



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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(क)	फ़ाइल संख्या / File No.	GAPPL/ADC/GSTP/3537/2023 / 1280-83
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-CGST-002-APP-JC-146/2023-24 and 26.02.2024
(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	04.03.2024
(ङ)	Arising out of Order-In-Original No. CGST/WT0701/KVS/10/2022-23 dated 05.10.2023 passed by The Superintendent, CGST, Range-I, Division-VII, Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Cygnet Enterprise Private Limited (GSTIN: 24AADCC1450E1ZB) 4th Floor, 16, Swastik Society, Near Stadium Circle, Navrangpura, Ahmedabad, Gujarat-380009

(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-APPEALBRIEF FACTS OF THE CASE:

M/s. CYGNET ENTERPRISE PRIVATE LIMITED (GSTIN-24AADCC1450E1ZB) having principal place of business at 4th Floor, 16, Swastik Society, Near Stadium Circle, Navrangpura, Ahmedabad, Gujarat, 380009 (hereinafter referred to as the "Appellant") has filed appeal against OIO No.CGST/WT0701/KVS/10/2022-23 dated 05.10.2023 (herein after referred as the "impugned order") passed by the Superintendent, CGST & C.Ex., AR-I, Division VII, Ahmedabad-North Commissionerate, Ahmedabad (hereinafter referred to as the 'adjudicating authority')

2. Brief facts of the case are that the Appellant is engaged in providing services of Works Contract Service, Information Technology Service, Maintenance or Repair Service etc. They are registered with GST under GSTIN No.24AADCC1450E1ZB. Prior to GST, they were registered with Central Excise & Service Tax Departments and holding registration No. AADCC1450EST001. During the course of Audit of the records of the appellant, it was noticed by the Audit Team that the appellant has availed Tran-2 credit of Rs.2,903/- CGST and Rs.229.5/- IGST, but the appellant was registered under existing law i.e. Service Tax regime. Hence as per Rule 117 (4)(a)(i) of the CGST Rules, 2017, Tran-2 credit is not admissible to the appellant.

Therefore, the appellant were issued Show Cause Notice No. No.CGST/WT0701/KVS/10/2022-23 dated 30.03.2023 to show cause as to why:-

- "i) Input Tax Credit amounting to Rs.3,134/- wrongly taken in Tran 2 and utilised should not be disallowed and recovered from the Noticee under proviso to Section 73 (1) of the CGST Act 2017 read with Rule 121 of CGST Rules, 2017;*
- (ii) Interest at applicable rates under Section 73(5) of the CGST Act, 2017 should not be demanded and recovered from them on the amount shown at Sr.No.(i) above;*
- (iii) Penalty should not be imposed upon them under the provisions of Section 122 (1)of the CGST Act. 2017."*

3. The adjudicating authority vide the impugned order passed the following:

- "(i) I confirm the demand for recovery of Input Tax Credit amounting to Rs.3,134/-, wrongly taken in Tran 2 and utilised, under proviso to Section 73 (1) of the CGST Act,2017 read with Rule 121 of CGST Rules, 2017,*
- (ii) I confirm the demand of Interest at applicable rates under Section 73(5) of the CGST Act, 2017on the amount confirmed at Sr. No.(i) above,*

(iii) I impose a penalty of Rs. 10,000/- (Rupees Ten Thousand provisions of Section 122 (1) of the CGST Act, 2017.”

4. Being aggrieved with the impugned order, the Appellant filed the present appeal on 01.11.2023 on the grounds that:

➤ At the outset, it is submitted that the impugned order has been passed on altogether new ground that Appellant has not submitted any document evidencing the fulfilment of conditions attached to proviso to section 140(3) of the CGST Act for availing the credit of eligible duties which was not raised in the SCN without appreciating the fact that the Appellant has furnished the details during the personal visit to the Respondent and the formal submission was also made to the Respondent vide their letter dated 30-06-2022.

