



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015



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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/29/2023 -APPEAL / 5704 - 5710

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-CGST-002-APP-JC-47/2023-24

दिनांक Date : 24-08-2023 जारी करने की तारीख Date of Issue : 05-09-2023

श्री आदेश कुमार जैन संयुक्त आयुक्ता (अपील) द्वारा पारित

Passed by Shri. Adesh Kumar Jain, Joint Commissioner (Appeals)

ग Arising out of Order-in-Original No. GST/05/Dem/AC/2022-23/HNM DT. 12.08.2022 issued by The Assistant Commissioner. CGST & C.Ex., Divison-II, Ahmedabad North Commissionerate.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

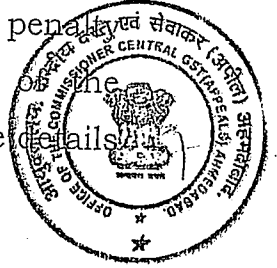
Respondent	Appellant
M/s. Shree Krishna Induction Pvt. Ltd., Corporate office, D-723, BG Tower, Opp. Delhi Darwaja, Shahibaug, Ahmedabad	The Assistant/ Deputy Commissioner, CGST & C.Ex. Division-II, Ahmedabad North Commissionerate

- (A) इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के रामक्ष 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 AP1 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 AP1 05 online.
- (i) Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying
(i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant, and
(ii) A sum equal to twenty five per cent of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order in relation to which the appeal has been filed.
- (iii) 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 दायर करने के लिए, अपीलकर्ता विभागीय वेबसाइट www.cbic.gov.in पर अपील दायर कर 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:**

The following appeal has been filed by the Assistant Commissioner, CGST & C.Ex.Division-II Ahmedabad-North Commissionerate (herein after referred to as the "appellant" / "department") in terms of Review Order issued under Section 107(2) of the CGST Act, 2017 (hereinafter referred as "the Act") by the Reviewing Authority i.e the Commissioner, CGST & C.Ex., Ahmedabad-North Commissionerate against the GST DRC-07 No.GST/05/Dem/AC/2022-23/HNM dated 12-08-2022 (herein after referred as the "impugned order"), as mentioned below, passed by the Assistant Commissioner, CGST & C.Ex. Division -II, Ahmedabad-North Commissionerate (herein after referred as the "adjudicating authority") in the case M/s. Shree Krishna Induction Pvt. Ltd., (GSTIN-24AAOCS3542E1ZF) Corporate Office - D-723, BG Tower, Opp. Delhi Darwaja, Shahibaug, Ahmedabad, Factory - Plot No.3086, 3087, 3088, GIDC-Phase-III, Chhatral, Kalol, Dist.-Gandhinagar (hereinafter referred to as the "respondent") for modification of interest by re-computing the same on delayed payment of TAX (Gross Tax paid through Cash and ITC), imposition of Penalty under Section 73(9) and 73(11) of CGST/GGST Act, 2017 read with Section 20 of the IGST Act, 2017 on the Respondent and imposition of appropriate penalty on Shri Vikash, Director of the Respondent under Section 137 of the CGST/GGST Act, 2017 read with Section 20 of the IGST Act, 2017. The details are as under:

**TABLE -A:**

Sl. No	Appeal Number	File	Date of filing of appeal	Order-in-Original (Impugned Order) No. & Date / No. & Date	Tax Period	Orders reviewed under Review Reference (Impugned Review Order) No. & Date	Amount of Tax and Interest paid.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	
1	V/02-03/ Appeal/GST/ Shri Krishna/ 22-23		27.01.20 23	GST/05/Dem/ AC/2022- 23/HNM dated 12-08-2022	January- 2018 to December- 2018	19/2022-23 dated 08- 12-2022	Rs.159,55,889/- TAX Rs.654,247/- Interest.

2. Brief facts of the case: The "Respondent" registered under [GSTIN: 24AAOCS3542E1ZF] is a private Ltd. Company and engaged in the activities of manufacturing and supply of Metal Alloy Casting (HSN-73259920). The DGGI during inspection of documents conducted at the factory premises of the respondent has found that they had charged and collected GST from their Customers/Client but had not deposited the same with the Govt. Ex-Chequer. Though they had filed GSTR-1 Returns for the period January-2018 to

December-2018, but they had not discharged GST Liability for the said period and also not filed the GST-3 B Returns. Therefore, the respondent was issued SCN for:

(1) GST amount of Rs.1,59,55,889/- (CGST-Rs.14,47,371/-, SGST-Rs.14,47,371/-, and IGST Rs.1,30,61,146/-) for the period from January-2018 to December-2018 collected but not paid for making outward taxable supplies declared in their GSTR-1M returns which should not be demanded and recovered from them under Section 73(1) of the CGST Act, 2017 read with Section 73(1) of Gujarat GST Act, 2017 read with section 20 of the IGST Act, 2017,

(2) GST amount of Rs.1,59,55,889/- paid during investigation and reflected in GSTR-3B for the months from January-2018 to December-2018 should not be appropriated against their GST Liability mentioned at (i) above,

(3) Interest at applicable rates should not be demanded and recovered from them under Section 50 of the CGST Act, 2017 read with Section 50 of Gujarat GST Act, 2017 read with section 20 of the IGST Act, 2017,

