::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी. द्वारा :- **DIN-20210764SX0000333F7D**

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIO No.	दिनांक/ Date
	V2/110/RAJ/2020	**7/JC/VM/Sub-Commr/2020-21**	**24.09.2020**

ख अपील आदेश संख्या(Order-In-Appeal No.):

RAJ-EXCUS-000-APP-028-2021

आदेश का दिनांक / Date of Order: **29.06.2021** जारी करने की तारीख / Date of issue: **02.07.2021**

श्री अखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals), Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता** & प्रतिवादी का नाम एवं पता /Name & Address of the **Appellant** & Respondent :-

M/s. Essar Oil Ltd (Now known as M/s Nayara Energy Ltd) 39 KM Stone, Essar Refinery site, Jamnagar – Okha Highway, District Dev Bhoomi Dwarka.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील,केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावी अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग , ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/- Rs.10,000/- where amount of dutydemand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित अधिनियम,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-

(i) वित अधिनियम,1994की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) &9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वितीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वितीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार कोपुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो मे,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई,वित मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित अधिनियम (न. 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s Essar Oil Ltd, District: Dev Bhoomi Dwarka (now known as M/s Nayara Energy Ltd) (*hereinafter referred to as* "Appellant") has filed Appeal No. V2/110/RAJ/2020 against Order-in-Original No. 7/JC/VM/Sub-Commr/2020-21 dated 24.9.2020 (*hereinafter referred to as* 'impugned order') passed by the Joint Commissioner, Central GST & Central Excise, Rajkot (*hereinafter referred to as* 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant was engaged in supply of petroleum products and was holding GSTIN No. 24AAACE0890PXM0051ZF. On scrutiny of details provided by the Appellant in GST-TRAN-1 about credit of duties transferred by them under Section 140 of the Central Goods and Service Tax Act, 2017 (hereinafter referred to as 'Act'), it was found by the jurisdictional Range Superintendent (JRS) that they had carried forward, *inter alia*, Cenvat credit of Education Cess and Secondary and Higher Education Cess (SHE) totally amounting to Rs. 84,15,645/- in their electronic credit ledger under Section 140(1) and Section 140 (4)(a) of the Act. It was further found by the JRS that the Appellant had also carried forward, *inter alia*, Cenvat credit of capital goods amounting to Rs. 87,91,463/- in their electronic credit ledger under Section 140(5) of the Act. It appeared to the JRS that the Appellant was not eligible to carry forward said credit of Education Cess, SHE Cess and capital goods in view of Explanation-1 of proviso to Section 140 of the Act and Explanation-2 of proviso to Section 140(5) of the Act. Accordingly, the Appellant was asked vide letters dated 17.10.2017 and 29.11.2017 to pay said ineligible Cenvat credit wrongly carried forward along with interest. The Appellant vide their letter dated 17.5.2019 informed that they had reversed Cenvat credit of Education Cess and SHE Cess amounting to Rs. 84,15,645/- under protest.

2.1 The Show Cause Notice No. V.CGST/AR-I-Kham-Jmr-II/Sub-Commr/RK/10/2018-19 dated 14.3.2019 was issued to the Appellant calling them to show cause as to why wrongly availed Cenvat credit totally amounting to Rs. 1,72,07,108/- should not be demanded and recovered from them under Section 73(1) of the Act along with interest under Section 50 of the Act and proposed imposition of penalty under Section 73(9) of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed the demand of wrongly

availed Cenvat credit totally amounting to Rs. 1,72,07,108/- under Section 73 of the Act and appropriated the amount of Rs. 84,15,645/- reversed by them against confirmed demand, along with interest under Section 50 of the Act and imposed penalty of Rs. 17,20,711/- under Section 73(9) of the Act.

