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/15-259/OA/2021

DIN-20231264WT000000A9FE
आदेश की तारीख़/Date of Order: - 22.12.2023
जारी करने की तारीख़/Date of Issue :- 22.12.2023

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

मूल आदेश संख्या / Order-In-Original No. 53/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 जिसपर रू .5) 00. पांच रूपये (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. GST/15-259/OA/2021 dated 14.06.2022 issued to M/s Tata Motors Limited., having GSTIN 24AAACT2727Q1Z2, Survey No.01, Village-North Kothpura, Taluka-Sanand, Ahmedabad-382170.

BRIEF FACTS OF THE CASE

1. M/s Tata Motors Limited, Survey No. 01, Village- North Kothpura, Taluka- Sanand, Ahmedabad-382170 & M/s Tata Motors Limited, PCBU Spare Parts Division, Survey No. 01, Village- North Kothpura, Taluka- Sanand, Ahmedabad-382170 (hereinafter referred to as "the said taxpayer" for sake of brevity) are engaged in the manufacturing of excisable goods viz. Motor Vehicles, Parts of Motor Vehicles etc. falling under Chapter 87 of CETA 1985. They were registered in Central Excise with ECC No. AAACT2727QXM023 and AAACT2727QXM046 respectively. They are having GSTIN 24AAACT2727Q1Z2.

2. As per directions issued vide by the CBIC (chairman) vide D.O.F. No. 267/67/2017-CX.8 dated 01.12.2017, TRAN-1, verification in respect of CGST was carried out by the Range Officer. During the course of TRAN-1 verification, it was noticed that the said taxpayer had carried forward the closing balance of Edu. Cess of (Rs.1,25,25,909/-) and Secondary & Higher Education Cess of (Rs. 62,47,027/-) Total of Rs.1,87,72,936/- to the TRAN-1, which is not admissible under section 140(1) of transitional provision under GST and the taxpayer has informed vide their letter No.TML/GJ/GST/Tran.Prov./18-19/23 dated 24.09.2018 that the Cenvat Credit wrongly carry forwarded on both education cesses in TRANS-1 amounting to Rs.1,87,72,936/- was reversed "Under Protest" in their GSTR-3B for the month of August-2018.

3. The audit of the records of the said taxpayer, PCBU Spare Division, was conducted by the Audit Commissionerate, Ahmedabad for the period from February 2014 to June 2017 vide FAR No. 1598/2018-19 dated 30.04.2019 and vide procedure para, the following objection was raised.

Procedural Para :1:- Non- Payment of Interest and penalty on the Credit Reversal of Cess taken in Tran-1.

As per the directions issued vide by the CBEC (chairman) vide D.O.F. No.267/67/2017-CX.8 dated 01.12.2017, TRAN-1, verification in respect of CGST was carried out. During the course of TRAN-1 verification, it was noticed that the assessee has taken transitional credit of Edu. Cess and SHE Cess amounting to Rs.1,87,72,936/- on dt. 22.12.2017 (Revised TRAN-1). The assessee submitted a copy of letter dated 24.09.2018 addressed to the Superintendent, Central GST & Central Excise, Range-IV, Division-III, Ahmedabad North under which they have informed that they have reversed carry forward of Cenvat Credit of Education Cess amounting to Rs.1,25,25,909/- and Secondary & Higher Education Cess amounting to Rs.62,47,027/- total Cenvat Credit of Rs.1,87,72,936/- "Under Protest" on dtd. 20.08.2018, which is not admissible under section 140(1) of transitional provision under GST. However, the assessee has not paid interest or penalty for the same.

Section 140(1) of the transitional provision under GST reads as following:

140(1)-Amount of CENVAT credit carried forward in the return allowed as input tax credit:

"Section 140(1) states, 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 forward in the return relating to the

period ending with the day immediately preceding the appointed day , furnished by him under the erstwhile law in such manner as may be prescribed.

PROVIDED that the registered person shall not be allowed to take credit in following circumstances, namely:-

(i) Where the said amount of the credit is not admissible as input tax credit under this act ; or

(ii) Where he has not furnished all the returns required under the erstwhile 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."

4. As per above section the eligible duties and taxes means the duty of excise specified in the First schedule in Central Excise Tariff Act,1985 the duty of excise specified in the second schedule to the Central Excise Tariff Act, 1985 (5 of 1986), the service tax leviable under section 66B of the Finance Act,1994 in respect of inputs held in stock and inputs contained in semi finished or finished goods held in stock on the appointed day. The list item does not include cesses viz. Education Cess, Krishi Kalyan Cess that are allowed to be taken as CENVAT Credit under credit regime.

The Transitional provisions under the CGST Act allow carryover of only the Cenvat Credit of eligible duties mentioned in the explanations given at the end of Section 140. Education Cess and Krishi Kalyan Cess are not mentioned there. Therefore, these Cesses will not be carried forward as credit as credit of the same is not allowed under GST.

5. Sections 50(3) of the CGST Act, 2017, which contains provisions regarding interest on ITC, 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".

