



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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DIN- 20220764SW0000924149

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/1976/2021 -APPEAL / 2562 - 2567

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-ADC-76/2022-23**

दिनांक Date : **11-07-2022** जारी करने की तारीख Date of Issue : **12-07-2022**

श्री मिहिर रायका\_अपर आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No. **ZP2407210421875 DT. 30.07.2021**  
issued by Assistant Commissioner, CGST, Division VI(Vastrapur), Ahmedabad South

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

**M/s. M.S. Khurana Engineering Ltd, Near Kanshiram Rana Bhavan,**  
**II Floor, MSK House, Panjrapol, 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.M.S.Khurana Engineering Ltd, Near Kanshiram Rana Bhavan, II Floor, MSK House, Panjrapol, Ambawadi, Ahmedabad 380 015 (hereinafter referred to as the appellant) has filed the present appeal on dated 10-8-2021 against Order No.ZP2407210421875 dated 30-7-2021 (hereinafter referred to as the impugned order) passed by the Assistant Commissioner, CGST, Division VI (Vastrapur), Ahmedabad South (hereinafter referred to as the adjudicating authority).

2. Briefly stated fact of the case is that the appellant registered under GSTIN 24AABCM4514F1ZY has filed refund claim for Rs.2,74,615/- on account of assessment/provisional assessment/appeal/any other order. The claim amount pertains to pre deposit made by them in an appeal filed before Commissioner (Appeals) against OIO No.11/CGST/Ahmd-South/ADC/MA/2020 dated 17-9-2020 under Section 35F of Central Excise Act, 1944. The appellate authority vide OIA NO.AHM-EXCUS-001-APP-87/2020-2021 dated 28-4-2021 partially allowed the appeal in respect of service tax demand and interest thereon but upheld penalty on service tax under Section 78 of Finance Act, 1994. The appellant filed GST refund claim for Rs.2,74,615/- which was paid as pre-deposit while filing appeal before Commissioner (Appeals). The appellant was issued show cause notice in RFD 08 under reference number ZP2407210055786 DATED 5-7-2021 for rejection of refund on the following grounds:

*As per Para 5.5 of Circular No.984/08/2014-CX dated 16-9-20214, in case of partial remand whereas portion of duty is confirmed, it may be ensured that the duty due to the Government on the order in favour of revenue is collected by adjusting the deposited amount. Please clarify the same.*

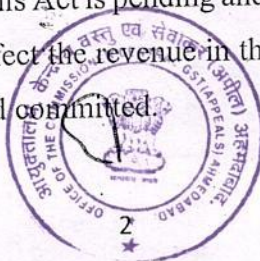
The adjudicating authority vide impugned order held that the refund is inadmissible to the appellant on the ground that reply to the SCN is not maintainable and also the appellant has not attended personal hearing.

3. Being aggrieved the appellant filed the present appeal on the following grounds:
- i. The demand order is not sustainable.
  - ii. When OIA has dropped the demand of service tax but upheld the demand of penalties on the agreed demand of service tax has been paid by the appellant with interest prior to SCN which has been appeal by the appellant, so as such no pending demand. While filing an appeal on payment of 10% penalty demand amount it has been stayed under Section 35F of Excise Act read with Section 140 of GST Act. So the refund of pre deposit has been allowable, rejection of the same on the assumption of liabilities has not been sustainable.
  - iii. For the set off of the refund amount against demand, it has to be confirmed demand and no appeal has been filed by the appeal.
  - iv. The appellant relied upon decision of Hon'ble Tribunal, Chennai in the case of M/s.Tamilnadu Electricity Board Vs CCE, Trichy (2008 227) ELT 170 (Tr.Chennai).



decision of Hon'ble MP High Court in the case of M/s.National Steel Industries ltd Vs UOI (2001 (134) let 616 (MP) ; decision of Hon'ble Madras High Court in the case of M/s.J Arunachala Gounder Textile Mills Pvt.Ltd Vs CCE, Salem (2013 (290) ELT 499 (Mad) ; decision of Hon'ble Tribunal, Mumbai in the case of M/s.Mars International Vs CCE Pune III (2016 (335) ELT 155 (Tri.Mumbai) and decision of Hon'ble High Court Karnataka in the case of CCE Banglore III Vs Stella Rubber Works (Unit NO.II) (2012 (275) ELT 404 (Kar).

