O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
2nd Floor, GST Bhavan,
Race Course Ring Road,
Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: cexappealsrajkot@gmail.com

[illegible]

क	Appeal / File No.	O.I.O. No.	Date
	V2/107/BVR/2017	4/ST/2015	12/01/2017

ख [illegible] (Order-In-Appeal No.):

BHV-EXCUS-000-APP-077-2018-19

Date of Order:	08.06.2018	Date of issue:	14.06.2018

Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

[illegible]

In pursuance to Board's notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग [illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

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

1.M/s Rudra Construction Co., 208, Platinum Arcade., Jayshree Cinema Road, Kadwa Chowk, Junagadh.

[illegible]
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]
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) [illegible]
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) [illegible]
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

(i) [illegible] नियमावली, 2001 [illegible]

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 [illegible] 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. 5,000/-, 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 Asstt. 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/-.

(ii) [illegible] 1994 [illegible] 5,000/- [illegible] 10,000/- [illegible]

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

(iii) [illegible] 1994 [illegible] 9(2) [illegible] 9(2A) [illegible]

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.

(iv) [illegible] 1944 [illegible] 35 [illegible] 1994 [illegible] 86 [illegible] 10 [illegible]

[illegible]

(i) [illegible] 11 [illegible]

(ii) [illegible]

(iii) [illegible] 6 [illegible]

- [illegible] 2014 [illegible]

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:

[illegible]

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) [illegible]

In case of any loss of goods where the loss occur 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) [illegible]

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) [illegible]

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) [illegible]

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and 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) [illegible]

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) [illegible]

[illegible]

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) [illegible]

[illegible] In case, if the order covers various numbers of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakhs fee of Rs. 100/- for each.

(E) [illegible]

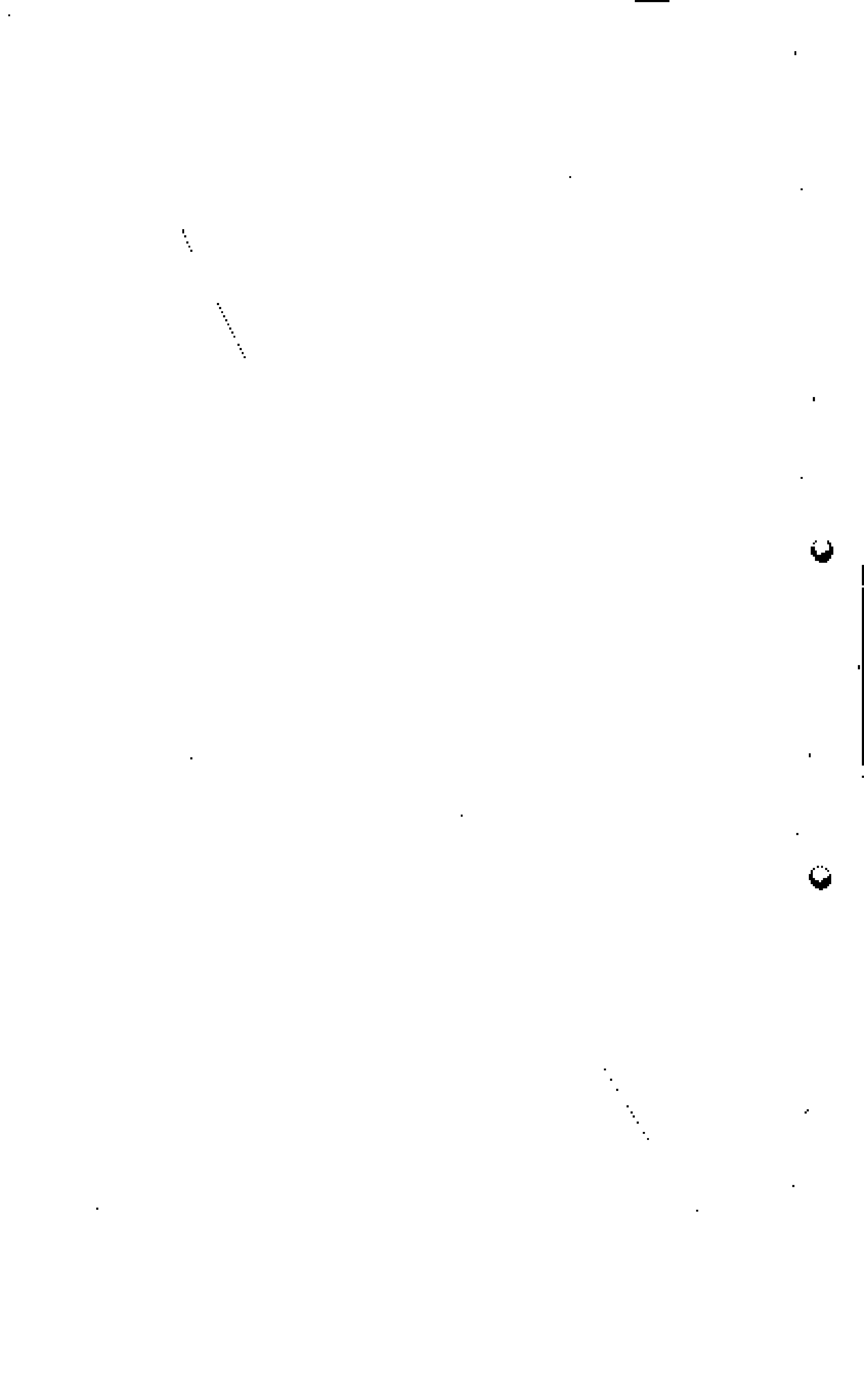
One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) [illegible]

