::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील फाइल संख्या / Appeal File No.		मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/2/EA2/RAJ/2017	5145 to 5145 18.00 P.M	153/ST/REF/2016	17.11.2016

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-085 -2017-18

आदेश का दिनांक / Date of Order: **29.09.2017** जारी करने की तारीख / Date of issue: **04.10.2017**

कुमार सतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ अपीलकर्ता **&** **प्रतिवादी** का नाम एवं पता /Name&Address of the Appellant **&** **Respondent** :-
M/s. The Executive Engineer, Central Public Works Department, Rajkot Central Division,Kothi Compound,Rajkot

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से 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.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित प्रपत्र की जा सकती है :/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए :/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावी अहमदाबाद- 380016 को की जानी चाहिए :/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above.

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 की चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां डयूटी शुल्क की मांग ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान संबंधित अपीलीय न्यायाधिकरण की शाखा के स्थायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा :/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित फार्म S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में अवश्य करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा :/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अन्तर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित रूपए S.T. 7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियों संलग्न करें (जिसे से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को अपील दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST 7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35एफ के अन्तर्गत, जो कि वित्तीय अधिनियम, 1994 की धारा 83 के अन्तर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्कांशेष कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अन्तर्गत जमा किए जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अन्तर्गत 'मांग किए गए शुल्क' में निम्न शामिल है

(i) धारा 11 डी के अन्तर्गत रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अन्तर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

Under Central Excise and Service Tax, "Duty Demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अन्तर्गत वित्त सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, वित्तीय विभाग, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid.

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर दी गई माल के विनिर्माण में प्रयुक्त कच्चे माल पर अदा की गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटती क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2) 1998 की धारा 109 के द्वारा निर्धार की गई तारीख अथवा तत्पश्चात या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अन्तर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अन्दर दायर की जानी चाहिए। उपरोक्त आवेदनों के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule. 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम है तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा है तो रुपये 1000 /- का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की विभिन्न पक्षों ने अपने से अपने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है । /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 के अनुसूची I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और संशोधित प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाईट www.cbec.gov.in को देख सकते है । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

::ORDER IN APPEAL ::

The Principal Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the appellant") has filed the present appeal against Order-in-Original No. 153/ST/REF/2016 dated 17.11.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Service Tax Division, Rajkot (hereinafter referred to as "the lower adjudicating authority") in the case of The Executive Engineer, Central Public Works Department, Central Division, Kothi Compound, Rajkot (hereinafter referred to as "the respondent").

2. The facts of the case are that the respondent had filed refund claim of Rs. 6,36,287/- under Section 11B of the Central Excise Act, 1944 (made applicable to service tax matter under Section 83 of the Finance Act, 1994) read with Notification No. 9/2016-ST dated 01.03.2016 and Section 102 of the Finance Act, 1994 for service tax reimbursed by them to their contractor M/s. Nirmal Construction Co., Rajkot (hereinafter referred to as "the service provider") for the services of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of civil structures or residential complex, etc. provided to the Government authority by the service provider during the period from 01.04.2015 to 29.02.2016. The respondent had claimed refund on 23.08.2016 along with the relevant documents including disclaimer letter issued by the service provider and the said refund claim was been sanctioned by the lower adjudicating authority vide the impugned order.

3. Being aggrieved with the impugned order, the appellant filed appeal, *interalia*, on the grounds that the lower adjudicating authority had not correctly observed provisions of Section 102 of the Act which provides special retrospective exemption in certain cases relating to the services provided to the Government, Local authority or a Government authority by way of construction, repair, maintenance etc. The plain reading of Section 102 of the Act establishes that as per Section 102(2) of the Act, if any assesse has already paid service tax in respect of above services provided during the period from 01.04.2015 to 29.02.2016, then it shall be entitled to refund of service tax paid on the said services in accordance with law subject to the satisfaction of unjust enrichment. The prime object to insert this section was of granting retrospective exemption and to grant refund thereof so arising out of them. Therefore, consequential refund, if any arises, can be granted only under Section 102 of the Act and not under Section 11B of the Central Excise Act, 1944 made applicable to service tax matters or Notification No. 9/2016-ST or any other Notification. Upon reading Section 102(1) and Section 102(2) of the Act, it is noticed that the exemption is granted for to levy and collection of service tax and, for the consequent refund, it specifies that refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all the material time. Therefore, the person who has charged and collected service tax under Section 66B of the Act is the person eligible for refund.

