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

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No	मूल आदेश सं / O.I.O. No	दिनांक / Date
	V2/227 to 232 /RAJ/2016	106 to 111/ST/REF/2016	12.09.2016
	V2/26 to 31/EA2/RAJ/2016	106 to 111/ST/REF/2016	12.09.2016

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

RAJ-EXCUS-000-APP-215-TO-226-2017-18

आदेश का दिनांक / Date of Order: **07.02.2018** जारी करने की तारीख / Date of issue: **08.02.2018**

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

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

घ **अपीलकर्ता** & प्रतिवादी का नाम एवं पता /Name&Address of the **Appellants** & Respondent :-
1.M/s. Kunal Structure (India) Pvt. Ltd., Kunal House Ganga Park, Plot No. 10,, Opp. Sanskruti Apartment,, Panchvati Road, Rajkot - 360 001.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित+त 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्याया.ोकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावो अहमदाबाद- 3८००१६ 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, जहा उत्पाद शुल्क की मांग ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहा संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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

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

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

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

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के 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, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

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

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

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

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

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

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

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम है तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा 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.

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

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

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

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

:: ORDER-IN-APPEAL ::

The present appeals have been filed by M/s. Kunal Structure (India) Pvt. Ltd., 'Kunal House', Ganga Park, Plot No. 10, Opp. Sanskruti Apartment, Panchvati Road, Rajkot – 360 001 (hereinafter referred to as the "appellant assessee") as well as by the Principal Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as 'appellant department') against the Orders-in-Original (hereinafter referred to as "the impugned orders") as shown in below mentioned table, passed by the Assistant Commissioner, Service Tax Division, Rajkot (hereinafter referred to as "the lower adjudicating authority").

TABLE

Sr.No.	Appellant's Appeal No.	Department's Appeal No.	Order-in-Original No. & Date	Amount involved
01	232/2016	EA2/26/2016	106/ST/REF/2016 dated 12.09.2016	1,50,26,614
02	231/2016	EA/2/27/2016	107/ST/REF/2016 dated 12.09.2016	80,23,135
03	232/2016	EA2/28/2016	108/ST/REF/2016 dated 12.09.2016	44,63,468
04	229/2016	EA2/29/2016	109/ST/REF/2016 dated 12.09.2016	5,47,513
05	228/2016	EA2/30/2016	110/ST/REF/2016 dated 12.09.2016	2,76,713
06	227/2016	EA2/31/2016	111/ST/REF/2016 dated 12.09.2016	1,96,248

2. The brief facts of the cases are that the appellant assessee, a service provider of constructions and works contract services to the Government, Government authority and local government authorities, filed applications for refund of service tax paid by them during the period from 01.04.2015 to 29.02.2016 in terms of Section 102 of the Finance Act, 1994, inserted vide Finance Act, 2016. It was submitted that the appellant-assessee had got work done through sub-contractors who had paid service tax at the applicable rate and were reimbursed/paid service tax to the extent by the appellant-assessee. The appellant assessee had availed cenvat credit of service tax paid to the sub-contractor and had also directly paid service tax on the services provided by them. The query memos were issued by the department calling for certain documents and information/clarification and later on issued SCNs proposing rejection of refund claims and calling for reasons as to why the amount of refund should not be transferred to the Consumer Welfare Fund under Section 12C of the Central Excise Act, 1944, made applicable to service tax matter under Section 83 of the Finance Act, 1994. The lower adjudicating authority vide impugned orders sanctioned the refund claims but ordered to credit the sanctioned refund to the Consumer Welfare Fund established under Section 12C of the Central Excise Act, 1944 on the ground that the incidence of service tax has been passed on by the appellant-assessee to their service recipients on the basis that they have not proved

beyond doubt that the incidence of service tax has not been passed on.