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) [illegible]

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 Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as "the appellant") authorized by the Principal Commissioner, Central Excise & Service Tax, Bhavnagar vide Review Order dated 08.03.2017 issued from F.No. V2/292/Ref/BRK/2016-17 has filed an appeal against the Order In Original No. 05/ST/2016 dated 12.01.2017 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as the "Adjudicating Authority").

2. Briefly stated, the facts of the case are as under:

(i) M/s [illegible] Construction Co., 205, Platinum Avenue, Joshipura Chowk Road, Kalwa Chowk, Junagadh-362 001 (hereinafter referred to as "the respondent") are holding Service Tax Registration No. AAKFR[illegible]SD001. filed refund claim of Rs.13,38,457/- (Service Tax of Rs. 12,03,029/- and interest of Rs. [illegible]) on account of retrospective exemptions granted to the services provided to the Government Departments and Local Authorities, as provided in Section 102 of the Finance Act, 1994. The said claim was filed on 09.11.2016 alongwith documents as detailed at Para-03 of the impugned order. However, on scrutiny of the said claim, a Show Cause Notice dated [illegible].12.2016 was issued to the respondent asking them to submit the documents/information as detailed at Para-03 of the impugned order.

(ii) The Adjudicating Authority vide the impugned order sanctioned refund claim of Rs. 13,38,457/- under the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 83 of the Finance Act, 1994 read with Section 102 of the Finance Act, 2016.

3. Being aggrieved by the impugned order, the appellant duly authorized by the Principal Commissioner, Central Excise & Service Tax, Bhavnagar vide Review Order dated 08.03.2017 issued from F.No.V2/292/Ref/BRK/2016-17 has filed an appeal against the impugned order wherein it is mainly contended as under:-

(i) The respondent has not submitted copy of any contract entered into by them with the service receiver for providing the services on which they paid Service Tax and for which refund in question is claimed. In absence of this contract, it cannot be verified and ascertained that the respondent had provided the said construction service to the Government Department/ Authority, under a contract which has been entered into before 01.03.2015 and on which stamp duty has been paid by them on or before 01.03.2015, which is a basic condition under Sub-section (1) of Section 102 of the Finance Act, 1994.

(ii) While sanctioning the refund claim, the Adjudicating Authority has erred by holding that the burden of service tax has not been passed on to any other person by the respondent. [illegible]

facts can only be verified & ascertained by scrutiny of Contracts and Bills/Invoices in respect of the said contracts executed by the respondent. Refund of tax is granted only when it is established that burden of tax has not been passed on to others. The doctrine of Unjust Enrichment is a just and salutary doctrine. Reference is placed on the decision of Hon'ble Supreme Court in the case of M/s. Mafatlal Industries Ltd- 1997 (89) E.L.T. 247 (SC).

(iii) From the ST-3 returns filed for the relevant period, it is found that the respondent has disclosed availment and utilisation of CENVAT Credit totally amounting to Rs.5,60,[illegible] for payment of service tax during the period from April,2015 to September,2015 and October,2015 to March,2016; that the Adjudicating Authority has not considered this fact while deciding the refund claim in question as to whether CENVAT Credit was allowed to the respondent while allowing the benefit of exemption from payment of service tax for which refund application has been filed by them; that thus, the Adjudicating Authority has failed to verify and ascertain the facts from the records i.e. ST-3 returns and other before passing the impugned order.

