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

फ़ोन नंबर/ PHONE No.: 079-27544557 फैक्स/ FAX : 079-27544463 E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वरा/By R.P.A.D
फा.सं./F.No. GST/15-42/OA/2022

DIN:20231164WT0000000C22
आदेश की तारीख़/Date of Order: - 29.11.2023
जारी करने की तारीख़/Date of Issue :- 29.11.2023

द्वारा पारित/Passed by:- लोकेश डामोर /*Lokesh Damor*
सयुक्त आयुक्त / *Joint Commissioner*

मूल आदेश संख्या / Order-In-Original No. 45/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।

(3) उक्त अपील की प्रति।
(4) 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 शुल्क 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. V/27-72/Parikh/SCN/2021-22 dated 14.02.2022 issued to M/s Parikh Packaging Private Limited, Opp. Rotomec Pens, Sarkhej Bavla Highway, Moraiya, Sanand, Ahmedabad, Gujarat-382213.

Brief facts of the case:-

M/s Parikh Packaging Private Limited, Opp. Rotomec Pens, Sarkhej Bavla Highway, Moraiya, Sanand, Ahmedabad, Gujarat, 382213 (hereinafter referred to as the 'Tax Payer' for the sake of brevity) is a unit engaged in the business of manufacturing & clearance of Packaging material etc. falling under Chapter 39 of CETA 1985 & they were registered with Central Excise under ECC No. AABCP7894FXM001 and Service Tax with STC No. AABCP7894FST001 during the erstwhile Pre-GST regime & are now registered under GST regime with GSTIN 24AABCP7894F1Z6.

2. An audit of the said Tax Payer was conducted by CERA Audit department and half margin memo (HM-36) was issued vide File No. GSTA- VIII/SSCA-TRAN/Ahmedabad North Comm./2020-21/HM-36 dated 23.03.2021. As per the aforesaid Half Margin Memo, it was revealed that the Tax Payer was eligible to claim the transition credit amounting to Rs 5,92,20,354/-in TRAN-I as per provision of Section 140 of CGST Act, 2017. However, on verification of Electronic Credit Ledger, it was also noticed that the Tax Payer has taken the ITC of transitional credit of Rs. 17,29,52,729/- through filing of Tran-1 return on 19.09.2017. Therefore, the taxpayer has taken the excess ITC of Rs. 11,37,32,375/- (Rs. 17,29,52,729 - Rs. 5,92,20,354) in their Tran-1 return.

3. The taxpayer has subsequently reversed the excess ITC of Rs. 11,37,32,375/- through filing of the revised Tran-1 return on 26.12.2017. However, the Tax Payer has not paid the applicable interest and penalty on the wrongly availed ITC of Rs. 11,37,32,375/-, which is recoverable under the provision of section 73(1) of CGST Act 2017 read with section 50(3) and section 122(2) of CGST Act 2017 respectively.

4. The relevant legal provision for interest and penalty:

(i) Section 50(3) of the Act reads as under:

> *"(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 claim or 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".*

(ii) Section 73 of CGST Act, 2017 provides for penal provisions where input tax credit wrongly availed and utilized as under-

Section 73 of CGST Act 2017: Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for

any reason other than fraud or any willful misstatement or suppression of facts (CHAPTER XV - DEMANDS AND RECOVERY)

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made 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 of 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 utilised 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 ten 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 utilised 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.

Explanation 1: For the purposes of section 74 and this section,-

(i) The expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2: For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

Whereas, in view of the above it appears that the interest as applicable under Section 50(3) of the CGST Act is recoverable from the Tax Payer & also Penalty under Section... of the CGST Act 2017 is imposable upon the Tax Payer for having availed excess & ineligible CENVAT Credit.

(iii) Section 122 (2) of the Act reads as under:

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) For reason of fraud or any willful 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.

5. The details of the wrongly availed ITC are as under:

Date of availment of excess ITC in Electronic credit ledger	Amount of ITC claimed in Electronic credit ledger in Rs.	Excess amount claimed in Rs.	Date of reversal of excess ITC claimed	No of days taken for reversal of the excess ITC	Interest payable (@ 24% adv
19.09.2017	17,29,52,729	11,37,32,375	26.12.2017	98 days	73,28,727/-

5.1 From the above table, it appeared that the Tax Payer have contravened the provisions of section 73(1) by availing inadmissible ITC in Electronic Credit ledger. By delaying the payment of reversal of excess ITC, it appeared that they are liable to pay interest under the provisions of Sections 50 (3) of the CGST Act, 2017. Further, it appeared that the Penalty under Section 73(1) read with section 122(2) of the CGST Act 2017 is imposable upon the Tax Payer for having availed ineligible ITC in Electronic Credit ledger.

