HATKESH TAX MARKET

PRINCIPAL COMMISSIONER OF APPEALS, GST & CENTRAL EXCISE

Room No. 224, 2nd Floor, Old Building

Near Income Tax Office, Race Course, Ring Road,

Surat-395001

Tele Fax No. 0261-2464112 Email-

V2(GST)37/GIDB/2018-19		31-07-2018

To

M/s Shreegopi Bros. Pvt. Ltd.

KCH-IV(CGST)-000-APP-472-2019

Date of Order	03.07.2019	Date of Issue	05.07.2019

Passed by Shri Akhilesh Kumar, Principal Commissioner, Central GST, Surat.

1. Appeal No. [illegible] filed by M/s. Shreegopi Bros. Pvt. Ltd., Plot No. 211, 2nd Floor, GIDC, Sachin, Surat.

2. The appellant, M/s. Shreegopi Bros. Pvt. Ltd., Plot No. 211, 2nd Floor, GIDC, Sachin, Surat, have filed the present appeal against Order-in-Original No. [illegible] dated 31.07.2018 passed by the Assistant Commissioner, Central GST, Division-IV, Surat (hereinafter referred to as the "adjudicating authority").

3. Brief facts of the case are that the appellant is engaged in the manufacture of [illegible] and is registered with the Central Excise department under Registration No. [illegible].

4. The appellant had filed refund claim of Rs. [illegible] on account of [illegible] for the period [illegible]. The refund claim was rejected by the adjudicating authority vide the impugned order on the grounds that [illegible].

5. Being aggrieved with the impugned order, the appellant has filed the present appeal on the following grounds:

[illegible]

6. Personal hearing in the case was held on 27.06.2019. Shri [illegible], Chartered Accountant, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum and requested that the appeal be allowed.

7. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and the submissions made at the time of personal hearing. The issue to be decided in the present appeal is whether the impugned order rejecting the refund claim is proper or not.

8. [illegible]

9. In view of the above, I pass the following order:

(i) The impugned order is set aside and the appeal is allowed.

(ii) [illegible]

(iii) [illegible]

10. The appeal is disposed of in terms of the above.

(Akhilesh Kumar)
Principal Commissioner
Central GST, Surat

:ORDER IN APPEAL::

The Deputy Commissioner, Central GST, Urban Division, Gandhidham, as per instructions and authorization of the Commissioner, Central GST, Gandhidham (Kutch) (hereinafter referred to as 'the Department') filed present appeal against Order-in-Original No. 52/Urban Re/2017-18 dated 31.1.2018 (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. 211, 2nd Floor, Gold Coin Complex, Plot No. 321, Ward 12B, Gandhidham (hereinafter referred to as 'the respondent').

2. The brief facts of the case are that the respondent filed refund application on 5.7.2017 for refund of service tax of Rs. 40,51,882/- paid by them on value of service of transportation of goods in a vessel whose Bills of Lading were issued on 19.1.2017. The respondent submitted refund claim on the ground that the point of taxation in respect of this service has been specified as the date of Bill of Lading of goods as per Notification No. 14/2017-ST dated 10.4.2017 made effective from 22.1.2017 read with CBEC Circular No. 206/4/2017-Service Tax dated 13.1.2017 clarifying that no service tax is leviable if date of Bill of Lading is prior to 22.1.2017. The lower adjudicating authority vide impugned order sanctioned refund claim of Rs. 40,51,882/-.

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. 40,51,882/- from M/s. Gautam Freight Pvt. Ltd., pure agent of foreign charterer/operator of the vessel M/s. Thoresen Shipping Singapore Pte. Ltd. (hereinafter referred to as M/s. Thoresen) but M/s. Gautam Freight Pvt. Ltd. has obviously collected service tax from M/s. Thoresen and no evidence to contradict such presumption has been provided by the respondent at the time of filing of refund claim; that the impugned order also not specifies that M/s. Gautam Freight Pvt. Ltd. had refunded the service tax of Rs. 40,51,882/- to M/s. Thoresen. 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 make the respondent eligible 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 the position was not altered any post clearance return of service tax by the respondent to their customer. The said aspect

has been clarified vide Circular No. 317/3/97-CX. dated 18.6.1997 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 already passed on and it has been put into the commercial chain of business transactions, it is almost impossible to derive with full proof evidence where such chain of transaction is broken and who is actually going to borne the incidence of service tax, as in respect of transaction under arm's length there remains no control over service tax passed on. The impugned order did not follow the facts as to in which capacity M/s. Gautam Freight Pvt. Ltd. has been considered to get service tax back, particularly, 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 vast gap between the dates of debit note and date of credit note. Leaving aside the transaction of returning 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. Thereen (principal) or any other person. Therefore, refund of service tax sanctioned vide impugned order is inadmissible to the respondent and the refunded 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 to reflect whether the service tax was borne by themselves or otherwise and no care has been taken by the lower adjudicating authority in 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. Thereen) 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 20.10.2017 of 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 files by the respondent for the period ended March, 2017 did not show service tax paid by them on 2.5.2017 under reverse charge. It was the claim of the respondent that they paid service tax in pursuant to Notification No. 2/2017 Service Tax and Notification No. 3/2017-ST both dated 12.1.2017 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 13.4.2017 and CBEC Circular No. 200/4/2017-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 files refund claim of service tax referring to Notification No. 14/2017-ST dated 13.4.2017 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 2.5.2017 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 entitles 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 and the person who had borne the incidence of such amount may apply for refund under Section 75A(6) 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, is not legal and proper.

