आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009
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निबन्धित पावती डाक द्वरा/By R.P.A.D

फा.सं./F.No. GST/15-276/OA/2021

DIN: 20231164WT000000E350

आदेश की तारीख़/Date of Order: - 03.11.2023

जारी करने की तारीख़/Date of Issue :- 03.11.2023

द्वारा पारित/Passed by:- लोकेश डामोर /*Lokesh Damor*

सयुक्त आयुक्त / *Joint Commissioner*

मूल आदेश संख्या / Order-In-Original No. 42/JC/ LD /GST/2023-24

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 90 दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015-को प्रारूप GST-APL-01 में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form GST-APL-01 to the Commissioner (Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within three months from the date of its communication. The appeal should bear a court fee stamp of Rs. 5.00 only.

इस आदेश के विरुद्ध अपील करने के लिए आयुक्त (अपील) के समक्ष नियमानुसार पूर्व जमा के धनराशी का प्रमाण देना आवश्यक है ।

An appeal against this order shall lie before the Commissioner (Appeal) on giving proof of payment of pre deposit as per rules.

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या GST-APL-01 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केंद्रीय जी. एस. टी. नियमावली ,2017 के नियम 108 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।
(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिस पर रू. 5.00 (पांच रुपये) का न्यायालय शुल्क़ टिकट लगा होना चाहिए।

The appeal should be filed in form GST-APL-01 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 108 of CGST Rules, 2017. It should be accompanied with the following:

(1) Copy of accompanied Appeal.
(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.5.00.

विषयः- कारण बताओ सूचना/Proceeding initiated against Show Cause Notice F. No. GST/15-276/OA/2021 dated 28.07.2022 issued to M/s India Oil Corporation Limited, Indian Oil Bhawan, Near Sola Fly Over Bridge, Sola, S G Highway, Ahmedabad - 380060.

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 and is also admissible as input tax credit under this Act.

Explanation. - For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely :-

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act ;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act ;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs ;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day ; and

(v) the supplier of services is not eligible for any abatement under this Act :

Provided that where a registered person, other than a manufacturer or a supplier of services, in not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person, shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 (1 of 1944) or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994 (32 of 1994), but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger, —

(a) the amount of CENVAT credit carried forward in return furnished under the existing law by him in accordance with the provisions of sub-section (1); and.

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day,

Brief facts of the case:-

M/s Indian Oil Corporation Limited, Indian Oil Bhawan, Near Sola Fly Over Bridge, Sola, S G Highway Ahmedabad – 380060 (hereinafter referred to as "the said Taxpayer") were engaged in providing various taxable services and were registered with erstwhile Service Tax Department having ST No. AAACI1681GST022 and AAACI1681GSD509.

2. During the course of verification of TRAN 1 record of the said Tax payer, it was observed that :

2.1 **Wrong carry forward of Krishi Kalyan Cess in TRAN-1 as transitional credit :**

During the course of verification and reconciliation of TRAN-1 and ST-3 Return of April-June'2017 filed by the taxpayer, it is observed that the taxpayer has wrongly carried forward the closing balance of Credit of Krishi Kalyan Cess of Rs. 1,56,72,279/- from the legacy Return (ST-3) of unit AAACI1681GST022 and Rs. 2,16,388/- from the legacy Return (ST-3) of unit AAACI1681GSD509 total KKC carried forward by the taxpayer from the said legacy return amounting to **Rs. 1,58,88,667/-** under Table 5(a) in TRAN 1 as transitional credit. The same is not admissible as per Section 140(1) of CGST Act, 2017. Therefore, the taxpayerwas required to pay the amount of said cess along with interest and penalty. The tax payer had made the reversal of the KKC amount of **Rs. 1,58,88,667/-** in the GSTR 3Bfor the month of August 2018. However, applicable Interest and Penalty on this amount has not been paid by the taxpayer.