A. Authority cannot go beyond the scope of Show Cause Notice

- Appellant submits that the SCN has been issued on the ground that the Appellant is not eligible for claiming the eligible ITC as they are not covered under the specified category of persons under section 140(3) of the CGST Act/ SGST Act.
- Ld. Respondent has in para 09 of the impugned OIO has held that the first stage dealer is also eligible to file Tran-2.
- However, thereafter they has travelled beyond the SCN and own its own has held that the statue required the assessee to fulfil certain conditions for getting the benefit of Rule 117(4)(a)(ii) and in the instant case the Appellant has not submitted any documents evidencing fulfilment of conditions attached to proviso to section 140(3) of CGST Act for availing the credit of eligible duties whereas no such allegation was made in the SCN.
- In this regard Appellant humbly wish to submit that SCN has been issued on the ground that the Appellant is not eligible to claim the credit as it is not covered under the specified category of person(s) as prescribed under section 140(3) of the CGST Act/ SGST Act and the ground on which impugned OIO has disallowed the credit has never been raised during the initial communication/ discussions/ SCN and personal hearing held before Ld. Respondent.
- Appellant wish to submit that the adjudicating authority cannot go beyond the scope of SCN and cannot confirm the demand on the ground which is not raised in the SCN.
- In the matter of Collector v. India Linoleums Ltd [1999 (108) E.L.T. A60 (S.C)] Hon'ble Supreme Court has dismissed the Civil Appeal filed by the Collector of Central Excise, Calcutta against the CEGAT order No. 499/93-A, dated 27-9-1993 [1998 (98) E.L.T. 828 (Tribunal)] wherein Appellate Tribunal in its order had held that confirmation of duty demand by the original authority was beyond the scope of the show cause notice and on this ground alone, the Tribunal ordered that the impugned order be set aside. (Further more citations have been mentioned.....)
- In the instant case, there is no allegation with regard to non-observance of conditions to the proviso to section 140(3) of the CGST Act/ SGST Act and therefore impugned OIC) disallowing the credit on the ground of non-observance of conditions to the proviso to section 140(3) of the CCST Act/ SGST Act is liable to be set aside.
- Appellant humbly wish to submit that in the instant case, SCN has been issued only on the ground that the Appellant is not falling under the



specified category of eligible person under section 140(3) and no other ground/ issue has been raised in the SCN. Accordingly, impugned OIO disallowing the transfer of eligible credit on new ground is beyond the scope of SCN and the impugned OIC) is liable to be set aside on this ground alone.

B. Without prejudice, all conditions for claiming credit in Tran-2 are fulfilled

- Without prejudice and without accepting the demand confirmed by impugned OIC), Appellant humbly wish to submit that they have furnished all details during personal visit to the jurisdictional office and also submitted the documents sought by the Department vide their letter dated 30-06-2022.
- Impugned OIO has held that the Appellant has not submitted any documents evidencing the fulfilment of conditions attached to proviso to section 140(3) of the CGST Act/ SGST Act for availing the credit of eligible duties.
- In this regard, Appellant wish to submit that there is no lapse in following the provisions of Act and rules made there under and therefore, the departmental audit team has raised only procedural para and not revenue para, that too without considering the fact that **we have claimed such ITC as first stage dealer and not as an assessee registered under service tax.**
- Further, during our personal discussion with the Jurisdictional officer on 24-06-2022, Appellant explained that ITC has been availed rightfully by following the provisions of the Law and also furnished the copies of TRAN-1 showing quantitative details of stock and TRAN-2 showing ITC claimed as per the scheme prescribed under Rule 117(4) of CGST Rules 2017 and thereafter again furnished the desired documents vide their letter dated 30-06-2022 to the Jurisdictional office (Respondent).
- Further to this, the acknowledged copy of the letter dated is also enclosed as exhibit to reply to the SQN which itself substantiate the claim of the Appellant that all details are furnished before the Ld. Respondent.
- Accordingly, the impugned OIO rejecting the claim of credit is based on false findings is liable to be quashed on this ground also.

C. Without prejudice, CENVAT amount not allowed to be transferred is eligible for refund

- Appellant humbly wishes to submit that in case the CENVAT credit in question is not allowed to be transferred to the GST regime for any reason, the same may then be kindly refunded to the Appellant being its property which is saved by the Constitution of India.
- In the matter of USV Private Limited vs. Commissioner of Central Excise & ST, Daman [Final Order No. A/10198/2023 dated 06-02-2023] the hon'ble Tribunal of Ahmedabad has held that the refund of accumulated balance of CENVAT credit of Education cess and Secondary and Higher Education cess is allowed as the same is not available for utilisation under GST. Appellant wish to submit that in case the CENVAT credit is not allowed to be transferred to GST, the same would not be available for utilisation and therefore the same should be granted as refund to the Appellant.



