



अभियन्ता (अपीला) का कार्यालय, केन्द्रीय करों एवं सेवा कर और उत्पाद शुल्क  
 THE DIRECTOR GENERAL (APPEALS), CENTRAL TAXES & SERVICES



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समितिकर्ता का पता : **संख्या :**

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 09/12/2018/0978/2018

सूचना संख्या :  
 GST/18/1000/2018

दिनांक :  
 Date  
 09/01/2018

ज. आवेदन संख्या : **Order No. 1000/2018**

**BHV-EXCISE-000-APP-082-2018-19**

आदेश का क्रमांक /  
 Order No.

08.06.2018

आदेश की तिथि /  
 Date of order

14.06.2018

Issued by Shri Gopal Dutt, Additional Director General (Appeals), Ahmedabad Zonal Unit, Ahmedabad.

आवेदनकर्ता द्वारा अहमदाबाद जिले के अन्तर्गत स्थित राजीव गांधी अंतर्राष्ट्रीय हवाई अड्डे पर 08.06.2018 को एक कार्रवाई की गई थी जिसके अन्तर्गत आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था। आदेश में आदेशकारी द्वारा आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था। आदेश में आदेशकारी द्वारा आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था।

The undersigned is directed to issue an order No. 1000/2018/0978/2018 dated 08.06.2018 read with Board's Order No. 00/2018/ST/1000/01/2018, Shri Gopal Dutt, Additional Director General (Appeals) Ahmedabad Zonal Unit, Ahmedabad has been appointed as a special authority for the purpose of passing orders in respect of appeals filed under Section 100 of Customs Act, 1962 and Section 85 of the Finance Act, 1944.

- 1. आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था। आदेश में आदेशकारी द्वारा आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था। आदेश में आदेशकारी द्वारा आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था।
- 2. आवेदनकर्ता & आवेदनी का नाम : **M/s. K.M. Khadker, 30/1A, Azha Complex, Near Kaka Complex, Zangam Road, Junagadh - 362 001.**

आवेदनकर्ता को आदेश जारी करने के अन्तर्गत आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था। आदेश में आदेशकारी द्वारा आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था।

- 100. इस आदेश के अन्तर्गत आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था। आदेश में आदेशकारी द्वारा आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था।
- 101. आवेदनकर्ता द्वारा अहमदाबाद जिले के अन्तर्गत स्थित राजीव गांधी अंतर्राष्ट्रीय हवाई अड्डे पर 08.06.2018 को एक कार्रवाई की गई थी जिसके अन्तर्गत आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था। आदेश में आदेशकारी द्वारा आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था।
- 102. आवेदनकर्ता को आदेश जारी करने के अन्तर्गत आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था। आदेश में आदेशकारी द्वारा आदेश संख्या 1000/2018/0978/2018 के अन्तर्गत आदेश जारी किया गया था।

In the Web version of Board's Order No. 00/2018/ST/1000/01/2018, Shri Gopal Dutt, Additional Director General (Appeals) Ahmedabad Zonal Unit, Ahmedabad has been appointed as a special authority for the purpose of passing orders in respect of appeals filed under Section 100 of Customs Act, 1962 and Section 85 of the Finance Act, 1944.



