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

[illegible] / [illegible]

[illegible] / [illegible] Ring Road,

राजकोट / Rajkot – [illegible]

Tele Fax No. 0281 – [illegible]

Email: [illegible]

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/[illegible]/[illegible]/2017	मूल आदेश सं / O.I.O. No. [illegible]	दिनांक / Date [illegible]/2017

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

BHV-EXCUS-000-APP-083-2018-19

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

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

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :-

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

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

(A) [illegible] 1994 [illegible] 86 [illegible]
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) [illegible]
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) [illegible]
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above.

(i) [illegible]

The appeal to the Appellate Tribunal shall be filed [illegible] Rules, [illegible] Central [illegible] Appeal Rules, 2001 [illegible] be accompanied [illegible] shall be [illegible] by a fee of Rs. 1,000/- Rs.5000/- Rs.10,000/- [illegible] of crossed bank draft in favour of Asst. Registrar of [illegible] public sector bank [illegible] place where the bench of the Tribunal is situated. Application [illegible] fee of Rs. 500/-.

(ii) [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 [illegible] Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against [illegible] should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. [illegible] fee of Rs.500/-.

(iii) [illegible]

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(iv) [illegible]

[illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible] 2014 [illegible]

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include:

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules

Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए ।

A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110 001 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) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

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

(ii) भारत के बाहर किसी राष्ट्र या प्रदेश को निर्यात किए गए माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यात की गई है।

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) यदि शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया हो।

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

(iv) अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 की धारा 109 के द्वारा नियुक्त किए गए हो।

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो-दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए।

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) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- का भुगतान किया जाए।

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) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है।

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) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए।

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) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है।

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) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbic.gov.in को देख सकते हैं।

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.cbic.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 in Original No. R/80/2016 dated 12.01.2017 passed 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. Krishna Construction Co., 205, Platinum Arcade, Jawahar Chowk Road, Kalva Chowk, Junagadh (hereinafter referred to as the respondent).

2. Briefly stated, the respondent filed a claim of refund of Rs. [illegible]/- which includes amount of interest of Rs. [illegible]/- 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 01.03.2016, exemption was restored. Vide section 102 of the Finance Act, 1994 the exemption was granted retrospectively and for duty paid during 01.04.2015 to 29.02.2016, refund mechanism was prescribed. The refund claim was decided by the adjudicating authority vide OIO No. R/80/2016 dated 12.01.2017 sanctioning refund amounting to Rs. [illegible]/- 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 ascertained that the said construction services have been provided under a contract which has been entered into before 01.03.2015 and on which stamp duty, 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 Bill, 2016 received assent of the President of India. From scrutiny of the documents submitted by the respondent along with refund claim, it is noticed that the respondent has not submitted copy of any contract entered into by them with the service receiver. In absence of copy of

had provided the said construction services to the government or a local authority or a governmental authority under a contract which was duly entered into before 01.03.2015 and on which service tax was duly 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, 2016, for granting of refund.

(i) Without scrutiny of the contract(s), 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/verification of the contract and the bills/ invoices raised by them in respect of work pertaining to the said contract. As held by the Hon'ble Supreme Court of India in the case of M/s. Mafatlal Industries Ltd. Vs. Union of India, reported in 1997 (89) ELT 247 (SC), refund of tax/duty is grantable 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, no person can seek to collect the tax from both the sides.

(ii) The respondent has claimed refund of interest amounting to Rs. 1,19,795/- 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 11B of the Central Act, 1944. 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 all the material time. The word "interest" is nowhere to be found in the section 102, ibid. It is settled law that the meaning of any term in a taxing statute cannot be understood with reference to even similar term used in any different taxing statute. It is essentially to be understood in the context it is used in the very section where the term is found to have been used. Being so, even while understanding the term 'refund of 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 ibid clearly specifies 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 can arise only when the party is allowing refund

clearly speaks of 'refund of the interest' which is absent in section 102 of the Finance Act, 1994. Moreover, respondent has paid interest in this case is a penal action and there is no provision under section 102 of the Finance Act, 1994 to refund it.

(iv) It is found from ST-3 returns filed by the respondent that they have disclosed availment of Cenvat credit totally amounting to Rs. 65,70,285/- and utilization of Cenvat credit of Rs. 46,00,427/- for payment of service tax during the period April 2015 to September 2015 & October 2015 to March 2016. However, there is no bifurcation/details of Cenvat credit disclosed in ST-3 return and therefore, the amount of Rs. 1,19,795/- ascertained by the adjudicating authority is without any basis and hence erroneous. In absence of details of Cenvat credit taken in records. Thus, he has failed to verify and ascertain the facts 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. 59,02,478/- under section 11B 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 26.03.2018, which was attended by Shri Vikas Mehta, Consultant of the respondent. He reiterated the submissions of cross objection and filed the additional written submission for consideration. Nobody appeared from appellant side.