3. Being aggrieved, the Appellant has preferred the present appeal, *inter alia*, on the following grounds:-

(i) The SCN which was issued under Section 73 was not maintainable since Section 73 did not apply to cases of transition of credit. Section 73(1) of the CGST Act provides for demand and recovery of 'input tax credit' wrongly availed or utilised. In the present case, credit transitioned under Section 140 is not credit which is 'availed' and hence, Section 73 would not apply. This proposition has been accepted by the Hon'ble Patna High Court in the case of *Commercial Steel Engineering Corporation v State of Bihar & Ors. [2019-TIOL-1585-HC-PATNA-GST]*. Furthermore, the credit transitioned does not qualify as 'input tax credit' which is defined under Section 2(63) of the CGST Act. Consequently, the provisions of Section 73 are not attracted in case of transition of credit under Section 140.

(ii) The Adjudicating authority has erred in confirming the demand on the ground that cross-utilisation of EC and SHEC was not permitted and that they were not subsumed into Central Excise Duty and/or Service Tax. The adjudicating authority failed to notice that there is no requirement or condition under Section 140 which stipulates that CENVAT credit of only those cesses or taxes which could be cross utilised for payment of other levies can be carried forward to the GST regime; that this finding is completely unfounded and misplaced inasmuch as there exists no such requirement under Section 140. The adjudicating authority appears to have read additional conditions into the law, where none exist, which is clearly impermissible.

(iii) That in terms of Section 140(1) of the Act, amount of CENVAT credit of eligible duties as on 30.06.2017 as per the last Central Excise/Service Tax return filed is entitled to be taken by the assessee. The phrase 'eligible duties' is defined under Explanation 1 to Section 140 of the CGST Act. However, the same applies only to sub-section (3), (4) and (6). The amendment made vide Section 28((b)(i) of the Central Goods & Services Tax (Amendment) Act, 2018 (the 'CGST (Amendment) Act') is not notified yet and hence, the definition of 'eligible duties' will not

apply in case of sub-section (1) as of now; that in the absence of any definition of the phrase 'eligible duties', the same will be interpreted in conjunction with the phrase 'CENVAT credit' preceding it. Accordingly, in terms of Section 140(1) of the CGST Act, the amount which is eligible for carry forward as transitional credit is the amount of CENVAT credit balance as on 30.06.2017; that 'CENVAT credit' is defined under the explanation to Section 142 of the CGST Act to have the same meaning as assigned to it under the Central Excise Act, 1944 or the rules made thereunder; that in terms of Rule 3 of the CENVAT Credit Rules, 2004, various taxes and duties were specified to mean 'CENVAT credit'; that the said amount of credit is undisputedly shown as CENVAT credit balance as on 30.06.2017 in the returns filed by the Appellant for the period ended 30.06.2017. Consequently, the amount is available as transitional credit in terms of Section 140(1) of the CGST Act.

(iv) That the adjudicating authority erred in referring to the definition of 'capital goods' under the erstwhile law, without appreciating that what can be transitioned under Section 140(5) is credit in respect of 'inputs' and 'input services'. The legislature has, in Explanation below Section 142, while defining various expressions for the purpose of Chapter XX, deliberately not provided that the expression 'inputs' or 'input services' would have the same meaning as provided for under the CENVAT Credit Rules, 2004. That being the case, while examining the scope and ambit of Section 140(5), all that the adjudicating authority could have considered was whether the items on which credit was availed qualify as 'inputs' under the CGST Act. There being no dispute on this position, merely because an item that qualifies as 'inputs' under the CGST Act is otherwise covered under the definition of 'capital goods' under the CENVAT Credit Rules, 2004, there was no ground for holding that transitional credit could not be carried forward under Section 140(5) of the CGST Act. There is no dispute on the fact that the goods in respect of which credit has been availed under Section 140(5) qualified as 'inputs' under Section 2(59) of the CGST Act. Once the goods in question qualify as 'inputs', irrespective of whether or not they fall under the ambit of 'capital goods' under the erstwhile CENVAT Credit Rules, 2004, credit of the same should be allowed under Section 140(5) of the CGST Act; that adjudicating authority erred in placing reliance on the decision of the Hon'ble Gujarat High Court in the case of RSPL Ltd. -2018-TIOL-2886-HC-AHM-GST inasmuch as that decision dealt with the constitutional validity of Section 140(5) itself.

