



सत्यमेव जयते

आयुक्तकाकार्यालय  
Office of the Commissioner  
केंद्रीय जीएमटी, 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/2246/2023/S95k-60
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-CGST-002-APP-JC-54/2023-24 and 14.09.2023
(ग)	पारित किया गया / Passed By	श्री आदेश कुमार जैन, संयुक्त आयुक्त (अपील) Shri Adesh Kumar Jain, Joint Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	19.09.2023
(ङ)	Arising out of Order-In-Original No. CGST/WT0701/KVS/01/2022-23 dated 29.03.2023 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 Astha Creation (GSTIN: 24AATFA7005L1Z9), 5 <sup>th</sup> Floor, A-501, Narnarayan Complex, Swastik Society Cross Road, Ahmedabad-380009

(A)	इस आदेश(अपील) से ब्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी /प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(iii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying - (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant; and (ii) A sum equal to <u>twenty five per cent</u> of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> .



**ORDER-IN-APPEAL****BRIEF FACTS OF THE CASE:**

M/s. Astha Creation, 501, 5<sup>th</sup> Floor, Narnarayan Complex, Swastik Society Cross Road, Ahmedabad, Gujarat, 380009 [hereinafter referred to as "the appellant"] have filed an appeal dated 01-06-2023 against OIO No.CGST/WT0701/KVS/01/2022-23 dated 29-03-2023 [hereinafter referred to as "impugned order"] passed by the Superintendent, CGST & C.Ex., AR-I Division-VII, Ahmedabad-NORTH [hereinafter referred to the "adjudicating authority"]

2. Facts of the case in brief, are that the appellant is registered vide GSTIN 24AATFA7005L1Z9 is engaged in the business of supply of goods viz. cotton Bed Sheets and Bed Covers falling under HSN 6304. During the course of Audit, it was observed by the Department that the Appellant had failed to make payment to their suppliers within 180 days as per the provisions of Section 16(2)(d) of the CGST Act, 2017. Therefore, Input Tax availed on such supplies was required to be reversed as per Section 16(2) (d) of the CGST Act, 2017. The ITC availed on such supply is Rs.7,66,780/- (Rs.3,83,390/- CGST and Rs.3,83,390/- SGST). Therefore a Show Cause Notice was issued to the appellant as to why?

"(i) the GST amounting to Rs.7,66,780.00 (Rs.3,83,390.00. (CGST) + Rs.3,83,390 (SGST) reversed vide GSTR -3B of October, 2021) ([Rupees Seven Lakhs Sixty Six Thousand Seven Hundred Eighty only) should not be demanded and recovered from them, under the provisions of Section 74 (1) of the Act read with the provisions of Section 20 of the IGST Act;

the GST amounting to Rs.7,66,780.00 (Rs.3,83,390.00 (CGST) + Rs.3,83,390.00 (SGST), { Rupees Seven Lakhs Sixty Six Thousand Seven Hundred Eighty only) already paid by them should not be appropriated as demanded (i) above.

(iii) interest at the prescribed rates under the provisions of Section' 50(1) of the CGST Act, 2017 along with and the corresponding entry of the SGST Act, 2017, read with the provisions of Section 20 of the IGST Act, 2017 should not be demanded and recovered from them on tax demanded at Sr.No.(i) above.

(iv) penalty under the provisions of Section 74(1) of CGST Act, 2017 read with Section 122(2)(b) of CGST Act, 2017 along with the corresponding entry of the SGST Act, 2017 read with the provisions of Section 20 of the IGST Act, 2017 should not be demanded and recovered from them on tax demanded at Sr.No.(i) above."

3. The adjudicating authority passed the following order in the above matter:

- (a) "I confirm the demand of GST amounting to Rs. 7,66,780/- (Rs.3,83,390.00 (CGT) + Rs.3,83,390 (SGST) (Rupees Seven Lakh Sixty Six Thousand Seven Hundred Eighty only) under the provisions of Section 74(1) of the CGST Act, 2017. An amount of Rs.7,66,780/- reversed vide GSTR 3 B of October 2021 is appropriated towards this liability.
- (b) I drop the demand of interest under Section 50 (1) of the CGST Act, 2017.

