आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER
केंद्रीय वस्तु एवं सेवा कर तथा केंद्रीय उत्पाद शुल्क, अहमदाबाद उत्तर
CENTRAL GOODS & SERVICES TAX & CENTRAL EXCISE, AHMEDABAD NORTH
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निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No. GST/15-65/OA/2018 आदेश की तारीख़/Date of Order: - 13.12.2021

जारी करने की तारीख़/Date of Issue :- 13 .12.2021

DIN NO: 20211264WT0000555BC2

द्वारा पारित/Passed by:- आर गुलजार बेगम */R. GULZAR BEGUM*

संयुक्त आयुक्त / *Joint Commissioner*

मूल आदेश संख्या / Order-In-Original No. 29/JC/GB/2021-22

जिस व्यक्ति)यों (को यह प्रति भेजी जाती है ,उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।
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इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से) 60 साठ (दिन के अन्दर आयुक्त) अपील ,(केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन ,अंबावाड़ी ,अहमदाबाद-380015को प्रारूप संख्या इ.ए (1-.A.E) 1-में दाखिल कर सकता है। इस अपील पर रू) 2.00 .दो रुपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

उक्त अपील ,अपीलकर्ता द्वारा प्रारूप संख्या इ.ए 1-.में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क) अपील (नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।

BRIEF FACTS OF THE CASE

1. M/s Claris Injectable Ltd.(Now known as M/s Baxter Pharmaceuticals India Private Limited), Ramdas Road, Off. Sindhu Bhavan Road, Bodakdev, Ahmedabad (hereinafter referred to as "assessee") is registered under GST having GST NO. 24AACCC6252B1Z8. They were earlier registered as Input Service Distributors under Service Tax.

2. The Input Service Distributors operating under the earlier Service Tax Law were allowed to distribute the credit on input services under Rule 7 of the Cenvat Credit Rules, 2004. Rule 24 of CGST Rules prohibits the migration of ISD registered under the existing law as ISD under GST. Input Service Distributors avail and distribute the credit in the Form GSTR-6 as provided under Section 20 of CGST Act 2017 read with the Rule 39 of CGST Rule, 2017. Further, it is seen that section 140 of CGST Act, 2017 does not permit carry forward of closing credit balance of Input Tax credit lying with ISD to GSTR-6 for distribution.

3. Director General of Audit vide their letter dated July 2018, observed that the said assessee as an Input Service Distributor had closing Input Tax credit balance of Rs 1,68,30,210/- On being enquired about it, the assessee vide their letter dated 20.09.2018 submitted as under:

" In respect of filing and transition of credit from the old regime to GST Regime, the transitional provisions for existing dealers i.e. Section 140(1) of the CGST Act, 2017, states that a registered person can carry forward the credit when the below conditions are fulfilled

a. *Credit is admissible under both laws*

b. *Return has been duly filed for prior 6 months*

i. On reading of aforesaid provisions, as is evident we have fulfilled both the conditions and accordingly, credit, as availed by us, is admissible in terms of such provisions and we have shown such credit as carry forward credit in Form GST TRAN-1. Copy of the return is attached herewith as Annex -1. There is no bar or restriction under the CGST Act read along with the Rules and regulations, that states that any undistributed ISD CENVAT credits cannot be carried forward into GST. In fact, the transition provisions under Section 140(7) of the CGST Act, even permit the availment of credit of the service tax paid by the ISD in relation to services received prior to the appointed date, however which could not be reported / booked pre-GST as invoices for such services are received by the ISD post introduction of I GST. In light of such progressive provisions, it is absurd to state that the amount of credit lying in balance with the ISD lapses. Given this, legally as well as objectively the carry forward of the ISD credit by the Company into their regular GST registration is just and proper.

ii. Further, the allegation and deduction in the captioned letter that an ISD credit can be carried forward and distributed only through GSTR-6 under GST is irrelevant to the facts of the current case. As discussed above, the Company has not obtained an ISD registration under GST law as all their units and HO being in the same State, have been included under a single registration, thus, under GST law, the Company has no need/obligation to file a GSTR-6. Moreover, the credit so transitioned can be justifiably utilized by the manufacturing units of the Company in terms of Section 49(4), as such credit actually directly belongs to such manufacturing units. Further, the only mechanism to transition the credit from the old regime to the GST regime is through Form GST TRAN-1, which as submitted above, does not perse bar the transition of ISD credits. Given this, the credits to the tune of Rs. 1,68,30,210/-, carried forward by the

Company into GST is valid and no compelling grounds have been brought out in the captioned letter to suggest otherwise.