6. Therefore, a SCN F. No. V/27-72/Parikh/SCN/2021-22 dated 14.02.2022 was issued to M/s Parikh Packaging Private Limited, Opp. Rotomec Pens, Sarkhej Bavla Highway, Moraiya, Sanand, Ahmedabad, Gujarat, 382213 called upon to show cause as to why: -

(i) Interest amounting to Rs. 73,28,727/- on wrongly availed credit of Rs 11,37,32,375/- should not be charged and recovered as per the provisions of Sections 50(3) of the CGST Act, 2017 read with section 73(1) of CGST Act, 2017.

(ii) Penalty should not be imposed and recovered under the provision of section 73(1) of CGST Act, 2017 read with section 122(2) of CGST Act, 2017.

Defense submission:

7.1 M/s. Parikh Packaging Private Limited vide their letter 21.03.2022 have stated that they have already submitted all the relevant facts and technical arguments vide their letter dated 25.06.2021 to the jurisdictional Range Officer. They have submitted copy of the said letter, wherein they have submitted that:

- They filed Form GST TRAN 1 on 19 September 2017 with ITC availment of INR 17,09,52,729/- for CGST;
- They found inadvertent ITC availment amounting to INR 11,37,32,375/- and immediately contacted GST helpdesk on official email ID: helpdesk@gst.gov.in on 27 September 2017 stating this inadvertent availment of ITC and an eagerness to revise the Tran-1 to reverse such inadvertently availed ITC i.e. to keep the remaining eligible ITC of INR 5,92,20,354/- for utilization in future;
- They filed their GSTR-3B return of July 2017 on 25 September 2017 which required them to discharge the GST liability as under:

Sr. No.	Particulars	IGST (INR)	CGST (INR)	SGST (INR)
1	Gross Liability for July 2017	2,93,63,270	49,16,440	49,16,440
2	ITC availed in GSTR 3B of July 2017	1,09,63,364	78,58,074	78,58,074
3	ITC utilized from Transitional Credit	1,54,58,272 (from CGST Tran-1 credit)	Nil	Nil
4	CGST ITC utilized from ITC availed during July 2017	29,41,634	Nil	Nil

- As evident from the above table which explains the payment of GST liability for July 2017, it can be clearly seen that Transitional Credit was only utilized to the extent of INR 1,54,58,272/- which is well within the eligible Transitional Credit of INR 5,92,20,354/-;
- The Transitional Credit inadvertently availed by the Company was not utilised for discharging GST liability. Such Transitional Credit was reversed by the Company without any utilization, immediately on availability of TRAN-1 revision facility on GST portal i.e., on 26 December 2017;
- The balance of Electronic Credit Ledger from 19 September 2017 (i.e. TRAN-1 filing date) to 26 December 2017 (i.e. TRAN-1 revision date) was always greater than the eligible Transitional Credit balance which the Company was eligible to avail i.e. 5,92,20,354/-;
- Further, they submit that the Company has been pro-active to inform to the GST helpdesk about the inadvertent availment of Transitional Credit and along with an eagerness to reverse the same through revision facility in TRAN-1 when the revision facility was made available. It clearly shows that the Company did not have any intention to evade the tax or to avail any excess ITC at any point

of time. Further, the above explanation also shows that there has been no actual utilization of inadvertent ITC availed through TRAN-I. Had the revision facility of TRAN 1 been made available then the Company would have certainly reversed the ITC immediately. However, due to late availability of revision facility of GST TRAN-1, the Company had to wait to reverse the inadvertently availed TRAN-1 credit;

- This shows that there is no mala-fide intention on part of the Company to evade the tax or avail excess ITC therefore, there should not be any levy of interest or penalty on the Company;
- In this regard, they placed their reliance on judgement pronounced by Hon'ble Patna High Court in case of M/s Commercial Steel Engineering Corporation, wherein, it was held that the interest is not leviable on the excess availment of Transitional Credit under GST regime when the same was not used for payment of tax. An extract of the case is reproduced below:

"an availment of a credit is a positive act and unless carried out for reducing any tax liability by its reflection in the return filed for any financial year, it cannot be a case of either availment or utilization. It is rightly argued by Mr. Kejriwal that even if the respondent no.3 was of the opinion that the petitioner was not entitled to such transitional credit at best, the claim could be rejected but such rejection of the claim for transitional credit does not bestow any statutory jurisdiction upon the assessing authority to correspondingly create a tax liability especially when neither any such outstanding liability exists nor such credit has been put to use.

Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under section 73(1) of 'the BGST Act'. The provisions underlying Section 73 is self-eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an 'availment'

.....

The legislative intent reflected from a purposeful reading of the provisions underlying section 140 alongside the provisions of section 73 and Rules 117 and 121 is that even a wrongly reflected transitional credit in an electronic ledger on its own is not sufficient to draw penal proceedings

until the same or any portion thereof, is put to use so as to become recoverable."

- As per the above pronouncement, interest should not become applicable in the instant case where the transitional credit was reversed by them without utilizing the same (i.e. before putting to use the transitional credit);
- Basis the above discussion, it may be observed that the Company did not have any intention of wrong Transition of Credit to GST regime. This happened mainly on account of inadvertent error. However, basis their bona-fide intentions, they contacted the GST helpdesk on pro-active basis for reversal of Transitional Credit and reversed the same on GST portal immediately on availability of revision facility without utilizing the same;
- It is a well-settled law that for levying of penalty of any nature, the presence of 'mens-rea' should be present. However, as may be referred from above, the company always had bona-fide intentions and suo-motu informed and took corrective steps to revise the Transitional Credit.

7.2. <u>Submission made by the taxpayer vide letter dated 05.08.2022:</u> The taxpayer vide letter dated 05.08.2022 has inter-alia submitted that:

- They had filed the Form TRAN-1 on 19 September 2017 and carried forward the credit to the tune of INR 17,29,52,729 under Central Goods and Service Tax ('CGST') head.
- During internal verification of the Form TRAN-1, the Company observed that it had inadvertently carried forward credit of INR 11,37,32,375/- Upon realizing the same, the Company immediately connected with the GST Help desk on 27 September 2017, to inform about the mistake of excess carry forward of credit and also requested to provide assistance for reversing the same. However, the Company received no assistance from the GST Help desk.
- The Transitional credit inadvertently carried forward by the Company was never utilized by the Company for discharging the GST liability. Such transitional credit was reversed by the Company suo-moto without any utilization, immediately on availability of TRAN-1 revision facility on GST portal i.e. on 26 December 2017.
- In this regard, the Company submitted the extract of Electronic Credit Ledger from 19 September 2017 to 26 December 2017 of Parikh Packaging Private Limited:

Date	Description	Transaction Type	Credit/Debit			Balance Available		
			IGST	CGST	SGST	IGST	CGST	SGST
-	Opening Balance	-	-	-	-	0	0	0
19/09/2017	Transitional Cenvat Credit/VAT	Credit	0	17,29,52,729	0	0	17,29,52,729	0

	credit							
25/09/2017	ITC accrued through – Inputs	Credit	1,09,63,364	78,58,074	78,58,074	1,09,63,364	18,08,10,803	78,58,074
25/09/2017	Other than reverse Charge	Debit	1,09,63,364	2,33,16,346	49,16,440		15,74,94,457	29,41,634
26/12/2017	Revision of Transitional credit – Tran-1	Debit	0	11,37,32,375	0	0	4,37,62,082	29,41,634

- From the above table, it can be clearly seen that the balance of electronic credit ledger from 19 September 2017 (i.e. TRAN 1 filling date) to 26 December 2017 (i.e. TRAN-1 revision date) was always greater than the amount of credit i.e. 11,37,32,375/-, inadvertently carried forward by the Company.
- The SCN can demanded interest of INR 73,28,727 at the rate of 24% as per section 50(3) of the CGST Act, 2017 along with imposition of penalty under Section 122(2) of the CGST Act, 2017 on account of wrong availment of transitional input tax credit in electronic credit Ledger;
- At the very outset, the Company denies the demand raised for payment of interest and penalty for having wrongly availed input tax credit in Electronic Credit ledger;
- Section 50(3) of CGST Act, 2017 (effective up to 4 July 2022) is reproduced below for reference:

