आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क
O/O THE Commissioner (APPEALS), CENTRAL GST & Exc. Ahd.

सुविधा कर भवन, सी.जी. रोड, Ahmedabad-380 009.

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अपील आदेश संख्या :

Appeal / Rej No.	O.I.O No.	Date
V2(ST)52/AHD/2017	01/ST/2016	30/12/2016

BHV-EXCUS-000-APP-050-2018-19

Date of Order	01.05.2018	Date of Issue	14.05.2018

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

1 In pursuance to Board's Notification No. 80/2017-ST dated 15.11.2017 read with Revenue Division No. 354/02/2017-ST dated 15.11.2017, 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 or Section 83 of the Finance Act, 1994.

2 अपील आदेश की प्रति निम्नलिखित व्यक्ति को निःशुल्क भेजी जाती है / Copy of this order is granted free of charge to the following person :

Deputy/Assistant Commissioner, Central Excise, Service Tax, Bhavnagar I Commissionerate

3 अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellant & Respondent.

M/s. P. M. Patel & Co., Plot No. 400, Sheri No. 4, Vijayrajnagar Bhavnagar 364 003.

कोई व्यक्ति जो उपरोक्त आदेश से असंतुष्ट है, इस आदेश के प्रति इस अपील के लिए उपयुक्त प्राधिकारी के समक्ष निम्नलिखित तरीके में अपील कर सकता है /
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) केन्द्रीय उत्पाद शुल्क अपील नियमावली, 2001 के नियम 6 के साथ पठित वित्त अधिनियम, 1994 की धारा 86 की उपधारा (1) के अन्तर्गत सिस्टेट, पश्चिम क्षेत्रीय न्यायपीठ, ओ-20, न्यू मेन्टल हास्पिटल कम्पाउन्ड, मेघाणी नगर, अहमदाबाद-380016 को अपील की जा सकती है /
An appeal lies to the West Regional Bench of Customs, Excise & Service Tax Appellate Tribunal under Section 86 of the Finance Act, 1994 read with Rule 6 of Central Excise (Appeals) Rules, 2001 to the West Regional Bench of Customs, Excise & Service Tax Appellate Tribunal, O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad-380016.

(B) उक्त अपील फार्म एस.टी.-5 में चार प्रतियों में दाखिल की जानी चाहिए और उसमें जिस आदेश के विरुद्ध अपील की गई हो उसकी भी उतनी ही प्रतियाँ संलग्न की जानी चाहिए। (सी.ई.ए. 1944 की धारा 35 एफ के तहत जमा की जाने वाली शुल्क की राशि, अपील से उत्पन्न होने वाले विवाद में शामिल शुल्क की राशि पर निर्भर करती है)
The appeal in Form S.T.-5 should be filed in four copies and should be accompanied by four copies of the order appealed against. (The amount of fee to be deposited under section 35F of the CEA, 1944 depends upon the amount of duty involved in the dispute)

(C) अपील ज्ञापन में जहाँ शुल्क या शुल्क और जुर्माना विवाद में है या जहाँ केवल जुर्माना विवाद में है, वहाँ इस शीर्ष के अन्तर्गत रु. 5 लाख या उससे कम, रु. 5 लाख से ज्यादा परन्तु 50 लाख से कम तथा रु. 50 लाख से ज्यादा के लिए क्रमशः 1000/-, 5000/- और 10000/- रुपये का निर्धारित जमा शुल्क भुगतान की साक्ष्य के रूप में टी.आर.-6 चालान की प्रति संलग्न करनी चाहिए।
In the case where duty or duty and penalty are in dispute or penalty alone is in dispute, a fee of Rs. 1000/- Rs. 5000/- and Rs. 10000/- where amount involved is Rupees 5 Lakhs or less, Rupees 5 Lakhs or more but less than Rupees 50 Lakhs and Rupees 50 Lakhs or more respectively 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 is situated is to be paid and the application should be accompanied by a copy of the T.R.-6 challan evidencing payment thereof.

(iii) [illegible Hindi paragraph] ... [illegible] के लिए [illegible] ... [illegible] ... बैंक ड्राफ्ट [illegible] ... [illegible] रु. 500/- [illegible] ।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 [illegible] prescribed 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. [illegible], Rs. [illegible] 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 Asst. 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 Hindi paragraph] ... [illegible] ... [illegible] रु. 500/- [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. 50 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/-.

(ii) [illegible Hindi paragraph] ... [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.

(iii) [illegible Hindi paragraph] ... [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.