6. It appeared that the said taxpayer had delayed the reversal of Edu. Cess and SHE Cess availed by them in the month of December 2017. It appears that the excess said cess availed by them was only reversed in the month of August-2018 and this has delayed the reversal of Edu. Cess & SHE Cess by 272 days. Accordingly, the interest payable @24% p.a. on the delayed reversal of excess availment of Credit has been worked out to Rs 33,57,527/-, as tabulated above:-

(Rupees in actuals)

Trans I filed on	Credit of Edu. Cess & KK Cess availed	Credit of Edu. Cess & KK Cess reversed	Interest payable @ 24% adv	No of days taken for reversal of the excess	Interest payable @ 24% adv

				ITC	
22.12.2017	Rs.1,87,72,936/-	20.09.2018	272 Days	272 Days	33,57,527/-

5. From the above facts, it appeared that the said taxpayer have contravened the provisions of Sections 39(7) of the Act read with the provisions of Section 5(1) of the IGST Act and Rules 85(3) of the Rules by delaying the payment of the excess Ed. Cess & KK Cess availed by them. By delaying the payment of reversal of excess ITC tax, it appeared that they are liable to pay interest amounting to Rs 33,57,527/- under the provisions of Sections 50(3) of the Act.

6. The objections were pointed out to the assessee vide letter dated 28.05.2019 and the assessee was informed vide their letter dated 11.03.2020 that-

"By the above referred letter dated 28.05.2019, we have been requested to pay interest by virtue of Section 50(3) of Central Goods and Service Tax Act, 2017(in short'CGST Act,2017') read with Notification No. 13/2017- Central Tax dated 28.06.2017 on Cenvat credit of Edu. Cess and S&HEC wrongly carried forwarded as Transitional credit, amounting to Rs.1,87,72,936/- in GST FORM TRAN-1.

It is hereby respectfully submitted that, we have legitimately earned the Credit of Rs.1,87,72,936/- pertaining to E Cess and S& HEC Cess in the pre-GST regime and same was reflected as closing balance in ER-1 Return for the month of June-2017. Further, we have carried forward the said balance by filing GST FORM TRAN-1 in terms of transitional provisions contained in Section 140(1) of CGST Act, 2017.

In view of retrospective amendment proposed in Explanation 3 to Section 140 by CGST(Amendment) Act,2018 (No.31 of 2018) dated 29.08.2018 and to mitigate the risk of future litigation we had reversed the said credit ***'Under Protest'*** *and intimated to the Department vide out letter dated 20.09.2018. However, we always under belief that the legitimately earned credit cannot be denied, and therefore we reversed the Cenvat credit by reserving the right to contest the matter or obtain refund of the amount reversed under protest in case of favourable clarification or judgment at later date.*

Section 50(3) provides for levy of interest where undue or excess claim of input tax credit has been made because of mismatch in the returns. This provision would not cover a scenario wherein an ineligible credit has been availed by an assessee for reasons other than that of excess availment"

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

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) 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 the 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.

7. Further, it is clearly evident from the provision of Section 50(3) of CGST Act, 2017 that liability to pay interest arises only when a taxable person makes excess claim of ITC under Section 42(10) or excess reduction of output tax liability under Section 43(10). Section 42 of CGST Act, 2017 deals with matching, reversal and reclaim of Input Tax Credit which is totally not applicable in the instant case. Accumulated credits carried forwarded in GST FORM TRAN-1 is totally out of scope of Section 42(10), thereby demand of Interest under Section 50(3) does not arise at all.

8. In the light of the submissions made above, it is amply clear that we are not liable to pay any interest under Section 50 of CGST Act, 2017 and such a demand of interest raised itself is bad in law and unsustainable and, therefore, the interest intended to be imposed upon such demand is erroneous".

7. The said taxpayer were given pre-SCN consultation vide letter GST/15-259/OA/2021 dated 23.02.2022 on 03.03.2022. The said taxpayer had not appeared for pre SCN consultation on 03.03.2022, however, vide letter dated 24.03.2022 informed that Tata Motors Limited has already filed a SCA No. 15315 of 2021 interalia challenging the Explanation 3 read with Explanation 1 and 2 to Section 140 of the CGST Act, 2017 as well as Paragraph 5 of circular no. 87/06/2019-GST dated 02.01.2019 as contrary to existing law. The SCA filed has also been admitted for hearing by Hon'ble High Court of Gujarat and is pending for decision and no stay has been granted by the Hon'ble High Court.

8. In view of above, it appeared that the wrongly availed cenvat credit of Rs. 1,87,72,936/- is required to be recovered under Section 73 (1) of CGST Act, 2017. The said taxpayer are also liable for penal action under Section 73(1) of

C.G.S.T Act, 2017 for wrongly availing and utilizing Transitional Credit on Educational Cess and Higher & SHE Cess, amounting to Rs.1,87,72,936/- in GST FORM TRAN-1.

9. Therefore, SCN F.No.GST/15-259/OA/2021 dated 14.06.2022 was issued to M/s Tata Motors Limited, Survey No. 01, Village- North Kothpura, Taluka- Sanand, Ahmedabad-382170. They were called upon to show cause as to why:-

(i) Input Tax Credit of Rs. 1,87,72,936 wrongly availed as determined in above referred show cause notice should not be demanded and recovered under Proviso to Section 73 (1) of the CGST Act, 2017;

(ii) The protest lodged vide letter No. TML/GJ/GST/Tran.Prov./18-19/23 dated 24.09.2018 by the assessee should not be vacated ;

(iii) The amount of Rs.1,87,72,936/- was reversed **"Under Protest"** in their GSTR-3B for the month of August-2018 should not be appropriated under Section 140(1) of the transitional provision under CGST Act, 2017.

(iv) Interest amounting to Rs. 33,57,527/- (Rupees Thirty three lac, Fifty seven thousand, Five hundred twenty seven only), should not be charged and recovered from them on the late reversal of Edu. Cess & S & HEC Cess under the provisions of Sections 50(3) of the CGST Act, 2017.