  "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 claim or on such undue or excess reduction, as the cose may be, at such rate not exceeding twenty-four per cent as may be notified by the Government on the recommendations of the Council".
- The above section provides for payment of interest in case of undue or excess claim of input tax credit as per Section 42(10) of the CGST Act, 2017 or undue or excess reduction in output tax liability as per section 43(10) of the CGST Act, 2017;
- Section 42 of the CGST Act, 2017 provides for matching, reversal and reclaim of input tax credit. Section 43 of the CGST Act, 2017 provides for matching, reversal and reclaim of reduction in output tax liability. In the present case, the dispute pertains to wrong availment of transitional credit. Thus, Section 43 of the CGST Act, 2017 would not be applicable;
- Section 42(10) of the CGST Act, 2017, provides that the amount reduced from the output tax liability in contravention of the provisions of sub-section (7) of Section 42 shall be added to the output tax liability of the recipient in his return for the month in which such contravention takes place and such

recipient shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of section 50;

- As stated above, in the present case, the dispute pertains to wrongful/excess availment of transitional credit by the Company and not regarding undue or excess claim of input tax credit under Section 42(10) of CGST Act, 2017. The Company submits that the Company has not reduced any of its output tax liability in contravention of provisions of Section 42(7) in order to attract payment of interest as per Section 50(3) of the CGST Act, 2017. Further, as stated in facts above, the entire credit of INR 11,37,32,375/-, inadvertently carried forward by the Company was unutilized and reversed as it is on 26 December 2017;
- The definition of input tax credit is provided under Section 2(63) of the CGST Act, 2017. The same reads as under:
  "(63) "input tax credit means the credit of input tax
- The Company submits that the Company had not availed excess or undue credit of input tax under Section 42(10) of the CGST Act, 2017;
- The Company also submits that Section 42 and 43 of the CGST Act, 2017 have been proposed to be omitted vide Finance Act, 2022. The effective date of omission is not yet notified;
- Also, the Company submits that Section 50(3) of the CGST Act, 2017 has been amended vide Notification No 09/2022-Central Tax dated 05 July 2022, w.e.f. 01 July 2017. The same reads as under:
  "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".
- The amended Section 50(3) clearly provides that interest is payable only in case where the input tax credit has been wrongly availed and utilized. The above change is a retrospective change (i.e., from 01 July 2017). It clearly indicates that the intent of the Government is to charge interest only on such credit which is wrongly availed and utilized and not otherwise. Therefore, unless the wrongly availed input tax credit is not utilized, interest would not be payable. In this present case, the Company has not utilized the wrongly availed transitional credit in TRAN 1 form and immediately reversed it when the revision facility for TRAN-1 got introduced. Therefore, the Company should not be required to make any payment for interest as the Company never utilized such wrongly availed transitional credit;

- Further, Rule 88B of the CGST Rules, 2017 were inserted vide Notification No. 14/2022-Central Tax dated 05 July 2022, w.e.f. 01 July 2017 sub-rule (3) of the said rule reads as under:

  "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 sald 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".

- Thus, as per the above, interest is calculated on the amount of input tax credit wrongly availed and utilized for the period starting from the date of utilization of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount. Further, the input tax credit wrongly availed shall be construed to have been utilized, when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed;

- As stated in facts above, the wrongly availed transitional credit was never utilized by the Company and was reversed on 26 December 2017 when revision facility for TRAN 1 form got available on GST portal. Further, the balance in electronic credit ledger never fell below the amount of wrongly availed transitional credit and hence, it should be construed that the Company had

never utilized such transitional credit. Therefore, no interest would be payable by the Company on account of wrong availment of transitional credit in terms of Section 50(3) of the CGST Act, 2017;

- As per above submission, the demand of interest of INR 73,28,727 is not sustainable in law. There has not been any contravention of any legal provisions of GST law by the Company;

- Section 122(2) of the CGST Act, 2017 reads as under:

  "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 willful 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"

- As per section 122(2)(a) of the CGST Act, 2017 the penalty shall be levied "*of the tax due from such person*". In present case, the Company has wrongly availed the transitional credit which was never utilized and the same is reversed by the Company on voluntarily basis. Accordingly, there was no tax due by the Company at the time of issuing show cause notice by the officer;

- It is a well-settled law that for levying of penalty of any nature, the presence of 'mens rea'. As may be referred above, the Company always had bona-fide intentions and suo-moto informed and took corrective steps to reverse the wrongly availed transitional credit in electronic credit ledger;

- Reliance is placed on the decision of the Hon'ble High Court in the case of M/s. Commercial Steel Engineering Corporation Vs. State of Bihar reported at 2019-VIL-348-PAT, wherein the Hon'ble High Court quashed the proceedings under Section 73 of the CGST Act, 2017 on the ground that the input tax credit was merely availed but not utilized for tax payment. The relevant portion of the decision is extracted below for ready reference:

"Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under section 73(1) of 'the BGST Act. The provisions underlying Section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an 'availment'.