3. Relevant provisions of **Section 140** of the Central Goods and Services Tax Act, 2017 is re-produced here-in-below:-

SECTION 140. Transitional arrangements for input tax credit. –

(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 :

relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to taken, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day :

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further the said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely :-

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act ;

(ii) the said registered person is not paying tax under section 10 ;

(iii) the said registered person is eligible for input tax credit on such inputs under this Act ;

(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs ; and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by a Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralized registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed ;

Provided that if the registered person furnished his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier :

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act :

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralized registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

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 Tariff Act, 1975.

4. Therefore, the conditions for eligibility of input tax credit of excise duty paid on input goods are as follows:

- The taxable person should not be paying GST under composition scheme under section 10 of CGST Act.
- The input tax credit should be allowable under CGST Act.
- The taxable person should have filed all returns for last six months i.e., from January, 2017 onwards.
- The input tax credit should not be relating to goods manufactured and cleared under exemption notification notified by Government [no such notification has been so far notified by Central Government]
- If the inputs were received from EOU/STP/EHTP, the credit will be available to the extent provided in rule 3(7) of Cenvat Credit Rules.
- The registered person is required to submit application electronically in form GST TRAN-1 within 90 days – Rule 117(2)(b) of CGST Rules, 2017. Time limit for filing GST TRAN-1 has been extended to 27-12-2017 – Order No. 10/2017 – GST dated 15-11-2017.
- The amount of credit specified in form GST TRAN-1 will be automatically credited to electronic credit ledger of applicant in form GST PMT-2 Rule 117(3) of CGST Rules, 2017.
- If credit is wrongly taken, it can be recovered under section 73 or 74 with interest – Rule 121 of CGST Rules, 2017.

5. **Section 73** of the Central Goods and Services Tax Act, 2017 reads as --

(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 utilized for any reason, other than the reason of fraud or any willful 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 utilized 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 thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance or order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(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 then thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any

amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

6. **Section 50** of the Central Goods and Services Tax Act, 2017 reads as ---

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax on any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent, as may be notified by the Government on the recommendations of the Council.

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent, as may be notified by the Government on the recommendations of the Council.

7. **Section 122** of the Central Goods and Services Tax Act, 2017 details the Penalty for certain offences wherein the relevant provisions reads as under:

(1) .....

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilized, ---

(a) for any reason, other than the reason of fraud or any willful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent of the tax due from such person, whichever is higher;
(b) .....
(3) .....

8. From the facts mentioned in the forgoing paras, it appeared that the said Taxpayer have contravened the provisions of Section 140 of the Central Goods and Services Tax Act, 2017 read with Rule 121 of the Central Goods and Services Tax Rule, 2017 in as much as they have wrongly availed & carried forward of Cenvat Credit of Krishi Kalyan Cess as transitory credit in TRAN-1 amounting to Rs. 1,58,88,667/-. As the Taxpayer has already paid the KKC amount of Rs. 1,58,88,667/- the same amount is required to be appropriated.

9. With the contraventions of the provisions of Section 140 of the Central Goods and Services Tax Act, 2017 read with Rule 121 of the Central Goods and Services Tax Rule, 2017, the said Taxpayer has made themselves liable for payment of Interest on the amount of Rs. 1,58,88,667/- at the rate of eighteen per cent payable per annum under Section 50 of the Central Goods and Services Tax Act, 2017.

10. With the contraventions of the provisions of Section 140 of the Central Goods and Services Tax Act, 2017 read with Rule 121 of the Central Goods and Services Tax Rule, 2017, the said Taxpayer has made themselves liable for payment of penalty amounting to Rs. 15,88,867/- in the instant case [owing to provision of ten thousand rupees or ten per cent of the tax due from such person, whichever is higher] under Section 122 of the Central Goods and Services Tax Act, 2017.

