[illegible] (अपील) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE

[illegible] 2nd Floor, GST Bhavan,
[illegible] / Race Course Ring Road,
राजकोट / Rajkot – 360 001

Tele Fax No. 0281 – [illegible]
Email: [illegible]

[illegible]

क	अपील / फाइल संख्या / Appeal / File No. V2/97/RAJ/2016/2017	मूल आदेश सं. / O.I.O. No. 8/54/2016	दिनांक / Date 26/01/2017

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

BHV-EXCUS-000-APP-079-2018-19

आदेश का दिनांक / Date of Order:	07.05.2018	जारी करने की तारीख / Date of issue:	14.05.2018

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

[illegible]

In pursuance to Board's Notification No. 26/2017-CE (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 अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellant & Respondent :-

1.M/s D.J. Odedara, 9, No., Lake View Complex, Opp. Narsinh Mehta Sarovar, Junagadh - 362 001.

[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, [illegible], Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above

(iii) [illegible] 1,000 [illegible] 5,000 [illegible]

(iv) [illegible] 50 Lac and above 50 Lac [illegible]

The appeal to the appropriate Tribunal shall be filed in Form [illegible] prescribed under Rule 9 of Cenvat Credit Rules, 2004, and shall be [illegible] against [illegible] and should be accompanied by [illegible] Where one or more [illegible] 50 Lac and above 50 Lac [illegible] Bench of the Tribunal within whose jurisdiction the [illegible] is situated.

(v) [illegible] 5,000 [illegible]

The appeal under sub-section (1) of Section 35F of the Central Excise Act, 1944, as the said section is made applicable to service tax vide Section 83 of the Finance Act, 1994, shall be filed in Form [illegible] of the Central Excise (Appeals) Rules, 2001, and shall be accompanied by a copy of the order appealed against (one of which at least should be certified copy) and should be [illegible] of Rs. 5000/- where the amount of service tax & interest demanded & penalty levied or the [illegible] Rs. 5,000/- but does not exceed Rs. 50,000/-, Rs. 1,000/- where the amount of service tax & interest demanded & penalty levied or the [illegible] Rs. 50,000/-, Rs. 5,000/- where the amount of service tax & interest demanded & penalty levied or the [illegible] Rs. 1 lakh but does not exceed Rs. 5 lakhs, Rs. 10,000/- where the amount of service tax & interest demanded & penalty levied or the [illegible] Rs. 5 lakhs, in the form of crossed bank draft in favour of the Assistant Registrar of a branch of any nominated public sector bank of the place where the [illegible] Tribunal is situated, [illegible] application made for grant of stay or for [illegible] of the order appealed against, [illegible]

2. [illegible] 35F [illegible] 35EE [illegible] Commissioner, Central Excise [illegible] Commissioner, Central Excise (Appeals), [illegible] Commissioner, Central Excise [illegible] Commissioner, Central Excise (Appeals) [illegible]

The appeal to the Appellate Tribunal shall be filed in Form [illegible] of the Service Tax Rules, 1994 and shall be verified in the manner specified in Form [illegible] of the Central Excise Rules, 2002 [illegible] Commissioner, Central Excise (Appeals) [illegible] Commissioner, Central Excise [illegible] Commissioner, Central Excise (Appeals) [illegible] the Commissioner [illegible] Assistant Commissioner or Deputy Commissioner of Central Excise [illegible] Service Tax to prefer appeal before the Appellate Tribunal.

(vi) [illegible] 1994 [illegible] 83 [illegible] 1944 [illegible] 1994 [illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

(iv) [illegible] 2004 [illegible]

(v) [illegible]

For an appeal to be filed before the CESTAT under Section 35B of the Central Excise Act, 1944 which is made applicable to Service Tax vide Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of [illegible] Duty demanded where the duty or [illegible] Rs. 5 Lac but does not exceed Rs. 50 Lac, Rs. 2500/- where the duty demand [illegible] Rs. 50 Lac but does not exceed Rs. 1 Cr., and above Rs. 1 Cr., in the form of crossed bank draft [illegible] 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/-.

