



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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DIN- 20240364SW0000004517

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या File No : GAPPL/ADC/GSTP/3129/2023 -APPEAL

13816-22

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-CGST-001-APP-JC- 244 /2023-24

दिनांक Date : 26.03.2024 जारी करने की तारीख Date of Issue : 27.03.2024

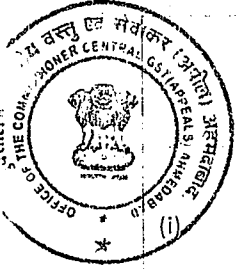
श्री आदेश कुमार जैन संयुक्त आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No. 16/BODAL/DIV-II/A'BAD SOUTH/AC/JDM/20-2023-24 dated 12.07.2023 issued by The Assistant Commissioner, CGST & CX, Div-II, Ahmedabad South Commissionerate

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

Appellant	Respondent
M/s Bodal Chemicals Ltd, 123-124, PHASE-I, GIDC., VATVA, AHMEDABAD-382445	The Assistant Commissioner, CGST & CX, Div-II, Ahmedabad South Commissionerate



(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.

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.

(i)

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

(ii)

(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-APPEALBrief Facts of the Case :

M/s. Bodal Chemicals Limited, Plot No.123-124, Phase-I, G.I.D.C. Estate, Vatva, Ahmedabad 382445 (hereinafter referred as 'Appellant') has filed the appeal against Order-in-Original No. 16/Bodal/Div-II/A'Bad-South/AC/JDC/2023-24 dated 12.07.2023 (hereinafter referred as 'Impugned Order') passed by the Assistant Commissioner, CGST, Division - II, Ahmedabad South (hereinafter referred as 'Adjudicating Authority').

2 Briefly stated the facts of the case is that presently the 'Appellant' is holding GST Registration - GSTIN No.24AAACD5352M1ZN and in the erstwhile regime, were holding Central Excise Registration No. AAACD5352MXM001, AAACD5552MXM002, AAACD5352MXM003, AAACD5352MXM004, AAACD5352MXM006, AAACD5352MXM007, AAACD5352MXM008, AAACD5352MXM015 & AAACD5352MXM016 has filed the present appeal on 28.08.2023. They are engaged in the manufacture of goods, falling under Chapter 29 of the HSN and availing the facility of credit of duty paid on inputs, capital goods and input services. During the verification of Transitional Credit of Tran-1 records of the appellant, it was observed that the appellant have taken Trans-1 Credit amounting to Rs.31,24,017/- (Rs.20,40,899/- as Education Cess and Rs.10,83,118/- as Secondary Education Cess) of unutilized credit of Central Excise/Service Tax which is inadmissible to them as per the provisions of Section 140, 140(1),(2),(3) of the CGST Act, 2017 read with Rules 117 to 121 of the CGST Rules, 2017.

3. Accordingly, upon issuance of a Show Cause Notice No.V.20/16-12/SCN-Bodal/2019-20 dated 24.06.2019 ~~was issued~~ to the Appellant for the wrongly carried forward credit amounting to Rs.31,24,017/- (Rs.20,40,899/- Education Cess and Rs.10,83,118/-Secondary Education Cess) under provisions of Section 140(1)(i) and required to be recovered under Section 73 of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017.

4. Thereafter, the *adjudicating authority* vide *impugned order* dated 12.07.2023 has confirmed the demand of Rs.31,24,017/- (Rs.20,40,899/- Education Cess and Rs.10,83,118/-Secondary Education Cess) under proviso to Section 73 of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017, interest at appropriate rate as applicable, under Section 50 and 10% penalty under Section 73 of the CGST Act, 2017 on the following ground:

(i) *Cess has been clearly excluded to be as 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.

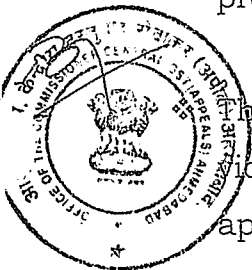
(ii) Replying upon the Hon'ble High Court of Madras vide order dated 16.10.2020 in the matter of Assistant Commissioner of CGST and Central Excise Vs Sutherland Global. Services Private Limited reported in [2020] 83 .GSTR 259(Mad.) has held that the Assessee was not entitled to carry forward and set off of unutilised Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess against the GST Output Liability with reference to Section 140 of the CGST Act, 2017.

(iii) The unutilized Central Excise/Service Tax CESS as transitional Credit is not admissible to them as per the provisions of Section 140, 140(1), 140(2), 140(3) of the CGST Act, 2017 read with Rules, 117 to 121 of CGST Act, 2017. I find that availing the ineligible amount as Transitional Credit in violation of the provisions of Section 140, 140(1), 140(2), 140(3) of the CGST Act, 2017.

