O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

[illegible] 2nd Floor, GST Bhavan

[illegible] / Race Course Ring Road

[illegible] / Rajkot – 360 001

Tele Fax No. 0281 – [illegible]

[illegible]

[illegible]	[illegible]	[illegible]
V2/[illegible]/2018-19	[illegible]/2018-19	31.01.2019

[illegible] Appeal No.

KCH-EXCUS-000-APP-071-2019

[illegible] Date of Order	01.07.2019	[illegible] Date of issue	03.07.2019

[illegible]

Passed by [illegible], Principal Commissioner (Appeals), Rajkot

[illegible]

[illegible] Name & Address of the Appellant / Respondent :-

[illegible] Pvt. Ltd Office No.[illegible], 2nd floor, Gold Coin Complex, Plot No.[illegible], Ward 12 B, Opp. [illegible] -Kutch, Gujarat

[illegible]

[illegible]

[illegible]

Revised application to Government of India:

[illegible]

:: ORDER IN APPEAL ::

The Deputy Commissioner, Central GST Urban Division, Gandhidham, as per directions and authorization of the Commissioner, Central GST, Gandhidham (Kutch) (hereinafter referred to as 'the Department') has present appeal against Order-In-Original No. 68/Urban Ref/2017-18 dated 21.1.2018 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central GST (Urban) Division, Gandhidham (hereinafter referred to as 'the lower adjudicating authority') in the case of M/s. Chowgule Brothers Pvt. Ltd., Office No. 311, 3rd floor, Gala Corn Complex, Plot No. 021, Ward 12B, Gandhidham (hereinafter referred to as 'the respondent').

2. The brief facts of the case are that the respondent had refund application on 5.7.2017 for refund of service tax of Rs. 22,43,858/- paid during January, 2017 to March, 2017 on value of service of transportation of goods in a vessel whose Bills of Lading were issued on 1.4.2017. The respondent submitted refund claim on the grounds that the point of taxation in respect of the service has been specified as the date of Bill of Lading of goods as per Notification No. 14/2017-ST dated 13.4.2017 made effective from 22.1.2017 read with CBEC Circular No. 205/4/2017-Service Tax dated 13.4.2017 clarifying that no service tax is leviable if the Bill of Lading is of date prior to 22.1.2017. The lower adjudicating authority vide impugned order sanctioned refund claim.

3. Being aggrieved with the impugned order, the department preferred present appeal, inter-alia on the following grounds: -

(i) It is evident that the respondent has collected service tax of Rs. 22,43,858/- from M/s. Gautam Freight Pvt. Ltd. pure agent of foreign charterer/operator of the vessel M/s. Bogazici Deniz Tasimacilig Ltd. Turkey (hereinafter referred to as M/s. Bogazici Deniz); that M/s. Gautam Freight Pvt. Ltd. had obviously collected service tax from M/s. Bogazici Deniz and no evidence to contradict such presumption has been provided by the respondent at the time of filing refund claim; that the impugned order did not disclose that M/s. Gautam Freight Pvt. Ltd. has not collected service tax from M/s. Bogazici Deniz or refunded the service tax to M/s. Bogazici Deniz. Hence, it is not evident that person who had actually borne the incidence of service tax had received back service tax amount.

(ii) Once the burden of tax has been passed on by the respondent to their customer any subsequent event of returning back of such service tax to their customers does not eligible the respondent to claim refund of service tax and hence, the refund claim filed by the respondent was hit by bar of unjust enrichment on the date of filing of refund claim and this position was not altered any case clearance

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return of service tax by the respondent to their customer. The said aspect has been clarified vide Circular No. 97/8/2007-ST dated 23.8.2007 which has been ignored by the lower adjudicating authority.