(vii) [illegible]

(a) [illegible]

(b) [illegible]

(c) [illegible]

(d) [illegible]

(e) [illegible]

(f) [illegible]

(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-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]

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 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]

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

(D) [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.

(E) [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.

(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 09.03.2017 issued from F.No. V2 /05/Ref/BVR/2016-17, has filed an appeal against the Order In Original No. 87/ADC/2016 dated 06.01.2017 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as the "Adjudicating Authority").

2. Brief facts of the case, in brief, are as under:-

(i) M/s. Kalpataru Construction, 6, Ravi Vision Complex, Opp. Navrang Multiplex, Bhavnagar-364002 (hereinafter referred to as 'the respondent') are holding Service Tax Registration No. AAGCB1229DST001 filed refund claim of Rs.15,49,071/- (Service Tax Rs.16,15,544/- and Cess of Rs.33,527/-), on account of exemption granted to the services provided to the Government Departments and Local Authorities, as provided in Section-102 of the Finance Act, 2012. The said claim was filed on 30.11.2015 alongwith documents as detailed at Para-3 of the impugned order. However, on scrutiny of the said claim, a Query Memo dated 22.12.2015 was issued to the respondent asking them to submit the documents/information as detailed at Para-3 of the impugned order.

(ii) The Adjudicating Authority vide the impugned order sanctioned refund claim of Rs.16,49,071/- 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 09.03.2017 issued from F.No.V2/05/Ref/BVR/2016-17 has filed the appeal on the impugned order, wherein it is interalia contended as under:

(i) The respondent has not submitted any documentary evidence to establish with the service receiver for providing the services on which they paid Service Tax and for which refund is sanctioned. In absence of this documents it cannot be verified and ascertained that the respondent had provided the said services prior to the Government Departments, the contract of which has been entered into before 01.03.2015 and on which service duty has been paid by the service receiver till 31.03.2015. This is a pre-condition under sub-section (1) of Section-102 of the Finance Act, 2016.

(ii) Without scrutiny of the documents, the Adjudicating Authority has erred by holding that the order of service tax has not been passed on to any other person by the respondent.

these cases can only be 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 distinction is quite and salutary doctrine. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Mafatlal Industries ltd [1997(89) ELT 247 (SC)].

(iii) The Adjudicating Authority has erred in sanctioning the refund of the interest of Rs. 53,000/- which is not admissible as per Section-102 of the Finance Act, 1994, in as much as sub-section (2) of Section 102 of the Finance Act, 1994 very categorically provides that, "refund shall be made only of such Service Tax which has been collected ...". Thus, the said interest, is not found in the said Section 102 of the Act. It is settled law that, the meaning of any term in a taxing statute cannot be understood with reference to even a similar term used in different taxing statute. It is essentially to be ascertained from the context in which it is used in the very section where the term is found to be used. Keeping 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 we have an LIC ibid clarifies that for refund of service tax has to be made, there is no scope to extend that for refund of interest also, as held by Hon'ble Supreme Court ibid. Thus 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 is for respondent who does not paying service tax in time and once it is by way of penalization which is not covered under Section 102 ibid.

4. The respondent vide letter dated 20.03.2018 filed Cross Objection (Written Submission) on the grounds interalia mentioned as under:-

(i) The dates of Notices to proceed were the work was prior to 01.03.2015 and thus, services in question were admittedly provided under contracts entered into prior to 01.03.2015. In cases where in respect of their submission, proof with respect of work orders which they claimed to have been furnished before the Adjudicating Authority as detailed at Para-5 of the impugned order.

(ii) There is no allegation in the Query Memo or contended in appeal that the service tax was not provided to the Government Authorities there is no evidence laid down in Section 102 ibid which asks for provision of Contract.