(4) Interest of Rs.6,54,247/- paid by them vide DRC-03 dated 25-07-2020, 04-08-2020 and 25-06-2021 should not be appropriated against their interest liability,

(5) Penalty should not be imposed upon them under Section 73(9) and 73(11) of the CGST Act read Section 73(9) and 73(11) of the GGST Act,

(6) Penalty should not be imposed upon them under Section 122(1)(iii) of the CGST Act, 2017 read with Section 122(1)(iii) of the Gujarat GST Act, 2017 read with section 20 of the IGST Act, 2017 for collecting tax but not depositing to the Government beyond a period of three months from the date on which such payment becomes due,

(7) Penalty should not be imposed upon them under Section 122(2)(a) of the CGST Act, 2017 read with Section 122(2)(a) of the Gujarat GST Act, 2017 read with section 20 of the IGST Act, 2017 for non-payment of the declared GST Liabilities,

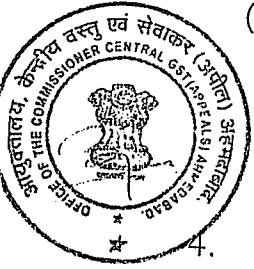
(8) Penalty should not be imposed upon Shri Vikash Asawa, Director of the Respondent for indulging into offence of the nature as prescribed under Section 137 of the CGST Act, 2017 read with Section 137 of the Gujarat GST Act, 2017 read with section 20 of the IGST Act, 2017.

3. The Adjudicating Authority vide Order-in-Original No.GST/05/Dem/AC/2022-23/HNM dated 12.08.2022 has ordered as under:

- (i) To Confirm the GST amount of Rs.1,59,55,889/- (CGST - Rs.14,47,371/-, SGST- Rs.14,47,371/-, and IGST Rs.1,30,61,146/-) not paid by them for making outward supplies during the period January-2018 to December-2018 declared by them in GSTR-1M



- Returns, and to be recovered from the Respondent under Section 73(1) of the CGST Act, 2017 read with 73(1) of the Gujarat GST Act, 2017 read with section 20 of the IGST Act, 2017,
- (ii) To appropriate the GST amount of Rs.1,59,55,889/- (CGST - Rs.14,47,371/-, SGST- Rs.14,47,371/-, and IGST Rs.1,30,61,146/- paid during investigation by the Respondent against the confirmed GST Liability as at (i) above,
 - (iii) to charge Interest amounting to Rs.6,54,247/- and should be recovered from the Respondent under Section 50 (1) of the CGST Act, 2017 read with Section 50 (1) of GGST Act, 2017 read with section 20 of the IGST Act, 2017 on GST Liability mentioned at (i) above,
 - (iv) To appropriate Interest of Rs.6,54,247/- paid by them vide DRC-03 dated 25-07-2020, 04-08-2020 and 25-06-2021 against their interest liability mentioned at (iii) above,
 - (v) Not to propose Penalty upon the Respondent under Section 73(9) and 73(11) of the CGST Act read with 73(9) and 73(11) of the GGST Act read with section 20 of the IGST Act, 2017,
 - (vi) Not to impose Penalty upon the Respondent under Section 122(1)(iii) of the CGST Act, 2017 read with Section 122(1)(iii) of the GGST Act, 2017 read with section 20 of the IGST Act, 2017
 - (vii) Not to impose Penalty upon the Respondent under Section 122(2)(a) of the CGST Act, 2017 read with Section 122(2)(a) of the GGST Act, 2017 read with section 20 of the IGST Act, 2017 for non-payment of the declared GST Liabilities,
 - (viii) Not to impose Penalty upon Shri Vikash Asawa, Director of the Respondent for indulging into offence of the nature as prescribed under Section 137 of the CGST Act, 2017 read with Section 137 of the GGST Act, 2017 read with section 20 of the IGST Act, 2017.



4. Being aggrieved with the impugned order the appellant department filed the present appeal on 16.01.2023 on the grounds that:

As regards to interest on delayed payment of Tax:

- (1) The adjudicating authority has erred in taking view to the effect that interest on delayed payment of GST was applicable towards portion of Tax paid by cash only (Net cash Liability basis only) not on tax paid by ITC as per proviso to Section 50(1) of the CGST Act, 2017 read with Section 50(1) of the Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017,
- (2) The Adjudicating authority has failed to consider that the GST Payment were made by the Said Tax Payer only after initiation of Inspection of records/investigation conducted by the Departmental Officers before furnishing the return GSTR-3B under the provisions of Section 39 and payment of Tax, which amounts to commencement of proceedings under Section 73 of the Act. Hence the interest needs to be charged on delayed payment of gross tax (paid through Cash and ITC) in terms of provisions of Section 50(1) of the Act and the dispute regards computation of interest in the present case correctly need to be adjusted,

