भारत सरकार (वित्त मंत्रालय) का कार्यालय, अपील एवं सेवा कर और उत्पाद शुल्क
OFFICE OF THE ADDITIONAL DIRECTOR GENERAL (APPEALS), CENTRAL GST & EXCISE

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट/Rajkot-360001
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Email: cexappl-ahmd@nic.in

ASTHANA

DIN :

क	अपील / मूल आदेश सं / Appeal / Order-in-Original No.	मूल आदेश दि / O.I.O. Dt.	दिनांक / Date
	AHM/Raj/RKR/2019	03/2018-19	19/12/2018

ख अपील आदेश सं. (Order-in-Appeal No.)

BHV-EXCUS-000-APP-084-2018-19

आदेश का दिनांक / Date of Order	06.03.2019	जारी करने की तारीख / Date of Issue	11.03.2019

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

अपीलकर्ता मेसर्स टाटा स्टील लिमिटेड, राजकोट द्वारा दायर की गई अपील के संबंध में, जिसमें उपरोक्त मूल आदेश, अपीलकर्ता की सेवा कर, [जिसे आगे 'सेवा कर' कहा गया है] के अंतर्गत सेवा कर की अदायगी के संबंध में अपीलकर्ता द्वारा की गई अपील के संबंध में पारित किया गया है, अपीलकर्ता को सेवा कर के भुगतान के संबंध में अपीलीय प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Instruction No. 390/08/2017-CX (Pt) dated 15.12.2017 read with Board's Order No. 102/07/2017-CX dated 19.12.2017, Shri Gopi Nath, Additional Director General, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35B of Central Excise Act, 1944 and Section 86 of the Finance Act, 1994.

ग अपील प्राधिकारी द्वारा पारित आदेश से व्यथित होकर निम्नलिखित व्यक्ति/व्यक्तियों द्वारा अपील दायर की गई है/ की गई है/ की जाती है/ की जाती है।
Any person aggrieved by this Order-in-Appeal may file an appeal to the Commissioner (Appeals), Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent

1. M/s Tecon Infrastructure P. Ltd., Tecon Complex, 3-Ward Plot Porbandar 360 575.

कोई व्यक्ति इस आदेश से असंतुष्ट है, तो वह इस आदेश के प्रति इस आदेश के संचार की तारीख से 60 दिन के भीतर सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के समक्ष अपील दायर कर सकता है।
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate Customs, Excise & Service Tax Appellate Tribunal within 60 days from the date of communication of this Order.

ङ सीमा शुल्क (अपील) नियम, 1982 के नियम 3 के उपनियम (2) के साथ पठित सीमा शुल्क अधिनियम, 1962 की धारा 129 (ए) के अंतर्गत फॉर्म सीए-3 में चार प्रतियों में की गई अपील निर्धारित की जाएगी और उसके साथ जहां शुल्क या शुल्क और जुर्माना विवाद में है या जुर्माना लगाया गया है, वहां पांच सौ रुपये का निर्धारित शुल्क संलग्न किया जाएगा। इसके अलावा, ऐसी अपील के साथ जहां शुल्क या शुल्क और जुर्माना विवाद में है या जुर्माना लगाया गया है, वहां पांच सौ रुपये का निर्धारित शुल्क संलग्न किया जाएगा।
The appeal before the Customs, Excise & Service Tax Appellate Tribunal shall be filed in Form No. CA-3 in quadruplicate, subject to the rules of Section 129 (a) of the Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 and shall be accompanied by a fee of five hundred rupees where the amount of duty or duty and penalty in dispute or penalty, where penalty alone is in dispute, is five lakh rupees or less and one thousand rupees where the amount of duty or duty and penalty in dispute or penalty, where penalty alone is in dispute, is more than five lakh rupees.