(c) I impose penalty of Rs. 7,66,780/- (Rs.3,83,390.00 (CGST) + Rs.3,83,390 (SGST) (Rupees Seven Lakh Sixty Six Thousand Seven Hundred Eighty only) under Section 74(1) of CGST Act, 2017 read with Section 122 (2) (b) of CGST Act, 2017 along with corresponding entry of Gujarat GT Act, 2017 and provisions of Section 20 of the IGST Act, 2017."

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

"At the outset the appellant denies all the findings in the impugned order as incorrect and unsustainable on the following grounds and each of the grounds below is independent and without prejudice to one another.

A. Submission, dated 21.04.2022, made by appellant in response to Show Cause Notice, dated 26.03.2022, has not been considered while passing the impugned order dated 29.03.2023.

A.1 In impugned 010 No. CGST/WT0701 /KVS/01 /2022-23, dated 29.03.2023, in Para 9 (3), it is mentioned that notice has not furnished any details of supplies, related to reversal of ITC, the amount of value not paid, and the amount of input tax credit availed of proportionate to such amount not paid to the supplier, in Form GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of issue of invoice.

A.2 In response to above, appellant hereby submits that the above allegation marked by the department in the impugned order, is travel beyond the show cause notice, since the said allegation related to non-furnishing of details in GSTR-2 in not alleged anywhere in show cause notice.

A.3 It is a settled principle of law that the adjudicating authority cannot travel beyond the scope of show cause notice, following which the order is liable to set aside. The same has been laid down in various cases time and again that Tribunal/Adjudicating authority cannot go beyond the scope of Show Cause Notice to record a finding and such recording cannot be sustained.

A.4 The Bangalore bench of CESTAT in the case of Syndicate Bank Vs. Commissioner of Central Excise [2022] 137 taxmann.com 302 (Bangalore - CESTAT) has observed that "the Heard both the sides and perused the records of the case. We find that as contented by the learned counsel the impugned order travelled beyond the scope of show-cause notice. Whereas the show-cause notice is issued for disallowance of credit for contravening of the provisions of Rule 9 of CENVAT Credit Rules, 2004, the learned commissioner proceeds to deny the credit on co-relation between input service and output service. Therefore, the impugned order is not legally sustainable".

A.5 In the case of M/s. Jeevan Diesels & Electricals Limited V. Commissioner of Central Excise, Customs & Service Tax, Bengaluru- III' - 2017 (2) TMI 58 - KARNATAKA HIGH COURT, the High Court held that the Tribunal exceeded the scope of the appeal. Hence the observations made by the Tribunal in their order cannot be sustained. The High Court allowed the appeal of the appellant.

A.6 Same has been laid down in various case laws, which are as under:-

- GODREJ INDUSTRIES LTD. VERSUS COMMISSIONER OF C. EX., MUMBAI, 2018 ACR 35 Supreme Court
- Ashok Bhan and V.S. Sirpurkar, JJ. No.- 3630-3631 of 2002 with 3761- 3762, 7638-7646 of 200 dated July 30th 2008
- 2014 (8) TMI 579 - CESTAT NEW DELHI
- Other Citation: 2013 (30) S.T.R. 356 (Tri. - Del.)
- CCE v. Millipore India (P.) Ltd. [2011] 16 taxmann.com 363/[2012] 34 STT 86 (Kar.) (para 6.1)

- *Toyota Kirloskar Motor (P.) Ltd. v. CCE* [CEA No. 47 of 2009, dated 28-3-2011] (para 6.1)
- *CCE & C v. Schott Glass India (P.) Ltd.* [2009] 21 STT 111 (Guj.) (para 7)
- *Association of Leasing & Financial Service Co. v. Union of India* [2010] 7 taxmann.com 740/29 STT 316 (SC) (para 7)
- *Sudhesh Sharma v. CCE* [201 O] 24 STT 149 (New Delhi - CESTAT) (para 7)
- *CCE v. Ashok Singh Academy* [2009] 23 STT 181 (New Delhi- CESTAT) (para 7)
- *Consulting Engineering Service (India) (P.) Ltd. v. Asst. CIT* [2017] 88 taxmann.com 762 (Delhi -Trib.) (Para 7).