- (C) **सहाय्य अर्थात् प्रत्येक आवेदन :**  
**Revenue application to Government of India:**  
 The applicant should submit the application to the Government of India, Ministry of Finance, Department of Revenue, 11, B-1, Connaught Place, New Delhi-110028. The application should be submitted to the Government of India, Ministry of Finance, Department of Revenue, 11, B-1, Connaught Place, New Delhi-110028. The application should be submitted to the Government of India, Ministry of Finance, Department of Revenue, 11, B-1, Connaught Place, New Delhi-110028.
- (D) **आवेदन के लिए आवश्यक दस्तावेज :**  
 The applicant should submit the following documents along with the application: (i) A copy of the original title deed or other document showing the title of the land. (ii) A copy of the original survey map or other document showing the location of the land. (iii) A copy of the original revenue records or other document showing the revenue history of the land. (iv) A copy of the original assessment order or other document showing the assessment of the land. (v) A copy of the original assessment order or other document showing the assessment of the land.
- (E) **आवेदन के लिए शुल्क का भुगतान :**  
 The applicant should pay the prescribed fee along with the application. The fee is payable to the Government of India, Ministry of Finance, Department of Revenue, 11, B-1, Connaught Place, New Delhi-110028.
- (F) **आवेदन के लिए समय सीमा :**  
 The applicant should submit the application within the prescribed time limit. The time limit is prescribed under Section 15 of the Revenue Act, 1923.
- (G) **आवेदन के लिए प्रक्रिया :**  
 The application will be considered by the Revenue Officer. If the application is approved, the Revenue Officer will issue an order. If the application is rejected, the Revenue Officer will issue a notice. The applicant may appeal against the order or notice.
- (H) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (I) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (J) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (K) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (L) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (M) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (N) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (O) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (P) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (Q) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (R) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (S) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (T) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (U) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (V) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (W) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (X) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (Y) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)
- (Z) **आवेदन के लिए सहाय्यक सूचना :**  
 The applicant should refer to the following website for more information: [www.revenue.gov.in](http://www.revenue.gov.in)

## ORDER IN APPEAL

The present appeal has been filed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as the appellant), authorized by the Principal Commissioner, Central Excise & Service Tax, Bhavnagar, against Order No. R/75/2015 dated 09.01.2017 issued by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as the adjudicating authority) in the case of refund claim filed by M/s. K. M. Golefara, 30/36, Artha Complex, Zangana Road, Jamnagar (hereinafter referred to as the respondent).

Briefly stated, the respondent filed a claim of refund of Rs. 15,88,446/- (with a credit amount of interest of Rs. 15,852/-) under section 102 of the Finance Act, 1994 for amount of construction related services provided by the respondent to various government departments. The services provided by the respondent to various government departments were exempted vide notification No. 9/2014-SI and 20/11/2014-101 of 2014, however, the said exemption was withdrawn vide notification No. 6/2015-SI dated 01.05.2015. Again, the notification No. 9/2015-SI of 01.05.2015, exemption was restored. With section 102 of the Finance Act, 1994 the exemption was granted retrospectively and the date paid during 01.04.2015 to 29.02.2016, before notification was prescribed. The refund claim was decided by the adjudicating authority vide DRD No. R/76/2016 dated 01.01.2017 sans giving refund amounting to Rs. 1,839,18/- to the respondent. Being aggrieved, the applicant filed the present appeal.

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

- (1) In so far as the refund of the amount of service tax paid by a service provider under section 102 of the Finance Act, 1994, it has to be ascertained that the said construction services have been provided under a contract which has been entered into before 01.3.2015 and on which amount due, if required, has been paid on or before 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 on which the Finance Act, 2016 received assent of the President of India. From scrutiny of the documents submitted by the respondent in support of refund claim, it is noticed that the respondent has not submitted copy of any contract entered into by respondent with the service provider. In absence of copy of

It is contended that it cannot be verified and ascertained that the respondent had provided the said construction services to the government or a local authority or a governmental authority under a contract which has been entered into between 01/03/2015 and on which stamp duty has been paid by them on or before 01/03/2015. This is a prima facie condition under sub-section (1) of section 102 of the Finance Act, 1994, for service tax refund.

31. With regard to duty of the contractor, the adjudicating authority has held that the burden of service tax has not been passed on to any other person by the respondent. In this regard, the facts can be ascertained only by scrutiny of record of the contractor and the bills/invoices issued by them in respect of work performed by the said contractor. As held by the Hon. Supreme Court of India in the case of *M/s. Kalsbeil Industries Ltd. Vs. Union of India*, reported in 1987 (29) ITR 247 (SC), burden of liability is generative only when it is established that burden of tax/duty has not been passed on to others. The doctrine of unjust enrichment is a just and salutary doctrine and no person can seek to collect tax for long period.
32. The respondent has claimed refund of interest amounting to Rs. 14,20,00/- paid by them on the amount of service tax which was not paid in time by them and the adjudicating authority has denied 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, refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at the material time. The term "interest" is nowhere to be found in the section 102, and it is settled law that the meaning of any term in a taxing statute should be understood with reference to even similar term used in the different taxing statute. It is essentially to ascertain whether the word used in the very section where the term is found to be used. Being so, even while understanding the term "interest" in the section 11B of the Central Excise Act, 1944, it cannot be made applicable with reference to the refund of service tax allowed in terms of section 102 of the Finance Act, 1994 which is a different enactment. Once section 102 has clearly specified that the refund of service tax has to be made, there is no scope to contend that the refund of interest is also specified under the said section. The question of refund of interest when the provision of law requires that



directly speaks of refund of the interest', which is absent in sub-section 10 of the Finance Act, 1994. Moreover, respondent has paid interest in this case as a penal action, and there is no provision under section 10 of the Finance Act, 1994 to refund it.