(iv) The Adjudicating Authority has erred in sanctioning the refund of the interest of Rs.[illegible] which is not admissible as per of Section 102 of the Finance Act, 1994, in as much as Sub-section (3) of Section-102 of the Finance Act, 1994, it categorically provided that Refund shall be made of all such Service Tax which has been collected [illegible]. Thus, the term interest is not [illegible] in the said Section 102 ibid. It is settled law that the meaning of any term in a taxing statute cannot be understood with reference to such similar term used in different taxing statute. It is essentially to be understood in the context it is used in the very section where the term is found to be used. Being so, even while understanding the term 'refund of interest' in Section 11B of Central Excise Act, it cannot be made applicable with reference to the refund of Service Tax allowed in Section 102 ibid. Once the Section 102 ibid clarifies that the refund of service tax has to be made, there is no scope to contend that the refund of interest is also specified under Section 102 ibid. The refund of interest can only be allowed if the provisions of allowing refund clearly specifies of 'refund of interest', which is absent in Section 102 ibid. Further, payment of interest by the respondent was due to not paying service tax in time and thus, it is by nature of penal action which is not covered under Section 102 ibid.

4. The respondent vide letter dated 20.[illegible].2018 filed Cross Objection [illegible] Submission [illegible] the grounds interalia mentioned as under:

(i) The dates of Agreement and Notice to proceed with the work wherein services provided to the Government are prior to 01.04.2015 and thus, services in question were invariably provided under contracts entered into prior to 01.03.2015. The respondent claimed to have furnished these documents before the Adjudicating Authority as described at Para 3 of the impugned order.

(ii) There is no allegation in the SCN or appeal that the construction services [illegible] not provided to the Government. Further, there is no condition laid down in Section 102 ibid which asks for production of Contract.

(iii) There is no allegation in the SCN or contended in appeal that the services were not provided under a contract that was entered into prior to 01.03.2015.

(iv) There is no proposal in the SCN to deny refund by citing non-submission of copy of contract. Thus, appeal filed asking for reversal of refund order by citing reason of non submission of contract has travelled beyond the scope of SCN. It is settled law that grounds of appeal cannot go beyond the scope of SCN. Reliance is placed on the decision of Hon'ble High Court in the case of Bajaj Auto Ltd.-2018 (15) G.S.T.L. 25 (Bom.) and in the case of Principal Commissioner of Customs & C.Ex. & S.T., Nagpur Vs Balasimha Engg. Pvt. Ltd. 2018 (20) G.S.T.L. 49 (Bom.). Hence, appeal is not maintainable.

(v) On the contention of the appellant that the Section 102 is a beneficial enactment, it is submitted by the respondent that no guidelines by way of Circulars or Instructions or Trade notice have been issued by the CBEC or any authority prescribing the procedure to be followed and documents to be submitted for the purpose of refund under Section 102 ibid. In absence thereof, refund orders cannot be lawfully challenged on the grounds which are not even taken in SCN.

(vi) On the contention that the Adjudicating Authority has held that burden of service tax in the present case has not been passed on to any other person without scrutiny of documents, the respondent has submitted that:

(a) The Contract and work orders in the present case were all issued prior to 01.04.2015 when the said service was exempted. Further, the impugned order on this issue is passed based on CA Certificate dated 29.11.2016 issued by Shri Nilesh Khade, CA wherein it is certified that no service tax is recovered by the claimant. The appeal nowhere alleges that this certificate is incorrect or false.

(b) Further, requirement of Contract is neither prescribed under Section 102 ibid nor specified in the SCN.

(c) There is not any suggestion in the appeal that service tax was passed on to any other person by the respondent. It is also not alleged that certificate of CA is in any manner incorrect or false. Thus, present appeal is an attempt to reduce an order of refund by merely making vague allegation that service tax was passed on to any other person, which is not permissible.

(d) The impugned order passed after applying the principle of unjust enrichment. Hence, it is incorrect on the part of appellant to allege or contend that decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. 1997 (89) E.L.T. 247 (S.C.) has not been complied with in granting refund.