iii. Without prejudice to the aforesaid submissions, we would like to submit that such credit was eligible credit under the Service Tax laws, and merely non distribution of credit to the manufacturing units in the Service Tax regime and carry-forward of credit in GST regime is a procedural lapse in as much as, in case such distribution would have taken place in pre July era, such credit would have been incorporated in our return under Central Excise laws and carried forward in the GST Regime. Thus, when there is no dispute on the eligibility of the Credit, the non-distribution of credit would merely be aprocedural lapse and on this ground alone the benefit cannot be denied to the assessee, especially since the law [whether erstwhile or GST] did not place any time limit/restriction on such distribution. "*

4. The Migration of persons registered under the prevailing law are coverd under Rule 24 of CGST Rules 2017 which provides as under:

CGST Rule 24: Migration of persons registered under the existing law (Chapter-III: Registration Rules)

(1) (a) Every person, ***other than a person deducting tax at source or an Input Service Distributor****, registered under an existing law and having a Permanent Account Number issued under the provisions of the Income-tax Act, 1961 (Act 43 of 1961) shall enroll on the common portal by validating his e-mail address and mobile number, either directly or through a Facilitation Centre notified by the Commissioner.*

(b) Upon enrollment under clause (a), the said person shall be granted registration on a provisional basis and a certificate of registration in ***FORM GST REG-25****, incorporating the Goods and Services Tax Identification Number therein, shall be made available to him on the common portal:*

Provided that a taxable person who has been granted multiple registrations under the existing law on the basis of a single Permanent Account Number shall be granted only one provisional registration under the Act:

(2) (a) Every person who has been granted a provisional registration under sub-rule (1) shall submit an application electronically in ***FORM GST REG-26****, duly signed or verified through electronic verification code, along with the information and documents specified in the said application, on the common portal either directly or through a Facilitation Centre notified by the Commissioner.*

(b) The information asked for in clause (a) shall be furnished within a period of three months or within such further period as may be extended by the Commissioner in this behalf.

(c) If the information and the particulars furnished in the application are found, by the proper officer, to be correct and complete, a certificate of registration in ***FORM GST REG-06*** *shall be made available to the registered person electronically on the common portal.*

(3) Where the particulars or information specified in sub-rule (2) have either not been furnished or not found to be correct or complete, the proper officer shall, after serving a notice to show cause in ***FORM GST REG-27*** *and after affording the person concerned a reasonable opportunity of being heard, cancel the provisional registration granted under sub-rule (1) and issue an order in* ***FORM GST REG-28****.*

*Provided that the show cause notice issued in **FORM GST REG-27** can be withdrawn by issuing an order in **FORM GST REG-20**, if it is found, after affording the person an opportunity of being heard, that no such cause exists for which the notice was issued.*

[(3A) Where a certificate of registration has not been made available to the applicant on the common portal within a period of fifteen days from the date of the furnishing of information and particulars referred to in clause (c) of sub-rule (2) and no notice has been issued under sub-rule (3) within the said period, the registration shall be deemed to have been granted and the said certificate of registration, duly signed or verified through electronic verification code, shall be made available to the registered person on the common portal.]$2

*(4) Every person registered under any of the existing laws, who is not liable to be registered under the Act may, ~~within a period of thirty days from the appointed day~~ on or before 31st March, 2018]$3, at his option, submit an application electronically in **FORM GST REG-29** at the common portal for the cancellation of registration granted to him and the proper officer shall, after conducting such enquiry as deemed fit, cancel the said registration".*

5. It implies that Rule 24 of CGST Rules, 2017 allows migration of Registered persons **other than a person deducting tax at source or an Input Service Distributor**, registered under anexisting law. In other words Input Service Distributors are excluded from the purview of migration to GST under Rule 24 of CGST Rules, 2017. It is, therefore, amply clear that Input Service Distributor are not allowed migration under GST as such the transfer of Input Tax Credit from erstwhile law to GST regime is totally unauthorised and contrary to the provisions of law. Therefore, the Input Tax credit availed by the said assessee under GST is illegal and is liable for recovery alongwith applicable interest.

6. Section 140 CGST Act provides that the credit balance in a return filed under the earlier law may be carried forward in the electronic credit ledger (not from GSTR6) of a registered person. It is seen that an ISD is not eligible as they do not have an electronic credit ledger for taking and distribution of the credit under GST law. Section 140 of CGST Act provides as under:

140. (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed: Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:— (i) where the said amount of credit is not admissible as input tax credit under this Act; or (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or (iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.

*(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in **his electronic credit ledger, credit of the unavailed CENVAT credit** in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed: Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law*

7. Section 140(1) CGST Act, 2017 provides that the credit balance in a return filed under the earlier law may be carried forward in the electronic credit ledger (not from

GSTR6) of a registered person. It is seen that an ISD is not eligible as they do not have an electronic credit ledger for taking and distribution of the credit under GST law. As such the Input Tax Credit availed under GST appears illegal and improper.