च सीमा शुल्क अधिनियम की धारा 129 (ए) के अंतर्गत अपील प्राधिकारी के समक्ष प्रत्येक अपील, अपील ज्ञापन [जिसे इसके बाद 'अपील' कहा गया है] के संबंध में, जहां शुल्क या शुल्क और जुर्माना विवाद में है या जुर्माना लगाया गया है, वहां पांच सौ रुपये का निर्धारित शुल्क संलग्न किया जाएगा।
The appeal before the Customs, Excise & Service Tax Appellate Tribunal under Section 35F of the Central Excise Act, 1944 shall be filed in Form No. S.T.5, in quadruplicate, subject to the rules of Section 86 of the Finance Act, 1994 and shall be accompanied by a fee of five hundred rupees where the amount of duty or duty and penalty in dispute or penalty, where penalty alone is in dispute, is five lakh rupees or less and one thousand rupees where the amount of duty or duty and penalty in dispute or penalty, where penalty alone is in dispute, is more than five lakh rupees.

छ अपील प्राधिकारी के समक्ष दायर प्रत्येक अपील, अपील ज्ञापन [जिसे इसके बाद 'अपील' कहा गया है] के संबंध में, जहां शुल्क या शुल्क और जुर्माना विवाद में है या जुर्माना लगाया गया है, वहां पांच सौ रुपये का निर्धारित शुल्क संलग्न किया जाएगा।
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ज अपील प्राधिकारी के समक्ष दायर प्रत्येक अपील, अपील ज्ञापन [जिसे इसके बाद 'अपील' कहा गया है] के संबंध में, जहां शुल्क या शुल्क और जुर्माना विवाद में है या जुर्माना लगाया गया है, वहां पांच सौ रुपये का निर्धारित शुल्क संलग्न किया जाएगा।
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झ अपील प्राधिकारी के समक्ष दायर प्रत्येक अपील, अपील ज्ञापन [जिसे इसके बाद 'अपील' कहा गया है] के संबंध में, जहां शुल्क या शुल्क और जुर्माना विवाद में है या जुर्माना लगाया गया है, वहां पांच सौ रुपये का निर्धारित शुल्क संलग्न किया जाएगा।
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(i) [illegible]

The appeal to the Appellate Tribunal shall be filed in quadruplicate in Form EA-3 / as 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. 1,000/- Rs.5,000/-, Rs.10,000/- 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/-.

(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 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 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. / Application made for grant of stay shall be accompanied by a 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]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible]

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

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

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

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

(a) Form of application for Revision application to Government of India:

(b) A revision application lies to the Additional Secretary to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi 110001, under Section 35EE of the Act in respect of the following cases, governed by first proviso to sub-section (1) of Section 35EE ibid:

(c) A revision application lies to the Additional Secretary to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi 110001, under Section 35EE of the Act in respect of the following cases, governed by first proviso to sub-section (1) of Section 35EE ibid:

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

(ii) In case of rebate of duty of excise on goods exported to any country or territory outside India or on excisable material used in the manufacture of goods which are exported to any country or territory outside India.

(iii) 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 thereunder 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.

(iv) In case of goods exported outside India export to Nepal without payment of duty.

(v) 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 thereunder 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.

(vi) The revision application should 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 of the order sought to be appealed against or such further period as may be permitted by the Secretary to the Government of India in his discretion. It should be accompanied by four 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 35EE of the Act, in favour of Pay and Accounts Officer, Ministry of Finance, Department of Revenue, New Delhi.

(vii) The revision application should 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 of the order sought to be appealed against or such further period as may be permitted by the Secretary to the Government of India in his discretion. It should be accompanied by four 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 35EE of the Act, in favour of Pay and Accounts Officer, Ministry of Finance, Department of Revenue, New Delhi.

(viii) In case, where the goods are exported to Nepal without payment of duty, the credit of duty paid on the materials used in the goods exported to Nepal will be allowed after the prescribed officer of Central Excise is satisfied that the goods have been imported into Nepal.

(ix) The revision application lies to the Additional Secretary to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi 110001, under Section 35EE of the Act in respect of the following cases, governed by first proviso to sub-section (1) of Section 35EE ibid:

(x) In case of goods exported outside India or in case of goods sold to a unit located in a Free Trade Zone or a 100% Export Oriented Undertaking, whether situated in a Free Trade Zone or elsewhere, the credit of duty paid on the materials used in the goods exported outside India or sold to a unit located in a Free Trade Zone or a 100% Export Oriented Undertaking, whether situated in a Free Trade Zone or elsewhere, may be allowed subject to such conditions, limitations or restrictions as may be specified by the Central Government by Notification in the Official Gazette.