- (3) The adjudicating authority has failed to consider the decision of the Hon'ble Jharkhand High Court in case of Mahadev Construction as reported in 2020 (36) GSTL 343 (Jhar) as relied in SCN,
- (4) In a similar case regarding interest on belated payment of Tax, the decision of Hon'ble High Court of Madras in case of SRINIVASA STAMPINGS AS REPORTED IN 2022 (61) GSTL 411 (Mad.) is applicable to the facts of present case, hence interest on delayed payment of tax is required to be charged towards gross tax,
- (5) The adjudicating authority has erred in considering that the self assessed tax is only as per the return furnished under Section 39 of the Act and there was no delay in discharging tax liability and self assessment of tax. The legal provisions of the act have been wrongly interpreted by the adjudicating authority. The adjudicating authority has failed to check the applicability of interest towards delayed payment of gross tax in terms of the provisions of Section 50(1) of the Act, and subsequently failed to consider the short payment of interest,
- (6) The Respondent is not eligible for payment of interest on delayed payment of Tax towards Net Cash payment portion only, therefore the interest liability needs to be re-calculated towards gross payment of tax which amounts to Rs.12,66,269/-,
- (7) Thus the amount of interest needs to be modified by re-computing the same on Gross Tax Liability in terms of provisions of Section 50(1) of the CGST Act, 2017 read with Section 50(1) of the Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017.



As regards penalty Under Section 73(9) and 73(11) of the CGST Act read with 73(9) and 73(11) of the GGST Act read with section 20 of the IGST Act, 2017 :

- (1) The adjudicating authority has erred in taking view to the effect that the Respondent had discharged their GST liability along with interest and there was no loss to the Govt. Exchequer hence penalty under Section 73(9) and 73(11) of the CGST Act read with 73(9) and 73(11) of the Gujarat GST Act read with section 20 of the IGST Act, 2017 was not sustainable and dropped the penalty,
- (2) The adjudicating authority has failed to consider that the Respondent had not paid applicable interest in full, in terms of Section 50(1) of the CGST Act, 2017 read with Section 50(1) of the Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017 towards delayed payment of Tax (Gross Tax). Once the tax due along with interest is not paid within due time, the provisions of section 73(9) is precisely applicable,
- (3) Thus the adjudicating authority has failed to apply the provisions of Section 73 of the Act as the same is precisely applicable in the present case simultaneously penalty in terms of Section 73(9) and 73(11) of the CGST Act read with 73(9) and 73(11) of the Gujarat GST read with section 20 of the IGST Act, 2017 would be applicable,

As regards penalty under Section 137 of the CGST Act, read with Section 137 of Gujarat GST Act, 2017 read with the IGST Act, 2017, on Shri Vikash Asawa, Director of the Respondent:

The adjudicating authority has failed to consider the omission or failure on the part of Shri Vikash Asawa, Director of the Respondent as there was a clear charge/allegation in the SCN which proposed to penalize him but the adjudicating authority has failed to discuss the same. The Director was at the helm of affairs of his Company (Respondent) resulting into such acts of non-payments of GST Liability and the contravention as discussed in notice. Further in his statement dated 11-06-2021, he had assumed responsibility for the non-payment of GST. Thus he had indulged in an offense of the nature as prescribed under Section 137 of the CGST Act, read with Section 137 of Gujarat GST Act, 2017 read with the IGST Act, 2017. Therefore an appropriate penalty needs to be imposed on Shri Vikash Asawa, Director of the Respondent under Section 137 of the CGST Act, read with Section 137 of Gujarat GST Act, 2017 read with the IGST Act, 2017.

In view of the above, the Appellant Department has prayed, to set aside the Order No.GST/05/Dem/AC/2022-23/HNM dated 12-08-2022 passed by the Assistant Commissioner, CGST & C.Ex., Division-II Ahmedabad-North Commissionerate with extent to:

- (i) Modify the Interest amount of Rs.6,54,247/- by re-computing the same as 19,20,516/- on delayed payment of Tax (Gross paid through Cash and ITC) in terms of provisions of Section 50(1) of the CGST Act, 2017 read with Section 50(1) of the Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017, and order recovery of short payment of Interest of Rs.12,66,269/- (Rs.19,20,516/- minus 6,54,247/-) in terms of provisions of Section 50(1) of the CGST Act, 2017 read with Section 50(1) of the Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017,
- (ii) Imposition of Penalty upon the Respondent Taxpayer under the provisions of Section 73(9) and 73(11) of the CGST Act read with 73(9) and 73(11) of the Gujarat GST Act read with section 20 of the IGST Act, 2017,
- (iii) Imposition of appropriate penalty on Shri Vikash Asawa, Director of the Respondent Taxpayer under Section 137 of the CGST Act, read with Section 137 of Gujarat GST Act, 2017 read with the IGST Act, 2017 read with section 20 of the IGST Act, 2017.

To pass appropriate order under sub section (11) of Section 107 of the CGST Act, 2017 as deemed fit in the interest of justice.

5. CROSS EXAMINATION FILED BY RESPONDENT:

The Grounds of Submission by the Respondent are as under:

The respondent filed written submission - Memorandum on cross examination dated 18-07-2023 wherein they submitted that :

- The delay in payment of Tax has invited the issue of payment of interest. GST of Rs.1,59,55,889/- as calculated by the Department in the Show Cause Notice was discharged by the Respondent during investigation itself and prior to Issuance of SCN dated 30-06-2021, issued under Section 74 of the CGST Act, 2017,
- There is no dispute w.r.to quantification of GST amount been discharged by the Respondent,
- Tax was paid and returns were filed before commencement of proceedings under Section 73 of the Act, hence demand of interest and penalty on gross amount is bad in law,
- The Company has declared its tax liability in GSTR-1 filed under Section 37 of the CGST Act. Total Liability for the tax period January-2018 to December-2018 was Rs.1,59,55,889/-(CGST -Rs.14,47,371/-, SGST-Rs.14,47,371/-, and IGST Rs.1,30,61,146/-). Further, during the investigation proceedings itself, the Respondent has discharged their Tax Liability suo moto by filing delayed GSTR 3B as per Rule 61 of the Act. They had filed GSTR-1 and later on by filing GSTR 3B, they discharged their Tax liability before issuance of Show Cause Notice under Section 73 of the GST Act.
- Vide clause 100 of the Finance Act, 2019, the Central Government amended section 50 Of the CGST Act, to insert a proviso allowing payment of interest on liability paid in cash.