(v) अपील सरकार को पुनरीक्षण आवेदन :
Revision application to Government :

[illegible]

(vi) [illegible]

(vii) [illegible]

(viii) [illegible]

(ix) [illegible]

(x) [illegible]

(xi) [illegible]

(xii) [illegible]

ORDER – IN – APPEAL

This proceeding has been filed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as the Appellant), as provided by the Principal Commissioner, Central Excise & Service Tax, Bhavnagar, vide Order in Original No. V/07/2016 dated 20.12.2016 passed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as the adjudicating authority) in the case of refund filed by M/s. D. N. Patel & Co., Plot No. 401, Sheet no. 1, Vijaynagar, Bhavnagar (hereinafter referred to as the respondent).

2. Briefly stated, the respondent had a total refund of Rs. 1,04,12,859/- which includes amount of interest of Rs. 1,34,814/- under section 102 of the Finance Act, 1994 on account of construction related services provided by them to various government departments. The services provided by the respondent to various government department were exempted vide notification No. 25/2012-ST dated 20.06.2012 till 01.03.2015, however, the said exemption was withdrawn vide notification No. 6/2015-ST dated 01.03.2015. Again vide notification No. 9/2016-ST dt.01.03.2016, exemption was restored. With section 102 of the Finance Act, 1994 the exemption was granted retrospectively and for duty paid during 01.03.2015 to 29.02.2016. refund mechanism was prescribed. The refund claim was decided by the adjudicating authority vide OIO No. BVR/07/2016 dated 20.12.2016 sanctioning refund amounting to Rs. 1,02,59,217/- to the respondent. Being aggrieved, the appellant have filed the present Appeal.

3. The appellant have filed the appeal on the following grounds:

(i) To be eligible for refund of the amount of service tax paid by a service provider under section 102 of the Finance Act, 1994, it has to be established that the said amount relates to taxable service provided under a contract which has been entered into on/after 01.03.2015 and on which stamp duty, if required, has been paid on or after 01.03.2015. The other important condition is that application for the claim of refund of service tax should have been made within the period of six months from the date of enactment of Finance Bill, 2016 received assent of the President of India. From scrutiny of the records submitted by the respondent along with refund claim, it is noticed that the respondent has not taken that stamp duty required to be taken with the service receiver. In absence of any of

full amount, it cannot be credited and accordingly if the respondent had provided the said consideration services to the government or a local authority or a governmental authority under a contract which has been entered into prior to 01.03.2015 and on which stamp duty has been paid by them on or before 01.03.2015. This is a prior condition under sub-section (1) of section 102 of the Finance Act, 1994 for sanction of refund.

(ii) Without scrutiny of the contractual documents, authority has held that the provision of service has not been passed on by any other person or the recipient in this case, we hold that it can be established only by examining the invoices and the bills/invoices issued by them in respect of work pertaining to the said contract. As held by the Hon. Supreme Court of India in the case of M/s. Mafatlal Industries Ltd. Vs. Union of India reported in 1997 (89) ELT 247 (SC), the bar of unjust enrichment is inapplicable only when it is established that the amount of tax/duty has not been passed on to others. The doctrine of unjust enrichment is a just and salutary doctrine, a person cannot be allowed to enrich himself unjustly.

(iii) The respondent has claimed refund of the said amount, for e.g. 1,51,015/- paid by them on the amount of service tax which was not paid in time by them and the adjudicating authority has sanctioned the same by relying on the provisions of section 102 of the Finance Act, 1994. As provided under sub-section (2) of section 102 of the Finance Act, 1994, no refund of all such amount has become or has been or will become payable if the provisions of sub-section (1) were in force at all the material time. The term "unjust" is nowhere to be found in the section 102. Ibid. It is settled law that the interpretation of any word in a taxing statute cannot be understood by reference to every statute but used in the different taxing statute. It is essentially to be read in context in which it is used in that very section which is the basis of the said refund. Using no other words understanding the term 'refund or interest' in the section 11B of the Central Excise Act, 1944, it cannot be made applicable with reference to the refund of service tax claimed in terms of section 102 of the Finance Act, 1994 which is a different enactment. Once section 102 ibid clearly specifies that the refund of service tax claim is only, when it is established that the refund of interest is also specified under the said section. The question of refund can arise only when the provisions allowing refund

details/details of refund of the amount which is absent in section 102 of the Finance Act, 1994. Moreover, respondent has paid interest in this case is a proof action and there is no provision under section 102 of the Finance Act, 1994 to refund it.

