आयुक्तकाकार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
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सत्यमेव जयते

By Regd. Post
DIN NO.: 20231164SW000042474D

(क)	फ़ाइल संख्या / File No.	GAPPL/ADC/GSTP/1185/2023 /6191 – 97
(ख)	अपील आदेश संख्याऔर दिनांक / Order-In –Appeal and date	AHM-CGST-002-APP-JC-88/2023-24 and 31.10.2023
(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	09.11.2023
(ङ)	Arising out of Order-In-Original No. 36/AC/D/2022-23/AM dated 08.12.2022 passed by The Assistant Commissioner, CGST & C.Ex., Division-IV, Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Suraj Subhasbhai Bhavnai, (Trade Name – B.K. Plast) A/6, Ashwamegh Industrial Estate, Nutan Nagrik Bank Lane, Changodar, Ahmedabad , Gujarat - 382213

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

OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD

ORDER-IN-APPEAL

BRIEF FACTS OF THE CASE :

M/s Suraj Subhashbhai Bhavnani (Trade Name B K Plast) A/6, Ashwamegh Industrial Estate, Nutan Nagrik Bank Lane, Changodar,, Ahmedabad, Ahmedabad, Gujarat, 382213 (GSTIN 24ACAPB5193R1ZD) (hereinafter referred to as "Appellant") has filed appeal against Order-In-Original No.36/AC/D/2022-23/AM dated 08-12-2022 (hereinafter referred to as the *"impugned order"*) passed by the Assistant Commissioner, CGST & C.Ex., Division-IV, Ahmedabad-North Commissionerate (hereinafter referred to as the *"adjudicating authority"*).

2. The facts of this case are that the Appellant are engaged in supply of goods falling under Chapter Head 39019090, 39011010 & 39021000 and holding GSTIN 24ACAPB5193R1ZD. It was observed by the Audit that the Appellant had availed Transitional Credit of CGST of Rs.32,10,083/- under TRAN-1 filed as required under Section 140 of the CGST Act, 2017. The appellant was not registered under Central Excise Act, 1944. They had claimed Transitional Credit on the basis of stock as on 30-06-2017. Further that the appellant had claimed refund of 4% SAD paid by them before the customs authorities at the port where they have imported goods. Thus they intended to have double benefit of 4% SAD paid of Rs.7,88,062/- i.e. at one side by claiming refund and other side by claiming transitional credit. Thus according to audit, the appellant was eligible for transitional credit of Rs.24,22,021/ only instead of Rs.32,10,083/-. Though the appellant had agreed to this, however did not pay excess availed ITC. Therefore the transitional credit of Rs.7,88,062/- availed in excess is required to be recovered from the appellant as per Section 140 of the CGST Act, 2017 read with Section 74 of the CGST Act, 2017 along with interest and penalty. Further, it was also observed by Audit that the appellant had taken excess credit of CGST and SGST of Rs.7,10,500/- each in the Month of November-2018 which was not reversed upto 31-03-2019. The appellant had quantified the exact amount of ITC availed by them in excess and accordingly had reversed an amount of CGST Rs.8,05,742/- + SGST Rs.8,05,742/- in the month of JULY-2019 towards excess ITC availed in the month of November-2018, however, they did not pay interest on the said delayed payment. Therefore the interest on the said delayed payment is also required to be recovered.

3. The Appellant were therefore, issued a Show Cause Notice No.110/2021-22 dated 15-02-2022 issued vide F.No.VI/1(b)-320/IA/AP-39/Cir-VI/2020-21 18.02.2022 as to why;

"(i) ..... (ii) ..... (iii) ..... (iv) .....(v) .....(v)i.....(vi).....(viii)..... (ix). .....

(x) Wrongly availed inadmissible credit of CGST amounting to Rs.7,88,062/- through Tran-1 in contraventions of the provisions of Section 140 of the CGST Act, 2017 should not be demanded and recovered under the provisions of Section 74(1) of the CGST Act, 2017.

(xi) Interest at appropriate rate should not be charged on the tax mentioned at (x) above under the provisions of Section 50 of the CGST At, 2017.

(xii) Penalty should not be imposed upon them, under the provisions of Section 122(2)(b) read with Section 74(1) of the CGST Act, 2017 on ineligible ITC demanded at (x) above.

xiii. .....xiv. ..... xv. .....

xvi. Interest of Rs.1,28,742/- on delayed payment of CGST should not be demanded and recovered under the provisions of Section 50(1) of the CGST Act, 2017.

xvii. Interest of Rs.1,28,742/- on delayed payment of SGST should not be demanded and recovered under the provisions of Section 50(1) of the Gujarat GST Act, 2017."