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

The impugned Order has been passed by the adjudicating authority in utter violation to the principles of natural justice. In the written submissions, the appellant had specifically requested that the submissions may be considered and no action may be taken. The adjudicating authority has ignored the said submissions of the appellant. The impugned order is thus unreasoned and therefore is not sustainable.

- ❖ The appellant submits that the entire proceedings is without jurisdiction. The jurisdiction of the appellant is with" the state tax authorities and therefore any proceedings could have been initiated by the state tax authorities only. The present proceedings being beyond jurisdiction is void ab initio. The adjudicating authority has erred in relying upon the provisions of section 6 of the CGST Act, 2017. Ongoing through the provisions of section 6(1), it is revealed that the officers of the state are authorized to be the proper officer for the purpose of the present act subject to the conditions: Here, the question is that the appellant is registered under the territorial jurisdiction of state tax authorities and under the said circumstances whether the Central Tax authorities could be considered as proper officer. It is submitted that no such notification for cross empowerment have been issued by the Government and



Therefore assuming jurisdiction SUO MOTO is not legal and proper. The impugned order having been passed without there being any notification empowering the adjudicating authority to act as proper officer is without authority of law. The adjudicating authority has referred to a letter dated 22.06.2019 of the Principle Director General, DGGI, New Delhi on cross empowerment. The appellant submits that such a letter from Principle Director General cannot be considered to have been issued by the government and a notification on the recommendation of council.

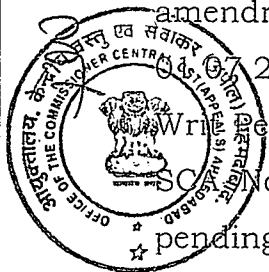
❖ The appellant submits that on receipt of the intimation for personal hearing, the authorized representative of the appellant vide his letter dated 17.04.2023 referred to the judgment of the Hon'ble High Court of Bombay in the case of Godrej & Boyce it was also intimated by him that the Union of India has filed a special leave petition against the said order of the Hon'ble High Court of Bombay. In view of the above facts, it was requested by him to transfer the case to call book. The adjudicating authority has negated the request of the appellant on the ground that the said circular for transferring the case to call .

❖ The appellant had submitted that the constitutional validity of the retrospective amendment brought about in section 140 of the Act with effect from 01.07.2017 was inequitable and arbitrary. The appellant had referred to the writ petition of Grasim Industries before the Hon'ble High Court of Gujarat in No.. 11061 of 2019. It was also informed that the said Petition was pending and had requested that the show cause notice may not be adjudicated.

Whereas the adjudicating authority stated that the Circular was issued for transferring the cases to call book prior to the implementation of GST. Such an approach reveals of the pre-determined and pre-judged of the adjudicating authority in clear defiance of the circular of the board. The appellant submits that the said circular has not been withdrawn and therefore is required to be followed.

❖ The adjudicating authority has chosen to refer to the judgement of the High Court of Madras by ignoring the sub judice case of Gujarat High Court and decision of Bombay. The above facts clearly point out pre-determined and pre-judged approach of the adjudicating authority without considering the judicial discipline.

❖ The impugned order sought to recover interest in section 50 of the Act. The appellant submits that they had all along maintained the amount of cess credit taken as balance except for a few months during which due to change in staff the amount was utilized. Therefore the interest under section 50 would be recoverable only if the transitional credit of Rs. 31,24,017/- was utilized. The same can be observed from the electronic credit ledger of the appellant.



- ❖ The adjudicating authority has imposed has maximum penalty which could be imposed under section 73 without assigning any reasons as to why the maximum permissible penalty was being imposed. There is absolutely nothing on record with suggest that the appellant had acted in any way in defense of law..
- ❖ Vide their additional submission dated 25.08.2023, it has been intimated that they had deposited the entire amount of cess amounting to Rs.31,24,017/- vide DRC-03 dated 22.07.2023.

PERSONAL HEARING

6. Personal hearing in the matter was held on 09.01.2024, wherein Shri N.K.Tiwari, Retd. Assistant Commissioner appeared before me on behalf of the appellant as authorised representative. Shri N.K.Tiwari reiterated the written submission. He further requested that since the issue is still pending in Hon'ble Supreme Court, the case may be kept in Call Book till the outcome of the department's appeal pending in the S.C.

DISCUSSION AND FINDINGS

7. I have gone through the facts of the case, written submissions made by the 'appellant'. I find that the main issue to be decided in the instant case is (i) whether the appeal has been filed within the prescribed time- limit and (ii) whether the appeal filed against the impugned order for rejecting cenvat credit of Education Cess and SHEC wrongly carried forward of Rs. 31,24,017/- can be set aside.

