



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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रजिस्टर्ड डाक एंडी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/38/2021-APPEAL / 6261 - 66
ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-ADC-120/2021-22**
दिनांक Date : **09-02-2022** जारी करने की तारीख Date of Issue : **09-02-2022**

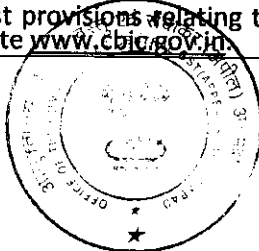
श्री मिहिर रायका अपर आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No. **ZT2411200183701** दिनांक: **13-11-2020** issued by Assistant Commissioner, CGST, Division I, Rakhial, Ahmedabad South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Shri Mital Sanjaybhai Patel of M/s. Ratneshwari Textiles, 35/A, Chirag Industrial Estate, B/s Revabhai Estate, Bagefirdos, Amraiwadi, Ahmedabad-380026

(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 वेबसाइट www.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

Shri Mital Sanjaybhai Patel of M/s.Ratneshwari Textiles, 35/A, Chirag Industrial Estate, B/s Revabhai Estate, Bagefirdos, Amraiwadi, Ahmedabad 380 026 (hereinafter referred to as 'the appellant') has filed the present appeal on dated 30-12-2020 against Order No.ZT2411200183701 dated 13-11-2020 (hereinafter referred to as 'the impugned orders') passed by the Assistant Commissioner, CGST, Division I, Rakhial, Ahmedabad (hereinafter referred to as 'the adjudicating authority').

2. Briefly stated the fact of the case is that the appellant filed refund application for refund of unutilized ITC on account of inverted tax structure under Section 54 of CGST Act, 2017 for Rs. 12,59,863/- for the period April 2019 to March 2020. The appellant was issued show cause notice proposing rejection of the claim on the ground that the ITC of input services appears to be claimed which is inadmissible as per Notification No.26/2018-CT dated 13-6-2018. Hence Net ITC and thus refund can't be quantified under Rule 89 (5). Clarify whether Notification No.49/2019-CT dated 9-10-2019 and 75/2019-CT dated 26-12-2019 complied or otherwise. The adjudicating authority vide impugned order rejected the entire claim on the ground that the appellant's contention not acceptable and accordingly refund amount is rejected on the grounds mentioned in SCN under section 43 of CGST Act, 2017.

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

- i. That the impugned order is non speaking order and is issued in gross violation of principles of natural justice ;
- ii. That the concept of principal of natural justice is must to be followed which is held consistently by Hon'ble Judiciary and on its violation the impugned order is void ;
- iii. That the natural justice is the essence of fair adjudicating deeply rooted in tradition and conscience to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice ;
- iv. That Roman Law – Natural justice recognizes three principles : Nemo debet esse judex in propria cause ; Audi alterem partem and speaking orders or reasoned decisions ;
- v. That the opportunity for hearing also includes personal hearing apart from making written representation. The requirements of a fair hearing has two elements ; first that opportunity to be heard must be given and second that such opportunity must be real and not illusory and make believe 1983 (14) ELT 1685 (Ker). A fair and reasonable hearing means a hearing which is adequate for the purpose of bringing before the officer who makes the decision all the relevant submissions. If fresh factual evidence is brought in and is likely to influence the decision, a fresh hearing should be given 1978 (2) ELT 1320

(SC). On the basis of above principles of natural justice the impugned order of the learned adjudicating authority is in gross violation of principles of natural justice as the said order is issued without opportunity of being heard and without appreciating the written submission of the appellant against the SCN.

