[illegible]
COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,

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[illegible]

[illegible]

Appeal / File No. [illegible]	O.I.O. No. [illegible]	Date [illegible]
V2/13/BVR/2017	3-50/2015	10/01/2017

[illegible] (Order-In-Appeal No.):

BHV-EXCUS-000-APP-078-2018-19

[illegible] Date of Order:	07.05.2018	[illegible] Date of Issue:	14.05.2018

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

[illegible]

In pursuance of Board's Notification No. [illegible] dated [illegible] read with Board's Order No. [illegible] dated [illegible].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 Service Tax [illegible] Finance Act, 1994.

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

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

1.M/s Rattan Construction Co., B-46, Shrinath Nagar, B/h. S. T. Depot, 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, [illegible] Floor, [illegible] Bhawan, [illegible], Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above.

(ii) [illegible]

The appeal to the Appellate Tribunal shall be filed in quadruplicate in Form EA-3 [illegible] prescribed under Rule 6 of Central Excise (Appeals) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/- Rs.10,000/- where amount of duty demand/interest/penalty/refund is up to 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/-.

(B) [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/-.

(C) [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.

(D) [illegible]

[illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[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.

(A) भारत सरकार को पुनरीक्षण आवेदन :

Revision application to Government of India:

[illegible] 35EE [illegible] 110001 [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-35 ibid:

(i) [illegible]

In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ii) [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] 1998 [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] 200/- [illegible] 1000/- [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.

(C) [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 lakh fee of Rs. 100/- for each.

(D) [illegible] 1975 [illegible]

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

(E) [illegible] 1982 [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.

(F) [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 08.0[illegible].2017 issued from F.No. V/2-295/[illegible]/2016-17 has filed an appeal against the Order In Original No. [illegible]/2016 dated 13.01.2017 (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 Parth Construction Co., [illegible], [illegible] Nagar, [illegible], Depot, [illegible]-36[illegible] 001 (hereinafter referred to as 'the respondent') are holding Service Tax Registration No. [illegible] filed refund claim of Rs. 1,20,446/- (Service Tax of Rs. 1,12,661/- and interest of Rs. 7,785/-), on account of retrospective exemptions granted to the services provided to the Government, local authority or Government Authorities, as provided in Section 102 of the Finance Act, 1994. The said claim was filed on [illegible].11.2016 alongwith documents as detailed at Para-3 of the impugned order. However, on scrutiny of the said claim, a Show Cause Notice dated 05.12.2016 was issued to the respondent asking them to submit the documents/clarification as detailed at Para 5 of the impugned order.

(ii) The Adjudicating Authority under the impugned order sanctioned the refund of Rs. 1,20,446/- under the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matters 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 0[illegible].03.2017 issued from F.No. V/2-295/[illegible]/2016-17 has filed an appeal against the impugned order alleging it is not legal, correct 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 claimed. In absence of full contract, it cannot be verified and ascertained that the respondent has provided the said construction service to the Government/Local Authority/Governmental 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. This is a prime condition under subsection (1) of Section 102 of the Finance Act, 1994.

(ii) Without prejudice to the above, 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. These facts can only be verified/ascertained by scrutiny of Contracts and Bills/invoices issued by the respondent. Refund of tax is grantable 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. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. [1997 (89) E.L.T. 247 (S.C.)].

(iii) The Adjudicating Authority has erred in sanctioning the refund of the interest of Rs. 7,765/- which is not admissible as per Section-102 of the Finance Act, 1994, in as much as Sub-section (3) of Section-102 of the Finance Act, 1994, categorically provides that "refund shall be made of all such Service Tax which has been collected ...". Thus, the term interest is not found 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 a 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 or used. Being so, even while understanding the term 'refund of interest' in Section 11B of Central Excise Act, 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 ambiguity and thus, the refund of interest is not envisaged in the Section 102 ibid. The refund of interest can only be allowed if the provisions of allowing refund clearly specifies [illegible] interest, which is absent in Section 102 ibid. Further, payment of interest by the respondent was due to not paying service tax [illegible] and thus, it is by nature of penal action which is not covered under Section 102 ibid.

4. The respondent vide letter dated [illegible].2018 filed Cross Objection (Written Submission) on the grounds [illegible] mentioned as under:

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

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

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

(iv) There is no allegation in the SCN to deny refund by citing non-submission of copy of contract. Thus, appeal filed seeking [illegible] refund order by citing reason of

no submission ... has travelled beyond the scope of SCN. It is settled law that grounds of appeal can not go beyond the scope of SCN. Reliance is placed on the decision of Hon'ble High Court in the case of Rajiv Arora 2008 (231) E.L.T. 26 (Bom) and in the case of Principal Commissioner of Customs, CE & ST, Nagpur Vs. [illegible] Pvt. Ltd. 2018 (359) E.L.T. 24 (Bom). Hence appeal is not maintainable.