(vii) On the interest issue, it is submitted that as per sub section (2) of Section 102 ibid, service tax levied or collected has to be refunded as if there was no levy during the relevant period. When there is a mandate to refund the service tax on the premise that there was no levy, it automatically follows that the amounts of penal interest (as duly admitted in appeal) collected along with service tax would have to be refunded.

(viii) On the contention of Cenvat Credit as issue mentioned at Para 4(vi) above, the respondent after reproducing the relevant paragraph of impugned order, [illegible] contended that

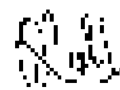
(a) since the appellant on record stated that Section 102 ibid is a different exemption and the [illegible] specified in Section 102 [illegible] other provisions [illegible]. As there is no reference of CENVAT Credit in Section 102 ibid, the appellant cannot be permitted to [illegible] Section 102 ibid [illegible] not specified [illegible] Section 102 [illegible] on Cenvat on the other hand, even though not specified in Section 102 ibid, must be made a pretext for questioning the [illegible] Section 102 ibid.

(b) the contention of the appellant that the Adjudicating Authority has not considered the ST 3 returns showing [illegible] and utilization of CENVAT Credit is factually incorrect in as much as the Adjudicating Authority has specifically dealt with this issue at Para 4 of the impugned order [illegible] to [illegible].

(c) Further, on this issue, appeal does not bring out any specific legal infirmity to the findings of the Adjudicating Authority and hence the appeal in this regard is vague, unspecific and totally nebulous and therefore, not tenable in the eyes of law.

5. Personal hearing was held on 26.03.2018 wherein Shri Vikash Mehta, Consultant appeared on behalf of the respondent and explained the case in detail [illegible] and files the written submission dated 26.03.2018 for consideration.

6. I have carefully gone through the facts of the case on records, grounds of the appeal memorandum filed by the appellant and also the cross objection (written submission) filed and oral submission made at the time of personal hearing by the respondent. I take up the appeal for the final decision. I find that the respondent has entered into agreement/contracts with Government/Local authority/Government authority to provide works as detailed at para-12 of the impugned order and [illegible] mentioned services provided to the Government in relation to the construction work, which were previously exempted vide entry 12(a) and (c) of Mega Exemption Notification No. 25/2012 dated 20.06.2012, applicable from 01.07.2012 under the new levy of negative list based service tax. However, these exemption entries of Notification No. 25/2012-ST were deleted vide the Finance Act, 2015 and accordingly a Notification No. 06/2015-ST dated 01.03.2015 issued for withdrawal of the said exemption. Hence, with effect from 1st April 2015, services provided to the Government, a Local Authority or a Governmental Authority in respect of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a civil structure or any original works meant predominantly for use other than for commerce, industries, or any other business or profession and of a structure meant predominantly for use as educational, clinical or art or cultural establishment [illegible]. Accordingly, the respondent paid service tax on bills raised from 01.04.2015 for above mentioned services provided to various



Government Departments under the contracts claimed to have been entered into with them prior to 1st March, 2015. Such service tax is amounting to Rs. 13,08,029/- on bills raised during the period from 01.04.2015 to 29.02.2016 and interest amounting to Rs 50,428/- for delayed payment of such service tax under the above mentioned contracts. Through the Finance Act, 2016 the exemption in respect of such construction related services provided to the Government etc. has been restored. Accordingly, Notification No. 9/2016-ST dated 01.03.2016 has been issued to amend Notification 25/2012-ST dated 20.06.2012 so as to insert entry 12A, to exempt the above stated services in respect of which contract has been entered into prior to 1st March, 2015. However, in respect of such services provided and bills raised by the assessee during the period from 01.04.2015 to 29.02.2016 (both days inclusive) to the Government, Local authority, Governmental Authority etc., on which the service tax had been paid by the service provider due to withdrawal of the exemption entry of Notification 25/2012-ST ibid which was operative during that period, a new provision –Section 102 has been inserted through the Finance Act, 2016, to grant the refund of the said service tax paid on such services during that period. Therefore, the appellant claimed refund of Rs.13,58,457/- (Service Tax of Rs. 13,08,029/- and interest of Rs. 50,428/-) paid by them in respect of the services provided to the Government during the FY 2015-16 as per newly introduced Section 102 of the Finance Act, 1994, the relevant portion thereof is reproduced as under for ease of appreciation of the issues:

> *(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 01.04.2015 and ending with the 29.02.2016, in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of—*
>
> *(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;*
>
> *(b) a structure meant predominantly for use as—*
>
> *(i) an educational establishment;*
>
> *(ii) a clinical establishment; or*
>
> *(iii) an art or cultural establishment;*
>
> *(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act,*
>
> *under a contract entered into before the 01.03.2015 and on which appropriate stamp duty, where applicable, had been paid before that date.*
>
> *(2) Refund shall be made of all such service tax which has been collected but which would not have been collected had sub-section (1) been in force at all the material times.*

Keeping the said provisions of Section 102 ibid in mind, I proceed to decide the appeal on merits.