- vi. That the adjudicating authority has simply stated that the claimant's contention is not acceptable, however refrained from giving any reasoning on the written submissions with respect to the show cause notice as to why the submissions of the appellant is not acceptable to them and hence the adjudicating authority had not commented on any of the contention of the appellant and decided the issue solely with pre determined mind to reject the refund claim ;
- vii. Referring to guidelines issued by the Board on dated 13-4-2016 vide instruction File No.390/CESTST/24/2016-JC, Circular No.1053/2/2017-CX dated 10-3-2017 issued by the Board ; Hon'ble CESTAT New Delhi's decision in the case of M/s.Amway India Enterprises P.Ltd Vs Commissioner of ST, New Delhi reported on 2015 (39) STR 1006 (Tri.Del) which was affirmed by Hon'ble Supreme Court 2018 (9) GSTL J 91 ; 2017 (351) ELT 38 (Guj HC) in the case of M/s.Padmavati Tubes Vs CCE, Vapi ; 2017 (349) ELT 694 (Guj HC) in the case of M/s.Cadila Pharmaceuticals ltd Vs CCE and 2011 (30) STT 68 (CESTAT Mum) in the case of M/s.Ami Clearing and Forwarding P Ltd Vs Assistant Commissioner of ST, Mumbai, the appellant contended that refund rejection order reveals that the adjudicating authority has not given any finding/reasoning on the reply which was submitted by the appellant in their submission dated 22-10-2020 and without granting opportunity of being heard ; that the contention of the adjudicating authority is supported without any basis and is arbitrary and is purely appears to have been mentioned without referring the facts and grounds as submitted during the adjudication and hence the impugned order to be set aside and refund should be sanctioned to them.
- viii. That they had rightly included the component of 'input service' in their refund claim as the amendment in Rule 89 (5) vide Notification No.26/2018-CT dated 13-6-2018 is held to be ultra vires and contrary to Section 54 of the CGST Act, 2017 as held by Hon'ble High Court of Gujarat in the case of M/s.VKC Footsteps P.ltd Vs UOI and 2 Others ; On the basis of above decision the component of input service cannot be excluded from the calculation of refund from net ITC formula ;
- ix. That they had availed total credit based on GSTR2A only and hence both the Notification No.49/2019-CT dated 9-10-2019 and Notification NO.75/2019-CT dated 26-12-2019 are complied automatically ;
- x. That they have a strong prima facie case and the balance of convenience is also strongly in their favor ;



- xi. That the impugned order may be set aside and their refund claim may be considered along with applicable interest

4. During appeal proceedings, the appellant vide their letter dated 10-12-2021 intimated that as per recent judgment of Hon'ble Supreme Court in the case of UOI Vs M/s.VKC Footsteps Pvt.Ltd., (Case No.4810/2021) in which Apex Court has upheld the Rule 89 (5) for not allowing refund of unutilized input credit on 'input services' in case of inverted rate structure. Hence adhering to the Apex Court judgment they make additional calculation in relation to their refund claim by excluding the quantum of ITC on input services. Accordingly as against claim amount of Rs.1259862.74/- the appellant has re-worked their claim amount to Rs.11,00,400/- taking into account ITC of Rs.41,01,857/-.

5. Personal hearing was held on dated 29-12-2021 and 17-1-2022. Shri Pravin Dhandharia, authorized representative appeared on behalf of the appellant on virtual mode. He intimated that he wants to submit additional submissions for which he was given 15 days working days to do so. Accordingly vide letter dated 17-1-2022 submitted that as they had submitted revised application for refund for the period April 2019 to March 2020, after reducing Net ITC to the extent ITC claim on input services, the appeal may be decided finally.

6. I have gone through the facts of the case, grounds of appeal, submissions made by the appellant and documents available on record. I find that against rejection of refund on the reason mentioned in the impugned order the appellant has challenged the fairness and legality of the impugned order being a non speaking order and bad in Law. I find that in this case the adjudicating authority has rejected the refund with following remarks:

The claimant's contention is not acceptable. Accordingly refund amount of Rs.1259683/- is rejected on the grounds mentioned in the SCN under Section 54 of the CGST Act, 2017.

