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	::आयुक्त (अपील) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क:: O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,	 राष्ट्रधर्म जयते
	द्वितीय तल, जी एस टी भवन / 2 nd 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 / OIO No	दिनांक / Date
	V2/235/RAJ/2016	104/ST/REF/2016	02.09.2016

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

RAJ-EXCUS-000-APP-082-2017-18

आदेश का दिनांक / Date of Order:	28.09.2017	जारी करने की तारीख / Date of issue:	03.10.2017
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कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ समुक्त 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. Kishan Infrastructure Pvt. Ltd., Gandhi Chamber., Gondal Road, Rajkot - 360 002

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.

(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 जगह 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 बतलाए गए अपील के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा 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 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, व्यय की मांग और समाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये 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 रजिस्टार 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/- रुपये 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 प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, व्यय की मांग और समाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये 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 रजिस्टार 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/- रुपये 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) एव (2A) के अंतर्गत दंड की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियों संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दंड 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 Form 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 अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत मांग किए गए शुल्क में निम्न शामिल है
- धारा 11 डी के अंतर्गत रकम
 - सेनवेट जमा की गयी गलत राशि
 - सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्त 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 होगी।
- 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 :
- amount determined under Section 11 D;
 - amount of erroneous Cenvat Credit taken,
 - 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, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परन्तुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, सरसद 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:
- 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
 - भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी 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.
 - 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.
 - सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इमुटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा निमत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए हैं। / 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.
 - उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के प्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन 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 अदावगी 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.
 - पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदावगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो 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.
 - यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपयुक्त दंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने 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 filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
 - यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट 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.
 - सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और 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.
 - उपरोक्त अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / 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 ::

M/s. Kishan Infrastructure Pvt Ltd, Gandhi Chamber, Gondal Road, Rajkot (*hereinafter referred to as "the appellant"*) have filed present appeal against the Order-in-Original No. 104/ ST/REF/2016 dated 02.09.2016 (*hereinafter referred to as "the impugned order"*), passed by the Assistant Commissioner, Service Tax Division, Rajkot (*hereinafter referred to as "the adjudicating authority"*).

2. The brief facts of the case are that the appellant is holding service tax registration No. AACCK4463GSE001 and providing services in respect of Construction of Canal to M/s. Sardar Sarovar Narmada Nigam Ltd (*hereinafter referred to as 'M/s. SSNNL'*). The appellant preferred refund claim for Rs.39,93,007/- under the provisions of Section 101 of the Finance Act, 1994 inserted vide Finance Act, 2016. The adjudicating authority vide impugned order has sanctioned the refund but credited the amount to the Consumer Welfare Fund on the ground that the claim is hit by the provisions of Section 12B of the Central Excise Act,1944 as made applicable to Service Tax by virtue of Section 83 of the Finance Act, 1994.

3. Being aggrieved with the impugned order the appellant preferred the present appeal on the following grounds:-

(i) Adjudicating authority has misread the provisions relating to service tax in the case and also misread the contract made between the two parties in the contract; that that adjudicating authority has taken into consideration a part of the clause without considering the meaning of the relevant clause as a whole to deny the refund.

(ii) It is wrong to arrive at the conclusion or to presume that burden of tax was passed on to the service recipient i.e. M/s. SSNNL by the appellant when no service tax was leviable at all in respect of services provided and payment of service tax was made at a much later date due to insistence of the DGCEI officers that too under protest; that the payment of service tax was made at the behest of the officers of DGCEI, Rajkot on 05/07.11.2015 for the period from 01.07.2012 to 29.01.2014 which is also evident from the copies of the letters addressed to the SIO,



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DGCEI, Rajkot and submitted to the adjudicating authority; that it is not the case that service tax was paid at a later stage by the appellant on instruction of M/s. SSNNL in terms of the contract.

(iii) The adjudicating authority at Para 12 of the impugned order has relied upon a letter dated 28.06.2016 of DGCEI and the same has not been provided to the appellant, which is violation of principle of natural justice.

(iv) The appellant submitted that they have produced copies of letter issued by M/s. SSNNL certifying that the appellant has not reimbursed service tax of Rs.28,91,347/-, Rs.3,72,393/- and Rs.7,29,167/- to the adjudicating authority to establish that tax incidence has not passed on to the service receiver/ their customers but the adjudicating authority did not consider this fact.

(v) Contract entered into with M/s. SSNNL for Botad Canal clause 42.2 very specifically provided that "Service Tax only will be reimbursed on submission of proof" but show cause notice intentionally omitted for the reasons best known to the Assistant Commissioner:

"..... except service tax. Service tax only will be reimbursed on submission of proof."

This vital omission was also brought to the notice of the adjudicating authority, however, incomplete clause 42.2 of the said contract is reproduced in the impugned order also; that Clause 42.5 very specifically provides as "difference of payment due to any upward revision of Service Tax during the period of contract shall be borne by M/s. SSNNL. Such tax shall be paid by the Contractor and it will be reimbursed by M/s. SSNNL upon production and verification of proof of payment."; that Clause 42.1 referred by the adjudicating authority is general in nature and not specific for service tax only; that it states that rate quoted shall be deemed to be inclusive of VAT/Service Tax/Other State Taxes/Local Taxes **where applicable** and shall be borne by the Contractor and it shall not be reimbursed; that it is a general clause and not specific clause for Service Tax as both the clauses are in respect of tax where applicable on the materials; that it is admitted fact that Service Tax was not applicable to service provided to the government for construction of canal therefore same cannot be considered as included in the rate and therefore, "where

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applicable" wordings are used in the contract; that the said clauses refer "Service Tax" with other taxes on the materials and need not to clarify that "Service Tax" is not leviable on material but leviable on provision of service only.

