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(i) किल्ला अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत टर्न की नयी अपील, सेवाकर नियमनाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म ST-7 में की जा सकती एवं उसके साथ अनुबन्ध, केन्द्रीय उत्पाद शुल्क अध्याय अनुबन्ध (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की (अर्थात् दो एक प्रति प्रामाणिक होनी चाहिए) और अनुबन्ध द्वारा सहायक अनुबन्ध अथवा उपानुबन्ध, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलार्थि न्यायाधिकरण को अवैतन टर्न 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) जीएस टुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थि प्राधिकरण (सेस्टैट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 355ए के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलार्थि प्राधिकरण में अपील करने वाला उत्पाद शुल्कसेवा कर ग्राहक के 10 प्रतिशत (10%), जब ग्राहक एक 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 इस कोई रूप में अधिक न हो। केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'ग्रॉस किए गए शुल्क' में विन्ड्य शामिल है।

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेस्टैट जमा की गई राशि
- (iii) सेस्टैट जमा नियमनाली के नियम 6 के अंतर्गत देय रकम

- बशर्त कि इस धारा के प्रारम्भ विधायक (स. 2) अधिनियम 2014 के अंतर्ग में हुई किसी अपीलार्थि प्राधिकारी के समक्ष विचारार्थि भरण अर्थात् एक 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 the 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 Central Credit taken;
- (iii) amount payable under Rule 6 of the Central 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 प्राधिकृत निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पारंग के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, किल्ला असायन, राजस्व विभाग, लोक सभिय, जेडन टीए भवन, संसद भवन, 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 ग्राहक के किसी नुकसान के मामले में, जहां नुकसान किसी ग्राहक 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 ग्राहक के प्रसकरण के दौरान, किसी कारखाने या किसी भंडार गृह में ग्राहक के नुकसान के अंतर्गत हो। / 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 रहे ग्राहक के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की जाती 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 ग्राहक को ग्राहक निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) अनुसिद्ध उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो कुवृष्टि क्रेडिट इस अधिनियम एवं इसके विविध धाराओं के तहत मध्य की गई है और ऐसे आदेश जो अनुबन्ध (अपील) के द्वारा किल्ला अधिनियम (स. 2), 1998 की धारा 105 के द्वारा किल्ला की गई जायि अथवा अनुसिद्धि पर वा बंद 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.

(v) उपरोक्त आवेदन की दो प्रतियां धार संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमनाली, 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 अदायगी के साथ-साथ के ली 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। / इहाँ 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 is 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 संलेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त इन में किया जाना चाहिए। इस तथ्य के होने पर भी की निम्नलिखित कार्य से बचने के लिए प्राथमिक अपीलार्थि प्राधिकरण 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if exceeding Rs. 1 lakh fee of Rs. 100/- for each.

(E) सामंतीय न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसूच मूल आदेश एवं स्थान आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिफ्ट नहीं 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) जीएस टुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थि न्यायाधिकरण (कार्य विधि) नियमनाली, 1982 में वर्णित एवं अन्य सम्बंधित मामलों को सम्बन्धित 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.

(G) उच्च अपीलार्थि प्राधिकारी को अपील दायित्व करने में संबंधित व्यवस्था, विस्तृत और नवीनतम धाराओं के लिए, अपीलार्थि विभागीय वेबसाइट [www.cbec.gov.in](http://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](http://www.cbec.gov.in)

**:: ORDER-IN-APPEAL ::**

M/s. Dharma Enterprise, 201, Business Bay, Royal Park Street-6 Corner, Kalawad Road, Rajkot-360 005 (hereinafter referred to as 'the appellant') is holding Service Tax Registration No. AAJFD8466GSD001 and has filed the present appeal against the Order-In-Original No. 175/ST/REF/2016 dated 30.12.2016 (hereinafter referred to as 'the impugned order'), passed by the Assistant Commissioner, Service Tax Division, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. Brief facts of case are that appellant filed refund claim for Rs. 5,77,743/- on 11.11.2016 under Section 102 of the Finance Act, 1994 inserted via Finance Act, 2016. They provided construction services, works contract services to various government, local authorities, government authorities etc falling under Sr. No. 12 of mega exemption Notification No. 25/2012-Service Tax dated 20.06.2012. The said exemption from Service Tax was withdrawn on these services vide Notification No. 06/2015-Service Tax with effect from 01.04.2015. The appellant paid Service Tax on these service provided by them to government authority on or after 01.04.2015. The exemption withdrawn was restored vide Notification No. 09/2016-Service Tax dated 01.03.2016 which prescribed the following conditions read with Section 102 of the Finance Act, 2016:

1. The contract for such services should be entered prior to 01.03.2015.
2. If the Service Tax has been paid by the assessee then it would have to be refunded.
3. The application for such refund has to be filed within 6 months from the date when the Finance Act, 2016 comes into force i.e. on or before 14.11.2016.

2.1 The appellant had provided services in the capacity of sub-contractor to M/s. Backbone Enterprise Ltd in the nature of works contract services. The sub-contract agreement between Backbone and the appellant mentioned that where sub-contractor had borne the burden of Service Tax, then the refund is to be claimed by the sub-contractor only. Thus, the appellant submitted that they had not received any amount towards Service Tax paid by them from the service recipient and hence, filed the present claim of refund. The lower adjudicating authority issued Show Cause Notice No. V/18-166/ST/Ref/2016-17 dated 28.11.2016 as to why the refund claim should not be rejected since they

had not produced the required documents to prove that the Service Tax had been borne by them and incidence of Service Tax has not been passed on to any other person as required under Section 12B of the Central Excise Act, 1944 made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994. The lower adjudicating authority decided the Show Cause Notice vide the impugned order wherein he rejected the refund claim by holding that as per clauses 6, 8(f) and 9 of the agreement, the Service Tax has to be borne and paid by the appellant; that the construction cost/amount of the project would include all types of taxes, which were leviable on the work awarded to the appellant by the contractor during the execution of work. In other words, it was alleged that the sub-contract value is inclusive of Service Tax and thus the tax has been passed on to the service recipients by the appellant. Therefore, the lower adjudicating authority held that the incidence of duty has been passed on to the service receivers/buyers in terms of Section 12B of the Central Excise Act, 1944 made applicable to Service Tax matters also.

3. Being aggrieved with the impugned order, the appellant filed appeal on the following grounds:

1. They are a sub contractor and had provided services to M/s. Backbone Enterprise Ltd., in the nature of Works Contract Services for construction of Government School and girls Hostel Building at Khambhadiya, originally Work Order allotted by Ex. Engineer, Road & Building Division, Jamnagar under Government of Gujarat falling at Sr. No. 12 of Mega Exemption Notification No. 25/2012 - ST Dated 20.06.2012. However, the said exemption from payment of Service Tax was withdrawn on services provided by the appellant vide notification No. 06/2015 ST with effect from 01.04.2015. At the time of Bidding for the said projects, the service tax exemption was available, on the services provided to various Government authorities and local authorities, W.E.F. 01.04.2015 due to withdrawal of exemption as referred above, they had paid service tax on the said services provided by them, however, the exemption was restored vide Notification No. 09/2016 ST dated 01.03.2016. The conditions laid down for claiming the service tax refund claim has been mentioned at Sec. 102 of the Finance Act, 1994, are reproduced as below:

*“(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 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."

2. They being a Sub Contractor, provided works contract service to M/s. Backbone Enterprise Ltd., in the nature of Works Contract Services for construction of School And girls Hostel Building at Khambhadiya. They had submitted Copy of Work Order Dated 06.06.2014 issued to M/s. Backbone Enterprise Ltd., Rajkot, issued by Ex. Engineer, Road & Building Division, Jamnagar. & Contract Agreement between them & M/s. Backbone Enterprise Ltd., for the execution of the above said work, through submission dated 22.11.2016. Details of the work done are as under:

Sr. No.	R. A. Bill No. & Date	Amount of Service Provided	Amount @ 50% on which Appellant has to pay Service Tax	Taxable Value @40% after abatement	Amount of Service Tax Paid	Service tax Paid Challan No. & Date	Nature of Work
1	2 <sup>nd</sup> , 08.09.2015	13,61,564	6,80,782	2,72,312	38,124	628, 04.11.2015	Construction of School and girls Hostel at Khabhadiya
2	7 <sup>th</sup> , 08.09.2015	74,56,868	37,28,434	14,91,374	2,08,792	253, 04.11.2015	Construction of School and girls Hostel at Khabhadiya
3	8 <sup>th</sup> , 08.09.2015	1,18,15,246	59,07,623	23,63,049	3,30,827	671, 04.11.2015	Construction of School and girls Hostel at Khabhadiya
<b>Total</b>		<b>2,06,33,678</b>	<b>1,03,16,839</b>	<b>41,26,735</b>	<b>5,77,743</b>		

They have, from time to time, discharged Service Tax liability and submitted following documents:

- Copy of the Invoices issued by the appellant to M/s. Backbone Enterprise Ltd., showing Service Tax amount payable by the appellant.
- Copy of the R.A. Bills issued by the Ex. Engineer, Road & Building Division, Jamnagar.
- Copy of the Service Tax paid challans of Rs. 5,77,743/-.
- Copy of the ST-3 Return showing details like Amount of Service provided, Service Tax paid by the appellant etc.

The Finance Bill 2016 got assent of the President on 14<sup>th</sup> May, 2016, and they filed service tax refund claim on 11.11.2016 i.e. will within the time limit prescribed at Sr. No. 3 of the Sec. 102 of the Finance Act, 1994. Thus, they have followed all the conditions prescribed under Sec. 102 of the Finance Act, 1994.

- The adjudicating authority while giving his findings at para 13 erred the provision of 29(h) of the Mega Exemption Notification No. 25/2012 ST Dated 20.06.2012, which is reproduced as below:

*"sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;*

So, the Services provided by them in the capacity of sub-contractor to the M/s. Backbone Enterprise Ltd., in the nature of Works Contract Services for construction of School And girls Hostel Building at Khambhadiya, originally Work Order allotted by Government of Gujarat, Executive Engineer, Road & Building Division, Jamnagar, clearly falls under the ambit of provision of 29(h) of the Mega Exemption Notification No. 25/2012 ST Dated 20.06.2012 as mentioned above. The adjudicating authority nowhere disputes that the construction work done by them is not meant for the Governmental Authorities or it is not meant for Educational Institution.

4. The observation made by Adjudicating Authority in paragraph 17 & 18 of the impugned order is not only baseless but also contrary to the documentary evidence placed on record by them. The Adjudicating Authority has completely failed to give due consideration to the fact that they have separately charged service tax over and above to the Contract Value while raising the invoice to M/s. Backbone Enterprise Ltd., Rajkot and they submitted copy of invoices and challans for payment of Service Tax. So, the portion of service tax was not included in the contract price. Therefore, the impugned order is not sustainable.
5. The observation made by Adjudicating Authority in paragraph 22 of the impugned order is not only baseless but contrary to the documentary evidences placed on record since he ignored documentary evidences in form of Certificate issued by independent Chartered Accountant, copy of audited balance sheet, ledger in the account of M/s. Backbone Enterprise Ltd. etc certifying that they have provided Works Contract Service to the M/s. Backbone Enterprise Ltd., and they have paid Service Tax of Rs. 5,77,743/- for the same, and they have not passed on the Service Tax paid of Rs. 5,77,743/- to the M/s. Backbone Enterprise Ltd.

4. Shri Chetan Detharia appeared and reiterated grounds of appeal and submitted that all required documents were submitted as reply to Show Cause Notice and during personal hearing to adjudicating authority but he did not go through the documents and held that documents were not submitted, which is not true; that the services were provided to government authority and Service Tax was paid during 2015-16, which was exempted by the Government with retrospective effect; that CA certificate has been submitted evidencing that bar of unjust enrichment is not applicable in this case as contract rate was not

changed during 2015-16 and remained same from 2012 onwards including 2015-16 and 2016-17; that appeal may please be allowed and refund may be granted.