(iii) There is no allegation in the Query Memo or contended in appeal that the construction services were not provided - Para-4 contends that were entered into prior to 01.03.2015.

(iv) There is no allegation in the Query Memo to deny refund for having non-submission of copy of contract. The appellant filed by asking for refund of tax paid by it, any reason of non submission of document has travelled beyond the scope of SCN (Query Memo). 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. 2008 (10) S.T.R. 73 (Bom.) and in the case of Municipal Commissioner of Corporation, CR 6/81, Nagpur Vs Jotirmay Engg. Pvt. Ltd. - 2018 (359) E.L.T. 10 (Bom.). Hence, appeal is not maintainable.

(v) On the contention of the appellant that the Section 11D is a penal 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 11B ibid. In absence thereto, refund orders cannot be normally challenged on the grounds which are not even taken in Query Memo.

(vi) On the contention that the Adjudicating Authority has held that unjust enrichment has not been passed on to the buyer, other issues without scrutiny of contracts, the respondent has submitted that -

(a) the Contract and work orders in the present case were dated prior to 01.04.2015 when the rate of service was nil. However, the impugned order in this case is passed based on CA Certificate dated 26.12.2016 issued by M/s. Thakkar & Co., wherein it is certified that no service tax is received by the claimant. The appellant somehow alleges that this certificate is incorrect or false.

(b) that requirement of the Act is neither prescribed under Section 11D ibid nor specified in the SCN (Query Memo).

(c) There is no any allegation in the record that service tax was passed on to any other person by the respondent. It is also not alleged that certificate in any manner fabricated 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 very visible.

(d) The impugned order passed after applying the principle of unjust enrichment. Hence, submission of the appellant is not legally sustained. The decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. 1997 (89) ELT 247 (SC) has not been applied while giving stand.

(vii) On the limitation issue, it is submitted that as per sub section (2) of section 11D ibid, service tax levied or collected shall be remitted to the Government by paying the amount within period. When there is no duty to be paid for service tax on the premise that there was no levy, it automatically follows that any amount of penalty or late fee cannot be imposed in respect of service tax not required to be remitted.

5. Personal hearing was held on 26.09.2018 wherein Shri Vikash Mishra, Consultant appeared on behalf of the respondent and explained the issue. He briefly and filed the written submission dated 26.09.2018 for consideration.

6. I have carefully gone through the facts of the case, grounds of appeal, cross-objection 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/contract with Government Authority/Government Authority to provide works as detailed at para 12 of the impugned order and thus rendered services provided to the Government in relation to the construction work which were previously exempted vide entry 12(a) and (e) of Mega Exemption Notification No. 25/2012 dated 20.06.2012 w.e.f. 01.07.2012 under the new levy of negative list based service tax. However, these exemption entries at Notification No. 25/2012-S 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, 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 work meant predominantly for use other than for commerce, industry or any other business or profession and/or a structure meant predominantly for use as religious, educational, medical, art or cultural establishment have become taxable. Accordingly, the respondent paid service tax on bills raised from 01.01.2015 for above mentioned services provided to various Government Departments under the contracts which had been entered into with them prior to 1st March, 2015. Such service tax is aggregating to Rs. 16,13,264/- on bills raised during the period from 01.04.2015 to 30.09.2015 and interest amounting to Rs.44,507/- 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 has been re-introduced. Accordingly, Notification No. 30/2016-ST dated 01.03.2016 has been issued to amend Notification 25/2012-ST dated 20.06.2012 so as to insert entry 12A, exempting taxable 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 is to be refunded as per the said provisions only. 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 provide refund of the said service tax paid on such services during that period. Therefore, the appellant claimed refund of Rs. 16,57,770/- (Service Tax of Rs. 16,13,264/- and interest of Rs. 44,507/-) paid by them in respect of the services provided to the Government during the FY 2015-16 are now newly introduced Section 102 of the Finance Act, 1994, the relevant portion thereof is reproduced as under for ready reference and in issue:-