7. I find that there is no dispute that the provisions of Section 102 of the Finance Act, 1994 provides for the refund of service tax paid in respect of service provided to the Government under the specified categories for construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration for the purposes as listed in the provisions. There

is also no dispute that the nature of services provided by the respondent is the construction services to the Government and Local Authority during the FY 2015-16 and the said services were exempted till 31.03.2015 (i.e. upto FY 2014-15) as per entry No. 13 of Mega Exemption Notification No. 25/2012-ST. There is also no dispute that the respondent paid the Service Tax of Service tax of Rs. 13,08,099/- and interest of Rs. 30,470/- on delayed payment of service tax. However, the respondent had filed the appeal both on merits as well as on the grounds of unjust enrichment. The appellant had [illegible] raised issues inter alia mentioned at Para-3 above. The respondent has also filed the cross objection inter alia on the grounds as detailed at Para 4 above. Thus, issue for decision before me is to decide whether the refund allowed by the Adjudicating Authority under the impugned order is legally sustainable or not. Now, I take up the each issue on which appellant contends for decision.

8. On the contention that the respondent has not submitted copy of any document as inter alia mentioned at Para-3(i) above, I find that the refund claim in question was filed alongwith the documents including *'Self attested copy of Work Orders of each bill as proof of the payment by each'* and also *'Self Attested copies of each refund claimed R.A. Bill as proof of service tax was received in bill'* as mentioned at para-3 of the impugned order. These facts are not disputed by the appellant before me. Further, as mentioned at para-4 of the impugned order, the said claim with documents were sent to the Range Officer for verification and the Verification Report dated 30.11.2016 [illegible] submission [illegible] and the claim was verified on the basis of documents submitted with the claim and thus, no specific query was raised in the said verification report. Further, as mentioned at para 5 of the impugned order, I also find that, subsequently, when the SCN dated 08.12.2016 was issued to the respondent, the copies of the [illegible] agreements were not asked for. Thus, from these facts, it is clearly transpired that the Adjudicating Authority after [illegible] the Work Orders and R.A. bills [illegible], had come to conclusion that the respondent had provided the construction services to the Government authorities in respect of the contracts entered before 01.03.2015. Thus, without asking for the actual contracts from the respondent, the Adjudicating Authority had satisfied himself that the condition that *'contract entered into before the 01.03.2015'* of the Sub-Section (1) of Section 102 ibid. had been fulfilled in the present case. Further, said condition is there in the said Section 102 ibid. just to ensure that the benefits are available in respect of those contracts which are entered before 01.03.2015 only. The Adjudicating Authority on the basis of the Work Orders and R.A. Bills and on the basis of the verification report of the Range Officer has satisfied himself and found that the said contracts were actually entered before 01.03.2015 and thus, under the circumstances, I do not find any infirmity in the impugned order. Further, I also find that it is not the contention of the appellant that the said contracts under consideration period were entered after 01.03.2015 and no such evidences or any contradictory facts have been placed before me by the

appellant. Further, this issue was also not raised in the SCN dated 06.12.2016 issued to the respondent. Further, I also find that there is neither any specific requirement enumerated in the said Section 102 that that the refund claim should invariably be accompanied by the copies of the contracts nor any [illegible] issued by the department for the same. Hence, when the condition of contracts prior to 01.03.2015 is fulfilled which had been found to be satisfied by the Adjudicating Authority on the basis of other documents viz. Work Orders and R.A.Bills, I do not find force in the said contention of the appellant. I therefore, reject this contention being not sustainable in the eyes of law.