11. The noticee was granted pre-consultant on 17.06.2022 at 12.00 Hrs to present their case before the Additional Commissioner, CGST, Ahmedabad North. Shri Rajesh Priyadarshi, Senior Manager, Finance, IOCL, Gujarat vide their letter dated 22.06.2022 had informed that they had reversed the credit of Krishi Kalyan Cess of Rs. 1,58,88,667/- and further requested to provide an opportunity at any future date for pre-consultation in the matter. therefore, Sh. Rajesh Priyadarshi, Senior Manager, Finance, IOCL, Gujarat appeared for personal hearing on 25.07.2022 and re-submitted their written submission submitted earlier vide their letter dated 22.06.2022.

12. Therefore, a notice bearing F No. GST/15-276/OA/2021 dated 28.07.2022 was issued to M/s. Indian Oil Corporation Limited, Indian Oil Bhawan, Near Sola Fly Over Bridge, Sola, S G Highway, Ahmedabad and called upon to show cause as to why:-

i. Transitional Credit of KKC amounting to Rs. 1,58,88,667/-(Rupees One Crore Fifty Eight Lacs Eighty Eight Thousand Six Hundred and Sixty Seven) should not be demanded and recovered from them under Section 73 of the Central Goods and Services Tax Act, 2017 read with Rule 121 of the Central Goods and Services Tax Rule, 2017. As the Taxpayer has already paid the KKC amount of Rs. 1,58,88,667/- , the same amount is required to be appropriated.

ii. Interest on the amount of Rs. 1,58,88,667/- as applicable at prescribed rate i.e., at the rate of eighteen per cent payable per annum under Section 50 of the Central Goods and Services Tax Act, 2017 should not be recovered from them for wrongly availment of Cenvat Credit under the provision of Section 50 of the Finance Act, 1994 read with Section 73 of CGST Act, 2017.

iii. Penalty should not be imposed upon them under Section 122(2) of the Central Goods and Services Tax Act, 2017 for the wrongly availed & carried forward of Cenvat Credit as transitional credit in TRAN-1.

Defense submission:

13. M/s. Indian Oil Corporation Limited vide their letter dated 05.09.2022 has submitted following submission:

13.1 Transitional Credit Provisions and TRANS-1:

Vide Finance Act 2016, Krishi Kalyan Cess (in short KKC) was levied on taxable services by the Central Government with effect from 01.06.2016 with the avowed object of financing and promoting initiatives, including agriculture or related activities. Notification No.28/2016-CE (MT) dated 26.05.2016 enabled a provider of output services to avail CENVAT credit and utilise the same against KKC liability.

After the implementation of GST, Section 140(1) of the Central Goods and Service Tax Act. 2017 entitled the registered person to carry forward the amount of CENVAT credit reflected in its last return before implementation of GST. Relevant excerpt of Section 140(1) is reproduced below:

"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:"

From the bare perusal of Section and CCR Rules, it is derived that credit of KKC will be eligible to be carried forward in the GST Regime as Transitional Credit. Accordingly, credit of KKC was included in TRANS-1 as Transitional Credit.

13.2. Retrospective Amendment vide CGST (Amendment) Act, 2018:

Meanwhile, the Government vide CGST (Amendment) Act, 2018 has made the retrospective amendment w.e.f. 1 July 2017 in the Section 140(1), to contextualise the phrase 'CENVAT credit' with the term 'eligible duties', to disallow the transition of accumulated credit of the Cesses into GST and an explanation to this effect was also inserted vide Explanation 3 further clarifying that "eligible duties and taxes" will exclude the Cess. By virtue of this amendment, the closing balance of credit available under Cesses is not transferable as input tax credit under GST.

13.3. Effect of KKC in GST Returns:

Credit in Krishi Kalyan Cess amounting to Rs. 1,58,88,667/- was availed as Transitional Credit in TRANS-1 based on interpretation of the provisions which were apparent and prevailing at the time of filing TRANS-1. On receipt of clarification vide CGST (Amendment), Act, 2018, the credit of KKC was reversed in the GST return.