> *"(1) Notwithstanding anything contained in section 11B, no service tax shall be refunded or allowed 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 not 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, or

(ii) a clinical establishment, or

(iii) a art or cultural establishment, or

(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in explanation 2 to clause (44) of section 65B of the said Act.

where a contract entered into before the 01.07.2012 and on which appropriate stamp duty, where applicable, has been paid before the date

(i) which is one of all such services on which tax has been collected but which would not have been collected had such service been provided before or after the aforesaid date

having the said provisions of Section 102 ibid in mind I proceed to 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, a local authority or a governmental authority for the purposes specified in the said section. There is also no dispute that the nature of services provided by the respondent to the contractor working for the Government and Local Authority during the F.Y. 2014-15 were of services which were exempted till 31.03.2015 (i.e. upto F.Y. 2014-15) as per entry No. 12 of Mega Exemption Notification No. 25/2012-ST. There is also no dispute that the respondent paid the service tax of Rs. 15,03,367/- alongwith interest of Rs. 13,387/- on delayed payment of service tax. However, the appellant has filed the appeal vide on merits as well as on the grounds of unjust enrichment. The appellant had vehemently contended as mentioned in Para-5 above. The respondent, however, has filed a cross objection in remand on the grounds as detailed in Para-4 above. Thus, issue for consideration before me is to decide whether the refund claim rejected by the Adjudicating Authority under the impugned order is exactly sustainable or not. Now, I take up the said issue on which appellant is remanded for decision.

8. On the contention that the respondent has not submitted copy of any contract as mentioned in Para 3(i) above, I find that the refund claim in question was filed alongwith the documents as per Circular No. 112/05/2010-ST dated 8.1.2010 as proof of expenses has been made before 07.07.2015 and no proof/copies of such documents were found to be part of the impugned order. This fact is not disputed by the appellant before me. Further, as mentioned in para-7 of the impugned order, the said claim with documents were sent to the Range Officer for verification vide the Verification Report dated 24.7.2016 wherein, who was not point out any non-submission of contract and the claim was verified on the basis of documents submitted with the claim and there no specific query was raised in the said verification report. Further, as mentioned at para-7 of the impugned order, I also find that as vehemently relied on the Circular No.

dated 25...2016 was issued to the respondent. The copies of Cess control statements were also taken from those files which clearly bring out that the Adjudicating Authority while relying on the Work Orders and R.A.Bills raised had come to conclusion that the respondent had provided the construction services to the Government Authorities in respect of the contracts/agreements entered before 31.03.2015. Thus, without asking for the actual contracts from the respondent, the Adjudicating Authority had satisfied himself that the condition viz. 'the contract entered into before the 01.03.2015' of the Sub Section (i) of Section 102 ibid, has been fulfilled in the present case. Further, said condition is that the said Section 102 ibid inter alia, 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 Order and R.A.Bills and on the basis of the verification report of the Range Office has satisfied himself and found that the said contracts were actually entered before 01.04.2015 and thus, under the circumstances, I do not find any infirmity in the impugned order. Further, I also find that the issue that the contention of the appellant that the contracts for which services were provided were entered after 01.03.2015 and no such documents any contradictory facts have been placed before me by the appellant. Further, this issue was also not raised in the Query Memo dated 23.11.2016 issued to the respondent. Further, I find that there is no other specific requirement enumerated in the said Section 102 ibid that the refund claim should invariably be sanctioned by the copies of the contracts and any corroborative evidence by the department. However, since the condition of contracts prior to 01.03.2015 is the fact 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. Therefore, rejection being not sustainable in the eyes of law.