The judgment of the Supreme Court rendered in the case of Ind. Swift Laboratories Ltd. (supra) is an expression on situation where such credit has been utilized by a dealer and it is in such circumstances that the Supreme Court bearing note on the adjudication done by Settlement Commission, has recorded its opinion.

In so far as the present case is concerned, Annexure 2 series confirms that the petitioner has an input tax credit in his favour under the Value Added Tax Act and the Entry Tax Act. Now whether he is entitled for refund of this credit or entitled to carry it forward in the transitional credit, may be a subject matter of proceeding pending before the statutory authority but nonetheless, it is definitely a confirmation of the fact that there is no tax outstanding against the petitioner which is recoverable. The legislative intent reflected from a purposeful reading of the provisions underlying section 140 alongside the provisions of section 73 and Rules 117 and 121 is that even a wrongly reflected transitional credit in an electronic ledger on its own is not sufficient to draw penal proceedings until the same or any portion thereof, is put to use so as to become recoverable.

This important aspect of the matter has eluded the wisdom of the respondent no.3 while passing the order. In fact it is on a complete misappreciation of legal position which lies at the foundation of the demand raised by the impugned order whereby the credit amount reflected in the credit ledger to the tune of 42,73,869.00 has been treated as an outstanding tax liability against the petitioner to order for its recovery together with interest and penalty even when the electronic credit ledger status at Annexure 7 confirms to a credit in favour of the petitioner i.e. a negative tax liability.

For the reasons and discussions above, the order dated 6.11.2018 passed by the respondent no.3, the Assistant Commissioner of State Taxes in purported

exercise of power vested in him under section 73 of 'the BGST Act' is held per se illegal and an abuse of the statutory jurisdiction and is accordingly quashed and set aside.

- The present issue is squarely covered by the aforesaid decision in the case of M/s Commercial Steel Engineering Corporation (supra). Therefore, interest and penalty should not be applicable to the Company considering the above judgement;

- Similar decisions have been passed in the following cases:

  I. M/s. Aathi Hotel, Versus the Assistant Commissioner (St) (Fac), Nagapattinam District, 2022 (1) TMI 1213-MADRAS HIGH COURT

  II. M/s. Vishwanath Iron Store Versus the State of Bihar Through The Principal Secretary, Commercial Tax Department, Govt. Of Bihar., & Others, 2020 (2) TMI 274 PATNA HIGH COURT

- Basis the above change in Law, the Company is not liable to discharge any interest on the wrongly availed credit in the electronic credit ledger. Further, in light of the above legal provisions and judgements, since the amount of transitional credit was suo-moto reversed by the Company immediately when the revision facility of TRAN 1 form made available on GST portal, there is no means-rea on the part of the Company. Considering the fact that there were no tax dues from the Company after reversal of wrongly availed transitional credit on a voluntary basis and in light of the abovementioned judicial pronouncements, the Company is not liable to pay any penalty under GST law.

7.3. <u>Submission made by the taxpayer vide letter dated 23.03.2023:</u> The taxpayer vide letter dated 23.03.2023 has again submitted copies of letter dated 21.03.2022 and 29.08.2022.

<u>Personal hearing:</u>

8. The personal hearing in the matter was held on 20.09.2023 and Shri Dhiraj Bhambhani, Chartered Accountant, Authorised Representative of the noticee attended the PH and he reiterated their written submission dated 23.03.2023. He further requested to decide the SCN on merit.

Discussion and findings:

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

9.1 I find that the issues involved in the present case for consideration is whether interest and penalty are applicable on wrongly availed credit in Tran-1 when the taxpayer has reversed the wrongly availed credit without utilizing the same by filing revised Tran-1.