4. The adjudicating authority, vide the impugned order dated 29-11-2022, passed the following order:

"(i).....(ii).....(iii).....(iv).....(v).....(vi) .....(vii).....

(viii) I confirm the demand of wrongly availed ITC of Rs. 7,88,062/- through TRAN-I in contravention of section 140 of the CGST Act, 2017, under section 74(1) of CGST Act, 2017;

(ix) I confirm the demand of interest at appropriate rate on wrongly availed ITC as (viii) above, under section 50 of the COST Act, 2017;

(x) I confirm the demand of imposition of penalty of Rs. 7,88,062/- under Section 74(1) of the CGST Act, 2017 read with Section 122(2) (b) of the CGST Act, 2017 read with the SGST Act, 2017 and IGST Act, 2017;

(xi) .....

(xii) I confirm the demand of interest of Rs. 1,28,742 /- CGST and interest of Rs.1,28,742 /- of SGST, on excess availment of ITC, under section 50 of the CGST/ SGST Act, 2017 read with the IGST Act, 2017."

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

"1. *The appellant is a Proprietorship firm engaged in business of reprocessing plastic granules, PP/PE Plastic granules, Power Plant- Plastic Plant Sweeping*

Granules/ Powder falling under HSN 3901/3902 and registered under GST with GSTIN 24ACAPB5193R1ZD.

2. The appellant submits that the compliance was duly met in the case of transfer of credit in TRAN-1 and there is no violation of law. As alleged in the show cause notice that the appellant has claimed excess credit by transfer under TRAN 1 amounting to Rs.7,88,062/- relating to 4% SAD paid at the time of import, refund on which has already been claimed. However, the appellant would like to submit that the said credit was allowed to be taken as per the provisions of Section 140(3) of the CGST Act, 2017.

.....

5. Refund of this additional duty was then specified vide Notification No. 102/2007-Customs dated 14.09.2007. The relevant portion enlisting conditions to claim refund is reproduced as under :

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim:

(i) document evidencing payment of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods."

6. Therefore, from the provisions reproduces above it is crystal clear that the 4% SAD credit was an eligible credit allowed to be carried forward as per provisions of Section 140(3) of the CGST Act, 2017. The show cause notice alleges that the appellant has claimed Transitional ITC as well as the SAD refund which is factually incorrect in as much as the appellant never claimed refund of the 4% SAD post GST implementation. The same is also substantiated with the help of the CA Certificate issued by the Auditor of the appellant. (Copy of CA Certificate dated 04.08.2022 is enclosed as Exhibit "F")

7. In addition to the above submission, assuming but not admitting that the said SAD credit claimed under TRAN-1 was ineligible, interest on the same cannot be levied as per the provisions of Section 50 of the CGST Act, 2017 read with Rule 88B of the CGST Rules, 2017. The interest on the amount of excess credit taken under TRAN-1 should be calculated only when on the "amount is availed and utilized" as per the provisions of Section 50 of the CGST Act, 2017 amended by Section 111 of the Finance Act, 2022 read with Rule 88B of the CGST Rules, 2017 vide Notification 14/2022-Central Tax dated 05.07.2022 both brought into effect from 01.07.2017. Since there was always excess balance in the credit ledger than the amount availed, thus there was no utilization. Therefore, in absence of any utilization of the excess credit wrongfully availed, there cannot be any liability of interest on the same as per the provisions of GST. .....

8. In response to the levy of interest and penalty on the said amount appellant would like to submit that it was an eligible credit which has been taken by the appellant as per the provisions of GST, therefore, there arise no question of such levy. In addition to the same the impact of the said credit does not result into any loss to Government since the refund on the same is not taken from the Customs Authorities. However, for the sake of discussion, without admitting that the said credit could not be availed, even if the appellant was not required to avail the credit on 4% SAD, the liability of interest on the same does not arise, since, there was always excess balance in the electronic ledger for the most part of the period, therefore, there was no utilization of the said amount of excess TRAN-1 credit which is a mandatory condition for levy of interest on the excess ITC availed. Therefore, appellant request that the interest liability and penalty be quashed on this point only.

