



आयुक्तका कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५,
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By Regd. Post

DIN NO.: 20231164SW0000555C08

(क)	फाइल संख्या / File No.	GAPPL/ADC/GSTP/2842/2023 / ६५१० - १५
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-CGST-001-APP-JC-149/2023-24 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	16.11.2023
(ङ)	Arising out of Order-In-Original No. CGST-VI/Dem-421/Adani/AC/DAP/2022-23 dated 24.03.2023 passed by The Assistant Commissioner, CGST, Division-VII, Ahmedabad South Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Adani Hazira Port Limited (GSTIN: 24AAICA0970E1Z1), Adani House, Nr. Mithakali Six Road, Navrangpura, Ahmedabad-380009

(A)	इस आदेश(अपील) से ब्यक्ति कोई व्यक्ति विवक्षित तरीके में उपयुक्त प्राधिकारी /आधिकारण 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)	उप्युक्त अपीलकर्ता को अपील दायर करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलकर्ता 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-APPEAL**Brief Facts of the Case :**

M/s. Adani Hazira Port 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-421/Adani/AC/DAP/2022-23 dated 24.06.2023 (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.24AAICA0970E1Z1 has filed the present appeal on 22.06.2023. They were providing taxable services, Transport of Goods by road/goods transport agency service etc. During the test check of Tran-1 records of the appellant, it was observed by C&AG vide HM-59 dated 03.03.2021 that they had carried forward Cenvat Credit balance of Rs.25,43,64,185/- under Table 5A of GST Tran-1. On scrutiny of the ST-3 returns of April'2017 to June'2017 of the appellant, it was found that the credit carried forward in their Tran-1 includes credit of Education Cess of Rs.40,35,850/-. SHEC of Rs.20,26,528/- and Krishi Kalyan Cess (KKC) of Rs.17,39,007/- aggregating to Rs.78,01,385/-.

3. A Show Cause Notice No.V/WS06/O&A/SCN-179/2021-22 dated 15.12.2021 was issued to the Appellant for the wrongly carried forward credit amounting to Rs.78,01,385/- (Education Cess of Rs.40,35,850/-. SHEC of Rs.20,26,528/- and Krishi Kalyan Cess (KKC) of Rs.17,39,007/-) under provisions of Rule 121 of the CGST Rules, 2017 read with Section 73 of the CGST Act, 2017 read with Rule 142(IA) of the CGST Rules, 2017 along with interest as per Section 50 of the CGST Act and penalty under Section 73(9) of the CGST Act, 2017 should not be recovered was issued to the tax payer with an opportunity for personal hearing which was attended by the appellant on 02.03.2023.

4. Thereafter, the adjudicating authority vide impugned order dated 24.03.2023 has confirmed the demand of Rs. 78,01,385/- (Education Cess of Rs.40,35,850/-. SHEC of Rs.20,26,528/- and Krishi Kalyan Cess (KKC) of Rs.17,39,007/-) under proviso to Rule 121 of CGST Rules, 2017 read with Section 73 (1) of the CGST Act, interest at appropriate rate as applicable, under Section 50 and 10% penalty under Section 73(9) of the CGST Act, 2017 and 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. 25,43,64,185/- out of which Rs. 78,01,385/- pertains to Cenvat credit of Education Cess, SHEC 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. 78,01,385/- 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 on the demand confirmed.
- (v) Imposed 10% of the demand amount as penalty under Section 73(9) of the CGST Act, 2017.

5. Being aggrieved with the impugned order the appellants has filed the present appeal on 22.06.2023 on the following grounds:

that they had reversed the ITC amounting to Rs. 78,01,385/- vide DRC-03 challan no.AD2412220191435 dated 20.12.2022 under protest without accepting the contention of the department given in the SCN dated 15.12.2021 prior to receiving the impugned order dated 24.03.2023;

The credit pertaining to KKC, SHEC and EC amounting to Rs. 78,01,385/- has been correctly carried forward by us under Section 140(1) of the CGST Act. The Department has erroneously contended that the said transition is in contravention of Section 140(1) of the CGST Act read with Rule 117(1) CGST Rules, 2017 read with Explanation 2 and 3 under Section 140(1) as eligible duties and taxes excludes cess.

That section 140(1) was amended by way of Section 28(a) of the CGST Amendment Act read with Notification No.2/2019-CT dated 29.01.2019, which inserted the term eligible duties in the Section 140(1) of the CGST Act. The relevant extract of the same is reproduced below for ease of reference:-

"(1) A registered person, other than a person opting to pay tax under Section 10, shall be entitled to take, in his electronic ledger, the amount of

CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day”.

