आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

सत्यमेव जयते

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/172/2021-APPEAL / 5726 TO 5731

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-ADC-104/2021-22**
दिनाँक Date : **11-01-2022** जारी करने की तारीख Date of Issue : **12-01-2022**

श्री मिहिर रायका_अपर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Mihir Rayka, Additional Commissioner (Appeals)

ग Arising out of Order-in-Original No. **ZT2410200233688** दिनाँक: **20-10-2020** issued by Assistant Commissioner, CGST, Division VI, Ahmedabad South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s. Kushal's Retail Private Limited, S-27, II Floor, Alphaone Mall, Vastrapur, Ahmedabad-380054

(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
(iii)	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 **twenty five per cent** 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 वेबसाईटwww.cbic.gov.in 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 www.cbic.gov.in.

ORDER IN APPEAL

M/s.Kushal's Retail Private Limited, S-27, II Floor, Alphaone Mall, Vastrapur, Ahmedabad (hereinafter referred to as the 'appellant') has filed the present appeal on dated 29-1-2021 against Order No.ZT2410200233688 dated 20-10-2020 (hereinafter referred to as 'the impugned order) passed by the Assistant Commissioner, CGST, Division VI, Ahmedabad (hereinafter referred to as 'the adjudicating authority).

2. Briefly stated the fact of the case is that the appellant, registered under GSTIN 24AAHCK5046J1ZG, has filed refund claim for refund of Rs.2,90,963/- on account of ITC accumulated due to inverted tax structure for the month of March 2020. The appellant was issued show cause notice No.ZP2409200423687 dated 29-9-2020 on the ground that 1) According to Section 54 (3) of CGST Act, no refund claim of unutilized ITC shall be allowed in cases other than 'zero rated supplies made without payment of tax and ITC accumulated due to inverted duty structure 2) The claimant was involved in retail business activity and they are not manufacturing any goods and sells the goods in the same rate of tax and 3) justification for claiming refund of GST credit along with supporting documents. The adjudicating authority vide impugned order rejected the claim on the reason that the rate of tax on input and output goods is the same (both covered in 3% tax slab) according to purchase and sales details uploaded with the claim along with RFD 01 application. According to Para 3.2 of the Circular No.135/05/2020-GST dated 31-3-2020, refund of accumulated ITC in terms of clause (ii) sub clause (3) of Section 54 of CGST Act is available where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

3. Being aggrieved the appellant filed the present appeal on the following grounds:

(i) That the adjudicating authority erred in holding that the appellant is not eligible to claim refund in terms of Section 54 (3) of the GST Law ;

(ii) That the adjudicating authority has erred in not appreciating the undisputed facts submitted during the course of refund application where the purchase of inputs at rates higher than 3% have been established and despite this submission the adjudicating authority rejected the claim ;

(iii) That the adjudicating authority has erred in not granting personal hearing over virtual mode and not granting sufficient opportunity to make its submission on the claim of inverted rate structure.

(iv) The show cause notice did not clearly spell out the reasons as to why the case does not fall in the inverted rate structure model.;

(v) That the order of the adjudicating authority is void ab-initio since it does not report the DIN which is a mandatory requirement vide CBIC Circular No.128/47/2019-dated 23-12-2019.

(vi) In view of above submissions the appleant requested to set aside the impugned order and grant relief.

4. Personal hearing was held on dated 4-1-2022. Shri Rishabh Singvi, authorized representative appeared on behalf of the appellant on virtual mode. He has been given 7 working days to submit additional information/submissions.

5. Accordingly, the appellant via email dated 6-1-2022 made following additional submissions wherein they interlia contended that

i. That in terms of section 54(3) of the CGST/ SGST law, the rate of inputs should be higher than the rate of output supplies. In the present facts, the appellant has procured inputs at multiple rates including 3%, 12%, 18% . From the review of the register, it is evident that the Appellant has inputs both at 3% and also at 12%/18%. The output continues to be at 3% only (i.e., imitation jewellery). Therefore, there is an error in the factual conclusion of adjudicating authority that there the inputs and the outputs are at the same rate.

ii. That there is no dispute on the eligibility of the input tax credit in terms of Section 16 read with Section 2(59) of the said law. Moreover, there is no dispute on the fact that all the items on which refund is being sought represents inputs and none of them represent input services / capital goods. The claim has been restricted only to claim of input tax credit on inputs and there is no claim of input services and capital goods. Therefore, in terms of Rule 89(5) of the CGST Rules which adopts Net ITC as input tax credit pertaining to input only has also been complied with and it is only on application of the said formula that a refund of Rs. 2,90,963/- has been arrived at.