100. Amendment of section 50. — In section 50 of the Central Goods and Services Tax Act, in sub-section (1), the following proviso shall be inserted, namely :-

“Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.”

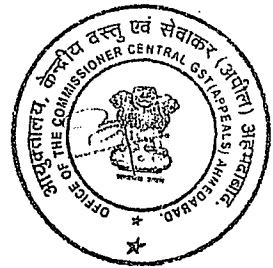
- In the case of M/s Reflex Industries Ltd. V. Asssitant Commissioner of CGST & Central reported at 2020(2) TMI 794, Hon'ble Madras High Court held that above proviso shall have retrospective effect w.e.f. 01-07-2017.
- Accordingly vide Notification No. 16/2021 CT dated 01-06-2021 aforesaid retrospective amendment was notified.
- The benefit of interest on net tax liability is available only when the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section except, where such return is furnished after commencement of the said period shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.



- As per the proviso to Section 50(1) , it is clear that commencement of proceedings under Section 73 or Section 74 meaning thereby, issuance of show cause notice prior to filing of returns/payment of tax would make assessee ineligible to claim benefit of payment of Net Tax over Gross Tax.
- The provision of Section 67, 68, 69,70, 73 and 74 have been elaborated.
- Issuance of SCN under Section 73 or 74 is an independent step which in itself is commencement of adjudication process. It is a mandatory requirement for raising any demand under GST Act, except payment of interest u/s 50 and assessment of non-filer of returns u/s 62 of the Act.
- In the case of M/s Sumilon Polyester limited vs. Union of India, 2022(9) TMI – Hon'ble Gujarat High Court, all the petitioners in this case have paid GST belatedly. Once the tax is paid lately, the interest liability is automatic. The Revenue demanded interest on delayed payment of tax under the provisions of CGST Act by calculating interest on the gross GST Liability instead of net liability as per Section 50(1) of the CGST Act. Challenged the decision of the Revenue, these writ petitions have been filed before the Hon'ble High Court.
- The Hon'ble High Court held that in view of the submissions made by the petitioner, the petition becomes infructuous in view of the amendment brought to Section 50(1) of the CGST Act, by substituting the proviso with effect from 01-07-2017 as per Section 112 of the Finance Act, 2021 and disposed the writ petitions. The Hon'ble High Court directed the Revenue to give effect to the amendments to Section 50(1).
- In the case of Kushal Ltd. Vs.UOI reported at 2020(34) GSTL 203(Guj) on the issue of Bank attachment under Section 83, Hon'ble High Court of Gujarat viewed that :

“12. In the present case, since the premises of the petitioners came to be searched, the provisions of sub-section (2) of Section 67 of the GST Acts would be attracted. In terms thereof, pursuant to an authorisation issued in this behalf, the proper officer may search the premises in respect of which the search is authorised and seize goods, documents or books or things and retain the documents or books or things so long as may be necessary for any inquiry or proceedings under the Act. In the present case, search proceedings were conducted at the premises of the petitioners on 27-9-2018. Thereafter, there was a visit by the respondents on 1-4-2019 which led to the arrest of the second petitioner. Thereafter, no search has been conducted at the premises of the petitioners. The search proceedings have, therefore, ended. It is the case of the respondents that proceedings under Section 67 of the GST Acts are not yet completed and the matter is still under investigation. In the opinion of this court, it may be that pursuant to the search, inquiry or other proceedings under the Act may have been undertaken; however, such inquiry or other proceedings are not under Section 67 of the GST Acts and hence, it cannot be said that any proceedings are pending under Section 67 of the GST Acts.”

- In the present case the whole basis of levy of demand, interest and penalty under Section 74(1) of CGST Act, 2017 of CGST Act, 2017 is non filing of returns viz, GSTR-1 and GSTR-3B.
- As per Section 62(1) of the CGST Act, Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, notice under Section 46 needs to be issued by the proper officer.



- However, in the present case, notice is issued by the officer upon the Respondent for non-filing of GSTR-1 and GSTR-3B for the period August – 2019 to December-2019 under Section 67 of the CGST Act, 2017 on 16-01-2020 following which SCN is issued under Section 74(1) of the GST Act, instead of proceedings under Section 62 of the GST Act for non-filing of Returns.
- That as per Section 62 (2) where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of late fee under Section 47 shall continue, meaning thereby on filing of returns within 30 days from the assessment order, the said order would be withdrawn on further payment of interest under Section 50 of the CGST Act.
- Case law of Jay Mathews Vs UOI reported in 2020-VIL-753-KER cited as under:

“On a plain reading of section 62(2), it is not in doubt that whenever an assessee fails to file a return and assessing officer is required to send the assessment order in terms of provisions section 62(1) of the act but, there is a caveat in terms of provisions under section 62(2) where on receipt of such information was received by the petitioner file returns within 30 days. There could not have been an occasion for issuing of recovery notice as assessment orders work in law required be withdrawn play appears an apparent error and omission on the part of the revenue is not adhering to the fact referred for the. For the reasons efforts aforementioned recovery notice are liable to set aside. Petition is allowed.”