(iii) The respondent has paid service tax under reverse charge mechanism. Once the incidence of service tax has been passed on and it has put into the commercial chain of business transactions, so it is most impossible to derive with full proof evidence where such chain of transactions will stop and who is actually going to borne the incidence of service tax. In the case of transaction under arm's length there remains no control over service tax passed on. The impugned order did not follow the facts to explain as to in what manner, M/s. Gautam Freight Pvt. Ltd. had been considered to get service tax back [illegible] when no evidence of service tax amount received by the respondent from M/s. Gautam Freight Pvt. Ltd. are made available for scrutiny. The transaction made through debit note and credit note are not conclusive evidence looking to long gap between the dates of debit note and date of credit note, leaving aside the transaction of [illegible] of service tax subsequent to filing of refund claim. Hence, it is evident that the respondent had originally passed on incidence of service tax to M/s. Gautam Freight Pvt. Ltd. or some other person at the time of providing service and M/s. Gautam Freight Pvt. Ltd. or such other person in turn had passed on the incidence of service tax to M/s. Bogazici Deniz (principal) or any other person. Therefore, refund of service tax sanctioned vide impugned order is inadmissible to the respondent and the refund amount at the most could have been credited to the Consumer Welfare Fund, even if the same was found sanctionable.

(iv) The respondent has not submitted copies of Balance Sheet/Profit & Loss account for the relevant period showing treatment of amount of service tax paid by them in their books of account [illegible] whether the service tax was borne by themselves or otherwise and no step has been taken by the lower adjudicating authority to call for the copies of Balance Sheet and Profit & Loss account of M/s. Gautam Freight Pvt. Ltd. for the relevant period showing treatment given in their accounts in respect of service tax paid by them to the respondent and no evidence thereof that service tax was passed on by them to their principal (M/s. Bogazici Deniz) or any other person.

(v) The respondent has not submitted copies of invoices raised by them to M/s. Gautam Freight Pvt. Ltd., Bank remittance certificates, communication from their overseas client, computation of service tax etc. at the time of filing of refund claim or at subsequent stage of proceedings. The respondent submitted Certificate dated 20.11.2017 from the Chartered Accountant based on records of the respondent but not on the basis of records of M/s. Gautam Freight Pvt. Ltd. lead to an inference that

M/s. Gautam Freight Pvt. Ltd. have not passed on service tax to their clients and had been borne by them. Thus, there is no documentary evidence to determine the eligibility for claiming refund by none other than the respondent and that the incidence of service tax was not passed on and was borne by M/s. Gautam Freight Pvt. Ltd. or the respondent or any other person. In absence of conclusive evidence, the respondent is not eligible for refund of service tax. It is not the case of the respondent that service tax has been paid under protest or on direction of the authority but the respondent has paid service tax at his own.

(vi) ST 3 return filed by the respondent for the period ending March 2017 did not show service tax paid by them on 7.3.2017 under reverse charge. It was the claim of the respondent that they paid service tax in pursuance to Notification No. 2/2017-Service Tax and Notification No. 3/2017-ST both dated 10.1.2017, made applicable from 22.1.2017, hence at the time of payment of service tax, there was no reason for the respondent to consider it as excess paid service tax and accordingly it must have been reflected in their books of accounts for FY 2016-17 which were closed. Prior to Notification No. 14/2017 ST dated 19.4.2017 and CBEC Circular No.208/4/2017 ST dated 13.4.2017 it was beyond purview of the respondent to consider payment of service tax as an excess payment. Hence, even if the service tax was not leviable in respect of services provided by the principal of the respondent the same has been fully consumed by the respondent as well as M/s. Gautam Freight Pvt. Ltd. or any other person augmenting the incidence of service tax and therefore, refund amount was required to be credited to the Consumer Welfare Fund presuming the incidence of service tax has been passed on to any other person.

(vii) The respondent filed refund claim of service tax referring to Notification No. 14/2017 ST dated 19.4.2017 but nowhere in the said Notification it has been authorized that the respondent or any other person can claim refund of service tax if paid prior to issue of the said Notification. It is not a case of the respondent that the payment of service tax made by them on 7.3.2017 either under mistake or under compulsion or under misunderstanding of statutory provision. Thus, any arbitrary process due to failure of the respondent to understand the legal provision does not make the respondent automatically entitled for refund of service tax paid.

(viii) In any case, service tax has been collected by the respondent from any other person which was not required to be collected in any manner as representing service tax, the respondent should pay the amount so collected to the credit of Government under Section 73A(2) of the Finance Act, 1994 (hereinafter referred to as 'the Act'). Even if the version of the respondent is accepted it can be construed that the payment of service tax was made by the respondent under Section 73A(2) of the Act and the amount paid to the credit of Government was required to be adjusted against

service tax payable by the respondent or to any person who had borne the incidence of such amount may apply for refund under Section 11B(1) of the Act. Hence refund sanctioned by the lower adjudicating authority under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Act was not legal and proper.

