



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, अम्बावाड़ी अहमदाबाद ३८००१५.  
 CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015  
 07926305065- टेलीफैक्स 07926305136



DIN-202206645W000000EBE4

रजिस्टर्ड डाक ए.डी. द्वारा

- क फाइल संख्या : File No : GAPPL/ADC/GSTP/1144/2021 -APPEAL / 2063 70 2068
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-ADC-61/2022-23**  
 दिनांक Date : **16-06-2022** जारी करने की तारीख Date of Issue : **16-06-2022**  
 श्री मिहिर रायका\_अपर आयुक्त (अपील) द्वारा पारित  
 Passed by Shri. Mihir Rayka, Additional Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **ZY2404210160116 DT. 13.04.2021**  
 issued by Deputy Commissioner, CGST, Division-VII (Satellite) Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
**M/s. Torrent Power Ltd Samanvay 600, Tapovan, Ambawadi, Ahmedabad-380015**

(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) <b>Full amount of Tax, Interest, Fine, Fee and Penalty</b> arising from the impugned order, as is admitted/accepted by the appellant, and (ii) A sum equal to <b>twenty five per cent</b> 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**

M/s.Torrent Power Ltd Samanvay 600, Tapovan, Ambawadi, Ahmedabad 380 015 (hereinafter referred to as the appellant) has filed the present appeal on dated 19-6-2021 against Order No.ZY2404210160116 dated 13-4-2021 (hereinafter referred to as the impugned order) passed by the Deputy Commissioner, CGST, Division VII (Satellite), Ahmedabad South (hereinafter referred to as the adjudicating authority).

2. Briefly stated the fact of the case is that the appellant registered under GSTIN 24AACCT0294J1ZC has filed refund application for refund of Rs.47,78,85,218/- under head 'assessment/provisional assessment/appeal/any other order' based on Hon'ble Gujarat High Court's Order No.C/SCA/5343/2018 dated 19-12-2019 in SCA no.5343 of 2018. The appellant was issued show cause notice No.ZS2403210307126 dated 22-3-2021 for rejection of refund on the ground that on going through refund application it is noticed that the reference numbers/proof of payment of pre-deposit made earlier for which refund is being claimed has not been seen and further the matter is sub judice with the Hon'be Supreme Court of India. The adjudicating authority vide impugned order held that refund is inadmissible to the appellant on the ground mentioned in the show cause notice.
3. Being aggrieved the appellant filed the present appeal on following grounds:
  - i. The impugned order is completely non-speaking and therefore in breach of principles of natural justice. SCN was issued to the appellant proposing to reject refund on the ground of non availability of working of refund claim and pendency of SLP before Hon'ble Supreme Court. The response given to the show cause notice have neither been recorded nor dealt with in the impugned order. The order is thus completely non-speaking and hence arbitrary and illegal.
  - ii. Hon'ble High Court has held in judgement dated 19-12-2018 that charges collected for activities ancillary to distribution of electricity such as application fees, meter rent, charges for shifting of lines etc are not taxable under the GST Acts and hence Sr.No.4 of Circular NO.1-3-2018 issued by the Board was held to be ultra vires the provisions of GST Acts. The appellant is therefore entitled to refund of tax and interest paid pursuance to such circular and hence rejection of refund is arbitrary, bad and illegal.
  - iii. Rejecting refund on the ground that proof of payment of tax was not submitted is completely contrary to facts on record. The appellant has duly submitted certificate of chartered accountant quantifying the amount of disputed tax and interest paid by them along with returns filed under GST Act. This was pointed out even in the reply to the show cause notice and the certificate of the chartered accountant was resubmitted. Thus, proof of payment of tax and interest was very much available on record of the adjudicating authority and rejection of refund claim on the ground that no proof of payment was given by them is bad and illegal.
  - iv. Rejection of refund on the ground of pending SLP before Hon'ble Supreme Court is bad and illegal. It is settled legal position by a catena of judgments that mere pendency of appeal before higher forum is not a ground for non execution of binding judgment/decision.