8. Therefore on persual of the provisions of Section 140 of CGST Act 2017, Rule 24 and Rule 86 of CGST Rules, 2017, the migration of Input Tax Distributors are not allowed under law and therefore the question of carrying forward of balance credit in GST era does not arise. The said amount, in case, distributed as input tax credit, is unauthorized and is not allowed to be distributed. Accordingly the balance Input Tax credit availed/transferred by the said ISD and migrated to GST is contrary to the provisions of law and are therfore is required to be recovered with applicalbe interest and penalities. In view of the above, the said assessee has contravened the provisions of Section 140 of CGST Act 2017 and Rule 24 and Rule 86 of CGST Rules, 2017 in as much as they have wrongly and illeglly carried forward the input credit lying in balance to GST.

9. In view of the above, Show Cause Notice No. GST/15-65/OA/2018 dated 27.11.2020 was issued to M/s. Claris Injectable Ltd asking them as to why ;

(i) Transitional Input Tax Credit amounting to **Rs 1,68,30,210/-** lying in balance as on 01.07.2017 and wrongly carried forward/transferred by them into GST should not be disallowed, demanded and recovered from them alongwith the applicable interest under Section 73 of Central Goods and Service Tax Act' 2017;

(ii) Applicable interest should not be imposed and recovered from them underSection 50 of Central Goods and Service Tax Act' 2017.

(iii) Penalty should not be imposed upon them underSection 122, Section 127 read with Section 73 of Central Goods and Service Tax Act' 2017.

DEFENCE REPLY

10. The assessee vide their reply letter dated 04.08.2021 submitted that they do not agree with the observations cited in the impugned SCN and stated that migration of ISD CENVAT credit is rightfully allowable to the Noticee in accordance with Section 140(7) of the CGST Act; that the CGST Act clearly elucidates the eligibility of the Noticee to transition undistributed ISD CENVAT credit ; the provision contained under Sub-Section 7 of Section 140 prevails over all other clauses covered in the Act, irrespective of what is specified under the whole CGST Act; that after the introductory words provided under Sub-Section 7, the provision continues with the statement - "the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act; that , it is important to highlight that the ISD CENVAT credit pertain to services received by the Noticee in the pre-GST era (the invoices of which were also received and booked in the erstwhile regime) and hence, this condition stands satisfied. Further, the Punjab High Court in the matter of Pratap Singh Kaison vs. Gurmej Singh (AIR 1958 Punj409,411) held that where the word "shall" is used in a statute, the presumption is that its use is imperative and not merely directory, particularly when it is addressed to a Court or a public servant and when a right or benefit depends upon it; that in line with the same, it can be construed that since the benefit of availing erstwhile ITC in the GST regime by the Noticee depends upon the rightful migration of such ITC in the GST era, it is imperative upon the public servant (being the department in the instant scenario) to comply with the clear provisions of Sub-Section 7 of Section 140 and allow the claim of the Noticee ; that the provision uses the words "even if" to suggest that although invoices (in respect of services received prior to the GST era) may have been received by an assessee after the implementation of GST, still the benefit of Section 140(7) would be available to such assessee. This thus, implies that where the law itself

provides for transition of ISD credit in such a peculiar situation where the invoices have been received in the post GST era, it would be absurd to hold that transition of the same ISD credit would be barred where the invoices have been received in the period in which the services have been received i.e. in the pre-GST era.

11. Accordingly, the insertion of such provision in Sub-Section 7 of Section 140 by itself suggests that transition of undistributed pre-GST ISD credit is allowable where the services and invoices have been received in the erstwhile regime; An ISD has been defined under Section 2(61) of the CGST Act to mean an office of the supplier of goods or services or both which receives tax invoices issued towards receipt of input services, and issues a prescribed document for the purposes of distributing the credit of Central Tax, State Tax/Union Territory Taxor Integrated Tax (IGST) paid on the said services to a supplier of taxable goods or services or both having same PAN as that of the ISD; that the ISD CENVAT credit is nothing but accumulated ITC at a HO which is available for distribution between other units. The essence, substance and form of the ITC remains the same ; that It is further argued that in the present case of the Noticee, such ISD credit is, at the end of the day, accumulated ITC in respect of taxes paid on input services. Therefore, by barring the migration of such ITC to the GST regime or by denying such transition into the new taxation era, the impugned SCN functions against the very objective of implementing a new taxation law and thus, defeats the very purpose for which it has been enacted. Accordingly, as the entire success of implementation of the new taxation law depends upon its ideology of seamless flow of credits, by denying the Noticee's claim, this very objective stands beaten ; that when GST was first implemented, the mechanisms for transition of ISD credit were not adequately laid out in Form GST TRAN-1. This resulted into taxpayers facing practical difficulties in reporting the closing balance of such credit and carrying forward the same to GST regime. Therefore, to cater to such requirement, the GST Council recommended amendments in the CGST Act and CGST Rules (specifically in Serial No. 7 of the table in Form GST TRAN-1) vide Notification No. 22 / 2017 – Central Tax dated 17 August 2017 which clearly implies that the intention of the lawmakers was to transition and distribute erstwhile ISD; because such amendment would not have been brought about had it not been the aim to migrate ISD CENVAT credit. In simple words, Sub-Rule (1) of Rule 117 of the CGST Rules mandates submission of a declaration electronically within ninety days (as extended from time to time) of the appointed day in Form GST TRAN-1 in respect of ITC carried forward in the last return prior to the appointed day. A bare perusal of the said Section indicates that Rule 117 applies where the following conditions are met:

a. *The registered person should be entitled to take credit of input tax in accordance with Section 140;*
b. *The amount of ITC carried forward into GST should be reflected in the last return filed prior to the implementation of GST;*
c. *A declaration in FORM GST TRAN-1 is to be electronically submitted on the common portal specifying such amount of ITC to be transitioned.*