- Accordingly, in case, CENVAT credit to be carried forward is disallowed, your honour may allow the refund of the same in principal and the Appellant would comply with the procedural aspect by filing separate refund application in this regard.

D. With regard to imposition of penalty, Appellant humbly submits as under

- Impugned OIO has confirmed penalty under section 122(1) of the CGST Act, 2017.
- In the instant case the Appellant is not engaged in any of the activity as mentioned in section 122(1) of the CGST Act/ SGST Act and further SCN has not mentioned any specific clause under which it **proposes to impose penalty.**
- Further impugned OIO has also not referred to any clause of section 122(1) under which it confirms the penalty renders the impugned OIO as non-speaking and the same is liable to be quashed on this ground also.
- It is nowhere alleged in the SCN and impugned OIO that the Appellant is engaged in any activity as mentioned in section 122(1) of the CGST Act/ SGST Act. In this regard Appellant submits that as per above legal submissions he has rightly claimed ITC through Tran-2 as it is covered under eligible category as prescribed under section 140(3) of the CGST Act.
- In view thereof, Appellant has not contravened any of the aforesaid provision of the Act and further impugned OIO confirming demand proposed in the SCN without any allegation in this regard is not just and proper.
- Appellant humbly submits that it is a well-settled proposition in law that imposition of penalty is the result of quasi-criminal adjudication. It is not a mechanical process or cannot be imposed just because it is legitimate to levy penalty.
- Penalty can be levied only if it is proved that there is presence of guilty, dishonest and willful intent either to defraud revenue or evade the payment of tax on our part. In other words, there has to be positive act on part of assessee to evade payment of duty.
- The decision of Supreme Court in Union of India vs. Rajasthan Spinning and Weaving Mills 2009 (238) ELT 3(SC) held that clearly held that element of mens rea is essential or the imposition of penalty.
- The decision of the Supreme Court in the case of Hindustan Steel Ltd. vs. State of Orissa (1978) ELT J 159 SC has categorically held that:

“the discretion to impose a penalty must be exercised judicially. A penalty will be ordinarily be imposed in cases where the party acts deliberately in defiance of the law, or is guilty of Contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.”

- It is submitted that an element of positive action to evade tax or mens rea is essential for the imposition of penalty. It is submitted that, the element



of mens rea or any positive act to evade payment of tax is conspicuously absent in the case in point.

- Therefore, it is amply clear that penalty u/s 122(1) of the CGST Act, 2017 cannot be imposed on Appellant considering the facts and circumstance of the case Non-speaking order
- Appellant humbly wish to submit that the impugned order has been passed without considering the facts and without giving any justification is therefore **non-speaking order** and is liable to set aside

E. Non-speaking order

- Appellant humbly wish to submit that the impugned order has been passed without considering the facts and without giving any justification is therefore non-speaking order and is liable to set aside.

F. Interest not chargeable

- As per Section 73(5) of the CGST Act, 2017 person is liable to pay the tax along with interest under section 50 of the CGST Act, 2017.
- As per section 50 of the CGST Act, 2017 a person who fails to pay tax or any part there of or excess ITC taken, to the credit of Central Government within the prescribed period shall pay simple interest at the rate fixed by Central Government for the period by which payment of such tax or part of tax thereof is delayed. Therefore, as per Section 50, interest is payable only when a person has delayed or has not paid tax on due dates.
- In the instant case, Appellant submits that they are not liable to pay tax/ reverse ITC and is not liable to any amount in the name of GST as they have rightly claimed the ITC through Tran-2 and therefore the question of payment of interest does not arise



The appellant has further prayed that the impugned order be set aside.

5. Personal Hearing:

Personal Hearing in the matter was held on 19.12.2023, wherein Shri Gopal Krishna Laddha, C.A. and Ms Anjali Bhatia C.A. appeared in person on behalf of the 'Appellant' as Authorized Representatives before the appellate authority. It is submitted that though the amount involved is Rs.3,134/- only but the OIO is travelled beyond the SCN which is bad in Law therefore liable to be set aside on this ground itself. As regards the merit, it is submitted that all the documents as desired under Section 140(3) have been submitted before the adjudicating authority as well as with the appeal.