(xi) The revision application should 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 of the order sought to be appealed against or such further period as may be permitted by the Secretary to the Government of India in his discretion. It should be accompanied by four 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 35EE of the Act, in favour of Pay and Accounts Officer, Ministry of Finance, Department of Revenue, New Delhi.

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ORDER IN APPEAL

The present appeal has been filed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as the appellant) against Order-in-Original No. BVG/36/2016 dated 19.12.2016 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. Parmar Developers Pvt. Ltd., Tirupati Complex, 3-Wadi Plot, Bhavnagar (hereinafter referred to as the respondent).

2. Briefly stated, the respondent filed a claim of refund of Rs. 67,87,809/- which includes amount of interest of Rs. 2,10,191/- under section 11B of the Finance Act, 1994 on account of construction related services provided by them to various construction agreements. The services provided by the respondent to said agreements were exempted vide notification No. 12/2007-ST dated 01.08.2007 till 01.03.2011, however, the said exemption was withdrawn vide notification No. 6/2011-ST dated 01.03.2011. Again vide notification No. 9/2015-ST dated 01.08.2015, exemption was restored. Vide section 102 of the Finance Act, 2015 the exemption was granted retrospectively and tax duly paid during 01.04.2015 to 31.03.2016. Refund claim was presented. The refund claim was decided by the adjudicating authority vide OIO No. BVG/36/2016 dated 19.12.2016 sanctioning refund amounting to Rs. 67,87,809/- and interest part being aggrieved, the appellant have filed the present appeal.

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

(a) To claim refund of the amount of service tax paid by a service provider under section 11B 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 01.08.2015 and on which service tax, if required, have been paid on or before 01.03.2016. The above said conditions for 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 the Assent of the President of India. From scrutiny of the documents submitted by the respondent along with refund claim, it is not clear that the respondent have submitted the copy of the contract entered into by them with the service receiver. In absence of copy of

[illegible], it cannot be verified and ascertained that the respondent had provided the said reconstruction services to the government or a local authority or a statutory body under a contract which has been entered into prior to 01.06.2012 and on which service tax has been paid by them on or before 01.03.2015. Thus it is a pre-condition under sub-section (1) of section 102 of the Finance Act, 1994. The question of refund

(ii) Without scrutiny of the contract(s), the adjudicating authority has not recorded that the reconstruction of service tax has not been passed on by the respondent in any other manner by the respondent. In this regard, the facts can be ascertained only by scrutiny/verification of the contracts 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 doctrine of unjust enrichment is applicable only when it is satisfied that the incidence of duty has been passed on by the assessee to the buyer. The doctrine of unjust enrichment is a principle of equity, i.e. no person can seek to collect the revenue both from the buyer and the seller.

(iii) The respondent has claimed refund of interest amounting to Rs. 2,00,431/- 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 applying the provisions of section 103 of the Finance Act, 1994. As provided under sub-section (2) of section 103 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 if the service had been provided at all the material time. The term 'interest' is not defined in the section 102, ibid. It is settled law that the meaning of any term, having a statutory source, be understood with reference to every statutory term used in the relevant statute. It is essential to be understood in the context in which the said section where the term is found to have been used. Being an exemption provision, the term 'refund' provided in the section 11B of the Central Excise Act, 1944, is required to be mutatis mutandis with reference to the refund of service tax claimed in terms of section 103 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 only as provided, it is required that the refund of interest is also governed under the said section. The question of refund can arise only when the provisions allowing refund

clearly speaks of refund or the amount which is relevant 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 undisputed that the ST-3 returns filed by the assessee but for the relevant period they have availed Cenvat credit for payment of service tax of the respondent. The adjudicating authority has not considered this fact while sanctioning the refund claim filed by the respondent as to whether the respondent was allowed to the respondent while allowing benefit of exemption from payment of service tax for which refund application has been filed by them. Hence, he is obliged to verify and ascertain the facts from the records before passing impugned order in Appeal.