13. As explained in above, Sub-Section (7) of Section 140 of the CGST Act explicitly allows the migration and distribution of ITC (by an ISD) pertaining to services received prior to the implementation of GST. Thus, the eligibility criteria stated under point (a) above stands satisfied in the case of the Noticee that the requirement provided under point (b), it is submitted that the amount of ISD CENVAT credit transitioned into GST pertains to the amount of CENVAT credit availed in the month of June 2017 and reflected in the ISD return filed for June 2017 i.e. in the last return filed prior to the implementation of GST that for point (c),the declaration in Form GST TRAN-1 was duly submitted electronically on 27 December 2017 by the Noticee by carrying forward ITC(amounting to Rs. 1,68,30,210/-) reflecting in the last return that;, it can be said that both conditions (b) and (c) are fulfilled in the instant scenario. It was further submitted

that Form GST TRAN-1 does not per se restrict the transition of undistributed ISD CENVAT credit from the pre-GST era to the GST regime; that the key Rules talking about transition through Form GST TRAN-1 are: Rules 117, 118, 119, 120, 120A. On a perusal of these Rules, it becomes very clear that none of them provide for any restriction to the transition of undistributed ISD credit to the GST era ; that, nowhere do the Rules provide for any restriction or bar on transitioning ISD CENVAT credit and thus, it can be said that the lawmakers themselves intended for such credit to be migrated in terms of Rule 117(1) of the CGST Rules. Hence, in the absence of any bar, it is submitted that the ISD CENVAT credit has been correctly transitioned by the Noticee.

14. The assessee has placed reliance on Guidance Note No. 267/8/2018-CX.8, dated 14-3-2018 which provides for two fundamental principles i.e *only such CENVAT credit can be taken as credit of CGST in the electronic credit ledger by filing TRAN-1 for which explicit legal authority exists in section 140 of CGST Act and Secondly, same CENVAT credit cannot be availed as transitional credit twice which are fulfilled by the Noticee in the present case.*

15. They further submitted that Rule 24 merely speaks about restrictions on migration of ISD registrations without providing anything about restriction on migrating credit thereof; that It is reiterated that the Noticee has migrated from ISD under Service tax to regular dealer/taxpayer under GST. In other words, the Noticee has not migrated or obtained registration as an ISD under the GST law. It is further reiterated that post the introduction of GST, the Noticee holds a common GSTIN number for both the HO and the manufacturing units located in the State of Gujarat. Under the CGST Act read with the CGST Rules, there is no specific provision which restricts the transfer of such credit. Additionally, it is submitted that at the time of migration and grant of GST Registration certificate, such migration was not disputed by the Departmental Authorities. Therefore, all the assertions made by the impugned SCN do not hold good and contain any merit. Accordingly, the SCN deserves to be quashed on this ground alone : that non-existence of electronic credit ledger to an ISD and therefore, non-applicability of Section 140(1) of the Act, it is submitted that under Section 140(1) all categories of registered persons are entitled for transitional credit, except the persons opting to pay tax under composition levy. Thus, it can be seen that by virtue of such inclusion clause (which makes a specific exclusion only for persons opting to pay tax under the composition scheme), it opens an avenue for a plethora of registered dealers, including the Noticee, to opt for transition of credit under this Section.

16. While Section 140(1) of the Act covers the above-mentioned registered persons, it also specifically provides for the transition through electronic credit ledgers. In this context, one may argue that ISDs only distribute the credit and do not utilize the credit for payment of outward tax. Therefore, as they are per se not eligible for ITC, they will not have an electronic ledger. However, on the other hand, Section 140(7) of the Act provides that the credit of an ISD accrued prior to the appointed day, though not transferable to the electronic credit ledger in terms of the provisions, is eligible for distribution on or after the appointed day. Thus, it can be seen that the provisions of Rule 117(1) of the Rules (whereby Form GST TRAN-1seeks details of credit under Section 140(7) of the Act) stands inconsistent with the provisions of Section 140(1) of the Act stipulating specifically to take credit in the electronic credit ledger. Nevertheless, it is highlighted that as far as transition of ISD CENVAT credit is concerned, the law is very clear and specific that ISD credit can be transitioned in line with Section 140(7) of the CGST Act. It is further noteworthy that if the transition is denied, it defeats the very purpose of migration of all other credits. Allowance of transition of CENVAT credit of central excise and Service tax while denying transition of ISD credit would lead to an