2.1 Since the issue involved is common in all these appeals, the same are taken together for decision.

3. Being aggrieved with the impugned orders, the appellant-assessee filed appeals, *inter-alia*, on the following grounds:

(i) The appellant-assessee had made submissions before the lower adjudicating authority in reply to SCN as well as oral arguments, however, he clearly overlooked the submissions of the appellant and mechanically confirmed the proposals made in the SCNs without following the principles laid down in the case laws cited by the appellant assessee and without mentioning any proper reason. The impugned orders being non-speaking orders have been passed in gross violation of principles of equity, fair play and natural justice. The appellant-assessee relied on decisions in the case of Cyril Lasardo (Dead) reported as 2004 (7) SCC 431 and Shukla & Brothers reported as 2010 (254) ELT 6 (SC).

(ii) The appellant-assessee had applied for refund of service tax paid by them as a person liable to pay service tax, thus, Section 11B(2)(d) is applicable. The presumption under Section 12B of the Central Excise Act, 1944 that incidence of duty has been passed on to the buyers is a rebuttable presumption. The appellant-assessee relied on decisions in the case of Apple India Pvt. Ltd. reported as 2014 (309) ELT 29 (Kar.) affirmed by Hon'ble Supreme Court reported as 2015 (320) ELT A277 (SC) and IBP Ltd. reported as 2013 (288) ELT 385 (Tri. Del.) and submitted their financial statements and CA certificate proving that they have not passed on the duty burden to their clients or any other person, however the lower adjudicating authority decided the SCNs without considering evidences available in the case in their favour.

(iii) The lower adjudicating authority has relied on 'Clause 3 – Payment' of the agreement entered with service recipients and held that the total contracting cost included all taxes and hence the appellant-assessee has passed on the tax burden to their clients. It is submitted that the said clause is a part of 'Information & Instructions for Tenderers' and nowhere speaks about inclusion of service tax. The clause which deals with inclusive of taxes is 'Clause 47 – Terms & Conditions of Contract' where there is no mention regarding inclusive of 'all taxes' but inclusion of sales tax in the contract price and not service tax at all. It was submitted that a term in the contract providing for inclusion of 'all taxes' does not lead to a necessary conclusion that service tax burden has been passed on to the clients even when the evidences available are otherwise. It was also submitted that at the time of entering into the

agreements with the clients, service tax was not payable on the services provided by them to the Govt. authorities and hence mere inclusion of 'all taxes' in the terms of agreements even technically cannot be a ground not to grant the refund claim by them and available to them. The appellant assessee relied on the following case-laws in their favour: -

- Cimmco Ltd. - 1999 (107) ELT 246 (Tribunal)
- Southern Refineries Ltd. – 2006 (199) ELT 334 (Tri. – Bang.)
- Roop Ram Suthar – 2014 (35) STR 583 (Tri. – Del.)
- Amadalavalasa Co-op. Sugars Ltd. – 2007 (219) ELT 526 (Tri. – Bang.)
- A.P. Engineers – 2014 (34) STR 795 (Tri. – Delhi)
- Thales-E Transaction CGA – 2006 (3) STR 205 (Tri. – Del.)

(iv) The lower adjudicating authority has observed that during the period from 01.04.2015 to 29.02.2016, the services rendered by the appellant-assessee became taxable, however he ignored the fact that there was no further agreement entered, which shows that the appellant-assessee was aware that there is already a clause regarding taxes. The finding of the lower adjudicating authority supports the plea of the appellant-assessee that service tax element has been paid by them over and above the contract price since there was no change in the contract even when the exemption was withdrawn. The appellant-assessee relied on decisions in the case of Organan (India) Ltd. reported as 2008 (231) ELT 201 (SC) and VXL Instruments Ltd. Reported as 2013 (294) ELT 320 (Tri. – Bang.).