(vi) 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 [illegible] 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 order cannot be lawfully challenged on the grounds which are not mentioned in SCN.

(vii) 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 contracts, 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 [illegible], Chartered Accountant wherein it is certified that no service tax is received by the claimant. The appeal nowhere alleges that this certificate is inaccurate or false.

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

(c) There is no allegation 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 inaccurate or false. Thus, present appeal is an attempt to extract an order without actually making any allegation that service tax was passed on to any other person, which is not permissible.

(d) The impugned order is 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 (SC) has not been applied while granting refund.

(viii) On the interest issue, it is submitted that as per Sub-section (2) of Section 102 ibid, service tax levied or collected must be refunded as if there was no levy during the relevant period. When there is mandate to refund the service tax on the premise that there was no levy, it automatically follows that any amount of penal nature (as duly admitted in appeal) collected along with service tax will have to be refunded.

5. Personal hearing was held on 26.03.2018 wherein Shri [illegible], CA attended appeal on behalf of the respondent and explained his case in detail orally and filed the written submission dated 26.03.2018 for consideration.

6. I have carefully gone through the facts of the case and 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 agreements/contracts with Government/Local authority/Government authority to provide works as detailed at Para-17 of the impugned order and thus, the taxable 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-ST 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, art or cultural establishment became taxable. 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 aggregating to Rs. 1,12,651/- which is paid during the period from 01.04.2015 to 29.02.2016 and interest amounting to Rs. 7,765/- on 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 by. 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 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 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.1,20,416/- (Service Tax of Rs. 1,12,651/- and interest of Rs. 7,765/-) 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 thereto is reproduced as under for better 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 1.04.2015 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 [illegible] I proceed to decide the appeal as under.

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 i.e. construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration for the purpose specified in the provisions. There is also no dispute that the nature of services provided by the respondent is the construction services to the Government / 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 1,12,661/- and interest of Rs. 7,[illegible] 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 vehemently contended as interalia mentioned at Para-3 above. The respondent has also filed the cross objection interalia on the grounds as detailed at Para-4 above. Issue to be decided 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 contended, for decision.

8. On the contention that the respondent has not submitted copy of any contract as interalia mentioned at Para 3(i) above, I find that the refund claim in question was filed alongwith the documents including "*Copy of Work Orders as proof of award of such civil work orders are before 01.03.2015*" and also "*Self attested copy of signed stamped R.A. Bill as proof of service tax not collected in bill*" as mentioned in para-5 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 was received wherein also no point on the issue of non submission of contracts etc. 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 05.12.2016 issued to the respondent, the copies of these contracts/agreements were not asked for. Thus, from these facts, it clearly transpires that the Adjudicating Authority after relying on the Work Orders and R.A.Bills raised, had came to conclusion that the respondent has provided the construction services to the Government authorities in respect of the contracts/agreements entered before 01.03.2015. Thus, without asking for the actual contracts from the respondent, the Adjudicating Authority had satisfied himself that the condition viz. *"a contract entered into before the 01.03.2015"* of the Sub Section (1) of Section 102 ibid, has been fulfilled in the present case. Further, spirit of law is there in the said Section 102 ibid also 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 contracts for which refund granted 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 05.12.2016 issued to the respondent. Further, I also find that there is neither any specific requirement as mentioned in the said Section 102 ibid that the refund claim should invariably be accompanied by the copies of the contracts nor any circular/instruction issued by the department for the same. Hence, when the condition of contracts prior to 01.03.2015 is fulfilled which has 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 inter alia mentioned at para-3(ii) above, I find that the appellant has vehemently contended that refund of tax is granted only when it is established that burden of tax has not been passed on to others as the Doctrine of Unjust Enrichment is a just and salutary doctrine. I find that in the verification report dated 30.11.2016 of the Range Superintendent as detailed at Para-4 of the impugned order, it is mentioned that the claimant (respondent) has submitted CA certificate. Further, this issue was raised in the SCN dated 05.12.2016 as detailed at Para 5 of the impugned order. Further, the Adjudicating Authority at Para-15 of the impugned order observed and held that: *"I find that the claimant has submitted a C.A. Certificate issued by [illegible] dated 29.11.2016 certifying that the incidence of the service tax so 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 to the extent that the burden of service tax paid by them had not been passed on to any other person. However, from the copy of the

Certificate dated 29.11.2016 of M/s M.M. Kheria (M. No. 105829), Chartered Accountant. I find that the said Certificate interalia states as under:

> *"This is to certify that, we have verified following mentioned ... [illegible] from the ... Government Department and certify that ... [illegible] ... "*

From the above highlighted bold portions of 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. Hence, the service tax is not recovered 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 verification of RA Bills instead of on the basis of Financial records/Books of Accounts especially the Balance Sheet so as to ascertain the fact 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 not at all relevant. Hence, reliance by the respondent on this certificate in the cross objection is also of no help to the respondent.