16) It is further noticed from SPT returns filed by the respondent for the relevant period that they have utilized Central credit for payment of service tax at the relevant time. The adjudicating authority has not considered this fact while deciding the refund claim filed by the respondent as to whether Central credit was allowed to the respondent while allowing credit of exemption from payment of service tax for which refund application was made filed by them. Thus, it has failed to verify and ascertain the facts from records of SPT returns and other before passing refund orders.

17) In view of the above, the impugned order passed by the adjudicating authority sanctioning refund of Rs. 15,58,412/- under section 114 of the Central Excise Act, 1994 as made applicable to the service tax matters vide section 93 of the Finance Act, 1994, is not proper, correct, and legally sustainable. It is null and void ab initio.

4. Hearing in the matter was held on 28.03.2018, which was attended by Mr. Vikas Mehra, Counselor of the respondent. He collected the submissions of course objections and filed the additional written submission for consideration. Nobody appeared from opposite side.

5. In course objection and additional submission filed by the respondent, it is averred, contended that:

(1) They provide list of construction services provided by them during relevant period and copies of bills and the service contracts were received from appropriate/local authority and that from dates of contract and work order, it is clear that the contracts were entered into prior to 01.03.2015. There is no proposal in the SPT to deny refund by citing non-submission of copy of contract. Therefore, no appeal filed by the respondent seeking reversal of refund order by filing the submission of copy of contract, has traveled beyond the scope of work. It is settled law that grounds of appeal cannot go beyond scope of SPT. They relied upon various cases of Rajj Anandhi vs. ITO - 2018 (14) 433 (SC) (60); and UOI vs. Sh. Nagaraj & Abhinav Singh Pvt. Ltd. - 2018 (35) EIT 43 (Bom).



- (ii) Regarding judicial enforcement, it is contended that the agreements entered into as to certain services were all issued prior to 01.04.2016, when service tax was abolished. The order passed by the adjudicating authority is not without any basis. The issue on certificate dated 07.11.2016 issued by C. E. Thadashwar & Co., Chartered Accountant, wherein it is said that no service tax is received by the appellant. The record nowhere alleges this. The certificate is incorrect or false. Thus, the grounds of appeal as regards the scope of SCB. There is no dispute as to the appeal that service tax was passed on to any other person by the appellant. It is also not disputed that the certificate issued by C.E. is not a return, correct or false. Thus, the appeal is an attempt to extract a return without actually making any allegation that service tax was passed on to any other person by the appellant, which is not permissible.
- (iii) Regarding return of interest paid, it is contended that as per sub-section (1) of section 102, no service tax shall be levied or collected during the period commencing from 01.04.2016 and ending with the 31st day of February, 2019 (both days inclusive), in respect of specified public services provided to Government, local authority or a Governmental authority. Thus, as per sub-section (2), service tax levied or collected by the specified service must be refunded as if there was no levy during the period 01.04.2016 to 28.02.2019, inasmuch as when there is a mandate to refund the service tax to the servicee then there was no levy. It automatically follows that any amount of partial nature (as they submitted in appeal) collected during the service tax will have to be refunded on account. When there is no levy or collection of tax, no amount was required to be collected in the first place and if there was any such collection, the same was required to be returned or refunded immediately, as rightly done by the Assistant Commissioner.
- (iv) Regarding Central credit, it is contended that as per view of the appellant section 102 is a different enactment and unless specified in section 103, no central credit can be read into it. There is no reference to Central credit in section 103. Therefore, the appellant cannot be permitted to supply or demand central credit, as it is specified in section 102 cannot be returned or returned but Central credit on the other hand, even though not specified in section 102, may be made a pretext for questioning the provision of section 102 of Finance Act, 1994. There is no reference to the validity of SCB entry