(ix) Entitlement of refund is ignored only by virtue of filing of claim: The impugned order is not categorical by confirming the non-entitlement of the respondent on the date of filing of refund claim since they had not returned the amount received by them in the name of service tax to the concerned person. As per submissions of the respondent, they first issued credit note on behalf of M/s. Gautam Freight Pvt. Ltd. on 26.6.2017 and then returned the balance amount through cheque dated 17.10.2017. Thus, the submission of the respondent that by virtue of credit note dated 26.6.2017 does not sustain. As per accounting principles, debit note or a credit note generally issued as a consequence of source invoice. In the present case, the transaction relates to a debit note dated 31.3.2017 and a credit note dated 26.6.2017 but there is no relationship attempted to be explained with reference to a particular invoice giving impression that the transactions without following invoice pattern is not genuine. It is not following from the facts narrated by the respondent in their claim whether the transaction in terms of credit note dated 23.6.2017 was a follow up of reduction in source invoice value or followed by reduction in invoice value with reference to particulars of a revised invoice issued in support that credit note dated 26.6.2017. In the absence of authenticity of revised invoice, the submission of invoice and credit note simultaneously would benefit gained as a mischief of account entries and absurd accounting practice. Thus, the claim of the respondent is not on sound footing. The department relied on following case laws in support of their contentions:

- Hindustan Petroleum Corporation Limited – 2014 TIOL 655 CESTAT-MUM.
- Addision & Co. Ltd. – 2016 (339) ELT 177 (SC)
- Saheyari Khand Udyog Mandal Ltd. – 2005 (181) ELT 528 (SC)
- Krishi Constructions – 2016 (42) STR 307 (Tri. – Bang.)
- S.S. Menon & Company – 2018 (27) STR 41 (Tri. – Ahmd.)

(x) The presumption under Section 12A of the Central Excise Act, 1944 is undeniably raised to state that the incidence of service tax is passed on to their principal, M/s. Bogazici Beton or to any other person. Hence, the respondent has to establish with evidence that the service tax passed on to their principal was returned to the principal or any other person who borne the incidence of service tax. In absence of evidence, the presumption stands un-rebutted. When the invoices raised are such that the incidence of service tax has been passed on, the presumption under Section 12B of the Central Excise Act, 1944 comes into application and the documents produced by the respondent are not sufficient to rebut the statutory

presumption. The department relied on the decision in the case of J K. Transformer Pvt. Ltd. reported as 2011 (38) STR 1167 (Tri. – Del.)

(xi) The amount mentioned in the challans showing payment of service tax submitted by the respondent were not matching with service tax leviable from the respondent against value of ocean freight mentioned in respective invoices for which refund has been claimed.

4. Personal hearing in the matter was attended to by Ms. Priyanka Patel, Advocate on behalf of the respondent who reiterated the grounds of appeal and submitted that the impugned order is correct as they have given Rs. 28,43,858/- to their agent M/s Gautam Freight Pvt. Ltd. and hence, refund is payable to them; on query that M/s. Gautam Freight Pvt. Ltd. still have this amount with them though showing refundable to M/s. Bogazici Deniz Tasimaciligi Ltd., Turkey but have not refunded to them, she submitted that M/s. Gautam Freight Pvt. Ltd. will give affidavit on oath that this amount shall be actually credited/given to M/s. Bogazici Deniz Tasimaciligi Ltd., Turkey within 15 days from the date of receipt of Order-in-Appeal and/or advice by M/s. Chowgule Brothers Pvt. Ltd., whichever is earlier. Also, the respondent shall also give an affidavit on oath that they will credit consumer welfare fund by Rs. 28,43,858/- if within 60 days Rs. 28,43,858/- is not refunded by their principal i.e. M/s. Gautam Freight Pvt. Ltd. to M/s. Bogazici Deniz Tasimaciligi Ltd., Turkey, it is also confirmed that M/s. Gautam Freight Pvt. Ltd. have business with M/s. Bogazici Deniz Tasimaciligi Ltd., Turkey ever now; that they have paid Rs. 28,43,858/- to M/s. Gautam Freight Pvt. Ltd. and hence, refund to them is correct, legal & proper and they have not been benefitted twice.