In the present case, their contention is that the goods qualify as 'inputs' as defined under the CGST Act, on which there is no dispute and hence, transitional credit thereon should be available under Section 140(5) of the CGST Act. The dispute before the Hon'ble High Court was not on the question of whether transition of credit was permissible on the item that qualifies as 'inputs' under the CGST Act.

(v) Since there is no infirmity in carry forward of the amount of Rs. 1,72,07,108/- under Section 140 of the CGST Act and consequently, there is no question of recovery of interest under Section 50 of the CGST Act. Section 50(1) stipulates that interest should be recovered in case a person who is liable to pay tax fails to pay the same within the due date to the Government. In the present case, there has been no delay in payment of tax to the Government as this amount has been reversed vide the Form GSTR-3B for May, 2019 prior to utilisation. This is evident from the extract of the enclosed Electronic Credit Ledger of the Appellant for the period September 2017 to June, 2019. There has never been any short payment to the extent of Rs. 1,72,07,108/-. The Impugned Order nowhere alleges that this amount has been utilised by them. Consequently, the stipulations under Section 50(1) are not attracted in the present case at all.

(vi) There is no infirmity in carry forward of amount of Rs. 1,72,07,108/- under Section 140 of the Act and consequently, there is no question of recovery of penalty under Section 73(9) of the Act. The provisions of Section 73 do not apply in case of carry forward of transitional credit and hence, penalty under Section 73(9) cannot be imposed on the Appellant.

4. Personal hearing in the matter was conducted in virtual mode through video conferencing on 25.5.2021. Shri Vishal Agrawal and Shri Kartik Dedhia, both Advocates, and Shri Govind Inani, Sr Manager appeared on behalf of the Appellant and reiterated submissions made in appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order, and written as well as oral submissions made by the Appellant. The issue to be decided in the present appeal is whether the Appellant had correctly carried forward Cenvat credit of Education Cess, Secondary and Higher Education Cess and capital goods in transit in their Electronic Credit Ledger under Section 140 of the Act or not.

6. On perusal of the records, I find that the Appellant had carried forward Cenvat credit of Education Cess, SHE Cess and capital goods totally amounting to Rs. 1,72,07,108/- in their electronic credit ledger through GST TRAN-1 under Section 140(4)(a) and Section 140(5) of the Act. The adjudicating authority confirmed the demand on the grounds that Section 140 of the Act has defined expression 'eligible duties and taxes' that can be transitioned in GST and it does not include Education Cess and SHE Cess. He has held that credit of Education Cess and SHE Cess were to be utilized only for payment of Education Cess and SHE Cess respectively and hence, the same cannot be treated as Central Excise duty or Service Tax.

7. I find that Section 140 of the Act contains provisions for transitional arrangement to carry forward Cenvat credit of eligible duties from the erstwhile Central Excise Act, 1944 and the Finance Act, 1994 into Goods and Service Act, 2017 and list of eligible duties which are eligible to be carried forward into new GST regime. The relevant provisions 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 the following circumstances, namely :—
>
> (i) where the said amount of credit is not admissible as input tax credit under this Act; or
>
> ..
>
> ..
>
> 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 (5 of 1986);

(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)."