6/11/17  
13/EA2/BVE/2017

manoj) and the other appeal has travelled beyond the scope of 90% (adverse effect)

6. I have carefully gone through the above order, grounds of appeal and objections raised by respondent in cross objection as well as during personal hearing. I find that the respondent have entered into agreement/contracts with Government/Local Authority/Governmental Authority to provide services as detailed in para-13 of the impugned order. The services provided to the Government in relation to the construction work were previously exempted vide entry 12(a) and (a) of Mega Exemption Notification No. 25/2012 dated 20.06.2012, applicable from 01.07.2012 under the new levy of registration 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 was issued for withdrawal of the said exemption. Hence, with effect from 1st April, 2015, services provided to the Government, Local Authority or 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, industries, or any other business or profession and to a structure meant primarily for use as educational, training, educational hostel, residential or taxable. Accordingly, the respondent paid service tax on bills received from 01.04.2015 onwards in relation to services provided to various Government Departments under the said work claimed to have been entered into with them prior to 1st March, 2015. Such service tax is aggregating to Rs. 15,73,591/- on bills raised during the period from 01.04.2015 to 29.02.2016 and interest amounting to Rs. 17,857/- has also been paid in respect of such service tax under the above mentioned contracts (total refund claim Rs. 15,91,447/-). Through the Finance Act, 2016, the exemption in respect of such construction related services provided to the Government etc. has been restored to. Accordingly, Notification No. 5/2015-ST dated 01.08.2016 was 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, 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 (both ways) payable to the Government, Local Authority, Governmental Authority etc. on which the service tax had been paid by the assessee, order has to be withdrawn of the exemption entry of Notification 25/2012-ST for which was operation during that period, a new provision -section 102 has been inserted through the

*Sd/-*



Finance Act, 2016, to grant the refund of the said service tax paid on such services during that period. Therefore, the respondent claimed refund of Rs. 15,85,445/- paid by him in respect of the services provided to the Government during the FY 2015-16 as an exempted financial Section 102 of the Finance Act, 1994. The relevant portion thereof is reproduced in order to better appreciation of the issue.

(1) Construction or repair or maintenance or other work, or service tax shall be levied or collected during the period commencing from the 01.04.2015 and ending with the 31.03.2016 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 or

(a) a steel structure or any other original works meant predominantly for use other than for agriculture, industry or any other business or profession;

(b) a structure meant predominantly for use as-

(i) an educational establishment;

(ii) a library establishment; or

(iii) a museum or cultural establishment;

(c) a residential complex predominantly for the use of the employees of their employers in other parts of the State in Rajasthan. The proviso (4) of section 102 of the said Act,

shall be construed entered into before the 01.08.2015 and on which provisions shall apply upto 31.03.2016 and thereafter upto that date,

it shall not be made of all such service tax which has been collected but which would not have been collected (as sub-section (1) been in force at all the institutions).

Keeping the said provisions of Section 102 of the said Act in mind, the respondent decided the appeal as under.

7. The respondent is of the view that the provisions of Section 102 of the Finance Act, 1994 provide for the refund of service tax paid in respect of services 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 construction related services to the Government and Local Authority during the FY 2015-16 and the said services were exempted till 31.03.2016 (i.e. upto FY 2014-15) as per entry No. 12 of Mega Compensatory Certificate No. 25/2012-93. There is also no dispute that the respondent paid Service Tax of Rs. 15,72,591/- along with interest of Rs. 15,850/- on delayed payment of service tax. However, the appellant had filed the appeal before the court as well as on the grounds of unjust enrichment. The appellant had vehemently contended as inter alia, mentioned at Para-5 above. The respondent

has a right to file an appeal or petition for a writ, on the grounds as detailed at Para-5 above. Thus, the main decision before me is to decide whether the refund claim allowed by the Adjudicating Authority under the impugned order is legally sustainable or not. Now, the sole question, on which appellant is challenging the decision.