FINDINGS:

5. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal filed by the department and the submissions made by the respondent during personal hearing. I find that, in the case of refund, provisions of Section 35F of the Central Excise Act, 1944 are not applicable. The issue to be decided in the present case is as to whether sanctioning of refund claim of service tax paid by the respondent on service of transportation of goods in a vessel, initially passed on the incidence of service tax by the respondent on the foreign charterer/operator of the vessel, through pure agent of the foreign charterer/operator and later on reversed service tax through credit voucher is hit by bar of unjust enrichment or not.

6. It is undisputed fact that the respondent had, in the capacity of shipping agent paid service tax of Rs. 28,43,858/- on service of transportation of goods in a vessel vide Challan dated 7.3.2017 in terms of Notification No. 2/2017-ST and Notification

No. 3/2017-ST both dated 7.1.2017 sanctioned service tax from M/s. Bogazici Denizcilik through M/s. Gautam Freight Pvt. Ltd. Subsequently, the Central Government vide Notification No. 14/2017-ST dated 13.4.2017 made effective from 22.1.2017, notified date of Bill of Lading as point of taxation. Since the date of Bills of Lading in the present case were issued on 26.1.2017, the respondent returned service tax amount by issuing Credit Note No. 0442 dated 28.6.2017 in the name of M/s Gautam Freight Pvt. Ltd. and claimed refund of service tax. The refund claim was sanctioned vide impugned order to the respondent and paid to them. Hence, the department has appealed against impugned order.

7. I find that the department is not entitled to retain this service tax paid by the respondent as no tax can be collected without authority of law since this service tax was/is not payable by the respondent to the department in view of Notification No. 14/2017-ST dated 13.4.2017, made effective from 22.1.2017 and clarification issued vide CBEC Circular No. 998/6/2017-Service Tax dated 13.4.2017. Hence, the amount of Rs. 28,45,658/- has to be deposited by the department, as per law.

8. The department has contended that the refund claim was hit by bar of unjust enrichment and that once the burden of tax has been passed on by the respondent to their customer any subsequent event of returning back of such service tax to their customers does not make the respondent eligible to claim refund of service tax from the department; that the impugned order has not described whether M/s. Gautam Freight Pvt. Ltd. have refunded this said service tax to M/s. Bogazici Deniz.

8.1 I find that Section 11B of the Central Excise Act, 1944 was made applicable to service tax matters by virtue of Section 83 of the Act, which provides that service tax amount as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise shall, instead of being credited to the Fund, be paid to the applicant if such amount is relatable to service tax paid by the person if the incidence of payment of service tax has not been passed on to any other person. In the present case, as revealed from the records and Certificate of the Chartered Accountant that the respondent has initially passed on incidence of service tax to M/s. Gautam Freight Pvt. Ltd. who passed on incidence of service tax to M/s. Bogazici Deniz, however, consequent upon issuance of Notification No. 14/2017-ST dated 13.4.2017 specifying date of Bill of Lading as point of taxation, the respondent returned service tax by issuing credit note and subsequently also issued Cheque No. 456528 dated 17.10.2017 for Rs. 28,45,658/- in favour of M/s. Gautam Freight Pvt. Ltd., their principal. However, I find that the respondent has not submitted any conclusive evidence establishing that principal of the respondent i.e. M/s. Gautam Freight Pvt. Ltd. has also returned Rs. 28,45,658/- to M/s. Bogazici Deniz, who ultimately bore the incidence of service tax. In view of these facts and

circumstances, I am of the considered view that the respondent is not entitled for refund since they failed to establish by providing documentary evidences that Rs. 28,43,859/- returned by them to M/s. Gautam Freight Pvt. Ltd. have also passed on this amount to M/s. Bogazici Deniz at the time of filing of refund claim or even at this appeal stage.