8. I find that the Appellant had carried forward Cenvat credit of Education Cess and SHE Cess lying as balance in their ER-1 return / ST-3 return as on 30.6.2017 through form GST-TRAN-1. I find that levy of Education Cess and Secondary and Higher Education Cess was dropped and deleted vide Section 153 and Section 159 of the Finance Act, 2015, respectively. Hence, at the time of introduction of GST, Education Cess and Secondary and Higher Education Cess were not being levied in the existing

law. I further find that Explanation 1 and Explanation 2 *supra* specified "Eligible Duties" which are eligible to be carried forward. Apparently, Education Cess and SHE Cess are absent from the list of duties which can be carried forward in GST era and hence, the same cannot be carried forwarded in GST era. Further, in terms of Explanation 3 *supra*, expression "eligible duties and taxes" excludes any Cess which has not been specified in Explanation 1 or Explanation 2 of Section 140 reproduced supra. Apparently, Education Cess and SHE Cess are not covered under 'eligible duties and taxes' under Explanation 1 or Explanation 2. Considering the legal provisions, I hold that the Appellant is not eligible to carry forward credit of Education Cess and SHE Cess lying in their return as on 30.6.2017 into their electronic credit ledger through GST TRAN-1 under Section 140 of the Act.

8.1 I rely on the decision dated 16.10.2020 rendered by the Hon'ble Madras High Court in the case of CGST & Central Excise, Chennai Vs. Sutherland Global Services Private Limited reported as 2020-TIOL-1739-HC-MAD-GST, wherein it has been held that,

> "58. We may also briefly add one more reason as to why we cannot subscribe to the view taken by the learned Single Judge and affirm it. GST Law, by enactment of respective laws by the Parliament and States and creation of GST Council to subsume the 16 indirect taxes which were in vogue prior to 01.07.2017 was a watershed moment in the taxation reforms in India. The following 16 indirect taxes which were hitherto leviable were subsumed in the new GST Law Regime and Constitutional Amendments were effected for that purpose besides enactment of separate laws by Parliament and States to impose GST on the sales of goods and services like Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017, the Union Territory Goods and Services Tax Act, 2017, the Goods and Services (Compensation to States) Act, 2017, etc. by Parliament and respective State Goods and Services Tax Act by different States and Union Territories.
>
> *(1) Central Excise Duty*
> *(2) Additional Excise Duties*
> *(3) Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955*
> *(4) Service Tax*
> *(5) Additional Customs Duty commonly known as Countervailing Duty*
> *(6) Special Additional Duty of Customs*
> *(7) Central Surcharges and Cess, so far as they relate to the supply of goods and services.*
> *(8) State Value Added Tax/Sales Tax*
> *(9) Entertainment Tax (other than the tax levied by the local bodies)*
> *(10) Central Sales Tax (levied by the Centre and collected by the States)*
> *(11) Octroi and Entry Tax*
> *(12) Purchase Tax*
> *(13) Luxury Tax*
> *(14) Taxes on lottery*
> *(15) Betting and gambling*
> *(16) State cess and surcharges insofar as they relate to supply of goods and services.*

59. The GST Law spared and did not include within its ambit and scope only six commodities which were left out and continued to be covered by the earlier existing laws of Excise Duty and VAT Law and for that purpose, Entry 54 of the State List and Entry 84 of the Union List were also suitably amended by 101st Constitutional Amendment Act. Six items which are not covered by GST are (a) Petroleum Crude, (b) High Speed Diesel, (c) Motor Spirit (commonly known as Petrol), (d) Natural Gas, (e) Aviation Turbine Fuel and (f) Tobacco and Tobacco products. Except the aforesaid 16 taxes and duties specified in different enactments, no other tax or duty were subsumed under the new GST Regime with effect from 01.07.2017.

60. Obviously, the transition of unutilised Input Tax Credit could be allowed only in respect of taxes and duties which were subsumed in the new GST Law. Admittedly, the three types of Cess involved before us, namely Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess were not subsumed in the new GST Laws, either by the Parliament or by the States. Therefore, the question of transitioning them into the GST Regime and giving them credit under against Output GST Liability cannot arise. The plain scheme and object of GST Law cannot be defeated or interjected by allowing such Input Credits in respect of Cess, whether collected as Tax or Duty under the then existing laws and therefore, such set off cannot be allowed.

