



सत्यमेव जयते

आयुक्तकाकार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५
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(क)	फ़ाइल संख्या / File No.	GAPPL/ADC/GSTP/1399/2024/4662 - 72
(ख)	अपील आदेश संख्या और दिनांक / Order-In - Appeal and date	AHM-CGST-001-APP-JC-13/2024-25 and 26.04.2024
(ग)	पारित किया गया / Passed By	श्री आदेश कुमार जैन, संयुक्त आयुक्त (अपील) Shri Adesh Kumar Jain, Joint Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	29.04.2024
(ङ)	Arising out of Order-In-Original No. CGST-VI/DEM-15/GST/ADANI PETRONET/DC/PMT/2023 dated 08.11.2023 passed by The Deputy Commissioner, CGST Division- VI, Ahmedabad South Commissionerate.	
(च)	Name of the Appellant	Name of the Respondent
	M/s Adani Petronet (Dahej) Port Pvt Ltd, Adani House. Near Mithakhali Six Road. Navrangpura, Ahmedabad, Ahmedabad, Gujarat, 380009	The Deputy Commissioner, CGST Division- VI, 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.
(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) <u>Full amount of Tax, Interest, Fine, Fee and Penalty</u> arising from the impugned order, as is admitted/accepted by the appellant; and (ii) A sum equal to <u>twenty five per cent</u> of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
	(ii) The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	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. Adani Petronet (Dahej) Port Pvt Ltd., Adani House, Nr. Mithakali Six Road, Navrangpura, Ahmedabad 380 009 (hereinafter referred as 'Appellant') has filed the appeal against Order-in-Original No. CGST-VI/Dem-15/GST/Adanipetronet/DC/PMT/2023-24 dated 08.11.2023 (hereinafter referred as 'Impugned Order') passed by the Deputy Commissioner, CGST, Division - VI, Ahmedabad South (hereinafter referred as 'Adjudicating Authority').

2. Briefly stated the facts of the case is that the 'Appellant' is holding GST Registration - GSTIN No.24AAECA5046R1ZD for providing taxable services viz., other cargo handling such as operation services, other storage and warehousing services, container handling services etc. During the course of audit, on verification of TRANS-1 and ST-3 (April'2017 to June'2017) it was observed that the appellant had transferred the Cenvat credit of Education Cess Rs. 5,19,829/-, SHE Cess of Rs.2,49,128/- and KKC of Rs.3,24,441/- whereas they are not allowed to transfer their credit of Ed.Cess, SHE Cess and KKC as per section 140(1) & (4) of CGST Act, 2017 and Rules made thereunder. The appellant was issued query memo dated 10.03.2021 by the audit party as well letter dated 17.12.2021 by the Range Superintendent, AR-V/Dn.VI to reverse the total inadmissible ITC of EC, SHE & KKC along with appropriate interest thereon. DRC-01A dated 28.06.2022 was issued to the appellant intimating their tax liability dues with applicable interest till 04.07.2022, followed by a show cause notice dated 08.07.2022. The adjudicating authority vide his impugned order disallowed the credit of Education Cess, SHE Cess and Krishi Kalyan Cess wrongly carried forward in form GST TRAN-1 amounting to Rs.10,03,398/- under the provisions of Section 73 of the CGST Act, 2017 read with the provisions of Rule 121 of the CGST Rules, 2017 along with interest under Section 50(1) of the CGST Act, 2017 and imposed penalty of Rs.1,09,340/- under the provisions of Section 73(9) of the CGST Act, 2017.

3. Being aggrieved with the impugned order, the appellant preferred appeal before the appellate authority on 16.01.2024 on the following grounds of appeal:

- Transitional credit of Education Cess, SHE and Krishi Kalyan Cess is rightly availed under Section 140 (1) of the CGST Act;
 - *the proviso to Section 140(1) specifically delineates those circumstances / conditions under which credit availed may not be transitioned, however, the Appellant has fulfilled all the conditions as set out in the proviso above and there is nothing thereunder, to*

militate against the availment of ED CESS , SHED & KKC in question. Further, there is no dispute or allegation under the SC which specifies that the Appellant has violated any conditions specified in the proviso to Section 140(1) of the CGST Act. Accordingly, the Appellant submits that the credit of ED CESS, SHED & KKC is rightly transitioned under the GST based on the unamended Section 140(1) of the CGST Act.