extremely illogical and unfair basis on which the foundation of the provision has been based; which may very well not be the intentions of the lawmakers while enacting the credit provisions. It is pertinent to note that credit lying with ISD is merely credit of input taxes discharged which is available for distribution amongst business units. At the end of the day, like in GST, in Service tax as well ISD was a distribution mechanism only, but the form and substance of the credit remains the same. Therefore, the intent of the GST law cannot be that transition in normal registrations is allowed, but the same credit when taken in ISD, is faulty; that while there maybe procedural anomalies or setbacks in reflecting transition of ISD credit, the law has always been very clear that such credit is valid, rightful and legal and is allowed to be migrated from one taxation regime to another. Therefore, barring the transition of such credit is unlawful and the impugned SCN based on such faulty observations deserves to be quashed and set aside. Without prejudice to the above, it is also pointed out that even the existence of technical challenges such as no electronic credit ledger should not hamper the substantive rights conferred upon the Noticee under section 140(7); as these requirements are purely procedural in nature. In support of this contention, the Noticee relied upon the decision of the Mumbai CESTAT in the matter of **ABM Knowledge Limited vs. Commissioner of Customs, Mumbai [2019 (27) G.S.T.L. 694 (Tri. - Mumbai)].**

18. It was further submitted that when the law clearly provides right to them to transition ITC to the GST regime, unintentional procedural lapses should not hinder the Noticee or provide a setback to the Noticee from carrying forward valid and rightful credit. Considering the pressure during the implementation of GST, through oversight the Noticee filled details in Form GST TRAN-1 in Table 5(a) instead of Table (7b). At the end of the day the transition has occurred in accordance with Section 140(7) read with Rule 117(1) and hence, such procedural lapses should be condoned and should not be used as a tool for denying the rights of the Noticee. In support of this point, the Noticee places reliance on the decision of the Delhi High Court in the matter of Super India Paper Products &Ors. vs. UOI &Ors. [TS-236-HC(DEL)-2021-GST], **Mangalore Chemicals & Fertilizers Ltd [1991 (55) ELT 437 (S.C)] and** Commr. of C. Ex., Cus. and S.T. vs. J.J. Polyplast Ltd. [2020 (252) ELT 511 (Guj.)] the Gujarat High Court. Considering all the above submissions, any procedural lapse should be excused in light of the existence of beneficial provisions which confer a right on the Noticee. Substantive rights should not be denied due to procedural gaps and hence, the impugned SCN purporting to deny such right to the Noticee deserves to be quashed and set aside.

19. It is submitted that in the present case there is no dispute with respect to the admissibility of the CENVAT Credit of the underlying services received in the pre-GST era. Thus, once it is accepted that the CENVAT credit in the present case is admissible, consequently, its admissibility for transition cannot be brought to challenge. The impugned SCN passed without appreciating the above needs to be set aside on this ground itself. Reliance in this regard is placed on the decision of the Hon'ble Karnataka High Court in the case of **KVR Construction 2012 (26) S.T.R. 195 (Kar.)** wherein it has held that that taxes/ any other amount cannot be withheld without authority of law and has been approved by the Hon'ble Supreme Court reported in **2018 (14) G.S.T.L. J70 (S.C.):** that the Noticee could have distributed the CENVAT credit of the common services if the same would have been noticed before 30 June 2017. However, in the instant case, inadvertently it was missed due the onset of GST pressure. Nonetheless, it does not take away the fact that such credit was lawful and admissible to the Noticee: that where the transition of such CENVAT credit is denied, it would greatly affect the right of the Noticee. Accordingly, the claim of the Noticee should be allowed and the impugned SCN should be quashed and set aside on this ground alone.

20. It was further submitted that in the present case, the CENVAT Credit of the taxes paid under the earlier laws was admissible and there is no dispute regarding the admissibility of the same. Hence, it can be considered as rights accrued under the earlier laws: that the provisions of section 174(2) of the CGST Act provides that the repeal of the earlier laws shall not affect any right acquired/ accrued under such acts: that section 174(2)(c) provides that the implementation of GST shall not affect any right acquired or accrued under the erstwhile Acts. They relied upon the judgements in case of **State of Punjab vs. Mohar Singh AIR (1955) SC (84): and Eicher Motors Ltd. Versus Union of** India **[1999 (106) E.L.T. 3 (SC)].. Samtel India Ltd. Versus Commissioner of Central Excise, Jaipur 2003 [(155) E.L.T. 14 (SC)]** wherein the Court observed that the right to credit became absolute when the input was used in the manufacture of the final product. In view of the above, it is clear that the Hon'ble Supreme Court has already settled the position under the existing regime that the CENVAT credit which is already availed based on the earlier provisions cannot be lapsed due to any amendment in the said provision. They have also submitted that the impugned SCN proposes to levy interest under Section 50 of the CGST Act which is deserve to be dropped similarly penalty.