(v) Penalty should not be imposed under Section 122 (2) (a) of CGST Act, 2017 read with Section 73 (1) on the assessee on wrongly availed and utilized transitional credit amounting to Rs.1,87,72,936/- in GST FORM TRAN-1.

DEFENCE REPLY

10. The said taxpayer vide letters 29.03.2022 and 02.08.2023 submitted their reply to SCN, wherein they stated that after reversal of said ITC of Rs.1,87,72,936/-, they had filed application for refund of the same but it was rejected. Against the said rejection order, they had filed appeal which was also rejected by OIA dated 28.01.2021 by Com(A)., CGST, Ahmedabad. Being aggrieved by the said OIA, they have filed SCA No.15315 of 2021 before the Hon'ble High Court, Ahmedabad which has been admitted. Though the SCA is yet to be decided, a copy of the interim order passed b the Hon'ble court was also attached by the said taxpayer. In the said SCA, they have prayed that:-

a) For ordering or declaring explanation 3 read with explanation 1 & 2 to Section 140 of CGST Act, 2017 as contrary to existing law and repeal and saving provision of Section, 142 and hence ultra virus to the CGST Act, 2017 and Rules made thereunder.
b) For issuing orders or direction quashing Paragraph (5) of the Circular No.98/06/2019 GST dated 02.01.2019 as arbitrary and contrary to the existing law and repeal and saving provision under Section 142 of CGST Act, 2017

c) For quashing and setting aside OIA dated 28.01.2021 and for issuing direction to allow the claim of refund of ceses alongwith interest and

d) To order to issue direction allowing to migrate CENVAT credit to Education Cess and SHE Cess under Section 140(1) of the CGST Act, 2017 notwithstanding retrospective amendment by CGST (Amendament) act, 2018.

11. Since the above referred issues to be decided by Hon'ble High Court, Ahmedabad, are having bearing on the issued raised in subject SCN i.e. interest being demanded on reversal of ITC which according to them is refundable and legitimately earned/availed and transitioned through TRAN 1, in the interest of justice to avoid multiplicity of litigation, they requested to keep the adjudication of the SCN dated 14.06.2022 in abeyance till their said SCA is decided. Further, the said assessee vide their letters dated 02.08.2023, 30.10.2023 and 12.12.2023 requested for adjournment of Personal Hearing till the said SCA is decided in view of the pending SCA No.15315 of 2021 with Hon'ble Gujarat High Court which is pending for disposal.

12. During personal hearing on 18.12.2023, the said taxpayer provided additional submission. Relevant portion of the same is reproduced below:-

"4. SUBMISSIONS

At the outset, the Noticees humbly submit that all the allegations made in the subject SCN, are unsustainable for the reasons given hereunder.

A The credit of Cesses was legitimately earned & transitioned by Noticeesthrough TRAN-1 – even the retrospective amendment would not take away this substantive right

A.1 The Noticees submit that in pre-GST era, CENVAT Credit of excise duty, service tax and Cesses thereon, was admissible in terms of Rule 3 of the erstwhile CENVAT Credit Rules, 2004 framed under Central Excise Act, 1944.

A.2 It is an undisputed and admissible fact that the mechanism for availing credit was also extended to ECess and SHECess under the aforesaid Rule.

A.3 There is no dispute regarding eligibility of the EC and SHEC under the Pre-GST Tax Regime and on the fact that the Noticees legitimately earned the credit on Cesses paid by suppliers/ vendors.

A.4 After the implementation of GST on 01.07.2017, the Credits admissible and lying in the records and declared in the Returns till 30.06.2017 could be transitioned from the previous regime to the GST regime under Section 140 of the CGST Act. It is undisputed fact that the Noticees submitted Returns and the balance of Cesseswere declared in the Returns for the month of June 2017.

A.5 When GST was introduced, the entire transition provisions and infact CGST Act and respective State legislations for GST had specific mentioning of "Existing Law" as epitome for implementation of the law at the first place.

A.6 Further Section 2(48) of the CGST Act defines 'Existing Law'. Section 2(48) of the CGST Act is reproduced below for easy reference.

"2(48) —existing law means any law, notification, order, rule or regulation relating to levy and collection of duty or tax on goods or services or both passed or made before the commencement of this Act by Parliament or any Authority or person having the power to make such law, notification, order, rule or regulation;"

A.7 Thus, the transition of credit from the previous regime to the GST regime is subject to Existing Law and the provisions under the GST Regime are to facilitate the transition of the existing credit.

A.8 The transition of credit includes the transition of CENVAT credit including towards the credit of EC, SHEC.

A.9 In the present set of facts, the Noticeeshad initially transitioned the unutilized ECess and SHECess though GST TRAN-1 Return. Since, indisputably Education Cess and Secondary and Higher Education Cess are covered by Clause (vi), (via), (x) and (xa) of Rule 3(1) of the CENVAT Credit Rules, 2004 framed under Central Excise Act, 1944, in light of Explanation to Section 142, they are clearly included in the expression "CENVAT Credit" occurring in Section 140(1) as it existed during relevant period.

A.10 It is pertinent to note that Section 140 of the CGST Act, 2017 provides for transitional arrangements for input tax credit. The relevant portion of Section 140, as it existed during the period when Noticees transitioned the Credit of Cesses,is reproduced below for the sake of ready reference:

"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."