9. On the contention of the appellant on the remand proceedings as hereinabove mentioned at para 8(iii) above, I find that the appellant was adequately provided that refund of tax is granted only when it is established that burden of tax has not been passed on to others by the Doctrine of Unjust Enrichment and as per the query memo. I find that this issue was raised in the Query Memo dated 23.11.2016 as details at Para 8 of the impugned order which is reproduced hereunder for ready reference of this issue:

> *"(i) The claimant has not submitted a Chartered Accountant certificate which categorically the duration of service tax paid by them has not passed on to any other person."*

On this issue, I find that the Adjudicating Authority at Sr. No.2 of Para 18 of the impugned order has observed as under:

> *"I find that the claimant has submitted a Chartered Accountant Certificate vide Ref. No. 17/2015-16, certifying that the burden of service tax paid by them has not passed on to any other person. Therefore, I find that the claimant has given satisfactory reply in the matter and the issue of unjust enrichment is settled."*

9.1 From the above facts, it is clear that the department has raised the issue of unjust enrichment in Query Memo and also in the Show Cause Notice and the entire tax paid by them had not been passed on to any other person. However, From the copy of the Certificate dated 06.11.2016 of M/s. Bharat Sanjay Associates, Chartered Accountant, I find that the said certificate states that "... *M/s B.J Solutions ..... has achieved the Gross Receipts for the year 2015-16 as Rs. 2,06,83,777/- and the said has not collected service tax from the Customers.*" From the underlined bold portion of the above Certificate, it transpires that the service is only certifying that the respondent has not collected service tax from the Customers. 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, the service tax is not collected but if the burden thereof is incorporated in the service charges, the doctrine of unjust enrichment is not satisfied. Apart hence, I find that this Chartered Accountant's Certificate dated 06.11.2017 relied upon by the respondent by themselves in proving the issue of unjust enrichment is of no use to them. 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 considered under the impugned order 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, 1994. The relevant provisions of law i.e. Section 11B is reproduced as under for better appreciation of the case.

Claim for refund of duty and interest, if any, paid on such duty. (1) Any person entitled to any 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 that

[Provided ...

[(...

Provided that the limit of one year may, in the case of any goods which are exported by the Government of India or the Government of a foreign country and in such other cases or class of cases as may be notified by the Central Government, be extended to such period or periods as may be prescribed.

(a) .....

(b) ....

(c) .....

(a) the date of credit and interest, if any, paid on such duty paid by the unincorporate, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the date of credit and interest, if any, paid on such duty borne by the class, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(c) the date of credit and interest, if any, paid on such duty borne by any other class of applicants as the Central Government may, by notification in the Official Gazette specify.

Provided further that the application under clause (c) of the first proviso shall be signed jointly by the persons of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons referred to in that clause.

From the underlined and bold portion of the above provisions of Section 11 B ibid, it clearly transpires that the refund is not available 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 if the service tax is not collected but if the burden thereof is transferred to the service receiver, the doctrine of unjust enrichment is not satisfied. Thus, it is imperative to examine whether the respondent has charged the service tax and accordingly passed the incidence to the service receiver in the present circumstances.

9.2 Further, I rely on the decision of the Hon'ble CESTAT, Mumbai in the case of M/s WADHWANI FINANCIAL Versus COMMR. OF C. EX. (PREVENTIVE), MUMBAI - 2018 (11) L.C.T. 58 (Tri. - Mumbai) wherein it is observed and held as under:

> "6. I have carefully gone through the records and considered the submissions made on behalf of the Revenue. The case file is a narrow compass as the appeal of Revenue is against the Commissioner (Appeals) order, which considering the refund claim has not gone into the fact, whether remittance of tax which stood sought for, has been passed on by the appellant during the proceedings before the Commissioner (Appeals) or not. Commissioner (Appeals) in his impugned order has relied upon the Chartered Accountant's certificate which was issued on the basis of books of accounts of the appellant, wherein it has been certified that the amount of refund is shown in the balance sheet as recoverable from the Government. Despite the submission of the appellant, the Commissioner (Appeals) has rejected the claim of the appellant on the ground that the Chartered Accountant's certificate is not conclusive evidence to prove that the incidence of duty has not been passed on. It is the case of the appellant that still the Commissioner (Appeals) is not satisfied with the Chartered Accountant's certificate, he could have sought for other documents like balance sheet and other books of accounts to check the authenticity of the CA certificate, which he failed to do so. It is settled position of law that, if the amount of refund is available in the balance sheet as recoverable from the Government and also in the profit and loss account of the concerned assessee, it can be safely presumed 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, Delhi-I, Old Edl, New Custom House, Ballard Estate, Mumbai-01 with a direction that the Assistant Commissioner should verify the books of accounts/balance sheet of the appellant and re-calculate the amount of refund admissible to the appellant."