In the present case it is not in dispute that the judgment of Hon'ble High Court is not stayed by Hon'ble Supreme Court. In such circumstances refusal to follow the binding judgment of Hon'ble High Court on the mere pendency of SLP against such judgment is wholly without jurisdiction, arbitrary and illegal.

- v. In view of above submissions the appellant requested to quash and set aside the impugned order and sanction refund.

4. The appellant vide their letter dated 11-5-2022 further submitted considering that the Order pronounced by the Hon'ble High Court has been challenged by the Department before Hon'ble Supreme Court which is pending, they requested to keep the hearing of the current appeal in abeyance till the adjudication of the matter pending before the Hon'ble Supreme Court.

5. Personal hearing was held on dated 30-5-2022. Shri Biren Shah, authorized representative appeared on behalf of the appellant on virtual mode. He stated that they have nothing more to add to their written submission till date.

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 claim was filed for refund of tax collected and deposited by the appellant, under protest, on services ancillary to the distribution service as per para 4 (1) of CBIC Circular No. Circular No.34/8/2018-GST dated 1-3-2018. The claim was filed in consequence to Hon'ble Gujarat High Court Order wherein Hon'ble High Court of Gujarat vide its judgment dated 19-12-2018 held that services ancillary to distribution of electricity were exempt from tax under GST Act and also struck down para 4 (1) of Circular as being ultra vires the provisions of Section 8 of CGST Act as well as Notification No.12/2017-CT @ Sr.No.25. The adjudicating authority rejected the claim on two grounds: 1) Non submission of proof of payment of tax for which refund was claimed and 2) the matter is sub judice before Hon'ble Supreme Court. Regarding first ground, I find that under Rule 90 of CGST Rules, 2017 provision is made for rectifying deficiencies in refund application by way of issue of deficiency memo. Therefore, in the subject case, for non-submission of proof of payment of tax the proper course of action is by way of deficiency memo and not by way of show cause notice proposing rejection of refund. I further find that appellant in their grounds of appeal stated that they had already submitted certificate of Chartered Accountant quantifying the amount of disputed tax and interest along with returns filed under GST Act with their reply to show cause notice. I have gone through reply dated 3-4-2021 and find that in para 4.2.2 and 4.2.3 the appellant has stated that they had submitted CA Certificate along with refund application and also copy of GST returns incorporating monthly liability disclosed and paid by them in compliance to above requirement. As per Rule 92 of CGST Rules, 2017 it is mandatory and statutory requirement to consider the reply filed to the show cause notice and to pass well-reasoned order for rejection of refund claim. However, in the subject case despite submitting of reply to show cause notice and furnishing proof of payment, rejection was ordered for non-submission of proof of payment of tax. Hence, it transpires that neither the aforesaid documents furnished by the appellant were examined nor reasons for non-acceptance of above documents furnished in compliance to show cause notice was



recorded. Therefore, I find that rejection of refund on the ground of non-submission of proof of payment of pre-deposit (tax) without considering reply filed to show cause notice and without recording reasons for rejection is against the provisions of Rule 92 of CGST Rules, 2017 and hence not a justifiable and sustainable ground for rejection.

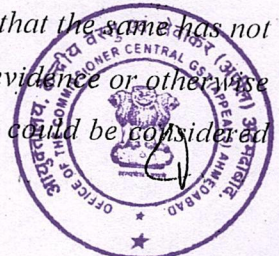
7. Regarding the second reason that matter is sub judice before Hon'ble Supreme Court, I find from Supreme Court website that against Hon'ble High Court of Gujarat's Order dated 19-12-2018 in SCA No.5343/2018 filed by the appellant, Government has filed SLP ( C ) No.019431 of 2019 (CA No.006278/2019 & Diary No.24733/2019) before Hon'ble Supreme Court. The SLP is presently pending for decision. It is also observed that no stay order was issued by Hon'ble Supreme Court against the order of Hon'ble High Court of Gujarat. The appellant in their grounds of appeal contended that the judgment of Hon'ble High Court is not stayed by Hon'ble Supreme Court and hence refusal to follow the judgment of Hon'ble High Court of Gujarat is wholly without jurisdiction, arbitrary and illegal.