The said provisions of refund to examine other provisions of law as well as principle of unjust enrichment which relates to sanction of the refund of service tax paid to the Government exchequer. The other provisions pertaining to cenvat credit so availed by the service provider on inputs/input services for providing exempted services and provisions of Rule 6 of the Cenvat Credit Rules, 2004 as well as the provisions of unjust enrichment. The motto behind the law makers to protect the Government revenue and to restrict the assesse for wrong availment of double benefits i.e one of obtaining refund and other is availment of cenvat credit for providing exempted services, which can only be possible when the assesse who has actually paid service tax to Government exchequer come forward and present the refund claim justifying their refund entitlement and ask for refund fulfilling the conditions as stipulated for and if his claim is lawful, the department grants the same to the person who has actually paid service tax. The findings of the lower adjudicating authority that provisions of Section 11B of the Central Excise Act, 1944 is applicable in the instant case is not correct since new Section 102 has been inserted specifically for granting the retrospective effect as well as consequential benefit.

3.1 It has also been contended that the law has equally imposed obligation upon service provider to charge and collect service tax from the recipient and to pay the same to the Government exchequer and if service providers fails to pay service tax for the services provided by him, the department asks the service provider to pay the same and the service provider only faces the consequences of interest and penalty and not the service recipient and in such situation, it becomes immaterial as to whether service provider has actually charged and collected service tax from service recipient or otherwise. The revenue can only be protected and checks framed under the Act and Rules can be examined only if the person who has actually paid service tax be allowed to claim refund of service tax so paid. Therefore, the person who can seek refund of service tax must be the person who is actually holding the status of the assesse who made payment of service tax to the Government exchequer.

3.2 Section 102 of the Act begins with non-obstante clause "Notwithstanding anything....", which gives overriding effect over any other provisions contained in Chapter V of the Act which make the said provision independent of any other provisions, even if it contains contrary. Thus, the subject refund claim can be decided only under Section 102 of the Act and not under Section 11B of the Central Excise Act, 1944. The Section 11B of the Central Excise Act, 1944 authorizes any person to apply for refund but the fact remains that the applicant has to furnish evidence of payment of excise duty in respect of which refund is claimed which restricts the scope of the term 'any person' used in the provision.

3.3 The person who claims for refund of the tax, the same should have been shown/recorded as "Tax receivable", failing to which mean that tax has become part of cost and therefore, indirectly the incidence of tax has been passed on. In present case, no such aspect was appearing to be verified.

3.4 It also reflects from the verification of ST-3 returns of the service provider that during the FY 2015-16 they had provided taxable services as well as exempted services. It seems that quantification of refund amount has also not been done properly by the lower adjudicating authority. The scrutiny of Audited Financial Statement of FY 2015-16 of the service provider, it appears that at Schedule B-10, the said service provider has shown an amount of Rs. 6,26,856/- as service tax advance under the heading "current assets" which tend to mean that the said amount is receivable either from the department or from the service recipient. Whereas, plain scrutiny of ST-3 returns for the said period seems that the said service provider has paid only an amount of Rs. 9,51,437/- during the FY 2015-16 and no cenvat credit is lying in balance as on 31.03.2016. Out of total payment of Rs. 9,51,437/-, Rs. 6,36,287/- has been claimed by service recipient as refund of service tax stating that they had paid the same to the service provider. Thus, it is not clarified how an amount of Rs. 6,26,856/- has been certified as service tax advance in the Books of Accounts of the service provider and what it stands for.

4. The respondent filed Memorandum of Cross Objections on 12.01.2017 on the following grounds: -

(i) The appellant is not clear whether the impugned order is legal or not. The grounds of appeal raised by the department are erroneous and devoid of merits. The impugned order passed by the lower adjudicating authority sanctioning refund of Rs. 6,36,287/- is just, legal and proper which has been issued after careful consideration of material facts, factual circumstances, documentary evidences, relevant Notifications and Circulars along with concept of unjust enrichment. Contrary to these, the grounds of appeal are absolutely baseless, imaginary and contrary to the directions issued by CBEC.

(ii) The department's contention that consequent refund, if any arises due to retrospective exemption granted under Section 102 of the Act, can be granted only under the said Section and not under Section 11B of the Central Excise Act, 1944 and that the service provider is only eligible to claim for refund under the said provisions, which is based purely on mis-reading of relevant provisions and in contrast to lawful and well settled principles of refund. There is no doubt and dispute that the provisions for refund is governed by Section 11B of the Central Excise Act, 1944 made applicable to service tax by virtue of Section 83 of the Act. The department had confused itself by concluding that in this particular case, the refund is governed by Section 102 of the Act and not Section 11B of the Central Excise Act, 1944. The respondent submitted that Section 102 was inserted solely for the