- 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 there under, 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 un amended Section 140(1) of the CGST Act.
 - The explanation to Chapter XX of the CGST Act, 2017 stipulates that the expression of 'CENVAT Credit' have the same meaning as respectively assigned to them in the Central Excise Act, 1944 or the rules made thereunder
 - Rule 3(1) of the Cenvat Credit Rules, 2004 stipulates that a manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit of duties/taxes/cesses as specified in the enumerated clauses and that all such credits, which have been enumerated in Rule 3(1) are collectively referred to as "CENVAT credit"
- That the only restrictions on the ambit of Section 140(1) are on the Proviso to the said sub-section, which provides that where the credit is not admissible as input tax credit under the act and/or where all the returns required under the existing law for the period of six months preceding 30.06.2017 have not been furnished, and/or the credit relates to goods manufactured and cleared under exemption notifications, the registered person will not be allowed to take credit.
- 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.



- the Appellant would like to state that Explanation 3 of Section 140 of the CGST Act mentions 'eligible duties and taxes' and not 'eligible duties'. The credit of ED CESS, SHED & KKC is transitioned by the Appellant based on Section 140(1) of the CGST Act which refers to the expression 'CENVAT credit of eligible duties' and not 'CENVAT credit of eligible duties and taxes'.
- 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 availed under Section 140(1) of the CGST Act.
- that the retrospective amendment made to Section 140 of the CGST Act vide the Amendment Act is arbitrary, unconstitutional and hence illegal. Accordingly, it is humbly prayed to your good self to set aside the demand raised vide the impugned order on this ground itself.
- 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.
- In addition to above contentions, the appellant has relied upon the following judgments:

- (i) Godrej & Boyce MFG Co. Ltd. vs UOI (supra)
- (ii) Rajasthan R.S.S. and Ginning Mills vs DCIT (2014) 11SCC 672
- (iii) Eicher Motors Ltd. vs UOI [1999(106) ELT 3(SC)]
- (iv) CCE Vs Blackwell Agro Ltd. [2013(291) ELT 365(Tri-Del)]
- (v) Spenta International Ltd. vs CCE Thane etc.

Personal Hearing in the matter was held on 25.10.2023 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 further stated that no DRC-01 which is mandatory as per Rule 142(subrule (1)) of CGST Rules, 2017 been issued at all neither electronically nor physically. Therefore the impugned Show Cause Notice is null and void. Further, the ITC has already been reversed and since the said ITC has never been utilized, no interest liability exists. In view of the above the impugned order is not legal and proper and requested to set aside the OIO and 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 Education Cess, SHEC and KKC wrongly carried forward of Rs. 78,01,385/- 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.



I observed that in the instant case that as against the impugned order of dated 24.03.2023, the appeal has been filed on 22.06.2023 i.e. appeal filed within the normal period prescribed under Section 107(1) of the CGST Act, 2017. 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. 78,01,385/- through TRAN-1 as transitional credit. Accordingly, a SCN dated 15.12.2021 was issued to the appellant in this regard. Thereafter, the adjudicating authority vide impugned order has confirmed the demand of wrongly availed credit of Cesses. Further, I find that the adjudicating authority has confirmed the demand of Rs. 78,01,385/- 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. 7,80,138/- under Section 73(9) of the CGST Act, 2017.

11. On carefully going through the submissions of appellant I find that the appellant had reversed the ITC amounting to Rs.78,01,385/- vide DRC-03

challan no.AD2412220191435 dated 20.12.2022 under protest without accepting the contention of the department given in the SCN dated 15.12.2021 prior to receiving the impugned order dated 24.03.2023.

12. Further, from 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.

13. 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.



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 alternatively eligible to claim refund of Cesses and in support of same they referred case of *Schlumberger Asia Services Ltd v Commissioner of CB & 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.

15. 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 15.12.2021. 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.

16. 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.

17. 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, hence, 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.

18. Further, as regards to imposition of penalty of Rs.7,80,138/- I find that the *appellant* has contended that penalty under Section 73(9) 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 there under.

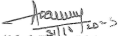
Section 73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts.-

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

19. In the present matter, as discussed in foregoing paras I find that the appellant had wrongly carried forward ITC of Cess amounting to Rs.78,01,385/-. The appellant had reversed the cenvat credit of cesses amounting to Rs.78,01,385/- beyond 30 days of the show cause notice issued. Therefore, they are liable to pay penalty under Section 73(9) of the CGST Act, 2017 and the penalty imposed by the Adjudicating Authority under Section 73(9) of the CGST Act, 2017 is legal and proper.

20. In view of the above discussions, I do not find any infirmity in the impugned order and thus the Order-in-Original dated 24.06.2023 is upheld.

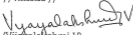
21. अपीलकर्ता द्वारा बर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellants stands disposed of in above terms.


31/10/2023

(Adesh Kumar Jain)
Joint Commissioner (Appeals)

Date: 10.2023

// Attested //


(Vijayalakshmi V)
Superintendent (Appeals)
Central Tax, Ahmedabad.



By R.P.A.D.
To,

M/s. Adani Hazira Port Ltd.,
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