- v. As per GST provision, if officer wants to set off the refund against the demand, then he has to follow the following procedure.
- vi. The proper officer before passing of refund sanction order has to confirm outstanding demand payable from applicant, under this Act or existing laws. It is provided in Section 54 (10) of the Act that if there is outstanding tax, interest and penalty under this Act or existing Laws payable from dealer to the Government, and no stay order has been issued by the respective authority, then in such cases, proper officer has power to adjust refund to such outstanding dues since available for recovery. Therefore, proper officer must confirm, whether such dues are unpaid and not stayed by the appellat authority or Tribunal or Court. He must give opportunity to the taxpayer to prove that dues are stayed or paid before sanction of refund, by producing relevant documents and challans. Thus, if it is seen that stay has been granted to the outstanding dues then refund should not be adjusted to the dues, otherwise it would result into double payment of dues.
- vii. As per Rule 92 (1), refund order has to be passed in Form GST RFD -06. Provision has been made in this Form for adjustment of refund. While passing this Order, an amount of provisional refund and amount of inadmissible refund required to be deducted from refundable amount. Thereafter after adjusting the refund to the outstanding demands under this Act or existing Laws which are available for recovery, proper officer has to determine net amount refundable and pass such refund sanction order in Form GST RFD -06.
- viii. If even after adjustment of refund, an amount of refund is due to person, then order is passed in Form GST RFD -06. However, if refundable amount is less than the outstanding demand, then in such cases for complete adjustment of refund order has to be passed in Form GST RFD 07. Thus after full adjustment of refund balance refundable amount would be NIL.
- ix. As per provision of Section 54 (10) (a) of the Act, where applicant has defaulted in furnishing of returns under this Act for any tax period, the proper officer has the power to withhold refund until furnishing of such returns. After filing of returns and payment of dues as per returns, refund would be granted.
- x. As per Section 54 (11) of the CGST Act, 2017 the Commissioner has power to withhold refund due as per any order, if the following ingredients are satisfied a) such Order is subject matter of an appeal or b) further proceeding in respect of such order is pending and c) any other proceeding under this Act is pending and Commissioner is of opinion that such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed.

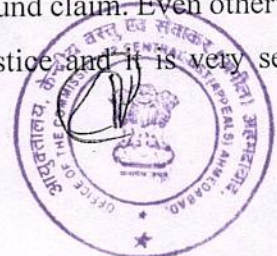


- xi. In view of above on satisfaction of above ingredients if the Commissioner is of opinion that grant of refund is likely to adversely affect the revenue, then he may withhold the refund by passing order under Section 54 (11) in Form GST RFD 07 after giving opportunity of being heard.
- xii. So, this process has not been followed by the proper officer and hence the act of rejection of refund claim is required to be set aside.
- xiii. The appellant relied upon the decision of Hon'ble Punjab and Haryana High Court in the case of M/s.Ratil Woollen Mills Vs State of Punjab and Others and decision of Hon'ble Andhra Pradesh High Court in the case of M/s.Sarvaraya Textile Mills Ltd Vs CTO.

4. Personal hearing was held on dated 1-6-2022. Shri Vipul Khandar authorized representative appeared on behalf of the appellant on virtual mode. He has asked for time to submit additional submission for which seven working days are granted. Accordingly, the appellant made additional submissions wherein they reiterated the submission made in their grounds of appeal. The appellant also submitted copy of appeal filed against the OIA No. AHM-EXCUS-001-APP-87/2020-2021 dated 28-4-2021 before Hon'ble CESTAT, Ahmedabad.

5. 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 made for refund of pre deposit paid while filing appeal before Commissioner (Appeals), Ahmedabad against OIO No. 11/CGST/Ahmd-South/ADC/MA/2020 dated 17-9-2020 in Form GST RFD 01 under Section 54 of CGST Act, 2017. Apparently pre deposit was made in terms of Section 35 F of Central Excise Act, 1944. As per Section 142 (3) of CGST Act, 2017, *Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944.* Therefore, prima facie I am of the view that present claim does not fall under the purview of Section 54 of CGST Act, 2017 and need to be filed and processed under erstwhile Central Excise Act, 1944.