7. I find that the appellant has claimed refund of ITC accumulated on inputs and input services for which they were issued show cause notice proposing rejection of claim amount due to inadmissibility of refund of ITC availed on input services. In reply to show cause notice the appellant relying on decision of Hon'ble High Court of Gujarat judgment in the case of M/s.VKC Footsteps India Pvt.Ltd Vs UOI which allows refund of ITC availed on input services, requested to grant refund. It transpires from the impugned order that their contention was not found acceptable to the adjudicating authority. However, the reasons as to why the contention was not acceptable so as to reject the refund claim are not found recorded in the impugned order. In other words, the impugned order only indicates the adjudicating authority's final decision but does not contain reasons for arriving the decision As per above provisions of sub rule (3) of Rule 92 of CGST Rules, it is a mandatory requirement to record the reasons in writing for issuance of show cause notice as well as for passing Order rejecting the refund claim. In the Master Circular No.1053/02/2017 – CX dated 10th March, 2017 issued by the Central Board of Excise and

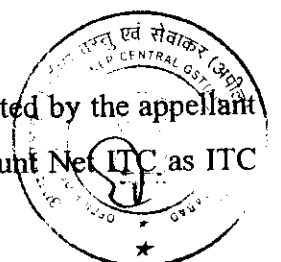
Customs, at Paragraph 14.5 it was laid down that *the adjudication order must be a speaking order. A speaking order is an order that speaks for itself. A good adjudication order is expected to stand the test of legality, fairness and reasons at higher appellate forums. Such order should contain all the details of the issue, clear findings and a reasoned order.*"

8. In view of above, I find that the impugned order passed by the adjudicating authority was not in accordance with guiding principles for issue of adjudication order. Therefore, I find strong force in the contention of the appellant made in this regard.

9. On the merit of the case, I find that in this case the main reason adopted for rejection of refund is inadmissibility of refund of ITC involved on input services. As per provisions of Section 54 (3) of CGST Act, 2017 read with Rule 89 (5) of CGST Rules, 2017, read with CBIC vide Circular No. 79/53/2018-GST and Circular No.125/44/2019-GST dated 18-11-2019 for the purpose of determining the admissible refund amount, ITC availed on input services and capital goods are kept out of the purview of the formula for arriving the Net ITC under Rule 89 (5) as amended vide Notification No.26/2018-CT dated 13-6-2018. Accordingly, the provisions of Section 54 (3) and Rule 89 (5) envisage determination of admissible refund taking into account ITC availed on inputs only and not to ITC availed on inputs services and capital goods.

10. With regard to the decision of Hon'ble High Court of Gujarat in the case of VKC Footsteps India P.ltd Vs UOI in SCA No.2792 of 2019 relied by the appellant, I find that in the said case the Hon'ble High Court of Gujarat held that the Explanation to Rule 89 (5) of CGST Rules, 2017 which denies unutilized input tax paid on input services as part of ITC accumulated on account of inverted tax structure as ultra vires the provisions of Section 54 (3) of CGST Act, 2017 and accordingly ordered the Department to allow the claim of refund filed by the petitioners considering the unutilized ITC of input services as part of 'net ITC' for the purpose of calculation of refund claim as per Section 54 of CGST Rules, 2017 read with Rule 89 (5) of CGST Rules, 2017. However, against the decision of Hon'ble High Court of Gujarat, Department has filed Civil Appeal No.4810 of 2021 before the Hon'ble Supreme Court of India. Hon'ble Supreme Court vide common Order dated 13-9-2021 allowed the appeal filed by the Department and set aside the judgment passed by the Hon'ble High Court of Gujarat. Thus, the vires of Rule 89 (5) of CGST Rules, 2017 vis a vis Section 54 (3) of CGST Act, 2017, its constitutional validity and legality were upheld by the Apex Court. Consequently, the Order of Hon'ble High Court of Gujarat, terming the explanation to Rule 89 (5) of CGST Rules, 2017 as ultravires Section 54 (3) of CGST 2017 has become void and inconsequential. Thus, as per decision of Hon'ble Apex Court the admissibility of refund under Section 54 (3) of CGST Act, 2017 read with Rule 89 (5) of CGST Rules, 2017 on account of ITC accumulated due to inverted duty structure is restricted to ITC availed on inputs only and not allowed to ITC availed on input services.

11. On scrutiny of details of ITC availed during the claim period, submitted by the appellant during appeal, I find that the appellant has claimed refund taking into account Net ITC as ITC



availed both on input and input services but the entire claim amount was held as inadmissible on the pretext that claim amount include ITC availed on input services. I find that rejection of entire claim on this ground itself is not a justifiable decision, inasmuch as the Section 54 (3) read with Rule 89 (5) of CGST Rules, 2017 allow refund of ITC availed on inputs. However, during the current proceedings, in adherence to decision of Hon'ble Supreme Court the appellant vide their letter dated 10-12-2021 re-worked the Net ITC to Rs.41,01,857/- and refund amount to Rs.11,00,400/- by excluding ITC availed on input services.