Further, it is also submitted that the Ld. Adjudicating authority has imposed penalty under Section 122 without mentioning any reason/grounds. Therefore the order is non speaking/reasoned, thus needs to be set aside. They further relied upon various case laws and submitted copies during the P.H. They further reiterated the written submissions and requested to allow the appeal.

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 submissions at the time of P.H. and observe that the, appellant is mainly contesting with, that adjudicating authority has travelled beyond the SCN and passed the impugned order on altogether new ground that the appellant has not submitted any documents evidencing the fulfillment of conditions attached to proviso to Section 140(3) of the CGST Act for availing the credit of eligible duties, which was not raised in the SCN, that they have rightly claimed the ITC through Tran-2 and therefore the question of payment of interest does not arise. Further, that the impugned OIO has also not referred to any clause of section 122(1) under which it confirms the penalty renders the impugned OIO as non-speaking and the same is liable to be quashed.

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

(i) Whether the order passed by the adjudicating authority is proper or otherwise?

6.3 At the foremost, I observed that in the instant case the "impugned order" is of dated 05.10.2023 and the present appeal is filed online on 01.11.2023. As per Section 107(1) of the CGST Act, 2017, the appeal is required to be filed within three months time limit. I observe that in the instant case the appeal has been 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, the appellant was registered under Service Tax regime vide registration No.AADCC1450EST001 and also had registration No.AADCC1450EED001 under Central Excise for operating as Dealer of Excisable Goods. The Audit as per procedural para of FAR No.CE/ST-528/21-22-Service Tax dated 23.03.2022, had noticed that the appellant had availed transitional credit in TRAN-2, though the appellant was registered under existing law i.e. Service Tax regime. Therefore as per Rule 117(4)(a)(i) of the CGST Rules, 2017 TRAN-2 Credit is not admissible to them.

6.5 I further observe that the SCN was issued on the ground that the appellant is not eligible for claiming the eligible ITC of Rs.2903/- CGST and Rs.229.5/- IGST, as they are not covered under the specified category of persons under Section 140(3) of the CGST Act/SGST Act. Therefore the said credit along with interest and penalty was liable to be recovered under the provisions of the CGST Act and Rules, 2017.



6.6 The adjudicating authority vide the impugned order found that the first stage dealer is eligible to file TRAN-2, and that such persons can claim credit of eligible duties when they are not in possession of documents evidencing payment of duty in respect of inputs to certain conditions and limitations. Such conditions are enumerated in Rule 117(4) of the CGST Act, 2017.

however for availing the said credit, the Taxpayer was required to fulfill certain conditions under Section 140(3) of the CGST Act. It has further been found by the adjudicating authority that the appellant has not submitted any documents evidencing fulfillment of conditions as per proviso to Section 140(3) of the CGST Act 2017 for availing the Credit of eligible duties, and the same has been disallowed.

6.7 To decide whether the appellant was eligible for the ITC of Rs.2,903/- CGST and Rs.229.5/- IGST in respect of Input Tax credit involved in inputs held in stock on the appointed day, the duty paying document of which were not available to them, which was claimed under TRAN-2, I refer the provisions related to the issue.

6.8 Rule 117 of the CGST Act, 2017, which provides for Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day and the circumstances under which the percentage of credit is allowed along with the conditions to be fulfilled, the relevant portion of the same is reproduced here under:

“Rule 117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.-

4) (a) (i) *A registered person who was not registered under the existing law shall, in accordance with the proviso to sub-section (3) of section 140, be allowed to avail of input tax credit on goods (on which the duty of central excise or, as the case may be, additional duties of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, is leviable) held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of central excise duty.*

(ii) The input tax credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract central tax at the rate of nine per cent. or more and forty per cent. for other goods of the central tax applicable on supply of such goods after the appointed date and shall be credited after the central tax payable on such supply has been paid:

Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent. and twenty per cent. respectively of the said tax;

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) The credit of central tax shall be availed subject to satisfying the following conditions, namely:-

