



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, अम्बावाडी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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DIN- 20230564SW000000ABB2

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/2850/2023 -APPEAL /1836-21

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

दिनांक Date : **30-05-2023** जारी करने की तारीख Date of Issue : **30-05-2023**

श्री मिहिर रायका_अपर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Mihir Rayka, Additional Commissioner (Appeals)

ग Arising out of Order-in-Original No. **03/CGST/WS08/AC/KSZ/2022-23 DT. 19.07.2022**

issued by The Assistant Commissioner, CGST, Division-VIII, Ahmedabad South

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

**M/s. Vodafone M-Pesa Limited, Vodafone House, Building B Corporate Road,
Off S.G. Highway, Ahmedabad -380051**

(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 दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbic.gov.in को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website www.cbic.gov.in .



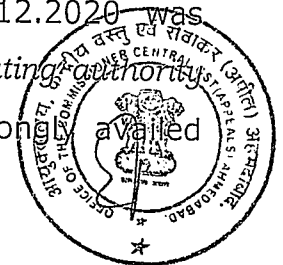
ORDER-IN-APPEAL**Brief Facts of the Case :**

M/s. Vodafone M-Pesa Limited, Vodafone House, Building B, Corporate Road, Off S. G. Highway, Ahmedabad – 380051 (hereinafter referred as '*Appellant*') has filed the appeal against Order-in-Original No. 03/CGST/WS08/AC/KSZ/2022-23 dated 19.07.2022 (hereinafter referred as '*Impugned Order*') passed by the Assistant Commissioner, CGST, Division – VIII, Ahmedabad South (hereinafter referred as '*Adjudicating Authority*').

2(i). Briefly stated the facts of the case is that the '*Appellant*' is holding GST Registration - GSTIN No.24AAECV8934F1Z6 has filed the present appeal on 21.10.2022; as per appeal memorandum the order appealed against was communicated to *appellant* as on 25.07.2022. During the course of EA-2000 audit by the CGST Audit Commissionerate for the period November 2014 to June 2017, it was observed that the '*Appellant*' had wrongly carried forward as transitional credit in TRAN-1 of the closing balance of credit of Krishi Kalyan Cess, Education Cess and Secondary & Higher Education Cess as reflected in ST-3 Return filed for the period April'17 to June'17. The same was not admissible as per Section 140(1) of the CGST Act, 2017. On being pointed out, the *appellant* had informed to the audit officers that they had reversed the said ineligible credit in the GSTR 3B return of March 2018, in terms of Section 140(1) of the CGST Act, 2017 under protest and informed the same vide their letter dated 17.07.2018. The details of reversal are as under :

Sl. No.	Cess	Amount (Rs.)
1	Education Cess	23,43,198/-
2	Secondary & Higher Education Cess	11,67,106/-
3	Krishi Kalyan Cess	4,24,725
TOTAL		39,35,029/-

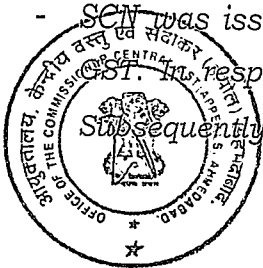
However, applicable interest and penalty on this amount has not been paid by the *appellant*. A Show Cause Notice dated 08.12.2020 was accordingly issued to the *appellant*. Thereafter, the *adjudicating authority* vide *impugned order* has confirmed the said demand of wrong Cenvat Credit and passed order as under :



- (i) I confirm the demand of the wrongly availed credit of Krishi Kalyan Cess, Education Cess and Secondary and Higher Education Cess, carried forwarded in Form TRAN-1 amounting to Rs.39,35,029/- under Section 73 of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017. Since the said amount stands paid, I order to appropriate it towards the said demand. I also order to vacate the protest lodged by the noticee during the reversal of the said wrongly availed transitional credit of cess.
- (ii) I drop the demand of interest amounting to Rs.7,58,113/-, in view of the amended Section 50(3) of the CGST Act, 2017, as the noticee has not utilized the said transitional credit for payment of tax.
- (iii) I do not impose any penalty under Section 73(9) of the CGST Act, 2017 as the noticee has paid the wrongly availed credit of cesses prior to the issue of SCN.