(v) The impugned orders have held that the appellant-assessee has not proved by documentary evidence that burden of tax has not been passed on to their clients or to any other person, which is completely baseless. The appellant-assessee had shown the service tax amount as 'receivables' in their financial statements and CA certificate to this effect was also submitted to the lower adjudicating authority. The appellant-assessee placed reliance on Circular F.No. 137/29/2016-Service Tax dated August, 2016 wherein the application of principle of unjust enrichment has been explained in refund cases vide Para 3.1 to Para 3.3 of the said Circular and also placed reliance on following decisions: -

- Konkan Synthetic Fiber – 2007 (216) ELT 80 (Tri.)
- Talsita Pharmaceutical P Ltd. – 2007 (210) ELT 220 (Tri.)
- Pride Foramer – 2006 (200) ELT 259 (Tri.)
- Jaipur Syntex Ltd. – 2002 (143) ELT 605 (Tri.)
- Maruti Udhyog Ltd. – 2003 (155) ELT 523 (Tri.)
- Hero Honda Motors Ltd. – 2000 (126) ELT 1014 (Tri.)
- Saralee Household – 2007 (216) ELT 685 (Mad.)

(vi) The department was in receipt of the letters from the service recipients that they have not paid any service tax amount to the appellant-assessee. In these circumstances, the refund claim cannot be denied on the ground of unjust enrichment. The appellant assessee relied on decision in the case of Modest Infrastructure reported as 2013 (31) STR (Guj.). The lower adjudicating authority has sought to distinguish the said case law on the ground that in the present case the total contracting cost is including all taxes. It is submitted that in the aforesaid case also, the total consideration contracted between the assessee and their buyer was inclusive of all taxes. The appellant-assessee also relied on decision in the case of SBI Capital Markets Ltd. Reported as 2015 (39) STR 335 (Tri. – Bom.)

(vii) The department has not challenged the authenticity of CA certificate and the letters issued by the service recipients. In such a situation, the refund claims cannot be denied on ground of unjust enrichment as held in the case of IVRCL Infrastructures & Projects Ltd. reported as 2014 (312) ELT 737 (Tri. – Bom.)

(viii) The applicant-assessee can get refund of duty borne by them as per clause (e) of the proviso to Section 11B (2) of the Central Excise Act, 1944 since the sub-contractors have charged and collected service tax from the appellant-assessee and it is appellant-assessee, which has borne the entire service tax paid in these appeals. The fact that the recipient of service is also entitled to file refund claim is no longer *res integra*. The issue stands concluded by the decision in Mafatlal Industries reported as 1997(89) ELT 247(SC) following by the decision in the case of Indian Farmer Fertilizer Co-Op. Ltd. Reported as 2014 (35) STR 422 (Tri. - Del.) and Jindal Steel & Power Ltd. reported as 2016 (42) STR 694 (Tri. - Del.)

4. Being aggrieved with the impugned orders, the appellant-department also filed appeals, *inter-alia*, on the following grounds:

(i) The appellant-assessee as well as their sub-contractors are engaged in providing various taxable services and have availed cenvat credit of tax paid on inputs and input services for payment of service tax. When the appellant-assessee has claimed refund of service tax paid on the output services, which subsequently became an exempted service, they are required to fulfil the obligations under Rule 6 of Cenvat Credit Rules, 2004 as made applicable to service tax matters under Finance Act, 1994, which have not been taken into consideration in the impugned orders. Further, none of the options under Rule 6 of the Rules appears to have been exercised by the appellant assessee. Therefore, the appellant-assessee was required to pay an amount @7% of value of exempted services as per Rule 6(3)(i) of the Rules. As per first proviso to Rule 6, service tax payment is required to be adjusted against the liability of amount in terms of sub-rule 3(i) of Rule 6.

(ii) The appellant-assessee is not eligible for refund since they have not borne service tax since the contract was inclusive of service tax and thus, whatsoever service tax was deposited by them was already charged and collected by them from the service recipients. The services later on became exempted services need not make them entitled to claim refund of service tax paid by them since the amount has already been charged and collected by them from the clients.

(iii) So far as service tax paid by the sub-contractors was concerned, the lower adjudicating authority has discussed that appellant-assessee had availed cenvat credit of the amount of service tax paid to sub-contractor and had utilized the same against service tax payment. However, later on the appellant-assessee had, to obtain refund of cenvat credit utilized also paid same portion of the service tax by cash/challans and subsequently, claimed refund. There are no such provisions prescribed in the Act or Rules framed thereunder and there are possibilities where sub-contractors while providing the aforesaid services to the appellant-assessee have availed input services upon which they had availed and utilized the cenvat credit and Rule 6 became applicable. The work done by the sub-contractors cannot be treated as exempted directly when the same was provided upon which the service tax has been paid separately by the principal contractor and none of the copies of the contracts/agreements have been submitted by the appellant-assessee to substantiate the very facts that they have undergone any sub-contracting with sub-contractors so far as the present exempted work of Government agency were concerned.