4.1 The appellant filed additional written submissions dated 05.12.2017, which stated as under:

(i) Appellant is a sub contractor and had provided services to M/s. Backbone Enterprise Ltd., in the nature of Works Contract Services for construction of School And girls Hostel Building at Khambhadiya, originally Work Order allotted by Ex. Engineer, Road & Building Division, Jamnagar. These works was falling at Sr. No. 12 of Mega Exemption Notification No. 25/2012 - ST Dated 20.06.2012. However, the said exemption from payment of Service Tax was withdrawn on certain services vide notification No. 06/2015 ST with effect from 01.04.2015. Since at the time of Bidding for the said projects the service tax exemption was available, on the services provided to various Government and local authorities, W.E.F. 01.04.2015 due to withdrawal of exemption as referred above, the claimant has paid service tax on the said taxable services provided. But the said exemptions again restored vide notification No. 09/2016 ST dated 01.03.2016. And said notification also allowed Service Tax Refund for the Services provided during the period of 01.04.2015 to 28.02.2016, which falls originally at Sr. No. 12 of Mega Exemption Notification No. 25/2012 ST along with certain conditions. So, the Appellant has filed service tax refund of Rs. 5,77,743/- along with all the necessary supporting documents as on 11.11.2016. But, the Adjudicating Authority has passed the impugned order holding that in order to claim refund of service tax ,the appellant is required to prove with documentary evidences that the burden of tax has not been passed on to the service recipient, that he has not proved with sufficient documents. Being aggrieved with the impugned order, the appellant has filed this appeal.

(ii) The submissions made herein are in addition to the submissions and explanations made as well as contentions raised in the appeal memorandum filed as on dated 27.02.2017, and though they have referred to some of explanations, submissions and contentions made in the said appeal memorandum filed as on dated 27.02.2017, the submissions made hereunder are only in addition to those made in the above referred reply.

1. The conditions laid down for claiming the service tax refund claim has been mentioned at Sec. 102 of the Finance Act, 1994:-

❖ *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.*

In this regard, they stated that, they are a Government Contractor and provided works contract service to various Government and Local Authorities and submitted Copy of Work Orders issued by the various Government and Local Authorities through submission dated 22.11.2016 and submitted the abstract of the Work orders vide letter dated 11.11.2016.

❖ *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.*

They also stated that they have time to time discharged their Service Tax duty liability as mentioned in the table shown at Sr. No. b (1). In support to contention, they have already submitted following documents to submission dated 22.11.2016;

1. Copy of the R. A. bills raised by the Government & Local Authorities to M/s. Backbone Enterprise Ltd.
2. Copy of the Service Tax Paid Challans of Rs. 5,77,743/-.

3. Copy of the ST-3 Return showing details like Amount of Service provided, Service Tax paid by the appellant etc.
  4. Calculation Sheets which correlates the Amount of Service Provided, Amount of Service Tax payable & Paid through the Challans, etc...
- ❖ *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."*

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The Finance Bill 2016 has got assent of the President as on 14th May, 2016, and they have filed service tax refund claim as on 11.11.2016, which is well within the time limit prescribed at Sr. No. 3 of the Sec. 102 of the Finance Act, 1994.

So, from the above they have followed all the conditions prescribed under Sec. 102 of the Finance Act, 1994 and hence the impugned order is not sustainable in the eyes of law.

2. Contention of the Ld. Adjudicating Authority that it is ample clear that refund can not be claimed by the claimant as a sub contractor as he had not provided any direct service to ay Government or local authorities:-

In this regard, they referred the provision of 29(h) of the Mega Exemption Notification No. 25/2012 ST Dated 20.06.2012, which is reproduced as below;

*"sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;*

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So, the Services provided by them on the capacity of sub-contractor to the M/s. Backbone Enterprise Ltd., in the nature of Works Contract Services for construction of School And girls Hostel Building at Khambhadiya, originally Work Order allotted by Ex. Engineer, Road & Building Division, Jamnagar, which clearly falls under the ambit of provision of 29(h) of the Mega Exemption Notification No. 25/2012 ST Dated 20.06.2012 as mentioned above. And the adjudicating authority nowhere disputes that the construction work done by the appellant is not meant to the Governmental Authorities or it is not meant for Educational Institution. So, only on that basis the impugned order must be set aside.