21. They further submitted that the impugned SCN fails to correctly lay down the charge of penalty. This is because there are various clauses under Section 122 which attract penalty, however, the impugned SCN is silent by not revealing the clause under which the Noticee is liable for such penalty. Thus, on this ground alone the SCN deserves to be quashed and set aside as the Noticee is left unaware of the charges levelled against it together with the applicable Sub-Section or clauses which cover such charge. It is further plead that the impugned SCN also purports to impose penalty under Section 127 of the Act. It is noteworthy that this Section comes into application only in cases where a registered person is liable for penalty and the same is not covered under any proceedings initiated under Sections 62, 63, 64, 73, 74, 129 or 130. However, in the operative portion of the SCN itself the SCN showcases that the proceedings have been initiated under Section 73 of the Act. The said assessee concluded that such credit was eligible credit under the Service Tax laws, and merely non distribution of credit to the manufacturing units in the Service Tax regime and carry-forward of credit in GST regime is a procedural lapse in as much as, in case such distribution would have taken place in pre July* era, such credit would have been incorporated in our return under Central Excise laws and carried forward in the GST Regime. Thus, when there is no dispute on the eligibility of the Credit, the non-distribution of credit would merely be procedural lapse and on this ground alone the benefit cannot be denied to the assessee, especially since the law [whether erstwhile or GST] did not place any time limit/restriction on such distribution.

PERSONNEL HEARING

22. Personal Hearing in the matter was granted and held on 21.09.2021 which was attended by Shri Amit Ahir, Senior Manager of the assessee company & Shri Sumit Jain, duly authorized representative of the assessee. During the personnel hearing, Shri Sumit Jain submitted that the issue is based on misinterpretation of Rule 24 of the CGST Act and they are eligible for transfer of credit. They re-interrelated the written submission dated 04.08.2021.

DISCUSSION AND FINDINGS

23. I have carefully gone through the case records, SCN, submission in reply, other documents and the arguments put forth at the time of personal hearing by the said

assessee. The issues involved is whether Cenvat credit balance lying with the said assessee under the earlier Service Tax law is allowed to carry forward their balance credit to electronic credit ledger of the new law i.e CGST

24. On perusal of the SCN and above referred documents, I find that Rule 24 of CGST Rules, 2017 allows migration of Registered persons **other than a person deducting tax at source or an Input Service Distributor**, registered under an existing law. In other words a registered person as an Input Service Distributor is excluded from the purview of migration to GST under Rule 24 of CGST Rules, 2017. In other words, Rule 24 allows all the registered persons other than a person deducting tax at source or an Input Service Distributor are allowed migration to new tax regime and therefore migration of an input credit distributor and transfer of Input Tax Credit from erstwhile law to GST regime is totally unauthorised and contrary to the provisions of law.

25. Section 140 CGST Act provides that the Cenvat credit balance lying in a return filed under the earlier law may be carried forward in the electronic credit ledger (not from GSTR6) of a registered person. Section 140 of CGST Act provides as under:

140. (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed: Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:— (i) where the said amount of credit is not admissible as input tax credit under this Act; or (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or (iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government. A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in ***his electronic credit ledger, credit of the unavailed CENVAT credit*** *in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed: Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law*

Further Rule 86 of CGST Rules, 2017 provides as under:

" Electronic Credit Ledger.-

(1) The electronic credit ledger shall be maintained in FORM GST PMT-02 for each registered person eligible for input tax credit under the Acton the common portal and every claim of input tax credit under the Act shall be credited to the said ledger.

(2) The electronic credit ledger shall be debited to the extent of discharge of any liability in accordance with the provisions of section 49.

(3) Where a registered person has claimed refund of any unutilized amount from the electronic credit ledger in accordance with the provisions of section 54, the amount to the extent of the claim shall be debited in the said ledger.

(4) If the refund so filed is rejected, either fully or partly, the amount debited under sub-rule (3), to the extent of rejection, shall be re-credited to the electronic credit ledger by the proper officer by an order made in FORM GST PMT-03.

(5) Save as provided in the provisions of this Chapter, no entry shall be made directly in the electronic credit ledger under any circumstance.

(6) A registered person shall, upon noticing any discrepancy in his electronic credit ledger, communicate the same to the officer exercising jurisdiction in the matter, through the common portal in FORM GST PMT-04.

26. On perusal of the provisions of Section 140 of CGST Act 2017, I find that a registered person shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed. It implies that a registered person under CGST only can take the credit, however, In the instant case as the said assessee is not registered person, the provisions of Section 140 of CGST Act, 2017 is not applicable. Further, I also find that for migrating to new tax regime an ISD assessee is not eligible as they do not have an electronic credit ledger for taking and distribution of the credit under GST law. As such the Input Tax Credit availed under GST appears illegal and improper according to Rule 24 of CGST, Rules,2017 and Rule 86 of CGST Rules, 2017, accordingly I find that the migration of Input Tax Distributors are not allowed under law and therefore the question of carrying forward of balance credit in new tax regime i.e.GST era does not arise.