(v) The adjudicating authority failed to appreciate contradiction between conditions referred to in clause 42.3 and 42.4 of the contract reproduced at page 8 of the impugned order. Clause 42.3 inter alia speaks that assessee shall pay various taxes otherwise final bill shall be withheld; that even at later stage after final payment if it was found that any of the tax required to be paid by contractor was not paid, then M/s. SSNNL shall not be liable for its payment. Clause 42.3 refers the taxes that are legally required to be borne by the appellant; that irrespective of this clause, wherever the appellant is statutorily required to pay service tax shall pay service tax and if it is not paid by service provider, department would recover it from such service provider only and not from the service receiver. Clause 42.4 stipulates that *VAT/ Service Tax/ Other State Taxes/ Local taxes at source shall be deducted as per the prevailing statutory provisions* and hence whenever service tax or other taxes referred in the clause were statutorily required to be paid through M/s. SSNNL (receiver of service), then the same shall be deducted by them from payment of contractor for onwards payment to the respective department. Thus, adjudicating authority failed to understand that clause 42.3 speaks of the taxes that are legally required to be borne by the contractor appellant whereas clause 42.4 relates to the taxes that are legally required to be paid by and/or through M/s. SSNNL.

(vi) Clause 42.2 of the contract, relied upon by the adjudicating authority, is quoted by the appellant, which provides as under:-

VAT/Service Tax/Other State Taxes/Local Taxes leviable for the work (including material component) under the Contract shall be borne by the contractor and it shall not be reimbursed by the SSNNL **except service tax. Service Tax only will be reimbursed on submission of proof.**

As per the above terms, the appellant claimed that it was entitled to get reimbursement of service tax from M/s. SSNNL, if the tax is paid at the material time; that payment of service tax was not made by them as it was

exempted in terms of Notification No. 25/2012-ST and paid by them at later stage under protest on insistence of DGCEI , Rajkot.

(vii) For 'Kachchh Canal' item wise "Rate Analysis" was submitted and it is submitted that same does not show the amount of Service Tax payable by it. Invoices prepared for all these three canal work disputed in the impugned order including Kachchh Canal nowhere show the amount of service tax but definitely show the amount of VAT etc. In other words, it is submitted by the appellant that the amount was paid as per rate analysis as well as invoice and the amount of service tax was neither charged by the appellant from M/s. SSNNL nor was the same reimbursed/ paid to them by M/s. SSNNL. Joint reading of clauses 42.1 and 42.2 in contract for Kachchh Canal reveals that Service Tax payable if any , is to be borne by appellant and no reimbursement will be admissible; that if the price of the contract was inclusive of service tax there was no need for another clause mentioning that service tax shall be borne by appellant and the same shall not be reimbursed. As per first clause, price was final and if any tax was required to be paid, it has to be borne by the agency /service provider/ the appellant and no reimbursement will be admissible.

(viii) The appellant relied upon case laws in respect of M/s. A.P. Engineers reported as 2014 (34) S.T.R. 795 (Tri. - Del.), M/s. Amadalvalasa Co-op Sugars Ltd , 2007 (219) E.L.T. 526 (Tri. - Bang.), M/s. Roopa Ram Suthar reported as 2014 (35) S.T.R. 583 (Tri. - Del.), and M/s. Kumar Metallurgical Corp Ltd - 2008 (221) E.L.T. 519 (Tri. - Bang.)

(ix) It is not in dispute that prior 01.07.2012 or even subsequent to 30.01.2014, no service tax was/is leviable for construction of canal; that there is no difference in conditions referred to in the contracts for the period prior to 01.07.2012 and also for the period subsequent to 30.01.2014; that it is evident that the contracts of both the periods provide same clause like clause 42 (42.1 to 42.6) VAT/SERVICE TAX/OTHER STATE TAXES/LOCAL TAXES in Contract of November, 2009 for Kachchh Branch Canal 122.219Km to 133.519Km and the contract of June-2016 for Kachchh Canal 325.390 to 339.062KM; that such clauses are general and refers payment of service tax wherever applicable as the

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same clauses are there for the period prior to 01.07.2012 when there was no levy of service tax on construction of canal, dam etc., in terms of exemption under Notification No. 25/2012-ST dated 20.06.2012 for the period 01.07.2012 to 29.01.2014 and subsequent to insertion of new definition of "Governmental Authority" with effect from 30.01.2014 as well as insertion of Section 101 in the Finance Act, 1994 by the Finance Act, 2016.

(x) For all three contracts, M/s. SSNNL had specifically clarified vide three separate letters (for each of the project) that the appellant was not refunded service tax paid by it and that the same will not be paid by them to the appellant in future; that for works contract of Kachchh canal, the appellant had provided services to KIPL-BEL(JV) and not to M/s. SSNNL. Therefore, the clauses of contract entered into with KIPL-BEL (JV) by SSNNL cannot be read for refund claim filed by appellant for service tax paid by it especially when incidence of tax was never passed on to KIPL-BEL(JV) or BEL or any other person. This argument too has been negated by the adjudicating authority at para 15 of the impugned order .

(xi) M/s. SSNNL with reference to its earlier letter dated 10.06.2016 had again vide letter No. KBCDM 213/AB/1448/161 dated 08/09.08.2016 addressed to Assistant Commissioner with a copy to KIPL-BEL(JV) inter alia clarified that *"any amount of Service Tax is not paid to the agency for the Kutch Branch Canal 243.839 to 250.423Km till today. And also for the period 01.07.2012 to 29.01.2014 the Service Tax is paid by the Agency for the above work amounting to Rs.28,91,347/-. If it is refund to the said agency, SSNNL have no any objection."*

(xii) It is evident from the copy of invoices that for 51% work done by them for KIPL-BEL (JV) and for 49% work for BEL from the contract awarded to KIPL-BEL (JV) by M/s. SSNNL, no service tax was charged and collected from them by it.

(xiii) According to the provisions of Section 12A of the Central Excise Act, 1944 as made applicable to Service Tax vide Section 83 of the Finance Act, 1994, every person who is liable to pay service tax has to prominently indicate in all the documents relating to assessment, invoice etc. the amount of such tax that shall form part of the value at which such

Rishu

services are to be provided. No service tax was shown separately in the invoices raised by it to KIPL-BEL(JV) and BEL and no service tax charged too. There is no allegation about violation of provisions of Section 12A of the Central Excise Act, 1944. Copy of all the invoices were already provided to the adjudicating authority.

(xiv) Agreement entered into with BEL, for doing sub-contract for 49% of BEL share in paragraph 8(c), it was clearly provided that:

"Service tax is not applicable vide service tax notification No. 25/2012-ST. If Service Tax is applicable during the assessment by the Central Excise & Custom department shall be borne and paid by the sub-contractor i.e. M/s. Kishan."

