



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

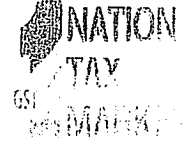
Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 07926305065-

टैलेफैक्स 07926305136



DIN- 20231064SW0000999A6D

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/1195/2023 -APPEAL / 3346 - 51

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-JC-129/2023-24**
दिनांक Date : **25.09.2023** जारी करने की तारीख Date of Issue : **18.10.2023**

श्री आदेश कुमार जैन संयुक्त आयुक्त (अपील) द्वारा पारित

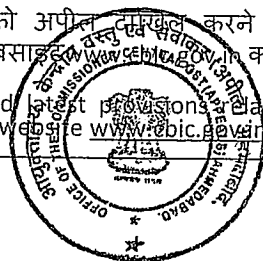
Passed by Shri Adesh Kumar Jain, Joint Commissioner (Appeals)

ग Arising out of Order-in-Original No. **CGST-VI/Dem-78/Hazira Infra/AC/DAP/2022-23 DT. 31.10.2022** issued by The Assistant Commissioner, CGST, Division-VI, Ahmedabad South

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

Appellant	Respondent
M/s Hazira Infrastructure Limited, Adani Corporate House, Shantigram, Nr. Vaishno Devi Circle; S.G. Highway, Khodiyar, Ahmedabad- 382421, (GSTIN: 24AACCH4242A1ZB)	The Assistant Commissioner, CGST, Division-VI, Ahmedabad South

(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) <u>Full amount of Tax, Interest, Fine, Fee and Penalty</u> 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 दायर करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbic.gov.in को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website www.cbic.gov.in .



ORDER-IN-APPEALBrief Facts of the Case :

M/s. Hazira Infrastructre Limited, Adani House, Nr. Mithakali Six Road, Navrangpura, Ahmedabad 380 009 (hereinafter referred as 'Appellant') has filed the appeal against Order-in-Original No. CGST-VI/Dem-78/Hazira Infra/AC/DAP/2022-23 dated 31.10.2022 (hereinafter referred as 'Impugned Order') passed by the Assistant Commissioner, CGST, Division - VI, Ahmedabad South (hereinafter referred as 'Adjudicating Authority').

2. Briefly stated the facts of the case is that the 'Appellant' is holding GST Registration - GSTIN No.AACCH4242A1ZB has filed the present appeal on 20.02.2023. To ascertain/verify the admissibility of the transitional credit availed, the tax payer was requested to submit the documents based on which they have availed the said transitional credit in TRAN-1 vide letter CGST/WS0605/TRAN-1/2019-20 dated 11.06.2021. However, despite repeated request the tax payer has not submitted the required documents for verifying the admissibility of transitional credit claimed by them. Further, an intimation dated 03.09.2021 (Form GST DRC 1A) of tax ascertained being payable under Section 73(5)/74(5) of the CGST Act, 2017 read with Rule 142(IA) of the CGST Rules, 2017 was issued to the tax payer. As appeared that the transitional credit amounting to Rs.34,36,949/- wrongly carried forward and utilized by them is not admissible to them and the same was required to be covered under the proviso of Section 73(1) of the CGST Act read with the provisions of Rule 121 of the CGST Rules along with interest as per Section 50 of the CGST Act and penalty under Section 122(1)(xvii) of the CGST Act, 2017 should not be recovered.

3. Accordingly, a show cause notice as to why the aforesaid amount should not be recovered along with interest and penalty under the proviso of Section 73(1) of the CGST Act read with the provisions of Rule 121 of the CGST Rules along with interest as per Section 50 of the CGST Act and penalty under Section 122(1)(xvii) of the CGST Act, 2017 was issued under F.No.CGST/WS0605/TRAN-1/HAZIRA/21-22 dated 10.09.2021.

4. Thereafter, the *adjudicating authority* vide *impugned order* dated 31.10.2022 has confirmed the demand of Rs. 89,277/- from total demand of Rs. 34,36,949/- under proviso to Section 73 (1) of the CGST Act, 2017 read with Rules 121 of CGST Rules, 2017, interest at appropriate rate as applicable, under Section 50 and penalty under Section 122(1)(xvii) of the CGST Act, 2017 and partially confirmed the Show Cause Notice for the following reasons:

