



## आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावड़ी अहमदाबाद ३८००१५.

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DIN- 202311645W000693124

रजिस्टर्ड ड्राफ्ट प.श्री. द्वारा

क फाइल संख्या File No : GAPPL/ADC/GSTP/2930/2023-APPEAL/8522-12

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-CGST-001-APP-JC- 159 /2023-24

दिनांक Date : 22.11.2023 जारी करने की तारीख Date of Issue : 28.11.2023

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/WS07/O&A/OIO-08(GST)/AC- KSZ/2022-23 dt.

31.03.2023 issued by The Assistant Commissioner, CGST & CX, Div-VII, Ahmedabad South.

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

Appellant	Respondent
M/s Prathana Infrastructure, 37, Devpriya Bungalow, Anandnagar Char Rasta, 100 FT Road, Ambawadi, Ahmedabad, Gujarat - 380015.	The Assistant Commissioner, CGST & CX, Div-VII, Ahmedabad South

(A)	इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण से समझ 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 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)	उप्य अपीलकारी प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलकारी 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. Prathna Infrastructure, 37, Devpriya Bunglow, Anandnagar Char Rasta, 100FT Road, Ambawadi, Ahmedabad, Gujarat - 380015 (hereinafter referred as 'Appellant') has filed the appeal against Order-in-Original No. CGST/WS07/&A/101-08(GST)/AC-KSZ/2022-23 dated 31.03.2023 (date of communication of the order appealed against is 04.05.2023) (hereinafter referred as 'Impugned Order') passed by the Assistant Commissioner, CGST, Division - VII, Ahmedabad South (hereinafter referred as 'Adjudicating Authority').

2. Briefly stated the facts of the case is that the 'Appellant' was registered under erstwhile Service Tax regime for providing "works contract service" i.e. construction of Residential Complex, and holding Service Tax Registration No :AAQFP2295JSD001, they were also registered under GST regime and holding Goods and Service Tax Identification Number 24AAQFP2295J1ZR for supply of taxable service namely "Works Contract Service" i.e. Construction of Residential Complex. During the course of audit it was observed that in the existing law i.e. in pre-GST era they were engaged in providing Works contact service and paying Service Tax after availing the benefit of abatement as provided under Notification No.26/2012-S.T dated 06.06.2012 as amended, however under the GST Regime the supplier had wrongly carry forwarded input tax credit amounting to Rs 11,96,181/- through TRAN- I in their electronic credit ledger in respect of inputs viz. cement, steel bar, etc held in stock on appointed day and which are contained in their semi finished & finished goods, under the provision of Section 140(3) of the CGST Acts, 2017.

3. In response to said TRAN-1, a SCN was issued to the appellant stating as to why -

- The Input Tax Credit of Rs. 11,96,181/- wrongly carried forward in table No. 7 of TRAN-1 should not be demanded/recovered under Section 73(1) of the CGST Act, 2017 read with Rule 121 of CGST Rules, 2017;
- Interest at applicable rates under Section 50(3) of the CGST Act should not be demanded and recovered from them on the wrong credit taken in TRAN-1;
- Penalty should not be imposed upon them under Section 125 of the CGST Act 2017.



4. Accordingly, the Adjudicating Authority has passed the impugned order on 31.03.2023 and confirmed the demand on the following grounds:

- that a building under construction being attached to earth cannot be called "goods" in terms of definition as per Section 2(52) mentioned above;
- as per Section 140(3) the condition no. (v) of the CSGT ACT, 2017, the noticee was eligible for abatement. Therefore the assessee was not eligible to take credit on input i.e. finished goods or semi-finished goods.
- In a similar issue, Director General of DG(Audit), Central Taxes, New Delhi vide letter dated 27.2.2018 has also denied the credit of inputs (i.e. Bricks, TMT bars & Rods, Cement etc.) held in stock as on 30.06.2017 as well as on inputs contained in their building under development under the provision of Section 140(3) of the Central Goods and Services Tax Act, 2017.
- the transitional credit of inputs already used in construction and contained in works in progress as on 30.06.2017 is not admissible. Therefore, the assessee is required to pay the wrongly availed credit of Rs. 11,96,181/-.
- The noticee is also required to pay interest as per Section 50(3) of CGS Act, 2017 and penalty under Section 125 of the CGST Act, 2017

Being aggrieved with the impugned order the appellant has filed the present appeal on 24.06.2023 on the following grounds -