(xv) Service Tax was paid by the appellant even for the sub-contract works for KIPL-BEL (JV) and BEL, therefore, they had filed refund claim as per the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax vide Section 83 of the Finance Act, 1994 and they are entitled for refund; that amount of service tax was calculated at the behest of officers of DGCEI and the calculation sheets enclosed with the letters to DGCEI clearly show that Bill amount was considered as cum-tax only with the VAT amount and not Service Tax amount. Service tax was calculated on such ex-value arrived at after deducting amount of VAT; that if such amt was considered as cum-tax including service tax in terms of the clause of contracts, in that case appellant would have deducted service tax amount so as to arrive at ex-tax value for the purpose of computing Service Tax but that is not the case. The adjudicating authority has taken note of this argument at para 16 of the impugned order and wrongly discarded on the ground that "it has got no relevance as various clauses of the Tender Document as mentioned hereinabove are very much clear and specific in nature, there remains no significance in the argument.." Reliance placed on Hon'ble Tribunal's decision in the case of M/s. Mind Edutainment Pvt. Ltd. as reported at 2016(41) STR 961 is not applicable in their case.

(xvi) Prior to 30 days from the bidding date, there was exemption from payment of service tax on provision of service of construction/works contract for canal to government by Notification No. 25/2012-ST dated

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20.06.2012, therefore, there cannot be any deemed inclusion of service tax in the amount charged and paid to appellant as per the clause 42.1 of the contract. The appellant further relied upon the decisions in the case of M/s. Modi Oil General Mills reported as 2007(210) ELT 342(P & H), M/s. Pricol Ltd reported as 2015(39) STR 190(Mad), M/s. Mahalaxmi Exports reported as 2010(258) ELT 217 (Guj), M/s. Eastern Shipping Agency reported as 2013 (32) S.T.R. 630 (Tri. - Ahmd.), M/s. Jayketan Marketing & Clothing reported as 2009(240) ELT 263 (Tri- Mumbai) and M/s. Krypton Industries reported as 2012 (28) STR 555(Tri- Kolkata).

(xvii) The adjudicating authority has misread the sub-clauses of clause 42 of the contracts; that "inclusive of service tax" can be inferred only when such service tax was statutorily required to be paid. Similarly, question of reimbursement comes into play only when it was so reimbursed by the service receivers to appellant. As for the documentary evidence about belated payment of disputed service tax under protest on insistence of DGCEI, the adjudicating authority has not brought on record any documentary evidence which may claim that the officer of DGCEI has rebutted the facts produced by the appellant before him.

5. Personal hearing in the matter was attended by Shri P D Rachchh, Advocate on behalf of the Respondent who re-iterated the grounds of appeal to say that they have not passed on service tax paid to the department due to insistence of DGCEI even though service tax was not payable; that the services of construction of canal have been exempted with effect from 01.07.2012 to 29.01.2014 by retrospective exemption vide Section 101 to 103 inserted by Finance Act, 2016; that this service was exempted even before 01.07.2012 as clarified by CBEC vide Circular No. 116/10/2009-ST dated 15.09.2009; that the work contract very clearly states that VAT/S Tax on 'materials' whereas there cannot be any service tax on materials; that the case laws already decided by the Hon'ble CESTAT & High Courts have very clearly hold that when duty/ tax is not payable then service tax can't e presumed to have been passed on to the customers; that their balance sheet has reflected amount of Rs.39.93 lacs as receivable from Government of India; that the C.A. has also certified to this effect; that CESTAT, Kokata in the case of M/s. Ramky Infrastructure Ltd reported as 2017-TIOL-1782-CESTAT-Kol has held that principle of unjust enrichment shall not apply in the case of

Rachchh

composite contract price; that their final payment has been made by M/s. SSNNL and they have given in writing that they have not paid service tax of Rs.39.93 lakh to the appellants; that they would submit written P.H., submission also within 15 days in this regard. The department did not submit any submission despite Personal hearing notices issued to them every time it was issued to the appellant.

5.1 Shri P D Rachchh, Advocate, on behalf of the appellant filed written submission dated 18.08.2017 wherein it was inter-alia submitted that the service tax was paid at the behest of GCEI officers even though services were exempted by virtue of Sr No. 12(d), Sr No. 29 (h) and definition of "Governmental Authority" vide Notification No. 25/2012-ST dated 20.06.2012. He summarized the submissions made by them in the during personal hearing.

FINDINGS

6. I have gone through the impugned order, appeal memorandum, records of personal hearing and summary submitted by the appellant. I find that the issue to be decided in the present appeal is whether adjudicating authority was correct in holding that the refund admissible to the appellant is required to be credited to the consumer welfare fund on the ground of unjust enrichment or not?

7. I find that the refund amount pertains to services provided for construction of Canal in respect of "Kachh Canal", "Botad Canal Package II" and Botad Canal Package-II" under three different contracts. The appellant has provided services for "Kachh Canal" as a subcontractor to a joint venture with M/s. Backbone Enterprise Limited where the appellant has 51% participation (hereinafter referred to as "KIPL-BEL(JV)". All three works of construction of canal were awarded by M/s. SSNNL where appellant has provided services of construction of canal for "kachchh canal" through the "KIPL-BEL JV" and services were provided on it's own for rest of the two contracts.

7.1 I also find that the adjudicating authority has arrived at his conclusion of service tax incidence passed on by the appellant on the ground of Clause 42.2 of Kachchh Canal Contract with M/s. SSNNL

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through joint venture "KIPL-BEL JV" whereas the appellant had entered into two agreement directly with M/s. SSNNL for Botad canal branch.

7.2. The appellant has vehemently argued that the adjudicating authority has considered Clause 42.2 only in Kachh Canal contract but not appreciated clause 42.2 of other two contracts, namely, Botad Canal Package-II and Package- III, which specifically mentioned service tax as under:-

(i) BOTAD SUB BRANCH CANAL (Package-II) JUNE, 2013

Clause-42 VAT/ SERVICE TAX/ OTHER TAXES/LOCAL TAXES

42.1 The rate quoted by the Contractor shall be deemed to be inclusive of VAT/ Service Tax/Other State Taxes/ Local Taxes prevailing as on 30 days prior to submission of bid where applicable on materials that have to be purchased for performance of the contract including completed items of work.