(x) Entitlement of refund is governed by date of filing of claim. The impugned order is not categorically confirming the non-entitlement of the respondent on the date of filing of refund claim since they have returned the amount received by them in the name of service to the appropriate person. As per submissions of the respondent they first issued credit note in favour of M/s. Gautam Freight Pvt. Ltd. on 28.6.2017 and then returned the amount through cheque dated 17.10.2017. Thus, the submission of the respondent merely on the basis of credit note dated 28.6.2017 does not sustain. As per accounting principle, a 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 21.6.2017 and a credit note dated 28.6.2017 but there is no relationship attempted to be established with reference to a particular invoice giving impression that the transaction 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 28.6.2017 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 respect of credit note dated 28.6.2017. In the absence of authenticity of revised invoice, the existence of invoice and credit note tantamount double benefit gained as a misdirection of account entries and absurd accounting method. 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-538-CESTAT-MUM.
- Addition & Co. Ltd. – 2016 (339) ELT 177 (SC);
- Sahyadri Khand Udyog Mandal Ltd. – 2015 (321) ELT 323 (SC)
- Kirtai Constructions – 2016 (43) STR 321 (Tri. – Bang.)
- S.S. Menon & Company – 2012 (27) STR 41 (Tri. – Ahmd.)

(xi) The presumption under Section 12B 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. Transon or to any other person. Hence, the respondent has to establish with evidence that the service tax passed on to their principal was remitted to the principal or any other person who borne the incidence of service tax. In absence of evidence, the presumption stands un-rebuted. 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 provided by the respondent are not sufficient to rebut the statutory presumption. The department relied on the decision in the case of J.R. Transformer

Pvt. Ltd. reported as 2014 (36) STR 1167 (Tri. – Del.)

(xi) The amount mentioned in the challans showing payment of service tax submitted by the respondent were not matched with service tax invisible 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 Shri Ashishek Doshi, Chartered Accountant on behalf of the respondent, who submitted PH submissions saying that they have returned tax/duly collected from M/s. Gautam Freight Pvt. Ltd on 20.6.2017 before filing refund claim on 5.7.2017 that they are working on principal to principal basis with M/s Gautam Freight Pvt. Ltd and hence can't be treated as agent of M/s. Gautam Freight Pvt. Ltd for refund of tax/duly purpose. that service tax was applicable from 22.1.2017 however their Bills of Lading was dated 19.1.2017 and hence, service tax was not payable but they wrongly paid that it has been held by the Hon'ble CESTAT, Ahmedabad in GAIL India Ltd. reported as 2016 (44) STR 598 (Tri. – Ahmd.) that returning of tax collected before is as good as not collected that Hon'ble High Court of Karnataka [2009 (14) STR 301] upheld the decision of Hon'ble CESTAT Bangalore in a case of Shiva Analytical (I) Ltd. reported as 2007 (7) STR 35 (Tri. – Bang.) that once service tax collected has been returned by way of cheque or credit note, there can't be question of unjust enrichment, that the Hon'ble Apex Court has also held in Vardhman Industries Ltd. reported as 2011 (269) ELT A27 (SC) that duly paid at the time of clearance of goods and collected from customers can be refunded if post-clearance transaction is made through credit note that all these 3 case-laws are applicable in this case in their favour, that appeal should be allowed; on query whether M/s. Gautam Freight Pvt. Ltd. has returned the tax to foreign shipping line or not, he replied that he is not aware of that fact and to reply this now they please be given some time which was agreed, that they have nothing to do with what M/s Gautam Freight Pvt. Ltd. have done or not done that M/s. Gautam Freight Pvt. Ltd. have issued Certificate dated 26.5.2016 to this effect.

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 including those made during personal hearing. I find that this being the appeal related to refund filed by the department, provisions of Section 35F of the Central Excise Act are not applicable. The issue to be decided in the present appeal is as to whether refund claim of service tax to the respondent, paid on service of transportation of goods in the vessel, incidence of service tax initially passed on by the respondent is hit by the doctrine of unjust enrichment or not.

