



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 380015

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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फाइल संख्या : File No : GAPPL/ADC/GSTP/482/2020-APPEAL / H235 To H240
अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-JC-60/2021-22**
दिनांक Date : **01-11-2021** जारी करने की तारीख Date of Issue : **10-11-2021**

श्री मिहिर रायका संयुक्त आयुक्त (अपील) द्वारा पारित

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

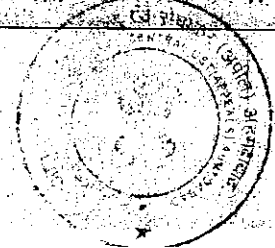
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Arising out of Order-in-Original No **ZP2409200411211** दिनांक 28-09-2020 issued by Assistant Commissioner, Division-IV, Narol, Ahmedabad South

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अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Dharmik Pravirbhai Jarecha Proprietor of M/s. Dharmik Print
237/1/6, Kadam Chemical, Maharajnu Khetar,
Suez Farm, Baherampura, Ahmedabad- 380022

(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) <u>Full amount of Tax, Interest, Fine, Fee and Penalty</u> 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 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

M/s.Dharmik Pravinbhai Jarecha, M/s.Dharmik Print, 237/1/6, Kadam Chemical, MaharajnuKhetar, Suex Farm, Baherampura, Ahmedabad (hereinafter referred as 'the appellant') has filed the present appeal on dated 28-10-2020 against Order No.ZP2409200411221 dated 28-9-2020 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Division IV, Narol, Ahmedabad (hereinafter referred to as 'the adjudicating authority').

2. The brief facts of the case are that the appellant are registered under GST Number 24AFWP1848N1ZR. The appellant has filed refund claim for Rs.16,00,930/- on account of ITC accumulated due to inverted tax structure. Out of the said claim amount the adjudicating authority vide impugned order has sanctioned refund of Rs.11,78,800/- and rejected the balance claim amount of Rs.4,22,130/- on the ground that the appellant has shown ITC accumulated due to input services under column Net ITC in RFD-01 and hence the amount of Rs.4,22,130/- is rejected.

3. Being aggrieved the appellant filed the present claim on dated 28-10-2020 on the following grounds :

The appellant is into processing of cloths where GST chargeable is at 5% and purchase conspires of 18% for chemicals. There are few input tax that consist of 5% slab where the folding of cloths is being outsources. As the assessee is allowed to take refund under inverted rated supply he has a right to claim all the unutilized input tax credit in the electronic ledger. Recently, Hon'ble Gujarat High Court has also given the same verdict in M/s.VKC Footsteps India P.ltd., Vs UOI and others on dated 24-7-2020. In view of above the appellant requested to give them the pending refund.

4. The appellant was given opportunity of Personal hearing on dated 14-10-2021, 21-10-2021 and 29-10-2021. However, on any of the dates either the appellant or their authority representative appeared for personal hearing. Therefore, it seems that the appellant do not wish to avail the opportunity of personal hearing. As per proviso to sub section 9 of Section 107 of CGST Act, 2017, no adjournment shall be granted more than three times to a party during hearing of the appeal. As I am not empowered to grant more than three adjournments, I proceed to decide the case on merits.

5. I have carefully gone through the facts of the case, grounds of appeal and documents available on record. I find that in this case, refund of Rs.4,22,130/- was rejected by the adjudicating authority as it pertains to refund of accumulated ITC on input services which has been taken into account for arriving Net ITC in RFD-01. The appellant's ground for granting the refund is on the basis of Hon'ble High Court of Gujarat's decision dated 24-7-2020 in the case of M/s.VKC Footsteps India P.ltd.

6. At the outset, before examining the merit of the cases on the basis of decision of Hon'ble Gujarat High Court's, supra, I go through the statutory provisions and instructions governing

admissibility of refund of ITC accumulated due to inverted tax structure contained under Section 54 (3) of CGST Act, 2017 read with Rule 89 (5) of CGST Rules, 2017.

Section 54 (3) of CGST Act, 2017:

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided that no refund of unutilized input tax credit shall be allowed in cases other than-

- (i) zero rated supplies made without payment of tax;
- (ii) 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 and services or both as may be notified by the Government on the recommendations of the Council.

Provided further that no refund of unutilized input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty.

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies."

Rule 89 (5) of CGST Rules, 2017

"(5). In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = $\{(\text{Turnover of inverted rated supply of goods and services}) \times \text{Net ITC} \div \text{Adjusted Total Turnover}\} - \text{tax payable on such inverted rated supply of goods and services.}$

Explanation:- For the purposes of this sub-rule, the expressions- (a) "Net ITC" shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules 4(A) or (4B) or both; and (b) "Adjusted Total turnover" shall have the same meaning as assigned to it in sub-rule (4).