A.11 An Explanation appended to Chapter XX of the CGST Act, which clarifies that "For the purpose of this Chapter, the expression "Capital goods", "Central Value Added Tax (CENVAT) credit", ... shall have

same meaning as respectively assigned to them in the Central Excise Act, 1944 or the rules made thereunder."

A.12 In light of Section 140(1) of the CGST Act, as it existed during relevant period, the Noticeescarried forward the amount of CENVAT credit including E Cess and SHE Cess, due in the previous regime to the GST regime.

A.13 TheNoticees further submit that Section 174 of the CGST Act provides for the repeal and saving clause. It safeguards the unfettered right and privileges accrued and vested under the erstwhile law i.e. existing law.

A.14 The relevant Section is reproduced herein below for the sake of convenience:

"174. Repeal and saving.— (1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and the Central Excise Tariff Act, 1985 (hereafter referred to as the repealed Acts) are hereby repealed."

A.15 The Noticees submit that the aforesaid repeal provision also protects the rights and privilege for duty including EC and SHEC and also there is no lapsing provision either existing in the pre-GST law or in GST law. Thus, the Noticees are entitled to transition the credit with respect to the Cess read with the repeal clause.

A.16 The Central Government retrospectively amended provisions of Section 140 (1) of the CGST Act vide Central Goods and Services Tax (Amendment) Act, 2018 read with Notification No. 02/2019- CT dated 29.01.2019 with effect from 01.07.2017.

A.17 The effect resulted "the amount of CENVAT credit carried forward" to exist as "the amount of CENVAT credit of eligible duties carried forward".

A.18 The Noticees submit that an expression of "eligible duties" was coined for the first time with the retrospective amendment and the "eligible duties" was neither a concept under the existing law i.e. the erstwhile law or it was ever defined and even it has not been defined under CGST Act.

A.19 Further the Explanation 1 and 2 to Section 140 of the CGST Act were also proposed to be amendedvide Central Goods and Services Tax (Amendment) Act, 2018. Also, Explanation 3 to Section 140 of the CGST Act was inserted vide Central Goods and Services Tax (Amendment) Act, 2018 read with Notification No. 02/2019- CT dated 29.01.2019 with effect from 01.07.2017.

A.20 The Noticees submit that in the present set of facts, the aforesaid retrospective amendment to Section 140(1) of the CGST Act, as notified by Notification dated 29.01.2019, does not affect the right of the Noticeeswith respect to the transition of the CENVAT Credit of EC and

SHEC which was eligible and entitled in law as on 01.07.2017.The Noticees further submit that the retrospective amendment with effect from 01.07.2017 does not alter the legal position and substantive right of the Noticees to transition the credit.

A.21 The Noticees submit that as per the Existing Law, Cess forms a part of the main duty. Hence, the eligible duties as per Explanation 1 and 2 to Section 140 of the CGST Act, Cess should also to be a part of "eligible duties" or "eligible duties and taxes".

A.22 The Noticee submit that further Explanation 1 & 2 are not applicable to Sub-Section (1) of Section 140 of the CGST Act, 2017 as the applicability is well specified therein only.

A.23 The Noticees also submit that as regards to Explanation 3, the expression deployed is "eligible duties and taxes" which though restricts Cess but again has a different expression "eligible duties and taxes" whereas, sub-section(1) of Section 140 has an expression "eligible duties" and therefore, both cannot be considered to be one and the same.

A.24 The Noticees submit that EC and SHEC is resultant of levy of excise duty as such and cannot be discarded since if it is governed under the existing law and no other change has been effectuated under the existing law till date regarding the same.

A.25 The Noticees submit that further a bare perusal of the said Explanation 3, which was added for the first time, though with retrospective effect, only deals with expression "eligible duties and taxes" and does not deal with any other expression.

A.26 The Noticees further submit that CBIC issued Circular No. No.87/06/2019-GST dated 02.01.2019,wherein Para (5) thereof is based on Explanation 3 which was introduced with retrospective effect. For ready reference, Para (5) of the said Circular is reproduced 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."

A.27 The Noticees submit that the purported effect of Explanation 3, as conveyed by the Circular is totally different.

A.28 Thus, the Noticees submit that they are eligible to the transition of the CENVAT Credit with respect to EC and SHEC, which was rightly transitioned, unhindered by the aforesaid retrospective amendment to Section 140(1).

A.29 The Noticees submit that if it is held that the expression eligible duties and taxes also excludes Cess for the purpose of sub-section (1) of Section 140 itself, then too such an explanation is contradictory to the framework of Existing Law and cannot alter the right to transition the credit of Cesses.

A.30 In this regard, the Noticees rely on the decision of Hon'ble Supreme Court in M. M. Aqua Technologies Ltd. v. Commissioner of Income Tax, Delhi-III [LL 2021 SC 373], wherein it is held that a clarificatory provision in tax laws cannot impose a new condition retrospectively. The ratio of the said judgement is squarely applicable to the present case. For ready reference, the relevant paragraph of the said judgement is reproduced below:

"22. Second, a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717 as follows:

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598] .If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506].But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively.

23. This being the case, Explanation 3C is clarificatory – it explains Section 43B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held by the High Court."

A.31 The Noticees submit that the purpose of an explanation is to give clarification to the provision and not impose any new conditions. The Explanations created a new definition of eligibility of Duty of Excise and per se has resulted into laying of new scope of eligibility of transition for CENVAT credit to GST era under the guise of retrospective amendment under Section 140 itself.In the present set of facts, the Explanation to

Section 140 of the CGST Act cannot impose new conditions to the Section 140, retrospectively.