13.4. Reversal of Transitional Credit of KKC and applicability of interest and penalty:

Cesses were treated as CENVAT Credit under Pre-GST regime and intention of Government was to provide seamless model for transition of all credits availed by taxpayers under erstwhile regime. The CENVAT Credit that had been permitted were continued in GST regime. Provisions prevailing before retrospective amendment and clarification clearly allowed carry forward of CENVAT Credit and there was no specific restriction with respect to availment of KKC Credit, further, reversal of KKC credit has already been done on receipt of clarification vide CGST (Amendment) Act, 2018.

Further, it is submitted that they had rightfully availed & carried CENVAT credit in line with provision of section 140 prevailing at that time and reversal was also carried out on receipt of amendment in the provisions for which the demand of interest section 50 of CGST Act 2017 is not sustainable. Further, Penalty under provision of section 122(2) read with section 73(1) of CGST Act 2017 is also not imposable since reversal of KKC credit was done on suo-moto basis on receipt of retrospective amendment.

Personal hearing:

13. The personal hearing in the matter was held on 12.09.2023 and Shri Ashit Mehtaji, Deputy General Manager (Fin), M/s. Indian Oil Corporation Ltd. attended the Personal Hearing on behalf of the tax taxpayer and he reiterated their written submission dated 05.09.2022. He further requested to decide the SCN on merit.

Discussion and findings:

14. I have carefully gone through show cause notice, written submission by the said taxpayer and the records of the case available on record.

15. I find that the issues involved in the present case for consideration are:

(a) Whether carried forward of Krishi Kalyan Cess (KKC) through TRAN-1 is permissible under GST law or not?

(b) Whether liability of interest and penalty accrues when ITC of KKC is reversed, or not?

16. In respect of issue at Sr. No. (a) I find that :-

16.1. The said taxpayer had carried forward the closing balance of CENVAT Credit of Krishi Kalyan Cess of Rs. 1,56,72,279/- from the legacy Return (ST-3) of unit AAACI1681GST022 and Rs. 2,16,388/- from the legacy Return (ST-3) of unit AAACI1681GSD509 total KKC carried forward by the taxpayer from the said legacy returns amounting to **Rs. 1,58,88,667/-** under Table 5(a) in TRAN 1 as transitional credit. I find that the transitional arrangements of closing balance of Cenvat credit available in returns either ER-1/3 or ST-3 during legacy period governs under the provisions of Section 140 of the Central Goods and Service Tax Act, 2017 and Explanations 1, 2 & 3 to Section 140 of the CGST Act, 2017 specified "Eligible Duties" or "Eligible Taxes and Duties" which can be transferred into GST for discharging the GST liability. For easy of reference, the relevant provisions of Section 140 of the CGST Act, 2017 and its explanations are reproduced as under: -

Section 140. Transitional arrangements for input tax credit.-

(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 [of eligible duties] 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 [within such time and] in such manner as may be prescribed:

(2) .....

(3).....

(4)....

(5)A registered person shall be entitled to taken, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day :

(6) to (10).....

***Explanation 1.** -For the purposes of [sub-sections (1), (3), (4)] and (6), the expression **"eligible duties"** means-*

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);
(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);
(iv) [****];
(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and
(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001),
in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.
***Explanation 2.**-For the purposes of [sub-sections (1) and (5)], the expression "eligible duties and taxes" means-*
(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);
(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);
(iv) [****];
(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;
(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);
(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001); and
(viii) the service tax leviable under section 66B of the Finance Act, 1994 (32 of 1994),
in respect of inputs and input services received on or after the appointed day.

[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).]

16.2. I find that Section 140 of the CGST Act, 2017 was amended retrospectively w.e.f. 01.07.2017 vide CGST (Amendment) Act, 2018 and Explanation 3 of Section 140 was also inserted retrospectively w.e.f. 01.07.2017, wherein it is categorically mentioned that 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).]