A.7 Further, it is mentioned that the contention in Reply, dated 21.04.2022, submitted in response to SCN, is not acceptable. However, as already mentioned in above paras, we have made a detailed submission dated vide said letter, in response to Show Cause Notice, along with the relevant case laws to the matter, along with the grounds for non-applicability of allegation of suppression of facts. The allegation and observation raised by the department in impugned order is factually incorrect, since adjudicating authority has partially considered the submission made by the appellant.

A.8 Therefore non-consideration of submission filed by the appellant before passing an order led to impugned order liable to be dropped and legally not sustainable.

**B. The only ground, on which the whole allegation of imposing Penalty under section 74(1) of CGST Act, 2017, is of non-furnishing of details of supplies in GSTR-2. However, currently GSTR-2 and GSTR-3 both are suspended since September 2017, and not required to be furnished by taxpayer, therefore requirement is deemed to be fulfilled by the appellant. On this ground alone, the impugned order is liable to be set aside.**

B.1 The whole allegation of the adjudicating authority, for imposing penalty under Section 74(1) of CGST Act, 2017, read with Section 122(2) (b) of CGST Act, 2017, is on the basis of non-furnishing of any details of supplies, related to reversal of ITC, the amount of value not paid, and the amount of input tax credit availed of proportionate to such amount not paid to the supplier, in Form GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of issue of invoice.

B.2 In view of above, we hereby wish to submit that the allegation marked by the department in the impugned O10, for imposing Penalty, is factually wrong and legally not sustainable. Authority have made allegation for suppression of facts and evasion of tax, although involved input tax credit has already been reversed, much before issuance of show cause notice. Therefore, at the time of issuance of show cause notice, the question of suppression of facts and evasion of tax does not arise.

B.3 Further, on the allegation of department for non-furnishing of any details of supplies, in Form GSTR-2, we hereby wish to submit that firstly, the facility of filing form GSTR-2 and GSTR-3 has been temporarily suspended for the period of July 2017 to March 2018, vide Notification No. 57 /2017 - CT, dated 15.11.2017, and Notification No. 58/2017-CT, dated 15.11.2017, and shall be subsequently notified in the Official Gazette.

However, government has not yet notified any timeline to file such returns i.e., GSTR-2 and GSTR-3, and therefore, both the said returns were suspended till date. Presently, taxpayers are not required to file GSTR-2 and GSTR-3 for any tax periods. Only GSTR-1 and GSTR-3B are now independent of GSTR-2 and GSTR-3.

B.4 Since, Form GSTR-2 is suspended till date, and tax payer is not required to file the same, the furnishing of details of supplies, related to reversal of ITC, the amount of value not paid, and the amount of input tax credit availed of proportionate to such amount not paid to the supplier, in Form GSTR-2 for the

month immediately following the period of one hundred and eighty days from the date of issue of invoice, is deemed to be fulfilled.

B.5 Therefore, even though the said Form GSTR-2 is suspended, allegation to impose penalty based on the said ground is legally not sustainable and therefore, liable to be dropped.

**C. During the course of GST Audit, Noticee has already made the reversal of Input Tax Credit as alleged in the impugned Show Cause Notice, vide GSTR-3B, filed for the tax period October-2021.**

C.1 In the impugned show cause notice, it has been alleged that noticee has failed to make the payment to its suppliers within 180 days, for the supplies received during the GST era. Therefore, Input Tax Credit availed on such supply was required to be reversed as per the provision of Second Provision to Section 16(2) *ibid*, read with Rule 37 of CGST Rules, 2017.