2(ii). Being aggrieved with the impugned order the appellant has filed the present appeal on 21.10.2022 wherein stated that -

- Under erstwhile regime they were holding Service Tax Registration. Chapter XX of the CGST Act inter-alia provides for the transitional arrangements for CENVAT credit of the eligible duties and taxes carried forward in the Service Tax Return filed by a registered person. They had transitioned carry forward CENVAT credit from erstwhile Service Tax Regime to GST era including credit of Krishi Kalyan Cess ('KKC'), Education Cess ('EC') and Secondary and Higher Education Cess ('SHEC') [collectively referred to as 'cesses'] as per Form ST-3 filed till the period June'17.
- Closing balance of cesses amounting to Rs.39,35,029/- transitioned to GST.
- However, basis certain clarification issued including as per Guidance Note on CGST transitional credit, the appellant inter-alia reversed the said credit of Rs.39,35,029/- in its books of accounts on 31.03.2018 as well as vide GSTR-3B Returns for the month of May 2018.
- Further, the appellant had informed about the cesses reversal being carried out under protest to the jurisdictional authority vide its letter dated 17.07.2018.
- SCN was issued to them alleging irregular transition of cesses under GST. In response to SCN they submitted their reply dated 21.06.22. Subsequently, a PH was scheduled on 27.06.22, which was duly



attended by them and re-iterated the submissions made earlier and requested to grant refund of the transitional credit as an alternative.

- Despite above submissions, the Respondent vide OIO denied transition of credit while giving findings as below –
 - o Central Goods and Services Tax (Amendment) Act, 2018 dated 29.08.18 inserting explanation 3 to Section 140(1) of the CGST Act is retrospectively amended with effect 01.07.2017;
 - o Judgment relied by appellant in the case of Godrej & Boyce Mfg. Co. Ltd. (W.P. No. 3226 of 2019) is rendered on a limited premise that SCN did not substantiate the claim of recovery of cesses;
 - o Circular No. 87/06/2019-GST dated 02.01.2019 (hereinafter referred to as '**impugned circular**') has clarified amendment related to Section 140(1) of the CGST Act;
 - o Reliance was placed upon Madras High Court ruling in the case of M/s. Sutherland Global Services Pvt. Ltd. (W.P. No. 4773 of 2018) as well as Cellular Operators Association of India [2018(14) GSTL (522) Del].
 - o The right to claim refund of cesses is not substantiate as per the judgment of Hon'ble Rajasthan High Court in case of Banswara Syntex vs. CCE, Jaipur [2019 (365) ELT 773(Raj.)] wherein it was held Cenvat Credit creates an indefeasible right only to the extent of making payment of corresponding cess and not eligible for refund.
 - o Amount of Rs.39,35,029/- reversed 'under protest' during March 2018 by the Appellant should be appropriated against ineligible credits availed towards cesses;
 - o Demand of interest and penalty are not sustainable and hence appellant is not liable to pay the same.

2(iii). Being aggrieved with the *impugned* order the appellant has filed the present appeal on the following grounds :

- At the outset, they denies all the allegations made in the *impugned* order and further submits that the allegations made are baseless and not sustainable both on facts and in law.
- Conditions of transitioning credit prescribed under the transitional provisions are satisfied by the appellant.
- The terms "of eligible duties" has been inserted in sub-section (1) of Section 140 vide Notification No. 2/2019-Central Tax dated 29.01.2019 (retrospectively amending Section 140 w.e.f. 01.07.2017)