61. For these reasons also, in our opinion, the learned Single Judge, with great respects, erred in allowing the claim of the Assessee under Section 140 of the CGST Act. The main pitfalls in the reasoning given by the learned Single Judge are (a) the character of levy in the form of Cess like Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess was distinct and stand alone levies and their input credit even under the Cenvat Rules which were applicable *mutatis mutandis* did not permit any such cross Input Tax Credit, much less conferred a vested right, especially after the levy of these Cesses itself was dropped; (b) Explanation 3 to Section 140 could not be applied in a restricted manner only to the specified Sub-sections of Section 140 of the Act mentioned in the Explanations 1 and 2 and as a tool of interpretation, Explanation 3 would apply to the entire Section 140 of the Act and since it excluded the Cess of any kind for the purpose of Section 140 of the Act, which is not specified therein, the transition, carry forward or adjustment of unutilised Cess of any kind other than specified Cess, viz. National Calamity Contingent Duty (NCCD), against Output GST liability could not arise.

62. For the aforesaid reasons, we are inclined to allow the appeal of the Revenue and with all due respect for the learned Single Judge, set aside the judgment of the learned Single Judge dated 05.09.2019 and we hold that the Assessee was not entitled to carry forward and set off of unutilised Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess against the GST Output Liability with reference to Section 140 of the CGST Act, 2017. The appeal of the Revenue is allowed. CMP No.690 of 2020 is closed. Costs easy."

(Emphasis supplied)

9. The Appellant has contended that the phrase 'eligible duties' defined under Explanation 1 to Section 140 of the Act applies only to sub-section (3), (4) and (6), since the amendment made vide Section 28((b)(i) of the Central Goods & Services Tax (Amendment) Act, 2018 is not notified yet and hence, the definition of 'eligible duties' will not apply in case of sub-section (1) as of now. The Appellant further contended that in absence of any definition of the phrase

'eligible duties', the same will be interpreted in conjunction with the phrase 'CENVAT credit' preceding it. Accordingly, the amount which is eligible for carry forward as transitional credit is the amount of CENVAT credit lying in balance as on 30.06.2017. Consequently, the amount is available as transitional credit in terms of Section 140(1) of the Act.

9.1 I find that phrase 'eligible duties' has been inserted in Section 140(1) of the Act retrospectively with effect from 1.7.2017 by virtue of Section 28(a) of the CGST (Amendment) Act, 2018. Though the phrase 'eligible duties' for the purpose of Section 140(1) has not been defined but the Board has clarified vide Circular No. 87/06/2019-GST dated 2.1.2019 issued from F.No. 267/80/2018-CX.8 that expression 'eligible duties' appearing in Section 140(1) will cover duties which are listed as "eligible duties" at sl. no. (i) to (vii) of explanation 1 to Section 140, and "eligible duties and taxes" at sl. no. (i) to (viii) of explanation 2 to Section 140. In any case, Explanation 3 to Section 140 of the Act has provided that expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 to Section 140. Further, 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, as held by the Hon'ble High Court in the case of Sutherland Global Services Private Limited supra. I, therefore, discard this contention of the appellant as devoid of merit.

10. As regards the second issue, I find that the Appellant had carried forward credit of capital goods in transit amounting to Rs. 87,91,463/- under Section 140(5) of the Act. The adjudicating authority denied the said credit on the ground that balance of Cenvat credit of only inputs and input services in transit can be carried forward in electronic credit ledger under Section 140(5) of the Act and credit of capital goods in transit cannot be carried forward. The Appellant has contended that merely because an item that qualifies as 'inputs' under the CGST Act is otherwise covered under the definition of 'capital goods' under the CENVAT Credit Rules, 2004, there was no ground for holding that transitional credit could not be carried forward under Section 140(5) of the CGST Act. The Appellant further contended that the goods in respect of which credit has been availed under Section 140(5) qualified as 'inputs' under Section 2(59) of the CGST Act and once the goods in question qualify as 'inputs', irrespective of whether or not they fall under the ambit of 'capital goods' under the

erstwhile CENVAT Credit Rules, 2004, credit of the same should be allowed under Section 140(5) of the CGST Act.