C.2 In response to said contention of department, we hereby wish to submit that, during the course of GST Audit for the period July-2017 to March- 2019 only, GST Audit team has marked the above-mentioned observation with respect to reversal of input tax credit of Rs. 7,66,780/- (CGST of Rs.3,83,390/- and SGST of Rs. 3,83,390/-).

C.3 On being agree with the observation of GST Audit team, noticee has duly reversed the above-mentioned input tax credit, which is availed for supplies, for which payment to suppliers has not been made within 180 days, in terms of Rule 37 of CGST Rules, 2017. Rule 37 of CGST Rules, 2017 is reproduced below:

37. Reversal of input tax credit in the case of non-payment of consideration.

(1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section(2) of section 16, shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in FORM GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice: Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:

Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.

(2) The amount of input tax credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.

(3) The registered person shall be liable to pay interest at the rate notified under sub-section (1) of section 50 for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in sub-rule (2), is paid.

(4) The time limit specified in sub-section (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter that had been reversed earlier.

C.4 In reference to above provision, noticee has reversed the said amount of input tax credit, as referred to in sub-rule (1) of Rule 37 *ibid*. The said reversal of input tax credit of Rs. 7,66,780/- (CGST of Rs. 3,83,390/- and SGST of Rs. 3,83,390/-), has been done through GSTR-3B filed for the tax period October-2021, and reversed the said credit through debiting the Electronic Credit Ledger, in the said month, much before issuance of show cause notice.

C.5 Therefore since the payment on account of reversal of input tax credit of Rs. 7,66,780/- (CGST of Rs. 3,83,390/- and SGST of Rs. 3,83,390/-), has already



been made by the noticee, the said reversal should be duly appropriated to the amount of demand proposed by the department, in the impugned notice, and hence demand is liable to be dropped. Invocation of Section 74 of the GST for levy and recovery of penalty is non-est and unwarranted in the present case in the eyes of law.

**Show Cause Notice, dated 26.03.2022 is wrongly issued under Section 74(1) of CGST Act, 2017 upon noticee demanding penalty, as there is no element of suppression of facts and evasion of tax is involved, in the present case, in terms of Section 74(1) *ibid*.**

D.1 The present show cause notice is issued under Section 74(1) of the CGST act, 2017, Gujarat goods and service Tax Act, 2017 trade with section 20 IGST act, 2017 to recover Tax, which is already been paid, Interest under section 50(1) of the CGST Act and Penalty under section 74(1) of the CGST Act.

D.2 Adjudicating authority has appropriated tax and dropped the demand of interest. However, department has alleged that the noticee had failed to make payment to its supplier as per the provisions of Section 16(2)(d) of the CGST Act, 2017 (Taxpayer failed to make the payment to its suppliers within 180 days), and also failed to furnish the details of said supplies in Form GSTR-2, and therefore, confirmed the demand of penalty u/s 74(1) of CGST Act, 2017.

D.3 In the impugned order, department has placed reliance that noticee has wrongly availed ITC in terms of the 2d Proviso to Section 16(2) of the Act. It further appears that they have not reversed the wrongly availed ITC within the prescribed due dates since they have not made payments towards the value of supply along with tax to their suppliers within 180 days. It therefore appears that there is a case of suppression of facts with intent to wrongly avail ITC. Further, noticee has also not furnished the details of said supplies in Form GSTR-2, and therefore, confirmed the demand of penalty u/s 74(1) of CGST Act, 2017.

D.4 In response to above observation, it is submitted that the demand and penalty under section 74(1) is liable to be set aside, as statutory provision of penalty of Section 74(1) has been overlooked by the departmental authorities, before issuance of Show Cause Notice. ....

D.5 As mentioned above, to apply the provision of Section 74(1) *ibid*, there should be a case which involves all two elements, i.e. willful misstatement or suppression of facts, along with intention to evade tax. If both the elements exist in any case, then department can proceed to issue notice under section 74(1) *ibid*.

