



सत्यमेव जयते

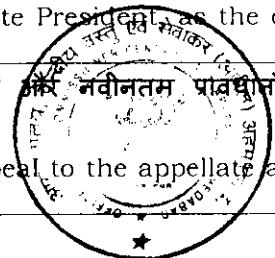
आयुक्त का कार्यालय  
Office of the Commissioner  
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय  
Central GST, Appeal Ahmedabad Commissionerate  
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद-380015  
GST Bhavan, Revenue Marg, Ambawadi, Ahmedabad  
Phone: 079-26305065 Fax: 079-26305136  
E-Mail : commrappl1-cexamd@nic.in

**By Regd. Post**

DIN NO. : 20211164SW0000888EF9

(क)	फाइल संख्या / File No.	GAPPL/ADC/GSTD/79 to 81/2020-APPEAL / H311 TO H316
(घ)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-CGST-002-APP-JC-55 to 57/2021-22 & 16.11.2021
(ग)	पारित किया गया / Passed By	श्री मिहिर रायका, संयुक्त आयुक्त अपील Shri Mihir Rayka, Joint Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	17.11.2021
(ङ)	Arising out of RFD-06 Orders, (i) Order No. ZX2405200218805 dated 24.05.2020, (ii) Order No. ZY2406200202706 dated 16.06.2020, (iii) Order No. ZZ240520026812 dated 28.05.2020 issued by Assistant Commissioner, Division - VI, Ahmedabad North	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	The Deputy Commissioner, CGST & C.Ex., Division-VI (S G Highway West) Ahmedabad North, Address :- 7th Floor, B. D. Patel House, Nr Sardar Patel Statue, Naranpura, Ahmedabad-380014
	प्रतिवादी का नाम और पता / Name and Address of the Respondent	M/s Fovera Orthodesign Pvt Ltd. (GSTIN-24AADCF3285A1Z3) Address :- 23, Ground Floor, Suramya Gold, Science City Road, Sola, Ahmedabad 380060

(A)	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.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(ii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying - (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant; and (ii) A sum equal to <u>twenty five per cent</u> of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax ( Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> .



**ORDER-IN-APPEAL****Brief Facts of the Case :**

The following appeals have been filed by the Assistant Commissioner, Central GST & C. Ex., Division – VI, Ahmedabad North Commissionerate (hereinafter referred as '*appellant*' / '*department*') in terms of Review Orders issued under Section 107(2) of the CGST Act, 2017 (hereinafter referred as '*the Act*') by the Reviewing Authority against RFD-06 Orders (hereinafter referred as '*impugned orders*') passed by the Assistant Commissioner, CGST & C. Ex., Division – VI, Ahmedabad North (hereinafter referred as '*adjudicating authority*') in the case of **M/s. Fovera Orthodesign Pvt. Ltd.**, 23, Ground Floor, Suramya Gold, Science City Road, Sola, Ahmedabad – 380060 (hereinafter referred as '**Respondent**').

Appeal No. & Date	Review Order No. & Date	RFD-06 Order No. & Date
GAPPL/ADC/GSTD/79/2020-APPEAL Dated 01.12.2020	45/2020-21 Dated 27.11.2020	ZX2405200218805 Dated 24.05.2020
GAPPL/ADC/GSTD/80/2020-APPEAL Dated 01.12.2020	44/2020-21 Dated 27.11.2020	ZY2406200202706 Dated 16.06.2020
GAPPL/ADC/GSTD/81/2020-APPEAL Dated 01.12.2020	43/2020-21 Dated 27.11.2020	ZZ2405200268127 Dated 28.05.2020

**2(i).** Brief facts of the case are that the '*Respondent*' holding GSTIN No. 24AADCF3285A1Z3 had filed following refund applications under Form RFD-01 :

Refund Application under form RFD-01 filed by ' <i>Respondent</i> '				Refund Sanctioned by ' <i>adjudicating authority</i> '
ARN No.	Period	Refund claimed		
AA2405200164581 / 21.05.20	April'18 to Sept.'18	55423 - SGST		44497 - SGST
AA240620033081Z / 15.06.20	April'19 to June'19	168539 - CGST 293474 - SGST		168539 - CGST 293474 - SGST
AA2405200231407 / 26.05.20	Oct.'18 to March'19	296234 - SGST		294668 - SGST

The refund claims were preferred under Section 54(3)(ii) of the CGST Act, 2017 which read as : "*where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies*"



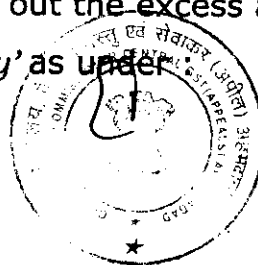
(other than nil rated or fully exempt supplies)" After examination of the said refund applications filed by the 'Respondent', the 'Adjudicating Authority' has sanctioned the total refund claims as mentioned in above table.