42.2 VAT/Service Tax/Other State Taxes/ Local Taxes leviable for the work (including material component) under the Contract shall be borne by the Contractor and it shall not be reimbursed.

Signature of the Contractor
HAN INFRASTRUCTURE PVT. LTD

Signature of the Engineer-In-Charge 70

Executive Engineer
 Gujarat Branch Canal Division No.3/5

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TC-71

by the SSNNL except service tax. Service tax only will be reimbursed on submission of proof.

- 42.3 If the Contractor is assesses of VAT/ Service Tax/Other State Taxes/ Local Taxes he should produce valid VAT/ Service Tax/Other State Taxes/Local Taxes clearance certificate before the payment of the final bill, otherwise the final

(iii) **BOTAD SUB BRANCH CANAL (PACKAGE-III), JUNE 2013.**

TC-66

Clause-41 INCOME TAX

Deduction will be made at source from the contractor's bill towards income Tax by the Employers as per prevailing rules of the Income Tax Authority.

Clause-42 VAT/ SERVICE TAX/ OTHER TAXES/LOCAL TAXES

42.1 The rate quoted by the Contractor shall be deemed to be inclusive of VAT/ Service Tax/Other State Taxes/ Local Taxes prevailing as on 30 days prior to submission of bid where applicable on materials that have to be purchased for performance of the contract including completed items of work

42.2 VAT/ service Tax / Other state Taxes / Local Taxes Levi able for the work (Including Material component) under the Contract shall be borne by the Contractor and it shall not be reimbursed by the SSNNL except service Tax. Service Tax only will be reimbursed on submission of proof.

42.3 If the Contractor is assesses of VAT/ Service Tax/Other State Taxes/ Local Taxes he should produce valid VAT/ Service Tax/Other State Taxes/Local Taxes clearance certificate before the payment of the final bill, otherwise the final payment to the Contractor shall be withheld. The contractor even after completion of the work and final payment have been made to him will be liable to pay any VAT/ Service Tax/ Other State Taxes/Local Taxes liability and SSNNL shall not be responsible for any VAT/ Service Tax/Other State Taxes/ Local Taxes liability of the contractor.

Signature of the Contractor

IRRAWADDI CONTRACTORS PVT. LTD

Signature of the Engineer-In-Charge

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7.3 I find that clause 42.2 of Tender documents for Botad Canal Package-II and Package-III reads that service tax will be reimbursed on submission of proof only.

Botad Canal (package-II and package-III)

*"42.2 VAT/ Service Tax/ Other State Taxes/ Local Taxes leviable for the work (including material component) under the Contract shall be borne by the Contractor and it shall not be reimbursed by the SSNNL **except service tax. Service tax only will be reimbursed on submission of proof.**"*

7.4 I find that Clause 42.2 of the Tender documents Kachchh Canal referred by the adjudicating authority reads differently from above as below:-

Kachchh Canal

"42.2 VAT/ Service Tax/ Other State Taxes/ Local Taxes leviable for the work (including material component) under the Contract shall be borne by the Contractor and it shall not be reimbursed by the SSNNL."

7.5 I, therefore, find that adjudicating authority has ignored very relevant words and phrases used in clause 42.2 of the contracts in respect of Botad Canal Package II of June, 2013 and Botad Canal Package III of June, 2013 and has considered Clause 42.2 of Kachchh canal branch of Sept, 2012 only even if the two contracts of Botad Canal Package II & Botad Canal Package III are different from it for reasons not explained in the order. I find that Clause 42.2 of the Contracts for Botad Canal (package II & Package III) very specifically stipulates that taxes will be borne by the contractor except service tax, which will be borne by M/s. SSNNL on submission of proof. The appellant has also produced copy of letters issued by M/s. SSNNL wherein it is clarified that no service tax was paid by M/s. SSNNL to the appellant for the contracts under consideration. Copy of the letter No. AB/1612 dated 16.06.2016 and letter No. AB/1412 dated 16.06.2016 are reproduced as under:-

Arif

Letter No. AB/1412 dated 16.06.2016

'નમનામી દેવી નમદે'

 **SARDAR SAROVAR NARMADA NIGAM LTD.**
(A wholly owned Govt. of Gujarat undertaking)
OFFICE OF THE EXECUTIVE ENGINEER
SAURASHTRA BRANCH CANAL DN. NO. 3/1,
"KANCHAN COMPLEX", TOWER ROAD, BOTAD


Ref no. AB/1412 / 16/6/16 Date: _____

To
Kishan Infrastructure Pvt. Ltd.
Gandhi Chamber, Gondal Road,
Rajkot

Subject : Constructing remaining earthwork for structure gaps, structure works, lining work and service road work for Botad sub branch canal Ch. 62.473 to 87.594 km (Package-III) [**About Payment of Service Tax**]

With reference to above subject, it is to say that payment of Service Tax for the period of 01/07/2012 to 29/01/2014 for work done under SSNNL for above work. **The service tax of Rs 372393.00 has been paid by you vide Challan no. 80292, Dtd. 05/11/2015 against 1st R. A. Bill amounting to Rs. 7577707.00**


You are not refunded this amount of Rs. 372393.00 and in future too you will not be refunded the same.


Executive Engineer
Saurashtra Branch Canal 3/1
Botad

Letter No. AB/1612 dated 16.06.2016

EXHIBIT.

'નમનામી દેવી નમદે'

 **SARDAR SAROVAR NARMADA NIGAM LTD.**
(A wholly owned Govt. of Gujarat undertaking)
OFFICE OF THE EXECUTIVE ENGINEER
SAURASHTRA BRANCH CANAL DN. NO. 3/1,
"KANCHAN COMPLEX", TOWER ROAD, BOTAD


Ref no. AB/1612 / 16/6/16 Date: _____

To
Kishan Infrastructure Pvt. Ltd.
Gandhi Chamber, Gondal Road,
Rajkot

Sub: Constructing remaining earthwork for structure gaps, structure works, lining work and service road work for Botad sub branch canal Ch. 42.846 to 62.473 km. Package-II, [**About Reimbursement of Service Tax**]

With reference to above subject, it is to say that payment of Service Tax for the period of 01/07/2012 to 29/01/2014 for work done under SSNNL for above work. **The service tax of Rs. 729167.00 has been paid by you vide Challan no. 80299, Dtd. 05/11/2015 against 1st R. A. Bill amounting to Rs. 14839606.**

You are not refunded this amount of Rs. 729167.00 and in future too you will not be refunded the same.