purpose of restoration of withdrawals of certain exemptions. The respondent relied on letter dated 29.03.2016 issued by the Tax Research Unit and submitted that exemption from payment of service tax on services mentioned therein was withdrawn w.e.f. 01.04.2015 and the same were being restored till 31.03.2020. It cannot be inferred that Section 102 has been introduced for refund of service tax paid between 01.04.2015 to 29.02.2016. When the exemption was granted retrospectively i.e. from 01.04.2015, the natural corollary was to pay back the amount of service tax paid between 01.04.2015 and 29.02.2016 else, the very purpose of granting retrospective exemption will be defeated. Section 102(2) of the Act is an enabling provision for this particular and specific refund of service tax paid during the referred period but it does not mean that the provisions for refund of such service tax will not be governed by Section 11B of the Central Excise Act, 1944. As mentioned in Section 11B of the Central Excise Act, 1944, any person can claim refund and the situations under which different persons can file refund is detailed in the first proviso to Section 11B. As per clause (e) of the proviso (e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person. In the present context, buyer means the receiver of service, which is the respondent. Accordingly, there cannot be any doubt that the person who had actually borne the burden of service tax can file a refund. The respondent relied on following case laws.

- Chambal Fertilizers & Chemicals Ltd. – 2016-TIOL-1136-CESTAT-DEL
- Oswal Chemicals & Fertilizers Ltd. – 2015-TIOL-65-SC-CX
- Indian Farmers Fertilisers Co-op Ltd. – 2016 (331) ELT 386 (All.)
- McNally Bharat Engineering Co. Ltd. – 2006 (194) ELT 318 (Tri. – Bang.)

(iii) It is very strange that for the purpose of denial of refund, it is being presented that this refund is not under Section 11B of the Central Excise Act, 1944 but while framing grounds for appeal viz. doctrine of unjust enrichment, documentary evidences and other provisions which are part of Section 11B are being discussed. If the department is of the view that Section 11B is not applicable, it would not be applicable for all purposes and not for selective purpose of denying the refund. In fact, the department is fully convinced that refund is to be granted under Section 11B and for that reason only the provisions and procedure laid down in Section 11B has been mentioned in the appeal, but for the purpose of denying the refund, it is being twisted to show that this refund is out of provisions of Section 11B. There is no mention in Section 102 of the Act that process of refund will be independent of Section 11B. Had this been the fact, a separate set of procedures must have been set out in this particular section only, there must be mentioned of format of application under which refund under Section 102 would be sanctioned. There is nothing as such and the entire process required to be followed under Section 11B has been followed.

(iv) There is no specific mention in Section 102 of the Act as to who can file refund and for that Section 11B of the Central Excise Act, 1944 is to be referred to and in Section 102(2) the appellant had tried to disentitle it from refund only on the basis of presence of word 'collected'. While framing a statute, especially when it is being inserted for granting refunds the intention is always to enable and not to disable a person from claiming refund. In that particular Section, to enable the refund, it is mentioned that – *"Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) has been in force at all the material times"* and the word *'collected'* is for service tax which has been collected which was not required to be collected. The word collected is for amount of service tax collected, as the amount, which is collected is only to be refund, but this does not mean that refund will be granted to the person who had collected it. If such interpretation is being done, it will defeat the very purpose of the insertion of the new section. In the famous Heydon's case it was held that *"....to arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act to consider what was law before the Act was passed, what was mischief and defect for which the law had not provided, what remedy Parliament has resolved and appointed to cure the disease and the true reason of the remedy and then the judges have to make such construction as shall suppress, the mischief, and advance the remedy, and to suppress suitable inventions and evasions for continuance of the mischief."*

(v) The appellant had gone on record to represent such facts and provisions which are not part of the statute. In Section 102 of the Act, it is mentioned that *"Notwithstanding anything contained in section 66B...."*. So Section 102 has been given over-riding effect over Section 66B, which is charging Section for service tax, but to deny the refund, it is mentioned that this non-obstante clause gives over-riding effect over any other provisions contained in Chapter V of the Act and this non-obstante clause make above provision independent of any other provisions, even if contains contrary. It is submitted that this is a glaring example of how the matter has been twisted. When it is written – Notwithstanding anything contained in Section 66B, it can never be Notwithstanding anything contained in Chapter V of the Act. Chapter V of the Act contains all provisions relating to service tax and how a particular Section i.e. Section 102 can override all the provisions of the Act under which the particular section has been framed.