16.3. Further, I find that the CBIC, New Delhi have issued a Circular No.87/06/2019-GST dated 02.01.2019 addressed to all Chief Commissioners and other Authorities clarifying the said provisions of CGST Amendment Act, 2018. In Para 5 of the aforementioned circular, it is categorically mentioned that the transitional credit of cesses is not permissible. The Para 5 of aforesaid circular dated 02.01.2019 is reproduced here-in-below:

"5. No transition of credit of cesses, including cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, would be allowed in terms of Explanation 3 to section 140, inserted vide sub-section (d) of section 28 of CGST Amendment Act, 2018 which shall become effective from the date the same is notified giving it retrospective effect."

16.4. In view of above, it is evident that the CENVAT Credit pertaining to Krishi Kalyan Cess is not considered as "eligible duty" occurring in Section 140(1) of the CGST Act, 2017 and carried forward the balance of credit of Krishi Kalyan Cess into electronic credit leger in GST regime through TRAN-1 is not eligible and carried froward the said ITC would be amount to wrongly availed ITC in credit ledger and the

same is required to be reversed or recovered from the beneficiary under the applicable provisions of GST law.

16.5. In this context, I rely upon the decision of Hon'ble Madras High Court dt. 16.10.2020 in WA No.53 of 2020 in the case of Assistant Commissioner of CGST and Central Excise Vs Sutherland Global Services Private Limited, wherein Hon'ble High Court has held that :-

"We found considerable force in the contention raised on behalf of the Revenue before us that credit of such Education Cess and Secondary and Higher Education Cess which could not be utilised against the Output Education Cess and Secondary and Higher Education Cess Liability, while the said impost was in force prior to Finance Act, 2015, became a dead claim in the year 2015 itself and therefore, there was no question of allowing a carry forward and set off after a gap of two years against the Output GST Liability with effect from 01.07.2017."

"Explanation 3 to Section 140 could not be applied in a restricted manner only to the specified Sub-sections of Section 140 of the Act mentioned in the Explanations 1 and 2 and as a tool of interpretation, Explanation 3 would apply to the entire Section 140 of the Act and since it excluded the Cess of any kind for the purpose of Section 140 of the Act, which is not specified therein, the transition, carry forward or adjustment of unutilised Cess of any kind other than specified Cess, viz. National Calamity Contingent Duty (NCCD), against Output GST liability could not arise."

In view of the above, I am of inclined to hold that balance of ITC of Krish Kalyan Cess is not covered under the folder of eligible duties as specified in explanation 1 & 2 of Section 140 of the Act and availment of the same by carried forward/ transferred into Electronic credit ledger through TRAN-1 to the said taxpayer for discharging their output liability would be amount to excess or undue/wrong availment of ITC and the same is not admissible to the taxpayer by any stretch of imagination of input tax credit under GST law. Accordingly, the question of wrongly availment of ITC of Krish Kalyan Cess in the instant case is satisfied and the said ITC is required to be recovered under provisions of Section 73 of the CGST Act, 2017 since the said inadmissible ITC of KKC has already been reversed by the said taxpayer in their GSTR-3B filed for the month of August- 2018, the same needs to be appropriated against the said wrongly availed ITC.

17. (b) In respect of issue at Sr. No. (b) regards applicability of interest and penalty

17.1. I reiterate that the issue regards non transability/carry forwarding of the closing balance of ITC of Krish Kalyan Cess available as per returns of pre-GST period in this case into electronic credit ledger through TRAN-1 are clearly and soundly established in view of my above discussions hence the same does not require any replication here. Further, I find that the said inadmissible ITC of KKC of Rs. 1,58,88,667/- has already been reversed by the said taxpayer before issuance of the present notice in their GSTR-3B filed for the month of August- 2018 but at the same time, I observe that the taxpayer had neither contested regards non utilization of ITC of KKC nor produced any document to this effect before me. Further, it is also observed that the said taxpayer had not paid interest as applicable on utilisation of such wrongly availed ITC.