12. With regard to clarification on compliance of Notification No.49/2019-CT dated 9-10-2019 and Notification No.75/2019-CT dated 26-12-2019, I find that as per Notification No.49/2019 CT dated 9-10-2019 amendment has been made under Rule 21A, 36, 83A, 91, 97,117 and 142 of CGST Rules, 2017. The provisions governing refund is contained under Rule 89 to 97 of CGST Rules, 2017. Therefore, except amendment made to Rule 91 and 97 none of the amendment made under other Rules relate to refund matters. Regarding amendment made to Rule 91 and 97, I find that the above amendments relate to action on the part of Department officers in processing and sanctioning refund and do not call for any compliance from the appellant. However, an amendment was made to Rule 36 of CGST Rules, 2017 which restrict availment of ITC which have not been uploaded by the suppliers to the extent of 20% of eligible credit available in respect of ITC availed which are uploaded by the suppliers. Therefore in the subject case if such a situation exists the ITC for determination of refund is required to be taken as per above amendment. The appellant on their part submitted that they had availed total credit based on GSTR2A only and thereby complied with above Notification. Further, I find that vide Notification No.75/2019-CT dated 26-12-2019 amendment was made to Rule 36, Rule 86 and Rule 138E of CGST Rules, 2017 and none of it pertains to Rules governing refund claims. However, as per amendment made to Rule 86 the Commissioner or any authorized officer not below the rank of Assistant Commissioner was empowered to disallow ITC fraudulently availed or found eligible on situations specified therein. Presumably amendment made vide above Notification No.75/2019 relate to action on the part of the Departmental officer and does not need any compliance on the part of the appellant. However, in compliance to the query the appellant submitted that they had complied with above Notification.

13. Regarding contention made for non grant of personal hearing, I find that in the show cause notice itself the appellant was asked to appear for personal hearing on 29-10-2020 at 4.29 pm. Further, the adjudication proceedings provide for three adjournments as per request of the appellant. However it is not forthcoming from their submissions as to whether the appellant has attended the personal hearing on the schedule date or sought any further adjournments. Therefore, I do not intend to set aside the impugned order on this ground.

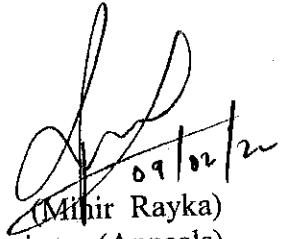
14. In view of above facts and discussions, since the appellant has revised their claim amount taking into account ITC availed on inputs, I hold that the appellant is entitled for refund of ITC accumulated on inputs, subject to the verification of ITC availed on inputs and determination of admissible refund in terms of Rule 89 (5) of CGST Rules, 2017. Needless to say, any claim for

refund made in consequence to this Order may be dealt with in accordance with provisions of CGST Act, 2017 and Rules framed there under and in accordance with instructions issued in the matter. Accordingly, I pass the following order :

- i. I allow the appeal and set aside the impugned order to the extent it pertains to rejection of refund taking into account ITC availed on inputs ;
- ii. I reject the appeal and upheld the impugned order to the extent it pertains to rejection of refund taking into account ITC availed on input services.

अपील कर्थाद्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।


15. The appeal filed by the appellant stands disposed of in above terms.


(Mihir Rayka)

Additional Commissioner (Appeals)

Date :

Attested


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



To,
Shri Mital Sanjaybhai Patel of M/s.Ratneshwari Textiles,
35/A, Chirag Industrial Estate,
B/s Revabhai Estate,
Bagefirdos, Amraiwadi,
Ahmedabad 380 026

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 Assistant Commissioner, CGST, Division I (Rakhial) Ahmedabad
- 5) The Additional Commissioner, Central Tax (Systems), Ahmedabad South
- 6) Guard File
- 7) PA file