6. On the contention that the respondent has not submitted copies of any contract as inter alia mentioned at Para-3(i) above, I find that the refund claim applicant also was not able to produce the documents including "Copies of Work Orders or copy of orders of work and order orders are refers 01.03.2015" as mentioned at para-3(i) of the impugned order. This fact is not disputed by the appellant as well. 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 27.11.2016 submitted, also do not point out this issue of non-submission of contracts and the claim was verified on the basis of documents submitted with the respondent. Thus, no specific query was raised in the verification report. Further, as mentioned at para-3 of the impugned order, I also find that subsequently when the query memo dated 25.11.2016 was issued to the respondent, these contracts/agreements copies 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 issued to the complainant for payment of its supplies for consumption 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. "for contract entered into before the 01.03.2015" of the Rule-8(a) of Part-8 of 102 read and been fulfilled in the present case. Further, said condition is there in the said section 102 (b) of the Act 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 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 cannot find any infirmity in the impugned order. Further, I also find that it is not the contention of the appellant that the contracts for other refund granted were entered after 01.03.2015 and no such evidence or any contradictory facts have been placed before me by the appellant. Further, this claim was allowed under the impugned order dated 25.11.2016 issued to the respondent. Further, I also find that there is neither any specific requirement nor condition as per said Section 102 (b) that the refund claim should invariably



be accompanied by the copies of the contracts and any circulars/instruction issued by the department for the same. Hence, when the condition that contract should be entered prior to 01/01/2016, is fulfilled which had been found to be satisfied by the Adjudicating Authority on the basis of other documents viz., work orders, etc. to the said works in the execution of the specified 1000 sq. ft. right of way for construction of sustainable housing. And

it is further contended by the appellant that in absence of contract/agreement, the aspect of unjust enrichment cannot be verified and therefore the adjudicating authority has erred in holding that there is no unjust enrichment vis-à-vis who actually contended that refund of tax is grantable only when it is established that amount of tax has not been received or to others as the Doctrine of unjust enrichment is a judicial and statutory creation. In this regard I find that the adjudicating authority has not established unjust enrichment in the case. This finding is based on certificate dated 16/11/2016 issued by M. V. Thandaveer & Co., Chartered Accountants, I have gone through the said certificate and find that the wordings used in the certificate is 'This is to certify that there are no tax invoices mentioned I.A. bills received from the various Dept. Department at the name of M/s. K. S. Gledana, Bangalore and certify that no service tax has been received in below mentioned bills'. Thus, the certificate is issued on the basis of IA bills only and not on the basis of financial records like balance sheet or audit reports. Even if IA bills and the corresponding amount are seen till the date of issue of certificate, no service tax was received by the respondent, it is possible that they may show the same as receivable from the service recipient. Therefore, in order to ascertain as to whether the burden of service tax has been passed on to any other person or not, it is necessary to examine financial records of the respondent. Hence, it is clear that merely on the basis of a certificate which is issued without verifying financial records and which states that 'service tax is not received', it cannot be held that burden of service tax is not been passed on to service recipient or any other person. Thus, I find that the adjudicating authority has not properly verified the aspect of unjust enrichment and the same is required to be re-examined in light of the above observations. My above views are supported by the judgement of Hon. CESTAT in the case of M/s MADHUCON JIRA PUNE VERSUS COMMR. OF CVS. (PREVENTIVE), MUMBAI - 2015 (229) E.L.T. 453 (Tn. - 15) which judgment is reproduced and held as under

"5. I have carefully gone through the records and conditional tax submissions made on behalf of the Revenue. The issue lies in a narrow compass on the aspect of unjust enrichment. The Assistant



Commissioner while reviewing the refund, has not gone into the fact, whether evidence of duty for which refund is sought for has been passed on or otherwise in any case even if it is a case of refund of routine deposit, cost of refund amounted may not be passed on. The question during the proceedings before the Commissioner (Appeals) has involved a Chartered Accountant's certificate, which was issued on the basis of books of account of the appellant, wherein it has been notified that the amount of refund is shown in the balance sheet as receivable from the Government. However, despite this notification of the appellant, the Commissioner (Appeals) has rejected the claim of the appellant on the ground that Chartered Accountant's certificate is not a conclusive evidence to prove that the incidence of duty has not been passed on. It is then surprise that, if at all the Commissioner (Appeals) is not satisfied with the Chartered Accountant's certificate, he should have called for other documents like Income sheet and other books of account to check the authenticity of the CA certificate, which is 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 credit side of the Income 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, 28<sup>th</sup> State Custom House, DLF Road, Gurgaon-122001, besides to say that the Assistant Commissioner shall verify the books of accounts/Income sheet of the appellant and on satisfaction that the amount of refund is sought 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.