(vi) It is submitted that they are not Private Limited or Limited Company, where Balance Sheet is prepared, but a fully Government department. In Government department, the consolidated statement of Income & Expenditure is prepared. The respondent is not a profit making body where 'profit & loss account' is prepared. What is being paid or borne by it shown as 'expenditure' and when received it is shown as 'income'. As such it is impractical to look for 'tax receivable' under heading 'current assets'. The lower adjudicating authority has satisfied himself

regarding passing on the burden of tax and he has observed that bar of unjust enrichment is not applicable in the present case, as the burden has not been passed to any other person. The department has not cited any provision under which above requirement is being thrown on the respondent.

(vii) The department has also contended that the service provider has paid Rs. 9,51,437/- during FY 2015-16 out of which Rs. 6,36,287/- claimed for refund. It is submitted that if there is any doubt regarding accounting entries of the service provider, it could have been verified before filing the appeal. Further, for the purpose of sanctioning of refund, documents and accounts of the claimant is of relevance and not of any other person. Appeal cannot be filed merely on suspicion and for sanction of refund, it was examined that service tax of Rs. 6,36,287/- paid by the respondent.

5. Personal hearing in the matter was attended to by Shri Jitendra Sharma, Executive Engineer who reiterated submissions made by them in their Memorandum of Cross Objections. He also submitted that they being Government of India Department do not maintain and prepare Balance Sheet; that they are also not required to maintain Balance Sheet every year or any year; that they undertake construction work of departments/organizations of Government of India only and do not undertake any work of any private sector; that they have borne the incidence of service tax paid to the contractor and have not recovered it from any other person/organization; that they paid service tax to the contractor, who deposited this service tax to Government of India account, under wrong impression that service tax is payable even in Government work; that when they come to know about the exemption Notification issued by the Government of India, Department of Revenue, they filed refund claim with undertaking that the contractor has neither claimed this service tax refund nor will claim in future; that they as well as the contractor, namely, M/s. Nirmal Construction Co. have given the above facts of narration in affidavit as because the said facts are true/factually correct; that appeal filed by the department deserves to be rejected

Findings:

6. I have carefully gone through the facts of the case, impugned order, grounds of appeals, Memorandum of Cross objections filed by the respondent and the submissions made by the respondent. The Department has not submitted any comments on the grounds raised by the respondent in their Memorandum of Cross objections and neither appeared for the personal hearing nor requested for adjournment. I, therefore, proceed to decide the case on merit.

7. I find that the issue to be decided in the present appeal is whether the impugned order passed by the lower adjudicating authority sanctioning the refund claim filed by the respondent under Section 102 of the Finance Act, 1994 is correct, legal & proper or not.

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8. I find that the respondent is a Central Government department engaged in execution of various projects of the Government of India through contractors by open tendering process. They have received the services of construction of civil structures and repair & renovation services provided by the contractor, namely, M/s. Nirmal Construction Co., Rajkot, during FY 2015-16, who charged and collected service tax from the respondent at the applicable rate. Consequently, the Central Government provided retrospective exemption from levy and collection of service tax for the services provided to the Government, a local authority or a Government authority for the specified services under Section 102 of the Act inserted vide Section 159 of the Finance Act, 2016 and the respondent filed refund claim which was sanctioned by the lower adjudicating authority after examining the claim and satisfying himself about the correctness of the claim. For ready reference, I would like to reproduce Section 102 of the Finance Act, 1994 (inserted by the Finance Act, 2016), which is as under: -

> *SECTION 102. Special provision for exemption in certain cases relating to construction of Government buildings. —*
>
> *(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of —*
>
> *(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;*
>
> *(b) a structure meant predominantly for use as —*
>
> *(i) an educational establishment;*
>
> *(ii) a clinical establishment; or*
>
> *(iii) an art or cultural establishment;*
>
> *(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act,*
>
> *under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.*
>
> *(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all the material times.*
>
> *(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President.*
>
> *(Emphasis supplied)*

8.1 The department has contended that consequential refund, if any arises, can be granted only under Section 102 of the Act and not under Section 11B of the Central Excise Act, 1944 made applicable to service tax matters or Notification No. 9/2016-ST or any other Notification and that the person who has charged and