- (i) During verification of Tran-1, it is observed that as per ST 3 return for the period April to June 2017, the closing balance of Cenvat credit of input services was Rs. 33,47,672/- and remaining balance amounting to Rs. 89,277/- pertains to Cenvat credit of Education Cess, SHED and Krishi Kalyan Cess which they have wrongly carried forward in Table 5(a) of TRAN 1 and therefore liable to be recovered/reversed by the taxpayer along with applicable interest and penalty.
- (ii) Cess has been clearly excluded to be so eligible for carry forward as ITC in TRAN 1. Therefore, there is no iota of doubt that Cess of any kind except National Calamity Contingent Duty (NCCD), which was so specified in Explanations 1 and 2 specifically could be allowed to be carried forward and adjusted against Output GST Liability. It may be noted here that this NCCD is allowed to be transitioned not as CENVAT credit, but because it is specifically included as "Eligible Duties" in Explanations 1 and 2 of Section 140 of the Act.
- (iii) Confirmed the demand of Rs.89,277/- as determined under the proviso to Section 73(1) of the CGST Act, 2017 read with Rules 121 of CGST Rules, 2017.
- (iv) Levied interest at applicable rate under Section 50 of the CGST Act, 2017 read with Rules 121 of CGST Rules, 2017
- (v) Imposed equal demand amount as penalty under Section 122(1)(xvii) of the CGST Act, 2017.
5. Being aggrieved with the impugned order the appellant has filed the present appeal on 20.02.2023 on the following grounds:
- that the adjudicating authority in his para 12,13,14 and 15 of the impugned order has stated that ED cess, SHED and Krishi Kalyan Cess are not allowed in terms of Explanation No.3 to Section 140 inserted vide Section (d) of Section 28 of CGST Amended Act 2018. Further CBEC circular 87/06/2019 dated 02.01.2019 clarified that no transition of Cess including Cess which collected additional duty of customs under subsection (1) of section 3 of Customs Tariff Act 1975 would be allowed in terms of explanation 3 of section 140.
 - that the adjudicating authority has relied on the amended provisions of section 140 of the CGST Act which was amended by the Amendment Act dated August 29, 2018
 - That the unamended provisions of section 140(1) of the CGST Act basis which the credit of ED Cess, SHED, and Krishi Kalyan is transitioned under the GST regime by the appellant as:



A registered person, other than a person opting to pay tax under Section 10, shall be entitled to take, in his electronic credit ledger, the amount of cenvat credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such manner as may be prescribed.

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely-

(i) where the said amount of credit is not admissible as input tax credit under this Act; or

(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or

(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government."

➤ the proviso to Section 140(1) specifically delineates those circumstances / conditions under which credit availed may not be transitioned, however, the Appellant has fulfilled all the conditions as set out in the proviso above and there is nothing thereunder, to militate against the availment of ED CESS, SHED & KKC in question. Further, there is no dispute or allegation under the SCN which specifies that the Appellant has violated any conditions specified in the proviso to Section 140(1) of the CGST Act. Accordingly, the Appellant submits that the credit of ED CESS, SHED & KKC is rightly transitioned under the GST based on the unamended Section 140(1) of the CGST Act.

➤ The retrospective amendment wef July 2017 in the Section 140(1), to contextualize the phrase cenvat credit with the term eligible duties', accordingly amended Section 140(1) of the CGST Act provided that a person registered both under the existing law and GST, shall be allowed to take in his electronic credit ledger, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed.

➤ As per Explanation 1 to section 140 eligible duties are defined as transition under GST and as the term eligible duties does not include ED Cess, SHED and KKC, its credit cannot be transitioned.

➤ The appellant further elaborates that eligible duties as per Explanation 1 to section 140 is also applicable to the transition of credit under Section 140(6) of the CGST Act, it is for this reason only that Explanation 1 states that the same would mean the duties enumerated therein, paid on inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

- The eligible duties as envisaged in Explanation 1 to section 140 was restricted to Sections 140(3), 140(4) and 140(6) of the CGST Act, it was only through the amendment act; the explanation 1 was proposed to extend it to Section 140(1) as well.
- that Explanation 3 of Section 140 of the CGST Act refers to the expression 'eligible duties and taxes' and the said expression is not employed in Section 140(1) of the CGST Act. Hence, Explanation 3 becomes irrelevant in understanding the scope and coverage of transitional credit of ED CESS, SHED and KKC vailed under Section 140(1) of the CGST Act.
- That the adjudicating authority has relied upon the departmental circular no. 87/06/2019 dated 02.01.2019 which clarified that the transition of credit of cesses is not allowed in terms of Explanation 3 of Section 140 of the CGST Act, is issued to settle ambiguity in the provisions by way of clarification does not hold good and has merely been provided to withdraw the credit of cesses which the appellant is entitled
- The appellant has relied upon references of various judgements to defend their case.
- the balance of ED CESS, SHED & KKC is a vested right, it could not be taken away on account of the subsequent omission of the provision enabling the availment of credit of ED CESS, SHED & KKC.
- that transitional credit of ED CESS, SHED & KKC cannot be denied merely relying on the judgement passed by the divisional bench of Hon'ble Madras High Court. Hence it is humbly prayed to your good self to set aside the impugned order.