- Section 140(1) refers to 'CENVAT Credit' carried forward in the return. 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 (i.e. CENVAT Credit Rules, 2004) made thereunder.
- In view of aforesaid provisions, a registered person shall be eligible to carry forward the credit into the GST regime provided it cumulatively satisfies the following two conditions ;
 - o Amount being carried forward into the GST regime qualifies as eligible CENVAT Credit under the CENVAT Credit Rules, 2004; and
 - o Aforesaid amount is shown in the return filed immediately preceding the appointed day.
- Thus, 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.
- They have cumulatively satisfied both the aforesaid conditions for the reasons mentioned hereunder :
- Rule 3 of CENVAT Credit Rules, 2004 lists the taxes/cess/duties which are regarded as CENVAT credit and are eligible for utilization against output liabilities. Thus, Rule 3(1) of CENVAT Credit Rules, 2004 is clear that cesses qualify as 'eligible CENVAT Credit' under Rule 3(1). Under the erstwhile regime, the department has also not raised any dispute pertaining to the availment or admissibility of said credit by the appellant.
- The credit of cesses is shown in the returns filed immediately prior to the appointed date. This fact is also accepted in the SCN as well as by the respondent in impugned order. In other words, there is no dispute on this aspect.
- Vide CGST (Amendment) Act, 2018, explanation 3 was inserted after Section 140 (10) of the CGST Act with retrospective effect from 01.07.2017 and it was, inter alia clarified that "eligible duties and taxes" will not include cess not specified in Explanation 1 and 2. However, the said amendment has not been notified by the Governemnt and presently, not in operation.
- The addition of term "eligible duties" by making retrospective amendment to Section 140(1) of the CGST Act also does not bar availment of CENVAT Credit accumulated on account of cesses to GST.

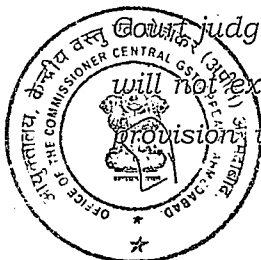


- Further, even though company had initially carried forward the CENVAT Credit accumulated on account of cesses through original Form GST TRAN-1, on account of prevailing ambiguity and to avoid any adverse implications, the company reversed it through Form GSTR-3B.
- In view of above, they have correctly carried forward the credit of cesses into the GST regime and therefore the impugned order is incorrect and the same is liable to be set aside.
- Explanation 1 and 2 not yet operational and accordingly impugned order is liable to be set aside.
- Hon'ble Bombay High Court in the case of Godrej and Boyce (supra) quashed a SCN issued to recover credit of Cesses transitioned under GST Law. The SCN was issued in terms retrospective amendment brought in Explanation 1 and 2, which in revenue's view curtailed carry forward of credit of such Cesses. As these provisions are not notified yet, the High Court quashed the SCN for having jurisdictional error.
- Impugned Circular which is relied upon by the respondent is ultra vires to the GST Law and hence bad in law. The impugned circular is ultra vires Section 140(8) of the CGST Act in as much as it places restrictions which neither existed thereunder prior to the Impugned Amendment, nor post introduction of the said amendment.
- Even if it is construed that the Impugned Amendment does create a retrospective restriction on transitioning of credit of the cesses into GST, even qua Section 140(8) of the CGST Act, such a retrospective amendment shall tantamount to an arbitrary and an illegal restriction, inasmuch as it takes away a vested/accrued and utilized right of the appellant.
- Paragraph 5 of the impugned circular inter alia seeks to arbitrarily and illegally disallow the transition and carry forward of credit of cesses into the GST Regime, which was levied on input services used in providing the said output services. Therefore, reliance place by respondent on impugned circular is bad in law and impugned order should be set aside.
- Explanation 2 and 3 is not made applicable to sub-section 8 of Section 140 of the CGST Act and thus, the appellant has validly transitioned cesses.
- As evident, Section 140(8) is a standalone provision which specifically lays down the conditions and procedure s for transition of credit into GST in case where the registered person was having a centralized registration under the existing law. By virtue of the same it is clearly a more specific provision which governs the assessee who had a



centralized registration under the existing law, and which nature of assesses would be governed by the said specific provision, rather than the generic transitional provision laid down under Section 140(1).