- the Appellant would like to state that Explanation 3 of Section 140 of the CGST Act mentions the term 'eligible duties and taxes' and not 'eligible duties', The credit of ED CESS , SHED & KKC is transitioned by the Appellant based on Section 140(1) of the CGST Act which refers to the expression 'CENVAT credit of eligible duties' and not 'CENVAT credit of eligible duties and taxes',
- that the retrospective amendment made to Section 140 of the CGST Act vide the Amendment Act is arbitrary, unconstitutional and hence illegal. Accordingly, it is humbly prayed to your good self to set aside the demand raised vide the impugned order on this ground itself.
- that Explanation 3 of Section 140 of the CGST Act refers to the expression 'eligible duties and taxes' and the said expression is not employed in Section 140(1) of the CGST Act. Hence, Explanation 3 becomes irrelevant in understanding the scope and coverage of transitional credit of ED CESS, SHED and KKC vailed under Section 140(1) of the CGST Act.



retrospective amendment to Section 140 of the CGST Act is unconstitutional

- The eligibility of the CESS to be seen at the time of availment; the appellant had transitioned the credit of EC, SHEC and KKC by way of filing GST TRAN-1 on 27.09.2017, under Section 140 of the CGST Act. It must be noted that this was filed prior to the enactment of the Amendment Act which was made effective from Feb.01, 2019.
- EC, SHEC and KKC is a part of the CENVAT credit pool and loses its identity. It is a settled position that as soon as the CENVAT credit is availed it loses its individual identity and it becomes a pool of CENVAT credit. In this regard the appellant has relied upon various judgements.
- Cenvat Credit of EC, SHEC and KKC is a vested right and hence the same cannot be reversed/recovered. Such vested right could not be taken away by a subsequent amendment in the legislation.

- Divisional bench ruling of the Hon'ble Madras High Court relied upon by the learned authority seems to be based on one sided view, hence falls short of wholistic research and is also pending before the Hon'ble S.C.
- Without prejudice to and in the alternative to anything contained in this submission, the appellant at the outset submits that the impugned SCN is illegal and hence liable to be quashed.
- The learned authority has specified that the ineligible credit of EC, SHEC and KKC availed in GST TRAN-1 and they claim excess input tax credit liable for payment interest in terms of Section 73 read with section 50(3) of the CGST Act. The appellant has convincingly and conclusively proved that it has not violated the provisions of the CGST Act and thus, the provisions pertaining to recovery of interest are not applicable.
- When the demand itself is not sustainable, the penalty cannot be imposed. The appellant at the outset submits that it is a law abiding taxpayer and had extended full cooperation with the revenue authorities. The appellant never had the intention to evade payment of service tax. The impugned order levies penalty under Section 73(9) of the CGST Act. It is not mandatory to levy the penalty. Further, penalty cannot be imposed in a case which is pertaining to the interpretation of the law.

With the above submissions, the appellant has requested to allow their appeal.

PERSONAL HEARING

4. Personal hearing in the matter was held on 20.03.2024, whereby Shri Rahul Patel, Chartered Account appeared before me on behalf of the appellant as authorized representative. It is submitted before me that the ITC availed but no utilized and still lying in balance. Since the issue is under litigation they have neither utilized not debited and is available as balance in Credit Ledger. Further provisions of Section 50(1) is not attracted as the same is for tax liability. In this case it is ITC credit availed but not utilized therefore no interest is leviable under Section 50(3) also. Further reiterated their written submission and requested to allow appeal.

DISCUSSIONS AND FINDINGS

5. 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 prescribe time- limit and (ii) whether the appeal filed against the impugned order "for rejecting cenvat credit of Rs. 10,93,398/- carried forward to TRAN-1 can be set aside.

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

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

(2)

(3)

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

I observed that in the instant case that as against the *impugned order* of dated 08.11.2023 and the appeal has been filed on 01/12/2024 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.

8. I have carefully gone through the facts of the case available on records, submissions made by the 'Appellant' in the Appeals Memorandum as well as through additional submission. I find that the 'Appellant' had availed the credit of Central Excise/Service Tax, Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess overall amounting to Rs.10,93,398/-through TRAN-1 as transitional credit. Accordingly, a SCN dated 08.07.2022 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. 10,93,398/- under proviso to Section 73 (1) of the CGST Act, 2017 read with Rules 121 of CGST Rules, 2017, interest as applicable, under Section 50(1) and penalty of Rs. 1,09,340/- under Section 73(9) of the CGST Act, 2017.