Executive Engineer
Saurashtra Branch Canal 3/1
Botad

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7.6 I also find that the appellant has produced copy of their Balance Sheet showing total refund amount of Rs.39,93,007/- as receivable in the Balance Sheet and also a certificate from chartered accountant to this effect. Therefore, I find that the adjudicating authority has definitely made factual error while arriving at his conclusion of unjust enrichment in respect of refund of service tax amount pertaining to Botad Canal Branch (package II & Package III).



7.7 I find that the adjudicating authority in the impugned order has discussed only clause 42.2 of the agreement between "KIPL-BEL JV" and M/s. SSNNL for Kachh Canal work whereas appellant has provided the services as sub contractor to the "KIPL-BEL JV" for construction of canal and the same is exempted as per Clause 29 of the Notification no. 25/2012 ST dated 20.06.2012, since the main contractor is providing exempted services.

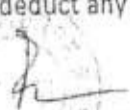
7.8 I find that terms and conditions in the agreement made by the appellant as subcontractor with the "KIPL-BEL JV" says that service tax is exempted under Notification 25/2012-ST and if payable, would be borne by the appellant as sub-contractor. Copy of the relevant clause 8(c) of the agreement is reproduced below:-

(c) With regard to the commercial terms, the provisions of the agreement shall prevail.

From the payment of the price payable to the Sub-contractor, BEL shall be entitled to make the following deductions:-

- (a) BEL will deduct Income Tax applicable at prevailing rate
- (b) BEL will deduct WCT VAT applicable at prevailing rate.
- (c) Service Tax is not applicable vide service tax notification No. Notification No. 25/2012-Service Tax. If Service Tax applicable during the assessment by Central Excise & Custom Department shall be borne and paid by Sub Contractor.
- (d) BEL will deduct 1% Profit margin on gross bills.
- (e) BEL will deduct any other deduction, if any deducted by employer.



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7.9 Clause 42.2 of the Tender Documents in respect of Kachh Branch Canal is reproduced below:-

... from the contractor's bill towards income Tax by the Employers as per prevailing rules of the Income Tax Authority.

Clause-42 VAT/ SERVICE TAX/ OTHER TAXES/LOCAL TAXES

42.1 The rate quoted by the Contractor shall be deemed to be inclusive of VAT/ Service Tax/Other State Taxes/ Local Taxes prevailing as on 30 days prior to submission of bid where applicable on materials that have to be purchased for performance of the contract including completed items of work.

42.2 VAT/Service Tax/Other State Taxes/ Local Taxes leviable for the work (including material component) under the Contract shall be borne by the Contractor and it shall not be reimbursed by the SSNNL.

42.3 If the Contractor is assesses of VAT/ Service Tax/Other State Taxes/ Local Taxes he should produce valid VAT/ Service Tax/Other State Taxes / Local Taxes clearance certificate before the payment of the final bill, otherwise the final payment to the Contractor shall be withheld. The contractor even after completion of the work and final payment have been made to him will be liable to pay any VAT/ Service Tax/ Other State Taxes/ Local Taxes liability and SSNNL shall not be responsible for any VAT/ Service Tax/Other State Taxes / Local Taxes liability of the contractor.

42.4 VAT/ Service Tax/ Other State Taxes / Local Taxes at source shall be deducted as per the prevailing statutory provision.

42.5 Difference of payment due to any upward revision of VAT/ Service Tax/Other State Taxes/ Local Taxes (Except on those components whose price rise is fully compensated as per Clause No. 38, Price Adjustment) during the period of contract shall be borne by the SSNNL. Such tax shall be paid by the Contractor and it will be reimbursed by the SSNNL, upon production and verification of

For, **KIPR, BEL (JV) Contractor**
 20/12/2016
 Authorized signatory

Signature of the Executive Engineer
 Executive Engineer
 Kachchh Branch Canal No 2/3
 - 20/12/16 -

7.10 I find that the adjudicating authority has proceeded on the reasoning that the contract amount includes service tax and hence tax burden is passed on by the appellant to M/s. SSNNL and hence refund to the appellant would amount to unjust enrichment even though the

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appellant have submitted that they have not received service tax element from M/s. SSNNL and M/s. SSNNL have also submitted that they have not paid service tax element to the appellant, which is very strange, legally not tenable and not permissible in law. It can also be seen that Clause 42.2 in contract for Kachchh Branch Canal upto Sept,2012 is general in nature. The appellant have also submitted that they were not paying service tax on the correct ground that services to M/s. SSNNL were exempted, however, payment of service tax was made by them under protest on 05/07.11.2015 due to insistence of officers of DGCEI for the period from 01.07.2012 to 29.01.2014.

7.11 I find that the words and phrase used in clause 42.2 indicate that taxes leviable are to be borne by the appellant, which implies that if any tax is not leviable then it is not to be borne by them. In other words, taxes prevailing at the material time are to be borne by the appellant and contractual value will include only those taxes, which are applicable on the services and/or goods. In this context, Clause 42.1 is also very important, which reads as under:-

"The rate quoted by the Contractor shall be deemed to be inclusive of VAT/ Service Tax other state tax Local taxes prevailing as on 30 days prior submission of bid where applicable on material that have to be purchased for performance of the contract including completed items of work.

7.12 Above clause provides deeming provision that quoted rate should be inclusive of all applicable taxes. This also suggests that Clause 42.2 is of general nature to include all taxes applicable at the material time. This is not in dispute that the services provided by the appellant were exempted and the appellant was treating their services as exempted and hence was not paying service tax which was not objected to by the commissionerate until an inquiry was initiated by the DGCEI, Rajkot.