(v) In view of the above, the impugned order passed by the adjudicating authority sanctioning refund of Rs. 47,59,300/- 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 19.02.2018, which was attended by Shri Punit Rajput, and Shri Hitesh H. Shah, C.A. and reiterated the submissions made in the appeal memorandum. They also submitted that the contract in full was submitted to the refund sanctioning authority and requested the case of assessee for consideration. Nobody appeared from appellant side.

5. The respondent have contended that:

(i) Refund is pertaining to two contracts and full copies of both contracts are submitted as Annexure 16 and 17 to refund claim dated 05.11.2015 duly filed and acknowledged on 17.11.2015. They submitted a copy of same. Thus, entire copies of contracts were available to the adjudicating authority and were considered while granting the refund. Thus, the appeal is based on wrong perception of the facts and is liable to be rejected only on this ground.

(ii) Further, as appeal is based on wrong perception of fact that full agreement documents were not available and hence case of unjust enrichment was not considered by the adjudicating authority in para 7 at point no. 6, adjudicating authority has mentioned that the assessee has not submitted such orders and render documents.

Thus, ground taken in the appeal is based on wrong assumption of the facts. At page 15 of the OIO, it is clearly mentioned that the claimant has submitted the CA certificate from their statutory auditors to effect that they have not passed on the burden of tax to the service recipient. This fact is duly ignored in the appeal by the department.

10. Further, vide a provisional correction of two contracts vide, First is from Executive Engineer, Roads and Building Department, Government of Gujarat and another one is awarded by Chief Engineer, Air Force, Military Engineer Services (Central Government). For both contract, they have specifically asked for the reimbursement of the service tax and the same has to be claimed through letter dated 10.10.2016. However, in reply to the above letter, Executive Engineer has sporadically issued letter dated 17.03.2016 stated that Taxes will not be reimbursed with the amount of service tax paid/payable by them. It proves beyond doubt that the burden of tax is not passed on by them to service recipient. Copy of said letter was enclosed and dated 17.3.2016 was also enclosed with refund claim and duly scrutinized by the adjudicating authority. They have also submitted payment advice issued by the State Government for processing of the payment against the work. In the same payment advice, it is clear that no payment of service tax is made to them and entire burden is borne by them. In case of second contract, Military Engineer Service, in contract at clause No. 21 at Paragraph 4 it is clearly mentioned that on this work Art is not subject to service tax. Hence by the acceptance of the contract it was clear that no tax is payable and the question of passing burden of tax does not arise at all. Further, in service contract, MES were agreed to pay service tax which was subsequently service payable due to amendment of law through budget 2015 and has also checked the same from their account. However, on receipt of refund claim they have immediately transferred the said amount back on 2.11.2016 through Cheque No. 012160. They have also issued an acknowledgement dated 19.01.2017 from A.No. MES/180/16-17 for above payment. In acknowledgement they have specifically mentioned that this receipt is for refund of service tax. Thus, it is beyond doubt that they have already got the amount of service tax refund to MES and it is beyond doubt that they have not passed on the burden of tax for the contract. They enclosed copy of receipt.

[c] Services were provided under the contracts which are awarded prior to 01.04.2016, which services were completed on or before, there is no question of inclusion of service tax in the price quoted in contract awarded. They have never included service tax in the cost for quoting the price for the contract awarded hence passing on the burden of tax, through cross invoice or tax, is not possible at all. On removal of exemption on 01.06.2016, they have paid the tax on total value of the services raised. They have not passed on the bill as of it is income for the tax. This fact can be verified from the reconciliation sheet of refund claim filed along with the refund claim.

[d] The doubt regarding interpretation of Circular is raised in the appeal is without any basis. They have submitted copies of the invoices. In fact, it can be seen from working sheet of the refund that they are paying, separately, Service Tax individual RA bills and service tax is never combined. The RA bill is even raised with the statement of such cost as per the agreement. The same has to be filed before the sanctioning authority and this fact is clearly recorded in para 10(2) of the OIO. Thus, issue of utilization of Cenvat credit is raised without verification of facts.