**2.(ii)** In the grounds of appeal the 'Department' has submitted that during the course of post-audit of the above said refund claims, it was noticed that the refund claims pertains to unutilized ITC accumulated on account of Inverted Duty Structure. In the matter of inverted duty structure the amount of refund is to be calculated as per Net ITC according to formula given under Rule 89(5) of the CGST Rules, 2017. As per the said provisions read with para 14 of Circular No. 79/53/2018-GST dated 31.12.2018, "Net ITC" means input tax credit availed on inputs during the relevant period and it excludes ITC availed on Services and Capital Goods. It is further submitted in the appeal by the 'Department' that in the instant case it is observed that Net ITC considered for refund amount calculation also includes ITC availed on Capital Goods & Input Services. The refund sanctioning authority i.e. 'adjudicating authority' has also considered the ITC availed on Capital Goods/Input Services in the "Net ITC".

**2(iii).** Since the 'adjudicating authority' has considered the ITC of Capital Goods/Input Services in the Net ITC, the 'Department' has recalculated the Net ITC by excluding the ITC of Capital Goods/Input Services. Accordingly, the 'Department' on the basis of uploaded claim documents Viz. Annexure-B & GSTR-2A have worked out the Net eligible ITC as well as Refund in all the three matters as under :

ITC Head	Turnover of inverted rated supply of goods or services (1)	Tax payable on such inverted rated supply of Goods and Services (2)	Adjusted Total Turnover (3)	Net Input Tax Credit Eligible (4)	Refund amount as per formula $[(1*4/3)-2]$
IGST/CGST/SGST	877526.3	99088.6	877526.13	107541.85	8453
IGST/CGST/SGST	6461546.75	384408.69	6461546.75	486754.44	102346
IGST/CGST/SGST	6596136	791536.35	6596136	725942.2	(-)65594

In view of above, the 'Department' has worked out the excess amount of refund sanctioned by the 'adjudicating authority' as under



Refund amount claim as per RFD-01	Refund amount sanctioned	Refund amount re-calculated as per above table	Excess Refund amount
55423	44497	8453	36044
462013	462013	102346	359667
296234	294668	(-)65594	294668

Considering the above facts the 'Department' has submitted that the 'impugned orders' issued by the 'adjudicating authority' are not proper and legal. Therefore, requested to set aside the said 'impugned orders'.

### **Personal Hearing :**

3. Personal Hearing in the matter was through virtual mode held on 26.10.2021. Shri Sunny Patel, Managing Director of M/s. Fovera Orthodesign Pvt. Ltd., appeared on behalf of the *Respondent*. During P.H. he has stated that he would like to submit documents in favour of his case. Accordingly, he has submitted the documents via mail on 29.10.2021. In the said documents Shri Sunny Patel has submitted that "we are of the opinion that Explanation (a) to Rule 89(5) which denies the refund of "unutilized input tax" paid on "input services" as part of "input tax credit" accumulated on account of inverted duty structure is ultra vires the provision of Section 54(3) of the CGST Act, 2017." He has also submitted the copy of judgement passed by the Hon'ble High Court of Gujarat in the case of M/s. VKC Footsteps India Pvt. Ltd.

### **Discussion and Findings :**

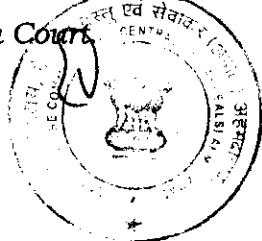
4(i). I have carefully gone through the facts of the case available on records, submissions made by the 'Department' in the Appeal Memorandum as well as documents / submissions made by the 'Respondent' at the time of personal hearing and on 29.10.2021. I find that the 'Respondent' has submitted the refund claims which were sanctioned by the 'Adjudicating Authority' as mentioned in the foregoing paras. The 'Department' has filed the present appeals wherein mainly contested that the refund claims are pertains to unutilized ITC accumulated on account of Inverted Duty Structure and in the said matter the amount of refund is to be calculated as per Net ITC according to formula given under Rule 89(5) of the CGST Rules, 2017. The 'Department' has also referred the para 14 of CBIC's Circular No. 79/53/2018-GST dated 31.12.2018, according to said Circular **Net ITC**



means input tax credit availed on inputs during the relevant period and it excludes ITC availed on Services and Capital Goods". However, in the present matters while sanctioning the refund claims in question the 'Adjudicating Authority' has considered the Net ITC inclusive of ITC of Input Services and Capital Goods alongwith ITC of Inputs. Accordingly, the 'Department' has recalculated the eligible refund amount as mentioned at para 2(iii) above.