3. Contention of the Ld. Adjudicating Authority that the contract value included the service tax also and in that way the claimant has recovered the same from the main contractor:-

Adjudicating Authority has completely failed to give consideration to the fact that the appellant has separately charged service tax over and above to the Contract Value while raising the invoice to M/s. Backbone Enterprise Ltd., Rajkot. The following documents has been submitted by the appellant along with the service tax refund claim application dated 11.11.2016, in support to the above contention;

1. Copy of the Service Tax Invoices issued by the appellant to the M/s. Backbone Enterprise Ltd., which clearly shows that service tax has separately charged, over and above to the Contract Value.
  2. Copy of the Service Tax paid Challan, which correlates with the Invoices raised by the Appellant.
4. Contention of the Ld. Adjudicating Authority that in order to claim refund of Service Tax, the claimant is required to prove with documentary evidences that the burden of tax/duty has not been passed on to the service recipient, that he has not proved with sufficient documents.:-

Adjudicating Authority has also erred in ignoring documentary evidence submitted by the appellant in the form of;

1. Certificate issued by the Independent Chartered Accountant, certifying that M/s. Dharma Enterprise, has provided Works Contract Service to the M/s. Backbone Enterprise Ltd., and they have paid Service Tax of Rs. 5,77,743/- for the same, and they have not passed on the Service Tax paid of Rs. 5,77,743/- to the M/s. Backbone Enterprise Ltd.
2. Certificate issued by the Independent Chartered Accountant, certifying that, M/s. Backbone Enterprises Limited., has provided Works Contract Services to the various Government Authorities and they have paid Service Tax of Rs. 31,93,322/- for the same. Further we also certify that they have not passed on the Service Tax paid of Rs. 31,93,322/- to the Government Authorities.
3. Copy of the Audited Balance Sheet for the F.Y. 205-16, showing Service Tax paid of Rs. 5,77,743/-, as Service Tax Refund Receivable.

4. Further they have also attached the Ledger of the Appellant in the Books of M/s. Backbone Enterprise Ltd., which shows that the Service Tax paid by M/s. Dharma Enterprise, has been debited to the account of appellant.
5. Other adjudicating authority has sanctioned the Service Tax refund for the Services provided during the period of 01.04.2015 to 28.02.2016 to various Government Authorities as per notification No. 09/2016 ST dated 01.03.2016:-

They relied upon the Order In Original No. R/68/2016 issued by Assistant Commissioner, Service Tax Division, Bhavnagar, in the case of M/s. Dharti Engineers, Amreli.

In this case M/s. Dharti Engineers, Amreli has filed refund claim as per notification No. 09/2016 dated 01.03.2016, for the Service tax of Rs. 5,88,686/- paid during the period of 01.04.2015 to 28.02.2016 for the Works Contract services provided to various Government Authorities. The Assistant Commissioner, Bhavnagar has sanctioned the Service tax refund claim as law bound in nature. Their case is squarely follows all the conditions lay down in the notification No. 09/2016 dated 01.03.2016. Adjudicating authority fails to appreciate the aforesaid fact while passing the Order-In-Original.

In the above premises, it was submitted that there is no justification in any of the allegations and proposals leveled thereunder and they requested to set aside the aforementioned Order In Original, as rejecting the service tax refund is unsustainable.

#### **FINDINGS:**

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and reply as well written and oral submission of appellant. The issue to be decided in the present appeal is as to whether appellant has passed on the incidence of Service Tax and hence not eligible for refund of Rs. 5,77,743/- claimed by them or not.

6. I find that at the material time, Service Tax under Works Contract service was chargeable on 40% of value of Services provided. The Works Contract service was under reverse charge mechanism wherein the service

provider had to pay 50% of Service Tax and service receiver had to pay remaining 50% of Service Tax. The appellant has paid 50% Service Tax of Rs. 5,77,743/- during November, 2015 for the period from April, 2015 to September, 2015 and had filed S.T.-3 return on 03.06.2016 wherein Service Tax liability of Rs. 5,77,743/- was shown to have been paid vide GAR-7 challan No. 00671, 00653 and 00628 all dated 04.11.2015 for Rs. 3,35,721/-, Rs. 2,11,881/- and Rs. 38,688/- respectively.