9. It is observed that the learned adjudicating authority erred in passing order by not taking the view provided by Section 50 of the CGST Act, 2017 along with Rule 88B of CGST Rules and relevant notification issued by the government. It was informed to the Department that the reversal of Rs.8,05,742/- of CGST and SGST each was made in July 2019. The interest on the amount from the date of credit to the date of reversal should be calculated on the "amount utilized" as per the provisions of Section 50 of the CGST Act, 2017 amended by Section 111 of the Finance Act, 2022 read with Rule 88B of the CGST Rules, 2017 vide

Notification 14-2022 Central Tax dated 01.07.2022 both brought into effect from 01.07.2017.....

10. Since, there was always balance in the electronic ledger for the most part of the period, therefore we agree to pay the interest liability only to the extent of shortfall, if any in the ledger balance below the alleged amount.

11. The appellant humbly states that it would not be out of place to mention that GST was in its First Year as far as 2017-18 is concerned. The sole intention of the Government to bring out the new tax law was to promote ease of doing business. In addition to that, where appellant found out that the ITC availed was improper, they had reversed with interest and penalty and thus there was no malafide intention behind said mistakes. It is due to lack of understanding of the provisions of the CGST Act along with rules as CGST law was new to the appellant. Hence, merely mistakes incurred by the appellant cannot be termed as fraud or any wilful-misstatement or suppression of facts as per section 74 of ibid. Thus, the appellant submits that the learned Adjudicating Authority may take the lenient view and drop the Interest on Excess Credit availed inNov.2018."

Further, the appellant has requested to allow the appeal and set aside the impugned order in light of Principles of natural justice and judgments of various Courts and Tribunals.

PERSONAL HEARING:

6. Personal hearing in this case was held on 18.08.2023. Shri Gunjan Shah Chartered Accountant appeared in person, on behalf of the appellant as authorized representative. He submitted that as regards to

(i) point (xii) of para 11 of the impugned order i.e. regarding confirmation of demand of interest of Rs.1,28,742/-CGST and interest of Rs. 1,28,742/- of SGST, on excess availment of ITC, under section 50 of the CGST/ SGST Act, 2017 read with the IGST Act, 2017, they have not utilized the Credit at any point of time since availment and reversal of the Credit, therefore as per the provisions of Section 50(3)of the GST Act, 2017, no interest is leviable,

(ii) point (viii), (ix) & (x) of para 11 of the impugned order, they have not claimed the SAD refund, Further, since goods were lying in stock, legally also they can't claim any refund of SAD, since GST was implemented w.e.f. 01-07-2017, no refund of SAD was claimed from Customs Deparment and CA Certificate is also submitted before the adjudicating authority.

All other points of para 11 of the impugned order have been accepted by the Appellant.

Discussion & findings:

7.1 I have carefully gone through the facts of the case and the submissions made by the appellant in their grounds of appeal as well as submitted at the

time of personal hearing and find that the appellant is mainly contesting the following points:

(i) 4% SAD credit of Rs. 7,88,062/- was an eligible credit allowed to be carried forward as per the provisions of Section 140(3) of the CGST Act, 2017. They had never claimed refund of 4% SAD post GST implementation.

(ii) The interest and penalty on the Excess credit availed and subsequently reversed the same with interest and penalty hence due to lack of understanding of the provisions of the CGST Act along with Rules as CGST Law, mistakes occurred which may not be termed as fraud or any willful-mistatement or suppression of facts as per Section 74 of the CGST Act, 2017.

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

(a) Whether the order passed by the adjudicating authority vide the impugned order confirming the demand of wrongly availed ITC of Rs. 7,88,062/- through TRAN-I in contravention of section 140 of the CGST Act, 2017, under section 74(1) of CGST Act, 2017 along with interest at appropriate rate on wrongly availed ITC under section 50 of the GST Act, 2017 and penalty of Rs.7,88,062/- under Section 74(1) of the CGST Act, 2017 read with Section 122(2) (b) of the CGST Act, 2017 read with the SGST Act, 2017 and IGST Act, 2017 is proper or otherwise ?

(b) Whether the order passed by the adjudicating authority vide the impugned order confirming the demand of interest of Rs. 1,28,742/- CGST and interest of Rs.1,28,742/- of SGST, on excess availment of ITC, and reversal of CGST Rs.8,05,742/- + SGST Rs.8,05,742/- in the month of JULY-2019, under section 50 of the CGST/ SGST Act, 2017 read with the IGST Act, 2017, is proper or otherwise?