6.2 My views are supported by the judgment of the Hon'ble Supreme Court in the case of Addison & Co. Ltd. reported as 2016 (339) E.L.T. 177 (S.C.) wherein it has been held as under :-

> 16. In the instant case, the Assessee has admitted that the incidence of duty was originally passed on to the buyer. There is no material brought on record to show that the buyer to whom the incidence of duty was passed on by the Assessee did not pass it on to any other person. There is a statutory presumption under Section 12B of the Act that the duty has been passed on to the ultimate consumer. It is clear from the facts of the instant case that the duty which was originally paid by the Assessee was passed on. The refund claimed by the Assessee is for an amount which is part of the excise duty paid earlier and passed on. The Assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he would be unjustly enriched.
>
> It will be useful to refer to the relevant part of *Mafatlal Industries v. Union of India* (supra) in this connection.
>
> > "108. (iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.
> >
> > The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be

exercise for unjust enrichment of a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched".

17. Section 11B(2) of the Act contemplates that the amount of refund determined by the Authorities shall be credited to the fund. The Proviso to Section 11B(2) permits the refund to be paid to the applicant instead of being credited to the fund if such amount is relatable to the manufacturer, the buyer or any other such class of applicants as notified by the Central Government.

....

....

....

21. That a consumer can make an application for refund is clear from paras 88 and 89 of the judgment of this Court in *Mafatlal Industries* (supra). We are bound by the said findings of a Larger Bench of this Court. The word 'buyer' in Clause (e) to proviso to Section 11B(2) of the Act cannot be restricted to the first buyer from the manufacturer. Another submission which requires to be considered is the requirement of verification to be done for the purpose of finding out who ultimately bore the burden of excise duty. It might be difficult to identify who has actually borne the burden but such verification would definitely assist the Revenue in finding out whether the manufacturer or buyer who makes an application for refund are being unjustly enriched. If it is not possible to identify the person/persons who have borne the duty, the amount of excise duty collected in excess will remain in the fund which will be utilized for the benefit of the consumers as provided in Section 12D.

(Emphasis supplied)

9.3 In view of the facts of this present case and the above judgment pronounced by the Hon'ble Supreme Court, it is clear that it is not sufficient to prove that the respondent is not getting unjust enrichment but also that his principal is not being enriched in unjust manner and that M/s. Bogazici Deniz, which has ultimately borne the incidence of service tax needed to be paid back and therefore, the respondent was required to establish that service tax of Rs. 28,43,858/- returned by them to M/s. Gautam Freight Pvt. Ltd. has actually been returned to M/s. Bogazici Deniz, who is the ultimate person who has borne the incidence of service tax of Rs. 28,43,858/-. Hence, I am of the considered view that the respondent is not entitled for refund of service tax of Rs. 28,43,858/- since they failed to establish that neither they nor their principal i.e. M/s. Gautam Freight Pvt. Ltd. was getting unjust enrichment. Hence, the impugned order sanctioning refund of service tax of Rs. 28,43,858/- in favour of the respondent is not correct, legal and proper and is required to be set aside. Therefore, the refund of Rs. 28,43,858/- paid to the respondent is required to be recovered from them to credit Consumer Welfare Fund.

9. In view of above, I set aside the impugned order and allow the appeal filed by the department with direction to the refund sanctioning authority to recover the refunded amount of Rs. 28,13,853/- from the respondent and credit consumer welfare fund forthwith.

९.१ विभाग द्वारा दायर की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9.1 The appeal filed by the department is disposed off as above.

(कुमार संजीव)
प्रधान आयुक्त (अपील्स)

By Speed Post

To,

(i) The Commissioner, Central GST, Gandhidham (Kutch).	(i) आयुक्त, केन्द्रीय वस्तु एवं सेवा कर गांधीधाम (कच्छ)
(ii) M/s. Chowgule Brothers Pvt. Ltd., Office No. 211, 2nd floor, Gold Coin Complex, Plot No. 321, Ward 12B, Gandhidham	(ii) मे. चौगुले ब्रदर्स प्रा. लिमिटेड, ऑफिस नं. २११, दूसरा मंजिल, गोल्ड कॉइन कॉम्प्लेक्स, प्लॉट नं. ३२१, वार्ड १२बी, गांधीधाम

प्रति,

(1) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु एवं सेवा कर, अहमदाबाद ज़ोन, अहमदाबाद को सूचनार्थ हेतु।

(2) सहायक आयुक्त, केन्द्रीय वस्तु एवं सेवा कर, डिवि. I, गांधीधाम को आवश्यक कार्यवाही हेतु।

(3) गार्ड फाईल।