27. Further, the condition of maintaining of Electronic Credit Ledger in prescribed format is mandatory for each registered person for being eligible for availing credit of input tax credit under section 16 of CGST, Act,2017 and debit of tax liability in terms of Section 49 of CGST Act, 2017 or claiming of refunds in terms of Section 54 of CGST, Act, 2017. I also find that an input Service Distributor registered under GST is not eligible for ITC under Section 16 CGST, Act,2017 as they do not use the inputs in the course of furtherance of the their business for making taxable supplies as ISD. I find that ISDs just distribute the credit and do not utilize the credit for payment of output tax. Further as ISDs are not eligible for ITC under Section 16 CGST, Act,2017 and as such will not have an electronic ledger,therefore, I find that after the appointed date i.e. after, 01.07.2017, the amount of credit lying balance with the ISD registered under the prevailing law automatically lapses as the same is not covered by TRAN-1 as the ISDs are not allowed to migrate under GST era and the said amount, in case, distributed as input tax credit, is unauthorized and is not allowed to be distributed. Accordingly, the balance Input Tax credit availed/transferred by the said ISD and migrated to GST is contrary to the provisions of law and, therefore, required to be recovered with applicalbe interest and penalities.

28. In view of the above, I find that the noticee has contravened the provisions of Section 140 of CGST Act 2017 and Rule 24 CGST, Rules, 2017 and Rule 86 of CGST Rules, 2017 in as much as they have wrongly carried forward the input credit lying in balance to GST return. The said assessee in their reply emphasized on the point of transition of ITC by a registered unit. They have not put forth any point regarding transition of ITC by a ISD assessee. I find that Rule 24 of CGST Rules, 2017 allows migration of Registered persons **other than a person deducting tax at source or an Input Service Distributor**, registered under an existing law. The wordings of the Rule is clear that Rule 24 allows migration of person other than Input Service Distributor and being an input Service Distributor, the said assessee has nothing to put forth in this regard. As there is no confusion, contradiction or interpretation on this issue as the Rule itself specifically mentioned that Rule 24 CGST, Rules, 2017 allows migration of Registered persons other a person deducting tax at source or an input service distributor registered under existing law. It explicitly prevents an Input Service Distributor from migration to GST for the purpose of distribution of Input Tax Credit

lying undistributed as on 01.07.2017. If the intention of the law was to allow the distribution of ITC by an assessee registered as ISD, then it should have make provisions for migration of the said ISD assessees without any hurdles. It is also pertinent to mention here that, the SCN is neither disputing the eligibility of ITC lying in the records of the assessee nor questioning the eligibility of any credit availed and accumulated by the said assessee. The assessee further contended that Rule 117, 118, 119, 120 and 120A are talking about transition through Form GST TRAN-1, On this point, I find that all provisions are made in these to transitions of ITC in normal case by registered units and not by any ISD. The said assesee in their reply also quoted a number of citations in favour of their arguments. However on perusal of the above referred case laws, I find that none of the case law is directly related to transfer/carry forward of ITC by ISD unit, but with reference to the denial of ITC credit on various grounds and not in relation to matter of the instant case.

29. Therefore, I find that the intent of Rule 24 of CGST Rule, 2017 & Section 140 of CGST Act, 2017 prevails to the extent that after the appointed date.i.e. 01.07.2017, the amount of credit lying balance with ISD registered under the existing law automatically lapses as the same is not covered by TRAN-1. The aforesaid amount carried forward/transferred as Input Tax Credit into GST is without any legal backing and accordingly not eligible to be distributed and therefore the wrongly carried forward/transferred ITC of Rs.1,68,30,210/- is required to be recovered under section 73 of CGST Act, read with Section 140(1) of CGST Act,2017 and Rule 24 of CGST Rule, 2017 along with interest u/s.50 of CGST Act.2017.

30. The SCN also proposed to impose penalty u/s.122 and u/s.127 of the CGST, Act,2017. Penalty u/s.122 of the CGST, Act, 2017 is imposable on the instances tabulated in the section wherein it has been specifically mentioned the situations under which penalty u/s.122 of the CGST, Act,2017 is imposable. As the assessee wrongly carried forward/transferred the ITC, it is proved that they have taken or distributed input tax credit in contravention of section 20, or the rules made thereunder and accordingly they are liable to impose penalty u/s.122 of the CGST, Act,2017. On perusal of the referred case laws, I find that the matter involved in the case laws relied upon by them are not similar to the instant case and therefore are not providing any shelter from imposition of penalty u/s.122 of CGST, Act,2017 in view of the fact that in spite of having knowledge of the various provisions of GST, they have carried forward the ITC with the intention to avail the credit wrongly as discussed above. The Government has from the very beginning placed full trust on the manufacturers/ service providers and accordingly measures like self-assessments etc., based on mutual trust and confidence are in place. Further, a manufacturer/service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made thereunder, as considerable amount of trust is placed on them and private records maintained by them, for normal business purposes are accepted, practically for all the purposes. All these operate on the basis of honesty of the said assessee, therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on them. From the evidences, it appears that the said assessee has wilfully carried forward/transferred Input Tax Credit and suppressed the material facts by wrongly availing the benefit with intent to avail and utilise ineligible ITC.