5. In the cross objection and additional submission filed by the respondent, it is inter alia, contended that

(i) They provided list of construction services provided by them during relevant period and contended that all the service recipients were government organizations/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 SCN to deny refund by citing non-submission of copy of contract. Therefore, the appeal filed by the appellant asking for reversal of refund order by citing non submission of copy of contract, has traveled beyond the scope of SCN. It is settled law that grounds of appeal cannot go beyond scope of SCN. They relied upon the case law of Bajaj Auto Ltd.

Vs UOI – 2008 (131) ELT 23 (Bom.) and CCE & ST, Nagpur Vs Fabrimet Engg. Pvt. Ltd. – 2012 (309) ELT 43 (Bom.)

(ii) Regarding unjust enrichment, it is contended that the agreement and notice to commence work were all issued prior to 01.01.2015, when service was exempted. The order passed by the adjudicating authority is not without any basis. It is based on certificate dated 29.11.2016 issued by Shri Narendra V. Kheda, Chartered Accountant, wherein it is certified that no service tax is received by the claimant. The appeal nowhere alleges that this certificate is incorrect or false. Thus, the ground of appeal is beyond the scope of SCN. There is no suggestion in the appeal that service tax was passed on to any other person by the claimant. It is also not alleged that the certificate issued by C.A. is any manner incorrect or false. Thus, this appeal is an attempt to extract an order without actually making any allegation that service tax was passed on to any other person by the claimant which is not permissible.

(iii) Regarding refund 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 01.04.2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of specified taxable services provided to Government, local authority or a Governmental authority. Thus, as per sub-section (2), service tax levied or collected for the specified service must be refunded as if there was no levy during the period 01.04.2015 to 29.02.2016. Inasmuch as when there is a mandate to refund the service tax on the premise that there was no levy, it automatically follows that any amount of penal nature (as duly admitted in appeal) collected alongwith service tax will have to be refunded or returned. 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 Ld. Assistant Commissioner.

(iv) Regarding Cenvat credit, it is contended that as per view of the appellant, section 102 is a different enactment and unless specified in section 102, no other provision can be read into it. There is no reference to Cenvat credit in section 102. Therefore, the appellant cannot be permitted to argue on one hand that interest, not being specified in section 102 cannot be refunded or returned but Cenvat credit on the other hand, even though not specified in section 102,

must be made a ground for questioning the operation of section 102 of Finance Act, 1994. The contention that the Assistant Commissioner has not considered ST-3 returns showing availment and utilization of Cenvat credit is factually incorrect inasmuch as the Assistant Commissioner has specifically dealt with this issue at para 17.8 of the impugned order. Thus, the said ground is contrary to facts available on record. Further, appellant has not bring out any specific legal infirmity in findings of the Assistant Commissioner in this regard. Hence, the appeal is vague, unspecific and totally frivolous. Therefore the same is not tenable in the eyes of law.

6. I have carefully gone through the refund order, grounds of appeal and contentions raised by respondent in cross objection as well as during personal hearing. I find that the respondent have entered into agreements/contracts with Government/Local authority/Government authority to provide works as detailed at para-12 of the impugned order. The services provided to the Government in relation to the construction work were previously exempted vide entry 12(a) and (c) of Mega Exemption Notification No. 25/2012 dated 20.06.2012, applicable from 01.07.2012 under the new era of negative list based service tax. However, these exemption entries of Notification No. 25/2012-ST were deleted vide the Finance Act, 2015 and accordingly, a Notification No. 06/2015-ST dated 01.03.2015 was issued for withdrawal of the said exemption. Hence, with effect from 1st April 2015, services provided to the Government, a Local Authority or a Governmental Authority in respect of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a civil structure or any original works meant predominantly for use other than for commerce, industries, or any other business or profession and of a structure meant predominantly for use as educational, clinical, art or cultural establishment became taxable. Accordingly, the respondent paid service tax on bills raised from 01.04.2015 for above mentioned services provided to various Government Departments under the contracts claimed to have been entered into with them prior to 1st March, 2015. Such service tax is aggregating to Rs. 88,19,644/- on bills raised during the period from 01.04.2015 to 29.02.2016 and interest amounting to Rs. 1,19,705/- on delayed payment of such service tax due to the above mentioned contracts (total refund claim Rs. 89,39,349/-). 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. 9/2016-ST dated 01.03.2016 has been issued, to amend notification 25/2012-ST dated