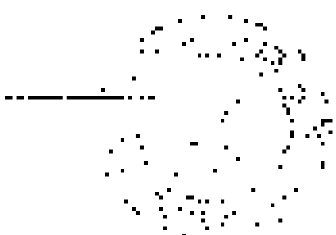
9. On the contention of the appellant on the issue of unjust enrichment as mentioned at para-5(ii) above, I find that the appellant has vehemently contended that refund of tax is grantable only when it is established that burden of tax has not been passed on to others as the Doctrine of Unjust Enrichment is a basic and statutory doctrine. I find that in the verification report dated 30.11.2016 of the Range Superintendent as detailed at Sr. No. 4 of Para-4 of the impugned order, it is mentioned that "*Service tax has not been passed on. The clause of Unjust Enrichment is not applicable in the present refund claim*". This is however, found to be without any basis. Further, the issue was raised in the SCN dated 06.12.2016 as detailed at Para-5 of the impugned order. However, the Adjudicating Authority at para-13 of the impugned order observed and held that-

"*I find that the claimant has submitted a C.A. Certificate issued by M/s. N.V.Kheda & Co. (M.No. 105929) dated 29.11.2016 certifying that the incidence of the Service Tax as paid by them has not been passed on to any other person. Hence clause of unjust enrichment is not applicable in this case.*"

9.1 From the above facts, it is clear that the department has raised this issue of unjust enrichment and asked for the Certificate from CA. However, from the copy of the Certificate dated 29.11.2016 of M/s N.V.Kheda (M.No. 105929), Chartered Accountant, I find that the said Certificate inter alia states as under:

> "*This is to certify that we have verified the following Residential RA Bills received by us from [illegible] ... [illegible] ... and certify that no service tax has been received or [illegible] ... [illegible] ...*"

From the underlined bold phrases or words in the above Certificate, it transpires that the same is only certifying that the respondent has not received service tax from the service receiver. However, from this certificate it does not transpire that the respondent has not passed on the burden of service tax to the service receivers. Even, if the service tax is not collected but if the burden thereof is transferred to the service receivers, the doctrine of unjust enrichment is not satisfied. Further, from the above Certificate it transpires that the same is issued on the basis of residential RA Bills instead of on the basis of Financial records/Books of Accounts especially the Balance Sheet so as to ascertain the facts that the burden is not passed on to any other person. And hence I find that this Chartered Accountant's Certificate dated 29.11.2016 relied upon by the Adjudicating Authority while deciding the issue of unjust enrichment is rather unreliable. The reliance by the respondent on this certificate in the cross-objection is of no help to the respondent.



9.2 The refund claim sanctioned vide the impugned order is in view of the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 83 of the Finance Act, 1994 read with Section 142 of the Finance Act, 2016. The relevant provisions of the said Section 11B is reproduced as under for better appreciation of the case.

Claim for refund of SECTION [duty and interest, if any, paid on such duty]. — (1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, __him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person.__

Provided...

Provided ...

[illegible] application,

(2)

Provided that the amount of [duty of excise and interest, if any, paid on such duty] as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to — rebate of duty of excise on excisable goods

(a)

(b) ...

(c) ...

(d) __the [duty of excise and interest, if any, paid on such duty] paid by the manufacturer, if he__ had not passed on the incidence of such [duty __and interest, if any, paid on such duty] to any other person;__

(e) the [duty of excise and interest, __if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any__ other __person;__

(f) the [duty of excise and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of [duty and interest, if any, paid on such duty] has not been passed on by the persons concerned to any other person.

From the underlined and bold portion of the said provisions of Section 11B, it is clearly conspicuous that the refund is admissible to the claimant if the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person. Thus, even the service tax is not collected/received but if the burden thereof is transferred to the service receivers, the doctrine of unjust enrichment is not satisfied. Thus, it is important to examine whether the respondent has charged the service tax and accordingly raised the liability to that extent on the service receivers in their books of accounts.

9.3 Further, I rely on the decision of the Hon'ble CESTAT, Mumbai in the case of M/s. MADHUCON RANA (JV) Versus COMMR. OF CUS. (PREVENTIVE), MUMBAI - 2015 (38) S.T.R. 439 (Tri. - Mumbai) wherein it is observed and held as under.

was allowed to the respondent while allowing the benefit of refund for payment of service tax for which claims applied were [illegible], than, the Adjudicating Authority has failed to verify and ascertain the facts from the records i.e. ST-3 returns and other before passing the impugned order. I find that this issue of cenvat credit taken was raised in the SCN dated 06.12.2016 as detailed at Sr. No. 8 of Para-5 of the impugned order, which is reproduced as under for better appreciation of the issue.