6. Personal Hearing in the matter was held on 26.07.2023 wherein Mr. Rahul Patel, C.A. appeared on behalf of the 'Appellant' as authorized representative. During P.H. he has reiterated the written submission and requested to allow the appeal.

DISCUSSIONS AND FINDINGS

7. I have gone through the facts of the case, written submissions made by the 'appellant'. I find that the main issue to be decided in the instant case is (i) whether the appeal has been filed within the prescribed time-limit and (ii) whether the appeal filed against the impugned order "for rejecting cenvat credit of Rs. 89,277/- carried forward to Table 5(a) of TRAN-1", can be set aside.

8. First of all, I would like to take up the issue of filing the appeal and before deciding the issue of filing the appeal on merits, it is imperative that the statutory provisions be gone through, which are reproduced,

below:

SECTION 107. Appeals to Appellate Authority. — (1) Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(2)

(3)

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a **further period of one month.**

9. I observed that in the instant case that as against the impugned order of dated 31.10.2022, the appeal has been filed on 20.02.2023 i.e. appeal filed by delay from the normal period prescribed under Section 107(1) of the CGST Act, 2017. I find that though the delay in filing the appeal is condonable only for a further period of one month provided that the *appellant* was prevented by sufficient cause. In the instant case, the appellant has stated that they were communicated the impugned order on 06.12.2023 and in view of the same, I find that the present appeal is well within the time limit and I proceed ahead to decide the case.



10. I have carefully gone through the facts of the case available on records, submissions made by the '*Appellant*' in the Appeals Memorandum as well as through additional submission. I find that the '*Appellant*' had availed the credit of Central Excise/Service Tax, Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess overall amounting to Rs.34,36,949/- through TRAN-1 as transitional credit. Accordingly, a SCN dated 10.09.2021 was issued to the *appellant* in this regard. Thereafter, the *adjudicating authority* vide impugned order has partially confirmed the demand of wrongly availed credit of Cesses. Further, I find that the *adjudicating authority* has confirmed the demand of Rs. 89,277/- under proviso to Section 73 (1) of the CGST Act, 2017 read with Rules 121 of CGST Rules, 2017, interest as applicable, under Section 50 and penalty of Rs. 89,277/- under Section 122(1)(xvii) of the CGST Act, 2017.

11. On carefully going through the submissions of *appellant* I find that the *appellant* is mainly contending that the Section 140(1) refers to '*CENVAT Credit*' carried forward in the return and the explanation to Chapter XX

'Transitional Provisions' states that the term 'CENVAT Credit' used in this chapter shall have same meaning as assigned to them in the Central Excise Act, 1944 or the rules made there under (i.e. CENVAT Credit Rules, 2004) ; that in view of said provisions, a registered person shall be eligible to carry forward the credit into the GST regime. The *appellant* has accordingly contended in this appeal that on a co-joint reading of Section 140(1) and aforesaid Explanation, it is evident that any credit which qualifies as eligible CENVAT Credit under the CENVAT Credit Rules, 2004 and shown in the return filed under erstwhile regime, shall be carried forward into the GST regime.

12. I find that the *appellant* has further contended that vide CGST (Amendment) Act, 2018, explanation 3 was inserted with retrospective effect from 01.07.2017 that *inter-alia* clarified that "eligible duties and taxes" will not include Cess, not specified in Explanation 1 and 3 ; that the said amendment has not been notified by the Government and presently, not in operation. Accordingly, they had carried forward the CENVAT credit accumulated on account of Cesses through TRAN-1.

13. In view of above, the *appellant* has contended that they have correctly carried forward the credit of Cesses into GST regime. Further, the *appellant* has contended that the Circular No. 87/06/2019-GST dated 02.01.2019 relied upon by the *Adjudicating Authority* is *ultra vires* to the GST law and hence bad in law. Further, *appellant* has contended that they are not eligible to claim refund of Cesses and in support of same they referred case of *Schlumberger Asia Services Ltd v Commissioner of CE & ST, Gurgaon-I [2021-/IL-218-CESTAT-CHD-ST]* wherein the *CESTAT* has followed the *aforementioned* decision of *Bharat Heavy Electricals Ltd (supra)* and held that the *appellant* is entitled to the refund claim of the cess balances.

14. Since, the *appellant* has contended that the amendment that excluding Cess in "eligible duties and taxes" has not been notified by Government, I refer the relevant Explanation 3. The same is reproduced as under :

Explanation 3.- For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975).]