7. On the subject issue, CBIC vide Circular No. 79/53/2018-GST Page 10 of 10 26/2018-Central Tax dated 13.06.2018 has clarified as under:

Section 54(3) of the CGST Act provides that refund of any unutilized ITC may be claimed 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). Further, section 2(59) of the CGST Act defines inputs as any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business. Thus, inputs do not include services or capital goods. Therefore, clearly, the intent of the law is not to allow refund of tax paid on input services or capital goods as part of refund of unutilized input tax credit. Accordingly, in order to align the CGST Rules with the CGST Act, notification No. 26/2018-Central Tax dated 13.06.2018 was issued wherein it was stated that the term Net ITC, as used in the formula for calculating the maximum refund amount under rule 89(5) of the CGST Rules, shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both. In view of the above, it is clarified that both the

law and the related rules clearly prevent the refund of tax paid on input services and capital goods as part of refund of input tax credit accumulated on account of inverted duty structure.

8. Further CBIC vide Circular No.125/44/2019-GST dated 18-11-2019 further given clarification as under :

53. Sub-section (3) of section 54 of the CGST Act provides that refund of any unutilized ITC may be claimed 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). Further, subsection (59) of section 2 of the CGST Act defines inputs as any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business. Thus, inputs do not include services or capital goods. Therefore, clearly, the intent of the law is not to allow refund of tax paid on input services or capital goods as part of refund of unutilized input tax credit. It is clarified that both the law and the related rules clearly prevent the refund of tax paid on input services and capital goods as part of refund of input tax credit accumulated on account of inverted tax structure.

9. In view of statutory provisions and Circulars, it is clear that refund of unutilized ITC is allowed for the situations falling under the proviso (i) or (ii) of sub section (3) of Section 54 of the CGST Act, 2017. In case of situation falling under proviso (ii) to said Section ie for inverted tax structure, the quantum of refund is to be determined in accordance with the formula prescribed under sub rule 89 (5) of CGST Rules, 2017. As per explanation given under Rule 89 (5) of CGST 2017, for determining the quantum of ITC eligible for refund, the amount of input tax credit availed only on inputs is to be taken in account for arriving 'Net ITC' in the formula prescribed for determining the eligible amount of refund. In other words, ITC availed on input services and capital goods are kept out of the purview of the formula for arriving the Net ITC. Accordingly, the provisions of Section 54 (3) and Rule 89 (5) envisage grant of refund of accumulated ITC availed on inputs only and not to accumulated ITC availed on inputs services and capital goods. The clarifications issued by the Board vide Circulars mentioned above also mandate the view that the intention of the Law is to allow refund of unutilized ITC availed on inputs only and not to allow refund of ITC availed on inputs services and capital goods.

10. In the subject case, it is clear that the portion of refund claim rejected by the adjudicating authority pertains to claim made in respect of ITC availed on input services. Since, statutory provisions and clarifications issued by the Board clearly restricts refund of ITC availed on input services, I do not find any infraction in the impugned order passed by the adjudicating authority rejecting the claim amount pertaining to ITC availed on input services.

11. 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 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. Thus order of Hon'ble High Court allows refund of credit availed on input services also.

13. However, I find that against the said 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 judgement passed by the Hon'ble High Court of Gujarat.

14. 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. Therefore, for the purpose of grant of refund of accumulated ITC under inverted duty structure the provisions contained under Section 54 (3) of CGST Act, 2017 read with Rule 89 (5) of CGST Rules, 2017, no longer call for any further interpretation and should be given full effect and followed. As earlier discussed, the adjudicating authority has allowed refund to the extent involved on ITC availed on inputs and rejected part amount of refund claim to the extent involved on ITC availed on input services. Since, the provisions of Rule 89 (5) of CGST Rules, 2017, in clear and unambiguous terms, takes into consideration ITC availed on inputs only for the purpose of arriving Net ITC in the formula prescribed for determining the eligible amount of refund I find that the Order passed by the adjudicating authority allowing refund of ITC availed on inputs and rejecting the ITC availed on input services is legally correct and in accordance with the provisions of CGST Act and Rules. Further, since the present appeals were filed mainly on the basis of Hon'ble Gujarat High Court's decision supra, which has now been set aside by Hon'ble Supreme Court, I find that the present appeal no longer sustainable on the basis of Hon'ble High Court's decision. Accordingly, I upheld the Order passed by the adjudicating authority and reject the appeal filed by the appellant.

अपील कर्था द्वारा 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)
Joint Commissioner (Appeals)

Date :
Attested

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



By RPAD

To,

Dharmik Pravinbhai Jarecha
Proprietor of M/s. Dharmik Print
237/1/6, Kadam Chemical, Maharajnu Khetar,
Suez Farm, Baherampura, Ahmedabad- 380022

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 Deputy/Astt. Commissioner, CGST, Division IV Narol, Ahmedabad South
- 5) The Additional Commissioner, Central Tax (Systems), Ahmedabad South
- 2-6) Guard File
- 7) PA file