10.1 I find it is pertinent to examine the provisions contained in Section 140(5) of the Act, which are reproduced as under:

> "(5) A registered person shall be entitled to take, 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, within such time and in such manner as may be prescribed, 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"

10.2 The above provisions enables a registered person to take credit of eligible duties and taxes in respect of inputs and input services received on or after the appointed day but duty in respect of which has been paid under the existing law. However, in absence of similar provisions for capital goods under Section 140, the Appellant is not eligible carry forward credit of duty paid on capital goods prior to appointed day but received on or after the appointed day. Further, whether an item is 'input' or 'capital goods' is to be determine as per the provisions of existing law and not as per the CGST Act, 2017 as contended by the Appellant due to reason that duty was paid under existing law and not under CGST Act, 2017 and provisions of existing law will be applicable while determining whether an item is 'input' or 'capital goods'. The Appellant has not disputed that goods in question were not capital goods as per the meaning of 'capital goods' defined under Rule 2(a) of the erstwhile Cenvat Credit Rules, 2004. I, therefore, hold that the Appellant was not eligible to carry forward Cenvat credit of capital goods in transit under Section 140(5) of the Act. I rely on the decision rendered by the Hon'ble Gujarat High Court in the case of RSPL Ltd. reported as 2018 (19) G.S.T.L. 430 (Guj.), wherein it has been held that,

> "17. Very clearly thus sub-section (5) of Section 140 allows a registered person, credit of eligible duties and tax in respect of inputs or input services which were received on or after the appointed day but on which the tax was paid earlier. In absence of any matching provisions pertaining to capital goods, in a situation where the duty had been paid on purchase of goods prior to the appointed day but the goods were received on or after the appointed day, there would be no possibility of availing credit on such tax under the GST regime.
>
> 18. It can thus be seen that to this limited extent, the CGST Act has made a distinction between the capital goods and inputs. The question is, is this demarcation unlawful? As noted, the fulcrum of the petitioner's argument was that this makes an artificial distinction between capital goods and inputs which has no rational relation to the purpose sought to be achieved. The subsidiary

contention of the petitioner was that there is no reason why such distinction should have been made. On the other hand, the respondents had argued that granting of credit on the duty paid is in the nature of concession. For valid reason, law can always be framed not granting such concession in certain cases.

19. The Legislature, as we have noted, made a clear and conscious demarcation between capital goods and inputs when it comes to availing credit of the duties paid on the goods which are in transit. When the entire tax structure was being replaced by the GST provisions, there would arise a need for making transitional arrangements. Chapter XX of the CGST Act, as noted, contains transition provisions. Section 140 contained in the said chapter makes detailed provisions for transitional arrangements for input tax credit. Subject to contentions and in the manner as may be prescribed, the unused tax credit would be migrated to the GST regime. This section also would enable a registered person to claim credit of the duty paid prior to the appointed day on the inputs even though the inputs may be received after the appointed day. This section consciously does not provide any such facility in relation to the capital goods in transit. This demarcation itself would not be artificial, arbitrary or in any manner, discriminatory. The capital goods and inputs used in manufacturing process have always been treated differently and distinct treatment have been given under the earlier statutes. If the Legislature therefore was of the opinion that in relation to capital goods in transit, duty paid before the appointed date cannot be claimed as a credit in the GST regime, we do not find that the distinction is in any manner artificial or arbitrary."