Explanation cannot override Existing Law

A.32 The Noticees humbly submit that the explanation cannot override existing law and that with implementation of a new law, the rights of the taxpayer that are accrued and vested are well protected along with safeguarding interest of the Revenue under Repeal provision i.e. Section 174 of CGST Act, 2017.

A.33 The Noticees further submit that the Explanation to a provision only aids to interpret the provision and is for clarification purposes. The Explanation cannot enlarge or narrow down the scope of any provision especially when it explains other provision. The Noticees submit that as per the Existing Law, Cess is a part of the Main Duty.

A.34 The Noticees also submit that EC & SHEC partakes the character of that levy, to which it is adjunct. This is recognized both by statute as well as by judgments. Hence, there is no legal rationale in distinguishing one form of excise duty from another form thereof. Therefore, the CGST Act as originally enacted provided for migration of entire excise duty, whether levied by way of Cess or otherwise, without any distinction in this regard.

A.35 The Noticees submit that by the retrospective amendment a discriminatory provision is being perpetuated between two kinds of excise duty i.e. one levied by way of Cess and another levied otherwise. On this count, retrospective amendment is violative of Article 14 of the Constitution of India. The eligibility of CENVAT and manner of availment of CENVAT of excise duty was inbuilt under Rule 3 of CENVAT Credit Rules, 2004, made under the umbrella of Central Excise Act, 1944.

A.36 The Noticees humbly submit that it is clear from the combined reading of the aforesaid rules that Cess is to be treated same as the main duty and therefore, cannot be excluded from the Eligible Duties even it has been redefined under the CGST Act under the garb of explanation at a later date for the existing law.A new law for transition can neither enlarge nor whittle down the scope of taxability and understanding of the Existing Law. Thus, if at all the Explanation 3 to Section 140 of the CGST Act is made applicable,then too it will be arbitrary and contradictory to the Existing Law as it has excluded and narrowed down the scope of eligibility and structure of duties. An Explanation can only clarify an ambiguity in the law as its purpose is only to aid in interpretation and understanding of an enactment. An Explanation cannot create a new scope of the Act or narrow down the real intent for which an enactment and provisions are made thereof. Therefore, the Explanation 3 specifically read with Explanation 1 & 2 to Section 140 of the CGST Act cannot narrow down or create a new law under the existing law.

Legislative Intent in GST

A.37 The Noticees submit that the legislative intent under GST laws i.e. CGST Act, 2017 is very apparent as it has provided that all CENVAT Credit under the old law will be subject to the existing law i.e. pre GST

law. That incorporation of existing law was consciously done so that for transition and even for refund, the deciding factor will be existing law. Once it has been intentionally done then there cannot be a half way effect to the existing law for all the issues including CENVAT credit under the existing law. The Noticees further submit that the origin, genesis and way the tax mechanism was implemented under the existing law has to be paved during transition through the transitional provisions under the CGST Act. The transitional provisions are a link or facilitating provisions between the old and the new tax regime. The transitional provisions comes under repeal and saving clause and under Section 140 to 142 of CGST Act, 2017, while the guiding factor being the existing law at the first place. With such background and intent being as clear as day light, transition provisions is never empowered to create a new tax levy or denial in an unreasonable manner. The transitional provisions cannot override the existing law and mechanism provided thereunder when a specific reference of existing law to deal with the accrued or vested right was absolute under the existing law.

A.38 The Noticees submit that transitional provision cannot frustrate the legislative intent and/or result unreasonableness by creating an unintentional interference in the Constitutional will which is to maintain and provide set off during transition from pre-GST era to GST era since GST itself is introduced so that link is not broken at any stage.

A.39 The Noticees further submit that if the intention of the Legislature would have been that the unutilized credit with respect to EC and SHEC should lapse then the Legislature could have either added a provision or passed a validating Act/Amendment to that effect. Since, neither there is any specific provision to this effect nor there is any validating Act, the Noticees act to transition the Cessesshall be allowed.

B. The above submissions are subject matter of Special Civil Application No. 15315 of 2021 which is admitted and pending before the Hon'ble Gujarat High Court – hence proposal in the subject SCN to appropriate the payment towards demand, vacate the 'under protest' request would be premature one - adjudication of the present SCN needs to be kept in abeyance till the decision on said Special Civil Application

B.1 The Noticees submit that all the submissions referred in Paragraph (A) above, are subject matter of Special Civil Application No. 15315 of 2021 which has been filed by them and admitted and pending before the Hon'ble Gujarat High Court. HenceNoticees respectfully submit that adjudication of the subject SCN needs to be kept in abeyance till the time decision on said Special Civil Application is given by Hon'ble Gujarat High Court since it has bearing on the issue raised in the impugned SCN. This will also save both Department and Noticees from multiplicity of litigation proceedings.

B.2 In the impugned SCN the Department has proposed to appropriate the credit reversal against the demand and to vacate the protest. The Noticees submit that legality of transition of Cesses credit thro' GST TRAN-1 and its refund is subject matter of said Special Civil Application filed before Hon'ble High Court Gujarat which is pending. Therefore, it would be

to take decision on appropriate of reversal towards demand and vacating the protest till the time decision is taken by Hon'ble High Court, Gujarat.

