dated 14.11.2017 and utilized the same for payment of their GST liability. The tax liability amounting to Rs 11,44,262/- wrongfully paid by the appellant by way of debiting their-electronic credit ledger during the period from March 2018 to March 2021.

**3(i).** Accordingly, the appellant was issued Show Cause Notice. The impugned Show Cause Notice has been adjudicated by the adjudicating authority vide the impugned order dated 24.05.2023. The adjudicating authority has passed the impugned order, which is briefly summarized as below:

- that the Noticee availed input tax credit on goods and services used in supplying the services during the period from March, 2018 to March, 2021 and utilized the same for payment of their GST liabilities, which



was in contravention to condition laid down in Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 amended by Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017;

- that the outward supplies made by the notice during the period from July 2017 to 14.11.2017 were covered under Sr. No. 7(iv)(Chapter Heading 9963) of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 attracting tax rate @9% Central Tax (Rate) and @9% State Tax. However, notification No. 11/2017-Central tax (Rate) dated 28.06.2017 was amended vide Sr. No. 7(i) of Notification No. 46/2017-Central Tax (rate) dated 14.11.2017(made effective from 15.11.2017), wherein the GST rate applicable to services provided by restaurants, eating joint including mess, canteens etc. was reduced to 5% subject to the condition that input tax charged on goods and services used in supplying the service was not taken;

- that the noticee knowingly and willingly made these act and it was apparently a deliberate attempt to Wilfully avail of Input Tax Credit to escape from payment of GST through cash. In view of the above, I hold that the noticee is liable to pay the GST amounting to Rs. 1144262/- for the period from March 2018 to March 2021, which is recoverable under Section 74 of the Act and hence as per the provisions of Section 50. of the Act, the noticee is required to pay interest on the amount of GST and penalty under Section 74 and Section 122(2)(b) of the CGST Act 2017.



4(i). Being aggrieved with the impugned order, the appellant preferred this appeal on 11.08.2023 on the following grounds:-

- At the outset the Appellant denies all the findings in the impugned order as incorrect and unsustainable on the following grounds each of the grounds below is independent and without prejudice to one another;
- Pre - Show Cause Notice (SCN) should be given in DRC-OIA before issuance of SCN u/s 73 & 74 of the CGST Act should be issued to give opportunity to assessee to settle the case;
- Appellants have rightly availed input tax credit as all the conditions of the Section 16 of CGST Act are satisfied. Therefore, the demand of input tax credit is invalid in the present case;
- Demand of Input Tax Credit on account of violation of condition of Notification No. 46/2017, Dated 14.11.2017 is erroneous. Therefore,

liable to be set aside. The appellant made reliance on the following judgments:

- (i) *Arvind Mills Ltd. V. CCE reported at 2009 (3) TMI 148 - CESTAT AHMEDABAD;*
- (ii) *Mardia Chemicals Ltd. [2006 (199) E.L.T. 110 (Tri.-Mum.)];*
- (iii) *Steelco Gujarat Limited case [2000 (122) E.L.T. 381 (Tribunal)];*
- (iv) *TTP Technologies Pvt. Ltd. Reported at 2012 (282) E.L.T.293 (G.O. 1.),*

- *that in the present case, SCN proceeds to recover ITC on the ground of violation of condition of Sr No. 7(i) of Notification 46/2017 dated 14.11.2017. ITC cannot be denied as all the conditions of availing credit is satisfied in the present case;*
- *Notification only determines rate of applicable tax and not eligibility of ITC. Condition stipulated in Notification No. 46/2017 dated 14.11.2017 starts with the phrase "provided that" for availment/non-availment of credit. It is submitted that the Notification in the present case puts a condition to opt for duty rate of 5% with a condition that that credit of input tax charged on goods and services used in supplying the service has not been taken. The Notification is restricted to determination of rate of tax and eligibility of credit. Thus demand of ITC is not sustainable;*
- *Penalty under Section 122(2)(a) read with Section 74 of CGST Act, 2017 is not impossible in the present case, as there is no element of evasion of tax is involved, in the present case, in terms of Section 74(1) ibid;*
- *Interest is not imposable under the provision of Sec. 50 of CGST Act, 2017*

In view of the above, authority may be pleased to set aside the impugned order passed in the name of the appellant.

**PERSONAL HEARING:**

5. Personal hearing in the matter was fixed on 10.10.2023 and 25.10.2023, 05.10.2023. Ms. Madhu Jain, Advocate, Authorized Representative appeared in person on behalf of the appellant in the present appeal. During virtual P.H. she reiterated the written submissions and requested to allow appeal in view of various judicial pronouncement of C.Ex. tax regime.





**Discussion and Findings:**

6. I have carefully gone through the facts of the case available on record and grounds of appeal in the Appeal Memorandum. The issues to be decided in the present appeal are whether the appellant had correctly availed ITC amounting to Rs. 11,44,262/- or otherwise?

7(i). It is observed from the case records that the appellant supplied services i.e. restaurants, eating joint including mess, canteens etc. and opted to pay GST @5% on their supplies of services in terms of Notification No. 46/2017- Central Tax (Rate) dated 14.11.2017 during the period from March 2018 to March, 2021. The said Notification No. 46/2017- Central, Tax (Rate) dated 14.11.2017, provides that service provided by restaurant, eating joint inducing mess, canteens etc. shall be leviable to 5% GST subject to a condition that input tax charged on goods and services used in supplying the service has not been taken. The appellant availed Input tax credit of input / input services used supplying their services during the period from March, 2018 to March 2021 and paid their entire tax liability through Input Tax Credit amounting to Rs.11,44,262/- in contravention to the condition laid down in the said notification.