9.2 From the facts of the case, I find that the CERA Audit have observed that the taxpayer has availed ITC of transitional credit of Rs. 17,29,52,729/- through filing of Form Tran-1 on 19.09.2017. However, as per the provisions of Section 140 of CGST Act, 2017, the taxpayer was eligible to claim the transitional credit to the tune of Rs. 5,92,20,354/- only. Accordingly, they have availed excess ITC of Rs. 11,37,32,375/- in their Tran-1. The taxpayer subsequently reversed the excess ITC of Rs. 11,37,32,375/- through filing of revised Tran-1 on 26.12.2017 but have not paid the applicable interest and penalty.

9.3. I find that the question of reversal of wrongly availed ITC of Rs. 11,37,32,375/- in TRAN-1 is not disputed anywhere as the taxpayer had its own reversed the same by filing revised TRAN-1. Now, the disputes remain in SCN is regards applicability of interest and subsequently imposition of penalty on such wrongly availed ITC.

9.4. I feel better to examine the relevant provisions regards applicability of interest on wrongly availed ITC and find the Section 50(3) of the CGST Act, 2017 deals 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.

[1][(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.

1. Substituted (w.e.f. 1st July, 2017) by s. 111 of The Finance Act 2022 (No. 06 of 2022) - brought into force w.e.f 05-07-2022 vide Notification No. 9/2022-C.T, dated 05-07-2022

9.5. Further, I find that Rule 88B of Central Goods and Services Tax Rules, 2017 [inserted retrospectively w.e.f. 01.07.2017 by virtue of Notification No. 14/2022-Central Tax dated 05.07.2022] prescribed manner of calculating interest on delayed payment of tax. 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, the period starting from the date on which such tax was due to be paid till the date sach 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.]

On combined reading the provisions of the section 50(3) of CGST Act, 2017 read with sub-rule (3) of Rule 88B of the CGST Rules, 2017 and its explanation 1, it becomes apparent that the issue of the interest liability arises only when the inadmissible/wrongly availed ITC has been availed and utilized for discharging the output GST liability and subsequently the balance of ITC goes down to available balance of wrongly availed ITC.

9.6. Now coming to the details of electronic credit ledger of the taxpayer, I find that prior to the reversal of said excess ITC on 26.12.2017, the taxpayer has filed their GSTR-3B return of July, 2017 on 25.09.2017 wherein, out of the total GST liability, they have discharged their GST liability of Rs. 1,54,58,272/- by utilizing the transitional credit of Central Tax from the available of ITC. For easy of reference the relevant entry of electronic credit ledger is reproduced as under

Sr. No.	Date	Tax Period	Description	Transaction Type	CENTRAL TAX	Balance In CENTRAL TAX Head
1	19/09/2017	Jul-17	Transactional Cenvat Credit/ VAT Credit	Credit	17,29,52,729/-	17,29,52,729/-
2	25/09/2017	July-17	ITC accrued through - inputs	Credit	78,58,074/-	18,08,10,803/-
3	25/09/2017	July-17	Other than reverse charge	Debit	2,33,16,346/-	15,74,94,457/-
4	26/12/2017	Dec-17	Revision of Transitional credit TRAN-1	Debit	11,37,32,375/-	4,37,62,082/-

9.7. From the fact of case, it is evident that the said taxpayer was entitled/eligible to the transitional credit of Rs. 5,92,20,354/- and as per the electronic credit ledger, they have utilized transitional credit of Central Tax amounting to Rs. 1,54,58,272/- only (i.e. (Rs. 2,33,16,346/- minus Rs. 78,58,074/-) to discharged their outward GST liability. Hence, prior to the reversal of the ineligible credit by the taxpayer on

26.12.2017, the balance in their electronic credit ledger was always higher than the wrongly availed credit of Rs. 11,37,32,375/-.

In view of the above, it is evident that the amount of wrongly availed credit of Rs. 11,37,32,375/- has not been utilized by the taxpayer. Accordingly, in view of the provisions of Section 50(3) of the CGST Act, 2017 read with sub rule (3) of Rule 88B of the CGST Rules, 2017, the demand of interest liability on the excess availment of the ITC in Tran-1 is not sustainable.

10. Now, coming to the next aspect of the case with regard to penalty under the provisions of Section 73(1) of CGST Act, 2017 read with section 122(2) of the CGST Act, 2017. First, I take up the matter with respect to penalty under the provisions of Section 73(1) of CGST Act, 2017. For better understanding, the Section 73 is being reproduced as under:-

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

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) .....

(3) .....

(4) .....

(5) The person chargeable with tax may, before service of notice under subsection (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 ten thousand rupees, whichever is higher, due from such person and issue an order.

....