8. In this regard, I refer to following Circulars/Instructions issued by CBIC providing guidelines for disposal of refund claims in such circumstances.

i) CBEC Circular No.572/9/2001-CX dated 22-2-2001- Subject: Central Excise & Customs - Disposal of refund/rebate claims where application is pending at appellate level - Instructions

- (1) Cases where it is considered advisable to contest an adverse High Court's Judgement, inter alia, involving substantial refund or release of any seized/confiscated goods by filing Special Leave Petition (SLP) including Stay Application, in the Hon'ble Supreme Court
- (2) Cases where Civil Appeal (CA) is proposed against adverse decision of the CEGAT involving high refund and or release of seized/confiscated goods
- (3) The cases where refund arises due to order of Commissioner (Appeal) or Commissioner of Central Excise/Customs and decision is taken to contest them before CEGAT.
- (4) Cases where refund arises due to order of a Central Excise Officer/Customs Officer subordinate to Commissioner of Central Excise/Customs and decision is taken to file appeal before Commissioner (Appeals)

In all types of cases mentioned above, processing of refund application should simultaneously start separately from the point of view of unjust enrichment provisions and accordingly the assessee/claimant should be asked to submit the evidence to establish his claim that incidence of duties whose refund is claimed has been borne by him and that the same has not been passed on to the buyer(s). Where the claimant is unable to furnish this evidence or otherwise is not entitled to refund, passing of appropriate orders on refund requested could be considered





by competent authority irrespective of the outcome of SLP/Civil Appeals/Stay Petitions pending before Supreme Court or other appeals etc. before lower appellate authorities.

- ii) Circular No.695/11/2003-CX dated 24-2-2003 – Subject Central Excise and Customs - Disposal of refund/rebate claims where Special Leave Petition/Civil Application along with stay application is pending at Supreme Court - regarding.

*I am directed to refer to clauses (1) and (2) of Board's Circular No.572/9/2001-CX dated 22.02.2001 which interalia provides that in cases where the Department has filed Special Leave Petition/Civil Application along with stay application against the adverse order of High Court/CEGAT as the case may be, no unilateral action should be taken by the Commissioners to release goods/order refund and decision in such cases where stay order is not forthcoming, should be taken only in consultation with the Board. In this connection, a number of references from field formations have been received.*

2. Board has examined the matter. It is observed that the above guidelines requiring consultation with Board in such cases dilute the legal position that the order of High Court/Tribunal should be implemented unless a stay has been obtained from the higher judicial forum on the implementation of the order. Further, consultation with Board in such cases may cause into delay in finalisation of the refund claims. Accordingly, Board has decided to permit jurisdictional Commissioners to take decision in such cases on merits at their level to grant refund or release goods without seeking permission/clearance from the Board. However, in the matters concerning Supreme Court, the jurisdictional Commissioners should continue to pursue with the Board for early disposal of stay application.

3. Board's Circular bearing No.572/9/2001-CX dated 22.02.2001 stands modified to the above extent.

- iii) Instruction issued from File No.201/01/2014-CX 6 dated 26-6-2014, Subject –Instructions regarding need to follow Judicial discipline in adjudication proceedings.

*Kind attention is invited to the order of Hon'ble High Court of Gujarat at Ahmedabad in case of M/sE.I. Dupont India Pvt Ltd (hereinafter referred to as M/s Dupont) in Special Civil Application no 14917 to 14921 of 2013 dated 25-10-2013 [2013-TIOL-1172-HC-AHM-CX]. M/s Dupont had filed appeal before the Hon'ble High Court against rejection of a refund claim on an issue which had earlier been decided by the Hon'ble High Court against the revenue, though in a matter relating to a different assessee. Thus, for deciding the refund, a binding precedent judgment existed*

2) However the binding precedent was not followed which led to litigation before the Hon'ble High Court to which Hon'ble High Court took a serious view. It may be noted that on the subject of consequential refund, where the department has gone in appeal, there already exists a circular no 695/11/2003 –CX dated 24-02-2003. This circular, of the Board is binding on all field officers. Had this circular been followed in the case, unnecessary litigation as well as adverse observation