(iv) The appellant-assessee has not provided any details regarding their total gross income and actual service tax payable thereon and what gross income subsequently became exempted. They had made payment of service tax then of actual required to be made and merely on submissions of service tax payment challans established their plea, the refund claim scrutinized.

(v) The appellant-assessee has provided "Works Contract Service" and had claimed abatement on the value of taxable services. Whereas, in the refund claims, neither the appellant-assessee nor the lower adjudicating authority discussed anything regarding the value of such services on which the payment of service tax so made showing specifically whether any abatement was claimed and if yes, at what percentage such abatement availed. The aforesaid verification can be made only upon filing of ST-3 returns, but the lower adjudicating authority did not make any such reconciliation and refund was sanctioned only on the basis of service tax payment particulars produced by the appellant-assessee.

(vi) The lower adjudicating authority has not followed the instructions issued by the Board vide Circular No. 869/7/2008-CX dated 16.05.2008 and sanctioned the refund claim without getting it pre-audited from the Dy./Asstt. Commissioner (Audit), where the amount of refund is more than Rs. 5 lakhs.

(vii) The lower adjudicating authority has not observed provisions of Section 73A of the Act.

5. Personal hearing in the matter was attended to by S/Shri Pradeep Mishra, Chief Financial Officer and Bhavin Ramani, Senior Manager, Finance & Accounts, who submitted written P.H. submissions to claim that incidence of Service Tax has not been passed on to service recipients/Govt. authorities/Local authorities or to any other person; that certificates of these authorities as well as Chartered Accountant say that incidence of Service Tax has not been passed on by them to any other person; that the amount has been shown as Short Term Loans & Advances under sub-head 'Balance with revenue authorities' duly certified by Chartered Accountant; that all these evidences had been submitted to the lower adjudicating authority but he did not pay attention to these Certificates/details; that appeals may please be allowed in view of above facts. The department neither submitted comments on Grounds of Appeal filed by the appellant-assessee nor appeared for P.H. even once, despite P.H. notices issued to the Commissionerate.

5.1. The appellant-assessee made written submissions vide their letter dated 29.12.2017 in respect of appeals filed by the department and narrated as under -

(i) The appellant-assessee has provided Works Contract Service and had not utilized any cenvat credit for payment of Service Tax; that they do not have any common credit and hence question of reversal of common credit does not arise and the appellant-assessee has not availed any common credit for providing taxable output services. Hence, Rule 6(3) of Cenvat Credit Rules, 2004 is not applicable in this case.

(ii) The appellant-assessee has provided services to the Government, local authority and Govt. authority which was exempted vide Entry No. 12(e) of Notification No. 25/2012-ST dated 20.06.2012. All the taxes were to be borne by the appellant-assessee in respect of works executed. While entering into agreements, there was no service tax on the said work, hence by no stretch of imagination in agreements clause of payment of service did exist. It is very much evidential that there was no amount of service tax paid by the customers to the appellant-assessee and the customers have not paid any additional amount other than the contracted prices though there was levy of service tax introduced on the said contracts. The appellant assessee has paid service tax from its own pocket to comply with the service tax law but the liability has not been passed on to

the service recipients. The appellant-assessee relied on following decisions: -

- Modest Infrastructure Ltd. – 2013 (31) STR 650 (Guj.)
- Addison & Co. – 2003-TIOL-396-HC-MAD-CX.
- Ind Swift Lands Ltd. – 2015 (38) STR 819 (Tri. Del.)
- Needle Industries (India) Pvt. Ltd. – 2016 (46) STR 489 (Tri. Chennai)
- Purnima Advertising Agency Pvt. Ltd. – 2016 (42) STR 785 (Guj.)
- Nissan Copper Ltd. – 2015 (329) ELT 843 (Tri. Ahmd.)
- Modi Oil & General Mills – 2007 (210) ELT 342 (P&H)
- Kirloskar Ebara Pumps Ltd. – 2007 (5) STR 280 (Tri. Mumbai)

(iii) The appellant-assessee borne the burden of service tax paid by them and they paid service tax to sub-contractors, hence eligible for refund. Therefore, the appellant-assessee is eligible for refund of payment made by the appellant-assessee and deposited by the sub-contractors to Govt. exchequer also.