"It is noticed that the claimant had claimed the Cenvat Credit taken. So the claimant was asked to clarify as to how the claim of utilisation of Cenvat credit under works contract [illegible] legal and also if the same was utilised against sub contractor, how the service tax paid [illegible] for the service provided by sub contractor can be claimed by the claimant?"

Thus, from above, it transpires that in the impugned SCN, issue regarding Cenvat was limited to legality of utilisation of cenvat credit under works contract as well as the issue that of refund of service tax paid by the sub contractor can be claimed by the respondent or not.

11.2 I find that the Adjudicating Authority at Sr.No.8 of Para 12 of the impugned order after considering the submission of the respondent based on *explanation-2 to Rule-2A(B) to Service Tax (Determination of Value) Rules,2006* and also with reference to Rule-3(4)(e) of the Cenvat Credit Rules,2004, has discussed and held as under:

"I find that the claimant submitted the [illegible] from all the three sub-contractors confirming that [illegible] the service tax [illegible] and they have not claimed refund from the department [illegible].

I also find that the claimant submitted their copy for CENVAT Credit Register from which CENVAT Credit is utilised for the payment of service tax to the sub contractors.

Therefore, on the basis of all these documents, submissions and discussions, I find that the claimant is eligible for the refund of CENVAT Credit utilised for paying service tax by them."

Thus, from above facts and discussion, it transpires that the Adjudicating Authority has held that the respondent was eligible for the refund of Cenvat Credit utilised in payment of service tax by them after considering the said *explanation-2 to Rule 2A(B) to Service Tax (Determination of Value) Rules,2006* and also with reference to *Rule-3(4)(e) of the Cenvat Credit Rules,2004* as well as based on the undertakings of the said sub-contractors.

11.3 In context of the facts and discussion herein above, the above contention of the appellant is examined. I find that the respondent has submitted [illegible] as mentioned at Para-[illegible] above. I find force in the contention/submission of the respondent. I find that the contention of the appellant that the Adjudicating Authority has not considered the ST-3 returns showing availment and utilisation of CENVAT Credit, is factually incorrect inasmuch as the Adjudicating Authority has specifically dealt with this issue at Para 8 of the impugned order.

[illegible] the issues [illegible] in the [illegible] SCN are [illegible] with at Para [illegible] of the impugned order. Further, on this issue, appeal does not bring out any specific legal [illegible] in the findings of the Adjudicating Authority and hence, the appeal in this regard is [illegible] unspecific and therefore, not tenable in the eyes of law.

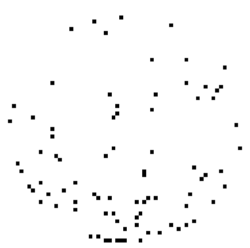
12. In view of the facts and discussion herein foregoing paras I set aside the impugned order as above [illegible] allowed all the [illegible] by the appellant accordingly.

(Gopi Nath)
Commissioner (Appeals)/
Additional Director General (Audit)

BY R.P.A.D.

To,
1. The Assistant Commissioner, CGST, [illegible] (Formerly [illegible] Division [illegible])
2. M/s [illegible] Construction Co., [illegible] Arcade, [illegible] Road, [illegible], [illegible]-[illegible]

Copy to:
1. The Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad.
2. The Principal Commissioner/Commissioner, CGST, [illegible]
3. The Commissioner (Appeals) [illegible]
4. The Assistant Commissioner (Systems), CGST, [illegible].
5. Guard File.
6. P.A. File.



"5. I have carefully gone through the records and considered the submissions made on behalf of the Revenue. The issue involved in the present case is the refund. [illegible] The Assistant Commissioner while sanctioning the refund has not gone into the fact whether incidence of duty for which refund is sought for, has been passed on or otherwise. In my view, even if it is a case of refund of revenue deposit, test of unjust enrichment has to be passed on. The appellant during the proceedings before the Commissioner (Appeals) has submitted a Chartered Accountant's certificate, which was issued on the basis of books of account of the appellant, wherein it has been certified that the amount of refund is shown in the balance sheet as receivable from the Government. However, despite this submission of the appellant, the Commissioner (Appeals) has rejected the claim of the appellant on the ground that Chartered Accountant's certificate is not a conclusive evidence to prove that the incidence of duty has not been passed on. It is also surprising that, if at all, the Commissioner (Appeals) is not satisfied with the Chartered Accountant's certificate, he should have called for other documents like balance sheet and other books of account to check the authenticity of the CA certificate, which he failed to do so. It is a settled position of law that, if the amount for which refund is sought for, has not been booked as an expenditure in the profit and loss account and shown in the asset side of the balance sheet as receivable, it is sufficient to prove that the incidence of duty has not been passed on.