8. It would be proper to examine Notification 25/2012-ST dated 20.06.2012 to find out whether services provided by the appellant to M/s. SSNNL were exempted or not. The relevant part of the said notification is as under:-

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“12. 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 historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);
- (c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;
- (d) canal, dam or other irrigation works;
- (e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or
- (f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65B of the said Act;”

Para 2 (s)

“(s) “governmental authority” means a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution;”

8.1 I find that the definition of Governmental Authority given in the notification No. 25/2012-ST dated 20.06.2012 vindicates the appellant's plea that the services provided by them to M/s. SSNNL were exempted at the material time which has also been acknowledged by the lower adjudicating authority at Para 10 of the impugned order. I also find that CBEC Circular No. 116/10/2009-ST dated 15.09.2009 has clarified that Canal system built by the government will not be chargeable to service tax. The appellant was not paying service tax to the department and was not charging service tax to M/s. SSNNL. Therefore, it implies that when contract were made by the appellant with M/s. SSNNL, contractual value did not represent service tax component. The appellant paid service tax at the insistence of the DGCEI officers under protest as they were of the view correctly that no service tax was payable by them on the services provided to M/s. SSNNL, they being governmental authority. Thus, there is no case of unjust enrichment only because service tax was paid by the appellant due to insistence of DGCEI officers even when Service Tax has neither been proved by M/s. SSNNL to the appellant nor has been collected by the appellant from someone else.

8.2 Section 101 was inserted in the Finance Act, 1994 vide Finance Act, 2016, which reads as under:-

"SECTION 101. Special provision for exemption in certain cases relating to construction of canal, dam, etc. — (1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of July, 2012 and ending with the 29th day of January, 2014 (both days inclusive) in respect of taxable services provided to an authority or a board or any other body —

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by the Government,

with ninety per cent. or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of canal, dam or other irrigation works.

(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 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)

8.3 From above, it is evident that what was already explicit, was made further explicit by making definition of governmental authorities further clear. In such circumstances, there can't be a case of unjust enrichment when service tax payable is nil and where service tax has not been collected from M/s. SSNNL as stated by the appellant and also submitted by M/s. SSNNL in writing. Had there been no insistence of service tax payment by DGCEI officers, then the appellant would not have paid this service tax to the department at all. For better appreciation of the principle of unjust enrichment let us examine, Section 12 B of the Act reproduced below:-

"SECTION 12B. Presumption that the incidence of duty has been passed on to the buyer. — Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."


8.4 I find that this is not a case of the department that the invoices/ Bills contained Service Tax element or these were raised showing service tax therein. Therefore, once transaction is done, duly reflected in the invoice after provisioning of the services without including service tax, then subsequent payment of service tax, that too under

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protest, by the appellant due to insistence of DGCEI officers cannot be presumed that incidence of service tax has been passed on to the receiver of the services under Section 12B of the Central Excise Act made applicable to service tax. Presumption made by the adjudicating authority is contrary to (i) the Chartered Accountant Certificate stating that service tax burden is not passed on to M/s. SSNNL(ii) Certificate by M/s.SSNNL that no payment of service tax has been made by them to the appellant (iii) the appellant are showing the amount as receivable from government of India in their books of account. Copies of these are being reproduced for ready reference as under:-

(i)Chartered Accountant's Certificate.

	EXHIBIT-
RAKESH JAVIYA (B.Com., F.C.A.)	<i>R. Javiya & Co.</i> CHARTERED ACCOUNTANTS
CERTIFICATE	
<p>I Rakesh Javiya proprietor of R. Javiya & Co. Chartered Accountant having registration/membership No. 108655 hereby certify that I auditor of M/s. Kishan Infrastructure Private Limited having its office at No. 6, Gandhi Chamber, Near Bombay Hotel, Dhebar Road, Rajkot. for the Financial Year 2015-16. On the basis of books of accounts we here certify that amount of Rs.39,93,007/- service tax paid vide E-payment Receipt No.80299 dated 05.11.2015, 80292 dated 05.11.2015, 80030 dated 07.11.2015 & 80032 dated 07.11.2015 for provisions of service to M/s. Sardar Sarovar Narmada Nigam Limited, a wholly owned undertaking of government of Gujarat for construction etc. work of canal are not debited in its profit and loss account but shown as receivable in the Balance Sheet.</p>	
<p>We further certify that said service tax amount of Rs.39,93,007/- has not been passed on to any other but incidence of tax was born by them.</p>	
<p>Place : Rajkot Date : June 01, 2016</p>	<p>FOR, R. JAVIYA & CO., Chartered Accountants Registration No. : 120300w</p> <p><i>Rakesh Javiya</i> (Rakesh Javiya) Proprietor M.No 108655</p> 

Rakesh

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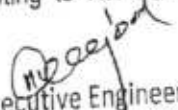
(ii) Copy of ledger account showing refund amount of Rs.39,93,007/- as receivable from the government of India is reproduced below:-