iii. That the contention of the adjudicating authority that the refund applied under Section 54(3) is not allowed since he is a retailer and not a manufacturer is erroneous and lacks any legal basis as there is no violation of the said provision. This is contrary to the decision of the Guwahati High Court in BMG Informatics which specifically overturns the legal contention of the Revenue department that trading entities are not entitled to refund of the accumulated input tax credit under inverted rate structure. The adjudicating authority failed to appreciate that factual background of the appellant who is a retailer chain store which procures imitation jewellery @ 3% and procures other inputs such packing material, consumables etc., that are taxable either at 12% or 18%. There is a constant accumulation of input tax credit due to the high variance between some inputs and outputs which is only 3%. There is no bar / restriction under law that the refund is eligible only to manufacturers. Therefore, the conclusion of the Respondent is erroneous in law and in facts.

iv. Referring to the decision of the Commissioner of Central Tax (Appeals) vide order 2020 (38) G.S.T.L. 113 (Commr. Appl. - GST – Guj, 2020 (42) G.S.T.L. 369 (Commr. Appl. - GST - Raj.) and Circular No. 125/44/2019-GST, dated 18-11-2019, the appellant contended that the above decision & CBEC Circular clearly affirms the stand of the

appellant that (i) inputs would include all items and not just raw materials/ principal inputs used in the process of manufacture, rather it would also include packing material, etc., which is presently the facts of the case (ii) even if there are multiple rates of taxes as input tax credit, the formulae has to be strictly applied and all inputs irrespective of the rate of tax should fall within the meaning for purpose of refund calculation.

v. Referring to GST Flyer dated 1-1-2018 and Circular No. 125/44/2019-GST, dated 18-11-2019 the appellant contended that even goods which are sold to merchant exporters where the rate of tax is 0.1% as part of any business activity would be eligible for refund under the inverted rate structure even if he is retailer. The Board accepts that even if suppliers are buying and selling the same goods (ie a retailer) they would be entitled to refund of the inverted rated structure and hence they are eligible for refund.

vi. That two principles of Law viz. provisions are to be satisfied in literal terms and there is no scope of additions or deletions of conditions. They relied upon Supreme Court judgments in CIT, Bombay v. Gwalior Rayon Silk Manufacturing Company Ltd. [(1992) 3 SCC 326] and State of Jharkhand and Others v. Ambay Cements and Another [AIR 2005 SC 4168 = 2004 (178) E.L.T. 55 (S.C.)]. Reliance is placed on judgments of the Punjab and Haryana High Court, Calcutta High Court and Andhra Pradesh High Court in PML Industries Ltd. v. Commissioner of Central Excise [2013 (290) E.L.T. 3 (P & H)], I.C.I. India Ltd. v. Collector of Customs [1992 (60) E.L.T. 529 (Cal.)] and Commissioner of Customs & Central Excise, Hyderabad-IV v. Sunder Ispat Ltd. [2015 (316) E.L.T. 238 (A.P.)] respectively to submit that the respondent authorities are creatures of statute and can only exercise power that has been specifically entrusted upon them and cannot under any circumstances travel beyond the scope of the statute.

vii. In summary, the appellant contends as follows:

a. There is no dispute on the fact that all the inputs specified in the register is eligible input tax credit.

b. The grounds on which the show cause notice dt. 29.09.2020 was issued (i.e. claimant is a retailer and not manufacturer) is different from the conclusion in the OIO. The provisions do not differentiate between a retailer or a manufacturer and hence this contention is untenable under law.

c. There is a factual error in the conclusion of the respondent that rate of tax on inputs and output goods is the same. The evidence of the input tax credit register (statement B of the refund application) clearly depicts presence of other inputs at 12% and 18%.

d. Reliance which is placed on para 3.2 of CBEC Circular 135/05/2020 dt. 31.03.2020 by the respondent is no longer valid since this has been struck down the Guwahati High Court in BMG Informatics which specifically read down this para in the Circular and upheld the literal wordings of section 54(3)(ii).

e. CBEC Circular no. 125/44/2019-GST, dated 18-11-2019 & First appeal orders of Gujarat (referred above) itself admit that the formula does not distinguish between multiple rate of inputs and refund is eligible despite some of the inputs being at the same rate as output.

f. Supreme Court's decision in UOI v. VKC footsteps (2021 (9) TMI 626 – SC) is distinguishable on law and facts since the said decision is on the point that refund is not eligible for input services and capital goods. The subject refund application under consideration does not include any refund of input services and capital goods and is clearly falling with the wordings of section 54(3)(ii) read with Rule 89(5).