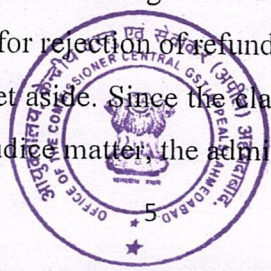
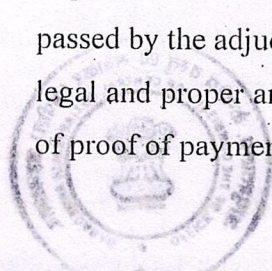
*of the Hon'ble High Court could have been avoided. This circular is once again brought to the notice of field officers with direction that it is followed scrupulously.*

9. I find that the above Circulars/instructions provide guidelines for handling of refund claims filed in consequence to Hon'ble High Court against which an appeal/application was filed by Department before Hon'ble Supreme Court, but no stay is in operation. Neither, above Circulars or CGST Act and Rules, provide for rejection of refund claim filed in consequent to Hon'ble High Court Order on the ground that Department has filed appeal/application before Hon'ble Supreme Court. Even otherwise it is a well settled principle of Law that no refund claim can be withheld on the ground that an appeal has been filed against the order giving the relief, unless stay order has been obtained and also that Hon'ble High Court's Order should be implemented unless stay has been obtained from higher appellant forum against the Order. Therefore, I find that rejection of refund claims merely on the ground that the matter is sub judice before Hon'ble Supreme Court is not a justifiable and tenable ground for rejection of refund claim.

10. During appeal proceedings the appellant vide letter dated 11-5-2022 further intimated that the Order pronounced by Hon'ble High Court has been challenged by the Department before Hon'ble Supreme Court and adjudication of the same is pending. Considering the same, the appellant requested to keep the hearing in current appeal in abeyance till adjudication of the matter pending before Hon'ble Supreme Court. In this regard I find that as per CBIC Letter File NO.162/73/95-CX dated 14-12-1995 read with Circular No.1053/2/2017-CX dated 10-3-2017 the following category of cases need to be transferred to call book.

- i) The cases in which the Department has gone in appeal to the appropriate authority.
- ii) The cases where injunction has been issued by Hon'ble, Supreme Court/High Court/CEGAT etc.
- iii) The cases where the Board has specifically ordered the same to be kept pending and to be entered into the call book and
- iv) The cases admitted by the Settlement Commission.

11. In view of above discussions, I hold that since the appellant has already submitted proof of payment of tax before the adjudicating authority, this ground is no longer sustainable ground for rejection of refund. Regarding the second ground that matter is sub judice before Hon'ble Supreme Court, I hold that in such instances, where there is no stay is in operation, the adjudicating authority should have kept the claim in abeyance or transferred to call book till final decision of Hon'ble Supreme Court rather rejecting the claim on this ground. Therefore, I hold that the impugned order passed by the adjudicating authority for rejection of refund on the ground mentioned therein is not legal and proper and deserve to be set aside. Since the claim was rejected due to non-submission of proof of payment of tax and sub judice matter, the admissibility of refund on merit, particularly

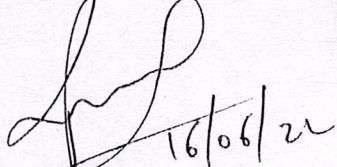




with respect to payment of tax and unjust enrichment is not examined in this proceeding. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

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

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

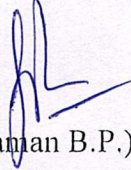
  
16/06/21  
(Mihir Rayka)

Additional Commissioner (Appeals)



Date :

Attested



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

To,

M/s.Torrent Power Ltd,  
Samanvay 600, Tapovan,  
Ambawadi, Ahmedabad 380 015

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 VII, Ahmedabad South
- 5) The Additional Commissioner, Central Tax (Systems), Ahmedabad South
- ✓ 6) Guard File
- 7) PA file