- Delhi High Court judgment in the case of Cellular Operators Association of India (Supra) is not applicable in the instant case.
- The aforesaid decision dealt with denial of cross utilization of unutilized EC and SHEC (being withdrawn) against excise duty and service tax liability on the basis that those cesses were not subsumed and there was no provision in the law for the cross utilization of unutilized EC and SHE cess with excise duty and service tax. However, in present case section 140(1) of CGST Act allows unutilized CENVAT Credit to be carried forward to electronic ledger without questioning the allowability of the same under the earlier tax regime.
- Therefore, the decision of Delhi High Court is not applicable in the appellant's case and accordingly, impugned order is liable to be set aside.
- The Hon'ble Supreme Court has held that a credit once availed is indefeasible in the case of Dai Ichi Karkaria Ltd. It is avilment of credit which creates an accrued vested right to utilize the same.
- Accumulated CENVAT credit is a vested right was also agreed by the Delhi High Court while pronouncing its decision in the case of M/s. Jahanpanah Club [2021 (6) TMI 79].
- Therefore, the appellant has a vested right to claim CENVAT Credit of cesses under CENVAT Credit Rules, 2004 and the said right, by virtue of Section 174(2)(c) of the CGST Act, shall remain unaffected.
- Repeals and savings clause under GST Law saves right of the appellant to claim credit.
- On conjoint reading of repeal and savings and transitional provisions of the CGST Act, it can be understood that a right was available with a taxpayer under erstwhile law to avail credit.
- Accordingly, with an advent of GST such right cannot be curtailed or taken away, hence cannot be denied by a new legislature.
- The appellant is alternatively eligible to claim refund of cesses.
- The contention of appellant fully supported by decision of Hon'ble Delhi Tribunal in case of Bharat Heavy Electricals Ltd. [2020-VIL-402-CESTAT-DEL-CE], wherein the Hon'ble Tribunal held that the credit earned by the appellant were a vested right in terms of Hon'ble Apex Court judgment in Eicher Motors [UOI 1999 (106) ELT 3 (SC)] case and will not be extinguish with the change of law unless there was a specific provision which would debar such refund. Further, it was held that



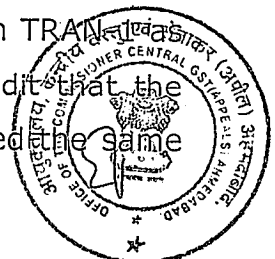
there is no provision in the GST law that such credit would lapse, thus merely by change of legislation suddenly the appellant could not be put in a position to lose this valuable right.

- *Therefore, alternatively that based on this ground alone, the appellant be granted refund of Rs.39,35,029/-.*
- *Amount paid by them is a deposit and payment made 'under protest', hence should not be appropriated against demand.*
- *Mere payment of tax cannot be construed to be a payment towards a demand under Section 73 of the Finance Act. Appellant had reversed merely due to lack of clarity, but did not admit such reversal as voluntary. Thus, such amount was paid "under protest". Therefore, it shall not be treated payment made either as voluntary even though reversed under Form GSTR-3B. Further, based on the above contentions, as an alternative remedy, appellant should be allowed for refund of the amount so paid.*
- *There are decisions of Courts wherein it has been consistently held that no amounts may be collected prior to an actual determination of an amount payable by an assessee. Thus, till the time instant matter in appellant's case attains statutory sanction, amount of Rs.39,35,029/- be treated as "payment under protest" and should not be appropriated against demand raised.*

3. Personal Hearing in the matter was held on 22.12.2022 wherein Mr. Jitesh Wadhvani appeared on behalf of the 'Appellant' as authorized representative. During P.H. he has reiterated the submissions made till date and informed that they want to give additional information, which was approved and 3 working days period was granted. Accordingly, the *appellant* on 26.12.2022 has submitted the copy of judgment in the case of Godrej & Boyce Mfg. Co. Ltd.