(Emphasis supplied)

10.3 I find that the above decision of the Hon'ble Gujarat High Court was relied upon by the adjudicating authority in the impugned order but the Appellant has distinguished the said case law by contending that the Hon'ble High Court in that decision dealt with the constitutional validity of Section 140(5) itself and not on the question of whether transition of credit was permissible on the item that qualifies as 'inputs' under the CGST Act, 2017. The Appellant reiterated that the goods in question qualified as 'inputs' as defined under the CGST Act,2017 and hence, transitional credit thereon should be available under Section 140(5) of the CGST Act. I find that the issue before the Hon'ble High Court in decision *supra* was constitutional validity of Section 140(5) of the Act. The Hon'ble Court examined the provisions of Section 140 of the Act and came to conclusion that the legislature has consciously decided not to enact provision regarding transition of credit of capital goods in transit. So, it is not under dispute that credit of capital goods in transit is not available for carry forward under Section 140(5) of the Act. Further, whether goods in question qualified as input under CGST Act, 2017 or not would be immaterial as eligibility under Section 140(5) of the Act has to be examined by applying the provisions of existing law as held by me *supra*. The contention of the Appellant is discarded being devoid of merit.

11. The Appellant has contended that the SCN which was issued under Section 73 was not maintainable since Section 73 did not apply to cases of transition of credit; that Section 73(1) of the CGST Act provides for demand and recovery of 'input tax credit' wrongly availed or utilised. In the present case, credit transitioned under Section 140 is not credit which is 'availed' and hence, Section 73 would not apply and relied upon case law of Commercial Steel Engineering Corporation v State of Bihar & Others - 2019 (28) G.S.T.L. 579 (Pat.)

11.1 I find that provisions of Section 140 of the Act enables an assesse to transition Cenvat credit of eligible duties lying in balance immediately preceding the appointed day into their electronic credit ledger. The Appellant opted to transition, inter alia, Cenvat credit of Education Cess, SHE Cess and capital goods in their electronic credit ledger through GST TRAN-1. So, when the said credit of Cess and capital goods was credited into their electronic credit ledger, it has to be considered that they availed credit of Cess and capital goods. Since, the Appellant was not eligible for availing credit of Cess and capital goods in their credit ledger, proceedings were initiated by invoking provisions contained in Section 73 of the Act, which empowers the proper officer to recover wrongly availed or utilised input tax credit. After careful consideration of the facts, I am of the considered opinion that the adjudicating authority correctly invoked provisions contained in Section 73 of the Act in respect of ineligible credit availed by the Appellant in their electronic credit ledger under Section 140 of the Act.

11.2 I have examined the relied upon decision of the Hon'ble Patna High Court passed in the case of Commercial Steel Engineering Corporation v State of Bihar & Others reported as 2019 (28) G.S.T.L. 579 (Pat.). I find that the said decision was rendered under the Bihar Goods and Service Tax Act, 2017. In the said case, the petitioner had inadvertently failed to avail VAT ITC in the years 2007-08 and 2011-12 and failed to report in respective returns. The said ITC was carried forward by them through GST TRAN-1 in the GST regime. The Department initiated proceedings under Section 73 seeking to recover the transitional credit as wrongly availed credit on the ground that the claim was not substantiated by returns. The High Court held that at best the claim could have been rejected but the same did not give jurisdiction to the authority to create tax liability when no outstanding liability existed. On examining the facts of the said case, I find that eligibility of disputed ITC was not decided yet and the same was pending before the statutory authority and in that backdrop the said decision was rendered as evident from para 35 of the said decision reproduced herein under:

> "35. Insofar 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."

11.3 Whereas in the present case, the Appellant was not eligible to avail credit of Education Cess, SHE Cess and capital goods in their electronic credit ledger and provisions contained in Section 73 of the Act empowers the adjudicating authority to recover any input tax credit wrongly availed or utilised for any reason. The adjudicating authority was, therefore, justified in invoking provisions contained in Section 73. Thus, facts involved in the present case are on different footing and said case law cannot be applied to the facts of the present case. I, therefore, discard the reliance placed on the said case law.