9.2 The refund claim sanctioned under the impugned order is in view of the provisions of Section 11B of the Central Excise Act, 1944 is made applicable to service tax matters under Section 83 of the Finance Act, 1994 read with Section 102 of the Finance Act, 2016. The relevant provisions of the said Section 11B is reproduced as under for better appreciation of the issue:

> *SECTION 11B. Claim for refund of [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 ...*
>
> *If, on receipt of any such 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) ....*
>
> *(e) 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) <u>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;</u>

(f) the [duty of excise and interest, if any, paid on such duty] borne by any other such other 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 transpires 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 amount of refund is not shown/booked by the service receivers, the doctrine of unjust enrichment is not satisfied. Thus, it is imperative to examine whether the respondent has charged the service tax and accordingly booked the liability to that extent on the service receivers in their books of accounts.

9.5 Further, I rely on the decision of the Hon'ble CESTAT, Mumbai in the case of M/s MADUCCON DENA PURE Versus COMMR. OF CUS. (PREVENTIVE), MUMBAI - 2015 (320) E.L.T. 458 (Tri. - Mum.) wherein it is observed and held as under.

> "5. I have carefully gone through the records and considered the submissions made on behalf of the Revenue. The issue lies in a narrow compass on the aspect of unjust enrichment. The Assistant Commissioner while sanctioning the refund has not gone into the fact whether incidence of duty, for which refund is sought, has been passed on or otherwise. In any view, even in the 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 recorded that the amount of refund is shown in the balance sheet as recoverable 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. In my considered opinion, if at all the Commissioner (Appeals) is not satisfied with the Chartered Accountant's certificate, he should have called for the other documents like balance sheet and other books of account to check the authenticity of the CA certificate, which he has not done 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 evidence that the incidence of duty has not been passed on.
>
> 6. In view of my above discussion, the appeal is allowed by way of remand to the Assistant Commissioner of Customs, Refund Cell, Sahar, New Custom House, [illegible] Mumbai-[illegible]. Needless to say that the Assistant Commissioner shall verify the books of accounts/balance sheet 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, if any. The adjudicating authority shall complete the denovo proceedings within a period of three months from the date of receipt of this order."

[illegible]

[illegible] above, though CA Certificate is produced in this case but in view of the facts and discussion at Para [illegible] above, the same is found to be of no help to the respondent, and thus, the effect of the said transaction in the Books of Account/Balance Sheet is crucial in deciding the issue of unjust enrichment. I find that the respondent have neither submitted nor placed any concrete evidence [illegible] against the said facts as mentioned at Para [illegible] above.

9.4 Further, the respondent in the Cross Objection as interalia mentioned at Para 4(iv) [illegible] above had contended that the impugned order [illegible] issue was passed on the basis of CA Certificate wherein it is certified that no service tax is received by the claimant. [illegible] 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 brought on record any evidence 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 11B [illegible] to be fulfilled.

9.5 In view of above facts and discussion, the respondent's submissions as interalia mentioned at Para [illegible] (iv) 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 observation so as to ascertain whether or not the incidence of service tax and interest, paid on such duty has 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 account. 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 in order to enable 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 the Tax Appeal No. [illegible]/2014 in the case of Commissioner of Service Tax, Ahmedabad V/s Associated Hotels Ltd reported in 2015(37) STR 723 (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 (281) ELT 44 (Tri.-Mumbai).

10. Further, on the contention of refund of interest, I find that the appellant contention is [illegible] mentioned at Para [illegible] above. The respondent has [illegible] said refund of interest as mentioned at para [illegible] above.

10.1 Further, if the impugned order is passed by granting refund in view of the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matters under Section 83 of the Finance Act, 1994 read with Section 102 of the Finance Act, 2016. The provisions of Section 11B ibid. which very categorically provides for refund of any service tax and interest, if any, paid on such duty/tax. Hence, refund of interest paid on such service tax for which one claims for refund under the said Section 102 ibid. is also available under the said Section 102 ibid 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 the said 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 for which case is remanded back, this issue of admissibility of interest may also be taken up in the remand proceedings by the Adjudicating Authority in light of my above observation.

11. In view of the facts and discussion herein above, I set aside the impugned order by way of remand and dispose off the appeal filed by the appellant accordingly.

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

BY R.P.A.D.

To,
1. The Assistant Commissioner, CGST, Bhavnagar (Formerly Service Tax Division Bhavnagar)
2. M/s Purvi Construction Co., B-16, Shrinath Nagar, B/h S.T Depot, Junagadh 362 001

Copy to:
1. The Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad.
2. The Principal Commissioner/Commissioner, CGST, Bhavnagar.
3. The Commissioner (Appeals) Rajkot.
4. The Assistant Commissioner (System), CGST, Bhavnagar.
5. Guard File.
6. P.A. File.