7.3. At the foremost, I observed that in the instant case the "impugned order" is of dated 29-11-2022 which as per the records of the Division made available, has been dispatched on 15-12-2022 and received by the appellant on 17-12-2023 and the present appeal is filed online on 16.03.2023. As per Section 107(1) of the CGST Act, 2017, the appeal is required to be filed within three months time limit. Therefore, I find that the present appeal is filed within normal period prescribed under Section 107(1) of the CGST Act, 2017. Accordingly, I am proceeding to decide the case.

7.4 In the instant case, I find that the Appellant are engaged in supply of goods falling under Chapter Head 39019090, 39011010 & 39021000 and holding GSTIN 24ACAPB5193R1ZD. The appellant have availed Transitional Credit of CGST of Rs.32,10,083/- under TRAN-1 filed as required under Section 140 of the CGST Act, 2017. The appellant was not registered under

Central Excise Act, 1944. They had claimed the Transitional Credit on the basis of stock as on 30.06.2017. It was noticed from the Books of Accounts i.e. Annual Report by the Audit that the appellant had claimed Refund of 4% SAD paid of Rs.7,88,062/- by them under the corresponding Bill of Entry from the Customs Authorities of the port of Import where they had imported the goods. Thus they were entitled of Transitional Credit Rs.24,22,021/- of CGST out of total transitional Credit of CGST of Rs.32,10,083/- claimed through TRAN-1 filed by them. The appellant had agreed the audit objection but have not made payment of Tax, Interest and Penalty. Thus Transitional Credit of 4% SAD paid of Rs.7,88,062/- is not eligible to them in view of the refund claimed of 4% SAD by them.

7.5 I observe that the additional duty of excise leviable under Section 3 of the Customs Tariff Act, 1975 is eligible to be availed in TRAN-1 under Section 140(3) of the CGST Act, 2017. The text of the explanation to Section140 (3) is reproduced here under:

"(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished [4][goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to] the following conditions, namely:-

.....

Explanation 1. *-For the purposes of [10][sub-sections (1), (3), (4)] and (6), the expression "eligible duties" means-*
(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

Though the transitional credit of 4% SAD of Rs.7,88,062/- is available to be taken by the Appellant but that does not mean that a taxpayer can avail double benefit simultaneously i.e. 4% SAD Refund from Customs authorities as well as Transitional credit of the said 4% SAD in TRAN-1.

7.6 As the Audit has pointed out on the basis of books of accounts (Annual Report) of the Appellant that Refund of 4% SAD paid of Rs.7,88,062/- has been claimed by them, under the corresponding Bill of Entry from the Customs Authorities of the port of Import where they had imported the goods, the Taxpayer's contention that they never claimed Refund of 4% SAD and that the same is substantiated with the help of CA Certificate dated 04-08-2022 is not acceptable. An entry in the Schedule-I of the SCHEDULE FORMING PART OF THE BALANCE SHEET AS ON 31.03.2018 of the Appellant's records is observed, which is as under:

"Recoveries from Revenue Authorities
4% Add Duty Receivable Rs.23,47,271/-."

7.7 The claim of the Appellant that they have never claim 4% SAD Refund from the Customs Authorities after implementation of GST is not sustainable in view of the above entry. Further, they have never submitted any proof of the said refund claimed whether belongs to the current SAD issue or otherwise.

7.8 Further, the observation of the CA in the said Books of Accounts of 2017-18 that *"The Receivables from revenue includes a sum of Rs.23,47,271/- for 4% SAD Receivables, however in our opinion the same is not receivable, as no claim is pending with Revenue Department and no amount will be received, however proprietor doesn't want to write off these amount, hence the same has been shown as receivables, hence profit is overstated"* is misleading opinion as there is no logic in showing the said amount as receivable, if the claim is not pending with the Revenue Department and no contrary evidence has been produced in this regard.

7.9 In view of the above, I am of the view that the transitional credit of 4% SAD is not allowed to the Appellant.

7.10 Further, I find that demand of wrongly availed ITC of Rs.7,88,062/- through TRAN-1 has been ordered to be recovered under Section 74 (1) of the CGST Act, 2017 alleging the suppression of the material facts regarding wrong transition and availment of Input Tax Credit, I therefore, refer to the term 'suppression' as explained in the explanation of Section 74 of the GST Act, which is defined as under:

"For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made there under, or failure to furnish any information on being asked for, in writing, by the proper officer".