(iv) The department's ground that the appellant-assessee has not provided any details in Para 5.4(i) is arbitrary and travelling beyond the scope of SCN as held in the cases of Reliance Ports and Terminals Ltd. – 2016 (33) ELT 630 (Guj.) and JBR Nirmaan Pvt. Ltd. – Order No. A/13477-13478/2017 dated 16.11.2017.

5.3 In connection with the appeals filed by the department also, personal hearing was attended to by S/Shri Pradeep Mishra, Chief Financial Officer and Bhavin Ramani, Senior Manager, Finance & Accounts, who reiterated points/grounds submitted by them in their additional submissions that they have not availed cenvat credit on inputs as well as common input services; that they have maintained their accounts on specific project basis separately; that the entire Service Tax has been paid by them through cash either directly or through sub-contractors; that they produced C.A. certificate dated 09.01.2018 for all 9 Govt. projects; that the Service Tax paid by the appellant-assessee has not been recovered from Government/Service recipients and hence incidence of service tax has not been passed on to any other persons; that since cenvat credit not taken by them, Rule 6(3) of Cenvat Credit Rules, 2004 will not be applicable at all; that departmental appeals should be rejected on the basis of the facts of the case. No one appeared on behalf of the department despite P.H. notices issued to the Commissionerate.

FINDINGS: -

6. I have carefully gone through the facts of the case, the impugned orders, appeals filed by the appellant-assessee as well as by the appellant-Department and written as well as oral submissions made by the appellant-assessee. The issues to be decided are: -

(i) Whether in the facts and circumstances of the present case, the impugned orders passed by the lower adjudicating authority sanctioning refund claims filed by the appellant under Section 102 of the Finance Act, 2016 are correct or not and

(ii) Whether the impugned orders to credit the sanctioned refund to the Consumer Welfare Fund are correct or not.

7. I find that the appellant-assessee had filed refund claims of service tax paid on 'Works Contract Services' provided by them directly and through their sub-contractors, to various Government authorities/local government authorities during the period from 01.04.2015 to 29.02.2016 consequent upon insertion of Section 102 in the Finance Act, 1994 through the Finance Act, 2016. The lower adjudicating authority sanctioned the amount claimed but ordered to credit the entire amount into Consumer Welfare Fund under Section 12C of the Central Excise Act, 1944 on the grounds that the agreements suggested that the total contracting cost was inclusive of all taxes and the appellant-assessee failed to prove that they have not passed on incidence of service tax to their clients/to any other person. The appellant-assessee has submitted that the contracts merely stated 'all taxes' but that does not lead to a conclusion that service tax has been collected by them from their service recipients and incidence of service tax burden has been passed on to them especially when Govt. authorities/Local Govt. authorities specifically given in writing that they have not paid service tax to the appellant assessee. It is submitted that at the time of entering into the contracts/agreements with Govt. authorities/Local Govt. authorities for all 9 projects, service tax was not payable for the services provided to the Govt. authorities/Local Govt. authorities and hence mere words of 'all taxes' in the agreements cannot be a ground to reject the refund claims without going into the evidences available in the case. I find that the appellant-assessee has provided 'Construction Service/Works Contract Service' to various Govt. authorities/Local Government authorities directly and also through sub-contractors during the period from 01.04.2015 to 29.02.2016 for which the contracts/agreements were signed during the year 2012 or 2013 or 2014 during which service tax was exempted vide Notification No. 25/2012-ST dated 20.06.2012 on the construction service/works contract service provided to the Government, Government authorities and local government authorities and there is no dispute on this fact. It is a fact that the contract price was not amended or modified when the exemption of service tax was withdrawn by the Government of India w.e.f. 1.4.2015 and the said services were made liable to service tax. I also find that the appellant-assessee has submitted copy of their audited Balance Sheets wherein the amount of service tax paid by them was accounted for under sub-head 'Balance with Revenue authorities' under the main head 'Short Term Loans & Advances', which clearly establish that the appellant-assessee has not