[e] It is stated that the appellant has by the impugned order has specific provision is existing in the section 102 of the Finance Act, 1994. However, this appeal is totally silent on the specific findings of the adjudicating authority on refund claim. Adjudicating authority has specifically found that they are not required to pay interest as they are not liable to pay tax as there. He has further noted that refund under section 11B of the Central Excise Act, 1944 is also available in the case as specifically mentioned through amendment in the year 2016. In absence of liability of tax itself, question of liability of payment of interest does not arise at all and the same is valid, apart from the reasons as discussed in the refund of tax.

[f] Section 102 of the Finance Act, 2016 categorically states that no service tax shall be levied or collected during the period commencing from the 14 day of April, 2016 and ending with the 30th day of February, 2016 (both days inclusive), in respect of taxable services. From the wording of this provision it is clear that no tax shall be levied or collected and hence liability to pay tax itself is absent. In view of section 73 of the Finance Act, 1994, person liable to pay tax is required to pay the interest. As in their case, they are not in person liable to pay tax question of payment of interest does not arise

at all. From the reading of the section 78, it is clear that liability to pay interest cannot be unlinked with the liability to pay service tax. But it is not the case in the present matter. Therefore, payment of interest cannot be refunded alongwith the refund claim.

(viii) It is argued in the appeal that exemption is available only if service is provided before 01.07.2012. However, in terms of section 102 of the Finance Act, 2012 it is applicable only in the remaining territories of scheduled area of the Sardar Sarovar Act, 1986. As made applicable to Gujarat, contracts between Government and Municipal Corporations are exempt from making payment of stamp duty and hence "appropriate stamp duty" is applied to the present contract.

5. I have carefully gone through the relevant records, grounds of appeal and contentions raised by respondent in written objection as well as during personal hearing. I find that the respondent have entered into agreements/contracts with Government authority/Governmental authority to provide works as detailed at para 1.2 above (supra). The services provided to the Government in relation to the said activity/work were previously covered under clause (zzzh) and (zj) of Mega Exemption Notification No. 25/2012 dated 20.06.2012 applicable from 01.07.2012 under the new levy of negative list based service tax. However, these exemptions entries of Notification No. 25/2012-ST were deleted vide Finance Act, 2015 and subsequently, a Notification No. 06/2015-ST dated 01.04.2015 was issued to prescribe 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 (i) civil structure or any original works meant predominantly for use other than for commerce, industry or any other business or profession, and (ii) a structure meant predominantly for use as residence, educational, clinical, art or cultural establishment, became taxable. Accordingly, the respondent paid service tax as detailed from 01.04.2015 for above mentioned services provided to various Government Departments as the contracts claimed to have been entered into with them prior to 1st March, 2015. Their service tax is aggregating to Rs. 62,75,000/- on bills raised during the period from 01.04.2015 to 29.02.2016 and interest amounting to Rs. 2,10,781/- on delayed payment of such service tax. Further the above mentioned contracts (and refund claim as 07.07.2016). Through the Finance Act, 2016, the exemption in respect of such construction related services provided to the Government etc. has also been withdrawn. Accordingly, Notification

No. 9/2015-ST dated 01.03.2015 was been issued to amend Notification 25/2012-ST dated 20.06.2012 so as to insert entry 19A, to exempt taxable services in respect of which consideration was been received prior to 1st March, 2015. However, in respect of such services provided and billed by the assessee during the period from 01.04.2014 to 28.02.2015 (both days inclusive) to the Government, Government Authority etc., on which the service tax had been paid by the service provider and in view of the retrospective effect of Notification No. 09/2015-ST dated which was operative during the 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. As per the said Section 102, the respondent claimed refund of Rs. 57,07,000/- paid by them in respect of the services provided to the Government during the FY 2014-15 as previously mentioned. 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 1st day of April, 2012 and ending with the 28th day of February, 2015, 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, 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) a place of worship; and
>
> (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 but for sub-section (1), save as provided in the said sub-section."

Keeping the said provisions of Section 102 ibid in mind, I proceed to decide the appellant's case.