6. I have carefully gone through the facts of the case, grounds of appeal, submission made by the appellant and documents available on record. In this case refund was rejected on the sole ground that the rate of inputs and output goods are same and hence in terms of Para 3.2 Circular No.135/05/2020 dated 31-3-2020 refund is not admissible in terms of Section 54 (3) (ii) of CGST Act 2017.

7. At the outset I refer to Section 54 (3) (ii) of CGST Act, 2017 wherein it was provided that

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), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council.

8. In the instant case, the appellant has claimed the refund under clause (ii) of the above Section viz. refund of unutilized input tax credit where the credit has accumulated on account of rate of tax on inputs is higher than the rate of tax on output supplies. The refund is claimed on the ground that some of their inputs viz packing materials, consumables used by them attracts higher rate of tax @ 12% and @ 18% whereas their output viz. imitation jewellery attracts tax at lower rate of 3% only owing to which there was accumulation of ITC.

9. I find that it is an admitted fact that the appellant is engaged in retail business activity wherein they procure imitation jewellery @ 3% tax and selling the same @ 3% rate of tax. However due to use of packing materials and consumables, in relation to their business activity, which attracts higher tax rate there was accumulation of ITC.

10. I refer to CBIC Circular No.135/05/2020-GST dated 31-3-2020 referred by the adjudicating authority wherein in para 3.2. it was clarified as under :

3.2 It may be noted that refund of accumulated ITC in terms clause (ii) of sub-section (3) of section 54 of the CGST Act is available where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. It is noteworthy that the input and output being the same in such cases, though attracting different tax rates at different points in time, do not get covered under the provisions of clause (ii) of sub-section (3) of section 54 of the CGST Act. It is hereby clarified that refund of accumulated ITC under clause (ii) of sub-

section (3) of section 54 of the CGST Act would not be applicable in cases where the input and the output supplies are the same.

11. As per the wordings applied in the Circular, if the input and output supplies are same ie same category of goods refund under Section 54 (3) (ii) is not applicable. In other words, even if there is usage of other inputs attracting higher rate of tax so long as the input goods and output goods are same refund will be not be admissible. It is pertinent to note that the Circular No.135/05/2020-GST dated 31-3-2020 was issued providing further clarification on refund matters with reference to clarification earlier issued vide Circular No.125/44/2019-GST dated 18-11-2019. It is observed that Circular dated 31-3-2020 clarify the situations where both the input and output are same whereas Circular No.125/44/2019-GST relate to the situation where there is use of multiple inputs attracting lower rate, same rate and higher rate of tax than the tax on output supply, ie in situation where the category of inputs and output are different and not same. Therefore in cases where both the input and output are same and attracting same rate of tax clarification issued vide Circular dated 31-3-2020 will prevail.

12. I also find that Section 54 (3) (ii) of CGST Act, 2017 envisage a situation where there is accumulation of credit due to rate of tax on inputs being higher than the rate of tax on output supplies. Therefore, use of words `accumulation' and `inputs' indicate that all inputs used for output supply should attract tax at higher rate than the tax on output supply causing accumulation of ITC so as to become eligible for refund under Section 54 (3) (ii) of CGST Act, 2017. I find that in any retail business activity the principal input and output will always be same and involvement of other inputs may not be substantial. In the case on hand also even by use of packing materials, consumables, attracting higher rate of tax, it will not lead to accumulation of ITC so as to become eligible for refund. This is also evident from Statement B submitted by the appellant in support of their contention that there are inputs which attracts higher rate of tax of Rs.12% and 18%, as per which out of total ITC of Rs.3,13,890/- only ITC of Rs.19,732/- pertains to inputs attracting higher rate of tax of 12% and 18%. In the subject case, claim was made for refund of Rs.2,90,963/- but inputs having higher tax rate was less than 10% of refund amount. In such a situation logical inference leads to the fact that accumulation of ITC is not on account of involvement of inputs having higher rate of tax so as to fall within the purview of Section 54 (3) (ii) of CGST Act, 2017.

13. With regard to their contention that the provisions do not differentiate between a retailer or a manufacturer, I do accept this submission. However, I find that in the impugned order the claim was rejected not the ground that the appellant is a retailer, but on the ground that the appellant being in retail business their input and output are same and attracts same rate of tax. This fact is also not negated by the appellant. Therefore it is wrong to presume that the claim was rejected on the ground that refund is not admissible to a retailer.