12. The Appellant has contended that interest under Section 50 is not payable as the amount was reversed by them vide the Form GSTR-3B for the month of May, 2019 prior to its utilisation and there has never been any short payment to the extent of Rs. 1,72,07,108/-/-, which is evident from the extract of their Electronic Credit Ledger for the period from September, 2017 to June, 2019. The Appellant further contended that the impugned order nowhere alleged that the said amount was utilised by them and hence, the provisions of Section 50 are not attracted at all.

12.1 I find that Section 73 of the Act, inter alia, provides that where input tax credit has been wrongly availed or utilized for any reason, the proper officer shall serve notice for recovery of tax along with interest payable under Section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder. The phrase used in Section 73 is "input tax credit wrongly availed or utilised". Thus, provisions of Section 73 are attracted for mere wrong availment of input tax credit also and interest is chargeable under Section 50 ibid. I find that identical issue stand decided by the Hon'ble Supreme Court in the case of M/s Ind- Swift Laboratories Ltd reported as 2011 (265) E.L.T. 3 (S.C.). The Hon'ble Court examined the phrase 'Cenvat credit wrongly taken or utilised' appearing in Rule 14 of the erstwhile Cenvat Credit Rules, 2004 and held that interest was also payable for Cenvat credit wrongly taken but not utilised. The relevant portion is reproduced as under:

"17. ... ... In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or has been erroneously refunded' as the word "AND". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest.

18. We do not feel that any other harmonious construction is required to be given to the aforesaid expression/provision which is clear and unambiguous as it exists all by itself. So far as Section 11AB is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, the High Court erroneously held that interest cannot be claimed from the date of wrong availment of CENVAT credit and that it should only be payable from the date when CENVAT credit is wrongly utilized. Besides, the rule of reading down is in itself a rule of harmonious construction in a different name. It is generally utilized to straighten the crudities or ironing out the creases to make a statute workable. This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is also held by this Court that the Rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute."

12.2 In view of above, I hold that the Appellant is liable to pay interest under Section 50 of the Act. I, therefore, uphold the impugned order to that extent.

13. The Appellant has contended that since provisions of Section 73 do not apply in case of carry forward of transitional credit, penalty under Section 73(9) cannot be imposed on them. I find that carry forward of transitional credit under Section 140 of the Act is nothing but transfer of credit lying as balance in Cenvat credit Register maintained under the existing law to electronic credit ledger

under CGST Act, 2017. Such transfer is, thus, availment of credit in electronic credit ledger through GST TRAN-1. However, such transfer is subject to provisions contained in Section 140 of the Act and ineligible credit transferred through GST TRAN-1 would tantamount to wrong availment of input tax credit. Further, Section 73 of the Act, inter alia, provides for imposition of penalty for wrong availment of input tax credit. Since, the Appellant had wrongly transitioned Cenvat credit of Education Cess, SHE Cess and capital goods through GST TRAN-1, as held by me supra, the Appellant is liable to penalty under Section 73(9) of the Act. I, therefore, uphold the penalty of Rs. 17,20,711/- imposed under Section 73(9) of the Act.

14. In view of above, I uphold the impugned order and reject the appeal.

15. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

15. The appeal filed by the Appellant is disposed off as above.

सत्यापित,

विपुल शाह
अधीक्षक (अपील)

..25 June, 2021..

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To, M/s Essar Oil Ltd (Now known as M/s Nayara Energy Ltd) 39 KM Stone, Essar Refinery site, Jamnagar - Okha Highway, District Dev Bhoomi Dwarka.	सेवा में, मेसर्स एस्सार ऑइल लिमिटेड (अब मेसर्स नायरा एनर्जी लिमिटेड) 39 KM स्टोन, एस्सार रिफाइनरी साइट, जामनगर-ओखा हाईवे, जिला देवभूमि द्वारका।

प्रतिलिपि :-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
3) संयुक्त आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।