(iv) The adjudicating authority has observed that the respondent has availed Cenvat credit of input services/accumulation and it was not ascertainable as to whether the said credit has been utilized by the respondent or not and hence he has rejected refund amount of Rs. 99,426/-. However, he has not provided any reason for rejecting only this amount from the total amount of Cenvat credit disclosed by the respondent in their ST-3 returns for the relevant period. The respondent has disclosed accumulation of Cenvat credit totally amounting to Rs. 14,04,765/- and utilization of Cenvat credit of Rs. 14,33,926/- for payment of service tax, during the period April 2015 to September 2015. However, there is no balance of unutilized Cenvat credit disclosed in the ST-3 return and therefore, the amount of Rs. 99,426/- ascertained by the adjudicating authority is without any basis and hence erroneous. In absence of details of Cenvat credit taken in records, he should have rejected refund of whole amount of Cenvat credit utilized by the respondent. They, he has failed to verify the data from the records i.e. ST-3 returns and other documents, before passing the impugned refund order.

(v) In view of the above, the impugned order passed by the adjudicating authority sanctioning refund of Rs. 1,03,39,213/- under section 102 of the Central Excise Act, 1944 as made applicable to the service tax matters vide section 83 of the Finance Act, 1994, is not proper, correct and legally sustainable and hence liable to be set aside.

4. Hearing in the matter was held on 15.02.2018, which was attended by Shri Chandan P. Patel, Advocate on behalf of the respondent and Shri Pravesh S. Sharma, C.A. of the respondent. They produced copy of cross objection dated 09.09.2017 which they claim to have submitted to the department on 08/09/2017 through speed post. They have also filed the copy of Notification No. 5/2015 dated 01.03.2015 and 9/2016 dated 01.03.2016 and claimed that they are eligible for interest on the refund amount also. They also submitted one additional submission dated 15.02.2018 for consideration. Nobody appeared from appellant side.

5. In cross objection submitted by the respondent as well as additional submission it is contended that-

(i) Regarding non-production of copy of contract entered by them with service recipient, it is submitted that at the time of filing of application, it cannot be said that they have enclosed copies of work orders and relevant documents which the department is entitled to obtain at the time of submission of application and later while conducting post refund audit. The adjudicating authority has deeply examined the documents and recorded findings in the Impugned Order. Thus, the objection raised by the department shall be set aside.

(ii) The doctrine of unjust enrichment is a statutory check and no person can seek to collect the tax back until and unless, further, person establishes beyond, any doubt that he has not passed the incidence of tax to any other person. The appellant contended that under the refund claim, they were the Government or Local Authority or Government authority. Every work undertaken with such authorities for the contract price are all inclusive of taxes. However, in these circumstances, the assessee allowed to claim the service tax amount which is above the contract value from Indian Railway Finance Corporation of Government. Thus, the contractor cannot claim that any taxes shall be included in the price offered by the service recipient. Hence the incidence of tax has not been passed on and thus they do not levy service tax on the value of contract and pay tax from its own pocket.

(iii) They claimed amount of interest alongwith refund of service tax. They relied upon decision in Indian Adjudicating Authority vide Order-in-Appeal No. 1008 Daily Trade Journal Private Ltd. Further, section 11B of the Central Excise Act, 1944 is referred in support of refund of interest. They had paid interest on service tax liability which is subsequently accepted; therefore interest amount is also refundable in terms of section 75 of the Finance Act, 1994, which says that person liable to pay tax or any amount to pay to the credit of the Central Government, they are not the person liable to pay tax or payment of interest thereof arise at all. From the reading of the section 75, it is clear that liability to pay interest can't be delinked with the liability to pay service tax. Both are conjunctive and not disjunctive. Therefore, any amount paid as interest should be refunded alongwith the refund of tax.

(iv) They also claimed refund of Cenvat credit of Rs. 41,60,925/- as shown in correctly and appropriately in ST-3 returns for the period of April 15 to Sept. 15. The objection raised vide Sr. No. 8 of Annexure-A by the department was not communicated at the time of filing

refund, however all documents related to Service Tax were not produced before adjudicating authority for verification. They have also submitted cash basis, self attested documents wherein they mainly following submissions:

"We do hereby undertake to reimburse the amount of refund sanctioned, as mentioned above, in respect of services provided to us by M/s. J K Construction and M/s. Anand Associate if at any point of time it is revealed that the sub contractors M/s. J K Construction and M/s Anand Associate have not paid and received the refund claim as the same is hit by unjust enrichment clause from these service providers of the government agency and we have also filed our original service"

(v) The CA firm/Service noted and confirmed that they have not passed on the incidence of service tax upon government or local authority or any person. Further, M/s. Anand Associate and M/s. J K Construction are liable and responsible for any action taken and decision by Commissioner, Service Tax, Ahmedabad in case any of the aforesaid statements is found to be false or incorrect.