D.6 In the present case, it is submitted that noticee has already reversed the input tax credit availed on supplies, for which payment to the suppliers not made within 180 days. Further, once the payment has been made to the supplies by the recipient, then the recipient shall be duly entitled to re-avail the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon, in terms of Third Proviso to section 16(2) of CGST Act, 2017, read with Rule 37(4) of CGST Rules, 2017.

Third Proviso to Section 16(2) of CGST Act, 2017, is produced below for ease of reference:

"Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon." Rule 37(4) of CGST Rules, 2017, is produced below for ease of reference: (4) The time limit specified in sub-section (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter that had been reversed earlier.

D.7 Therefore, since the noticee has already reversed the credit, and duly eligible to re-avail the said credit, once the payment is made to the supplier, as mentioned in above paras, there could not be the mens rea intention, of the noticee at all, to evade the tax. Intact the said credit is although eligible credit in terms of Section 16(2) of CGST Act,

2017, and all the conditions of said section has been duly complied with by the noticee. Therefore, the whole action of the noticee could be the "Revenue Neutral" i.e., Reversal of credit and Re-availment of said credit, and therefore the contention of department with respect to intention to evade tax by the noticee, is not legally sustainable in the present case.

D.8 Since the element of "intention to evade tax" does not exist in the instant case, henceforth the levy of Penalty under section 74(1) of CGST Act, 2017, is erroneous and deserves to be set aside. Noticee has duly reversed the input tax credit on the invoices, for supply on which noticee has made the payment after 180 days to their suppliers, in the aforesaid GSTR-3B, and reversed the said credit by debiting Electronic Credit Ledger, on 20.11.2021, i.e., discharged during the course of GST Audit only, and also before the issuance of Final Audit Report and Show Cause Notice. The said facts were also accepted by the department in the impugned order. Further, noticee is also duly eligible to re-claim the said reversed credit, once the payment to the suppliers has been made, in terms of Third Proviso to Section 16(2) of CGST Act, 2017, read with Rule 37 of CGST Rules, 2017. Therefore, the allegation of department with regards to suppression of facts with intent to evade tax, is factually wrong and legally not sustainable in the present case.

D. 9 It is submitted that appellant has duly reversed the said credit by declaring complete taxable value in GSTR-3B for the period October-2021, and the same is not even disputed by the department as the demand raised in the show cause notice sync with the figures reversal or payment made by the noticee. Hence the impugned show cause notice is liable to be quashed and demand is liable to be dropped.

**E. Penalty is not imposable under Section 74(1) of CGST Act, 2017, in the present case, as noticee is bonafide and has no intention to evade tax.**

The department has imposed a penalty under section 74(1) of the CGST Act, 2017, chargeable with section 74 of Gujarat GST act and section 20 of IGST Act, for delay in reversal of input tax credit in terms of provision of Rule 37 of CGST Rules, 2017, and non-compliance of various provisions under GST Act. The department has refrained from imposing a separate penalty under section 122(2) (b) of CGST Act, 2017, as already penalty under section 74(1) of the GST act is imposed upon noticee.

E.2 At the cost of repetition, Section 74(1) ibid is extracted herein below: -  
 "SECTION 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of 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 by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice."

E.3 At the outset, it submitted that penalty is not imposable as demand is not sustainable, in the present case, since appellant is duly eligible to avail re-credit of reversed ITC, once the payment of consideration is made to the suppliers.

E.4 Further, in any case, demand is revenue neutral, in the present case, as mentioned in Para D.7 above. Further, noticee does not have any intention to avail undue benefit or to evade the tax, by availing the credit. Infact noticee as duly reversed the said input tax credit, as and when query raised by the GST Audit team, and the said credit is duly eligible to be re-availed by the noticee once the payment to the suppliers has been made by the noticee. Further, the said credit is reversed before the issuance of Final Audit Report and Show Cause Notice. Thus, considering the said

facts, penalty is not impossible in the instant case, in terms of Section 74(1) of CGST Act, 2017, without involving element of intention to evade tax.