collected service tax under Section 66B of the Act is the person eligible for refund and no one else. I find that the contentions raised by the department are not correct as Section 102 of the Act did not prescribe the manner of presentation of refund claim and also did not provide anywhere in the said Section that only the person who has charged and collected service tax under Section 66B of the Act is eligible for refund of service tax. It is settled position of law that the refund of Central Excise duty should be governed under the provisions of Section 11B of the Central Excise Act, 1944. The provisions of Section 11B of the Central Excise Act, 1944 have been made applicable to service tax by virtue of Section 83 of the Act. Therefore, each and every refund claim of service tax should be governed by Section 11B of the Central Excise Act, 1944. I also find that Section 102 grants retrospective exemption to the specified services provided to the Government or local authority or Government authority and restored the exemption which was withdrawn vide Notification No. 6/2015-ST dated 01.03.2015. It is also a fact that the services provided during the period when they were taxable, the service provider has charged and collected service tax from the service recipient i.e. respondent and deposited into the Government account. Section 102(2) provides refund of service tax paid from 01.04.2015 to 29.02.2016 and in this case, the respondent as service recipient has borne the burden of service tax and cannot be deprived of substantial benefit provided by the Government with retrospective effect. Therefore, the arguments of the department that consequential refund arising out of insertion of Section 102 of the Act can be granted only under Section 102 of the Act and not under Section 11B of the Central Excise Act, 1944 and person who has paid service tax to the Government exchequer is only the person eligible to claim refund, is highly illogical and cannot be allowed to sustain.

8.2 The department has also contended that Section 102 of the Act begins with non-obstante clause "Notwithstanding anything....", which gives overriding effect over any other provisions contained in Chapter V of the Act and this makes the said provision independent of any other provisions, and therefore, the subject refund claim should have been decided only under Section 102 of the Act and not under Section 11B of the Central Excise Act, 1944; that Section 11B of the Central Excise Act, 1944 authorizes any person to apply for refund but the fact remains that the applicant has to furnish evidence of payment of excise duty in respect of which refund is claimed which restricts the scope of the term 'any person' used in the provision. The respondent vehemently countered this argument of the department by saying that "Notwithstanding anything contained in Section 66B" has been provided in Section 102(1) of the Finance Act, 1994 which can never be "Notwithstanding anything contained in Chapter V of the Act" and that Chapter V of the Act contains all provisions relating to service tax and they submitted that how a particular Section i.e. Section 102 can override all the provisions of the Act under which the particular section has been framed. I find that Section 102(1) provides non-obstante clause *"Notwithstanding anything contained in Section 66B..."* , which means even if these

services are taxable under Section 66B but the specified services provided to the Government or to a local authority or to a Government authority during the period from 01.04.2015 to 29.02.2016 have been retrospectively exempted. Thus, the said non-obstante clause in Section 102(1) of the Act has over-riding effect over Section 66B of the Act but does not have over-riding effect over entire Chapter V of the Finance Act, 1994. It is now well settled position of law that in a taxing statute there is no scope of any intendment and the same has to be construed in terms of the language employed in the statute and that regard must be had to the clear meaning of the words and that the matter should be governed entirely by the language of the rules and the notification. Therefore, such arguments of the department have no legal backing and the same are devoid of merits.

8.3 The department has further contended that the person who claims for refund of service tax should show these amounts as "Tax receivable" in their books of account and if not so means that tax has become part of cost and therefore, the incidence of tax has been passed on. I find that the respondent being Government department is not required to prepare Balance Sheet and this fact has been given by the respondent on affidavit. They being service receiver paid service tax to the service provider, who had deposited it into Government account and there is no denial of this fact. The respondent has also submitted letter of service provider that they have not claimed and they will not claim this service tax from the department or any one. The respondent has also submitted that they have not passed on the incidence of tax to any other person. Hence, I find that the respondent has sufficiently established that they have borne the incidence of service tax and not passed on to any other person.

8.4 The department has contended that the service provider had paid service tax of Rs. 9,51,437/- during FY 2015-16 whereas Rs. 6,36,287/- only had been claimed for refund by the respondent. The respondent has submitted that this difference is because the service provider has undertaken work for the persons other than CPWD also (private persons) and the services provided to the private persons are not exempted. This has been given by the service provider also on affidavit. I find force in this argument. I further find that for the purpose of sanctioning of refund, documents and accounts of the claimant of refund is of relevance and not of other private person. I find that this argument of the department is very much irrelevant to the facts of the present case and cannot be a ground for rejection of the refund claim filed by the respondent as service recipient and a department of the Government of India.

9. In view of above factual and legal position, I do not find any reason to interfere with the impugned order. Hence, I uphold the impugned order and reject the appeal.

१०. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

10. The appeal filed by the appellant stand disposed of in above terms.

(कुमार संतोष)
आयुक्त (अपील्स)

By Regd. Post AD

To,

The Executive Engineer, Central Public Works Department, Central Division, Kothi Compound, Rajkot	एक्सूकयूटिव इंजीनियर, सेंट्रल पब्लिक वर्क्स डिपार्टमेंट, सेंट्रल डिविजन, कोठी कम्पाउण्ड, राजकोट

Copy to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, GST & Central Excise, Division-I, Rajkot.
4. Guard File.