7(ii). The appellant availed Input Tax Credit of Rs.11,44,262/- during the period from March, 2018 to March, 2021 in contravention to Notification No. 46/2017 Central Tax (Rate) dated 14.11.2017 and utilized the same for payment of their GST liability. The tax liability amounting to Rs 11,44,262/- wrongfully paid by the appellant by way of debiting their-electronic credit ledger during the period from March 2018 to March 2021.

8(i). In the instant case the main issue is of availment of ineligible ITC in respect of providing Restaurant Service in contravention to Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 and the same was amended by Notification No. 46/2017 Central Tax (Rate) dated 14.11.2017. Accordingly I refer to the abstract of the said notification:-

**Notification No.11/2017-Central Tax (Rate) dated 28.06.2017**

Sr. No.	Chapter, Section or Heading	Description of Service	Rate (percent)	Condition
7	Heading 9963 (Accommodation, food and beverage services)	(i) Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or drink, where such supply or service is for cash, deferred payment or other valuable consideration, provided by a restaurant, eating joint	9	---



		including mess, canteen, neither having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year		
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**Notification No.46/2017-Central Tax (Rate) dated 14.11.2017**

Sr. No.	Chapter, Section or Heading	Description of Service	Rate (percent)	Condition
7	Heading 9963 (Accommodation, food and beverage services)	(i) Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article For human consumption or drink, where such supply or service is for cash, deferred payment or other valuable consideration, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied, other than those located in the premises of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having declared tariff of any unit of accommodation of seven thousand five hundred rupees and above per unit per day or equivalent. Explanation;- "declared tariff" includes charges for all amenities provided in the unit of accommodation (given on rent for stay) like furniture, air conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit.	2.5	Provided that credit of input tax charged on goods and services used in supplying the service has not been taken [please refer to explanation no. (iv)].

**8(ii).** As per the Notification No.11/2017-Central Tax (Rate) dated 28.06.2017(Sr. No. 7), the appellant was paying the GST @ 18% on their supplies of services during the period from July 2017 to 14.11.2017 and availing input tax credit on goods and services used in supplying the services. Further the said notification was amended by notification no. 46/2017-Central Tax (Rate) dated 14.11.2017 (made effective from 15.11.2017), wherein the GST



rate applicable to services provided by restaurants, eating joint including mess, canteens etc. was reduced to 5% subject to the condition that input tax charged on goods and services used in supplying the service was not taken.

8(iii). However in the instant case it is observed that the appellant is availing the benefit of the Notification No.46/2017-Central Tax (Rate) dated 14.11.2017 and paying the GST @5% and also availing the input tax charged on goods and services used in supplying the service and paying the entire tax liability by way of utilized input tax credit. Accordingly, it is observed that the appellant had wrongly availed and utilized the input tax credit and violated the conditions stipulated under Sr. No. 7(i) of Notification No. 46/2017-Central tax (Rate) dated 14.11.2017.

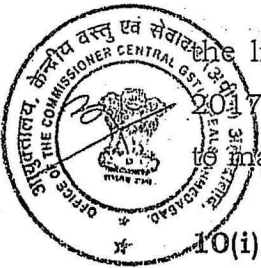
9. Further I refer Section 16(1) of the CGST Act 2017 as mentioned below i.e. Eligibility and conditions for taking input tax credit.-

*(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.*

In the instant case the appellant has to prove his eligibility to avail ITC in the light of aforesaid conditions, enumerated in Section 16 of the CGST Act, 2017. However the appellant has failed to satisfy all the mandatory conditions to make him eligible for ITC on supply of goods and services.

10(i). Further it is observed that the appellant has relied upon certain case laws. I have gone through the said case laws to examine whether the same is applicable to the facts of the present case. Accordingly, I find that considering the facts of the present case and the evidences produced by the investigating authority, the abovementioned case laws relied upon by the appellant would not be applicable in the present case. Hence, the contention of the appellant is not legally sustainable, as appellant had wrongly availed and utilized the input tax credit and violated the conditions stipulated under Sr. No. 7(i) of Notification No. 46/2017-Central tax (Rate) dated 14.11.2017.

10(ii). It may further stated that the appellant is well versed with the GST laws and provisions to taxations. They should have taken reasonable steps to ensure genuineness of ITC being availed by them. As stated above, the burden lies on the said appellant to demonstrate that he had taken such care.

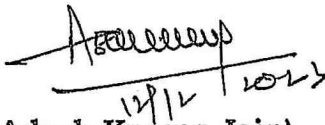


It was however found that the said notice has availed the ITC of Rs. 11,44,262/- by violating the conditions stipulated under Sr. No. 7(i) of Notification No. 46/2017-Central tax (Rate) dated 14.11.2017.

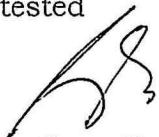
11. In view of the above discussions, I do not find any merit in the contention of the appellant so as to intervene in the impugned order passed by the adjudicating authority. Accordingly, I find that the impugned order of the adjudicating authority is legal and proper and hence upheld.

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.

  
(Adesh Kumar Jain)  
Joint Commissioner (Appeals)  
Date: 12.12.2023

Attested



(Sandheer Kumar)  
Superintendent (Appeals)

By R.P.A.D.  
M/s. Dhara Enterprise,  
Ground Floor, Shop No. 14-15,  
Satyam Complex Vibhag-2,  
Opposite Gujarat High Court,  
S.G. Highway, Ahmedabad,  
Gujarat-380060.



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/Asstt. Commissioner, Range-III, CGST, Division- VII, Ahmedabad North Commissionerate.
5. The Superintendent, Range-III, CGST, Division- VII, Ahmedabad North Commissionerate.
6. The Superintendent (Systems), CGST Appeals, Ahmedabad.
7. Guard File.
8. P.A. File.