7.11 I find that in the instant case, the Appellant has suppressed the material facts of wrong availment of Input Tax Credit through TRAN-1 simultaneously

with the claim of benefit of Refund of 4% SAD amounting to Rs.7,88,062/- which has been detected during Audit by the Department.

7.12 Further, I find that the appellant has not reversed the said Input Tax Credit availed irregularly in TRAN-1 on their own inspite of the fact that the same was not eligible, thereby utilized the same with intention to evade payment of GST which has been detected during Audit by the Department and the adjudicating authority has confirmed the same under Section 74(1) of the CGST Act, 2017 vide the impugned order, which I am of the view that the same is legal and proper, as per the provisions ibid.

7.13 Further with regard to the applicability of interest, on the wrong availament of Tran-1 credit of Rs.7,88,062/- and interest of Rs. 1,28,742/- CGST and interest of Rs.1,28,742/- of SGST, on excess availment of ITC, and reversal of CGST Rs.8,05,742/- + SGST Rs.8,05,742/- in the month of JULY-2019 imposed vide the impugned order, under section 50(3) of the CGST/SGST Act, 2017, I refer to the relevant provision of Section 50(3) of the CGST Act, 2017, which is reproduced as under:

Section 50. Interest on delayed payment of tax.-

(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed].

The Manner of calculating interest on delayed payment of tax as per Notification No.14/2022-Central Tax dated 05-07-2022 The text of Rule 88B inserted vide the said Notification is reproduced hereunder:

"7. In the said rules, with effect from the 1st July, 2017, after rule 88A, the following rule shall be deemed to have been inserted, namely: -

—88B. Manner of calculating interest on delayed payment of tax. -

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

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

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

(2) the date of utilisation of such input tax credit shall be taken to be, —
(a) the date, on which the return is due to be furnished under section 39 or the actual date of filing of the said return, whichever is earlier, if the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, on account of payment of tax through the said return; or
(b) the date of debit in the electronic credit ledger when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, in all other cases."

7.14 From the above provisions, it is observed that Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilized.

7.15 As regards to reversal of Rs.8,05,742/- of CGST and SGST each was made in July 2019, the contention of the appellant that Since, there was always balance in the electronic ledger for the most part of the period, therefore they are agreed to pay the interest liability only to the extent of shortfall, if any in the ledger balance below the alleged amount, I observe that the interest payable shall be calculated on the amount of input tax credit wrongly availed and utilised, for the period starting from the date of utilisation of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount, at such rate as may be notified under said sub-section (3) of section 50 of the CGST/Gujarat GST Act, 2017. Further, the explanation (1) and (2) of the Rule 88B of the CGST/SGST Rules, 2017 are required to be taken care while calculating such interest.

7.16 As regards to the contention of the Appellant that there is only 8 days gap in ITC availment and ITC reversal as well as closing balance of ITC available with them and that they are ready to pay applicable interest, if any arises considering outstanding balance available with them after application of Circular No.192/04/2023 dated 17-07-2023, it is observed that the reversal of excess credit of ITC pertains to CGST and SGST, whereas the circular quoted is related to the wrongly availed IGST credit, hence not applicable in the said excess availment.

7.17 As regards to contention of the Appellant that assuming but not admitting that the said SAD credit of Rs.7,88,062/- claimed under TRAN-1 was ineligible, interest on the same cannot be levied as per the provisions of Section 50 of the CGST Act, 2017 read with Rule 88B of the CGST Rules, 2017, since there was always excess balance in the credit ledger than the amount availed,

thus there was no utilization. I find that since the said Tran-1 credit is found ineligible, the interest would also be applicable under Rule 50(3) of the CGST Act, 2017. However, if the credit so availed is not utilised, the interest is not recoverable subject to the availability of balance in the electronic credit ledger and fulfilment of the explanations (1) & (2) specified in the Rule 88B of the CGST Rules, 2017.

7.18 Therefore, I find that the appellant is required to pay interest as per the above discussion and findings on the wrong availament of Tran-1 credit of Rs.7,88,062/- and interest of Rs. 1,28,742/- CGST and interest of Rs.1,28,742/- of SGST, on excess availment of ITC, and reversal of CGST Rs.8,05,742/- + SGST Rs.8,05,742/- in the month of JULY-2019, imposed vide the impugned order, which is proper and Legal.