Discussion and Findings :

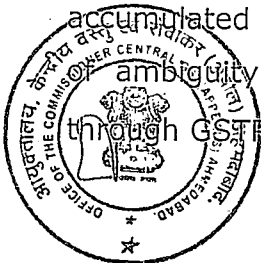
4(i). I have carefully gone through the facts of the case available on records, submissions made by the 'Appellant' in the Appeals Memorandum as well as through additional submission. I find that the 'Appellant' had availed the credit of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess Rs.23,43,198/-, Rs.11,67,106/- and Rs.4,24,725/- respectively (Total Rs.39,35,029/-) through TRANSITIONAL credit. However, as being pointed out by the audit that the credit of Cesses are not admissible, the *appellant* had reversed the same



Under Protest. Moreover, the *appellant* has not paid the applicable interest and penalty on this amount. Accordingly, a SCN dated 08.12.2020 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 and appropriated the amount so paid by the appellant. I find that the *adjudicating authority* has dropped the demand of interest amounting to Rs.7,58,113/- in light of amended Section 50(3) of the CGST Act, 2017, as the *appellant* has not utilized the said transitional credit for payment of tax. Further, I find that the *adjudicating authority* has also not imposed penalty under Section 73(9) of the CGST Act, 2017 as the *appellant* has paid the wrongly availed credit of cesses prior to issuance of SCN.

4(ii). 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.

4(iii). 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 2 ; that the said amendment has not been notified by the Government and presently, not in operation. They had initially carried forward the CENVAT credit accumulated on account of Cesses through TRAN-1, however, on account of ambiguity and to avoid any adverse implications they reversed it through GSTR-3B.



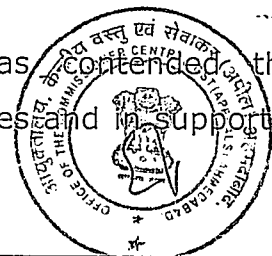
4(iv). In view of above, the *appellant* has contended that they have correctly carried forward the credit of Cesses into GST regime. They have also referred the judgment passed by Hon'ble High Court of Judicature at Bombay in the matter of *Godrej & Boyce Mfg. Co. Ltd. Versus UOI and Ors. (Writ Petition No. 3226 of 2019)*. 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, I find that the *appellant* has contended that they are alternatively eligible to claim refund of Cesses and in support of same they referred case of *Bharat Heavy Electricals Ltd. [2020-VIL-402-CESTAT-DEL-CE]* as well as case of *Eicher Motors [UOI 1999 (106) ELT 3 (SC)]*.

5. 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, section17, section18, clause (a) of section 20, sub-clause (i) of clause (b) and sub-clause (i) of clause (c) of section28, shall come into force. In the present matter the SCN vide which demanded the wrongly availed Transitional Credit is issued on 08.12.2020. 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.

6. 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)* and *Eicher Motors (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.

7. In view of the above discussions, I do not find any force in the contentions of the *Appellant*. Accordingly, I find that the *impugned order* passed by the *Adjudicating Authority* is correct and as per the provisions of GST law. Therefore, I do not find any reasons to interfere with the decision taken by the *Adjudicating Authority* vide "*impugned order*" and accordingly, I 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.

(Mihir Rayka)

Additional Commissioner (Appeals)

Date: 30.05.2023

Attested

(Dilip Jadhav)

Superintendent (Appeals)

By R.P.A.D.

To,

M/s. Vodafone M-Pesa Limited,
Vodafone House, Building B, Corporate Road,
Off S. G. Highway, Ahmedabad - 380051

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