E.5 Without prejudice to above, noticee hereby also submit that for imposing penalty under Section 74 of the Act, there should be an intention to evade payment of tax, and wrong availment of any refund, or suppression or concealment of material facts. The Noticee have provided all the details as and when desired by the GST Audit team, and the Noticee at no point of time had the intention to evade any tax. Further, the noticee have clearly stated that there is no suppression in the present case and also that there is contravention of the provisions of the Act, with an intent to evade payment of tax, and crave leave to rely on the submissions made herein above to that effect.

E.6 The Noticee inter alia place reliance upon the following decisions to submit the information is available on record, no suppression can be alleged on the assessee.

- (a) *Suvikram Plastex Pvt. Ltd. v. CCE, Bangalore - III 2008 (225) ELT 282(T)*
- (b) *Rallis India Ltd. v. CCE, Surat 2006 (201) ELT 429 (T)*
- (c) *Patton Ltd. v. CCE, Kolkata - V 2006 (206) ELT 496 (T)*
- (d) *CCE, Tirupati v. Satguru Engineering & Consultants Pvt. Ltd. 2006 (203) ELT 492 (T)*
- (e) *Indian Hume Pipes Co. Ltd. v. CCE, Coimbatore 2004 (163) ELT 273 T*

E.7 It is further submitted that penalty under Section 74 of the Act can be imposed only if the taxpayer suppresses any information from the Department with mens rea to evade tax. However, the Noticee have not suppressed any fact with an intention to evade payment of tax. The case of the noticee is Revenue Neutral, and therefore, imposing penalty under Section 74 of the Act is not sustainable in the present case. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of *Akbar Badruddin Wani v. Collector of Customs* reported at 1990 (047) ELT 0 1 61 SC, wherein the Hon'ble Supreme Court has held as follows: -

"We refer in this connection the decision in *Merck Spares v. Collector of Central Excise & Customs, New Delhi*, [1983] ELT 1261; *Shama Engine Valves Ltd. Bombay v. Collector of Customs, Bombay*, [1984] 18 ELT 533 and *Madhusudan Gordhandas & Co. v. Collector of Customs, Bombay*, [1987] 29 ELT 904 wherein it has been held that in imposing penalty the requisite mens rea has to be established. It has also been observed in *Hindustan Steel Ltd. v. State of Orissa*, [1970]1 SCR 753 by this Court that:

The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of 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."

E.8 In this regard, the noticee has further placed reliance on the decision of the Hon'ble Supreme Court in the case of *Pahwa Chemicals Vs. CCE - 2005 (189) ELT 257 (SC)* wherein The Hon'ble Supreme Court held that mere failure to declare does not amount to mis-declaration or will-full suppression. There must be some positive act on part of party to establish either will-full mis- declaration or will-full suppression, with intent to evade tax. When all the facts ere within knowledge of department and all the statutory returns were being regularly filed, there is no question of will-full mis-declaration or will-full suppression.

E.9 Therefore, based on the above submission, we hereby submit that noticee is bonafide and has no intention to evade tax, and therefore the penalty, in the present case, is not impossible under section 74 *ibid*, on account of wrong availment of credit by reason of fraud or any willful-misstatement or suppression of facts. For imposing penalty under Section 74 *ibid*, requisite mens rea has to be established, which is absent in the present case. Therefore, on the basis of above ground of submission, demand proposed in the impugned notice is liable to be dropped.



E.10 Without prejudice to above submission, in any case, the department can invoke the demand and can serve notice, in terms of section 73(1) of CGST Act, 2017, reproduced below for your reference:

*"Section 73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized 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 utilized 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 / penalty leviable under the provisions of this Act or the rules made thereunder."*

E.11 However, even though, department proceeds with Section 73(1) *ibid*, penalty is not impossible in the present case, in terms of Section 73(5) *ibid*, since noticee has already reversed the disputed input tax credit, before issuance of show cause noticee. For the reference, Section 73(5) of CGST Act, 2017 is reproduced below for ease of reference:

*(5) The person chargeable with tax may, before service of notice under sub-section (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.*

E.12 In view of the above submission, since demand is not sustainable in present case, penalty is also not impossible at all. Therefore, the whole case of the department imposing Penalty under Section 74 1 *ibid*, is liable to be dropped, and the impugned order is liable to be set aside. Demand confirmed in the impugned order is not justifiable."