(i) such goods were not unconditionally exempt from the whole of the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 or were not nil rated in the said Schedule;

(ii) the document for procurement of such goods is available with the registered person;

⁴[(iii) The registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2), submits a statement in FORM GST TRAN-2 by 31st March 2018, or within such period as extended by the Commissioner, on the recommendations of the Council, for each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period:]

⁵[Provided that the registered persons filing the declaration in FORM GST TRAN-1 in accordance with sub-rule (1A), may submit the statement in FORM GST TRAN-2 by ⁶[30th April, 2020]];

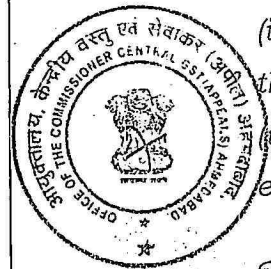
(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT-2 on the common portal; and

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person."

6.9 Further, Section 140 of the CGST Act, 2017 provides for Transitional arrangement for Input Tax Credit, the relevant portion of Section 140(3) is as under:

"Section 140. Transitional arrangements for input tax credit.-

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs



contained in semi-finished or finished ⁴[goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to] the following conditions, namely:-

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;
- (iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and
- (v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed."

6.10 From the Rule 117(4) (a) (i) of the CGST Rules, 2017, it is observed that, a registered person who was not registered under the existing law shall, in accordance with the proviso to sub-section (3) of section 140, be allowed to avail of input tax credit on goods (on which the duty of central excise or, as the case may be, additional duties of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, is leviable) held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of central excise duty.

6.11 Further, as per proviso to Section 140(3) of the CGST Act, 2017, a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

6.12 From the above provisions, it is observed that Input Tax Credit in respect of inputs held in stock on the appointed day, the duty paying document of which are not available, can be availed by a registered person who was not registered under the existing law and a registered person other than a manufacturer or supplier of services who is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, such registered person only is eligible for taking ITC subject to fulfillment of other conditions as mentioned in the provisions of law.

6.13 It is observed that in the instant case, the appellant was registered under the existing law i.e. under Service Tax for providing services as well as under Central Excise for operating as a Dealer of Excisable Goods. Therefore, the parameter/limitation of "not registered under the existing law" as in Rule 117(4)(a) (i) of the CGST Rules, is not fulfilled. Further, in GST regime the appellant is engaged in providing services of Works Contract Service, Information Technology Service, Maintenance or Repair Service etc., therefore the parameter/limitation of "registered person other than a manufacturer or supplier of services" as per the proviso to Section 140(3) of the CGST Act, 2017 is also not fulfilled as the appellant is engaged in providing services as mentioned herein above.


Therefore, I am of the view that the appellant is not eligible for availing the Transitional credit under TRAN-2, in respect of Input Tax credit involved in inputs held in stock on the appointed day, the duty paying document of which were not available to them.

6.14 As per Section 140(3) of the CGST Act, 2017, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, within such time and in such manner as prescribed, subject to the conditions mentioned there under was available to the appellant being Dealer in Excise regime. Such conditions include the condition that the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs.

6.15 Thus, in view of the above provisions, I am of the view that the appellant is not eligible for ITC of Rs.2903/- CGST and Rs.229.5/- IGST claimed under TRAN-2 for Input Tax credit involved in inputs held in stock on the appointed day, the duty paying document of which were not available to them.



6.16 I find that the adjudicating authority has not explained the ineligibility of Transitional credit of ITC of Rs.2903/- CGST and Rs.229.5/- IGST to the appellant and merely passed the impugned order on the ground that the appellant has not submitted any documents evidencing the fulfillment of conditions attached to proviso to Section 140(3) of the CGST Act, 2017 for availing such credit of eligible duties. At one place the adjudicating authority has pointed that on going through Section 140(3) of the CGST Act, 2017, he found that the category of first stage dealer is also eligible to file TRAN-2, however, here the proviso to Section 140(3) is to be read along with Rule 117(4) of the CGST Rules. Thus, the findings of the adjudicating authority are not proper as explained in the foregoing paras. Thus the contention of the appellant that adjudicating authority has travelled beyond SCN is correct in as much as at the first stage, eligibility of availing such credit was required to be decided. Once the eligibility is under question, and if found the same as eligible, then only the conditions required as per the provisions are to be fulfilled. The impugned order should have been passed for in-eligibility of availing the transitional credit. Therefore, I am of the view that the order demanding the reversal of Input Tax Credit, is legal as per the provisions as explained above in the foregoing paras.