6.1 The appellant has produced copy of account ledger of Service Tax receivable, sub contract income, Backbone Enterprise Ltd. and Service Tax payable. The appellant has also produced certificate issued by Chartered Account certifying that the appellant has not passed on Service Tax of Rs. 5,77,743/- to M/s. Backbone Enterprise Ltd. In sub contract income, they have credited the total expenditure towards services provided by them to M/s. Backbone Enterprises Ltd. However, they have debited the expenditure towards services provided by them to M/s. Backbone Enterprises Ltd excluding TDS, VAT and Service Tax. Thus, it is contended that the appellant has not passed on the incidence of Service Tax paid by them and refund sought by them in their appeal.

6.2 The lower adjudicating authority has given findings that the appellant provided services in capacity of sub-contractor, who had provided the services to the contractor and not directly to the government or local authorities and thus the refund cannot be claimed by the appellant in terms of Section 102 of the Act. I find that Sr. No. 12 and 29 of Notification No. 25/2012-S.T. dated 20.06.2012 read as under:

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 65 B of the said Act;

29. Services by the following persons in respective capacities -

- (a) .....
- (b) .....

- (c) .....
- (d) .....
- (e) .....
- (f) .....
- (g) .....
- (h) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;  
(Emphasis supplied)

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6.2.1 Thus, the above mentioned Sr. 29(h) of the exemption Notification covers the case of the appellant as they have provided services by way of works contract, in capacity of sub-contractor, to the main contractor M/s. Backbone Enterprises Ltd. providing works contract services of construction of Government School and Girls hostel Building at Khambhaliya which were exempted as per Sr. No. 12 of Notification No. 25/2012-ST. Therefore, the said findings of the lower adjudicating authority are not correct, legal and proper.

6.3 The appellant has submitted copy of sub-contract agreement dated August, 2014 from which it is very clear that contract price does not include Service Tax. Para 6 of sub contract mentions works contract tax, VAT and labour cess, octroi, royalty but does not mention Service Tax, however, Service Tax was imposed w.e.f. 01.04.2015 on the services provided to even government, government authority or local government authority and hence the appellant claimed refund of Service Tax paid subsequently because of central government granting exemption retrospectively in 2016. I have seen the audited accounts of the appellant of 2015-16 and the appellant has kept this amount as "service tax receivable" at Sr. No. 23 of Schedule 'H' of Balance Sheet as on 31.03.2016, which establish beyond doubt that the incidence of Service Tax has been borne by the appellant and not passed on to any other person. The certificate dated 21.11.2016 of R. Javiya & Co., Chartered Accountant further proves that the amount of Rs. 5,77,743/- paid by the appellant has not been passed on to the main contractor i.e. M/s. Backbone Enterprises Ltd or to the government authorities. The invoices issued by the appellant also prove that they have paid Service Tax of Rs. 5,77,743/- but not charged it to the main contractor and hence, can't be paid by the main contractor and has not been paid by the main contractor to the appellant.

B. J. J.

6.4 In view of above overwhelming evidences, it is very clearly proved that the incidence of Service Tax paid by appellant has not been passed on by them to the main contractor or any other person and hence, refund claimed by the appellant is payable to them. The findings of the lower adjudicating authority

in this regard are not correct at all. Thus, I have no option but to set aside the impugned order and allow the appeal and I do so.

6. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
7. The appeal filed by the appellant is disposed of in above terms.

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*R.P.A.D.*  
6/3/2017  
**(कुमार संतोष)**  
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Dharma Enterprise, 201, Business Bay, Royal Park Street-6 Corner, Kalawad Road, Rajkot-360 005

मे. धर्मा एंटरप्राइज, २०१, बिजनेस बे, रॉयल पार्क स्ट्रीट नं. ६ कोर्नर, कालावड़ रोड, राजकोट- ३६० ००५.

**Copy for information and necessary action to:**

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Rajkot.
- 3) The Assistant Commissioner, GST & Central Excise, Division-I, Rajkot.
- 4) The Superintendent, GST & Central Excise, Range-Rajkot.
- 5) Guard File.