expensed the element of service tax into the account of service receivers and the incidence of service tax has not been passed on to any service recipients or to any other person. The certificate of Chartered Accountant produced by the appellant-assessee also clarifies that incidence of service tax has not been passed on by the appellant-assessee to any other person. The appellant-assessee has also produced copy of letters of their service receivers clearly stating that they have not reimbursed the service tax amount under these 9 projects. In view of these documentary evidences produced by the appellant-assessee, there is no doubt whatsoever that the appellant-assessee has proved beyond doubt that they have not passed on the incidence of service tax to any service recipients or to any other person. Hence, the impugned orders crediting the refunded amount to Consumer Welfare Fund are not correct, legal and proper and, therefore, I set aside the impugned orders and allow appeals of the appellant-assessee.

8. The appellant-department has filed appeals contending that the lower adjudicating authority has not taken into consideration that the appellant-assessee or their sub-contractors have availed cenvat credit on inputs or input services for providing these taxable services, which became exempted subsequently and therefore Rule 6 of the Cenvat Credit Rules, 2004 is to be applied. The appellant-assessee has submitted that they have not availed cenvat credit on any inputs and have also not availed cenvat credit on common input services such as Telecommunication Services, Security Services, Professional Services, Insurance Services, IT Software services, Advertising services, etc. and hence question of reversal of cenvat credit under Rule 6(3) of Cenvat Credit Rules, 2004 does not arise. I also find that the appellant-assessee has submitted project-wise details and also Certificates dated 09.01.2018 issued by A.S. Shah & Co., Chartered Accountant. I find that the contention of the department that the appellant-assessee has availed cenvat credit on inputs or input services for providing of services which became exempted subsequently, is factually incorrect and cannot be allowed to sustain. Since, the appellant-assessee has not availed cenvat credit on inputs and/or common input services, the question of payment of amount under Rule 6(3) of the Cenvat Credit Rules, 2004, would not arise and the appellant assessee is entitled for refund of Service Tax paid by them either directly or through their sub-contractors towards providing of construction services and works contract services to the Govt. authorities and/or local government authorities in terms of Section 102 of the Finance Act, 1994 inserted vide Finance Act, 2016.

8.1. The appellant-department has also contended that the lower adjudicating authority has discussed that the appellant-assessee had availed cenvat credit of service tax paid to the sub-contractors and had utilized the same against service tax payment, however, later on the appellant-assessee, to obtain refund of cenvat credit utilized had paid some portion of the service tax by cash/challans and subsequently, claimed the

refund. The appellant-assessee has submitted their month-wise cenvat credit account for the period under refund claims i.e. from April, 2015 to February, 2016 and submitted that they have considered service tax reimbursed to sub-contractors as payment of service tax made by them and they have paid remaining service tax liability to the Government account directly and have not utilized cenvat credit of such service tax reimbursed to their sub-contractors and submitted project wise C.A. certificates dated 09.01.2018 certifying that they have not availed any cenvat credit for the projects in 2015-16, which were exempted under Notification No. 25/2012 dated 20.06.2012 during the prior period. After going through the accounts, I find that the appellant-assessee has taken cenvat credit of service tax reimbursed to the sub-contractors to whom work amongst these 9 Govt. projects were sub-contracted, however the said amount of cenvat credit has also been debited by them in the same month from April, 2015 to February, 2016 and cenvat credit so availed has not been utilized by them at all towards payment of service tax liability on output services provided to the Govt. authority or local Government authority. Further, the appellant-assessee has also paid service tax on remaining contract value on their own through GAR-7 challans. The appellant-assessee has taken credit and debited their cenvat credit account in same months to mention their service tax liability on entire contract value as the contracts were awarded to them and to establish that they have discharged their service tax liability either directly or through sub-contractors. Since the appellant-assessee has debited the cenvat credit in respect of service tax paid by their sub-contractors and which they have reimbursed to their sub-contractors in same month, it cannot be said that the appellant-asseessee has utilized these cenvat credit towards service tax payment on output service and thereafter paid service tax in cash so as to claim refund as entire service tax payment made by their sub-contractor or by them during FY 2015-16, when these services provided to Govt. authority or local Government authority was taxable and no retrospective exemption was provided. I find that it is a settled legal position that subsequent reversal of the credit would amount to as if no credit has been availed as has been held by the Hon'ble Apex Court in the case of Chandrapur Magnets reported as 1996 (81) ELT 3 (SC). Hence, I find that the department appeals have no leg to stand on and accordingly, the same are required to be rejected as having no truth and/or valid point.