7. I find that there is no dispute that the provisions of Section 102 of the Finance Act, 1994 provides for 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 Local Authority during the FY 2013-15 and the said services were completed on 31.12.2015 (vide PV 2014-15) as per entry No. 12 of Mega Exemption Notification No. 32/2010-ST. There is also no dispute that the respondent paid Service tax of Rs. 30,25,000/- alongwith interest of Rs. 2,10,191/- on delayed payment of service tax. However, the controversy has arisen in the present case as to the eligibility of the appellant to avail the benefit of the said exemption notification. The appellant had submitted a declaration in this regard, as mentioned at Para 3 above. The respondent has filed the cross objection before me, 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 the said issue on which the appellant and the respondent have submitted their written submissions and have also made oral submissions during personal hearing.

8. On the perusal of the impugned order, I find that the Adjudicating Authority has sanctioned the refund claim on the ground that the appellant had submitted the requisite documents as mentioned in the Notification No. 32/2010-ST dated 22.06.2010 and the Chartered Accountant Certificate certifying that the amount of refund claimed does not include any amount of service tax which has been passed on by the service provider to any other person. Further, the refund claim was found to be hit by the provisions of unjust enrichment as per the Chartered Accountant Certificate. Copies of Work Orders, tender documents and the invoices were submitted by the appellant before the Adjudicating Authority. The said claim with documents was sent to the Range Officer for verification and the Verification Report dated 28.11.2016 was received. I find that the 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 3 of the impugned order, a show cause notice dated 07.12.2016 was issued to the respondent, wherein no such query was also asked for. Thus, from these facts, it clearly transpires that the Adjudicating Authority after verifying the work orders, tender documents and CA Certificate, arrived at the conclusion that the respondent had provided the construction services to the Government Authorities in respect of the contracts/agreements entered before 01.08.2016. Thus, the Adjudicating Authority rightly held that the condition viz. **"a contract entered into before the 01.08.2016"** of the Sub-section (i) of Section 102 ibid had been fulfilled in the present case. Further, said condition is given in the said section 102 ibid just to ensure that the benefits are available in respect of those contracts which are entered before 01.08.2016 only. The Adjudicating Authority

[illegible] orders and [illegible] on the basis of the verification report of the Range Office was satisfied in merit and found that the said contracts were already reduced before 01.04.2016 and thus, under the circumstances, it is not [illegible] to the impugned order. Further, Taken into account the contention of the appellant that the contracts pertaining to the refund prayed were entered after 01.04.2016 and no such evidences as may establish the same have been placed before me by the appellant. On the other hand, the respondent have submitted evidence that they have provided explanation to the adjudicating authority at the time of filing refund application. Further, the issue was also raised in the Query Memo dated 25.11.2016 issued to the respondent. Further, as per the Trade Notice No. 89/2016 dated 30.12.2016 issued by the Department for the issue, it was also clarified that the refund claim should invariably be accompanied by the copies of the contracts and also certificate/declaration issued by the Government for the same. Hence, when the condition that contracts should be prior to 01.04.2016 is fulfilled, the ground raised in the said ground of the appellant is rejected.

9. It is further contended by the appellant that the impugned contract/agreement, the terms of payment cannot be verified and therefore the adjudicating authority has erred in holding that there is no unjust enrichment and has wrongly rejected refund of tax is payable only when it is established that burden of tax has not been passed on to others. Doctrine of Unjust Enrichment is a just and equitable principle in this regard. I find that the respondent has submitted that they have provided copies of both the contracts with their application and hence the point raised by the appellant is factually incorrect. On going through the cross objection filed by the respondent it is noticed that in case of services provided by Bharat Sanchar Nigam Limited, MTNL had submitted to pay the service tax to the respondent as and when they became payable due to amendment in law through Budget 2015 and had also debited the same from their account. However, on receipt of refund claim the respondent had immediately reversed the said by [illegible] 04.07.2017 through challan No. 00219 and MTNL had issued an acknowledgment dated 21.07.2017. Thus, it is clear that the respondent had collected service tax from MTNL for the services provided by them to MTNL during, 01.04.2015 to 30.06.2017. Despite having collected the service tax from MTNL, the respondent was never entitled to retain it and credit the same in their Cenvat Account as the burden of service tax had not been passed on to any [illegible]. The adjudicating authority has rightly rejected the refund [illegible]