I further observe that the Interest and penalty have been confirmed by the adjudicating authority under Section 73(5) of the CGST Act, 2017 and Section 122(1) of the CGST Act, 2017 respectively. However, the interest for wrong availment of Cenvat Credit is required to be recovered under the provisions of Section 50(3) of the CGST Act, 2017 read with Rule 88B (3) of the CGST Rules, 2017. and Penalty under the provisions of Section 122(2)(a) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017.

6.18 The provisions of Interest and Penalty are as under:

***Section 50. Interest on delayed payment of tax.-**

²[(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]

2. Substituted (w.e.f. 1st July, 2017) by s. 111 of The Finance Act 2022 (No. 06 of 2022) - brought into force w.e.f 05-07-2022 vide Notification No. 9/2022-C.T., dated 05-07-2022 .

¹ [**Rule 88B. Manner of calculating interest on delayed payment of tax.-**

(3) In case, where interest is payable on the amount of input tax credit wrongly availed and utilised in accordance with sub section (3) of Section 50, the interest shall be calculated on the amount of input tax credit wrongly availed and utilised, for the period starting from the date of utilization of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount, at such rate as may be notified under said sub-section (3) of Section 50.

Explanation.-For the purposes of this sub-rule, -

(1) Input tax credit wrongly availed shall be construed to have been utilised, when the balance in the electronic credit ledger falls below the amount of input tax credit, wrongly availed and the extent of such utilisation of Input Tax credit shall be the amount by which the balance in electronic credit ledger falls below the amount of input tax credit wrongly availed.

(2) the date of utilisation of such input tax credit shall be taken to be, -

(a) the date, on which the return is due to be furnished under section 39 or the actual date of filing of the said return, whichever is earlier, if the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, on account of payment of tax through the said return; or

(b) the date of debit in the electronic credit ledger when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, in all other cases.]

1. Inserted vide Notification No. 14/2022-CT dated. 05.07.2022 w.e.f. 01.07.2017.

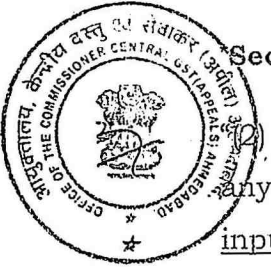
Section 122. Penalty for certain offences.-

(1) 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 willful 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;”

6.19 In this regard, the judgment of Hon'ble Supreme Court in case of the Collector of Central Excise, Calcutta V/s Pradyumna Steel Ltd. arising out of SLP (Civil) in 18531 of 1995 decided on 19-01-1996, wherein it is mentioned that :

“3.It is settled that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power. Thus there is a clear error



apparent on the face of the Tribunal's order dated 23.06.1987. Rejection of the application for rectification by the Tribunal was therefore contrary to law".

6.20 The above judgment of wrong quoting of provisions is applicable in the present case. Therefore I find that the impugned order demanding wrongly availed and utilised ITC claimed under TRAN-2, under the provisions of Section 73(1) of the CGST Act, 2017 along with interest under Section 50(3) of the CGST Act, 2017 penalty under Section 122(2)(a) of the CGST Act, 2017, is legal and proper.

7. In view of above discussions, the impugned order passed by the adjudicating authority is upheld.

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

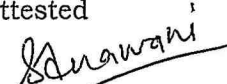
The appeal filed by the appellant stands disposed of in above terms


28/02/2024

(ADESH KUMAR JAIN)
JOINT COMMISSIONER(Appeals)
CGST & C.Ex., AHMEDABAD.

Date: .02.2024.

Attested


(Sunita D. Nawani)
Superintendent,
CGST & C.Ex.,
(Appeals), Ahmedabad



By R.P.A.D.

To:

M/s. CYGNET ENTERPRISE PRIVATE LIMITED
4th Floor, 16, Swastik Society, Near Stadium Circle,
Navrangpura, Ahmedabad, Gujarat, 380009
(GSTIN-24AADCC1450E1ZB)

Copy to:

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