- That only return needs to be filed along with payment of interest but there is no provision for imposition of penalty. Hence, imposition of penalty under Section 74(1) is not in consonance with the scheme of CGST Act, 2017. On this ground alone, show cause notice dated 30.06.2021 and impugned order dated 12.08.2022, needs to be set aside.
- Explanation II of Section 74 of CGST act, 2017 defines suppression to cover the - non declaration of facts - non declaration of information. Hence, penalty as proposed by the Appellant is not payable.

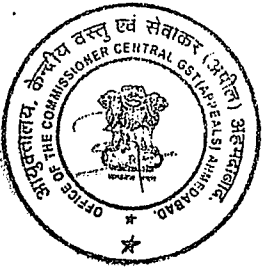
PRAYER OF THE RESPONDENT TO LEVY PENALTY UNDER SECTION 73 OF THE CGST ACT IS ILLEGAL AND BAD IN LAW.

- It is submitted that invocation of Section 73(9) is baseless and unfounded. Company has discharged its tax liability through GSTR 3B returns along with interest under Section 50 through DRC-03 Challans. It may kindly be noted that, payment of tax liability and interest has been discharged prior to issuance of impugned show cause notice. We have also informed the same to the office of DGGI, Ahmedabad in reply to their pre consultation DRC-01 A intimation dated June 14, 2021, through our letter dated June 29, 2021, annexed as "Annexure-4" to this reply. Therefore, issuance of show cause notice after the payment has been made becomes illegal.
- As per the excerpt in Section 73(5) and (6), it is clear that once the taxable person has paid its entire tax liability along with due interest as per Section 50 of the Act and has informed the officer about the same,



officer cannot issue show cause notice under section 73(1) of the Act. Therefore Section 73(9) cannot be imposed, and issuance of impugned show cause notice was infructuous. Considering above submission, demand of penalty by the appellant is invalid.

- Further Section 73(11) can only be imposed only when self-assessed tax or any amount collected as tax has not been paid within thirty days from the due date of payment of such tax.
- Self-assessed finds its mention in Section 59 of the Act, which states- "59. Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39."
- Therefore, it is clear that the self-assessed tax is only as per the return furnished under Section 39 of the Act. As per Rule 61 of CGST Rules, Form GSTR3B has been categorised as the return for the purpose of Section 39 of the Act. It may kindly be noted that company has discharged its tax liability immediately at the time of filing its GSTR 3B returns. Therefore, there is no delay in discharging tax liability and self-assessment of tax. Hence, impugned notice issued after making entire payment becomes illegal and baseless and allegation of the applicant is untenable.
- Further, without prejudice to above submission, the Respondent has submitted that business was going through hardships and inspite of raising invoices to its customers, company was not able to collect the invoiced amount on time. Due to such issues with respect to business cash flow company incurred substantial financial loss and was not even able to carry out its day-to-day operations. Since there was delay in collecting invoiced amount from the customers, company could deposit tax amount only after inordinate delay and that unfortunately happened to be after the inspection at company's premises. This is to note that, Company kept on submitting its GSTR 1 and declared its liability timely. Therefore, it is clear that default on the part of company was misfortunate and unintentional.
- It is settled legal principle that penalty cannot be imposed in the absence of mens rea. Unless there is mens rea (i.e. guilty mind/act done with wrong intention) present, the penalty cannot be imposed. In the instant case, none of the matters in dispute can be said to be related to done either with the guilty mind or with the wrong intentions. Hence, the penalty should not be levied in the instant case. The Judgements in case of M/s Hindustan Steel Ltd. Vs the state of Orissa (AIR 1970(SC)253), M/s Bansal Alloys & Metals Pvt. Ltd. Vs Union of India (2010(260) ELT 343(P&H) quoted .
- Unless there is mens rea (i.e., guilty mind/ act done with wrong intention) present, the penalty cannot be imposed. In the instant case, none of the matters in dispute can be said to be related to done either with the guilty mind or with the wrong intentions. Hence, the penalty should not be levied in the instant case.
- Further, considering the submissions made in the points above, there is no unpaid liability of tax, interest or penalty on the company since all the liabilities have already been disposed. Therefore, we humbly submit



before you that claim of the appellant to impose penalty under section 137 on Director of the company may kindly be rejected.

Based on the above-mentioned statement of facts and grounds, it is prayed that in the interest of equity and justice, this appeal may kindly be quashed, and case must be dropped in light of the legal provisions.

Personal Hearing :

6. Personal hearing in the present appeal was held on 19.07.2023. Ms. Madhu Jain, Advocate appeared virtually on webex on behalf of the Respondent. During P.H. she reiterated the written submission that the amount of interest is payable only on Cash portion as per Section 50 of the Act and that before issuance of SCN, payment is made. As Taxes, interest and dues have been paid before issuance of SCN, therefore, penalty under Section 137 is not imposable.