Further the appellant has prayed to set aside the impugned order and drop the demand of penalty of Rs.7,66,780/- under Section74(1) of the CGST Act, 2017 read with Section 122(2)(b) of the CGST Act, 2017.

#### PERSONAL HEARING:

5. Personal hearing in the matter was held on 29.08.2023 virtually, Ms.Madhu Jain, Advocate, appeared on behalf of the Appellant in the present appeal. During the Personal Hearing she submitted that the credit availed on invoices against which the appellant has failed to make payment within six months (180 days), they have already reversed the credit. Since the GSTR-2 & 3 is suspended till date, it's not possible to submit these details to the department. However, they have reversed the said credit before issue of SCN, and the credit have never been utilized, no penalty under section 74 can be imposed as there is no suppression of any fact on their part. She further reiterated the written submissions and requested to drop the penalty imposed under Section 74 and 122 of the GST Act, 2017.

#### DISCUSSIONS AND FINDINGS:

6. I have gone through the facts of the case, available documents on record and written submissions made by the 'appellant'. I find that the main issue to be decided in the instant case is :

- (i) whether the impugned refund order passed by the Adjudicating Authority is legal & proper and is in conformity with Section 74 of the CGST Act, 2017 or not;
- (ii) whether the penalty imposed under Section 74(1) of the CGST Act, 2017 read with Section 122(2)(b) of the CGST Act, 2017 read with the corresponding Sections of the Gujarat GST Act, 2017 read with Section 20 of the IGST Rules, 2017 or not.

6.1 At the foremost, I observed that in the instant case the "impugned order" is of dated 29-03-2023 and the present appeal is filed online on 1-06-2023. As per Section 107(1) of the CGST Act, 2017, the appeal is required to be filed within three months time limit. Therefore, I find that the present appeals are filed within normal period prescribed under Section 107(1) of the CGST Act, 2017. Accordingly, I am proceeding to decide the case.

6.2 I find that the present appeal is filed to set aside the penalty imposed vide the impugned order on the grounds that the appellant have provided all the details as and when desired by the GST Audit team, and at no point of time there is any suppression in the present case, also there is no contravention of the provisions of the Act, with an intent to evade payment of tax.

6.3 In this regard, I find that the issue involved in the present appeal is non-reversal of Input Tax Credit in respect of suppliers to whom the Appellant had failed to make payment as per the provisions of Section 16(2)(d) of the CGST Act, 2017 i.e. they have failed in making payment to it suppliers within 90 days, thereby the Input Tax Credit availed on such supply amounting to Rs.7,66,78/- (Rs.3,83,390/- CGST + Rs.3,83,390/- GGST )as required to be reversed as per Section 16(2)(d) of the CGST Act, 2017, has not been done by the appellant. However, the same has been reversed on being pointed out by the Audit.

6.4 I find that most of the ITC pertains to the period 2017-18. The Appellant reversed the said Credit vide GSTR-3B for the month October-2021 which was filed on 20-11-2021, as pointed out by the Audit during the audit conducted from 18-10-2021 to 10-11-2021 as per the provisions of Rule 37 of the CGST Act, 2017 which reads as under:

**Rule 37. Reversal of input tax credit in the case of non-payment of consideration.-**

<sup>1</sup>[(1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, but fails to pay to the supplier thereof, the amount towards the value of such supply <sup>3</sup>[whether wholly or partly,] along with the tax payable thereon, within the time limit specified in the second proviso to sub-section(2) of section 16, shall pay <sup>4</sup>[or reverse] an amount equal to the input tax credit availed in respect of such supply <sup>5</sup>], proportionate to the amount not paid to the supplier,] along with interest payable thereon under section 50, while furnishing the return in **FORM GSTR-3B** for the tax period immediately following the period of one hundred and eighty days from the date of the issue of the invoice:

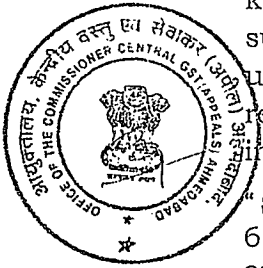
**Provided** that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:

**Provided** further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.

(2) Where the said registered person subsequently makes the payment of the amount towards the value of such supply along with tax payable thereon to the supplier thereof, he shall be entitled to re-avail the input tax credit referred to in sub-rule (1).]