7.19 Further, as regards to imposition of Penalty under Section 74(1) of the CGST Act, 2017 read with Section 122(2)(b) of the CGST/GGST Act, 2017 and also read IGST Act, 2017, I refer the same provisions, the text of which is as under:

Section 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful-misstatement or suppression of facts.-

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

"Section 122. Penalty for certain offences.-

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,-

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

7.20 I find that the appellant has wrongly availed excess ITC through TRAN-1/ not reversed the credit in spite of the fact that the same was not eligible to be taken knowingly, thereby utilized the same with intention to evade payment of GST which have been detected during Audit by the Department, as explained in the foregoing paras. I observe that the provisions of Section 122(2)(b)

provides that where the input tax credit has been wrongly availed or utilised for the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher. I find that as the Appellant in the present case has suppressed the facts of availing the credit of Rs.7,88,062/- simultaneously with the claim of 4% SAD, the Appellant is liable for penalty under the said provisions.

7.21 The imposition of penalty for excess availment of credit is supported by the following judgment.

"Case Name : Munna Traders Vs State of Bihar (Patna High Court) Appeal Number : Civil Writ Jurisdiction Case No. 9032 of 2023 Date of Judgement/Order : 08/08/2023.

12. In the present case, it is seen that the assessee has defaulted tax payment, based on an excessive claim of input tax credit, later deposited the input tax credit without interest due under Section 50; which attracted the penalty under Section 122. We have already found that there can be no coercion found in so far as the deposit is concerned. The assessee, hence, has admitted the discrepancy with respect to excess claim of input tax credit and paid the amounts due on which interest was also due under Section 50 of the BGST Act. The non-payment of tax due and the failure to pay interest attracted the penalty imposed.

13. .....the allegation of excess claim has been admitted and differential amount paid by the assessee. The penalty levied was proper and a civil liability, attracted on the failure to pay the tax due, on a wrong claim of input tax credit".

7.22 The above judgment is squarely applicable to the present case. Therefore I am of the view that the penalty imposed under Section 74(1)of the CGST/GGST Act, 2017 read with Section 122(2)(b) of the CGST/GGST Act 2017, read with Section 20 of the IGST Act 2017, vide the impugned order, is proper and legal.

8. In view of the above, I pass the following order:

(i) Uphold the demand of wrongly availed ITC of Rs.7,88,062/- through TRAN-1 in contravention of section 140 of the CGST Act, 2017, under section 74(1) of CGST Act, 2017,

(ii) Uphold the penalty of Rs. 7,88,062/- under Section 74(1) of the CGST Act, 2017 read with Section 122(2) (b) of the CGST Act, 2017 read with the GGST Act, 2017 and IGST Act, 2017,

(iii) Allow the appeal with regard to interest payable on :

(a) the wrongly availed ITC of Rs.7,88,062/- through TRAN-1 as in (i) above, vide the impugned order, under Section 50(3) of the CGST Act, 2017,

(b) the excess availment of ITC Rs.16,11,484/- (Rs.8,05,742/- + SGST Rs.8,05,742/-) and reversed in the month of JULY-2019, vide the impugned order, under section 50(3) of the CGST/Gujarat GST Act, 2017,

subject to verification by the concerned authority to the effect that the TRAN-1 credit and the ITC as referred in(iii) (a) and (b) above has not been utilized at any point of time and balance of credit is maintained till the payment/reversal of the said ITC. Thereafter, if any interest still found payable, the same shall be recovered from the appellant. The Appellant is directed to submit all desired documents before the Adjudicating authority.

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

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

31/10/2023

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

Date: 10.2023

ATTESTED.

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

By R.P.A.D.

M/s Suraj Subhashbhai Bhavnani (Trade Name B K Plast)
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(GSTIN 24ACAPB5193R1ZD)

Copy to:

1. The Principal Chief Commissioner of CGST & C.EX., Ahmedabad Zone.
2. The Commissioner [Appeals], CGST & C. Ex., Ahmedabad.
3. The Commissioner, CGST & C. Ex., Ahmedabad-North.
4. The Additional Commissioner, CGST & C.Ex., Ahmedabad-North
5. The Dy/Asstt. Commissioner, CGST & C. Ex, Division-IV Ahmedabad-North.
6. The Superintendent [Systems], CGST (Appeals), Ahmedabad.
7. Guard File/ P.A. File.