10.1 I find that the show cause notice was issued with demand of interest under section 50(3) of the CGST Act, 2017 read with section 73(1) of CGST Act, 2017 and with proposal to impose penalty under the provisions of section 73(1) of CGST Act, 2017 read with section 122(2) of CGST Act, 2017. I find that the excess/wrongly availed input tax credit has already been reversed by the taxpayer through filing revised Tran-1, before issuance of the show cause notice under section 73(1) and the demand of interest liability on the excess availment of the input tax credit in Tran-1 is not legitimate as discussed in the foregoing paras.

From the above, it can be inferred that there was no tax or interest due from the taxpayer. Accordingly, in light of section 73(8) of the CGST Act, 2017, I do not find any corner to impose a penalty under the provisions of Section 73 of the CGST Act, 2017.

11. Prior to approaching toward the second aspect with regard to penalty under the provisions of section 122(2) of the CGST Act, 2017, it would be better idea to look into the provisions of the section which are reproduced as under:

Section 122. Penalty for certain offences :-

....

(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.

.....

11.1 Upon a straightforward interpretation of the aforementioned provisions, it becomes apparent that Section 122(2) of the CGST Act, 2017 provides for penalty where the input tax credit has been **wrongly availed or utilised**. I agree with the fact with regard to non-utilisation of such excess credit availed by the taxpayer but the facts are undeniable established that the taxpayer has wrongly availed ITC of Rs. 11,37,32,375/- and in view of the above, Penalty under the provisions of 122(2)(a) of the CGST Act, 2017 for wrong availment of ITC in this case appears to be imposable but on the same time, I have observed that the Show Cause Notice proposes penalty under the provisions of Section 73(1) of the CGST Act, 2017 readwith Section 122(2) of the CGST Act, 2017 and the fact of non-utilization of wrongly availed ITC and subsequently non-applicable of interest has already been established beyond doubt in this case as per discussions in above paras, accordingly, all proceedings in this case deemed to be concluded in terms of provisions of Section 73(8) of the CGST Act, 2017 and penalty under the provisions of Section 73 of the CGST Act, 2017 is not applicable in this case.

11.2. It is pertinent to mention here that the said noticee has submitted that they have filed GST TRAN 1 on 19 September, 2017 for availment of ITC of Rs. 17,29,52,729/- for CGST and they have found inadvertent ITC availment amounting to Rs. 11,37,32,375/- which was immediately contacted for reversal on GST helpdesk on official email ID- helpdesk@gst.gov.in on 27th September. Later on, 26th December, 2017, the said inadvertently availed ITC of Rs. 11,37,32,375/- has been reversed without utilizing immediately on availability of TRAN-1 revision facility on GST portal. I find that the said ITC has been wrongly availed but the same was reversed without utilisation.

11.3. Further, it is also observed that no separate penalty under the provisions of Section 122(2) of the CSGT Act, 2017 has been proposed in the present Show Cause Notice and once all proceeding in this case appears deemed to be concluded in terms provisions of Section 73(8) of the CGST Act, 2017, I do not find any reason to consider the present case for imposing separate penalty under the provisions of Section 122(2) of the CGST Act, 2017 for wrong availment of ITC which was reversed without putting into table of utilization.

In view of the above, I am of the view that penalty under provisions of Section 73 of the CGST Act, 2017 readwith Section 122(2) of the CGST Act, 2017 in this case is not sustainable.

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

ORDER

(i) I drop the demand of interest on wrongly availed credit of Rs. 11,37,32,375/- under the provisions of Section 50(3) of the CGST Act, 2017.

(ii) I do not impose penalty on the taxpayer under Section 73(1) of the CGST Act, 2017 readwith Section 122(2) of the CGST Act, 2017.

13. The show cause notice bearing F.No. V/27-72/Parikh/SCN/2021-22 dated 14.02.2022 is disposed off in above terms.

(Lokesh Damor)
Joint Commissioner,
Central Excise & CGST,
Ahmedabad North.
Date :- 29/11/2023

Place: Ahmedabad
F.No. GST/15-42/OA/2022

To,
M/s Parikh Packaging Private Limited,
Opp. Rotomec Pens, Sarkhej Bavla Highway,
Moraiya, Sanand, Ahmedabad,
Gujarat, 382213

Copy to:-

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
2. The DC/AC, CGST & Central Excise, Division-IV, Ahmedabad North.
3. The Superintendent, Range-V, Division-IV, 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.