



आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

07926305065-

टेलफैक्स 07926305136



DIN- 20231264SW000021262C

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या File No : GAPPL/ADC/GSTD/305/2023 -APPEAL / 9415-20

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-CGST-001-APP-JC- 164 /2023-24

दिनांक Date : 30.11.2023 जारी करने की तारीख Date of Issue : 01.12.2023

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. WS07/O&A/OIO-07/AC-RAG/2022-23 DT.

17.11.2022 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	
The Assistant Commissioner, CGST, Division-VII, Ahmedabad South	M/s Dharti Madrid County LLP, 311, Iscon Mall, 311, Iscon Mall, Jodhpur. Satellite, Ahmedabad-380015	New Address: M/s Dharti Madrid County LLP, Nr Mann Party Plot, 4-5, Sigma Corporate-1, Sindhu Bhawan Road,, Bodakdev, Ahmedabad, Gujarat, 380059

(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 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.appeals.in को देख सकते हैं।

For elaborate, detailed and latest provision relating to filing of appeal to the appellate authority, the appellant may refer to the website www.appeals.in.



ORDER IN APPEAL

The Assistant Commissioner, CGST, Division-VII Ahmedabad South (hereinafter referred to as the '**Appellant/Department**') in terms of Review Order No. 21/2023-24 dated 12.05.2023 issued under Section 107 of the CGST Act, 2017, has filed the present appeal offline in terms of Advisory No.9/2020 dated 24.09.2020 issued by the Additional Director General (Systems), Bengaluru. The appeal is filed against Order No. WS07/O&A/GST/OIO-07/AC-RAG/2022-23 dated 17.11.2022 (hereinafter referred to as the '**Impugned Order**') passed by the Assistant Commissioner, CGST, Division VII, Ahmedabad South (hereinafter referred to as the '**Adjudicating Authority**') to M/s. Dharti Madrid County LLP, 311, Iscon Mall, Above Star India Bazaar, Jodhpur, Satellite, Ahmedabad 380 015 (hereinafter referred to as the '**Respondent**').

2. Briefly stated the fact of the case is that the Respondent was registered under Service Tax Registration No.AAHFD5340BSD001 for providing taxable services under sub-clause (105) of Section 65 of the Finance Act, 1994. On audit of records of the Respondent by the CGST Audit officers for the period from 2014-15 to June 2017 and as per Final Audit Report No.326/2018 dated 29.10.2018 issued by the AC, Circle-IV, CTA, CGST, Ahmedabad it emerges that;

(i) on verification of TRAN-1 and ST-3 Returns for the period April-June'2017, the Respondent has wrongly carried forward the closing balance credit of KKC amounting to Rs. 2,98,736/- as transitional credit which is inadmissible as per proviso to Section 140(1) of the CGST Act, 2017; the Respondent agreed to the audit objection and reversed the ITC amount of Rs.2,98,736/-, however denied to pay the interest stating that they never utilised it.

(ii) further on verification of TRAN-1 and reconciliation it was observed that the Respondent had carried forward the credit of Rs.29,03,913/- on the inputs held in stock in Table 7A, on which the CENVAT was not available in the Service Tax Regime in TRAN-1 as transitional credit. The Respondent could not justify as they were not maintaining any inventory of stock and whatever stock that has been shown in table 7A denotes the stock that has already been used in under construction buildings. Thus, the transitional inputs already used in construction and contained in works in progress as on 30.06.2017 is inadmissible in lieu of proviso Section 140(3) read with Section 2(52) of the CGST Act, 2017.

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

- (i) An amount of closing balance of Rs.2,98,736/- wrongly carried forward of Credit of KKC as reflecting in the ST-3 return filed for the period of Apr-June 2017-18, in TRAN-1 as transitional credit should not be demanded/recovered under Section 73(1) of CGST Act, 2017 read with Rule 121 of CGST Rules, 2017. As the said assessee had reversed the differential amount of Rs.2,98,736/-, why the said amount of Rs.2,98,736/- should not be appropriated under Section 73 of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017.
- (ii) An input tax credit amount of Rs.29,03,913/- wrongly taken in table No.7 of TRAN-1, should not be demanded/recovered under Section 73(1) of CGST Act, 2017 read with Rule 121 of CGST Rules-2017.
- (iii) Interest at applicable rates under Section 50(3) of the CGST Act, 2017 should not be demanded and recovered from them on the wrongly carried forward of the closing balance of credit of KKC and wrong credit taken in TRAN-1, as narrated at (i) & (ii) above.
- (iv) Penalty should not be imposed upon them under Section 125 of the CGST Act, 2017.