17.2. It is incumbent upon me to mention it here that once the wrongly availed credit has been utilised for discharging the output liability, the same needs to be recovered or reversed along with applicable interest. I find that the case before me, the reversal of wrong availed ITC has made without paying applicable interest. The Section 50(3) of the Act prescribes interest on Input Tax Credit wrongly availed and utilised. For ease of reference the relevant provisions is reproduced as under:-

Section 50. Interest on delayed payment of tax.-

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

*[**Provided** that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.]*

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

[(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed].

In view of above, it is evident that interest liability would squarely arise on wrong availment of Input Tax Credit and subsequent to utilization of the same. I find that the taxpayer had accepted the credit of KKC as wrongly availed and utilised as they have reversed the said ITC before the course of audit undertaken by the department but failed to pay applicable interest on such wrong availment of ITC.

17.3. Further, I find that a new Rule 88 of Central Goods and Service Tax (Amended) Rules, 2022 regards manner of calculating interest on delayed payment of tax has been inserted retrospectively w.e.f. 01.07.2023 vide CBIC Notification No. 14/2022-Central Tax, dated 05.07.2022 for easy of reference the same is reproduced as under:-

*[**Rule 88B. Manner of calculating interest on delayed payment of tax.-***

(1) In case, where the supplies made during a tax period are declared by the registered person in the return for the said period and the said return is furnished after the due date in accordance with provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, the interest on tax payable in respect of such supplies shall be calculated on the portion of tax which is paid by debiting the electronic cash ledger, for the period of delay in filing the said return beyond the due date, at such rate as may be notified under sub-section (1) of section 50.

(2) In all other cases, where interest is payable in accordance with sub section (1) of section 50, the interest shall be calculated on the amount of tax which remains unpaid, for the period starting from the date on which such tax was due to be paid till the date such tax is paid, at such rate as may be notified under sub-section (1) of section 50.
(3) In case, where interest is payable on the amount of input tax credit wrongly availed and utilised in accordance with sub-section (3) of section 50, the interest shall be calculated on the amount of input tax credit wrongly availed and utilised, for the period starting from the date of utilisation of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount, at such rate as may be notified under said sub-section (3) of section 50.
Explanation.-For the purposes of this sub-rule, -
(1) input tax credit wrongly availed shall be construed to have been utilised, when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, and the extent of such utilisation of input tax credit shall be the amount by which the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed.
(2) the date of utilisation of such input tax credit shall be taken to be, -
(a) the date, on which the return is due to be furnished under section 39 or the actual date of filing of the said return, whichever is earlier, if the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, on account of payment of tax through the said return; or
(b) the date of debit in the electronic credit ledger when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, in all other cases.]

As per provisions of the sub-rule (3) of Rule 88B of as above, it is evident that the utilisation of wrongly availed ITC would attract interest provisions if balance of such wrongly availed ITC has been reduced in guise of discharging of output tax liability. I find that the wrong availment of ITC is respect of Krishi Kalyan Cess (KKC) has been established beyond doubt as per my discussions in foregoing paras and regards utilisation of the said ITC, the taxpayer has neither made any written submission nor produced any documentary evidence before me to explain the situation of non utilisation of wrongly availed ITC of Krishi Kalyan Cess.

17.4. The liability of interest would automatic be arisen if the tax or wrongly availed ITC due is paid/reversed after due day of payment of tax as prescribed. I relying upon the judgement of Hon'ble Jharkhand High Court in case of Mahadev Construction reported at2020 (36) G.S.T.L. 343 (Jhar.), wherein it was held that

"Liability of interest is automatic, the same is required to be adjudicated in event of an assessee disputes in computation or vary leviability of interest, by initiation of adjudication proceeding under section 73 or section 74 of the CGST Act."

In view of the above, I am hold that Interest, on wrongly availed and utilised ITC of Krishi Kalyan Cess, is correctly applicable as per provisions of Section 50(3) of the CGST Act, 2017 readwith sub rule (3) of Rule 88B of the CGST Rule, 2017, as amended.