(vi) I have carefully gone through the refund order, grounds of appeal and submissions made by respondent in cross objection as well as during personal hearing. I find that the respondent have entered into a main contract with Government/Local authority/Government agency to provide services as detailed at para-3 and the main activity is construction services provided to the Government which is for construction work were previously exempted vide entry (iii)(a) and (b) of Mega Exemption Notification No. 25/2012 dated 20.06.2012, as applicable from 01.07.2012 to 31.03.2015 i.e. new regime of negative list of services 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 01.07.2015 was issued for withdrawal of the exemption. Hence, w.e.f. 1st April 2015, services provided to the government, a local authority or a government authority in respect of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a civil structure or any complex meant predominantly for use other than for commerce, industries, or any other business or profession or work of a structure meant predominantly for

[illegible] educational [illegible] cultural establishment [illegible] Accordingly, the respondent paid service tax [illegible] for various Municipal services provided to various Government Departments under the contracts [illegible] have been entered into with them prior to 1st March, 2016. Such service tax is amounting to Rs. [illegible] for the period from 01.04.2015 to 29.02.2016 and interest amounting to Rs. 1,51,010/- on belated payment of such service tax under the above mentioned contracts [illegible] Rs. 1,04,13,649/-. Through the Finance Act, 2015, the exemption in respect of [illegible] was withdrawn. Accordingly, Notification No. 9/2016-ST dated 01.03.2016 has been issued to amend notification No.25/2012-ST dated 20.06.2012 so as to insert entry 66A to exempt above stated services in respect of which contract has been entered into prior to 1st March, 2016 However, in respect of such services provided and bills raised by the assessee during the period from 01.04.2015 to 29.02.2016 [illegible] days [illegible] to the Government, Local Authority, Governmental authority etc., the service tax had been paid by the service provider due to withdrawal of the exemption entry of Notification 25/2012-ST [illegible] which was operative during that period, a new provision [illegible] 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 is entitled [illegible] Rs. 1,04,13,649/- 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 provision is reproduced as under for [illegible] appreciation of the issues.

> (1) Notwithstanding anything contained in section 66D, 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 or a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or 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 the purpose of providing residence to employees or other persons specified in Explanation 1 to clause (l) of section 65B of the said Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any service provided under a contract entered into before the 01.03.2015 and on which [illegible] duty, cess or any tax is applicable, and collected before that date.

[illegible]

6. Refund shall be made only if such service tax amount has been borne by such claimant and not collected from any other person i.e. he is the person on whom the burden of tax has been passed on.

Keeping the said provisions of Section 102 (ibid) in mind, 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, 2001 provide for the refund of service tax paid in respect of service provided to the Government, under the specified services (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 construction related services to the Government and Local Authority during the FY 2015-16 and the said services were completed till 31.03.2015 (i.e. upto FY 2014-15) as per Entry No. 12 of Mega Exemption Notification No. 25/2012-ST. The issue is also not in dispute that the respondent had paid Service Tax of Rs. 1,00,000/- (Rupees One Lakh Only) vide challan dated 18.12.2015 for delayed payment of service tax. However, the appellant has filed the appeal both on merits as well as on the grounds of unjust enrichment. The appellant has elaborately discussed as inter alia, mentioned at Para-3 above. The respondent has also filed the cross objection inter alia, on the grounds as detailed at Para-5 above. Thus, issue for decision before me is to decide whether the refund allowed by the adjudicating Authority under the impugned order is to be upheld or not. Now, I take up each issue on which appellant contended, for discussion.