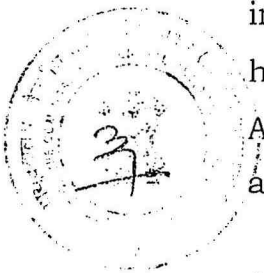
9. On carefully going through the submissions of *appellant* I find that the *appellant* is mainly contending that the Section 140(1) refers to 'CENVAT Credit' carried forward in the return and the explanation to Chapter XX 'Transitional Provisions' states that the term 'CENVAT Credit' used in this chapter 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.

10. 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.

11. 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 08.07.2022. 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.

12. Further, I find that the *appellant* has contended that alternatively they are eligible to claim refund of Cesses and in support of their claim they referred case law of *Bharat Heavy Electricals Ltd. (Supra)*. In the present appeal proceedings the issue involved is rejection of transitional credit claimed by *appellant* by filing TRAN-1 in terms of Section 140 of the CGST Act, therefore, facts and circumstances of present case is different from the aforesaid case laws and thus ratio of said case laws are not applicable in the present matter.

13. Further, as regards to order for demand & recovery of interest the *appellant* has contended that since, there was no dispute on eligibility of credit at the time of availment and the only dispute was for transferring the credit, hence, levy of interest is incorrect. Further, during personal hearing they stated that they have not utilized the wrongly availed credit of Ed.Cess, SHEC and KKC and as they have enough balance in their electronic credit ledger, interest should not charged from them. I observe that no where in the impugned order, it is mentioned that the *appellant* had reversed the wrongly availed ITC of the above cesses. Hence, If tax is payable under Section 73, interest shall also be payable under Section 50 of the CGST Act, 2017. Accordingly, the adjudicating authority has held that the noticee has carried forward transitional credit and therefore ordered for recovery of interest under Section 50(1) of the CGST Act, 2017. Accordingly, in the absence of any reversal of the wrongly availed credit, I do not find any force in the contentions of the *appellant* in this regard.

14. Further, as regards to imposition of penalty of Rs.1,09,340/- I find that the *appellant* has contended that penalty under Section 73(9) of CGST Act, 2017 is not imposable upon them as they had availed the credit rightly and have no malafide intention. 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.

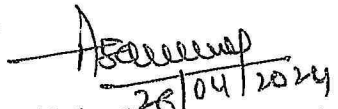
Section 73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts.-

(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.

15. In the present matter, as discussed in foregoing paras I find that the appellant had wrongly carried forward ITC of Cess amounting to Rs. 10,93,398/- However, I find that there is no evidence on record that the appellant had any time failed to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made there under or furnishes false information or documents during any proceedings under this Act. However, the appellant has contravened the provisions of Section 16 & Section 140 of the act as they have wrongly availed the Cesses to Tran-1 which is not eligible and accordingly they are liable to pay penalty under Section 73(9) of the CGST Act 2017.

16. In view of the above, I do not find any force in contentions of the Appellant. The order passed by the Adjudicating Authority is legal and proper, thus upheld.

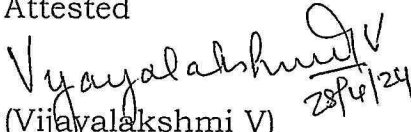
17. अपीलकर्ताद्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.


28/04/2024
(Adesh Kumar Jain)

Joint Commissioner (Appeals)

Date: .04.2024

Attested


28/4/24
(Vijayalakshmi V)
Superintendent (Appeals)

By R.P.A.D.

To,

M/s. Adani Petronet (Dahej) Port Pvt. Ltd.

Adani House, NR. Mithakhali Road, Ahmedabad - 380009.

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Ex., Appeals, Ahmedabad.
3. The Commissioner, CGST & C. Ex., Ahmedabad-South.
4. The Dy/Asstt. Commissioner, CGST, Division-VI, Ahmedabad South.
5. The Superintendent (Systems), CGST Appeals, Ahmedabad.
6. Guard File.
7. P.A. File