> ...stood. It is needless to say that the appellant shall be given credit of the amount of service tax paid by them. The applications for refund made shall be computed within a period of one month from the date of receipt of this order."

From above, though CA Certificate is produced in this case but in view of the facts and discussion at Para 9.1 above, the same is found to be of no help to the respondent. Thus, the claim of the said expenditure in the Profit & Loss Account/Balance Sheet is crucial in deciding the issue of unjust enrichment. I find that the respondent have not produced any documentary evidences before me except the said Balance sheet/Profit & Loss Account at Para 9.1 above.

9.4 Further, the respondent in the Cross Objection has mainly contended at Para-4 (vi) (c) as reproduced supra that the impugned order has been passed on the basis of the CA Certificate wherein it is certified that no service tax is received by the claimant. It was even before me that in the event of the service receiver who does not reflect the service tax in question in their service receiver's books, the respondent has not carried as per their duty 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 pre-requirement under the said provisions of Section 11D (2) of the Central Excise Act, 1944.

9.5 In view of above facts and discussion, the respondent's submissions as mentioned at Para 4 (vi)(c) above, is of no help to them.

9.6 In view of the facts and discussion herein above, I find it appropriate that this issue of unjust enrichment needs to be re-examined in light of my above observation as to whether or not the incidence of service tax and interest, paid on such duty has been passed on by the assessee to service receivers. It is also essential to examine whether or not the respondent have charged the service tax from their customers and the burden of the same has been passed on to the service receivers in their books of accounts. Hence, the matter needs to be remanded back to Adjudicating Authority for deciding 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 documents before the Adjudicating Authority that may be asked for by the Adjudicating Authority while deciding the issue. 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.374/2014 in the case of Commissioner, Service Tax Ahmedabad Vs Associated Hotels Ltd. reported at 2015(37) STR 928 (Guj.) and also by the decision of the Hon'ble CESTAT, WZO Mumbai in case of Commissioner of Central Excise, Pune Vs Bal Automation Ltd and reported in 2017 (52) S.T.R. 69 (Tri. - Mumbai).

10. Further, on the contention of refund of interest I find that the appellant conceded to interest in terms of Para-8 (ii) above. The respondent has voluntarily submitted an undertaking to that effect.

10.1 I find that 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 matter under Section 83 of the Finance Act, 1994 read with Section 102 of the Finance Act, 2016. The provisions of Section 11B ibid, inter-alia categorically provides for refund of any amount as and interest, if any, paid on such duty/tax. Once, refund of interest paid on the service tax which was admissible as refund under the said Section 11B ibid is also available under the said Section 11B ibid read with provisions of Section 11BB 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 stand affirmed to 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 to which case is remanded back, this issue of availability of interest may also be taken up in the refund proceedings by the Adjudicating Authority in light of the observations.

11. In view of the above discussion, I hereby reject the impugned order and allow the above terms and dispose of the appeal filed by the appellant, accordingly.

(Gopi Nath)
Commissioner (Appeals)
Additional Director General (Retd.)

To,

1. The Assistant Commissioner, CGST, Bhavnagar (Formerly Service Tax Division, Bhavnagar)
2. M/s D.D.Odedara, G. No., Near View Complex, Opp. Navinal Vidhut Sahayak, Junagadh-362 001

Copy to:

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