6. In view of the above discussion, the appeal is allowed by way of remand to the Assistant Commissioner of Customs, [illegible] New Custom House, Ballard Estate, Mumbai [illegible]. Needless to say that the Assistant Commissioner shall verify the balance sheet and other documents of the appellant and on satisfaction that the amount of refund is shown as receivable, the refund shall be granted. It is also directed that the appellant shall be granted interest on the refund in accordance with law. [illegible] adjudication of refund matter shall be completed within a period of [illegible] from the date of receipt of this order."

[illegible], though CA Certificate is produced in this case but in view of the facts and discussion in Para 9.1 above, the same is found to be of no help to the respondent, and thus, the status of the [illegible] in the Books of Accounts/Balance Sheet is crucial in deciding the issue of unjust enrichment. I find that the respondent have neither produced nor placed any conclusive evidences before me against the said findings mentioned in Para 9.1 above.

9.4 Further, the respondent in the Cross Objection, as [illegible] mentioned at Para 4(vi) [illegible] above had contended that the impugned order in this case was passed on the basis of the CA Certificate wherein it is certified that no service tax is received by the claimant. However, before me it is the contention of the respondent that they had not received the service tax in question from the service receiver and thus, the respondent has not submitted any form any evidences that the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person/ service receivers, which is the prime requirement under the said provisions of Section [illegible] ibid to be fulfilled.

9.5 In view of above facts and discussion, the respondent's contentions as inter-alia mentioned at Para 4 (vi) [illegible] is of no help to them.

9.6 In view of the facts and discussion herein above, I find it appropriate that the issue of unjust enrichment needs to be re-examined in light of my above observations so as to ascertain whether or not the incidence of service tax and interest paid on such tax had been passed on by him to any other person or service receivers. Further, it is also essential to examine whether or not the respondent has charged the service tax and accordingly raised the liability to that extent on the service receivers in their books of accounts. Hence, the matter needs to be remanded back to Adjudicating Authority for deciding afresh the above issue in light of my above observation after giving an opportunity of hearing to the respondent. The respondent is also directed to put all the evidences before the Adjudicating Authority that may be asked for by the Adjudicating Authority while the matter is heard in remand proceedings. I order accordingly the Adjudicating Authority to decide the said issue afresh. These findings of mine are supported by the decision of the Hon'ble High Court of Gujarat in Tax Appeal No 278/2014 in the case of Commissioner, Service Tax, Ahmedabad V/s Associated Cotsn Ltd reported at 2015(39) S.T.R. 725 (Guj.) and also by the decision of the Hon'ble CESTAT, WZB Mumbai in case of Commissioner of Central Excise, Pune-I V/s Sai Advantium Ltd and reported in 2012 (27) STR 46 (Tri. - Mumbai).

10. Coming on the contention of refund of interest, I find that the appellant contended as interalia mentioned at Para 5(iv) above. The respondent has vehemently submitted as interalia mentioned at para-4(viii) above.

10.1 I find that the impugned order passed by granting refund is in view of the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 83 of the Finance Act, 1994 read with Section 102 of the Finance Act 2016. The provisions of Section 102 ibid, which very categorically provides for refund of any service tax and interest, if any, paid on such services. Hence, refund of interest paid on such service tax which are admissible for refund under the said Section 102 ibid, is also available under the said Section 102, read with provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 83 of the Finance Act, 1994, provided the refund of service tax itself is admissible under these provisions. When the admissibility of refund of service tax in the present case on the issue of unjust enrichment as discussed in foregoing paras is directed to be examined by the Adjudicating Authority (in remand proceedings) afresh, this issue of availability of interest may also be taken up in the remand proceedings by the Adjudicating Authority in light of my above observation.

11. Now, I take up the issue of CENVAT availment and utilization. I find that the appellant has contended as interalia mentioned at Para-5(i) above.

11.1 Thus, appellant's contention is limited to the issue that with regard to availment and utilization of CENVAT Credit totally amounting to Rs 5,60,300/- the Adjudicating Authority has not considered this fact while deciding the refund claim [illegible] question as to whether CENVAT Credit