**4(ii).** Further, I find that the 'Respondent' has mainly relied upon the judgement of Hon'ble High Court of Gujarat in the matter of M/s. VKC Footsteps India Pvt. Ltd. In this regard, I find that the said judgement was challenged before the Hon'ble Supreme Court by the Union of India. On 13.09.2021 the said judgement of Hon'ble High Court of Gujarat has been set aside by the Hon'ble Supreme Court by allowing the appeal of Union of India. The relevant para 113 under "H - Conclusion" of the Order of Hon'ble Supreme Court is reproduced as under :

*The Division Bench of the Gujarat High Court having examined the provisions of Section 54(3) and Rule 89(5) held that the latter was ultra vires. In its decision in **VKC Footsteps India Pvt. Ltd.** (supra), the Gujarat High Court held that by prescribing a formula in sub-Rule (5) of Rule 89 of the CGST Rules to execute refund of unutilized ITC accumulated on account of input services, the delegate of the legislature had acted contrary to the provisions of sub-Section (3) of Section 54 of the CGST Act which provides for a claim of refund of any unutilized ITC. The Gujarat High Court noted the definition of ITC in Section 2(62) and held that Rule 89(5) by restricting the refund only to input goods had acted ultra vires Section 54(3). The Division Bench of the Madras High Court on the other hand while delivering its judgment in **Tvl. Transtonnelstory Afcons Joint Venture** (supra) declined to follow the view of the Gujarat High Court noting that the proviso to Section 54(3) and, more significantly, its implications do not appear to have been taken into consideration in **VKC Footsteps India Pvt. Ltd.** (supra) except for a brief reference. Having considered this batch of appeals, and for the reasons which have been adduced in this judgment, we affirm the view of the Madras High Court and disapprove the view of the Gujarat High Court.*



4(iii). In view of above, I find that the 'Adjudicating Authority' has wrongly calculated the Net ITC by considering ITC of Input Service/Capital Goods while sanctioning the refund claims of 'Respondent'. Accordingly, the 'Adjudicating Authority' has sanctioned the excess amount of refund to the 'Respondent' and thus the Refund Orders issued in Form RFD-06 which are being challenged in the present appeals are found to be not proper and legal.

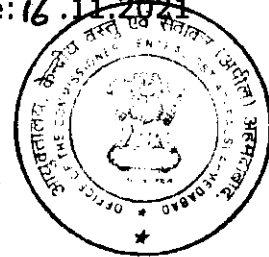
5. In view of above discussions, the appeals filed by the 'Department' are allowed and the 'impugned orders' to the extent of erroneously sanctioning refund of Rs. 36,044/, Rs.3,59,667/- and Rs.2,94,668/- in excess of the eligible refund amount, are set aside for being not proper and legal.

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


6. The appeals filed by the 'Department' stand disposed off in above terms.

  
(Mihir Rayka)  
Joint Commissioner (Appeals)

Date: 16.11.2021



Attested

  
(Dimp Jadav)  
Superintendent  
Central Tax (Appeals)  
Ahmedabad

By R.P.A.D.

To,  
The Assistant Commissioner  
CGST & C. Ex., Division - VI,  
Ahmedabad North.

Appellant

M/s. Fovera Orthodesign Pvt. Ltd.,  
23, Ground Floor, Suramya Gold,  
Science City Road, Sola, Ahmedabad - 380060

Respondent

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Excise, Appeals, Ahmedabad.
3. The Commissioner, Central GST & C. Ex., Ahmedabad-North. VI
4. The Deputy/Assistant Commissioner, CGST & C. Ex, Division-VI - S G Highway East, Ahmedabad North.
5. The Additional Commissioner, Central Tax (System), Ahmedabad North.
- ✓ 6. Guard File.
7. P.A. File