C. Allegation as to contravention of provisions of Section 39 (7) of the CGST Act read with Section 5 (1) of IGST Act and Rule 85 (3) of the CGST Rules is unsustainable

C.1 In the subject SCN, the Department has alleged contravention of Section 39 (7) of the CGST Act read with Section 5 (1) of IGST Act and Rule 85 (3) of the CGST Rules. The Noticees submit that the said provisions may not be relevant for the impugned case in as much as:

a) Section 39 (7) is for furnishing the GST Returns and paying tax considering the inward and outward supply during the month. The present case relates to transition of Cesses which are alleged to be not eligibleand not to filing of GST Returns.

b) Section 5 (1) of the IGST Act is for levy and collection of tax. In the instant case, there is no dispute that the Noticees have paid tax as per the GST Returns.

c) Rule 85 (3) is about debiting the Electronic Credit Ledger by the tax amount. In the instant case, it is not in dispute that the Noticees paid tax due on the transactions and the same was debited in Electronic Credit Ledger also.

C.2 In view of above, the Noticees submit that the allegation as to contravention of above provisions is not sustainable.

D. In the instant case, interest is not payable under Section 50(3) of CGST Act

D.1 In the subject SCN, interest under Section 50 (3) has been demanded. For ready reference the provisions of Section 50 (3) are reproduced below:

"Section 50. Interest on delayed payment of tax –

(3) Where the input tax credit has been wrongly availed and utilized, the registered person shall pay interest on such input tax credit wrongly availed and utilized, 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."

D.2 The terms 'input tax' and 'input tax credit' have been defined as below in Section 2 of the CGST Act:

"Section 2 (62) "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes ....."

"Section 2 (63) "input tax credit" means the credit of input tax."

D.3 In the instant case, the allegation of the Department is that Noticees wrongly transitioned the credit of Cesses thro' GST TRAN-1 which was reversed by them with delay and therefore interest is payable. In this regard, the Noticees respectfully submit that such cases do not fit under the definition of `input tax' or `input tax credit' under Section 2 (62) or 2 (63) of the CGST Act as it is not input tax charged on supply of goods or services. It is the credit of Cesses transitioned thro' GST TRAN-1 which in Department's view is not eligible. On the basic eligibility aspect, the Noticees refer to Para (A) of above submissions. Since it is not a `input tax credit' of CGST, SGST, IGST or UTGST wrongly availed on supply and utilized, the Noticees submit that interest would not be applicable under Section 50 (3) of the CGST Act. In pre-GST regime, taxable event `supply' itself was not there. What was transitioned was credit of Cess legitimately earned under pre-GST regime. Therefore, the Noticees respectfully submit that interest under Section 50 (3) is not be applicable in the instant case.

E The proposal to impose penalty under Section 122 2 (a) read with Section 73 (1) of the CGST Act, is uncalled for and unjustified

E.1 In the subject SCN, penalty has been proposed to be imposed under Section 122 (2) (a) read with Section 73 (1) of the CGST Act.

E.2 The Noticees respectfully submit that penalty under Section 122 2(a) of the CGST Act is attracted when a registered person supplies goods or services or both on which tax has not been paid or short paid or where the input tax credit has been wrongly availed and utilized, for any reason other than the reason of fraud or any willful misstatement or suppression of facts to evade tax.

E.3 In the instant case, there is no non-payment of tax or short payment of tax or even wrong availment of `input tax credit'. As explained in Para (D) above, the Noticees transitioned the credit of Cesses as per Section 140 of the CGST Act which is not `input tax credit' but it is transitional credit.

E.4 It is also pertinent to note that upon noticing retrospective amendment, the Noticees reversed the same keeping the Department fully informed. However, upon noticing that the substantive right to credit, cannot be taken away by retrospective amendment, filed refund claim and the matter is now pending before Hon'ble High Court Gujarat. Thus, all the acts of the Noticees were above the board.

E.5 Since it is matter of interpretation to be decided by Hon'ble High Court, Gujarat, the Noticees submit that proposal to impose penalty, is totally unjustified and uncalled for.

F The Noticees crave leave to add, alter or amend any of the above submissions at the time of or before the personal hearing.

G. The Noticee crave leave to refer and rely upon any case law and/or judgment, as and when produced.

H. The Noticee crave leave to file additional documents/affidavits, if any.

PRAYERS

In view of the above submissions, it is most respectfully prayed that

a) the proceedings initiated in the above Show Cause Notice be kept in abeyance till the decision on Special Civil Application filed before Hon'ble High Court Gujarat is taken; and

b) if your honour still wants to proceed with the adjudication, all the above submissions of the Noticees be considered while passing the Order."

PERSONAL HEARING

12. In the instant case, opportunity of Personal Hearing was granted to the said taxpayer on 18.12.2023. Shri Yagnikkumar Bhatt, authorised representative of the noticee of the said taxpayer appeared and re-iterated their written submission dated 23.09.2022 and 02.08.2023. He also submitter additional written submission dated 14.12.2023 and requested to decide the SCN on merits. Prior to 18.12.2023 every time the said taxpayer requested for adjournment on the ground that their SCA No.15315 of 2021 on the same issue is pending with Hon'ble Gujarat High Court. However, the said taxpayer themselves admitted that no stay has been granted by the Hon'ble in their appeal. As no stay has been granted by the Hon'ble High Court in their SCA, I proceed to adjudicate the SCN as I am bound to adjudicate the Show Cause Notice within the stipulated time prescribed in the GST Act and Rules made thereunder.

DISCUSSION AND FINDINGS

13. In this connection, I have carefully gone through show cause notice, written submission by the said taxpayer and the records of the case available on record. On perusal of the above referred records, I find that the issues involved in the present case for consideration are:-

(a) Whether carried forward Education Cess, Secondary and Higher Education Cess amounting to Rs.1,87,72,936/- through TRAN-1 is permissible under GST law or not.