DISCUSSION AND FINDINGS:

7. I have carefully gone through the facts of the case, grounds of appeal, submissions made by the "appellant" department in their appeal memorandum and cross examinations / submissions made by the respondent in the instant case.

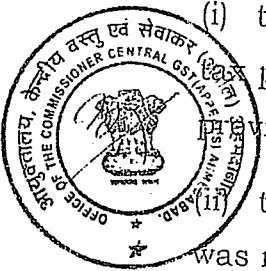
7.1 I find that the present appeal is filed by the Department to set aside the impugned order on the grounds that the adjudicating authority has erred in taking view to the effect that:

(i) the interest on delayed payment of GST was applicable towards portion of tax paid by Cash only (net Cash Liability basis) not on tax paid by ITC as per proviso to Section 50(1) of the CGST/GGST Act, 2017.

(ii) the Penalty under Section 73(9) and 73(11) of the CGST/GGST Act, 2017 was not sustainable as the Respondent had discharged their GST Liability with Interest and there was no loss to the Govt. Exchequer.

(iii) the penalty on the Director of the Respondent was not applicable by simply mentioning that the provisions of section 137 of the CGST/GGST Act, 2017 in the instant case are not applicable.

7.2 It is observed that The "respondent" is registered under [GSTIN-24AAOCS3542E1ZF] is a private Ltd. Company engaged in the activities of manufacturing and supply of Metal Alloy Casting (HSN-73259920). The DGGI during inspection of documents conducted at the factory premises of the respondent has found that they had charged and collected GST from their Customers/Client but had not deposited the same with the Govt. Ex-Chequer. Though they had filed GSTR-1 Returns for the period January-2018 to



December-2018, but they had not discharged GST Liability for the said period amounting to Rs.1,59,55,889/- and also not filed the GSTR 3B Returns.

7.3 During the course of Investigation, Shri Vikash Asawa Director of the Respondent in his statement dated 11-06-2021 had admitted the fact of non-payment of GST Of Rs.1,59,55,889/- for the period January-2018 to December-2018. The Respondent have discharged the GST Liability of Rs.1,59,55,889/- and filed all the corresponding outstanding returns for the period January-2018 to December-2018. Further, they have paid the interest of Rs.6,54,247/- towards partial payment of interest liability. They further informed that they would like to contest the demand and would like to receive the Show Cause Notice under Section 73(1) of the CGST/GGST Act, 2017 read with section 20 of the IGST Act, 2017.

7.4 I find that there is no dispute regarding the demand in the present case. However, the dispute is with regard to the charging of interest and imposition of penalty.

7.5 Therefore, I refer to the relevant provision of Section 50(1) of the CGST Act, 2017 with regard to interest, which is reproduced as under:

Section 50. interest on delayed payment of tax –

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part there of remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent, as may be notified by the Government on the recommendations of the Council.

Subsequently, amendments were made in Section 50 vide F.A (NO.2), 2019 and Further vide F.A. 2021 and the amended provision was given effect from 01.07.2017. The amended provisions are reproduced below:

SECTION 50. Interest on delayed payment of tax. –

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

[Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be payable on that portion of the tax that is paid by debiting the electronic cash ledger.

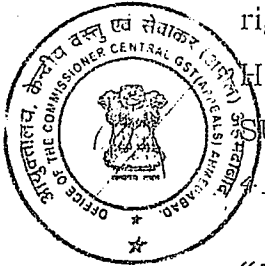
The above provisions were made effective with effect from 1st July, 2017 vide Finance Act, 2021”.

7.6 From the plain reading of the above Section 50 (as amended), it is clear that the interest under Section 50 of the CGST Act, 2017 can only be levied on the net tax liability and not on the gross tax liability where the supplies made during the tax period are declared in the return after the due date. However, where such returns are furnished after commencement of any proceedings under Section 73 or Section 74 in respect of said period, then interest shall be payable on the entire amount of delayed debit/payment.

7.7 In the instant case, I find that for the period January-2018 to December-2018, the GSTR 3B returns were filed by the Respondent after initiation of investigation. Thus, the tax payments for these period as well as the statutory returns were filed subsequent to initiation of investigation but before issuance of SCN under Section 73 of the GST Act, 2017. Therefore, in terms of amended Section 50 of the GST Act, vide The Finance Act 2021 (No. 13 of 2021), which was given retrospective effect w.e.f. 01-07-2017 vide Notification No. 16/2021-CT, dated 01-06-2021, the interest shall be payable only on the net cash tax liability (i.e. that portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger).

7.8 The judgment dated 21-04-2020 quoted by the Department has been rightly quoted regarding interest on belated payment of tax, wherein the Hon'ble High Court of Madras in case of SRINIVASA STAMPINGS Versus SUPERINTENDENT OF GST & C. EX., HOSUR reported in 2022 (61) G.S.T.L. 11 (Mad.) held that:

“18. However, the important issue for consideration in the instant writ application is the interpretation of the provisions of Section 73 of the Act. A bare reading of Section 73(1) of the Act reveals that where it appears to the Proper Officer that “any tax has not been paid or short paid” the Proper Officer shall serve notice on the person chargeable with tax, “which has not been so paid” or “which has been short paid” 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 of the Act and a penalty leviable under the provisions of the Act and Rules. Thus, a bare reading of Section 73(1) would reveal that if tax has not been paid or has been short paid, a notice is required to be served by the Proper Officer on the assessee not only requiring him to show cause as to why tax be not recovered from it, but also specifying in the notice the interest payable under Section 50 also to be recovered along with penalty. Thus, if there is a short payment of tax or non-payment of tax, a notice is required to be issued even for recovery of interest under Section 50 of the CGST Act.