4. The adjudicating authority vide his impugned order had found that;-

- (i) the interest in respect of credit of KKC availed, is chargeable in those cases where the Input Tax Credit have been wrongly availed and utilised but in the present situation, the service provider has not utilised the ITC therefore, the interest cannot be charged from them.

the project was under construction stage as on 01.07.2017 and the Respondent has correctly availed the ITC on the inputs contained in the under construction buildings as they have paid GST on supply of services.

In view of the aforesaid grounds, the adjudicating authority held that the Respondent has correctly carried forward the ITC of Rs. 29,03,913/- in their TRAN-1. The adjudicating authority had accordingly dropped the proceedings initiated against the Respondent.

5. During Review of the Impugned Order dated 17.11.2022 the department has observed that the impugned order is not legally tenable and proper on the following grounds:

- that the adjudicating authority has simply accepted the contentions of the noticee that they have taken the eligible credit of Rs. 29,03,913/-, taken in table No 7 of TRAN-I and simply accepted the noticee reliance of OIA No. AK/ADC/GST/522/RGD-APP/2021-22 dt 31.12.2021 in the case of M/s Godrej Greenview Housing Ltd. wherein it was held that credit on inputs TMT

- bars held in stock and/or used in the under construction building(WIP)as on appointed date of 01.07.2017 is eligible credit under Section 140(3) of CGST Act,2017 and held that the appelland has correctly transited the ITC to the GST regime;
- It appears that the adjudicating authority has not correctly appreciated the Section 140(3) of the CGST Act, 2017;
 - 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;
 - the condition no. (v) as mentioned in Section 140(3) has also not been fulfilled. It may be noted that the registered person who is eligible for any abatement under this Act (CGST Act) cannot claim the above said Credit on input contained in their finished goods or semi-finished goods. As the said assessee was eligible for abatement under this Act, therefore the assessee were not eligible to take credit on input i.e. finished goods or semi-finished goods;
 - that the credit of inputs Cement and TMT Bars are used for construction of buildings which is an immovable property. Therefore, in view of above criteria mentioned in Section 17 of the CGST Act, 2017, the decision of the adjudicating authority that the noticee has correctly availed the transitional credit of Cement and TMT Bars used in the construction of Building, does not appear to be legal and proper;
 - the adjudicating authority should have considered the Section 17 of the CGST Act, 2017 which clearly restrict the eligibility of input tax credit in the case of inputs/input services used for construction of an immovable property (other than plant or machinery) and should have confirmed the demand of input tax credit of Rs. 29,03,913/- made in the show cause notice;
 - they further pray to set aside the No.WS07/O&A/GST/OIO- 07 dated 17.11.2022; passed by the Assistant Commissioner, Commissioner, CGST, Div-VII, Ahmedabad South.

Personal Hearing:

6. Personal Hearing in the matter was fixed/held on 21.11.2023 wherein Mr. Nirav Pankaj Shah, Advocate appeared on behalf of the Respondent and stated that TRAN-1 is filed for the services provided for under construction buildings. The appeal of the department is mainly on the ground that TRAN-1 credit is not

admissible since the same is availed on immovable property, which is a mis interpretation of the law. He further submitted that the appeal is filed on ST-4 therefore on technical ground also Departmental Appeal is not maintainable. He further submitted additional submissions and requested to reject the Departmental Appeal. Accordingly, the Respondent has submitted their reply/submissions dated nil as under –