- That the appellant deny all the allegations/ observations raised in the show cause notice and state that the show cause notice is not sustainable;
- that the construction service provider has been eligible for the transitional credit u/s 140(3) of the CGST Act, of eligible duties/taxes paid on the inputs contained in semi-finished or finished goods, that is on the inputs which had already been used in the construction of immovable property when the GST was rolled out on 1 July 2017.
- That the obvious purpose behind enacting this provision u/s 140(3) was that if an activity, exempt under the existing regime, had become taxable outward supply under the new dispensation, then subject to the 5 specified conditions, the person making such supply, out of the opening stock of his inventory as on 1 July, 2017, would be entitled to the credit of inputs used for building that stock. There may be hundreds of suppliers of composite supply of construction service who had unsold inventory of such immovable property units on that day, some under



construction and others already constructed. They obviously expected to benefit from this reasonable statutory entitlement;

That a natural corollary of the expanded meaning of "goods", imported from the State VAT into the GST law, therefore, is that for the limited purpose of works contracts, the

goods (inputs) like cement, bricks, TMT bars etc. which have changed their form to become a part of the immovable property, would have to be treated as semi-finished or finished goods and, therefore, eligible for ITC under S.140(3) of the CGST Act. Considering them as an immovable property would in fact take them out of the GST net altogether in terms of para 5 of Schedule III to the CGST Act;

That in the case of appellant, so long as the outward supply remains taxable under GST law, then, unless the ITC is explicitly barred, credit of tax paid on inputs will invariably be available. It can't be denied by implication. Even under S.17(5) of CGST Act, where ITC in respect of certain inputs and input services has been specifically disallowed, including works contracts and construction service under sub-clauses (c) &(d) thereof, exceptions have been made in every case where the inputs and input services are used directly for making taxable supplies. So appellant has availed ITC as per provision erstwhile as applicable;

The land being immovable property is outside the GST purview, as provided in S.7(2) of CGST Act read with para 5 of Schedule III thereto. Its value is, therefore, excluded to arrive at the taxable value of construction service. The value of land or of the undivided share of land in construction of any immovable property has been pegged, vide para 2 of the Notification No. 11/2017-CT(R) dated 28.6.2017, at one-third of the total amount charged for the supply of the service as well as transfer of land or undivided share of land. Thus, the taxable value of supply of service, excluding the land value, is taken as two-thirds of the total price charged. In this context, it is also relevant to look that in case of construction of complex, the supply is deemed to be taxable, as laid down in para 5(b) of the Schedule 11, only where whole or a part of the consideration is received by the person engaged in the construction of complex from the buyer either:

- (i) before issuance of a completion certificate, where required, by the competent authority; or
- (ii) before its first occupation (by the builder of the complex himself), whichever is earlier;

The show cause notice merely alleging baldly that there is suppression on the part of the Appellant. The present show cause notice has not brought any evidence/ fact which can establish that the Appellant has suppressed





Section 140 (3) of CGST Act, 2017:-

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 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:-

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;
- (iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and
- (v) the supplier of services is not eligible for any abatement under this Act :

**9(ii).** As the supply of service in relation to construction of residential complex also involves transfer of "land/undivided share of land" which do not attract GST, the value of such land/ undivided share of land shall be deemed to be 1/3rd of the total amount charged for such supply. As such GST on Residential Complex [for which a part or total consideration is received prior to issue of a completion/occupancy certificate or its first occupancy, whichever is earlier], shall be 2/3rd of the total consideration charged for such supply (thus GST payable on a Flat/House/Complex would works out to be 12% of the total consideration inclusive of the value of land/ undivided share of land). As such ITC claimed Rs. 11,96,181/- on the inputs contained in their finished goods or semi-finished goods (i.e. building under development) held in stock on the appointed day is not found to be admissible as per condition mentioned at above condition (v) of Section 140(3) of the CGST Act,2017.



10(i). It is seen that in the case of M/s R.B. Construction Company 2019 (23) G.S.T.L. 429 (App. A.A.R.-GST), Appellate Authority For Advance Ruling Under GST, Gujarat, has held as under:-

10.6 Section 2(52) of the CGST Act, 2017 and the GGST Act, 2017 defines the term 'goods' as every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply. The work of the appellant falls within the definition of 'works contract' as given under Section 2(119) of the CGST Act, 2017 and the GGST Act, 2017. Therefore, even if the contract of the appellant was on work-in-process stage on the appointed day, the same would not be covered within the terms 'semi-finished or finished goods' as the term 'goods' covers movable property and not immovable property.