20. This Court, while interpreting the term "tax not paid" has held that if a tax has not been paid within the prescribed period, the same would fall with the expression "tax not paid" as mentioned under Section 73 of the CGST Act. The aforesaid interpretation further finds support from other sub-sections of Section 73, particularly sub-sections (5), (6) and (7) of Section 73. A bare reading of the aforesaid sub-sections (5), (6) and (7) of Section 73 would reveal that a person chargeable with tax, if before service of notice pays the amount of tax along with interest payable thereon under Section 50 of the Act on the basis of his own ascertainment, then the Assessing Officer, if satisfied that correct tax along with interest has been paid by the said assessee, shall not issue any notice under Section 73(1) of the Act. However, Section 73(7) of the Act provides that if an assessee, who has itself on his own ascertainment, deposited the tax along with interest, but if in the opinion of the Proper Officer, the amount paid on own ascertainment falls short of the amount actually payable, then a notice would be issued by the said Proper Officer under Section 73(1) of the Act for recovery of the actual amount payable. Thus, from a conjoint reading of the aforesaid provisions, it would be evident that even in a case where an assessee files his return as per his own ascertainment, pays the tax and even pays interest, but if the said amount paid by the assessee is falling short of the amount actually payable, the Proper Officer is required to initiate proceedings under Section 73(1) for recovery of the said amount of tax and interest. The natural corollary of the above interpretation is that if an assessee has allegedly delayed in filing his return, but discharges the liability of only tax on his own ascertainment and does not discharge the liability of interest, the only recourse available to the Proper Officer would be to initiate proceedings under Section 73(1) of the CGST Act for recovery of the amount of "short paid" or "not paid" interest on the tax amount.

It is not a true that liability of interest under Section 50 of the CGST Act is automatic, but the said amount of interest is required to be calculated and intimated to an assessee. If an assessee disputes the liability of interest i.e. either disputes its calculation or even the leviability of interest, then the only option left for the Assessing Officer is to initiate proceedings either under Section 73 or 74 of the Act for adjudication of the liability of interest."

7.9 Thus it is settled that for any non-payment/short payment and dispute with regard to liability of interest under Section 50 of the GST Act, 2017, a show cause notice is required to be issued. Therefore, the contention of the Respondent that Officer cannot issue Show Cause Notice under Section 74(1) of the Act and the impugned show cause notice was infructuous, is not tenable. Here the Respondent contests about the SCN under Section 74(1) of the GST Act, which is not so. Thus, the Show Cause Notice issued under Section 73(1) of the GST Acts, is legal.

7.10 Further, the judgement dated 08-04-2022 quoted by the Department regarding interest on belated payment of tax, the Hon'ble High Court of Madras in case of SRINIVASA STAMPINGS Versus SUPERINTENDENT OF GST & C. EX., HOSUR reported in 2022 (61) G.S.T.L. 411 (Mad.) held that:

"16. Since tax was paid by the petitioner belatedly, petitioner is liable to interest during the period default. There was no excuse for not paying the

tax in time from its electronic cash register. Nothing precluded the petitioner from discharging the tax liability from its electronic credit.

17.If there is a belated payment of tax declared in the returns filed, interest has to follow. The petitioner has to pay the interest on the belated payment of tax and as has been demanded. Even where there is a failure to file returns or circumstances specified under Sections 73 and 74 of CGST Act, 2017, interest has to be paid.

18.There is therefore no merits in the present writ petition. Therefore, this writ petition deserves to be dismissed. Accordingly, it is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.”

7.11 The above judgment seems to be not applicable in the present case, as the interest has been paid by the Respondent. The only dispute is of the interest payment on gross amount rather than amount that was paid through electronic cash ledger, which has already been discussed above.

7.12 From the foregoing, I am of the view that the demand of interest on the delayed payment of GST on the gross amount, is not legally sustainable.

7.13 Further for determination of penalty, I refer the provisions of the following Section:

‘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.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.



(5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

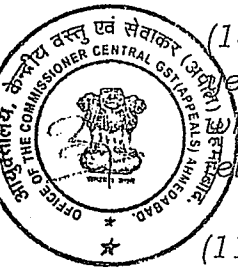
(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax."

7.14 I find that the Respondent had collected the Tax for the period January-2018 to December-2018 but not paid the same to the Government Ex-Chequer till 05-03-2019 i.e. the Respondent started filing GSTR 3B Returns for the month of January-2018 onwards from 05-03-2019 till December-2018 by 18-06-2019. Therefore the Act of the Respondent falls under Section 73(9) of the GST Act, 2017. The proper officer has to determine the tax not paid or short paid along with interest and penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order. The said penalty according to Section 73(11) of the GST Act, 2017 shall be payable where any amount of self assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such Tax. Here in this case, the Respondent has not paid the amount collected as tax within a period of thirty days from the due date of payment as is evident



from the Show Cause Notice/Impugned Order and the interest paid by them on belated payment of GST.