- ❖ The Respondent placed reliance on the OIA passed by the Additional Commissioner, CGST Raigad in case of M/s. Godrej Greenview Housing Ltd. wherein under the similar circumstances the input tax credit was allowed to be transitioned and that order was upheld by the Commissioner (Appeals) in favour of the assessee;
- ❖ The adjudicating authority has correctly issued the OIO dated 17.11.2022 which is legally valid and correct. There is no substance in the appeal filed by the Revenue Department on the following grounds which are independent and without prejudice to each other;
- ❖ The appeal filed by the department is in form ST-4 which is a form of filing the appeal before the Commissioner (A). However, in the present matter the dispute is pertaining to a period from July 1st 2017 and therefore pertaining to GST. The revenue department has filed the present appeal under the incorrect law and incorrect form;
- ❖ The revenue department cannot approbate and reprobate for the same issue. The Respondent is engaged in providing construction services; in service tax regime also the Respondent was eligible to claim cenvat credit of eligible inputs, input services and capital goods and similarly in GST regime the Respondent is eligible to claim input tax credit of eligible inputs, input services and capital goods. Once the services provided are considered as a taxable service liable to GST then at the same time the revenue cannot contend that the stock held by the Respondent is immovable properties.
- ❖ The revenue department has no authority to recover transitional credit under Section 73 of the CGST Act, 2017; As per the statutory provisions that the recovery proceedings can be initiated only in a case where the tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized for any reason. Therefore it is necessary to understand that whether the transitional credit would be covered within the meaning of input tax credit.
- ❖ Appellant cited the case law of The Hon'ble Jharkhand High Court in case of Usha Martin Ltd. in their favour where as it stands today and is clear that for transitional credit proceedings cannot be initiated under Section



73 of CGST Act, 2017 and the appeal filed by the department is liable to be dismissed.

- ❖ Since no recovery proceedings can be initiated there is no question of levying interest under Section 50(3) of the CGST Act, 2017 and penalty under Section 125 which is general in nature.

Discussion and Findings :

7. I have carefully gone through the facts of the case, grounds of appeal, submissions made by the 'Respondent' in the Appeals Memorandum as well as through additional submission's and documents available on record. It is observed that the Respondent had availed the transitional credit of Total 29,03,913/- by filing TRAN-1 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 and finished goods, under the provision of Section 140(3) of CGST Act, 2017.

8. Show Cause Notice was issued to the Respondent in this regard.

Hereafter, the Adjudicating Authority has passed the impugned order on 17.11.2022 and dropped the proceedings initiated against Respondent vide OIO No. WS07/O&A/GST/OIO-07/AC-RAG/2022-23 dated 17.11.2022.

Accordingly, the appellant/department has preferred the present appeal.

9(i). In this case, the transitional credit of Rs. 29,03,913/- availed by the Respondent on the inputs contained in semi-finished or finished goods held in stock on the appointed day was held inadmissible and ordered for recovery. It is observed that transitional credit availed by the Respondent was held inadmissible under Section 140 (3) of CGST Act, 2017. For better appreciation of facts, I refer to Section 140 (3) of CGST Act, 2017 as under:

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 :

2(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 of Rs. 29,03,913/- 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 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 Respondent 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 is 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. 29,03,913/- 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. 29,03,913/- 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 of CGST Act, 2017. Therefore, interest is leviable in the present case. The Respondent 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 Respondent.

14. In view of above discussions, the appeal filed by the 'Department/Appellant' is allowed and the impugned order passed by the adjudicating authority is set aside.

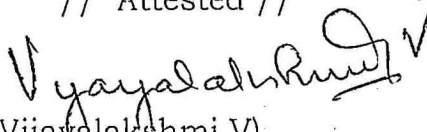
अपीलकर्ताद्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The Appeal filed by 'Department' stand disposed off in above terms.


(Adesh Kumar Jain)
Joint Commissioner (Appeals)

Date: .11.2023

// Attested //


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



By R.P.A.D.

To,

To,

The Assistant / Deputy Commissioner, Appellant
CGST, Division – VII, Ahmedabad South.

M/s. Dharti Madrid County LLP
311, Iscon Mall, Above Star India Bazaar
Jodhpur, Satellite, Ahmedabad-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.