13. In view of the facts and discussion in view above, I find it appropriate that this issue of duty is not to be treated as a mere claim in light of my above observations so as to ascertain whether or not the incidence of service Tax and interest, paid on such tax had been passed on by firm to any other person or service receivers. Further, it is also essential to examine whether or not the respondent has accepted the service tax and accordingly shifted the liability to the extent on the service receivers in their books of accounts. Hence, the writ petition is hereby allowed. I am to Adj. Director, Authority for deciding fresh


*(Signature)*


The above issue is left open after 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 called for by the Adjudicating Authority when the matter is heard in refund proceedings in order to enable the Adjudicating Authority to decide the case afresh. There are no evidences supported by the decision of the Hon'ble High Court of Gujarat in the Tax Appeal No.276/2011 in the case of *Chandrashekar, Service Tax, Administrator V/s Associated Hotels Ltd.* reported at 2011 (5) ST 723 (Guj.) and also by the decision of the Hon'ble JUDGE, 9334 Model in case of *Commissioner of Central Excise, Punjab V/s Sai Advanment Ltd.* reported at 2012 (27) ST 43 (Pun. Model).

11. Further, it is the contention of the appellant that refund of the interest 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, provides that refund shall be made of all such Service Tax which has been collected; that the refund of interest can only be allowed if the provisions allowing refund clearly specify an amount of interest, which is absent in section 102 and hence, payment of interest by the respondent was due to not paying service tax in time and thus, it is by nature of penalty which is not covered under section 102 itself. The respondent has submitted that as the appellant has seized sale liability to pay tax as there is no service tax liability as per section 102, the respondent is not interest in this regard, that the interest order is passed giving ground in view of the provisions of Section 11B of the Central Excise Act, 1944 as it is applicable to service tax matter under Section 23 of the Finance Act, 1994 read with Section 102 of the Finance Act, 1994. The provisions of Section 11B itself, which as per appellant provides for refund of any service tax and interest, if any, paid as such duty/tax. Hence, refund of interest paid on such service tax which has been called for refund under the said Section 102 itself is also available under the said Section 102 and as per the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 23 of the Finance Act, 1994, provided the refund of service tax itself is available under the said provisions. When the issue of admissibility of interest in the present case on the issue of unjust enrichment is decided to be examined by the Adjudicating Authority for which case is pending, then amount of amount of interest may also be taken up in the refund proceedings by the Adjudicating Authority in light of the above discussion.

17. It is further noted that by the appellant that the adjudicating authority has not considered that the respondent has utilized Concept credit for payment of service tax on a transaction the nature of which will not qualify to secure whether Concept credit was allowed to the respondent while allowing benefit of exemption from payment of service tax or not. In this regard, respondent has submitted that it has submitted to General 50N as well as in section 102 and hence no appeal was filed against order of 50N. In this regard, I find that neither appellant nor respondent has provided any facts regarding utilization of Concept credit by the respondent. In this regard, I find that the adjudicating authority has not examined the aspect that when service tax on output service is exempted, whether an assessee can avail Concept credit or not. In my view, this condition was required to be satisfied. However, I find that nothing is forthcoming from the impugned O.O. Since the matter is being remanded back to the adjudicating authority on the basis of factual conclusions, the adjudicating authority should also examine this issue of admissibility of credit when output service is exempted as neither appellant nor respondent have provided any facts regarding utilization of Concept credit by the respondent.

18. In view of the facts and discussion herein foregoing pages, I set aside the impugned order in above terms and directed that the appeal filed by the appellant be sent to be considered by adjudicating authority.

  
Gopi Nath  
Commissioner (Appeals)

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

To,

1. The Assistant Commissioner, CGST, Bhavnagar (Formerly 'Service Tax Division, Bhavnagar')
2. Mrs. Krivona Construction Co., 209, Panchratna Arcade, Jaydasa Cinema Road, Kalva Chowk, Mumbai.

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 (Regional, CGST), Bhavnagar
5. Gopal Kish.
6. P.A. File.