7.15 Further, the judgments quoted with regard to Penalty imposed, to prove Mens-rea, are not relevant here as the demand along with interest and penalty has been issued under Section 73 of the CGST/GGST Act, 2017.

7.16 I find that the adjudicating authority has neglected the fact that the Respondent Company had filed GSTR 3B Returns after the due date and discharged their GST liability belatedly along with interest which resulted in contravention of the provisions of Section 39 of the CGST Act, 2017 read with Rule 61 of the GST Rules, 2017 and Section 49 of the CGST Act, 2017. Further, the Respondent has also failed to self assess the Tax payable and furnish Return GSTR 3B in time for the period January-2018 to December-2018, resulting in contravention of Section 59 of the CGST Act, 2017. I am of the view that the adjudicating authority has erred in not imposing penalty under Section 73(9) read with 73(11) of the CGST Act read with 73(9) read with section 73(11) of the Gujarat GST Act read with section 20 of the IGST Act, 2017 considering there was no loss to the Govt. Exchequer. The provisions of Sections and the Rules made there under are for strict compliance by the Tax payers. As the same are not being followed in its true spirit, the Govt. has therefore penalized the acts which are found contrary to the provisions. Therefore, I am of the view that the penalty {amounting to Rs.15,95,589/- (10% of Rs.1,59,55,889/-)} under Section 73(9) and 73(11) of the CGST/GGST Act, 2017 read with Section 20 of the IGST Act, 2017 is imposable on the Respondent Company, who has contravened the provisions of Sections ibid of CGST/GGST Act, 2017 by not depositing the amount of Tax collected from their buyers, in time.



7.17 Further, with regard to penalty under Section 137, I refer the relevant provisions of the GST Act.

“Section 137. Offences by companies-

.....
(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly”.

7.18 Further, I refer instruction No. 04/2022-23 [GST – Investigation] dated 01-09-2022, issued by the CBIC wherein it has been stated that :

“ Prosecution is the institution or commencement of legal proceeding; the process of exhibiting formal charges against the offender.....

7.2 In case of filing of prosecution against legal person, including natural person:

7.2.1 “-----Section 137 (2) of the Act provides that where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Thus, in the case of Companies, both the legal person as well as natural person are liable for prosecution under section 132 of the CGST Act.”

7.19 From the above, I understand that, only when it is proved that the offence has been committed by a Company and proved with the consent or connivance of or is attributable to any neglect on the part of the director etc., deemed guilty of that offence and proceeded against, is punished accordingly. However, as per the records available and submissions made by the appellant department in the instant case, I have not come across any such proceedings initiated against the Respondent or the Director of the Respondent, therefore, the penalty under Section 137 of the GST Act, 2017 is not imposable, at this stage. Further, I find that no proceedings under Section 137 of the GST Act, 2017 have been initiated by the Department and neither adjudicating authority nor this appellate authority is the proper authority to initiate proceedings under Section 137 of the Act ibid and to impose punishment under Section 137. Therefore, I am not interfering to the impugned order passed by the adjudicating authority.

7.20 In view of the above, I allow the appeal filed by the Appellant Department partially as under:

- (i) uphold the order passed by the adjudicating authority with regard to appropriation of interest of Rs.6,54,247/- paid by the Respondent Company vide DRC-03 dated 25.07.2020, 04.08.2020 and 25.06.2021 on cash portion of the tax and reject

the Departmental appeal to charge interest on Gross amount of Tax paid.

- (ii) Impose penalty of 15,95,589/- (10% of Rs.1,59,55,889/-) under Section 73(9) & 73(11) of the CGST / GGST Act, 2017 read with Section 20 of the IGST Act, 2017.
- (iii) Uphold the order passed by the adjudicating authority with regard to not imposing of penalty on Shri Vikash Asawa, Director of the Respondent, under Section 137(2) of the CGST/GGST Act, 2017 read with Section 20 of the IGST Act, 2017.

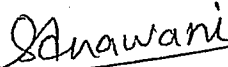
The order passed by the adjudicating authority is modified to the above extent.

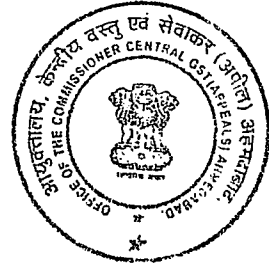
8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
8. The appeal(s) filed by the appellant department stand disposed of in above terms.


(ADESH KUMAR JAIN)
JOINT COMMISSIONER (APPEALS)

Attested

Date: .08.2023


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



By R.P.A.D.

To

The Assistant Commissioner, CGST & Central Excise, Division - II,
Ahmedabad-North, 3rd floor, Sahjanand Arcade, Near Helmet Circle,
Memnagar, Ahmedabad- 380052.

Copy to:

- 1.The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
- 2.The Commissioner, CGST & C.Excise, Appeals, Ahmedabad
- 3.The Commissioner, CGST & C.Ex, Ahmedabad-North, Commissionerate.
4. M/s. Shree Krishna Induction Pvt. Ltd., D-723, BG Tower, Opp Delhi Darwaja, Shahibaug, Ahmedabad.
- 5.The Additional Commissioner, Central Tax (System), Ahmedabad-North.
6. The Superintendent (Systems), CGST Appeals, Ahmedabad, for publication of the OIA on website.
7. Guard File/ P.A. File.