14. The appellant referring to decisions of Commissioner (Appeals) and CBIC Circular No.125/44/2019-GST further contended that inputs would include all items including packing

materials and even if there are multiple rates of taxes as ITC, all such inputs irrespective of rate of tax should fall within the meaning for the purpose of refund calculation. They also contended that rate of tax input and output are not same and that there are other inputs attracting tax @12% and 18% as given in Statement B. In this regard, I reiterate that above aspects are not disputed in this case but as the category of principle input and output supplies are same and attracting same rate of tax the claim was rejected in terms of Circular No. 135/05/2020-GST dated 31-3-2020.

15. Regarding the judgment of Hon'ble High Court of Guwhati in the case of M/s.BMG Informatics relied by the appellant, I have gone through the order and find that in the said case the registered person viz. M/s.BMG Informatics Pvt.Ltd procure information and technology products and supply to various Government Departments, PSU and other Research and Educational institutions in Northeast regions for which partial exemption was provided under Notification No.45/2017. In such a situation though both the input and output supply are same tax rate was different. In the said Order Hon'ble High Court has held that Circular No.135/05/2020 appears to be in conflict and provides for the contrary to the provisions of Section 54 (3) (ii) of CGST Act, 2017. However, at para 32 Hon'ble High Court has remanded the case back to Assistant Commissioner to consider the matter afresh and grant refund if tax on input supplies ie on IT products is higher than the tax on output supplies ie also IT products. Thus Hon'ble High Court though held that Circular No.135/05/2020 is in conflict and contrary to the provisions of Section 54 of CGST Act 2017, on the other hand acknowledge that the refund is admissible only if there was higher tax on inputs than tax on output supply. However in the subject case not only both the principal input and output supply are same but also both attracts same rate of tax and the inputs attracting higher rate of tax do not have any significant influence on retail activity so as to cause any accumulation of credit as discussed in preceding paras. I also find it pertinent to refer to Hon'ble Supreme Court decision in the case of M/s.VKC Footprints Pvt.ltd wherein it was held that legislature is empowered to define the circumstances in which a refund under Section 54 (3) of Act can be claimed. The relevant para is as under :

70 We must be cognizant of the fact that no constitutional right is being asserted to claim a refund, as there cannot be. Refund is a matter of a statutory prescription. Parliament was within its legislative authority in determining whether refunds should be allowed of unutilised ITC tracing its origin both to input goods and input services or, as it has legislated, input goods alone. By its clear stipulation that a refund would be admissible only where the unutilised ITC has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies, Parliament has confined the refund in the manner which we have described above. While recognizing an entitlement to refund, it is open to the legislature to define the circumstances in which a refund can be claimed. The proviso to Section 54(3) is not a condition of eligibility (as the assessees' Counsel submitted) but a restriction which must govern the grant of refund under Section 54(3).

16. With regard to their submission against non grant of personal hearing and non mention of DIN in rejection order, I find that the appellant was granted personal hearing on 9-10-2020.

However the appellant's submission is silent as to whether sought any adjournment or otherwise. Regarding non mention of DIN, the adjudicating authority vide letter File No.WS06/CGST/Ref/Misc/2019-2020 dated 10-12-2021 has clarified that refund rejection order is system generated and given to the claimant through GST Portal online. In place of DIN there is unique order number generated through portal.

17. In view of aforesaid facts and discussions I hold that the impugned order passed by the adjudicating authority rejecting the refund claim is factually and legally correct. Accordingly I upheld the impugned order and reject the appeal filed by the appellant.

18. अपीलकर्ताद्वारादर्जकीगईअपीलोकानिपटाराउपरोक्ततरीकेसेकियाजाताहै।
The appeals filed by the appellant stand disposed off in above terms.

(Mihir Rayka)
Additional Commissioner (Appeals)

Date :
Attested

(Sankara Raman B.P.)
Superintendent
Central Tax (Appeals),
Ahmedabad
By RPAD

To,

M/s.Kushal's Retail Private Limited,
S-27, II Floor, Alphaone Mall,
Vastrapur, Ahmedabad

Copy to :

1) The Principal Chief Commissioner, Central tax, Ahmedabad Zone
2) The Commissioner, CGST & Central Excise (Appeals), Ahmedabad
3) The Commissioner, CGST, Ahmedabad South
4) The Additional Commissioner, Central Tax (Systems), Ahmedabad South
5) The Assistant Commissioner, Division VI (Vastrapur), Ahmedabad South
6) Guard File
7) PA file