KISHAN INFRASTRUCTURE PVT. LTD. GANDHI CHAMBER, GONDAL ROAD RAJKOT Pan No:AACCK 4463 G			
Balance Sheet		Page No: 3	
Financial Year:2015-2016			
From:01/04/2015 to 31/03/2016			
Credit	Liabilities	Debit	Assets
22,78,094.00 (Sub Total)			
SALLARY PAYABLE 25,500.00 DIPAK GAURISHANKAR RAVAL 27,000.00 ILESHKUMAR DHIRAJLAL JAVIA 49,450.00 KANAIYALAL BAPULAL BAROT 39,700.00 PATEL JITENDRAKUMAR MUKTILAL 18,000.00 RAMESH PRABHUDAS PRAJAPATI 24,500.00 SHIV HARESHWAR SINGH 1,84,150.00 (Sub Total)		Creditors for Expenses 25,357.00 LAXMAN TILOKCHAND KUMBHAKAR 1,33,832.82 MARUTI CONSTRUCTION CO. 25,000.00 SAI INDIA TRANSPORT CO 1,84,189.82 (Sub Total)	
Duties & Taxes 2,008.00 PREV. YEAR ADJUSTMENT TAX 16,805.00 TDS ON INTEREST (94A) 1,60,516.00 TDS ON JOB WORK/TRANS (94-C) 1,129.00 TDS ON PROFESSIONAL (94D) 12,850.00 TDS ON SALLARY (92B) 87,279.00 TDS VAT ON SUB CONT. 2,80,587.00 (Sub Total)		Duties & Taxes 68,57,201.00 DEFERRED TAX ASSETS DEPRICIATO 18,20,458.00 INCOME TAX (TDS) 2005/06 A/C 82,05,189.00 INCOME TAX (TDS) 2014-15 8,23,010.00 INCOME TAX (TDS) DED 12-13 50,61,500.00 INCOME TAX DEDUCTION (06-07) 15,91,563.00 INCOME TAX DEDUCTION (07/08) 49,99,826.00 INCOME TAX TDS 15-16 20,85,141.00 INCOME TAX TDS DED (11/12) 5,98,023.00 INCOME TAX(TDS)DED (KIPL)04/05 14,96,579.00 INCOME TAX(TDS)DEDUCTION 10-11 95,187.00 PROVIDENT FUND A/C 28,310.08 VAT TAX 12.50% 3,473.74 VAT TAX 4% 1,368.44 VAT TAX ADT 1% 5,647.00 VAT TAX ADT 2.5% 12,87,373.00 VAT TDS DEDUCTION 2015-16 349,56,849.26 (Sub Total)	
Bank Accounts 239,29,703.53 AXIS BANK C.910030047597625 239,29,703.53 (Sub Total)		Service Tax receivable 39,93,007.00 SERVICE TAX RECEIVABLE FROM GOVT. OF INDIA 39,93,007.00 (Sub Total)	
Retention Money Deposit 1,83,608.00 CHAKANSINH KUPSINH SD 92,799.00 DHIRUPAD KUMBHAKAR(SD) 1,02,276.00 GANGADHAR NAGEN KUMBHAKAR (SD) 9,944.00 GAUTAMKUMAR THAKOR (SD) 14,228.00 GOWARDHAN KUMBHAKAR(SD) 2,50,864.00 JAY CONSTRUCTION (SD) 13,829.00 LAXMANBHAI NAVABHAI DAMOR SD 9,654.00 MANTU GOSTA KUMBHAKAR (SD) 34,52,857.00 MARUTI CONST CO.(S.D.)RAJKOT 26,775.00 MEGHAJI KANJI SAMA (SD) 98,839.00 MURLIDHAR BHAKTA KUMBHAKAR SD 1,02,386.00 NARSHIBHAI SURMABHAI DAMOR(SD) 47,25,147.00 PAI CONSTRUCTION (SD) 54,500.00 RAJEEV KUMAR (SD) 16,272.00 RASPAL CHOTELAL (SD) 38,257.00 SACHIDANAND CHAUDHARI -SD 38,930.00 SAHANI ARJUN MAHENDRA(SD) 27,463.00 SANTOSH JITEN BARMAN SD 63,500.00 SHANKARIBHAI VALLBHAI DAMORSD 16,266.00 SHEVYNATH SAHANI(SD) 9,99,979.00 SHRI NARAYAN CONST (D)HER(SD) 27,270.00 ULTRATECH CONSTRUCTION CO.(SD) 7,826.00 VAIDANATH BHUNESHWER SAHANI SD 18,699.00 VANMALI KUMBHAKAR SD 1,00,000.00 VEER INFRA TECH SD 7,787.00 VINOD MACHAR SD 195,00,722.00 (Sub Total)		Provisions 1,08,698.00 PREPAID WORK INSURANCE 1,08,698.00 (Sub Total)	
		Prepaid Exp 5,01,760.00 PREPAID VEHICLE (RTO) TAX 5,01,760.00 (Sub Total)	
		Accounts Receivables 55,63,865.00 BACKBONE ENTERPRISE LTD. 46,137.00 BANK INTEREST RECIVABLE A/C 147,11,605.00 EXEN, DIST R & B DN JANMANGAR VERADI MEJOR BRIDGE 55,277.00 INTEREST DEPO. RECIVABLE PGVCL 71,51,757.87 KIPL- BEL(JV) 34,689.00 VADALIA FOOD 275,63,280.87 (Sub Total)	
		Bank Accounts 18,81,214.27 AXIS BANK 910020045246779 2,459.78 DENA BANK(000011000462)PARADR 2,89,268.00 DENA BANK(019611023753)CANALOR 25,000.00 DENA SIBER PREMIUM A/C 21,97,972.05 (Sub Total)	
		Deposits 1873,38,559.04 Page Total	
1873,38,559.04 Page Total			

Continued

Handwritten signature

(iii) Letter No.742 dated 10.06.2016 issued by M/s. SSNNL

SARDAR SAROVAR NARMADA NIGAM LIMITED (A WHOLLY OWNED GOVERNMENT OF GUJARAT UNDERTAKING)		EXHIBIT- VII
		Executive Engineer, Kachchh Branch Canal Dn No.2/3 Narmada Bhavan, Rambaug Road, Aadipur, Dist. Kachchh. (Gujarat)
No: 742	Date : 10/06/2016	
To KIPL-BEL JV Gandhi Chamber, Gondal Road, Rajkot-360002		
Subject: Construction of Kutch Branch Canal reach Ch. 243.839 to 250.423 Km. (Earthwork, Lining, Structures, Service Road, Gate works, Control Cabin and O & M for Package IR-5.) [About Reimbursement of Service Tax]		
Reference: Your letter no.KIPL/40/2015, Dtd.10/11/2015		
With reference to above subject and reference, It is to state that for the period of 01/07/2012 to 20/01/2014 work done under SSNNL for above work the service tax paid by the agency is not reimbursed of service tax amounting to Rs. 28,91,347.00.		
 Executive Engineer Kutch Branch Canal Dn. No. 2/3, Aadipur (Kutch		

8.5 I find that the appellant has shown sufficient evidences to prove as discussed above, that the incidence of service tax has not been passed on to M/s. SSNNL, the service recipient as required under Section 12 B of the Central Excise Act made applicable to Service Tax matters. There is no contrary evidence adduced by the department and / or adjudicating authority in the impugned order to contradict these submissions made by the appellant. In view of the above, it is very evident that the appellant has not passed on the incidence of service tax to M/s. SSNNL (service recipient) in this case.