18. Now, Coming to next limbs regards imposition of penalty under the provisions of Section 122(2) of the CGST Act, 2017.

18.1. I find from facts of case elaborated in the notice that the demand of wrong availed and utilised ITC has been proposed by invoking the provisions of Section 73 of the CGST Act, 2017 and penalty has been proposed under the provisions of Section 122(2) of the CGST Act, 2017.

18.2. Before going ahead, it would be better idea to look into the provisions of Section 122(2) of CGST Act, 2017 first, the same is reproduced as under:-

Section 122 (2):- *Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,-*

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

On plain reading of the above provisions, it is evident that clause (a) of the Section 122(2) of the Act, speaks about the penalty commensurate to Section 73(1) of the Act for contraventions of provisions of the Act. Further, it is also evident that quantum of penalty equal to ten thousand or ten percent of tax due, whichever is higher, is liable on a registered taxable person who supply any goods or service or both where the input tax credit has wrongly been availed and utilised for reason other than fraud or any wilful misstatement or suppression of facts to evade tax.

18.3. Looking to the facts of the case, the wrong availment of ITC of Krishi Kalyan Cess has been soundly established in the instant case. Further, the utilisation of such wrongly availed ITC and consequent to liable for interest has also been justified as per discussions in foregoing paras. Further, I find that the said wrongly availed ITC has already been reversed by the said taxpayer but the payment of applicable interest is still pending hence the present case cannot be considered under the provisions of Section 73(8) of the CGST Act, 2017. For contraventions of provisions of Section 140 of the CGST Act, 2017 readwith Rule 121 of the CGST Rules, 2017 in as much as wrongly availed and utilsed of input tax credit of Krishi Kalyan Cess as transitory credit in TRAN-1, penalty under the provisions of Section 122(2)(a) of the CGST Act, 2017 is squarely applicable in the instant case.

19. In view of the above discussion and findings, I pass the order as under:

ORDER

i. I confirm the demand of Transitional Credit of KKC amounting to **Rs. 1,58,88,667/- (Rupees One Crore Fifty Eight Lakhs Eighty Eight Thousand Six Hundred and Sixty Seven only)** and order to recover the same under the provisions of Section 73 (9) of the Central Goods and Service Tax Act, 2017 readwith Rule 121 of the Central Goods and Service Tax Rules, 2017. Since the taxpayer has already paid the KKC

amount of Rs. Rs. 1,58,88,667/-, the same is appropriated against aforesaid confirmed demand;

ii. I hold the liability of interest on confirmed demand as above at prescribed rate under Section 50(3) of the Central Goods and Services Tax Act, 2017.

iii. I impose penalty of Rs. 15,88,867/- **(Rupees Fifteen Lakhs Eighty Eight Thousand Eight Hundred and Sixty Seven only)** upon the said taxpayer under Section 122(2) of the Central Goods and Services Tax Act, 2017 for the wrongly availed & carried forward of Cenvat Credit as transitional credit in TRAN-1.

20. The show cause notice bearing F.No. GST/15-276/OA/2021 dated 28.07.2022 is disposed off in above terms.

(Lokesh Damor)
Joint Commissioner,
Central Excise & CGST,
Ahmedabad North.

Place: Ahmedabad
F.No. GST/15-276/OA/2021

Date :- 03/11/2023

To,
M/s Indian Oil Corporation Limited,
Indian Oil Bhawan, Near Sola Fly Over Bridge,
Sola, S G Highway Ahmedabad – 380060

Copy to:-

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
2. The DC/AC, CGST & Central Excise, Division-VI, Ahmedabad North.
3. The Superintendent, Range-IV, Division-VI, CGST & Central Excise, Ahmedabad North **with a request to create Form GST DRC-07 electronically in terms of DSR Advisory no.01/2018 dated 26.10.2018 of the ADG, Systems & Data Management, Bengaluru.**
4. The Superintendent (System), CGST & Central Excise, Ahmedabad North for uploading the order on website.
5. Guard File.