8. On the contention that the respondent has not submitted copy of any contract as inter alia mentioned at Para-8(i) above, I find that the refund claim in question was filed alongwith all the documents including "Copies of Work Orders" as mentioned at para 2 of the impugned order. This claim is 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 of the Verification Report dated 18.10.2016 submitted, also do not point out this issue of non submission of documents and I find also was verified on the basis of documents submitted with the claim and thus no query was raised by the said verification report. Further, as mentioned at para 4 of the impugned order, I also find that subsequently vide the Query Memo dated 31.10.2016 was issued to the respondent, these contract agreements copies were not asked for. Thus, from above, it clearly transpires that the

Adjudicating Authority after relying on the work orders, had come to a conclusion that the respondent had provided the taxable services to the Government authorities in respect of the contracts/agreements entered before 01.03.2015. Thus, without calling for the actual Contracts from the respondent, the Adjudicating Authority had acted in haste that the condition viz. *'a 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 benefit is available in respect of those contracts which are entered before 01.03.2015 only. The Adjudicating Authority has relied on the work orders and on the basis of the verification report of the Range Officer, has satisfied himself and found that the said contracts were entered into 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 other evidences in this regard have been placed before me by the appellant. Further, the issue was also raised in the Query Memo dated 2.11.2016 issued to the respondent. Further, I also find that there is neither any specific requirement, anywhere in the said Section 102 that the refund claim should invariably be accompanied by the copies of the work orders nor any circulars/clarification issued by the department for the same. However, it is observed that some of the work orders, for which the respondent had claimed refund, were given in the year 2009. The time limit specified in such work order is one year (2 months+1 month+9 months) that is to say that this type of work orders are required to be certified as to what all the work assigned in the year 2009 was actually carried out during 2010 or not. Thus, I opine that the adjudicating authority has not properly scrutinized the work order and not seen minutely at all. Therefore, this issue requires to be re-examined by the adjudicating authority. Since, as discussed herein below, the matter is being remanded to the adjudicating authority, the adjudicating authority should also examine the relevant documents and verify that refund is claimed for the contracts which were executed before 01.03.2015.

The learned counsel for the appellant, that in absence of any terms/provisions, for issuance of impugned show cause notice, to be set aside and therefore the adjudicating authority was wrong in holding that there is no injustice caused and has vehemently contended that refund of tax is grantable only when the incidence of the burden of tax has not been passed on to others. The Department of Appeal No. [illegible] has also vehemently contended that in the

regard. I find that the respondent has submitted that since the invoices were including all taxes, they cannot charge service tax separately and that they have produced the same for perusal of the impugned order. I find that the adjudicating authority has relied upon the certificate dated 29.11.2016 issued by the Chartered Accountant. Perusal of the said certificate, following is noted:

"In this regard, it is stated and confirmed that the assessee has not passed on the incidence of the Service Tax upon Government or Local Authority or any other person and hence the reimbursement is not at all considered to the claimant is fulfilled in respect of services provided to Government or Local Authority."

I find that the language used in the said certificate of the C.A. mentions nowhere the basis on which the certificate is issued, viz., whether after examining financial records like balance sheet, audit report etc. or merely on the basis of say of the claimant. The C.A. has "stated and confirmed" that the assessee has not passed on the incidence of service tax. But how the aforesaid certificate was arrived at i.e. what type of examination the adjudicating authority was required to do to peruse the financial records of the claimant (respondent) to see whether the liability is created on the service receivers or not. I find that the adjudicating authority has not applied its mind in respect of aforesaid relevant aspect. Therefore, I am of considered view that the aspect of unjust enrichment is required to be examined thoroughly by the adjudicating authority. My above view is also supported by the judgement of Hon. CESTAT in the case of M/s MAHI Dairy & N.A. PURI Mumbai (COMMR. OF CUS. (PREVENTIVE), MUMBAI - 2015 (325) E.L.T. 164 (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 issue lies in a narrow compass as the request of unjust enrichment. The Assistant Commissioner, while considering the refund, has not gone into the fact, whether evidence of duty for which refund is sought for, was been passed on or otherwise. In my view, even if it is a case of refund of excessive 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 the submission of the appellant, the Commissioner (Appeals) has rejected the claim of the

rejection 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 rather explained that if a person, that is unsatisfied with the Chartered Accountant's certificate, he should move rather for other documents like balance sheet and other books of accounts to check the correctness 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 evidence 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, Behind Cell, New Custom House, Ballard Estate, Mumbai-II. 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 adjudication of refund matter shall be completed within a period of one month from the date of receipt of this order."