6. I further find that claim was rejected on the ground that reply to the SCN is not maintainable and also on the ground of non-attendance of appellant during personal hearing. As per sub rule (3) of Rule 92 of CGST Rules, it is statutory requirement to issue show cause notice; consider the reply filed by the claimant; provide opportunity of personal hearing and record the reasons in writing for rejection of refund claim. In this case the appellant has filed reply to the show cause notice. However neither any findings was recorded in the impugned order on reply filed by the appellant nor reasons for non-acceptance of reply was recorded in the impugned order. Regarding personal hearing, I find that personal hearing was fixed on 12-7-2021. It is seen from the impugned order that the appellant has not attended personal hearing on the said date. As per proviso to Rule 92 (3) it is a statutory requirement to provide opportunity of being heard before rejection of refund claim. Even otherwise, opportunity of personal hearing is one of the principles of natural justice and it is very settled



principle of Law that no adverse order should be passed in judicial/quasi-judicial proceedings without providing opportunity of being heard. Therefore, conduct of personal hearing is invariably required before passing order of rejection of refund. In the subject case, it transpires that though personal hearing was fixed on 12-7-2021 no further opportunity of personal hearing was granted to the appellant before rejection of refund claim. Therefore, I have reason to believe that in this case personal hearing was not held before passing order of rejection. In view of above, the impugned order passed by the adjudicating authority without recording reasons for rejection and without providing opportunity of personal hearing, I find is bad in Law and hence not legally sustainable and tenable on this reason.

7. I find that claim was proposed for rejection in terms of para 5.5 of CBIC Circular No.984/8/2014-CX dated 16-9-2014. I have gone through the above Circular and find that at para 5 guidelines were issued for grant of refund of pre-deposit as under :

*5. Refund of pre-deposit:*

*5.1 Where the appeal is decided in favour of the party / assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944 or Section 129EE of the Customs Act, 1962.*

*5.2 Pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962. Therefore, in all cases where the appellate authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.*

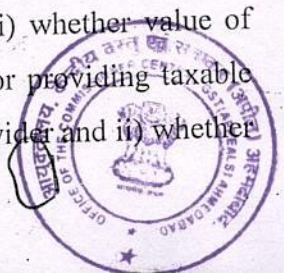
*5.3 If the Department contemplates appeal against the order of the Commissioner (A) or the order of CESTAT, which is in favour of the appellant, refund along with interest would still be payable unless such order is stayed by a competent Appellate Authority.*

*5.4 In the event of a remand, refund of the pre-deposit shall be payable along with interest.*

*5.5 In case of partial remand where a portion of the duty is confirmed, it may be ensured that the duty due to the Government on the portion of order in favour of the revenue is collected by adjusting the deposited amount along with interest.*

*5.6. It is reiterated that refund of pre-deposit made should not be withheld on the ground that Department is proposing to file an appeal or has filed an appeal against the order granting relief to the party. Jurisdictional Commissioner should ensure that refund of deposit made for hearing the appeal should be paid within the stipulated time of 15 days as per para 5.2 supra.*

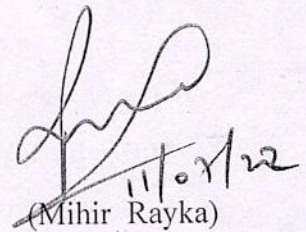
8. I find that para 5.5 of above Circular envisage to adjust pre-deposit in case of partial remand where a portion of duty is confirmed in favor of revenue. I have gone through the OIA passed by the Commissioner (Appeals). I find that the said OIA involve two issues i) whether value of materials supplies free of cost by service recipient and used by appellant for providing taxable service is to be included in gross amount for valuation of taxable service provided and ii) whether



penalty imposed under Section 76 and 78 of Finance Act, 1994 on service tax paid by the appellant which escaped assessment is sustainable or otherwise. On the first issue the appellate authority ruled in favor of the appellant but upheld penalty imposed under Section 78 of Finance Act, 1994 on service tax which escaped assessment and already paid by the appellant. Consequent to said OIA, the appellant claimed refund of pre deposit of Rs.2,74,615/- made by them and also filed appeal before Hon'ble CEASTAT challenging imposition of penalty. Hon'ble CESTAT, Ahmedabad vide Final Order No.A/10769/2022 dated 30-6-2022 has set aside the penalty imposed under Section 78 and allowed the appeal filed by the appellant with consequential benefit. In this case, except penalty, no other amount is due for recovery from the appellant. Since the penalty has also been set aside by Hon'ble CESTAT, at this stage of proceedings no amount is due for recovery from the appellant. Therefore, in terms of Para 5 of CBIC Circular No.984/8/2014-CX dated 16-9-2014, I hold that the appellant is entitled for refund of pre deposit made by them. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

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


9. 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,

M/s.M.S.Khurana Engineering Ltd,  
Near Kanshiram Rana Bhavan, II Floor,  
MSK House, Panjrapol, 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 Deputy Commissioner, CGST, Division VI (Vastrapur) Ahmedabad South
- 5) The Additional Commissioner, Central Tax (Systems), Ahmedabad South
- ✓ 6) Guard File
- 7) PA file