or the certificate issued by C.A. Since such certificate of C.A. is not made available to the public by appellant or by the respondent. I am not able to ascertain as to how such certificate was issued to the taxpayer and in any case, it is clear that the aspect of unjust enrichment was not properly verified by the adjudicating authority. Had the adjudicating authority properly verified the financial records of the respondent, it would have immediately known to him that the burden was already passed on to the MES. Though it is argued by the respondent that they have immediately transferred the burden to MES and that MES had issued acknowledgement to the same, it is also a matter of record that adjudicating authority has not properly verified the aspect of unjust enrichment. It is very much possible that such type of issue might be there in case of another contractee also. Therefore, in my considered view, the aspect of unjust enrichment is required to be re-examined thoroughly.

10. In view of the above discussion, I am of the view that the issue of unjust enrichment needs to be re-examined in light of my above observation so as to ascertain whether any amount of service tax, which is incurred, paid on such tax had been passed on by the respondent to their service receivers. Further, it is also essential to ascertain whether and 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 observation after giving an opportunity of hearing to the respondent. The respondent is also directed to submit all the evidences before the Adjudicating Authority that may be asked for by the Adjudicating Authority while the matter is being remanded. However, in order to enable the Adjudicating Authority to decide the case afresh, I find. Validity of view are supported by the decision of the Double Tiger Constr Gujarat in the Tax Appeal No.97/2014 in the case of Commissioner, Service Tax, Ahmedabad V/s Associated Hotels Ltd. reported at 2015 (37) STR 929 (Guj.) and also by the decision of the Tribunal CESTAT, WZB Mumbai in case of Commissioner of Central Excise, Pune-I Vs. Bal Ashram Trust and reported at 2012 (27) STR 4 (Tri. - Mumbai)

11. Further, it is the contention of the appellant that refund of the interest is not admissible as per Section 11B of the Finance Act, 1994, in as much as sub-section (2) of Section 142 of the Finance Act, 1994, provides that, "refund shall be made of such amount which has been collected but is not due or which was only be allowed in the event of allowing refund

clearly specifies a refund claim, which is absent in section 11B ibid. That, payment of interest by the revenue can arise due to not paying service tax in time and thus, it is by nature of penal action which is not covered under Section 11B ibid. The respondent has submitted that liability of interest is governed by Section 75 of Finance Act, 1994 and service tax liability is there as per section 73C thereof and not as per refund provisions. Liability is under section 75 of the Finance Act, 1994 and it is clear that liability to pay interest cannot be delinked with liability to pay tax. Both are statutory and it is not applicable in this regard. It is also submitted that the impugned order is a speaking one and is in view of the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matters under Section 83 of the Finance Act, 1994 read with Section 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 are admissible for refund under the said Section 11B ibid, is also subject to the provisions of Section 11B of the Central Excise Act, 1944 as are applicable to service tax matter under Section 83 of the Finance Act, 1994, provides the refund of service tax itself is admissible subject to such provisions. 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 for which reasonable time is given, 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.

7. It is further contended by the appellant that the adjudicating authority has not considered that the respondent were entitled for payment of service tax paid under reverse charge without any delay as it was not in a position to pass on the benefit which is having benefit of exemption from payment of service tax or not. In this regard, respondent has submitted that they had submitted service tax paid challans paid separately for each PA bill alongwith the refund claim. It is not in dispute that the impugned order is a speaking one without application of mind. In this regard, I find that the adjudicating authority has not examined the aspect that whether service tax on input 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 for the aforesaid ground the impugned OIO is set aside and the matter is being remanded back to the adjudicating authority on the issue of unjust enrichment. The adjudicating authority should also examine the issue of admissibility of

credit taken suitably dealt with. As neither appellant nor respondent have produced any documentary evidence of Cenvat credit by the respondent.

13. In view of the facts and discussions herein hereinabove, I set aside the impugned order in above terms and allow the appeal 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, Division (Formerly Service Tax Division), Bhavnagar.
2. M/s. Tirupati Infrastructure [illegible] Complex, 3 Wadi Plot, Ambaji - 385 575.

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.