III. In view of the above discussion herein above, I feel it appropriate that the matter of refund claim needs to be re-examined in light of my above observation as well as after verification of the incidence of service Tax and interest, paid on input services, passed on by them to any other person or service receivers. Further, it is also essential to ascertain whether or not the respondent has charged the service tax and cess from their clients. To that extent the service receivers or their clients are necessary party. The matter needs to be remanded back to Adjudicating Authority for deciding afresh the above issue after following principles of natural justice by giving an opportunity of hearing to the respondent. The respondent is also directed to produce all the relevant documents before the Adjudicating Authority who may be asked to do so by the Adjudicating Authority as well as matter is remanded back to re-adjudicate proceedings in order to enable the Adjudicating Authority to decide the case afresh. These findings of mine are supported by the decision of the Hon'ble High Court of Gujarat in the Tax Appeal No.1296/2014 in the case of Commissioner, Service Tax Ahmedabad Vs Ambuja Cements Ltd. reported at 2015(40) STR 724 (Guj.) wherein it is held by the decision of the Hon'ble Gujarat High Court, with regard to case of

Commissioner of Central Excise, Pune-I Vs. Sai Advertising Ltd and reported in 2012 (27) S.T.R. 481 (Bom.)

11. Moreover, in the contention of the appellant that refund of the interest is not admissible as per Section 11B of the Central Act, 1944, it was argued as sub section (2) of Section 142 of the Finance Act, 1994, provides that refund should be made of all such Service Tax which has been collected and that the refund of interest can only be allowed if the provision of allowing refund clearly specifies of refund of interest which is absent in section 142 and, that, 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 142 ibid. The respondent has submitted that liability of interest arises only if liability to pay tax is there. Since no service tax liability is there as per section 142, there cannot be any question of interest liability and relied on Circular of the Finance Act, 1994 and it is clear that liability to pay interest cannot be made applicable to liability to pay tax. I have carefully considered the submissions in this regard, and find that the contention of the appellant granting refund is in view of the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax vide Section 83 of the Finance Act, 1994, read with Section 142 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 which was admissible for refund under the said Section 142 ibid, is very available under the said Section 142 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 on merits and procedure. When the issue of admissibility refund of service tax in the present case on the issue of unjust enrichment is directed to be examined by the Adjudicating Authority by the above case laws cited supra, the issue of admissibility of interest may also be taken up in the remand proceedings by the Adjudicating Authority in light of my above observation.

12. It is further contended by the appellant that the adjudicating authority has erred in not granting Rs. 24,136/- to the reason that it was not shown specifically as to whether the said credit on account of bank charges/commission has been utilized by the respondent or not. However, he has not provided any reason for reversing the amount of Service Tax amounting to Rs. 24,136/- claimed by the respondent in their ST-3 returns for relevant period. The respondent have paid an amount of Rs. 24,136/- and thus it is not a case of Rs. 24,136/-. However,

no bifurcated details were observed in absence of details he should have rejected refund claim in whole amount of Cenvat credit taken/utilized by the assessee. On the other hand, the respondent has contended that they have received taxable services from sub contractors M/s. Anand Associates and M/s [illegible] contention that if refund is granted to them, they have no objection. I have gone through the undertakings given by both the sub-contractors to the respondent. I find that M/s. Anand Associates has raised invoices to the tune of Rs. 28,26,332/- from the respondent and M/s. J. K. Construction had raised invoices to the tune of Rs. 5,32,265/- from the respondent (total Rs. 34,00,925/-). The respondent had taken total credit of Rs. 24,97,307/- in their Cenvat credit account and had utilized the same towards payment of service tax on services provided to government by way of construction and is exempted. The respondent is not eligible for taking and utilizing Cenvat credit and the per rule 6 of the Cenvat Credit Rules, 2004. I find that the adjudicating authority has deducted refund amount by Rs. 69,183/- on account of Cenvat taken on bank charges/commission, perhaps by considering those in the service tax credit as commonly utilized for taxable and exempted services prior to 01/04/2011 of Cenvat Credit Rules, 2004. However, the adjudicating authority has not examined the aspect that when service tax on output services is exempted, whether the assessee can avail Cenvat credit or not. In my view, this aspect should be explored by the adjudicating authority. However, I find that the respondent have failed to follow the conditions and therefore, refund as claimed is not admissible. Since the matter is being remanded back to the adjudicating authority on the issue of unjust enrichment, the adjudicating authority should also examine this issue of admissibility of credit when output services is exempted.

11. In view of the facts and discussion herein hereinbefore, I set aside the impugned order in above terms and allowed all the appeals filed by the appellant by way of remand to adjudicating authority.

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

To,

1. The Assistant Commissioner, CGST, Bhavnagar Division, Service Tax Division, Bhavnagar.

2. M/s P. R. Patel & Co., Plot No. 400, Ghodi Road, Vijaynagar, Bhavnagar.

Copy to:-

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