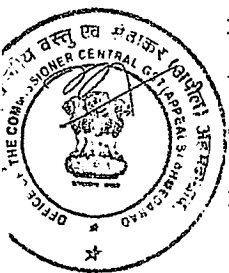
8. First of all, I would like to take up the issue of filing the appeal and before deciding the issue of filing the appeal on merits, it is imperative that the statutory provisions be gone through, which are reproduced, below:

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

(2)

(3)

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



9. I observed that in the instant case that as against the *impugned order* dated 12.07.2023, the appeal has been filed on 28.08.2023 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 of Education Cess and Secondary & Higher Education Cess amounting to Rs. 31,24,017/- through TRAN-1 as transitional credit. Accordingly, a SCN dated 24.06.2019 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. 31,24,017/- under proviso to Section 73 of the CGST Act, 2017 read with Rules 121 of CGST 2017, interest as applicable, under Section 50 and penalty of Rs. 14,402/- under Section 73 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.31,24,017/- vide DRC-03 challan no.AD240723018236B dated 22.07.2023 without accepting the contention of the department given in the SCN dated 24.06:2019 voluntarily.

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.

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

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

The Explanation 3 is inserted w.e.f. 01.07.2017 by s.28 of '*The Central Goods and Services Tax (Amendment) Act, 2018 (No. 31 of 2018)*'. And the Government of India vide Notification No. 02/2019 – Central Tax dated 29.01.2019 appoints the 01.02.2019, as the date on which the provisions of *the Central Goods and Services Tax (Amendment) Act, 2018 (31 of 2018)*, except clause (b) of section 8, section 17, section 18, clause (a) of section 20, sub-clause (i) of clause (b) and sub-clause (i) of clause (c) of section 28, shall come into force. In the present matter the SCN vide which demanded the wrongly availed Transitional Credit is issued on 24.06.2019. 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 and Secondary & Higher Education Cess under TRAN-1 is not admissible. As the *appellant* has deposited the amount of Rs. 31,24,017/- vide DRC-03 dated 22.07.2023, the same is required to be appropriated towards the demand raised.

15. Further, as regards to order for demand & recovery of interest the *appellant* has contended that they maintained the amount of cess credit taken as balance except for a few months during which due to change in staff the amount was utilized, 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 of the CGST Act, 2017. Accordingly, I do not find any force in the contentions of the *appellant* in this regard.



16. 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 wilful-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.-

- (9) *The proper officer shall, after considering the representation, if any, made 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.31,24,017/-. The appellant had reversed the cenvat credit of cesses amounting to Rs.31,24,017/-. beyond 30 days of the show cause notice issued. Therefore, they are liable to pay penalty under Section 73 of the CGST Act,

2017 and the penalty imposed by the Adjudicating Authority under Section 73 of the CGST Act, 2017 is legal and proper.

20. Now coming to the point of the appellant that the adjudicating authority does not have the jurisdiction in deciding their case as they fall under the jurisdiction of the State. In this regard, the adjudicating authority has rightly quoted the provisions of Section 6(1) of the CGST Act, 2017 16.1 to 17.4 of the impugned order. Apart from which, here I would like to reproduce the clarification provided by the CBIC letter D.O.F.No.No.CBEC/20/43/01/2017-GST dated 05.10.2018 at para 2 which is self explanatory:-

"2. In this regard, GST Council in its 9th meeting held on 16.01.2017 had discussed and make recommendations regarding administrative division of tax payers and concomitant issues. The recommendation in relation to cross-empowerment of both tax authorities for enforcement of intelligence based action is recorded at para 28 of Agenda note no.3 in the minutes of the meeting which reads as follows:-

viii. Both the Central and State tax administrations shall have the power to take intelligence based enforcement action in respect of the entire value chain"

3. It is accordingly clarified that the officers of both Central tax and State tax are authorized to initiate intelligence based enforcement action on the entire taxpayer's base irrespective of the administrative assignment of the tax payer to any authority. The authority which initiates such action is empowered to complete the entire process of investigation, issuance of SCN, adjudication, recovery, filing of appeal etc. arising out of such action.

21. In view of the above discussions, I do not find any infirmity in the impugned order and thus the Order-in-Original dated 12.07.2023 is upheld.

22. 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.

// Attested //

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

Asanurup
28/13/2024
(Adesh Kumar Jain)
Joint Commissioner (Appeals)



By R.P.A.D.

To,

M/s. Bodal Chemicals Limited
Add. Plot No.123-124, Phase-1,
GIDC Estate, Vatva
Ahmedabad – 382445.

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-II, Ahmedabad South.
5. The Range Superintendent, CGST AR-III, Division-II, Ahmedabad South.
6. The Superintendent (Systems), CGST Appeals, Ahmedabad.
- ~~7. Guard File.~~
8. P.A. File