(b) Whether liability of interest and penalty arises when ITC of Education Cess & KKC is reversed, or not.

14. In this connection, I find that ineligible cesess amounting to Rs.1,87,72,936/- was reversed "Under Protest" in their GSTR-3B for the month of August-2018 by the tax payer and after reversal, the tax payer had filed application for refund of the same but it was rejected. Against the said rejection order, they had filed appeal with Com(A) and which was also rejected by OIA dated 28.01.2021 by Com(A)., CGST, Ahmedabad. Being aggrieved by the said OIA, they have filed SCA No.15315 of 2021 before the Hon'ble High Court, Ahmedabad which has been admitted. However, the said taxpayer themselves admitted. that no stay has been granted by the Hon'ble in their appeal. As no stay has been granted by the Hon'ble High Court in their SCA, I proceed to adjudicate the SCN as I am bound to adjudicate the Show Cause Notice within the stipulated time prescribed in the GST Act and Rules made thereunder.

15. In respect of issue at Sr. No. (a) I find that during the time of Tran-1 verification by the Range Officer, it was noticed that the said taxpayer had carried forward the closing balance of Edu. Cess of (Rs.1,25,25,909/-) & Higher Education Cess of (Rs. 62,47,027/-) total of Rs.1,87,72,936/- to the TRAN-1, which is not admissible under section 140(1) of the CGST Act, 2017, which contains transitional provision under GST. Subsequently, the said taxpayer vide their letter No.TML/GJ/GST/Tran.Prov./18-19/23 dated 24.09.2018 informed that the Cenvat Credit wrongly carry forwarded on both education cess in TRAN-1 amounting to Rs.1,87,72,936/- was reversed "Under Protest" in their GSTR-3B for the month of August-2018.

16. Meanwhile, the audit of the records of the said taxpayer's PCBU Spare Division, was conducted by the Audit Commissionerate, Ahmedabad for the period from February 2014 to June 2017 and Final Audit Report was also issued vide FAR No. 1598/2018-19 dated 30.04.2019, wherein the following procedure para was raised:-

> *Procedural Para :1:- Non- Payment of Interest and penalty on the Credit Reversal of Cess taken in Tran-1.*
>
> *As per the directions issued vide by the CBEC (chairman) vide D.O.F. No.267/67/2017-CX.8 dated 01.12.2017, TRAN-1, verification in respect of CGST was carried out. During the course of TRAN-1 verification, it was noticed that the assessee has taken transitional credit of Edu. Cess and SHE Cess amounting to Rs.1,87,72,936/- on dt. 22.12.2017 (Revised TRAN-1). The assessee submitted a copy of letter dated 24.09.2018 addressed to the Superintendent, Central GST & Central Excise, Range-IV, Division-III, Ahmedabad North under which they have informed that they have reversed carry forward of Cenvat Credit of Education Cess amounting to Rs.1,25,25,909/- and Secondary & Higher Education Cess amounting to Rs.62,47,027/- total Cenvat Credit of Rs.1,87,72,936/- "Under Protest" on dtd. 20.08.2018, which is not admissible under section 140(1) of transitional provision under GST. However, the assessee has not paid interest or penalty for the same".*

17. In view of the above, I find that the said taxpayer had carried forward the closing balance of CENVAT Credit of Edu. Cess of (Rs.1,25,25,909/-)and Secondary & Higher Education Cess of (Rs. 62,47,027/-) Total amounting to Rs.1,87,72,936/- in TRAN-1 as transitional credit. I further find that the transitional arrangements of closing balance of Cenvat credit available in returns either ER-1/3 or ST-3 during legacy period is governed by the provisions of Section 140 of the Central Goods and Service Tax Act, 2017 and Explanations thereof. Explanations 1, 2 and 3 to Section 140 specify "Eligible Duties" or "Eligible Taxes and Duties" which can be carried forward 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:

PROVIDED that the registered person shall not be allowed to take credit in following circumstances, namely:-

(i) Where the said amount of the credit is not admissible as input tax credit under this act ; or

(ii) Where he has not furnished all the returns required under the erstwhile 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) .....

(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).]

18. 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).

19. 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 cess is not permissible. The Para 5 of aforesaid circular dated 02.01.2019 is reproduced here-in-below for ease of reference:-

> *"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."*

20. The said taxpayer, in their submission have stated that the credit of cesses was legitimately earned and transitioned by them through TRAN-1, however, in view of above clear provisions contained in Section 140 of the CGST Act, 2017, it is evident that the CENVAT Credit pertaining to Education Cess and Secondary & Higher Education Cess are not considered as "eligible duty" or "eligible duties and taxes" which can be carried forward in Electronic Credit Ledger in GST regime, in accordance with the above provisions of Section 140 of the CGST Act, 2017 and Circular

No.87/06/2019-GST dated 02.01.2019 issued by CBIC. occurring in Section 140(1) of the CGST Act, 2017. Carrying forward balance of such Cesses would amount to wrongly availing ITC in electronic credit ledger and the same is required to be reversed or recovered from the beneficiary under the applicable provisions of GST law.