10(ii). In view thereof, the appellant is not entitled to avail input tax credit in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in the stock under sections 140(3) of the CGST Act, 2017. As per Section 2(59) of the CGST Act, 2017, inputs means any goods other than capital goods used or intended to be used by a supplier in course of furtherance of business. Whereas as per Section 2(52) of the said Act "Goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.

11. I further refer the letter F.No.381/274/2017, dated 27-2-2018 issued by the Directorate General of Audit, New Delhi. The said letter was issued in a case of M/s. ABC wherein it was noticed during the audit that the said assessee has taken transitional credit of inputs (bricks, TMT bars and rods, cement etc) held in stock as on 30-6-2017 as well as on inputs contained in their building under development. The DG (Audit), referring to the provisions of Section 140 (3) of CGST Act, 2017 clarified as under;

*As per Section 2 (59) of the said Act, 'inputs' means any goods other than capital goods used or intended to be used by a supplier in course of furtherance of business. As per Section 2 (52) of the said Act, 'Goods' means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply. M/s. ABC referred to Section 140*



(3) of the CGST Act, 2017 and submitted that they availed the credit of Rs.59.24 lakh in Tran 1 against the inputs contained in their finished goods or semi finished goods (i.e. their buildings under development) held in stock on the appointed day. The contention of the assessee does not appear to be correct as a building under construction being attached to earth cannot be called 'goods' in terms of definition as per Section 2(52) mentioned above and in terms of various case laws under erstwhile Central Excise Act, 1944. Therefore it appears that in the case of building construction, the transitional credit of inputs already used in construction and contained in WIP as on 30-6-2017 is not admissible.

**12(i).** In view of above, the provisions of Section 140(3) of CGST Act, 2017 allows transitional credit of inputs contained in semi-finished and finished goods in stock as on appointed day only to the specified class of persons. However, clarification issued by DG (Audit) categorically rules out transitional credit of inputs already used in construction of building in stock and contained in work in progress as on 30-6-2017 on the ground that such buildings does not fall under the definition of 'goods' given under Section 2(52) of CGST Act, 2017 under which 'goods' is defined to mean only movable property.

**12(ii).** Concurrent reading of Section 140(3) of CGST Act, 2017, Section 2(52) of CGST Act, 2017 and clarification issued by DG (Audit) leads that, the term 'goods' given under Section 140 (3) of CGST Act, 2017 means every kind of movable property. Therefore, to qualify for availing transitional credit of eligible duties of input contained in semi-finished or finished 'goods' in terms of Section 140(3), such goods ought to be movable goods. In this case, transitional credit of Rs. 11,96,181/- was availed on inputs already used in such buildings/ structures and contained in under construction buildings/structures (work-in-progress). Such buildings/structures are undoubtedly immovable goods. Since Section 140(3) read with Section 2(52) allows transitional credit only on inputs used finished/semi-finished goods of movable nature, transitional credit of Rs. 11,96,181/- availed on inputs used in such buildings/structures is not admissible. The registered person who is eligible for any abatement under CGST Act cannot claim the credit under reference in view of the condition (v) of Section 140(3) of CGST Act, 2017.

**13.** The interest is levied on "ineligible ITC availed and utilized" under Section 50(3) of CGST Act, 2017. Therefore, interest is leviable in the present case. The appellant is also liable for penalty under Section 125 of





CGST Act, 2017 for contravention of the provisions of Section 140 of CGST Act, 2017. Hence, penalty is also imposable upon the appellant.

14. In view of the above discussions, I don't find any infirmity in the impugned order passed by the adjudicating authority. Accordingly, I upheld the impugned order and reject the appeal filed by the appellant.

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.

*Adesh Kumar Jain*  
22/11/2023  
(Adesh Kumar Jain)  
Joint Commissioner (Appeals)  
Date: 22.11.2023

Attested

*SK*  
(Sandheer Kumar)  
Superintendent (Appeals)

By R.P.A.D.

To,  
M/s. Prathna Infrastructure,  
37, Devpriya Bunglow,  
Anandnagar Char Rasta,  
100FT Road, Ambawadi,  
Ahmedabad, Gujarat - 380015.



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-VII, Ahmedabad South.
5. The Superintendent (Systems), CGST Appeals, Ahmedabad.
6. Guard File.
7. P.A. File