20.06.2012 so as to insert entry 12A, to exempt above stated services in respect of which contract has been entered into prior to 1st March, 2015. However, in respect of such services provided and tax paid by the assessee during the period from 01.04.2015 to 29.02.2016 (both days inclusive) to the Government, Local Authority, Governmental Authority etc., on which the service tax had been paid by the service provider due to withdrawal of the exemption entry of Notification 25/2012-ST ibid which was operative during that period, a new provision –Section 102 has been inserted through the Finance Act, 2016 to grant the refund of the said service tax paid on such services during that period. Therefore, the respondent claimed refund of Rs. 49,50,178/- paid by them in respect of the services provided to the Government during the FY 2015-16 as per newly introduced Section 102 of the Finance Act, 1994, the relevant portion thereof is reproduced as under for better appreciation of the issues.

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

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

5. I find that there is no dispute 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 31.03.2015 (i.e. upto FY 2014-15) as per entry No. 12 of Mega Exemption Notification No. 25/2012-ST. There is also no dispute that the respondent paid Service tax of Rs. 58,42,682/- alongwith interest of Rs. 1,[illegible]0,70[illegible]/- on delayed payment of service tax. However, the appellant had filed the appeal both on merits as well as on the grounds of unjust enrichment. The appellant had subsequently contested as inter alia, mentioned at Para 3 above. The respondent has also filed the cross object on 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 legally sustainable or not. Now, I take up each issue on which appellant contested, for decision.

A. On the contention that the respondent has not submitted copy of any contract as detailed/mentioned at Para 3(i) above, I find that the refund claim in question was filed alongwith the documents including *'Copies of Work Orders as proof of tax payment by credit and Bill of sub contractors - copy of service tax paid challans of sub contractors as proof of service tax paid by Cenvat credit'* as mentioned at para 3 of the impugned order. This fact 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 and the Verification Report dated 2[illegible].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 claim and thus, no specific query was raised in the said verification report. Further, as mentioned at para 5 of the impugned order, I also find that subsequently when the SCN dated 07.12.2016 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 had come to conclusion that the respondent had provided the construction services to the Government authorities in respect of the contracts/agreements entered before 01.03.2015. Thus, without asking for the actual Contracts from the respondent, the Adjudicating Authority has satisfied himself 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 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 given situation, I do not find any infirmity in the impugned order. Further, I also find that it is not the contention of the appellant that the contracts for which refund granted were entered after 01.03.2015 and no such evidences or any contradictory facts have been placed before me by the appellant. Further, this issue was also not raised in the SCN dated 07.12.2016 issued to the respondent. Further, I also find that there is neither any specific requirement enumerated in the said Section 102 ibid that the refund claim should invariably be accompanied by the copies of the contracts nor any circular/ instruction issued by the department for the same. Hence, when the condition that contracts should be entered prior to 01.03.2015, is fulfilled which has been found to be satisfied by the Adjudicating Authority on the basis of other documents viz., work orders, I do not find force in the said contention of the appellant. I therefore, reject this contention being not sustainable in the eyes of law.

9. 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 and has vehemently contended that refund of tax is granted only when it is established that burden of tax has not been passed on to others as the Doctrine of Unjust Enrichment is a just and salutary doctrine. In this regard, I find that the adjudicating authority has held that there is no unjust enrichment in the case. This finding is based on certificate dated 29.11.2016 issued by Shri N. V. Khoda & Co., Chartered Accountant. I have gone through the said certificate. I find that the wordings used in the certificate is "*We have verified the following mentioned RA bills received by Krishna Construction Co., Station Road, Talala (Gir), Pin 362 150 from the various Government Department and certify that no service tax has been received or tender Amount is reduced by service tax amount in below mentioned bills from service receiver*". Thus, the certificate is issued on the basis of RA bills only and not on the basis of financial records like balance sheet or audit report. Even if RA bills do not show service tax amount and even if on the date of issue of certificate, no service tax was received by the respondent, it is possible that they can show the same as receivable from the service recipients. 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. Further, in the said certificate, against several entries, it is mentioned that "*Tender Amount is reduced by Service Tax amount afterwards*". Thus, it is clear that merely on

the basis of a certificate which states contradictory things and 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 has 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 MATTRICON INDIA PLT Versus COMMR. OF CUS. (PREVENTIVE), MUMBAI 2015 (320) E.L.T. 158 (Tri. - Mumbai) wherein it has observed and held as under.