31. In this regard, I rely upon the decision of Larger Bench of Hon'ble Supreme Court in the case of UIO Vs Dharmendra Textile Processors -2008 (231)ELT 3(SC) and further clarification in the case of M/s Rajasthan Spinning & Weaving Mills [2009 (238) E.L.T. 3 (S.C) wherein, it was, inter alia held that:

"23. The decision in Dharmendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no jurisdiction in quantifying the amount and penalty must be imposed equal to the duty determined under sub section (2) of Section 11 A. that is what Dharmendra Textile decides".

32. With the above observation, the Hon'ble Apex court held that mensrea is not an essential ingredient to impose penalty under Section 11AC of the Central Excise Act, 1944 and there is no discretion available on quantum of penalty imposable under that section. As penal provisions of Section 122 of the CGST Act, 2017 and Section 11 AC of Central Excise Act, 1944 are pari materia, the ratio of decision of the Apex court is applicable to GST matters also.

33. In view of the above, I find that the said assesee have resorted to suppression of the material facts with the intent to avail/utilising ineligible Input Tax Credit. As the said assessed wrongly carried forward/transferred Input Tax Credit of Rs.1,68,30,210/- and therefore, I find that they have rendered themselves liable for penalty under section 122 of CGST Act, 2017

34. As far as penalty u/s.127 of CGST, 2017 is concerned, I find that this Section comes into application only in cases where a registered person is liable for penalty and the same is not covered under any proceedings initiated under Sections 62, 63, 64, 73, 74, 129 or 130. However, in the operative portion of the SCN itself the SCN show causes that the proceedings have been initiated under Section 73 of the Act and therefore I refrain from imposing any penalty u/s.127 of CGST Act, 2017.

In view of the above discussion and findings, I pass the following orders:-

ORDER

(i) I order to recover transitional Input Tax Credit amounting to Rs 1,68,30,210/- (Rs.One Crore Sixty Eight Lacs Thirty Thousand Two Hundred and Ten only) lying in balance as on 01.07.2017 and wrongly carried forward/transferred by them into GST under Section 73 of CGST Act, 2017 read with Section 140(1) of CGST Act, 2017 and Rule 24 of CGST Rules, 2017.

(ii) I order that interest on the amount mentioned in Sr. No. (1) at the appropriate rate be recovered from them under Section 50 of Central Goods and Service Tax Act, 2017.

(iii) I impose penalty of Rs.1,68,30,210/- (Rupees One Crore sixty eight lacs, thirty thousand two hundred and ten only) on M/s Claris Injectable Ltd.(Now known as M/s Baxter Pharmaceuticals India Private Limited), Bodakdev, Ahmedabad under Section 122 read with Section 73 of Central Goods and Service Tax Act, 2017.

(iv) I further order that in terms of Section 74 (11) of the CGST Act, 2017 if M/s Claris Injectable Ltd.(Now known as M/s Baxter Pharmaceuticals India Private Limited), Bodakdev, Ahmedabad pays the amount of ITC as determined at Sl. No. (i) above and interest payable thereon U/s.50 and a penalty equalant to fifty percent of such tax within thirty days of communication of the order, all proceedings of this notice shall be deemed to be concluded.

35. The Show Cause Notice No. GST/15-65/OA/2018 dated 27.11.2020 issued to M/s Claris Injectable Ltd.(Now known as M/s Baxter Pharmaceuticals India Private Limited), is disposed off in the above manner.

13/12/21

(R.GULZAR BEGUM)
Joint Commissioner,
CGST & Central Excise,
Ahmedabad North.

Date: 13/12/21

F. No. GST/15-65/OA/2018
By:-R.P.A.D.

To
M/s Claris Injectable Ltd.(Now known as Baxter Pharmaceuticals India P. Limited),
Ramdas Road, Off. Sindhu Bhavan Road,
Bodakdev, Ahmedabad

Copy to: -

1. The Commissioner of CGST & C.Ex., Ahmedabad North.
2. The Deputy Commissioner Division-VI, C. Ex & CGST, Ahmedabad North.
3. The Superintendent, Range-I, Division-VI, C.Ex. & CGST, Ahmedabad North
4. The Superintendent(system) CGST, Ahmedabad North for uploading on website.
5. Guard File