6.5 From the above provisions, I find that a registered person, who has availed of Input Tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section (2) of Section 16, shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in form GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice.

6.6 I find that the appellant has neither furnished the details with the Department at any point of time that they have not made payment to their suppliers even after lapse of 180 days, nor reversed the same through GSTR-3B Return till the audit of their unit was undertaken. Though GSTR-2 is suspended, and the same was within the knowledge the appellant, does not mean that the credit availed by the appellant which subsequently becomes not available to them due to the failure of statutory requirements, cannot be reversed by their own. Unless the fact that they have not made payment to their suppliers is declared by the appellant, the department would not come to know about the same. The appellant has availed the credit but when subsequently due to non compliance of the statutory provisions, it becomes un-available to them, therefore, it becomes the responsibility of the appellant to reverse the same, in the present system of self assessment regime as envisaged in the following Section of the GST Act.



**Section 59. Self-assessment. -**

6.7 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”.

6.8 Further burden of proof to claim such credit, lies with the Appellant as per the provisions of Section 155 of the CGST Act, 2017 which reads as under:

**Section 155. Burden of proof.-**

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

6.9 I find that the appellant has failed to self assess the tax liability to be reversed and not produced at any time the documents to prove that the said Input Tax Credit was eligible to them even after lapse of 180 days of non-payment to their suppliers. Thus the appellant has contravened the provisions of the Act, *ibid*.

6.10 Further, I find that the period of dispute is mainly of 2017-18 and the audit was conducted during 18-10-2021 to 10-11-2021 i.e. even after lapse of more than three years, the appellant has not brought on record whether the payment has been made to the suppliers subsequently during the period after lapse of 180 days. The appellant has merely claimed that the demand is revenue neutral, that they have reversed the credit so availed, however the said credit is duly eligible to be re-availed by them once the payment to the suppliers has been made. This implies that they have not taken pain even to substantiate that the credit though availed but not reversed due to failure to pay the amount to its suppliers, has become re-available to them on so and so date.

6.11 The appellant has taken plea that though the said Form GSTR-2 is suspended, allegation to impose penalty based on the said ground is legally not sustainable and therefore, liable to be dropped. However, as discussed supra, I find gross negligence on part of the Appellant, therefore I do not agree with the contention of the appellant. Further, the citations quoted by the appellant regarding penalty are not applicable in the present case.

6.12 As per provisions ibid, I am of the view that the appellant should have reversed the ITC, immediately in the succeeding month when the period of 180 days was over. The appellant has neither brought to the knowledge of the Department that they have not made payment to their suppliers within 180 days as required in the provisions ibid, nor reversed the credit so availed on their own which is gross negligence on their part and suppression of the vital facts, leading to the wrong availment of Input Tax Credit beyond the stipulated period of 180 days, Therefore, I am inclined to uphold the penalty imposed by the adjudicating authority.

7. In view of the foregoing facts & discussion, I do not find any infirmity in the impugned order and the impugned order passed by the adjudicating authority is legal and proper and as per the provisions of law to the above extent. Accordingly, I reject the present appeal of the "Appellant".

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

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

*Adesh Kumar Jain*  
14/09/2023

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

Attested

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



By R.P.A.D.

To:

M/s. Astha Creation, 501, 5<sup>th</sup> Floor, Narnarayan Complex, Swastik Society  
Cross Road, Ahmedabad, Ahmedabad, Gujarat, 380009.  
(GSTIN 24AATFA7005L1Z9)

Copy to:

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