> *"5. I have carefully gone through the records and considered the submissions made on behalf of the Revenue. The issue lies in a narrow compass on the aspect of unjust enrichment. The Assistant Commissioner, while sanctioning the refund, has not gone into the fact, whether incidence of duty, for which refund is sought for, has been passed on or otherwise. In my view, even if it is a case of refund of revenue deposit, test of unjust enrichment has to be passed on. The appellant during the proceedings before the Commissioner (Appeals) has submitted a Chartered Accountant's certificate, which was issued on the basis of books of account of the appellant, wherein it has been certified that the amount of refund is shown in the balance sheet as recoverable from the Government. However, despite this admission 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 utter 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 balance sheet and other books of account to check the authenticity of the CA certificate, which he failed to do so. It is a settled position of law that, if the amount for which refund is sought for, has not been booked as an expenditure in the profit and loss account and shown in the asset side of the balance sheet as receivable, it is sufficient 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, RMD, New Custom House, Ballard Estate, Mumbai-01. 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 arise. The adjudication of refund matter shall be completed within a period of one month from the date of receipt of this order."

10. In view of the facts and discussion herein above, I feel it appropriate that the issue of unjust enrichment needs to be re-examined in light of my above observation so as to ascertain whether or not the incidence of service Tax and interest paid on such tax had been passed on by him to any other person or service receivers. Further, it is also essential to examine whether or not the respondent has charged the service tax and accordingly raised the liability to that extent on the service receivers in their books of accounts. Hence, the matter needs to be remanded back to Adjudicating Authority for deciding afresh the above issue in light of my above observations after giving an opportunity of hearing to the respondent. The respondent is also directed to put all the evidences before the Adjudicating Authority that may be asked for by the Adjudicating Authority when the matter is heard in remand 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.770/2014 in the case of Commissioner, Service Tax, Ahmedabad V/s Associated Hotels Ltd., reported at 2015(37) STR 723 (Guj.) and also by the decision of the Hon'ble CESTAT, WZB Mumbai in case of Commissioner of Central Excise, Pune-I Vs. Sai Advantium Ltd. and reported in 2012 (27) STR 45 (Tri.- Mumbai).

11. Further, it is the contention of the appellant that refund of the interest is not admissible as per of Section 102 of the Finance Act, 1994, in as much as sub-section (3) of Section-102 of the Finance Act, 1994, specifies 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 of allowing refund clearly specifies of the refund of interest, which is absent in Section 102 ibid; 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 102 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 102, there cannot be any interest. In this regard, I find that the impugned order is passed granting refund is in view of the provisions of Section [illegible]B 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 [illegible] 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 are admissible for refund under the said Section 102 ibid, is also available under the said Section 102 ibid, read with provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 83 of the Finance Act, 1994, provided the refund of service tax itself is admissible under the said provisions. When the issue of admissibility of refund of service tax in the present case on the issue of unjust enrichment is directed to be examined by the Adjudicating Authority for which case is remanded back, this issue of availability of interest may also be taken up in the remand proceedings by the Adjudicating Authority in light of my above observation.

13. It is further contended by the appellant that the adjudicating authority has not properly verified Cenvat credit availed totally amounting to Rs. 53,70,225/- and utilization of Cenvat credit of Rs. 86,90,717/- for payment of service tax. The respondent has contended that section 102 being a different provision, unless specified in section 102, no other provision can be read into it. There is no reference to Cenvat Credit in section 102. In this regard, I find that as per para-3 of the impugned order, the respondent have submitted bills of sub-contractor and copies of service tax paid challans of sub-contractors as proof of service tax paid by the sub-contractor. Thus, it appears that the respondent had availed credit of service tax paid by sub-contractor and utilized the same for payment of service tax during the material period. 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 Cenvat credit or not. In my view, this condition was required to be satisfied. However, I find that nothing is forthcoming from the impugned OIO. 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 service is exempted, as neither appellant nor respondent have provided any data regarding utilisation of Cenvat credit by the respondent.

14. In view of the facts and discussion herein foregoing paras, I set aside the impugned order in above terms and disposed of the appeal filed by the appellant by way of remand to adjudicating authority.

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

To,

1. The Assistant Commissioner, CGST, Bhavnagar Division Service Tax Division, Bhavnagar.
2. M/s. Krishna Construction Co., 102, Platinum Arcade, Jaysinhpur Circle Road, Nana Chiloda, Junagadh.

Copy to:

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