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8.6 I find that the Hon'ble CESTAT in the case of M/s. Himantsingka Seide Ltd reported as 2005(191) ELT 885 (Tri-Bang) has held as under:-

6. We have gone through the rival contentions. This is a case where de-bonded goods have sold. There is nothing wrong in the presumption of the Revenue that the duty burden is included in the sales price. But the error committed by the Revenue is in presuming that duty collected in excess of what is payable had been passed on to the buyers. Whenever there is a composite price inclusive of all duties, the meaning is that the price includes only the duty payable. We cannot presume that the excess duty paid by mistake is passed on to the buyer. The Hon'ble Tribunal in the case of Cimmco Ltd. v. Collector of Central Excise, Jaipur [1999 (107) E.L.T. 246 (Tribunal)] had interpreted the term 'inclusive of all duties and tax' and it has been held therein that condition in work order that the words 'inclusive of all duties, taxes ...' does not mean that excise duty is covered by it especially when appellant has been taking a stand from the beginning as to non-excisability of goods. It is worthwhile to briefly mention the facts of the case. In the above-mentioned case, the appellant had a contract with M/s. I.O.C. Ltd. for supply of 150 tank wagons; "for supply, fabrication and mounting of heating coils inside tank wagons for LSHS service". The contract covered 150 tank wagons. They applied for permission under Rule 173H of Central Excise Rules for bringing duty paid wagons and other duty paid materials for such fabrication job. After obtaining necessary permission from the Department, they executed the work and cleared the tank wagons on payment of duty, as demanded by the Department, under protest. Thereafter they claimed refund. The refund claim was rejected. But the Collector (Appeals) held that the process carried out by the appellants did not amount to manufacture and since the Assistant Commissioner had concluded that the goods are covered by Rule 173H, he should have been allowed clearance without payment of duty. In view of the favourable order, the appellants filed a refund claim for the consequential refund amount. But the claim was rejected on the ground of unjust enrichment. The Revenue relied on the work contract which indicates that the rates are inclusive of all taxes. The Tribunal interpreted the terms 'inclusive of all duties' and held that the provision that "the rates are inclusive of all duties" would not lead to the necessary presumptions or conclusion that excess duty should be held to have been covered or provided for. The price here was a lump sum amount and the usual condition that the rates are inclusive of all duties and taxes is only with a view to avoid any possibility of the supplier raising any demand at a later stage on the ground that certain duties are to be paid. The expression 'rates are inclusive of all duties and taxes' have to be understood as applicable to only duties and taxes which are payable. The Tribunal held in the above mentioned case that there is no unjust enrichment and the appellants would be entitled to obtain refund. The ratio of the above case is clearly applicable here. In the present case also, the sale price, no doubt, includes all statutory levies payable. That means, after some time the seller should not come to the buyer for extra amounts on the plea that further duty has to be paid to the Department. The presumption that the sale price includes duty erroneously paid in excess has no basis. More precisely, the sale price includes only the duty payable. In these circumstances, there is no question of unjust enrichment. We allow the appeal with consequential relief.

(Emphasis supplied)

8.7 I also find that the Hon'ble CESTAT in the case of Roopa Ram Suthar reported as 2014(35) STR 583 (Tri-Del) has held that:-

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"6. Respondents/assesseees preferred appeals. These were allowed by the common order of the learned appellate Commissioner. The appellate Commissioner concluded that analysis of the invoices issued by the appellant clearly disclosed that no Service Tax component was included in and collected from the customers by the assesseees; that the assesseees had remitted Service Tax by treating the gross amount received as inclusive of Service Tax; that in an agreement with Oil India Ltd., the recitals disclose that the agreed rates were inclusive of all the taxes leviable; but however there was no specific collection of Service Tax. Learned appellate Authority relied on the decisions of this Tribunal in *M/s. Sandeep Metal Craft Ltd. v. CCE, Nagpur* reported in 2008 (85) R.L.T. 845 CESTAT = 2008 (226) E.L.T. 428 (Tribunal) and in *M/s. Amadalavalasa Cooperative Sugars Ltd. v. CCE* reported in 2007 (80) R.L.T. 35 (CESTAT) = 2007 (219) E.L.T. 526 (Tribunal) = 2009 (15) S.T.R. 501 (Tribunal), to conclude that where the contract price is inclusive of duty, there cannot be unjust enrichment."

8.8 I further find that Hon'ble CESTAT in the case of *M/s. Eastern Shipping Agency* reported as 2013(32) STR 630 (Tri-Ahd) has held as under:-

"7. The said Chartered Accountant's certificate as reproduced above has been sought to be discarded by the first appellate authority summarily indicating that the said certificate does not disclose accounting practices whatsoever and that the said certificate is based on the accounts. In my considered view, these findings of the first appellate authority are far from reality, inasmuch as it can be seen from the Chartered Accountant's certificate that Chartered Accountant has categorically certified that he has verified the books of account like Cash/Bank Book and Ledger Accounts and on verification, he has certified that the amount has not been passed on by the appellant to their clients. In my view, the decision in the case of *Crane Betel Nut Powder Works (supra)* (wherein I was one of the Member), would directly apply in this case.

8. I also find strong force in the contentions of the Id. Counsel that the judgment of the Hon'ble High Court of Gujarat in the case of *Mangal Textile Mills Pvt. Ltd. (supra)* would apply inasmuch as the certificate of Chartered Accountant produced by the appellant was not disputed by the Revenue authorities, by bringing on record any other opinion contrary to the Chartered Accountant's certificate.

9. I find that the various case laws cited by Id. Counsel are directly on the point.

10. In view of the foregoing and also the binding judicial pronouncements, I find that the impugned order is unsustainable and is liable to be set aside."

11. The impugned order is set aside and the appeal is allowed with consequential relief.

8.9 In light of the above decisions, I am of the considered view that the appellant has furnished relevant documents/evidences to substantiate their claim that the incidence of Service Tax has not been passed on to *M/s. SSNNL*. I am unable to discard these evidences in respect of refund pertaining to Kachchh canal also in absence of any contrary evidences available in the impugned order or produced before me by the department during appeal proceedings.

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9. In view of the above facts and circumstances of the case, I set aside the impugned order passed by the adjudicating authority and allow the appeal filed by the appellant.

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

9.1 The appeal filed by the appellant is disposed of in above terms.

o/c

(Handwritten Signature)
 (कुमार संतोष)
 आयुक्त (अपील्स)

By R.P.A.D.

M/s. Kishan Infrastructure Pvt. Ltd, Gandhi Chamber, Gondal Road, Rajkot	मेसर्स किशान इंफ्रस्ट्रक्चर प्रा ली गांधी चेंबर गोंदल रोड, राजकोट
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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, Rajkot.
4. Guard File.