The Explanation 3 is inserted w.e.f. 01.07.2017 by s.28 of 'The Central Goods and Services Tax (Amendment) Act, 2018 (No. 31 of 2018)'. And the Government of India vide Notification No. 02/2019 - Central Tax dated 29.01.2019 appoints the 01.02.2019, as the date on which the provisions of the Central

Goods and Services Tax (Amendment) Act, 2018 (31 of 2018), except clause (b) of section 8, section 17, section 18, clause (a) of section 20, sub-clause (i) of clause (b) and sub-clause (i) of clause (c) of section 28, shall come into force. In the present matter the SCN vide which demanded the wrongly availed Transitional Credit is issued on 10.09.2021. Accordingly, I do not find any force in the contention of the *appellant*. In view of foregoing, I am of the considerate view that in the present matter, as per Section 140 of the CGST Act, 2017 it is very much clear that transitional credit of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess under TRAN-1 is not admissible.

15. Further, I find that the *appellant* has contended that alternatively they are eligible to claim refund of Cesses and in support of their claim they referred case law of *Bharat Heavy Electricals Ltd. (Supra)*. In the present appeal proceedings the issue involved is rejection of transitional credit claimed by *appellant* by filing TRAN-1 in terms of Section 140 of the CGST Act, therefore, facts and circumstances of present case is different from the aforesaid case laws and thus ratio of said case laws are not applicable in the present matter.

16. Further, as regards to order for demand & recovery of interest the *appellant* has contended that since, there was no dispute on eligibility of credit at the time of availment and the only dispute was for transferring the credit, levy of interest is incorrect. However, If tax is payable under Section 73, interest shall also be payable under Section 50 of the CGST Act, 2017. Accordingly, the adjudicating authority has held that the noticee has carried forward transitional credit and therefore ordered for recovery of interest under Section 50(1) of the CGST Act, 2017. Accordingly, I do not find any force in the contentions of the *appellant* in this regard.

17. Further, as regards to imposition of penalty of Rs.89,277/- I find that the *appellant* has contended that penalty under Section 122(1)(xvii) of the CGST Act is not imposable in the matter of wrong availment of input tax credit. Whereas, in the present case they had carried forward CENVAT credit lying in balance as on 30.06.2017 in electronic credit ledger pursuant to rollout of GST w.e.f. 01.07.2017 which is permissible as per Section 140(1) of the CGST Act. Accordingly, the *appellant* has contended that there was no such deliberate and *mala-fide* intention to avail excess input tax credit and therefore, charging interest and penalty in the instant case is not tenable. Accordingly, I hereby refer the relevant provisions.

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 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 for any reason, other than the reason of fraud or any willful-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.

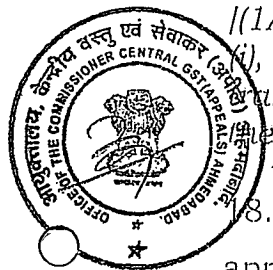
Section 122. Penalty for certain offences.-

- (1) Where a taxable person who -
(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act: "shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51" >section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52" >section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher".

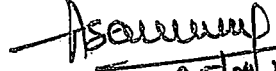
(1A) Any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.

18. In the present matter, as discussed in foregoing paras I find that the appellant had wrongly carried forward ITC of Cess amounting to Rs.89,277/ . However, I find that there is no evidence on record that the appellant had any time failed to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made there under or furnishes false information or documents during any proceedings under this Act. Therefore, the penalty imposed by the Adjudicating Authority under Section Section122(1)(xvii) of the CGST/GGST Act, 2017 is not maintainable.

19. In view of the above discussions, I uphold the demand of Rs. 89,277/- under Section 73(1) along-with interest at applicable under Section 50 of the CGST Act, 2017 and drop the penalty of Rs. 89,277/ imposed under Section 122(1)(xvii), as discussed above.



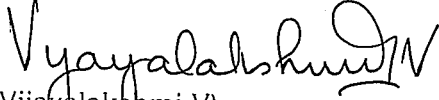
20. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.


25/09/2023
(Adesh Kumar Jain)

Joint Commissioner (Appeals)

Date: .09.2023

Attested


(Vijayalakshmi V)
Superintendent (Appeals)

By R.P.A.D.
To,



M/s. Hazira Infrastructure Limited,
Adani House, NR. Mithakhali Road, Ahmedabad -- 380009.

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Ex., Appeals, Ahmedabad.
3. The Commissioner, CGST & C. Ex., Ahmedabad-South.
4. The Dy/Asstt. Commissioner, CGST, Division-VI, Ahmedabad South.
5. The Superintendent (Systems), CGST Appeals, Ahmedabad.
6. Guard File.
7. P.A. File