8.2. The appellant-department has also contended that the impugned orders have not examined the provisions of Section 73A of the Finance Act, 1994. Before discussing on this aspect, I would like to reproduce Section 73A of the Act, which reads as under: -

> *SECTION 73A. Service tax collected from any person to be deposited with Central Government. — (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing*

service tax, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.

(3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.

(5) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).

(6) Where any surplus amount is left after the adjustment under sub-section (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 (1 of 1944) or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount.

(Emphasis supplied)

8.2.1. I find that Section 73A (1) of the Finance Act, 1994 very clearly provides that if service provider has charged and collected excess amount of service tax from the service recipients than assessed and paid by them to the Government, the service provider has to deposit the amount representing service tax so collected by him to the credit of the Central Government. In the instant case, the facts of the case reveal that the appellant-assessee has neither charged nor collected service tax from the service recipients, as is also evident from the Certificates/letters issued by the service recipients and also revealed from the accounts of the appellant-assessee, but they paid service tax on the services provided by the but them, which became exempted subsequently in view of Section 102 inserted vide the Finance Act, 2016. Hence, I find that the contention of the department is not in consonance with the facts of the instant case available on records and therefore it does not deserve any consideration whatsoever.

8.3. The appellant-department has also contended that the appellant-assessee has not submitted copies of ST-3 returns and has not provided certain information

such as Gross value of Taxable services and service tax paid thereon and the value of the services, which became exempted subsequently, the details of abatement claimed in the taxable value of services, etc. I find that the appellant-assessee is a registered service tax assessee and the appellant-assessee has submitted that they have filed ST-3 returns with the department. The SCN has also not alleged anything like this. The service tax assessed and paid by the appellant-assessee has not even been questioned in the Show Cause Notices and/or in the impugned orders and therefore, I do not find that appellant-assessee is required to submit these details again to the department along with the refund claims. This contention is travelling beyond scope of Show Cause Notice and hence, can't be accepted as valid ground.

8.4 In view of the facts stated from Para 8 to Para 8.3, I have no option but to reject the departmental appeals.

9. In view of factual and legal position detailed from Para 7 to Para 8.4, I set aside the impugned orders and allow the appeals filed by the appellant-assessee with consequential relief and reject the appeals filed by the appellant-department.

९.१. अपीलकर्ता और डिपार्टमेंट द्वारा दर्ज की गई उपरोक्त अपील्स का निपटारा उपरोक्त तरीके से किया जाता है।

9.1. The appeals filed by the appellant and department stand disposed off as above.

सत्यापित,

(कुमार संतोष)
आयुक्त (अपील्स)

By **Regd. Post AD**

To,

M/s. Kunal Structure (India) Pvt. Ltd., 'Kunal House', Ganga Park, Plot No. 10, Opp. Sanskruti Apartment, Panchvati Road, Rajkot – 360 001	मे. कुनाल स्ट्रक्चर (इंडिया) प्रा. लिमिटेड, 'कुनाल हाउस', गंगा पार्क, प्लॉट न. १०, संस्कृति अपार्टमेंट के सामने, पंचवटी रोड, राजकोट – ३६० ००१

Copy to:

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