6. I find that it is undisputed that the respondent had in their capacity of shipping agent paid service tax of Rs. 40,51,682/- on service of transportation of goods in a vessel vide Challan dated 2.3.2017 in terms of Notification No. 2/2017-ST and Notification No. 3/2017-ST, both dated 10.1.2017 and collected service tax from their principal M/s. Gautam Freight Pvt. Ltd. Subsequently, the Central Government issued Notification No. 14/2017-ST dated 12.4.2017 (effective from 22.1.2017) and notified date of Bill of Lading as the point of taxation. Since Bills of Lading in the present case were issued on 10.4.2017, the respondent returned service tax amount of Rs. 40,51,682/- by issuing Credit Note No. CN/1 dated 28.5.2017 in the name of M/s. Gautam Freight Pvt. Ltd. and claimed refund of service tax. The refund claim was sanctioned vide the impugned order in favour of the respondent and Rs. 40,51,682/- paid to them. Hence, the department filed appeal against the impugned order.

7. I also 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 12.4.2017, made effective from 22.1.2017 and clarification issued vide CBEC Circular No. 208/4/2017-Service Tax dated 13.4.2017, hence, the amount of Rs. 40,51,682/- has to be refunded 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 service tax has been passed on by the respondent to their customers by subsequent action of reversing back of such service tax to their customers does not make the respondent eligible to claim refund of service tax from the department. I find that the impugned order has not described whether M/s. Gautam Freight Pvt. Ltd. have refunded the said service tax to M/s. Thorsen.

9. 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 and if proved that the incidence of service tax has not been passed on to any other person. In the present case, as it is evident from the records and Certificate of the Chartered Accountant that the respondent had initially passed on incidence of service tax to M/s. Gautam Freight Pvt. Ltd. who passed on incidences of service tax to M/s. Thorsen and consequent upon issuance of Notification No. 14/2017-ST dated 12.4.2017 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. 405107 dated 17.10.2017 for Rs. 40,51,682/- in favour of M/s. Gautam Freight Pvt.

Ltd., their principal. However, the respondent has not submitted any conclusive evidence establishing that their principal Gautam Freight Pvt. Ltd. have also returned Rs. 40,51,682/- to M/s. Thirsen, 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. 40,51,682/- returned by them to M/s. Gautam Freight Pvt. Ltd. has also been passed on by them to M/s. Thirsen at the time of filing of refund claim or even at this appeal stage.

8.2 My views are supported by the judgment of the Hon'ble Supreme Court in the case of Addison & Co. Ltd. reported as 2010 (108) E.L.T. 177 (S.C.) wherein it has been held as under :-

> 15. 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 excess 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 para of *Mafatlal Industries v. Union of India* (supra) in this connection :
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> > "104 (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

> [illegible] Supreme Court [illegible] contrary to law, [illegible] is not meant to be exercised for unjust enrichment. The doctrine of unjust enrichment is not [illegible] applicable to the State. State represents the people of the country. We are not to speak of the people suffering injustice [illegible]"

17. Section 11B(2) of the Act provides that the amount of refund determined by the Authority shall be credited to the fund. The Proviso to Section 11B(2) provides that where it is found that such amount instead of being credited to the Fund, is refundable to the manufacturer, the buyer or any other person, class of applicants as notified by the Central Government.

....
. .. .
....

21. That a consumer can resist an application for refund is clear from paras 97 and 98 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' as used in the proviso to Section 11B(2) of the Act cannot be restricted to the first buyer from the manufacturer. Another submission which remains 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 even verification would definitely assist the Revenue in finding out whether the manufacturer or buyer who makes an application for refund are being unjustly enriched. 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 the 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 Ms. Thareja, which has ultimately borne the incidence of service tax has been paid back. Therefore, the respondent was required to establish that service tax of Rs. 40,51,682/- returned by them to M/s. Gautam Freight Pvt. Ltd. was actually been also returned to Ms. Thareja, who is the ultimate person who has borne the incidence of service tax of Rs. 40,51,682/-. Hence, I am of the considered view that the respondent is not entitled for refund of service tax of Rs. 40,51,682/- 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. 40,51,682/- in favour of the respondent is not correct, legal and proper and is required to be set aside and Rs. 40,51,682/- 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 lower sanctioning authority to recover the refunded amount of Rs. 40,57,882/- from the fabricated end credit consumer welfare fund forthwith.

९.३ डिपार्टमेंट द्वारा दर्ज की गई अपील का विपक्ष उपरोक्त तरीके से किया जाता है।

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

(मोहित अग्रवाल)
प्रभारी 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. 127, Ward 12B Gandhidham	(ii) मे. चोगुले ब्रदर्स प्रा. लिमिटेड ऑफिस नं. २११, दूसरी मंजिल, गोल्ड कॉइन कॉम्प्लेक्स, प्लॉट नं. १२७ वार्ड १२बी, गांधीधाम

प्रति:

(1) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु एवं सेवा कर, अहमदाबाद क्षेत्र, अहमदाबाद को जानकारी हेतु

(2) श्री एच.एल. आयुवर, केन्द्रीय वस्तु एवं सेवा कर, अंजार मंडल, गांधीधाम को आवश्यक कार्यवाई हेतु।

(3) गार्ड फाईल।