21. I further 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 unutilisedCess of any kind other than specified Cess, viz. National Calamity Contingent Duty (NCCD), against Output GST liability could not arise."*

22. In view of the above, I am inclined to hold that balance Education Cess and Secondary & Higher Secondary Cesess are not covered under the folder of "eligible duties" or "eligible duties and taxes" as specified in explanation 1, 2 and 3 of Section 140 of the CGST Act, 2017 and availing of the same by way of carrying forward/transferring these Cesses into Electronic Credit Ledger through TRAN-1 for discharging their output liability would be amount to excess or undue/wrong availment of Input Tax Credit and the same is not admissible to the said taxpayer by any stretch of imagination of input tax credit under GST law in view of the clear provisions contained in Section 140 in this regard. Accordingly, the there is wrong availment of ITC of Education Cess and Secondary & Higher Secondary Cesses in the instant case and the said ITC of Rs.1,87,72,936/- is required to be recovered under provisions of Section 73 of the CGST Act, 2017. Since the said inadmissible ITC of Education Cess and Secondary & Higher Secondary Cesses has already been reversed by the said taxpayer on 20.09.2018, the same needs to be appropriated against the said wrongly availed ITC.

23. Now, I would like to discuss the applicability of interest. In this regard, I reiterate that the issue regarding non transferability/carrying forwarding of the closing balance of Education Cess and Secondary & Higher Secondary Cess available as per returns of pre-GST period 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 repetition here. Further, I

find that the said inadmissible ITC of Education Cess and Secondary & Higher Secondary Cesess of Rs. 1,87,72,936/- has already been reversed by the said taxpayer on 20.09.2018 i.e. before issuance of the present notice i.e. 14.06.2022. I also observe that the said taxpayer have nowhere claimed that they have not utilized the above ITC of Education Cess and Secondary & Higher Secondary Education Cess, nor have they produced any document to this effect before me. Further, it is also observed that the said taxpayer had not paid interest of Rs.33,57,527/- for delay of 272 as demanded in the SCN on utilisation of such wrongly availed ITC.

24. 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 been done without payment of applicable interest. The provisions of Section 50(3) of the CGST Act, 2017, prescribe 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].

25. 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 said taxpayer had accepted the credit of Education Cess & Secondary and Higher Secondary Cess as wrongly availed and utilised as they have reversed the said ITC before audit was undertaken by the department but failed to pay applicable interest on such wrong availment and utilization of ITC.

26. Further, I find that a new Rule 88B of Central Goods and Service Tax Rules, 2017, regarding manner of calculating interest on delayed payment of tax has been inserted retrospectively w.e.f. 01.07.2017 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.]

27. As per the provisions of the sub-rule (3) of Rule 88B of the CGST Rules, 2017, 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 Education Cess and Secondary & Higher Secondary Cess has been established beyond doubt as per discussions in foregoing paras and as 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 Education Cess & Secondary & Higher Secondary Cess.

28. The liability of interest would arise if the tax or wrongly availed ITC due is paid/reversed after due day of payment of tax as prescribed. In this regard, I rely upon the judgement of Hon'ble Jharkhand High Court in case of M/s. 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."

29. In view of the above, I am hold that Interest, on wrongly availed and utilised ITC of Education Cess & Secondary & Higher Secondary Cess , is correctly applicable as per provisions of Section 50(3) of the CGST Act, 2017 read with sub rule (3) of Rule 88B of the CGST Rule, 2017, as amended.

30. Now, Coming to next limb regarding imposition of penalty under the provisions of Section 122(2)(a) of the CGST Act, 2017. 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)(a) of the CGST Act, 2017. Before going ahead, it would be pertinent 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.

31. 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(9) 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 supplies any goods or service or both; or where the input tax credit has been wrongly availed or utilised for reason other than fraud or any wilful misstatement or suppression of facts to evade tax. Looking to the facts of the case, the wrong availment of ITC of Education Cess & Secondary & Higher Secondary 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. The said taxpayer have availed transitional Credit in contravention of provisions of Section 140 of the CGST Act, 2017 and have wrongly utilized the same. Accordingly, they have made themselves liable for penalty under the provisions of Section 122(2)(a) of the CGST Act, 2017.

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

ORDER

i. I confirm the demand of Transitional Credit of Education Cess and Secondary & Higher Secondary Cesess amounting to Rs. 1,87,72,936/- (Rupees One Crore Eighty Seven Lakhs Seventy Two Thousand Nine Hundred and Thirty Six only) and order to recover the same under the provisions of Section 73 (9) of the Central Goods and Service Tax Act, 2017 read with Rule 121 of the Central Goods and Service Tax Rules, 2017;

ii. I order the protest lodged by the said taxpayer to be vacated with regards to their payment of Rs. 1,87,72,936/- and order this amount to be appropriated and adjusted against the amount of demand confirmed above;

iii. I order the recover the interest of Rs.33,57,527/- by holding the liability of interest on confirmed demand under Section 50(3) of the Central Goods and Services Tax Act, 2017;

iv. I impose penalty of Rs. 18,77,293/- (Rupees Eighteen Lakhs Seventy Seven Thousand Two Hundred and Ninety Threeonly) upon the said taxpayer under Section 122(2)(a) of the Central Goods and Services Tax Act, 2017 for the wrongly availing, carrying forward and utilization of inadmissible Cenvat Credit as transitional credit in TRAN-;

33. Accordingly, the Show Cause Notice bearing F.No. GST/15-259/OA/2021 dated 14.06.2022 is disposed off in above terms.

22/12/2023

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

Date: 22.12.2023

BY SPEED POST/ BY HAND
F.No. GST/15-259/OA/2021

To,
M/s Tata Motors Limited,
Survey No. 01, Village- North Kothpura,
Taluka- Sanand,Ahmedabad-382170.

Copy to:-

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